

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3779

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Sherry Webster, a/k/a Sherry Jones,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
CR 92 150 D

(March 22, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Sherry Webster was convicted at trial of assaulting, resisting, and impeding a federal officer with a dangerous weapon and using a firearm in relation to a crime of violence in violation of 18 U.S.C. §§ 111 and 924(c). Complaining of the admission of evidence of an extrinsic offense, Webster appeals. We affirm.

*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Around 6:00 a.m. on March 13, 1992, state and federal agents went to Webster's residence to execute an arrest warrant for appellant's son Willie Webster. Their clothing clearly indicated that they were law enforcement agents. Deputy U.S. Marshal Johnson knocked on Webster's door and loudly announced, "Police." Within a few seconds, Webster opened the door. Webster was carrying a loaded pistol which she began to raise toward Deputy Johnson. Before she had raised it above waist level Deputy Johnson and other officers wrestled the weapon away from Webster and arrested her.

After arresting Webster, the officers performed a security sweep of the residence and determined that Willie was not present. Immediately after entering the front room, Deputy Johnson observed a crack pipe on the floor and what appeared to be narcotics on a table. These items were within four feet of the door which Webster opened.

Webster moved to suppress evidence of the narcotics and paraphernalia under Fed. R. Evid. 404(b). At the suppression hearing Webster testified that she did not hear the law enforcement agents arrive. She claimed that she just happened to be holding the pistol when she opened her front door to check the weather and found the officers there. The district court held the narcotics and paraphernalia admissible under Rule 404(b) and United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 400 U.S. 920 (1979). The district court found that the items were relevant to the issue of Webster's motive and that their probative

value was not substantially outweighed by unfair prejudice. The items were introduced at trial with a limiting instruction.¹

Webster argues that the district court erred in admitting the drug-related items. We review the district court's evidentiary rulings for abuse of discretion. Beechum, 582 F.2d at 598. As the district court noted, the analysis for admitting extrinsic evidence under Rule 404(b) was set out in Beechum. Such evidence must (1) be relevant to an issue other than the defendant's character and (2) possess probative value that is not substantially outweighed by the danger of undue prejudice. Beechum, 582 F.2d at 911; Fed. R. Evid. 404(b), 403.

In deciding whether evidence of an extrinsic offense is relevant to an issue other than character, the trial court must first determine whether the defendant committed that offense. United States v. Zabaneh, 837 F.2d 1249, 1262 (5th Cir. 1988). Webster argues that the Government failed to prove that she had anything to do with the narcotics and paraphernalia. The Government responds that Webster's proximity to the items, demonstrated by their closeness to the door and the fact that she answered the door within seconds of Deputy Johnson's knock, establish at least constructive possession. Whether Webster possessed the items is a preliminary question of fact governed by Fed. R. Evid. 104(b). Beechum, 582 F.2d at 913. The test is

¹The district court told the jury that the items were part of the total circumstances and might be probative to the issues presented, but reminded it that Webster charged with assault on a marshal and not with any narcotics charge.

whether the jury could reasonably find that Webster possessed the drugs. Id.; Zabaneh, 837 F.2d at 1263. On this record, we hold that it could.

Next, Webster contends that the unduly prejudicial effect of the items outweighed their probative value. To support her contention she cites United States v. Carpenter, 963 F.2d 736 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992). In Carpenter a defendant charged with possession of a firearm by a felon challenged the admission of evidence regarding a crack pipe found in his car. The district court "wisely decided to exclude the actual pipe" but admitted testimony about it and a photograph of the car showing it. Id. at 741. We affirmed the district court's decision that the testimony and photograph had probative value not outweighed by the danger of undue prejudice. Id.

Carpenter did not create a per se rule against the admission of physical evidence of extrinsic offenses.² The items in this case possessed probative value as to Webster's motive or state of mind in confronting law enforcement officers with a loaded pistol. The danger of unfair prejudice was diminished by the district court's limiting instruction to the jury. We are not persuaded that the district court abused its discretion in finding that the danger of undue prejudice did not substantially outweigh the items' probative value.

AFFIRMED.

²Webster sought to exclude the drug-related items altogether. She did not ask the district court to limit evidence of them to testimony or photographs.