

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7657
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JUSTO ENRIQUE ROGUE-ROMERO, a/k/a RICKY GOMEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CR S90 67 01)

August 5, 1993

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Appellant appeals his conviction of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. We affirm.

We note first that the notice of appeal was untimely but within the thirty day excusable negligent period of Federal Rule of Appellate Procedure 4(b). During that time the district court appointed counsel for the Defendant which constitutes a finding of excusable negligent. See United States v. Quimby, 636 F.2d 86, 89

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(5th Cir. 1981); see also Mann v. Lynaugh, 840 F.2d 1194, 1199 n. 4 (5th Cir. 1988).

Appellant first contends that the evidence is insufficient as to both counts. We examine the evidence as a whole in the light most favorable to the verdict and accord the Government the benefit of all reasonable inferences and credibility choices. United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989). We find evidence sufficient if "a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." Id. at 67. As to the conspiracy count, the Government was required to prove beyond a reasonable doubt the existence of an agreement to possess with intent to distribute a controlled substance; the defendant's knowledge of that agreement; and the defendant's voluntary participation. Proof of an overt act by the Defendant in furtherance of the conspiracy is not required. Circumstantial evidence is sufficient. United States v. Alvarado, 898 F.2d 987, 992 (5th Cir. 1990). As to the second count the Government was required to prove beyond a reasonable doubt that Defendant knowingly possessed a controlled substance with a specific intent to distribute it. Likewise, these elements may be established by circumstantial evidence. United States v. Galvan-Garcia, 872 F.2d 638, 640 (5th Cir.), cert. denied, 493 U.S. 857 (1989).

A review of the record as a whole does not in any way support Appellant's contentions. We will not here review the evidence but that given by Gladis Roque, Agent Futvoye, informant Ausmer and police officer Pope is more than sufficient to support the jury's

verdict as to each count.

Appellant next complains of the district court's ruling admitting evidence of acts which occurred prior to the dates of the conspiracy alleged in the indictment. We review for abuse of discretion. United State v. Anderson, 933 F.2d 1261, 1267-68 (5th Cir. 1991). The evidence concerned cocaine deliveries by Appellant to Burns before the dates specified in the indictment. The court specifically instructed the jury that it was to consider this evidence not as proof that Appellant did possess with intent to distribute cocaine during the time-frame alleged in the indictment, but only in determining whether a conspiracy did or did not exist during the period April 1990 to July 1990. Appellant contends the limiting instruction was inadequate but does not explain why. Under Federal Rule of Evidence 404(b) evidence that is inextricably intertwined with the evidence used to prove a charged crime is admissible so that the jury can evaluate the totality of the circumstances under which defendant acts. United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992), cert. denied, 113 S.Ct. 1258 (1993). The evidence of the acts committed preceding the date of the conspiracy as alleged in the indictment was relevant to establishing the existence and purpose of the charged conspiracy. United States v. Aquirre Aquirre, 716 F.2d 293, 297-98 (5th Cir. 1983).

Next Appellant complains of the admission into evidence of photographs of the cocaine which the witness Ausmer turned over to law enforcement officers. The cocaine was destroyed before trial.

The objection was to the authenticity and accuracy of the photographs. Appellant points to no evidence indicating that the photographs were not accurate and Ausmer testified that the photograph represented the package that he bought from Burns, that he was present when the photographs were taken, and that they accurately reflect the substance that Burns said was cocaine. This is sufficient to support a finding that the photos are what their proponents claim. United States v. Mojica, 746 F.2d 242, 245 (5th Cir. 1984).

Appellant lists as error the admission of Rogue's testimony regarding Romero's placement of a handgun in her purse. He offers no argument on this issue however and we do not address it. See Anderson, 933 F.2d at 1267-68.

The district court limited defense counsel's cross examination of Rogue on the subject of unrecorded statements allegedly made by her and described in a report of an unrecorded interview of her by law enforcement agents. Counsel attempted to read the statement during cross examination and the district court sustained the prosecution's objection limiting counsel's cross examination to questions concerning whether the witness had made the statements. We review for clear abuse of discretion. United States v. Merida, 765 F.2d 1205, 1216 (5th Cir. 1985). The report was extrinsic evidence of statements allegedly made, the admissibility of which is governed by Federal Rule of Evidence 613(b). Such evidence cannot be admitted unless, inter alia, the witness has had an opportunity to deny the statement. Counsel was allowed to question

the witness on that issue but declined to do so. The admission of the evidence was not error.

Appellant's brief makes reference to several other issues but they are inadequately briefed and are therefore not considered.

AFFIRMED.