IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8517
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO ESTRADA,
a/k/a Frank G. Estrada, Jr.
a/k/a Frank Gonzlaes Estrada
a/k/a Frank Gonzalez Estrada
a/k/a Frank Gonzales, Jr.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A 90 CR 115 All)

(March 22, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I

The Austin Police Department investigated reports from several informants that Francisco Estrada kept and sold narcotics at 74 San Saba Street. A surveillance team observed the residence as various

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

people entered the house and stayed for periods of three to five minutes. Because the activity at San Saba Street was consistent with narcotics trafficking, an agent with the Drug Enforcement Administration secured a warrant to search the residence. The Austin police detained Estrada when he arrived at the residence while the search team executed the warrant.

Officers found a large bag of marijuana seeds in the dining area of the house and drug paraphernalia in a garage apartment occupied by Estrada's brother and sister-in-law. A search of Estrada's person and automobile produced a set of keys, a pager, an address book, and some papers described as drug tally sheets. Officers used Estrada's keys to open one of the entry doors of 74 San Saba and a padlock on a bedroom door. In the padlocked bedroom, one of the doors and a window were boarded shut. Officers found a sack of animal feed which contained 28 balloons of heroin and four ounces of cocaine in nine plastic baggies. They also found instructions for setting up a methamphetamine laboratory, a list of precursor chemicals for the production of methamphetamine, men's clothing, and Estrada's personal documents, including a business card belonging to Estrada's probation officer. A second search warrant was executed on an apartment on Willow Creek Drive leased to Julie Soto and Frank Estrada. Officers found more documents and a small vial containing a trace amount of cocaine.

Estrada entered a plea of not guilty to a three-count superseding indictment, charging conspiracy with unknown others to possess heroin and cocaine with intent to distribute (count one), possession with intent to distribute heroin (count two), and possession with intent to distribute cocaine (count three). The jury returned a verdict of guilty on all counts. The district court sentenced Estrada within the guidelines to concurrent terms of imprisonment of 87 months on each count, a six-year term of supervised release, and a special assessment of $150.

II

Estrada argues that the district court abused its discretion in admitting evidence of extrinsic conduct under Fed. R. Evid. 404(b).[1] See U.S. v. Ellender, 947 F.2d 748, 761 (5th Cir. 1991). Specifically, Estrada challenges the admission of the following evidence: 1) a diagram of a methamphetamine lab and testimony that the diagram was prized by people involved in illegal activity, 2) testimony by Estrada's parole officer that Estrada had failed urine tests on two occasions because of the presence of cocaine and/or marijuana, 3) testimonial evidence by the parole officer of a prior heroin conviction, 4) evidence that at the time of his arrest Estrada had offered the police officers information concerning another marijuana transaction, and 5) testimonial

[1]On appeal, Estrada does not raise the question whether the evidence was sufficient to support the convictions.

evidence that the investigation of Estrada was precipitated by information received from informants.[2]

Rule 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Whether Rule 404(b) evidence is admissible is governed by a two-step test. See U.S. v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). First, the extrinsic offense evidence must be relevant to an issue other than the defendant's character. Id. Second, the probative value of the evidence must not be outweighed by undue prejudice. Id.

Assuming, without conceding, that the extrinsic evidence was relevant, Estrada asks this court to focus on the second prong of Beechum. He argues that the probative value of the extrinsic evidence was slight and that the "sum total" of the evidence, "taken as a whole and viewed in light of all the evidence at trial" was more prejudicial than probative.

We will assume that the evidence was more prejudicial than probative, and ask the question whether the error was harmless.

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[2]Prior to trial, the Government gave notice of its intent to offer evidence of other acts by the defendant. The stated purpose for offering the evidence was to show "state of mind" to establish the element of intent or knowledge in the possession count and the conspiracy count.

The government argues that any error in admitting the evidence was harmless because "[t]he government produced overwhelming evidence that Estrada possessed the heroin and cocaine." In a conclusionary statement, Estrada argues that the error in admitting the prejudicial evidence was not harmless because "the remaining evidence [did] not rise to the leval [sic] of overwhelming."

The Supreme Court set forth the test for this type of harmless error in Kotteakos v. U.S., 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946). The "primary question is what effect the error had, or reasonably may have had, upon the jury's decision." U.S. v. Bernal, 814 F.2d 175, 184 (5th Cir. 1987) (citation omitted). The error must be viewed "in relation to the entire proceedings." Id. If the evidence of guilt is overwhelming, the error is harmless if it would not have had a substantial impact on the jury's verdict. U.S. v. Williams, 957 F.2d 1238, 1244 (5th Cir. 1992) (citing Bernal, 814 F.2d at 184).

