

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 92-4542

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LUIS CANGA-RENTERIA,

Defendant-Appellant.

Appeal from the United States District Court

For the Western District of Louisiana

CR 91 60073 01

(March 26, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant, Luis Canga-Renteria, was convicted by a jury of:
(1) conspiracy to distribute 2.1 kilograms of cocaine, in violation
of 21 U.S.C. §§ 841(b)(1)(B) and 846 (1988); (2) possession with
intent to distribute 144 grams of cocaine, in violation of 21

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (1988); and (3) being a previously deported alien found unlawfully in the United States, in violation of 8 U.S.C. § 1326 (1988). The district court sentenced Canga-Renteria to concurrent terms of imprisonment of 480 months and 180 months, with concurrent terms of supervised release of 96 months and 36 months. Canga-Renteria appeals, arguing that the district court: (a) erroneously accepted the prosecutor's explanation for striking an African-American venireperson; (b) should not have admitted evidence of his 1986 conviction for possession of cocaine with intent to deliver; (c) erred by prohibiting him from explaining the circumstances surrounding his 1986 conviction; (d) should have granted his motion for judgment of acquittal, due to insufficiency of the evidence; and (e) erroneously refused to grant him an adjustment for minimal or minor participation in the offense. We affirm.

I

Officer Lennis Landry, an undercover narcotics investigator in New Iberia, Louisiana, purchased cocaine from Canga-Renteria in New Iberia. The New Iberia police department then arrested Canga-Renteria. Canga-Renteria was indicted for conspiracy to distribute 2.1 kilograms of cocaine, possession with intent to distribute 144 grams of cocaine, and violating United States immigration laws. At trial, Canga-Renteria asserted that he had promised a new acquaintance named "David" that he would drive David and another man from Houston to Louisiana and then return to Houston with the other man as a passenger. Canga-Renteria claimed that he was only

returning a favor he owed to David, that he had no knowledge of the drug sale, and that any involvement in the deal was a mistake. The jury found Canga-Renteria guilty on all counts. Canga-Renteria appeals.

II

A

Canga-Renteria claims that the prosecution violated the Equal Protection Clause when it exercised a racially-motivated peremptory strike against African-American venireperson Grace Levy. Canga-Renteria timely objected to the strike, and the prosecution explained that Levy was stricken because of her employment as a

barmaid.¹ The district court overruled Canga-Renteria's objection to the strike against Levy.

The Equal Protection Clause forbids a prosecutor to exercise peremptory challenges against prospective jurors solely on account of their race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986); *United States v. Cobb*, 975 F.2d 152, 155 (5th Cir. 1992), *petitions for cert. filed*, (U.S. Dec. 30,

¹ After Canga-Renteria's objection, the following colloquy occurred:

THE COURT: Okay, what about Grace Levy?

MR. GRAYSON [prosecutor]: Which number is that now?

THE COURT: Number 15, from Abbeville.

MR. GRAYSON: Eighteen years a barmaid.

THE COURT: And that's all she ever was, and that was all the information that I could get out of her.

Well, first what is))wait a minute, let's find out what the potential))

MR. SKINNER [defense counsel]: I think, Your Honor, that both of these people have been excluded without any reason other than the fact that they're black and that there's no reason that can be articulated for their exclusion.

THE COURT: Well, the fact that she was a barmaid, I think that profession))that's one thing that may be okay, I think, to exercise a peremptory challenge. But the other thing is, I asked her specifically what else has she done besides being a barmaid and she said that's all, and I don't know))it's just enough that I didn't get a very))to me that's not a very good answer, that's all.

If that's a *Batson* challenge on that, I'll deny that.

Record on Appeal, vol. 2, at 86-87. Canga-Renteria concedes that the prosecutor's single statement regarding Levy's employment was an explanation for the peremptory strike. See Brief for Canga-Renteria at 9 ("The only reason given by the Government for the exclusion of [Grace Levy] was that she had been a barmaid for eighteen years.").

1992) (No. 92-7081) and (U.S. Jan. 4, 1993) (No. 92-7374).² Where the facts at voir dire raise an inference that the prosecutor's peremptory strikes were racially motivated, the prosecutor has the burden of showing that the strikes were based on "permissible racially neutral selection criteria." See *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721. "Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, the trial court then has the duty to determine if the defendant has established purposeful discrimination." *Hernandez v. New York*, ___ U.S. ___, ___, 111 S.Ct. 1859, 1868, 114 L. Ed. 2d 395, ___ (1991). "The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact." *Id.* Since that finding largely turns on an evaluation of the prosecutor's credibility, reviewing courts should accord the finding great deference. *Batson*, 476 U.S. at 98 n.21, 106 S. Ct. at 1724 n. 21. We review the district court's finding concerning the presence *vel non* of purposeful discrimination under the clearly erroneous standard. *Cobb*, 975 F.2d at 155. We will not find a district court's ruling to be clearly erroneous unless we are left with the definite and firm conviction that a mistake has been committed. *United States v. Mitchell*, 964 F.2d 454, 457-58 (5th Cir. 1992).

