

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-3660  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ARTHUR MITCHELL,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
CR 91 098 A

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July 16, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Arthur Mitchell appeals his conviction of, and sentence for, conspiring to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. We affirm the conviction but vacate the sentence and remand for resentencing.

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\* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In March 1991, Drug Enforcement Administration ("DEA") agent Tommy Johnson negotiated with Alfred Simmons to purchase seven ounces of cocaine. They agreed to meet at a gasoline station in Harahan, Louisiana. When Johnson arrived, Simmons asked Johnson to follow him to a residence owned by Daniel Dempsey. An individual, later identified as Gregory Fontenberry, was waiting on the corner outside the residence. Simmons informed Johnson that Gregory was his source's brother and usually held the "dope" but did not on this occasion. Simmons and Gregory then made a telephone call to Jerome Fontenberry, and Simmons told Johnson that Jerome would be arriving shortly with the cocaine.

When Jerome arrived, he was introduced to Johnson and informed Johnson that his source would be arriving soon. A red Ford Taurus then pulled up in front of the house and honked several times. Jerome stated that this was his "man" and asked Simmons and Johnson to wait in the house while he got the cocaine. Fontenberry then approached the driver of the Taurus, later identified as Mitchell, a/k/a Bigelow, who handed him a package containing nine ounces of cocaine, which Simmons cut into a seven-ounce and a two-ounce package.

While Simmons was separating the cocaine, Johnson and Jerome Fontenberry went outside to get the money for the cocaine from Johnson's car. Johnson gave the prearranged arrest signal, and Jerome Fontenberry was arrested. Mitchell watched Jerome being arrested, but he eluded capture. During the subsequent car chase,

agent J. D. Roberts was involved in a serious traffic accident when he hit a telephone pole in an attempt to avoid hitting another agent's car. The abandoned Taurus was found at an automobile body shop. Several times, including a rental receipt in the name of Connie Mitchell and a jean jacket with a laundry tag in the name of A. Mitchell, were found in the Taurus. Mitchell was arrested in January 1992.

Mitchell was convicted of one count of conspiracy to possess cocaine with intent to distribute. Over his objections, the district court denied him the two-level decrease for acceptance of responsibility; gave him a four-level increase for being an organizer or leader of the conspiracy; and gave him a two-level increase for obstruction of justice. Mitchell was sentenced to 137 months' imprisonment, five years' supervised release, and a \$50 special assessment.

## II.

### A.

Mitchell argues that he was denied a fair trial because the prosecutor committed three acts of misconduct. Specifically, he argues that during the opening argument, the prosecutor improperly suggested that DEA agent Woodfork knew Mitchell prior to the March 1991 transaction because Woodfork had over twenty years of law enforcement experience; that during his direct examination of Woodfork the prosecutor implied that Woodfork knew Mitchell because of his law enforcement experience; and that during the closing

argument the prosecutor suggested that defense counsel had manufactured evidence.

To warrant a new trial, the alleged prosecutorial misconduct "must be so pronounced and persistent that it permeates the entire atmosphere of the trial." United States v. Stewart, 879 F.2d 1268, 1271 (5th Cir.) (internal quotations and citations omitted), cert. denied, 493 U.S. 899 (1989). On appeal, we determine whether the conduct was improper and then whether it prejudicially affected the substantive rights of the defendant. United States v. Parker, 877 F.2d 327, 332 (5th Cir.), cert. denied, 493 U.S. 877 (1989).

If the conduct was improper, the defendant is not entitled to relief unless the misconduct casts serious doubt upon the correctness of the jury's verdict. United States v. Carter, 953 F.2d 1449, 1457 (5th Cir. 1992). To make that determination, we consider (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of guilt. Id.

B.

Mitchell's first two allegations of prosecutorial misconduct are related. At trial, Mitchell objected to the portion of the prosecutor's opening argument summarizing Woodfork's anticipated testimony. Specifically, he objected to the following statement:

Well, you are going to hear from Special Agent Woodfork, this is a man with many years of law enforcement experience. Special Agent Woodfork is now assigned in the Seattle, Washington area, but he was born and raised in New Orleans. He knew him, he knew Arthur Mitchell. He

knew who he was and he knew him by his nickname as well, Bigelow.

At trial, Mitchell argued that the prosecutor was attempting to imply that Woodfork knew Mitchell through his law enforcement activities and therefore was attempting to imply a connection between Mitchell and unidentified prior bad acts. The district court overruled the objection.

Mitchell also objected to the prosecutor's direct examination of Woodfork, arguing that the prosecutor was making the same improper inference by asking Woodfork whether he knew Mitchell prior to the March 1991 transaction immediately after questioning him about his law enforcement experience. The district court apparently overruled the objection, and it instructed the prosecutor to frame his question to Woodfork to make it plain that he was not attempting to imply a connection between Woodfork's law enforcement experience and his prior knowledge of Mitchell. In response, the prosecutor elicited testimony from Woodfork that he had been born and raised in New Orleans and therefore knew a lot of people in the area.

