UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7633
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT NEIL CONDER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-L91-215-01)

June 18, 1993

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:[1]

Robert Neil Conder appeals his conviction, pursuant to 21 U.S.C. §§ 846, 841(a)(1) & 841(b)(1)(C), for conspiracy to possess with intent to distribute in excess of 50 kilograms of marijuana. We **AFFIRM.**

I.

Conder negotiated to purchase the marijuana from an undercover Drug Enforcement Administration agent, Alberto Juarez; but before Juarez was able to deliver it, Conder's associate, Cawley,

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 Pursuant to that rule, the court has determined that this opinion should not be published.

cancelled the deal, stating that "they" thought Juarez was a police officer.[2] After this, DEA agents secured the cooperation of Cawley, and thereafter conducted a lawful search of an apartment, where they found Conder and $184,000 in cash. Conder was indicted on one count of conspiracy, found guilty following a jury trial, and sentenced to, *inter alia*, 78 months imprisonment.

II.

Conder contends that the district court erred (1) in charging the jury on the law of conspiracy and (2) in admitting extrinsic evidence of prior bad acts by Conder, and that (3) his trial counsel provided ineffective assistance. We address these contentions in turn.

A.

Conder contends that the charge was erroneous because it did not instruct on the requirement of an overt act in furtherance of the conspiracy, and because of the hypothetical illustration of what is meant by conspiracy. Because Conder failed to object to the charge, we review only for plain error. *E.g.*, ***United States v. Lokey***, 945 F.2d 825, 832 (5th Cir. 1991).

For a conviction under § 846, there is no requirement of an overt act; the essence of the crime is the agreement to violate the narcotics laws. ***United States v. Natel***, 812 F.2d 937, 940 (5th Cir. 1987).[3] Moreover, although the district court did not specify

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[2] The district court would not allow Juarez to speculate as to the identity of the people referred to as "they".

[3] Section 846 provides: "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject

the elements of possession with intent to distribute in the hypothetical, it had covered those elements immediately preceding it. There is no error, much less plain error.

B.

Conder contends next that the district court erred, under Fed. R. Evid. 404(b), in admitting the testimony of two law enforcement officers concerning prior attempted marijuana transactions by Conder. We review the admission of evidence under Rule 404(b) under the heightened abuse of discretion standard employed for criminal trials. *See* ***United States v. Carrillo***, 981 F.2d 772, 774 (5th Cir. 1993). In order to be admissible under Rule 404(b), extrinsic evidence must be "relevant to an issue other than the defendant's character" (*e.g.*, intent), and "must possess probative value that is not substantially outweighed by its undue prejudice". ***Id.*** Conder contends that the evidence was inadmissible because his intent was not in issue, and its prejudicial effect substantially outweighed it probativeness.

Contrary to his assertions, Conder's intent was in issue. Moreover, "in a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence". ***United States v. Parziale***, 947 F.2d 123, 129 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1499 (1992) (quoting ***United States v. Prati***, 861 F.2d 82, 86 (5th Cir. 1988)). Furthermore, because the evidence of Conder's

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to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy".

guilt was overwhelming, any error the district court may have made in admitting the testimony was harmless. *See* ***United States v. Heller***, 625 F.2d 594, 599 (5th Cir. 1980) ("[a]n error is harmless if the reviewing court is sure, after viewing the entire record, that the error did not influence the jury or had a very slight effect on its verdict"). Among other evidence, Juarez testified that he personally met with Conder; discussed price, amount, and place of delivery of the marijuana; discussed prices for various delivery points; and was told by Conder to deliver it.

C.

Finally, Conder contends that his trial attorney provided ineffective assistance in that he should not have introduced an audio tape, an enhanced version of the tape, and a transcript of the enhanced tape to show that Conder had withdrawn from the conspiracy; rather, he should have moved to suppress it, because it contained evidence of Conder's participation in the conspiracy.[4] In sum, this is an attack on Conder's counsel's trial strategy. Conder failed to raise this issue in the district court.

In this circuit, an ineffective assistance of counsel claim cannot be raised for the first time on appeal, except in "rare cases where the record allow[s] [the Court] to evaluate fairly the merits of the claim". ***United States v. Higdon***, 832 F.2d 312, 314 (5th Cir. 1987), *cert denied*, 484 U.S. 1075 (1988). This is not

[4] Because, as explained above, there was no reversible error with respect to the jury charge or the extrinsic evidence, we do not address Conder's ineffective assistance contentions for those matters.

such a case. This is especially true in this instance, because decisions about trial strategy must be afforded due deference and should not be evaluated as deficient simply because hindsight shows that they were not successful. ***Drew v. Collins***, 964 F.2d 411, 422 (5th Cir. 1992); ***Ellis v. Lynaugh***, 873 F.2d 830, 839 (5th Cir.), *cert. denied*, 493 U.S. 970 (1989). *Cf.* ***United States v. Freeze***, 707 F.2d 132, 138-39 (5th Cir. 1983) (no review where Court could "only speculate about why defense counsel made no motions to suppress or objections to the evidence").[5]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[5] Of course, this claim can be raised in a 28 U.S.C. § 2255 proceeding. *E.g.*, ***United States v. Merida***, 985 F.2d 198 (5th Cir. 1993).