The evidence to support each element of possession with intent to distribute narcotics is overwhelming even if all of the extrinsic evidence is excluded. First, the government showed that Estrada exercised dominion and control over the narcotics. Estrada had keys to the house and the padlocked bedroom where officers found cocaine, heroin, and marijuana seeds (for which he was not charged). Several of his personal belongings and papers were also found in the bedroom. Second, the element of knowledge and intent is not challenged. In arguing that the extrinsic evidence had no

probative value, Estrada concedes in his brief that "there was other evidence as to knowledge and intent" and that "whatever probity the extrinsic evidence possessed in this regard was of small incremental value." Third, the large amount of cocaine and heroin was sufficient to infer intent to distribute. See U.S. v. Romero-Reyna, 867 F.2d 834, 836 (5th Cir. 1989), cert. denied, 494 U.S. 1084 (1990).

Neither Estrada nor the government addresses the conspiracy conviction in count one. As is often the case in conspiracy convictions, the record lacks direct evidence of a conspiracy; however, there is ample circumstantial evidence that Estrada was involved with other unknown persons in a conspiracy to possess narcotics with intent to distribute. Officers conducting a surveillance of the residence saw considerable "vehicular" and "walk-up" traffic consistent with extensive drug trafficking at the San Saba house. Estrada was carrying a pager and drug tally sheets when he was arrested. Three forms of controlled substances--marijuana seeds, cocaine, and heroin--were found in the house in sufficient quantity to infer Estrada's involvement with others. Estrada's brother and sister-in-law lived on the premises, and officers found narcotics paraphernalia in their apartment over the garage. Viewing the overwhelming evidence of possession together with the surrounding circumstances, a conspiracy with unknown persons can be inferred. See Wright, 797 F.2d at 253. Accordingly, if the district court abused its discretion in

admitting the Rule 404(b) evidence, any error was harmless because it did not have a substantial impact on the jury's verdict. See Williams, 957 F.2d at 1244.

III

Estrada also asserts that the government's references in closing argument to the methamphetamine diagram, his failed urinalysis, and information from informants was improper. The government argues that any error in admitting the evidence of Estrada's prior bad acts was cured by the district court's charge to the jury: "The defendant is not on trial for any act, conduct, or offense not alleged in the indictment." We need not address this issue in any detail. In view of the preceding discussion and holding, any improper reference to Estrada's prior bad acts in closing argument did not substantially influence the jury and was, consequently, harmless. See Kotteakos, 328 U.S. at 764-65.

IV

Estrada argues that the district court abused its discretion in permitting hearsay evidence concerning information from informants. Estrada specifically challenges testimonial evidence that the Austin police received information "from various sources that narcotics [were] being kept and sold at [74 San Saba Street] by Mr. Estrada" and that "[s]ome of the information contained was that Mr. Estrada carried the drugs in his pocket . . . ."

In a motion in limine, Estrada sought to suppress any testimony that informants provided information that Estrada was

dealing narcotics. The government stated that they would not seek to offer the evidence because it was hearsay. It was the government's intention to offer only the observances of the surveillance team. The district court denied the motion in limine because the government agreed to limit the questions, excluding information received from any informant. When the government failed to restrict the questions at trial, Estrada objected; and the district court, apparently concluding that questions were not in breach of the government's pretrial representations, overruled the objections.

Estrada asserts that the government violated the agreement not to elicit information concerning the informants; therefore, the district court should have granted his objections to the testimony. Because the district court overruled his objections, Estrada argues that disclosure of the identity of the informant was necessary to protect his right of cross-examination. At trial when Estrada objected to the hearsay, he did not renew his earlier request--made in connection with his motion in limine--that the district court order the disclosure of the identity of the informant.

The government contends that there is no error because the testimony did not constitute hearsay. The government argues that the statements were not offered for their truth "but rather to establish background and the police officers' reasons for getting involved in the Estrada incident." Id. As authority for the argument, the government relies on U.S. v. Gonzalez, 967 F.2d 1032

(5th Cir. 1992). In Gonzalez, this court stated that "[t]estimony not used to establish the truth of the assertion simply does not fall under the proscriptions against the use of hearsay." Id. at 1035 (internal quotations and citation omitted). According to the government, the prosecutor pointed out in closing argument that the officers did not rely on the informants but conducted surveillance to determine if Estrada was involved with drug activity. If the testimony of the officer regarding the informants is not hearsay and simply background, the district court did not abuse its discretion in admitting the evidence. See U.S. v. Ellender, 947 F.2d 748, 761 (5th Cir. 1991).

Assuming the district court abused its discretion in failing to sustain Estrada's objection, and the plain error standard applies, we see no basis for reversal because the proceedings were not seriously affected and there was not miscarriage of justice. Any doubt that could have been created by Estrada's cross-examination of the informant was at most collateral to the jury's determination of his guilt. The prosecutor explicitly stated to the jury in closing argument that the police did not rely on the hearsay information in concluding whether Estrada was engaged in drug trafficking, but on the independent investigation and surveillance that the officers conducted and to which we have earlier alluded.

V

For the reason we have set out in this opinion, the conviction of Francisco Estrada is

A F F I R M E D.