UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-8563

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMIRO HINOJOSA-SUSTAITA,
and JESUS ELIAS-GARCIA,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(EP-92-CR-227-2)

(September 23, 1993)

Before WIENER, EMILIO M. GARZA, Circuit Judges, and LITTLE,[*] District Judge.

EMILIO M. GARZA, Circuit Judge:[**]

Jesus Elias-Garcia and Ramiro Hinojosa-Sustaita were convicted of one count of conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988). Elias-Garcia argues on appeal that the evidence was insufficient to support his conviction and that the district court erred in

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[*] District Judge for the Western District of Louisiana, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

admitting unduly prejudicial testimony. Hinojosa-Sustaita contends that the court erred in admitting Fed. R. Evid. 404(b) evidence without proper notice and clearly erred in finding the quantity of heroin involved in the conspiracy for sentencing purposes. Finding no merit to the defendants' points of error, we affirm.

I

In May 1992, Drug Enforcement Agency ("DEA") agent Salvador Martinez contacted a confidential informant ("CI") and asked him to "find anybody who was selling both cocaine or heroin." While in Juarez, Mexico, the CI became acquainted with Hinojosa-Sustaita, known to the CI as "Shorty." Knowing that Hinojosa-Sustaita dealt marijuana, the CI asked Hinojosa-Sustaita if he also supplied cocaine. Hinojosa-Sustaita replied that he could obtain cocaine from his contacts in El Paso. On May 22, 1992, the CI and Hinojosa-Sustaita arrived in El Paso, where the CI was introduced to "La Changa," later determined to be Elias-Garcia, and another individual, later determined to be Raymond Guzman.[1] Elias-Garcia and Guzman told the CI that they had three ounces of heroin; the CI countered with a request for five ounces. Elias-Garcia then took two substance-filled balloons out of his mouth and stated "No, this is it." Elias-Garcia assured the CI that "it was pure" and "not to be mistrustful."[2] Elias-Garcia further stated that he and Guzman

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[1] Guzman was charged as a co-conspirator with Elias-Garcia and Hinojosa-Sustaita. Prior to trial, Guzman entered into a plea agreement with the government, and is not a party to this appeal.

[2] The CI initially testified that the defendants used the term "chiva," apparently a popular term for heroin. On cross-examination, however, the CI admitted that none of the defendants

could get additional heroin, and would be able to deliver it shortly at the Fox Plaza Shopping Center parking lot in El Paso. The CI and Hinojosa-Sustaita then drove to Fox Plaza to wait.

After arriving at the Fox Plaza, the CI called agent Martinez, and indicated that Elias-Garcia and Guzman were bringing heroin. Hinojosa-Sustaita also talked with agent Martinez, telling him that Elias-Garcia and Guzman "wouldn't be long in coming and for him to come prepared." When Elias-Garcia and Guzman arrived at Fox Plaza, the CI entered Guzman's vehicle, whereupon Guzman ordered Elias-Garcia to take out the heroin and show it to the CI. Elias-Garcia subsequently removed the heroin, wrapped in a shirt, from under the seat and showed it to the CI. After pretending to test the heroin, the CI gave it back to Elias-Garcia to put back underneath the seat. The CI then called Agent Martinez to confirm that he had seen the heroin. When agent Martinez arrived at the Fox Plaza, he asked Guzman if he "had the stuff." Guzman replied that he did, and proceeded to unwrap the shirt containing the heroin the CI had seen earlier. Agent Martinez then signalled his fellow DEA agents, who converged on the area and arrested the three defendants.

Elias-Garcia and Hinojosa-Sustaita were convicted after a jury trial of one count of conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846. The district court sentenced both defendants to seventy months of imprisonment, followed by five years of supervised release, and a

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used the term "chiva," and that he had only assumed the substance in the balloons to be heroin.

special assessment of $50.00. Both defendants filed a timely notice of appeal.

