

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 92-7577

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LEE N. MORGAN, JR.,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
(CR-J92-00010(W))

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(November 16, 1993)

Before GOLDBERG, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:<sup>1</sup>

Defendant-Appellant Lee Morgan appeals his conviction for cocaine conspiracy, attempt to possess with intent to distribute cocaine within a 1000 feet of a school, and a related traveling offense. We affirm.

I.

This appeal primarily concerns whether Morgan believed that cocaine rather than flour was involved. Though the actual substance that exchanged hands was flour, the convictions must be

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

upheld if the defendant agreed to possess cocaine and believed the substance to be cocaine.

Morgan first complains that he was entitled to a jury instruction that he was presumed to know the substance involved was flour, not cocaine. Morgan requested that the court charge the jury on each count that,

Morgan is presumed to know what was the substance that was sold, and you must find for the Defendant . . . unless you find that the Government has proven beyond a reasonable doubt that the substance sold was in fact cocaine or has proven beyond a reasonable doubt that Morgan believed the substance to be cocaine.

It is not reversible error to refuse a requested instruction unless the instruction 1) was substantially correct, 2) was not substantially covered in the charges delivered, and 3) concerned an important issue so that failure to give it seriously impaired the defendant's ability to present a given defense. United States v. Allison, 953 F.2d 870, 876 (5th Cir.), cert. denied, 112 S.Ct. 2319 (1992). Because Morgan's requested charge does not meet the requirements of Allison, no reversible error occurred.

The court charged the jury

[I]f you do not find beyond a reasonable doubt that the defendants believed the substance involved to be cocaine . . . then it would be your duty to acquit the defendants. . . .

The fact that the substance involved in this case was not real cocaine is no defense to the attempt charge . . . . [A]s to the defendant Morgan, the Government must convince you that he actually thought he was assisting Warden in buying real cocaine; . . . the Government must show the defendant's actions uniquely marked his conduct as criminal. In other

words, the defendant's conduct taken as a whole must clearly confirm beyond a reasonable doubt that he actually thought he was buying or assisting someone in buying real cocaine.

Tr. 1494-95 (emphasis added). This instruction tracks the holding of United States v. Oviedo, 525 F.2d 881, 885 (5th Cir. 1976) (discussed next part), regarding the intent of a defendant charged in a criminal attempt.

Morgan complains that under the delivered charges, the jury could find him guilty of conspiring to possess with intent to distribute cocaine even if he knew the substance was flour. Morgan also contends that the instructions improperly left on Morgan the burden of proving what he believed when he should have had the benefit of a presumption of an innocent state of mind. Assuming without deciding that Morgan's proffered charges are correct, he has inaccurately assessed the charges delivered. The conspiracy charge delivered required the Government to prove that Morgan agreed "to commit the crime of knowingly and intentionally possessing with intent to distribute cocaine." Tr. 1488 (emphasis added). The instructions on both conspiracy and attempt properly left the Government with the burden of proof.

The jury could not have reached the verdict it did unless it was satisfied that the Government proved beyond a reasonable doubt that Morgan conspired to possess with intent to distribute cocaine and thought the substance was cocaine. Because this heavy burden was properly left on the Government, the fact that the court did not further instruct the jury to presume that Morgan knew flour was involved is not such an omission as could seriously impair Morgan's

ability to present a defense.

These instructions adequately conveyed to the jury that the Government must prove that Morgan thought he was dealing with cocaine as requested in Morgan's proffered charge.<sup>2</sup> Accordingly, the failure to give the requested charge was not reversible error.

## II.

Morgan next complains that the evidence was not sufficient to establish that he believed the substance was cocaine. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, with all reasonable inferences and credibility choices made in support of it; we inquire whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Kim, 884 F.2d 189, 192 (5th Cir. 1989).

Oviedo demands that, for a jury to infer criminal intent in a criminal attempt, the defendant's objective acts must mark his conduct as criminal:

Thus, we demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.

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<sup>2</sup> The charges given did not substantially cover Morgan's requested instruction that the Government could attain a conviction by proving beyond a reasonable doubt that the substance sold was in fact cocaine. We agree with the Government that this aspect of the requested instruction addresses a factual scenario not suggested by the evidence--that real cocaine exchanged hands. We therefore conclude that this aspect of the requested instruction did not "concern an important issue" within the meaning of Allison.

Oviedo, 525 F.2d at 885. A jury should not find criminal intent based solely on acts consistent with a non-criminal enterprise. Id. at 886.

Morgan maintains that his objective conduct is consistent with a non-criminal enterprise (selling flour). Morgan argues that viewing his actions in a light most favorable to the verdict, a jury could not find that he believed the flour was cocaine and that a jury could only conclude that he was "in" with Hamm on the scam to rip off the purchase money.

