IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3892
(Summary Calendar)

UNITED STATES of AMERICA,

Plaintiff-Appellee,

v.

ANTHONY CHARLES and
TERRY GROS,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana
CR 91 474 M

August 11, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Terry Gros appeals his conviction by a federal jury of conspiracy to distribute approximately two kilograms of cocaine in violation of 21 U.S.C. § 846. Gros contends that his conviction should be reversed because the district court improperly admitted evidence during trial of two prior drug-trafficking convictions and other extrinsic drug-related activities. Finding no reversible error, we affirm.

I.

[*]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 Pursuant to that Rule, the court has determined that this opinion should not be published.

On April 12, 1991, the Jefferson Parish Sheriff's Department received information from a confidential informant that Gros was involved in the distribution of cocaine from a house trailer located in the Parish. Based on this information, drug agents set up surveillance on the trailer, which was owned by Gros' father-in-law. The surveillance confirmed that Gros frequented the location.

On April 13, the agents observed Gros leaving the trailer, then returning with an individual later identified as Hernan Rudas, a Columbian National who resided in Miami, Florida. Shortly thereafter, another individual, later identified as Anthony Charles, arrived at the trailer in a pick-up truck. Approximately ten or fifteen minutes later, Charles emerged from the trailer carrying a tool box. He placed the tool box in the bed of his pick-up and drove away. When the drug agents subsequently stopped Charles, he denied placing the tool box in the truck or knowing anything about it. A search of the tool box revealed two packages containing a substance later determined to be cocaine.

After arresting Charles, the drug agents returned to the trailer and arrested Gros as he was attempting to leave the trailer. The agents then entered the trailer and arrested Rudas and another individual. Inside the trailer, the agents discovered bundles of money, totalling approximately $53,000, in a brown paper box, which was sitting on the kitchen table. They also discovered a beeper, a revolver, and other drug paraphernalia. Gros, Rudas, and Charles were all indicted by a federal grand jury with one count of conspiring to distribute cocaine in violation of 21 U.S.C. § 846.

In a pretrial motion, Gros requested advance notice of the Government's intention to introduce any evidence of other crimes, wrongs, or acts that might be admissible under Rule 404(b) of the Federal Rules of Evidence.[1] The Government indicated that it did not intend to

[1] Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

introduce any Rule 404(b) evidence, but that it would notify Gros if those plans changed. In a minute order disposing of Gros' motion, the presiding magistrate judge noted that the Government would "make every effort" to provide Jencks Act materials forty-eight hours prior to trial, or on the Friday prior to a Monday trial, and that any Rule 404(b) evidence subsequently coming to light would be disclosed at that time.

On the Friday before Gros' trial, the Government apparently contacted Gros' defense attorney, notified him of its intention to introduce evidence of Gros' two prior drug-trafficking convictions, and "made available" the Jencks Act materials, which included the statement of the witness through whom the prior convictions would be offered. The materials, however, apparently were not delivered to Gros' trial counsel until the morning of the trial. In addition, on the morning of the trial, the Government filed a Bill of Information with the court, specifying the prior convictions it intended to introduce as evidence under Rule 404(b).

At trial, Rudas, who had pleaded guilty pursuant to a plea agreement, testified as a witness for the Government. During his testimony, Rudas stated that he had known Gros for about six years and that he and Gros previously had been involved in at least ten other drug transactions. Gros' trial counsel raised no objections to Rudas' testimony regarding Gros' previous drug-trafficking activities.

Rudas also testified at length regarding the charged offense. He testified that, although he had not heard from Gros for around two years, he had received a call from Gros in April 1991 asking him to locate five kilos of cocaine. He stated that he had obtained a portion of the cocaine from one of his sources, that he and Gros had met and returned to the trailer with the drugs, and that, after Gros made some phone calls, Charles had arrived to purchase the cocaine.

> intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED.R.EVID. 404(b).

The Government later sought to introduce Gros' prior drug-trafficking convictions as evidence of his intent to engage in the charged conspiracy. Gros' attorney objected, and, during the bench conference that followed, he explained that he had been under the impression the Government was not going to offer Rule 404(b) evidence and that, although he objected to the Government's use of the evidence, he was "totally unprepared to do anything about it . . . ." The prosecutor acknowledged that the Government initially had no plans to use the convictions, but that those plans had changed. He then told the court that Gros' attorney had been notified three days prior to trial (the Friday before the Monday trial) of the change in plans. Gros' attorney did not challenge this assertion. After noting that it also was "surprised" by the Government's decision to introduce the Rule 404(b) evidence, the district court concluded that the Government had a "right" to introduce the prior convictions because it had given notice as required by the rule. The court therefore overruled the objection and allowed the testimony--albeit with a limiting instruction.

On August 4, 1992, the jury found Gros and Charles guilty of conspiring to distribute cocaine. Gros was later sentenced to a 360 month term of imprisonment in accordance with the Sentencing Guidelines. He now appeals his conviction.[2]

II.

Gros argues on appeal that his conviction should be reversed because the district court improperly admitted the evidence of his prior drug-trafficking convictions and the other drug-related activities described by Rudas. We apply a highly deferential standard to the trial court's evidentiary rulings, and we will reverse only for an abuse of discretion. United States v. Anderson, 933 F.2d 1261, 1267-68 (5th Cir. 1991). Even if error is found, it is subject to the harmless error doctrine. United States v. Capote-Capote, 946 F.2d 1100, 1105 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2278 (1992). Because Gros' trial counsel raised no

[2] Anthony Charles also perfected an appeal. His appeal, however, was dismissed by this court for want of prosecution--that is, failure to file a brief--on April 21, 1993.

objection to Rudas' testimony, however, we review the admission of that evidence only for plain error. United States v. Garza, 990 F.2d 171, 176 (5th Cir. 1993).

