UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7740
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN GERALD BROUSSARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CR-J92-80(L)(N))

(November 4, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

John Gerald Broussard challenges his convictions for various drug-related offenses. We **AFFIRM**.

I.

Sheriff's deputies, pursuant to a search warrant, entered a home in Jackson, Mississippi. One deputy found Broussard standing in the kitchen with a mixing bowl and spoon in his hands. The bowl contained a mixture of baking soda and cocaine; a fingerprint

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

expert later identified one of Broussard's fingerprints on the bowl. The deputies recovered three pounds of cocaine hydrochloride and crack cocaine in the kitchen.

Broussard was indicted for conspiracy to possess crack cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 846; possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1); possession with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1); and the use of a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)-(2). Broussard was convicted on the first three charges, but acquitted on the firearms charge.

II.

A.

Consistent with his motion to suppress in district court, Broussard asserts that the evidence obtained by virtue of the warrant should have been suppressed.

1.

First, he maintains that the warrant was defective in three respects: (1) the "bare bones" affidavit was insufficient for issuance of the warrant; (2) the issuing judge misidentified the affiant; and (3) the issuing judge improperly credited the hearsay statements of an informant without corroboration.

We need not reach this issue, because the evidence is admissible under the good faith exception to the exclusionary

rule.[2] ***United States v. Gordon***, 901 F.2d 48, 49-50 (5th Cir.), *cert. denied*, 498 U.S. 981 (1990); *see also* ***United States v. Leon***, 468 U.S. 897 (1984) (establishing the exception). Broussard contends that the warrant was "facially deficient", and thus not within the scope of the good faith exception. The warrant did identify one law enforcement officer as the affiant, when, in fact, it was another.[3] Broussard makes much of the fact that the officers whose names apparently were switched were both involved in

---

[2] We do note, however, the remarkable similarity between the assertions made by Broussard in this case and those rejected in ***United States v. Brown***, 941 F.2d 1300, 1302-04 (5th Cir.), *cert. denied*, 112 S. Ct. 648 (1991).

[3] The "Underlying Facts and Circumstances" affidavit provided, in its entirety:

> I, Scott Turner, Affiant am employed by the HINDS COUNTY SHERIFFS DEPARTMENT as a DEPUTY SHERIFF. My duties include the enforcement of the uniform Controlled Substances Act of 1972 amended.
>
> Now comes before me a person that has provided information to this officer in the past. Information provided by this confidential source has proven to be true and correct, therefore proving that this confidential informant has proven to be a reliable person.
>
> THIS same confidential source has told this investigator that he has seen crack cocaine at 570 Heatherwood St., Jackson MS. This residence is controlled by a black female, known as Sharon Smith. This confidential source has stated that he has seen crack-cocaine in the past 24 hrs. Based upon the reliability of this confidential source[,] I, Scott Turner hereby request a Search Warrant be issued for the above location.

Though the affiant was clearly Turner, the search warrant stated that the affiant was Danny Woods. Danny Woods was another law enforcement officer who planned to "do the search warrant", but he decided to take control of the surveillance of the house and let Turner procure the warrant.

the investigation of the crime and the execution of the warrant. From this fact, Broussard argues that the officers "knew that the warrant was defective on its face".

We review the reasonableness of a law enforcement officer's reliance on a warrant *de novo*. ***United States v. Wylie***, 919 F.2d 969, 974 (5th Cir. 1990). Unquestionably, the officers may have known that the warrant misidentified the affiant; however, to conclude that such *de minimus* error renders a warrant facially defective would "egregiously elevate form over substance." *See* ***Gordon***, 901 F.2d at 50. In fact, the Supreme Court characterizes a facially deficient warrant as one "failing to particularize the place to be searched or the things to be seized" to such an extent "that the executing officers cannot reasonably presume it to be valid." ***Leon***, 468 U.S. at 923. Here, the defect in issue did not go to the substance of the warrant, i.e., the place to be searched and what was to be seized; rather, the alleged defect -- an apparent product of negligence or inadvertence -- was one an officer might reasonably, and in good faith, conclude was of little or no moment. The exclusionary rule is not concerned with such minor transgressions. ***United States v. De Leon-Reyna***, 930 F.2d 396, 400 (5th Cir. 1991) (en banc) (citing and quoting ***Leon***).

2.

Next, Broussard asserts that guns seized during the search were outside the scope of the warrant. Even assuming this to be correct, failing to exclude the seized guns must be deemed

harmless, because he was acquitted of the firearms charges. Fed. R. Crim P. 52(a).