We disagree. A reasonable jury could find that Morgan agreed to find a buyer for real cocaine. Forrest Hamm, a codefendant who pleaded before trial, testified that at the request of a cocaine supplier, he asked Morgan whether he knew of a buyer for cocaine. Around the time Morgan found codefendant Derek Warden to buy, one of two suppliers proposed to Hamm that they rip-off the purchaser by supplying other than cocaine. Hamm agreed with the supplier, but continued discussions with Morgan concerning a real deal. The jury could infer from Hamm's testimony that the agreement to do a rip-off was between Hamm and one of the suppliers--not Morgan.

Additionally, Morgan's objective acts suggested that he believed the substance was cocaine. Hamm testified that when Morgan and Hamm were in the room with the two suppliers, they lifted their shirts and dropped their pants to assure that no one was wired. The jury may have considered that if Morgan were in on the flour scam, everyone in the room would have known that no drugs were involved and they would have skipped this charade. A second

incident occurred after Warden discovered he had been ripped-off. He, Morgan, and Hamm hurried to the airport looking for the suppliers; Hamm stayed on the lower level while Morgan and Warden searched the upper level. Though Warden had never seen the suppliers and so could not have recognized them, Morgan spotted one of them and snatched his airline ticket. The jury may have reasoned that had Morgan been in on the flour-selling scam, he would have let his ally escape. The jury could reasonably infer from Morgan's objective acts that he was not in on the scam and thought that real cocaine was involved.

### III.

Morgan next complains that the court erred in admitting "drug profile" evidence and testimony that Morgan and Warden had spent time together in jail. We review the admission of evidence only for an abuse of discretion. United States v. Eakes, 783 F.2d 499, 506-07 (5th Cir.), cert. denied, 477 U.S. 906 (1986).

Drug profile evidence cannot be admitted as substantive evidence of guilt. United States v. Williams, 957 F.2d 1238, 1241 (5th Cir. 1992). The court admitted a pager, a conversion chart, testimony how a drug dealer uses a conversion chart and a pager; the court also admitted various photos of money, of a red BMW, of codefendant Warden and his girlfriend sitting with a heap of money, and money with pistols. Morgan complains that this evidence was prejudicial drug profile evidence and irrelevant.

Most of the evidence was relevant to Warden rather than Morgan: the BMW corroborated a surveillance witness, the cash

showed sufficient resources to make the purchase, and the conversion chart was in Warden's wallet. We affirm evidentiary rulings unless they affect "a substantial right of the [complaining] party." Fed. R. Evid. 103(a); see also Foster v. Ford Motor Co., 621 F.2d 715, 721 (5th Cir. 1980). The jury was properly instructed to consider the evidence against Warden separately. Any error regarding such evidence does not affect Morgan's "substantial rights." The evidence also linked Warden to Morgan and was therefore relevant to establish a relationship between coconspirators. As for the digital pager, Hamm's testimony suggested that Morgan reached Warden by having Warden call back a number left on his pager. We find no abuse of discretion in admitting any of the evidence challenged.

Morgan complains, too, that a remark about Morgan's prior jail time unduly prejudiced him. When Hamm asked Morgan what the buyer was like, Morgan assured him that Warden was "good people" and that Morgan knew this because he had spent time with Warden in jail in Mississippi. Evidence of prior trouble with the law is admissible if substantially relevant for some purpose other than to show that the defendant probably committed the crime because he is a man of evil character. United States v. Sutherland, 463 F.2d 641, 648-49 (5th Cir.), cert. denied, 490 U.S. 1078 (1972). This evidence did have some relevance: it both explained why Morgan was flying into Mississippi under an assumed name and established a close relationship between coconspirators, Warden and Morgan. It demonstrated how Morgan characterized the strength of their

relationship. Accordingly, admission of this testimony was not an abuse of discretion.

#### IV.

Morgan finally complains that the court erred in denying him a continuance to obtain a transcript of his earlier mistrial. The defendant supposedly ordered a transcript but for reasons not manifest in the record did not receive it in time to prepare for the second trial. Morgan's lawyer copied Hamm's testimony from the Government's transcript the evening before Hamm testified. Morgan complains that those "few fatigued hours" provided his lawyer inadequate preparation time.

Our review of the record reveals that the error, if any, was harmless. Defense counsel adequately cross-examined Hamm and has shown no prejudice by suggesting how he would have cross-examined Hamm differently had a continuance been granted.

#### V.

Morgan's final argument pertaining to his sentence was raised for the first time in the reply brief. The Court will not consider this argument because Morgan failed to object to the issue at the sentencing and failed to assign the issue as error in the opening brief. See United States v. Mejia, 844 F.2d 209, 214 n.1 (5th Cir. 1988).

#### Conclusion

The jury charges delivered adequately conveyed the requested instruction regarding the burden of proof and intent to possess in



an attempt. Sufficient evidence supports a finding that Morgan believed he was dealing with real cocaine. We find no reversible error in the evidentiary rulings or the failure to grant a continuance. The judgment is

AFFIRMED.