A.

Gros first argues that the district court improperly admitted the evidence of his two prior drug-trafficking convictions. Specifically, Gros argues that the district court erred in admitting the evidence because the Government failed to give him reasonable notice of its intention to introduce the prior convictions, as required by Rule 404(b). We disagree.

Federal Rule of Evidence 404(b) was amended effective December 1, 1991, to require the prosecution in a criminal case, upon request of the accused, to "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any [Rule 404(b)] evidence it intends to introduce at trial. FED.R.EVID. 404(b). Other than requiring pretrial notice, however, Rule 404(b) states no specific time limits in recognition of the fact that what constitutes reasonable notice will depend largely on the circumstances of each case. See id. advisory committee's note. Thus, the determination of whether the prosecution has complied with the rule's reasonable notice requirement properly lies within the discretion of the district court. See id. ("The court, in its discretion may, under the facts, decide that a particular request or notice was not reasonable, either because of lack of timeliness or completeness."). Although to date no circuit court has passed on the breadth of a district court's discretion in such cases, notice periods imposed by district courts, even in complex cases, have varied greatly. See, e.g., United States v. Evengelista, 813 F.Supp. 294, 302 (D.N.J. 1993) (ten days imposed in multi-defendant case); United States v. Williams, 792 F.Supp. 1120, 1133 (S.D.Ind. 1992) (ten days imposed in two-defendant, multi-count money laundering case); United States v. Alex, 791 F.Supp. 723, 729 (N.D.Ill. 1992) (seven days imposed in multi-defendant, multi-count racketeering case); United States v. Green, 144 F.R.D. 631, 645 (W.D.N.Y. 1992) (30 days imposed in 26-defendant, multi-count drug and racketeering case).

In the case before us, Gros' trial counsel objected to the admissibility of Gros' prior convictions on the ground that the Government had previously represented that it would not introduce any Rule 404(b) evidence. Upon being informed, in the presence of Gros' trial counsel and without contradiction, that the prosecution had provided notice three days prior to trial, the district court allowed the evidence. In light of the relatively straight-forward nature of the Government's case against Gros and the fact that Gros clearly was aware of the fact of his own convictions, we cannot say that the trial court abused its discretion in finding the three-day notice reasonable.[3]

B.

Gros also argues that the district court erred in admitting Rudas' testimony regarding Gros' previous drug-related activities. As noted, supra, we review the admission of this evidence only for plain error. Under this standard, we will reverse only if the district court committed an error "`so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice.'" Garza, 990 F.2d at 176 (quoting United States v. Fortenberry, 914 F.2d 671, 673 (5th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1333 (1991)).

Gros contends that Rudas' testimony constituted Rule 404(b) evidence of `other acts,' that the Government never informed his trial counsel of its intention to introduce the evidence, and that the evidence "was elicited purely for the prejudicial effect that it might have on the jury." In response, the Government asserts that Rudas' testimony regarding his prior drug-related activities with Gros was not subject to the constraints of Rule 404(b) because it was "intrinsic" evidence of

[3] We note that Gros has never argued that the evidence of his prior convictions was not properly admissible under Rule 404(b); rather, he has complained only that it was improperly admitted because of his lack of notice. Thus, despite the rule in this circuit that remand may be required in cases such as this where the district court fails to articulate, on the record, its reasons for admitting Rule 404(b) evidence, see United States v. Elwood, ___ F.2d ___, 1993 WL 195348, *5 (5th Cir., June 9, 1993); United States v. Anderson, 933 F.2d 1261 (5th Cir. 1991), we find that remand is not appropriate. See United States v. Valdiosera-Godinez, 932 F.2d 1093, 1099 (5th Cir. 1991) ("any issues not raised or argued in the appellant's brief are considered waived and will not be entertained on appeal").

the existence of the charged conspiracy. See FED.R.EVID. 404(b) advisory committee note ("The [1991] amendment does not extend to acts which are `intrinsic' to the charged offense . . . ." (citing United States v. Williams, 900 F.2d 823 (5th Cir. 1990))). Although we have reservations about the increasing scope of this `intrinsic' evidence exception, we must agree that the district court did not commit "obvious" error in allowing the testimony.

In Williams, we explained that "`[o]ther act' evidence is `intrinsic' when the evidence of the other act and the evidence of the crime charged are `inextricably intertwined' or both acts are part of a `single criminal episode' or the other acts were `necessary preliminaries' to the crime charged." 900 F.2d at 825. We have also held that evidence is intrinsic to a charged conspiracy when it is "relevant to establish how the conspiracy came about, how it was structured, and how each [participant] became a member." United States v. Lokey, 945 F.2d 825, 834 (5th Cir. 1991); United States v. Nichols, 750 F.2d 1260, 1264-65 (5th Cir. 1985). Thus, in United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1258 (1993), we concluded that the district court had not abused its discretion in admitting (with a limiting instruction) a witness's testimony that he had sold cocaine to the defendant on numerous occasions prior to the charged conspiracy because the evidence "was relevant to the crime charged in that it allowed the jury to understand the nature of the relationship between the two and evaluate whether it was likely that the Defendant would have conspired with [the witness] as charged." 972 F.2d at 648. Because Royal is virtually indistinguishable from the case before us, we must conclude that the district court could not have committed plain error in admitting Rudas' testimony.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.