As Mitchell concedes, the only issue at trial was whether Arthur Mitchell was the driver of the red Ford Taurus. Therefore, the district court did not commit reversible error by allowing the prosecutor's argument that Woodfork knew Mitchell prior to March 1991 and the questions regarding Woodfork's prior knowledge of Mitchell. The prosecutor was building a foundation for Woodfork's identification of Mitchell. Additionally, on cross-examination Mitchell elicited testimony from Woodfork that he had never

arrested Mitchell or had him under extensive surveillance. The district court's rulings regarding the prosecutor's opening argument and questioning of Woodfork do not rise to the level of reversible error.

C.

Mitchell also argues that the prosecutor made an improper rebuttal argument implying that defense counsel had manufactured evidence. In response to defense counsel's argument that there was a fingerprint on sunglasses found in the abandoned red Taurus which the government did not check, the prosecutor stated,

For all we know, this is great fingerprints they are talking about. Yes, I just point one on here right now. they could have put that on it. It could be fingerprints[.]

The district court sustained Mitchell's objection and immediately instructed the jury to disregard the argument because there was no evidence to suggest that defense counsel had put the fingerprint on the sunglasses.

Assuming that this comment was improper, Mitchell has not demonstrated that this isolated improper comment was prejudicial. The district court immediately instructed the jury to disregard the comment, and the evidence of guilt was strong. Johnson, Woodfork, and Jerome Fontenberry identified Mitchell as the driver of the red Taurus; Johnson testified that Fontenberry referred to the driver as his "man," and Fontenberry testified that Mitchell gave him the cocaine; Woodfork testified that Mitchell handed Fontenberry a package; and a jacket with a name "A. Mitchell" and a rental

receipt in the name of "Connie Mitchell" were found in the car. Mitchell is not entitled to a new trial.

### III.

Mitchell also raises three sentencing guidelines claims. He argues that the district court erred in finding that he did not accept responsibility for his criminal activity; that he was a leader or organizer of the conspiracy; and that he obstructed justice.

The district court's findings are reviewed under the "clearly erroneous" standard. United States v. Brigman, 953 F.2d 906, 908 (5th Cir. 1992) (acceptance of responsibility), petition for cert. filed, Aug. 4, 1992 (No. 92-5417); United States v. Rodriguez, 897 F.2d 1324, 1325-26 (5th Cir. 1989), cert. denied, 498 U.S. 857 (1990) (aggravating role in the offense); United States v. McDonald, 964 F.2d 390, 392 (5th Cir. 1992) (obstruction of justice). Under this standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

#### A.

The defendant has the burden of establishing that he accepted responsibility. United States v. Perez, 915 F.2d 947, 950 (5th

Cir. 1990). The district court denied Mitchell the two-level reduction because he refused to accept responsibility for related conduct and because he denied the factual elements of the offense and put the government to its burden of proof. The two-level reduction "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, comment. (n.2). The district court did not clearly err by denying the reduction on this basis.

Mitchell also asserts that the denial of the two-level reduction violated his Fifth Amendment privilege against self-incrimination. He argues that he declined to testify at trial to protect himself from a possible enhancement as a leader or organizer of the criminal activity. We need not address this argument, as the district court's alternative finding adequately supports the denial of the two-level reduction. See Williams v. United States, 112 S. Ct. 1112, 1121 (1992) (if the district court considers an erroneous sentencing factor, remand is required unless the "error did not affect the district court's selection of the sentence imposed"). We note, however, that awarding the two-level decrease only if Mitchell admits all relevant conduct does not violate the Fifth Amendment. United States v. Mourning, 914 F.2d 699, 705 (5th Cir. 1991); United States v. Krummel, No. 91-2519 (5th Cir. Mar. 23, 1992) (unpublished); United States v. Tarter, No. 91-2383 (5th Cir. Nov. 18, 1991) (unpublished).

C.

A defendant's base offense level may be increased four levels if he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). In making this assessment the district court should consider

(1) the exercise of decision-making authority; (2) the nature of the participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share in the fruits of the crime; (5) the degree of participation in planning or organizing the offense; (6) the nature and scope of the illegal activity; (7) and the degree of control and authority exercised over others.

Rodriguez, 897 F.2d at 1325-26; see U.S.S.G. § 3B1.1, comment. (n.3).

The evidence indicated that the conspiracy involved at least five individuals and that Mitchell was Jerome Fontenberry's cocaine source. The finding that Mitchell was Fontenberry's source is not clearly erroneous. But, although Mitchell argued that the evidence did not establish any of the listed factors, the district court did not consider these factors to determine that Mitchell was a leader or organizer of the conspiracy. Therefore, the sentence must be vacated and the case remanded for further factual development on this issue. See United States v. Rivera, 898 F.2d 442, 446 (5th Cir. 1990).

B.

Finally, a defendant's base offense level can be increased by two levels if he "recklessly created a substantial risk of death or

serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2. Woodfork approached the Taurus with his credentials and gun displayed and ordered Mitchell to get out of the car. In response, Mitchell sped away, and in the subsequent car chase Roberts was seriously injured. This conduct created a substantial risk of bodily injury, see United States v. Lee, 989 F.2d 180, 183 (5th Cir. 1993), and the district court's finding was not clearly erroneous.

The judgment of conviction is AFFIRMED. The judgment of sentence is VACATED, and this matter is REMANDED for resentencing.