II

A

(1)

Elias-Garcia first contends that the evidence was insufficient to support his conviction. He argues that the evidence adduced at trial, at most, shows that he knew Hinojosa-Sustaita and Guzman, and that he was present at the Fox Plaza during the heroin deal. "In reviewing the sufficiency of the evidence, we determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United States v. Pruneda-Gonzalez,* 953 F.2d 190, 193 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 2952, 119 L. Ed. 2d 575 (1992). "We accept all credibility choices that tend to support the jury's verdict." *United States v. Anderson,* 933 F.2d 1261, 1274 (5th Cir. 1991). In a drug conspiracy conviction under 21 U.S.C. § 846, "the government must prove beyond a reasonable doubt that a conspiracy existed, the accused knew of the conspiracy, and he knowingly and voluntarily joined it." *United States v. Hernandez-Palacios,* 838 F.2d 1346, 1348 (5th Cir. 1988). "No evidence of overt conduct is required. A conspiracy agreement may be tacit, and the trier of fact may infer agreement from circumstantial evidence." *Id.* The CI testified that when negotiating the purchase of heroin, Elias-Garcia removed two

substance-filled balloons from his mouth, whereupon he stated that "it was pure" and "not to be mistrustful." The CI further testified that Elias-Garcia, upon Guzman's orders, removed from beneath a car seat the packaged heroin, and also was the person who put the heroin back in the same place before agent Martinez arrived. Agent Martinez testified that after he inspected the heroin, he held it up in plain view so that Elias-Garcia could see it. Based upon this circumstantial evidence, particularly the CI's testimony, we hold that sufficient evidence supports Elias-Garcia's conviction for conspiracy to possess with intent to distribute heroin.[3]

(2)

Elias-Garcia also contends that the court's admission of the following testimony of agent Martinez on direct examination deprived him of a fair trial:

> Q. What specifically did Raymond Guzman say [after being arrested]?
>
> A. He claimed that he was receiving heroin at least once a week, five to ten ounces, from a connection, what he said was a Chuy and Juan.[4] He did not know their last names. He was receiving from Mexico. And these gentlemen would go to his house several days later to pick up money.
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> . . . .

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[3] At oral argument, counsel for Elias-Garcia argued that the CI, on cross-examination, contradicted his direct testimony concerning Elias-Garcia's role in the conspiracy. After reviewing the record, we conclude that the CI only contradicted his direct testimony that Elias-Garcia had used the term "chiva."

[4] The record shows that the government did not attempt to show that Chuy and Juan were, in fact, any of the named defendants.

Q. And what specifically did [Hinojosa-Sustaita] say?

A. Mr. Hinojosa claimed that Elias was the one that introduced him to Mr. Guzman and that Guzman could get just about any amount of))

Record on Appeal vol. 6, at 269, 271. Elias-Garcia argues that this testimony created "negative or adverse impressions" upon the minds of the jury concerning "Elias-Garcia's alleged or presumed narcotic trafficking." We review evidentiary rulings for abuse of discretion. *United States v. Liu,* 960 F.2d 449, 452 (5th Cir.), *cert. denied,* ___ U.S. ___, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992). "If abuse is found, then the error is reviewed under the harmless error doctrine." *Id.*

Elias-Garcia does not dispute that such testimony was admissible to rebut the direct testimony of Guzman and Hinojosa-Sustaita.[5] Furthermore, the district court instructed the jury on two separate occasions that such testimony was only admissible to impeach Guzman and Hinojosa-Sustaita, and that such testimony would not be admissible to prove the truth of Guzman's and Hinojosa-Sustaita's statements. Given the innocuous content of the objected-to testimony and the court's limiting instructions as to the proper use of the testimony, we find no abuse of discretion in the court's admission of agent Martinez's rebuttal testimony.

B

(1)

[5] Guzman had testified that, prior to day of the arrests, he had never seen or sold heroin. Hinojosa-Sustaita had testified that he had never seen Guzman prior to the day of the arrests.

Hinojosa-Sustaita first contends that the court erred in admitting extrinsic act evidence under Fed. R. Evid. 404(b), without proper notice upon request.[6] On direct examination, the CI testified regarding the circumstances leading up to the heroin deal with Hinojosa-Sustaita on May 22:

> Q. [By the prosecution] Now, when did you first meet Shorty?
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> A. A month before the deal.
>
> Q. And where did you meet him?
>
> A. In Juarez.
>
> Q. Okay. And did you meet him in your home, his home? Whose home did you meet in?
>
> A. His house.
>
> . . . .
>
> Q. And would you go out and socialize with Shorty?
>
> A. Yes.
>
> Q. And during this time, did you ask him to do anything for you?
>
> A. Yes.
>
> Q. What did you ask him, sir?

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[6] Rule 404(b) provides:

> 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, *provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.*

Fed. R. Evid. 404(b) (effective December 1, 1991).

. . . .

Q. And what agreement did you reach with Short?

A. Well, since he was selling marijuana, I asked him if he could get some cocaine for me and he said, yes, he had some people in El Paso.