Canga-Renteria contends that "[t]he only reason given by the Government for the exclusion of [Levy] was that she had been a

² The Equal Protection Clause of the Fourteenth Amendment pertains to the states, but *Batson* applies to federal, as well as state, criminal cases. See *Brown v. United States*, 479 U.S. 314, 320, 107 S. Ct. 708, 711, 93 L. Ed. 2d 649 (1987) (holding that "Batson applies . . . to a federal conviction").

barmaid for eighteen years," and that this "simply is not an appropriate or sufficient reason for her exclusion." This explanation is certainly race-neutral. It is also a reasonable explanation, since employment as a barmaid could have exposed Levy to both legal and illegal substance abuse, possibly leaving her more sympathetic than other prospective jurors to the use of and trafficking in drugs. Furthermore, the district court was able to observe the demeanor of the prosecutor and determine that the prosecutor's explanation was credible. See *Hernandez*, 111 S. Ct. at 1869 ("[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.'). The district court's implicit finding that the prosecutor did not strike Grace Levy on account of her race was not clearly erroneous. Therefore, we reject Canga-Renteria's claim.

B

Canga-Renteria also asserts that the trial court erred by admitting evidence of his 1986 conviction for possession of cocaine with intent to deliver. At trial, after the prosecution rested, Canga-Renteria took the stand and testified regarding the circumstances leading up to his arrest in New Iberia. Canga-Renteria asserted that he agreed to follow "David" and a "gentleman" from Houston to Louisiana in his car, and then to return to Houston with the gentleman as a passenger.³ Canga-

³ Canga-Renteria said that he met David shortly before the trip to Louisiana, while soliciting donations for his brother's burial costs. Canga-Renteria stated that he did not meet the gentleman, Luis Carlos Arroyo Neiva, until departure for the trip.

Renteria denied knowledge of the trip's purpose, claiming that he was simply performing a favor for David.⁴ Following Canga-Renteria's testimony, the prosecutor sought to admit evidence of the 1986 conviction for possession of cocaine, in order to prove Canga-Renteria's intent to commit the instant offense.⁵ The district court permitted the prosecution to introduce evidence of the 1986 conviction.⁶

We review rulings on the admissibility of evidence for abuse of discretion. *See United States v. Duncan*, 919 F.2d 981, 985 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2036, 114 L. Ed. 2d 121 (1991); *United States v. Hutson*, 821 F.2d 1015, 1019 (5th Cir. 1987); *United States v. Acosta*, 763 F.2d 671, 693 (5th Cir.), *cert. denied sub nom. Weempe v. United States*, 474 U.S. 863, 106 S.Ct. 179, 88 L. Ed. 2d 148 (1985). Our duty is to assess the relevance and probative value of the evidence, and we will reverse "rarely and only after a clear showing of prejudicial abuse of discretion." *Duncan*, 919 F.2d at 987; *United States v. Shaw*, 701 F.2d 367, 386 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L. Ed. 2d 744 (1984).

⁴ Canga-Renteria claimed that David made a \$30 donation for his brother's burial, and that he felt compelled to return the favor by driving to Louisiana. Canga-Renteria stated that he did not know the purpose or the destination of the trip, except that a man in Louisiana owed David some money. Canga-Renteria asserts that he did not intend to participate in a drug deal.

⁵ See Record on Appeal, vol. 3, at 23-24.

⁶ See *id.* at 27.

Prior convictions may be introduced into evidence under either Rule 404(b) or Rule 609(a) of the Federal Rules of Evidence.⁷ The district court stated that it "allow[ed] . . . the [1986] conviction to show any absence of mistake," while adding that "[the 1986] conviction [was] good for impeachment purposes." Record on Appeal, vol. 3, at 27. The initial statement permitting "the [1986] conviction to show any absence of mistake" seems to refer to Rule 404(b). However, the additional language allowing "[the 1986] conviction . . . for impeachment purposes" appears to refer to Rule 609(a). Therefore, the admission of the 1986 conviction will be examined under both Rule 404(b) and Rule 609(a).

Before the district court may admit evidence under Fed. R. Evid. 404(b), the evidence must first pass the Fed. R. Evid. 403 balancing test. *United States v. Beechum*, 582 F.2d 898, 911 (5th

⁷ 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 conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, or absence of mistake or accident. Fed. R. Evid. 404(b).

Rule 609(a)(1) provides:

For the purpose of attacking the credibility of a witness, the evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. Fed. R. Evid. 609(a)(1).

Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L. Ed. 2d 472 (1979). Rule 403 states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403; *Duncan*, 919 F.2d at 987.

In the case at bar, the district court concluded that the prejudicial effect of Canga-Renteria's 1986 conviction did not substantially outweigh its probative value.⁸ We agree. The 1986 conviction was probative, in that it tended to show that Canga-Renteria was not mistaken as to the purpose of his trip to New Iberia. Furthermore, that probative value was not substantially outweighed by the danger of unfair prejudice. The 1986 conviction was not for a heinous crime; neither was it likely to incite the jury to an irrational decision by its effect on human emotion. See *Beechum*, 582 F.2d at 917 (affirming admission of evidence of prior acts which were neither heinous nor likely to inflame jury). Furthermore, the admission of the 1986 conviction did not mislead the jury, cause undue delay, or waste time. See *id.* (weighing prejudicial effects of evidence of prior acts). Therefore, we hold

⁸ The government offered evidence of two prior convictions. In admitting only the 1986 conviction, the district court stated:

The Court will not allow both prior convictions because it feels that it does not meet 403 of the Federal Rules of Evidence, that is that the prejudicial effect outweighs the probative value by offering a second conviction.

The Court allows, certainly, the [1986] conviction to show any absence of mistake or what was going on. That prior conviction is good for impeachment purposes. Record on Appeal, vol. 3, at 27.

that the district court did not abuse its discretion by determining that the 1986 conviction was not excludable under Rule 403.

Fed. R. Evid. 404(b) permits introduction of evidence of "[o]ther *crimes, wrongs or acts*" which tend to prove a person's "motive, opportunity, intent, preparation, plan, knowledge, identity, or *absence of mistake or accident.*" Fed. R. Evid. 404(b) (emphasis added). Rule 404(b), however, will not allow the introduction of evidence which tends to prove only criminal disposition. *Shaw*, 701 F.2d at 386; *see also United States v. Brown*, 562 F.2d 1144, 1147 (9th Cir. 1977). If the evidence is relevant to an issue other than the defendant's character, Rule 404(b) broadly recognizes its admissibility. *United States v. Anderson*, 933 F.2d 1261, 1268 (5th Cir. 1991); *Shaw*, 701 F.2d at 386. When Canga-Renteria claimed that he was mistaken as to the purpose of the trip to Louisiana, he opened the door to evidence which rebutted his defense of mistake. Consequently, the district court properly allowed the prosecution to introduce the 1986 conviction under Fed. R. Evid. 404(b)'s absence-of-mistake provision. Having found no clear showing of prejudicial abuse of discretion, we reject Canga-Renteria's argument under Rule 404(b).

"Fed. R. Evid. 609(a) permits the impeachment of a testifying defendant with evidence of prior convictions punishable by death or imprisonment in excess of one year, provided the [district] court first determines that the probative value of admitting the evidence outweighs its prejudicial effect." *United States v. Turner*, 960 F.2d 461, 465 (5th Cir. 1992). The district court's application of

the 609(a)(1) balancing test will be reviewed for abuse of discretion. See *Turner*, 960 F.2d at 465; *United States v. Martinez*, 555 F.2d 1273, 1277 (5th Cir. 1977).

The probative value of Canga-Renteria's 1986 conviction was considerable. Canga-Renteria's defense depended on his assertion that he was unaware that he was involved in a drug deal. The prior conviction tended to impugn the credibility of that assertion. Furthermore, the risk of unfair prejudice from the admission of the 1986 conviction was minimal. The prior conviction was not likely to incite or confuse the jury, or to waste time. See *Beechum*, 582 F.2d at 917. Therefore, we find that the district court did not abuse its discretion by admitting the evidence of the prior conviction under Rule 609(a)(1).

C

Canga-Renteria contends that the district court erred by prohibiting him from explaining the circumstances surrounding his 1986 conviction. On redirect examination, the district court limited Canga-Renteria's explanation so that it would not lead to questioning regarding another prior conviction, which would have prejudiced Canga-Renteria. Again, we review rulings as to the admissibility of evidence using an abuse of discretion standard. See *United States v. Duncan*, 919 F.2d 981, 985 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2036, 114 L. Ed. 2d 121 (1991). Evidence of a prior conviction may be limited to the "number of convictions, the nature of the crimes and the dates and times of the convictions." *United States v. Gordon*, 780 F.2d 1165, 1176

(5th Cir. 1986). Therefore, Canga-Renteria was not entitled to explain his prior conviction at length, and we find that the district court acted within its broad discretion in terminating Canga-Renteria's testimony regarding the prior conviction.

D

Canga-Renteria asserts that the district court erred by denying his motion for judgment of acquittal, because the government failed to prove that he committed the drug-related offenses of which he was convicted. Further, Canga-Renteria asserts that the evidence presented at trial was not sufficient to sustain a finding of guilt on the drug-related offenses. Canga-Renteria moved for judgment of acquittal at the conclusion of the prosecution's case-in-chief, and also at the conclusion of his own case-in-chief. The district court denied Canga-Renteria's motions in both instances, and the jury returned a verdict of guilty.

