IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-7205
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CALVIN EARL PLANT,
a/k/a Calvin Earl Hardy,
a/k/a Chicken and
CALVIN PARNELL,

Defendants-Appellants.

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Appeals from the United States District Court for the
Northern District of Mississippi
(CR-G91-101-D)

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(January 28, 1993)

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

GARWOOD, Circuit Judge:

Defendants-appellants, Calvin Plant (Plant) and Calvin Parnell (Parnell), appeal their convictions for conspiracy to possess marihuana with the intent to distribute and for using or aiding and abetting the use of a firearm in a drug trafficking crime, namely

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the marihuana conspiracy. Plant also appeals his conviction for possession of a firearm as a previously convicted felon. Plant and Parnell assert that they are entitled to a new trial because (1) a prosecution witness lied on the stand; (2) an improper jury instruction was given; and (3) the prosecutor's closing argument was improper. We affirm.

Facts and Proceedings Below

Plant, Parnell, and Plant's cousin Herbert Plant (Herbert) were arrested in a sting operation conducted by the Drug Enforcement Agency (DEA), the Mississippi Bureau of Narcotics (MBN), and the Greenville, Mississippi Police Department.[1]

On February 21, 1991, a confidential informant, Reynaldo Montez Leal (Leal), who had previously sold drugs to Herbert, called Herbert from a Greenville motel and offered to sell him one hundred pounds of marihuana. Leal and Faron Gardner (Gardner), an MBN agent, set up the sting in the motel. Gardner posed as a drug dealer from South Texas. The motel room was bugged and surveillance officers were placed in the room next door and the parking lot.

That evening, Leal phoned Herbert several times, and Herbert and Leal met briefly in the motel parking lot. At 11:30 that night, Leal phoned Herbert again and Herbert returned to the motel with Plant to negotiate the sale of marihuana. Herbert agreed to buy 100 pounds of marihuana from Leal and Gardener for $75,000. Plant was present during the meeting, but, other than smelling the

[1] Pursuant to a plea bargain, Herbert testified against Plant and Parnell. Herbert is not a party to this appeal.

drugs and saying the stuff smelled like marihuana, he remained silent. Herbert, in Plant's presence, told Gardner he would return with the money at 2:30 a.m.

Herbert testified that from 11:30 to 2:30, he, Plant, and Parnell drove around for an hour drinking in a white Ford Maverick before concluding that they could not come up with the money. Instead, they decided that they would try to steal the marihuana from Leal.

At 3:00 a.m., the surveillance officers saw three men approach the motel. One of the men carried a rifle. The surveillance officers could not determine the identity of the men because it was dark. One of the men approached the motel room and knocked on the door, requesting entry. Looking out of the window, Gardner saw that the man knocking was Herbert. Gardner saw another man whom he could not identify behind Herbert. Because Herbert was late, Gardner thought Herbert had not come up with the money and refused to let Herbert in. Herbert kicked in the door, Gardner identified himself as a police officer, and Herbert ran out of the room. Herbert was immediately arrested in the parking lot.

Herbert told the police that Plant and Parnell were his accomplices, that they had accompanied him to the motel that night, and that Parnell had carried a rifle. A short time after Herbert's detention, Parnell was found hiding in the bushes by the motel's restaurant and was placed under arrest. A fully loaded rifle was found in the bushes next to the motel parking lot. Between 4:00 a.m. and 4:30 a.m. that morning, a patrolling forest ranger saw Plant in a white Ford Maverick a few blocks from the motel at a

stoplight, placing him near the scene of the crime. The ranger said he had known Plant for twenty years. Plant was arrested two days later pursuant to a warrant.

At trial, Leal testified that he had been in the drug business for a while before deciding to begin cooperating with the government. On cross-examination, Leal was asked why he had decided to work with the government. Leal said he was scared he would get caught. Then counsel said, "I see. You weren't arrested or anything?" Leal answered, "No, sir."

No evidence was presented at trial on behalf of either Plant or Parnell.

In January 1992, the jury convicted Plant and Parnell of conspiracy to possess marihuana with the intent to distribute and aiding and abetting the use of a firearm in a drug trafficking crime, and Plant was also convicted for possession of a firearm as a previously convicted felon. One week after trial, defense counsel moved for a new trial after learning of information indicating that Leal had been arrested in 1987, around the time he began working as an informant. This motion was denied.

Plant and Parnell appeal, asserting that they are entitled to a new trial because (1) a prosecution witness lied on the stand; (2) an improper jury instruction was given; and (3) the prosecutor's closing argument was improper.

Discussion

A. Leal's Perjury

Plant and Parnell contend that the district court should have granted them a new trial after learning that Leal had perjured

himself by testifying that he had never been arrested around the time he began to cooperate with the government. They claim that they deserve a new trial because they first discovered this after trial and because the prosecutor failed to disclose this information before or during trial.