Record on Appeal vol. 5, at 72-74. Hinojosa-Sustaita argues that the CI's remark that Hinojosa-Sustaita previously sold marijuana constituted extrinsic evidence which the prosecution did not give notice of in accordance with Fed. R. Evid. 404(b). The government concedes that no notice was given; it argues, however, that Rule 404(b), and its notice requirement, do not apply because Hinojosa-Sustaita's alleged marijuana dealings formed an integral part of the circumstances surrounding the charged offense of conspiracy to deal heroin. *See, e.g., United States v. Costa,* 691 F.2d 1358, 1361 (11th Cir. 1982) ("Campbell testified as to the circumstances in which he came to know Costa as a dealer in cocaine to show why he could expect Costa to provide him with a kilogram. The evidence concerning the prior acts and that used to prove the crime charged were inextricably intertwined."). Assuming *arguendo* that the CI's reference to Hinojosa-Sustaita's marijuana dealings was Rule 404(b) evidence, and that the court abused its discretion by admitting the evidence despite the prosecution's failure to give notice, we find only harmless error. The record reveals that Hinojosa-Sustaita's alleged marijuana dealings was never mentioned again during the presentation of evidence to the jury, or during the prosecution's closing argument. Moreover, the overwhelming evidence supporting Hinojosa-Sustaita's guilt))i.e., his introduction of Elias-Garcia

and Guzman to the CI, his participation in the heroin negotiations, and his statement to agent Martinez that he "should come prepared"))supports our conclusion that only harmless error, if any, occurred. *See United States v. Williams,* 957 F.2d 1238, 1244 (5th Cir. 1992) (finding harmless error in admission of Rule 404(b) evidence where evidence would not have substantially influenced the jury's verdict). Consequently, the admission of such evidence cannot be the basis for reversing Hinojosa-Sustaita's conviction.

(2)

Lastly, Hinojosa-Sustaita contends that the court erred in finding the quantity of drugs involved in the conspiracy for sentencing purposes. Based upon the testimony of the DEA's chemist, the court found that the amount of heroin seized on the day of the arrests was 123.9 grams. Agent Martinez testified that when he initially weighed the heroin on an office scale on the day of the arrests, the heroin weighed 97.9 grams. Hinojosa-Sustaita argues that the court erred in relying upon the chemist's testimony because the heroin weighed by the chemist was not the same heroin seized on the day of the arrests. "A district court's findings about the quantity of drugs implicated by the crime are factual findings reviewed under the `clearly erroneous' standard." *United States v. Rivera,* 898 F.2d 442, 445 (5th Cir. 1990). "A factual finding is not clearly erroneous as long as it is plausible in light of the record read as a whole." *United States v. Sanders,* 942 F.2d 894, 897 (5th Cir. 1991). "For sentencing purposes, the district court may consider any relevant evidence without regard to

its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." *United States v. Young,* 981 F.2d 180, 185 (5th Cir. 1992) (attribution omitted), *cert. denied,* ___ U.S. ___, 113 S. Ct. 2454, 124 L. Ed. 2d 670 (1993).

Aside from the weight discrepancy, there is nothing in the record suggesting that the heroin seized on the day of the arrests was substituted for or altered before being weighed by the DEA chemist. Agent Martinez testified that after seizing the heroin, he placed it in an evidence bag. He identified this evidence bag as Government's Exhibit 3; the DEA chemist identified this same exhibit as the evidence bag containing heroin which he weighed at the lab.[7] Agent Martinez further testified that the difference in weight may have been caused by the office scale not being calibrated correctly. Because agent Martinez's explanation is plausible in light of the record as a whole, we find no clear error in the court's finding about the quantity of drugs involved in the conspiracy.

III

Accordingly, the defendants' convictions and sentences are AFFIRMED.

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[7] Apparently, two DEA agents performed field tests on the seized heroin after agent Martinez placed it in the vault and before the DEA chemist weighed the heroin at the lab. This break in the chain of custody went to the weight of the evidence, not its admissibility, which Hinojosa-Sustaita does not challenge on appeal. *See United States v. Shaw,* 920 F.2d 1225, 1229-30 (5th Cir.), *cert. denied,* 111 S. Ct. 2038 (1991). The jury has the ultimate responsibility for deciding the authenticity of evidence. *United States v. Logan,* 949 F.2d 1370, 1377-78 (5th Cir. 1991).