3.

As the final basis for asserting that his Fourth Amendment rights were violated, Broussard charges that the deputies violated the "knock and announce" rule, 18 U.S.C. § 3109.[4] But, we recently declined to incorporate that rule into the constitutional requirement of reasonableness that governs *searches by state law enforcement personnel*. ***United States v. Sagaribay***, 982 F.2d 906 (5th Cir. 1993), *cert. denied sub nom.* ***Rueda v. United States***, (U.S. Oct. 4, 1993) (No. 92-9165). The deputies' actions were reasonable: the raid took place in the afternoon, "minimiz[ing] the risk that they would unnecessarily intrude into the defendants' private activities"; the deputies had reason to believe that drugs were in the home; and, the deputies announced their identity and purpose upon entering the home. *See* ***id.*** at 910. Their failure to knock and announce was reasonable under the totality of the circumstances. *See* ***id.***

B.

Broussard testified at trial. He challenges the introduction into evidence during his cross-examination of his prior convictions

---

[4] The statute provides in pertinent part:

> The officer may break open any outer or inner door or window of a house ... to execute a search warrant, if, *after notice of his authority and purpose*, he is refused admittance....

18 U.S.C. § 3109 (emphasis added).

for grand larceny auto (two convictions) and carrying a concealed weapon by a felon. But, Fed. R. Evid. 609(a)(1) permits the impeachment of an accused with evidence of prior convictions punishable by death or imprisonment in excess of one year if its probative value outweighs its prejudicial effect. And, the district court has broad discretion in applying this rule. ***United States v. Turner***, 960 F.2d 461, 465 (5th Cir. 1992).

On the other hand, the district court is required to make a finding in the record that the probative value of the prior conviction exceeds its prejudicial effect. ***United States v. Acosta***, 763 F.2d 671, 695 (5th Cir.), *cert. denied sub nom.* ***Weempe v. United States***, 474 U.S. 863 (1985). The court did so, stating: "If they were drug convictions then the court would at least be considering the substantial prejudice that would be inherent in a drug conviction. I'm not now ruling on this, but the court is inclined to allow the government to inquire about these convictions." This court has approved the use of prior convictions where "the instant charge and the previous ... conviction did not involve the same elements, issues or defenses." ***United States v. Breckenridge***, 782 F.2d 1317, 1323 (5th Cir.) (internal quotations and citation omitted), *cert. denied*, 479 U.S. 837 (1986). The district court did not abuse its discretion.[5]

---

[5] In his reply brief, Broussard also argues that the prosecutor improperly inquired about the details of the convictions, such as the length of incarceration. This specific argument was not raised in Broussard's original brief; a new lawyer was appointed for his reply brief. Because this issue is raised for the first time in the reply brief, we will not address it. Needless to say, "an appellant abandons all issues not raised in its *initial* brief."

C.

As asserted in his motions for acquittal at trial, Broussard challenges the sufficiency of the evidence for his conviction on the conspiracy charge (21 U.S.C. § 846), claiming that there was "no proof that [he] ever entered into an agreement with any person to possess cocaine with the intent to distribute it."

A conviction must be sustained if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." ***United States v. Bell***, 678 F.2d 547, 549 (5th Cir. 1982) (en banc) (footnote omitted), *aff'd*, 462 U.S. 356 (1983). In order to secure a conviction under 21 U.S.C. § 846, the government must prove, *inter alia*, that two or more persons agreed to violate the narcotics laws. *See* ***United States v. Carter***, 953 F.2d 1449, 1454 (5th Cir.), *cert. denied sub nom.* ***Hammack v. United States***, 112 S. Ct. 2980 (1992). The agreement may be tacit, and it may be inferred from circumstantial evidence. ***Id.*** at 1456. Of course, credibility determinations are "within the province of the jury." ***Id.*** at 1455 (citation omitted). At bottom, "[w]hether the evidence is direct or circumstantial, the test is whether the jury could reasonably, logically, and legally infer from the evidence presented that appellant was guilty ... beyond a reasonable doubt." ***United States v. White***, 569 F.2d 263, 266 (5th Cir.) (citation and

---

United Paperworkers Int'l. Union, AFL-CIO, CLC v. Champion Int'l. Corp., 908 F.2d 1252, 1255 (5th Cir. 1990) (citations omitted); *see also* ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 627 n.50 (5th Cir. 1993).

internal quotations omitted; ellipses in original), *cert. denied*, 439 U.S. 848 (1978).

