IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1397

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO DEAN HARRIS and
TERRY CRAIN, a/k/a Maurice M.D. Clayton,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
(1:92-CR-038-3)

(June 1, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Co-defendants Antonio Dean Harris and Terry Crain each appeals his judgment of conviction and sentence rendered by the district court. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On August 14, 1992, narcotics officers from the police department in Abilene, Texas, obtained a search warrant from a state district court judge for the residence of Terry Crain. At approximately 6:30 a.m. that same day, Officer D.D. Gray parked near the residence and observed two vehicles, a Mercedes and a Riviera, parked in the driveway. Crain and Antonio Dean Harris were looking into the open trunk of the Riviera. Crain then got into the Riviera while Harris got into the Mercedes, and they moved the vehicles to different locations in the driveway.

At approximately 9:30 a.m., officers executed the search warrant. When they entered Crain's residence, they observed Harris asleep on the living room sofa and Crain asleep in the bedroom. They instructed Crain and Harris to be seated in the living room while the officers conducted their search.

The officers discovered $2,300 in cash, in small denominations and folded in bundles of $100 increments, in Crain's bedroom closet. A narcotics dog alerted to the presence of a controlled substance on the money. The officers also discovered two pagers in the house, one on the bedroom floor and one in the living room.

The officers then asked Crain for the keys to the Riviera. He told officers that he did not have them because the car belonged to his uncle. The officers contacted his uncle, who informed them that Crain was in possession of the keys. Crain then told the officers that a woman named Jackie had the keys.

When the officers contacted Jackie, she also informed them that Crain was in possession of the keys. The officers then searched the living room and discovered the keys on the floor beneath the sofa, "in close proximity" to where Crain had been sitting. In searching the trunk of the Riviera, the officers discovered a black shaving kit containing three bags of crack cocaine and a set of electronic scales.

On August 18, 1992, a grand jury returned an indictment against Crain and Harris, charging them with conspiracy to possess with the intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii), and possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii).

At trial, Crain attempted to introduce a Drug Enforcement Agency (DEA) document entitled "Report on Trace Analysis of U.S. Currency," which was prepared by a forensic chemist and which concluded that the general United States currency in circulation is contaminated with traces of cocaine. The district court refused to admit the report into evidence.

Crain called his brother, Charles, as a witness. Charles testified that Harris had told him that the cocaine inside the black shaving kit belonged to him. Harris then moved for a severance because Charles was "point[ing] the finger at him." The district court denied Harris' motion for severance.

The jury found Harris and Crain guilty on both counts. Harris was sentenced to a term of 151 months imprisonment on each

count, to be served concurrently, and a five-year term of supervised release; he was also ordered to pay a special assessment of $100. Crain was sentenced to a term of 188 months imprisonment on each count, to be served concurrently, and a five-year term of supervised release; he was also ordered to pay a special assessment of $100. Harris and Crain now appeal.

II.

Harris contends that the district court erred by denying his motion for severance. We disagree.

This court reviews the district court's denial of a motion for severance for an abuse of discretion. United States v. Dillman, 15 F.3d 384, 393 (5th Cir. 1994). To demonstrate an abuse of discretion, the defendant must bear the heavy burden of showing that he suffered specific and compelling prejudice against which the district court was unable to afford protection and that this prejudice resulted in an unfair trial. Id. at 393-94.

Harris argues that he suffered compelling prejudice because he and Crain presented mutually antagonistic defenses at trial. Assuming arguendo that such was the case, severance was not warranted. In Zafiro v. United States, 113 S. Ct. 933, 937-38 (1993), the Supreme Court expressly declined to adopt a bright-line rule requiring severance whenever co-defendants present conflicting defenses, even when prejudice is shown. Instead, the Court held that a district court should grant a severance "only

if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. at 938.

Moreover, a limiting instruction that the jury consider the evidence as to each co-defendant separately is generally sufficient to cure any prejudice caused by co-defendants accusing each other of the crime. United States v. Stouffer, 986 F.2d 916, 924 (5th Cir.), cert. denied, 114 S. Ct. 115 (1993); see Zafiro, 113 S. Ct. at 938. The district court in this case instructed the jury that "[t]he case of each defendant and the evidence pertaining to that defendant should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant."

Harris has thus not shouldered his burden of demonstrating specific and compelling prejudice that resulted in an unfair trial. The district court did not abuse its discretion in denying Harris' motion for severance.

III.

Crain first argues that the evidence was insufficient to support his conviction and thus the district court erred in denying his motion for judgment of acquittal. We disagree.