To obtain a new trial based on newly discovered evidence, a defendant must meet one of two tests. Normally, a defendant must establish all of the following: 1) the new evidence was unknown to defendant at trial; 2) it was material, not merely cumulative or impeaching; 3) it would probably produce an acquittal; 4) the failure to discover the evidence was not due to defendant's own lack of due diligence; and 5) the district court abused its discretion in denying a motion for new trial. *United States v. Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991); *United States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991). However, where the government knew or should have known that it was offering false testimony, a new trial should be ordered if there was "*any reasonable likelihood* that the false testimony affected the judgment of the jury." *United States v. MMR Corp.*, 954 F.2d 1040, 1047 (5th Cir. 1992)); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979).

Here, it is not shown that the government had any reason to believe Leal was offering false testimony prior to or during trial, unlike *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). The government does not have a duty to determine the complete arrest record of every witness it calls to the stand. There is no showing that the arrest resulted in any conviction. Moreover, Leal's 1987

arrest was in Texas, by Cameron County authorities, while this case was prosecuted by the United States in Mississippi.[2]

Appellants have failed to meet their burden. The evidence of Leal's 1987 arrest is not material and probably would not have produced an acquittal. It is merely cumulative impeachment evidence that does not meet the standard for a new trial. *United States v. Tutino*, 883 F.2d 1125, 1140 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1139 (1990) (new evidence used to "further impeach a witness whose character has already been shown to be questionable does not meet this standard"). Appellants argue that the 1987 arrest showed that Leal was especially biased in this case since he was never prosecuted for the 1987 arrest because he agreed to cooperate with the police. The fact that Leal was not prosecuted for that arrest may reflect his motive for testifying in a 1987 or 1988 case, but it is marginal at best as to bias in this 1991 case. Since the claimed 1987 arrest, Leal had cooperated with the government in several other drug cases before he participated in this sting. *Compare United States v. Fried*, 486 F.2d 201, 203 (2d Cir. 1973), *cert. denied*, 94 S.Ct. 2385 (1974) (pending undisclosed indictment against witness merited new trial because witness likely biased as leniency may be given in return for testimony).

Leal's credibility was already questioned when he testified that he had been involved in numerous drug deals in the past. The fact that Leal was arrested for using marihuana would not have additionally weakened his credibility. Also, the parts of Leal's

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[2] We assume, *arguendo* only, that the motion for new trial adequately shows Leal's 1987 arrest.

testimony that were important to the case were corroborated by the testimony of Herbert and Gardner and by audio tapes of the events happening in the motel. Whether or not Leal told the truth would have had at most a marginal impact on whether the jury believed Herbert's testimony. We also note that there was an entire absence of any defense evidence.

We conclude that the district court did not abuse its discretion in denying the motion for a new trial based on newly discovered evidence since appellants have not shown that this evidence was material or that it would probably have produced an acquittal.

Alternatively, Plant and Parnell claim that the prosecution was aware of Leal's arrest record and failed to disclose it in violation of *Brady v. Maryland*, 83 S.Ct. 1194 (1963). Failure to disclose evidence impeaching a witness's credibility violates *Brady*. *United States v. Bagley,* 105 S.Ct. 3375, 3380-83 (1985). However, a new trial is required only if there is a reasonable probability that the evidence would have changed the verdict, even if the prosecution knew of the evidence at the time of trial. *Id.* at 3383. Here, as noted, there is no showing the prosecution did know. Leal's credibility was already questioned through his testimony that he used to sell marihuana and had cooperated with the government. Leal was not a crucial witness. The prosecution's evidence was unrebutted. We hold that there is no reasonable probability that evidence of the 1987 arrest would have changed the verdict, and we affirm the district court's determination on this issue.

B. Improper Jury Instruction

Plant and Parnell also contend that an improper jury instruction was given respecting the offense of using or aiding and abetting the use or carrying of a firearm during a drug trafficking offense. 18 U.S.C. § 924(c)(1) (1988). The jury instruction stated:

> "If either defendant carried or used a firearm during and in relation to a drug trafficking crime at a time when both defendants were mutually engaged in a conspiracySQ in the conspiracy alleged, then both defendants are equally guilty . . . ."

Defendants contend on appeal that the instruction was improper because it failed to specify that a person must *knowingly* use or carry a gun to be guilty under section 924(c)(1) and that an accomplice must know that the principal was carrying a gun while perpetrating the drug offense.[3] While section 924(c) requires that the party carrying the firearm do so knowingly, and arguably that accomplices know that principals are carrying a gun to be guilty of aiding and abetting,[4] these objections were not raised below and we

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[3] Under *United States v. Rayborn*, 872 F.2d 589, 596 (5th Cir. 1989), "[a] party to a continuing conspiracy may be responsible for a substantive offense committed by a coconspirator pursuant to and in furtherance of the conspiracy, even though that party does not participate in the substantive offense or have any knowledge of it." Thus, a coconspirator can be guilty of an offense whether or not the elements of aiding and abetting are proven and whether or not an aiding and abetting jury charge is given. Coconspirator liability differs from aiding and abetting liability where the accomplice must be actually involved in each crime committed by the principal to be guilty of that offense. Applying section 924(c) under the *Rayborn* theory, it would not matter if the coconspirator knew of the gun as long as one conspirator did. Under an aiding and abetting theory, it may be arguable that each party would have to have known of the gun to be convicted under section 924(c).