Broussard's brother was apprehended after leaving the home just before the warrant was executed. Officers found items used in the processing of crack cocaine in his car, and he testified at trial that he had pled guilty to narcotics charges. Upon entering the home, a deputy found Broussard standing in the kitchen, mixing cocaine powder and baking soda in a bowl. Another container of such a mixture was found "cooking" in the microwave oven. In all, three pounds of cocaine was recovered, and four beepers were found in the kitchen. The jury apparently discounted Broussard's denial of any involvement with the cocaine and his explanation for the discovery of his fingerprints on the bowl (that he may have touched it while moving it out of the way so he could get a drink of water). In sum, the jury could have reasonably inferred that Broussard and his brother had a tacit agreement to possess and distribute crack cocaine.

D.

Broussard contends that he was denied due process by the district court refusing the following requested "theory of the case" instruction:

> The Court instructs the jury that if you have a reasonable doubt about whether or not the government has proved John Broussard guilty and believe John Broussard may have travelled to Jackson Mississippi merely to visit his brother, Craig Broussard, and was not in a conspiracy to possess controlled substances, did not possess controlled substances, and did not use or carry a firearm during and in relation to a crime of drug trafficking, then it is your duty to return a

> verdict of acquittal on all counts against John Broussard.

We disagree. Initially, we note that the district court's discretion in formulating a charge is broad, "so long as the charge accurately reflects the law and the facts of the case." ***United States v. Allred***, 867 F.2d 856, 868 (5th Cir. 1989) (citation omitted). We will reverse the refusal to give a proposed instruction only if "the instruction (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and, (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." ***United States v. Grissom***, 645 F.2d 461, 464 (5th Cir. 1981); *see also* ***Allred***, 867 F.2d at 868.

The requested instruction was substantially covered in the charge. *See* ***United States v. Robinson***, 700 F.2d 205, 211 (5th Cir. 1983) (noting that the usual entitlement to a "theory of the case" instruction may be disregarded if the substance of the requested charge "is stated elsewhere in the instructions"). The jury was instructed (1) on reasonable doubt; (2) to determine the facts from the evidence; (3) to weigh the evidence, draw reasonable inferences, and make credibility determinations; and (4) on the elements of the crimes. Taking the instructions as a whole, *see* ***United States v. Chavis***, 772 F.2d 100, 108 (5th Cir. 1985) (requiring that a charge "be considered as a whole"), the charge more than adequately conveyed that which Broussard wished the jury to hear.

In addition, the failure to give the instruction did not substantially impair Broussard's ability to present a defense. Indeed, pursuant to the charge, he had the opportunity to propound his "theory of the case" in closing argument. The district court did not abuse its discretion; it is not obligated to "secure for the defendant a judicially narrated account of `his' facts and legal arguments." ***Robinson***, 700 F.2d at 211 (citations omitted).

E.

As noted, Broussard testified at trial. He asserts that the prosecutor's closing argument comment that "in order to find [Broussard] not guilty, you have got to believe everything he told you" violated the due process clause by impermissibly shifting the burden of proof to the defendant. *See* ***In re Winship***, 397 U.S. 358, 364 (1970). (His immediate objection at trial was overruled.) Broussard claims that "[t]heoretically the jury could have believed nothing that the defendant said but could still have found that the government had failed to meet its burden of proof and could have voted not guilty." And, he asserts that the district court, by failing to sustain his objection, placed its imprimatur upon an unconstitutional shifting of the burden of proof.

Even assuming the comments were inappropriate, they must also be harmful. *See* ***United States v. Lowenberg***, 853 F.2d 295, 301 (5th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989) (requiring that a prosecutorial comment be both inappropriate and harmful in order to constitute reversible error); Fed. R. Crim. P. 52(a). "A criminal conviction is not to be lightly overturned on the basis of a

prosecutor's comments standing alone." ***Lowenberg***, 853 F.2d at 302 (citation and internal quotations omitted). If the charge helped cure any improper argument, or if the strength of the evidence of the defendant's guilt is great, we should deem the improper argument harmless. ***Id.***

The charge, which instructed the jury on the elements of the crime and the necessity of proof beyond a reasonable doubt, coupled with the overwhelming evidence of guilt, renders the comments harmless.

III.

For the foregoing reasons, the convictions are

AFFIRMED.