IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8634
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SALLY LOU WADDELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
P 92 CR 38 1

June 17, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

On the ground that the district court should have granted her motion for mistrial, Sally Waddell appeals her conviction of conspiracy to possess with intent to distribute marihuana and possession with intent to distribute marihuana, in violation of respectively, U.S.C. §§ 846 and 841(a)(1). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

A Border Patrol agent observed a Dodge mini-van that slowed down significantly as it approached a Border Patrol checkpoint and noticed the passenger, who turned out to be Waddell, spraying perfume in the vehicle. The agent became suspicious after questioning the occupants of the van, Waddell and her sister Juanita Bandy, and a canine officer brought a dog to sniff the vehicle for drugs. The dog alerted and Bandy, the driver, consented to a search of the vehicle, which produced 187 pounds of marihuana wrapped in bundles in garbage bags.

II.

Waddell argues that the district court erred in denying her requests for mistrial following the introduction of testimony of her alleged prior acts of trafficking marihuana. Waddell relies upon Fed. R. Evid. 404, which provides that evidence of other crimes or wrongs is inadmissible to show character.

A district court's decision to grant or to deny a mistrial based upon the admission of prejudicial evidence is reviewed for an abuse of discretion. In re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 764 F.2d 1084, 1090 (5th Cir. 1985).

Extrinsic evidence of other offenses or wrongs is admissible under rule 404(b) if the district court determines that (1) it is relevant to an issue other than the character of the defendant and (2) the prejudicial effect of the evidence does not outweigh its probative value. United States v. Beechum, 582 F.2d 898, 911 (5th

Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). A district court is not required to conduct this analysis sua sponte in the absence of an objection under rule 404(b). United States v. Greenwood, 974 F.2d 1449, 1462, n.8 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3772 (U.S. May 17, 1993). If a defendant fails to object at trial to extrinsic evidence, we will reverse only if the admission of the evidence resulted in plain error. Id. at 1462. "[T]he plain error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Id. at 1463 (internal quotation and citation omitted).

Waddell challenges three portions of the testimony of James Willard, who was employed to assist Bandy, who was handicapped. Defense counsel did not object to Willard's testimony that Waddell and Bandy talked about making a trip to pick up a load of marihuana in March 1992, the trip on which they were apprehended. Waddell's counsel did object to several other portions of Willard's testimony during the following colloquy, but did not raise an objection under rule 404(b). Waddell quotes the following passages to support his argument that extraneous offense evidence was presented to the jury:

> Assist. U.S. Att. (AUSA): And What did Ms. Bandy say about this trip?
>
> A. Well, she was, they were excited about it. They were both excited about it because it would have been the first one that they had since before Christmas.
>
> AUSA: The first run they made for marihuana?
>
> A. Yes, ma'am.

AUSA: Did they talk about --

Counsel: Objection, leading, Your Honor.

The Court: Sustained. It is leading.

Counsel: I ask the Court to instruct the jury to disregard it.

The Court: The jury will disregard that.

Counsel: We move for a mistrial.

The Court: Denied.

AUSA: The first run, the first trip they had made. Did you understand what they were talking about?

A. Yes, ma'am, I did.

AUSA: What was your understanding?

A. That they would be hauling marijuana from southern Texas back up to Dallas.

AUSA: And this was the same as they had done previously?

Counsel: Objection, that is leading and suggestive.

The Court: Rephrase your question.

Counsel: We ask you instruct the jury to disregard the comment.

The Court: Disregard the comment, please, jury.

Counsel: We renew our motion for a mistrial.

The Court: Denied.

The government further questioned Willard as follows:

AUSA: In addition to what Ms. Waddell said about travelling to the Big Bend area to see this other gentleman, did she ever give any other reason why she made these trips?

A. Not that particular time. The other trips she had told me))

Counsel: I am going to object to that as extraneous, irrelevant, immaterial, and highly prejudicial.

The Court: Overruled. Who is she, is that Ms. Waddell?

A. Yes, sir.

The Court: All right. Can you give us a time or time frame and place where this occurred?

A. It would have been at Ms. Bandy's house before March 23rd, around in there.

The Court: Okay.

A. During my employment.

The Court: Overruled.

AUSA: Okay. You were going to tell us about any other purpose for these trips.

A. The only, the only purpose was to haul the marijuana, that was the only purpose I was told.

The government also asked Willard the following question:

AUSA: Were you ever invited to go on this or any other trip?

A. Ms. Bandy talked about it, and I was, especially when Ms. Waddell was going to have to have surgery, but this was talked about before the individual had come and approached Ms. Bandy again before, like I said, I was reluctant about it and after the individual had come and talked to Ms. Bandy at the shop about hauling another load, he))

Counsel: I object to the extraneous matters, Your Honor. It is outside the presence of my client and it is highly prejudicial.

The Court: Sustained. Let's move.

Counsel: I ask the court to instruct the jury to disregard it.

The Court: The jury will disregard it.

Counsel: I move for a mistrial. I have to.

The Court: Denied. The only thing you have to do is die and pay taxes.

Defense counsel did not lodge an objection under rule 404(b), and therefore, the admission of the evidence must be reviewed for plain error. The district court directed the jury to disregard the majority of the statements that Waddell contends are objectionable. Testimony was admitted, without objection, that the sole purpose of the sisters' trips was to haul marihuana. It is ordinarily presumed that "a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant." Greer v. Miller, 483 U.S. 756, 767 n.8 (1987) (internal quotations and citations omitted).

Even if there was reason to believe that the jury failed to obey the curative instructions, and despite the fact that some evidence of extrinsic offenses was admitted, the evidence that Waddell previously was involved in drug trafficking would have been admissible under the Beechum analysis. Waddell testified that she was not aware that there was marihuana in the vehicle. The evidence was relevant to prove intent or lack of mistake on Waddell's part, and its probative value on the intent issue was outweighed by any prejudice arising because the crime charged and the extrinsic offenses were similar. See United States v. Marrero, 904 F.2d 251, 259 (5th Cir.), cert. denied, 498 U.S. 1000 (1990) (district court did not commit plain error in admitting evidence of

extrinsic offenses similar to the offense charged where criminal intent was the primary issue at trial).

Further, the error, if any, did not result in manifest injustice, as counsel did not object and does not challenge on appeal the admission of Willard's additional testimony that the sisters had engaged in drug trafficking for eight years prior to this incident and had sprayed perfume previously to disguise the marihuana odor when stopped by law enforcement officials. The district court did not abuse its discretion in denying the motions for mistrial.

AFFIRMED.