[4] *United States v. Wilson*, 884 F.2d 174, 178-79 (5th Cir. 1989)(defendant must know he carried a firearm); *United States v.*

refuse to consider them now.

Defendants also contend on appeal that the jury instruction was defective as a *Pinkerton* instruction because it failed to say that a coconspirator who does not actually commit an offense is only liable if the act was in furtherance of the conspiracy and reasonably foreseeable. *Pinkerton v. United States*, 66 S.Ct. 1180, 1184 (1946). This objection was not raised below and we will not consider it now.

The thrust of the objection below was that the charge's above-noted language, which dealt with coconspirator liability, was erroneous merely because the coconspirator might not have been present at the scene and might not have known the gun was then being carried.[5] This objection is unavailing under *Raborn*.

Nelson, 733 F.2d 364 (5th Cir. 1984) (state must prove accomplice knew principal carried a gun); *United States v. Morrow*, 977 F.2d 222, 231 (6th Cir. 1992)(en banc); *but see Rayborn*, 872 F.2d at 595 ("knowledge" not listed as element of 924(c) crime). We note that the evidence showed that Parnell carried the gun into the motel. Since he was physically holding a rifle in his hands he had to know that he was carrying it. Plant, who Herbert testified was walking next to Parnell, had to see that Parnell was carrying a gun.

[5] Defense counsel's objection stated in part that

> "[t]he jury could . . . conclude that [Plant] was part of a conspiracy, but also conclude that he was not at the scene at 4:30 when the gun was used and that he did not have knowledge that the gun was used at that point. I don't think it's fair to say at that point that the gun can be used against him when maybe his only role was just to test the dope or something. That's my concern here, Your Honor."

Also:

> "the jury could conclude that my client's involvement in the conspiracy ended at the point where he just smelled the marihuana and commented as to its quality or whatever. And if the jury did conclude that, then they

Further, the instructions as given clearly required the jury to find that "at a time" the gun was carried "during and in relation to a drug trafficking crime" both the party so carrying it and the other party "were mutually engaged in the conspiracy alleged," the charged marihuana conspiracy.

In sum, while jury instructions concerning section 924(c)(1) should refer to the fact that the party using or carrying the firearm must *know* that a firearm is being used or carried, we find that this objection was not made below. The instruction given adequately states the liability of a coconspirator.[6] No reversible error is presented in this connection.

C. Improper Closing Argument by Prosecutor

Plant and Parnell contend that two remarks by the prosecutor during closing arguments were improper and require a new trial.

If prosecutorial remarks are improper, reversal is only required where the statements prejudiced defendants and cast "`serious doubt on the jury's verdict.'" *United States v. Lokey*, 945 F.2d 825, 837-38 (5th Cir. 1991) (quoting *United States v.*

> would have the right not to conclude that just because at a later point in the conspiracy another defendant carried the gun, my client's held responsible for that defendant's actions."

This objection does not address whether the jury instruction contained a statement concerning the mens rea for the offense for either the man who carried the gun or his accomplice. Under *Rayborn* it is clear that as long as there is no proof that Plant had withdrawn from the conspiracy, Plant is still chargeable with the firearm offense regardless of his actual knowledge of the use of the firearm.

[6] At least it does where, as here, there was no objection for failure to require reasonable forseeability.

Rocha, 916 F.2d 219, 234 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2057 (1991). A cautionary instruction by the judge may cure the prejudice from an improper remark. *Id.* at 838.

Appellants claim the following remark improperly questions the ethics and integrity of defense counsel:

> "But when Lynn Mead and this other officer, Jack Morgan, come tearing after two defendants who are running down the street that they think are armed in the rain at four in the morning, . . . they never know whether they'll ever see their wives and children again. . . . And yet, they have to come up here and be savaged by people like this."[7]

We hold that this remark does not constitute reversible error for several reasons. First, it is not a direct attack on counsel. Second, the remark was made in rebuttal to previous statements by defense counsel attacking the testifying officers. *United States v. Medrano*, 836 F.2d 861, 865 (5th Cir.), *cert. denied*, 109 S.Ct. 58 (1988) (remark in direct response to defense counsel not improper); *United States v. Hernandez*, 891 F.2d 521, 526 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1935 (1990). Third, the district judge gave a cautionary instruction following defense counsel's objection.

Appellants also claim that the following remark prejudicially inflamed the passions of the jury: "Now I wish that we could have one case, United States of America versus the Drug Problem. But we can't do that." We do not think that this remark constitutes reversible error inasmuch as a prosecutor may make a plea for

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[7] Following objection, the judge issued a cautionary instruction advising the jury to base their decision on the evidence, but the instruction did not expressly direct the jury to disregard the remark.

general law enforcement and a cautionary instruction was given by the district court. *See United States v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984) (discussing "polyphonic interlude" between improper pleas for conviction and proper pleas for law enforcement).

Even if both remarks were improper, reversal is not justified because, considering the context of the entire trial and the unrebutted prosecution evidence, there is no reasonable likelihood that the jury's verdict was affected thereby.

Conclusion

Neither Plant nor Parnell has demonstrated any reversible error. Their convictions are accordingly

AFFIRMED.