In reviewing the denial of a motion for judgment of acquittal, and in deciding the sufficiency of the evidence, we "consider the evidence as a whole taken in the light most favorable to the Government, together with all legitimate inferences to be drawn therefrom to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt." *United States v. Turner*, 960 F.2d 461, 465 (5th Cir. 1992) (applying standard of review to motion for judgment of acquittal); *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2952, 119 L. Ed. 2d 575 (1992) (applying same standard to sufficiency of evidence). "It is not necessary that the evidence

exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *Pruneda-Gonzalez*, 953 F.2d at 193.

Canga-Renteria argues that the evidence was insufficient to support a conviction, because no evidence showed that he handled the drugs. The record does not support Canga-Renteria's argument. Officer Lennis Landry testified that Canga-Renteria personally handed him a bag of cocaine. See Record on Appeal, vol. 2, at 162 ("Canga at that time . . . gave me . . . the brown paper bag with the cocaine in it").

Canga-Renteria further argues that (1) no evidence showed that his fingerprints were found on the drugs or on the money that was paid for the drugs; and (2) the government failed to introduce audio tapes of the drug deal. Reversal for insufficiency of the evidence is not warranted merely because the government failed to present all of the evidence which possibly could have been presented. We will uphold a verdict of guilty, and the district court's denial of a motion for judgment of acquittal, where the evidence presented by the government would enable a reasonable juror to find guilt beyond a reasonable doubt. The prosecution produced sufficient evidence here. An undercover police officer testified that he conducted the cocaine transaction with Canga-Renteria. See *id.* at 156-62. The officer claimed he negotiated a price with, handed the money to, and received the drugs from Canga-Renteria. See *id.*

Canga-Renteria also argues that the evidence was insufficient to support a guilty verdict, because at trial he denied committing the drug-related offenses and offered an explanation for his presence at the scene of the crime which was corroborated by his co-defendant. This argument merely calls into question the jury's assessment of the credibility of Canga-Renteria and his co-defendant. Because "[w]e accept all credibility choices that tend to support the jury's verdict," *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991), Canga-Renteria's argument is not persuasive. The testimony and evidence in the present case, "demonstrate that reasonable jurors could properly find [Canga-Renteria] guilty." See *Anderson*, 933 F.2d at 1274. Accordingly, we affirm the denial of the motion for judgment of acquittal, and we find the evidence sufficient to support the jury's verdict of guilty.

E

Canga-Renteria contends that he was entitled to a downward adjustment, under section 3B1.2 of the sentencing guidelines, for minimal or minor participation in the offense.⁹ Canga-Renteria

⁹ Section 3B1.2 provides:

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

claims that at most his involvement was that of a courier, and therefore he was a minimal or minor participant in the offense. Section 3B1.2 was constructed to reduce a sentence only when the defendant was substantially less culpable than the average participant in the offense. *United States v. Buenrostro*, 868 F.2d 135, 138 (5th Cir. 1989), *cert. denied*, 495 U.S. 923, 110 S.Ct. 1957, 109 L. Ed. 2d 319 (1990). The district court denied Canga-Renteria's request for the downward adjustment, because it found that Canga-Renteria was not a minor or minimal participant: "[t]he defendant's role in this offense cannot be considered minor and was more than a mere courier in the transaction. Mr. Canga had knowledge and understanding of the scope of the enterprise and contemplated and negotiated future transactions." See Record on Appeal, vol. 4, at 9-10. A judicial fact-finding that a defendant was not a minimal or minor participant will enjoy the protection of the clearly erroneous standard. *United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.), *cert. denied*, 492 U.S. 924, 109 S.Ct. 3257, 106 L. Ed. 2d 602 (1989). Witnesses at trial identified Canga-Renteria as a price negotiator for the deal and also as a person receiving money for the sale of the drugs. Consequently, the district court's finding that Canga-Renteria's role was not minimal or minor was not clearly erroneous, and Canga-

United States Sentencing Commission, *Guidelines Manual*, § 3B1.2 (Nov. 1990).

Renteria was not entitled to an adjustment under section 3B1.2. Therefore, we affirm Canga-Renteria's sentence.¹⁰

III

For the foregoing reasons, we AFFIRM.

¹⁰ Canga-Renteria also asserts that "[t]he Sentencing Commission exceeded its authority by acting in an irrational . . . manner in compiling the guidelines for career offenders," resulting in a "violat[ion of] the Eighth Amendment to the United States Constitution." Appellant's Brief at 16. Canga-Renteria cites no authority for his proposition, and we decline to adopt it.