This court reviews the district court's denial of a motion for judgment of acquittal de novo. United States v. Restrepo,

994 F.2d 173, 182 (5th Cir. 1993). On a sufficiency of the evidence challenge, we consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 111 S. Ct. 2064 (1991). The test is not whether the evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. Id. The jury is the final arbiter of the weight of the evidence and the credibility of the witnesses. Restrepo, 994 F.2d at 182.

To establish an offense under 21 U.S.C. § 841(a)(1), the government must prove that the defendant had knowing possession of the illicit substance with intent to distribute. United States v. Cardenas, 9 F.3d 1139, 1158 (5th Cir. 1993), petition for cert. filed (April 28, 1994); United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992). The elements of the offense may be proven by circumstantial evidence alone. Cardenas, 9 F.3d at 1158. Possession may be actual or constructive and may be joint among several defendants. Id. This court has defined "constructive possession" as "'the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance.'" Id. (quoting United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir. 1989)).

To prove the drug conspiracy charge against Crain, the government must prove beyond a reasonable doubt (1) that a conspiracy existed, i.e., that two or more persons agreed to violate the narcotics laws; (2) that Crain knew of the conspiracy; and (3) that Crain voluntarily participated in the conspiracy. Cardenas, 9 F.3d at 1157; United States v. Sanchez-Sotelo, 8 F.3d 202, 208 (5th Cir. 1993), cert. denied, 114 S. Ct. 1410 (1994). Direct evidence is not required; each element may be inferred from circumstantial evidence. Cardenas, 9 F.3d at 1157; Sanchez-Sotelo, 8 F.3d at 208.

Viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the verdict, the evidence is sufficient to support Crain's conviction. Crain and Harris were observed looking into the open trunk of the Riviera, where the cocaine was subsequently discovered, only a few hours before the search warrant was executed. Crain was also observed moving the Riviera to a different location in his driveway, thus exercising dominion and control over the vehicle. The keys to the Riviera were discovered "in close proximity" to where Crain had been sitting after Crain had told the officers first that those keys were with his uncle and then that they were with a woman named Jackie. A pager and a large quantity of cash were found in the bedroom where Crain was sleeping, and another pager was discovered in his living room. The district court therefore did not err in determining that the evidence was sufficient to support the

jury's verdict and denying Crain's motion for judgment of acquittal.

IV.

Crain also argues that the district court erred by excluding from evidence a report which questioned the reliability of the identification of cocaine on United States currency. He contends that this exclusion deprived him of the opportunity to contradict the testimony of a government witness on an issue that was material to the government's prosecution. His contention is unavailing.

We review the district court's exclusion of evidence for abuse of discretion. United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993); United States v. Jardina, 747 F.2d 945, 950 (5th Cir. 1984), cert. denied, 470 U.S. 1058 (1985). Even if an abuse of discretion is found, the error is reviewed under the harmless-error doctrine. United States v. Liu, 960 F.2d 449, 452 (5th Cir.), cert. denied, 113 S. Ct. 418 (1992). An erroneous evidentiary ruling, properly objected to, is considered harmless unless the ruling affects a substantial right of the party so objecting. See FED. R. EVID. 103(a).

Assuming arguendo that the report should have been admitted, the failure to do so was harmless error. Crain concedes that he was able to elicit testimony from two government witnesses concerning the possibility of contamination of United States currency. Both Officer Gray and J.R. Burch, a chemist with the

Texas Department of Public Safety, testified that it was probable that a certain percentage of United States currency in circulation is contaminated with traces of cocaine. In light of the fact that Crain was able to elicit this testimony and the other evidence of Crain's guilt, we cannot say that the district court's exclusion of the report affected one of Crain's substantial rights. Hence, any error the district court may have made in refusing to admit the report was harmless error.

V.

Finally, Crain argues that the district court erred in refusing to grant him a four-level downward adjustment pursuant to § 3B1.2 of the United States Sentencing Guidelines (the Guidelines) based upon his alleged minimal participation in the conspiracy for which he was convicted. We disagree.

Section 3B1.2 provides for a four-level reduction if the defendant was a minimal participant in the crime. See U.S.S.G. § 3B1.2(a). A "minimal participant" is one who is "plainly among the least culpable of those involved in the conduct of a group." Id. at comment. (n.1).

We review the district court's finding of whether Crain was a "minimal participant" for clear error. See United States v. Martinez-Moncivais, 14 F.3d 1030, 1039 (5th Cir. 1994); Gadison, 8 F.3d at 197-98. Ignorance of the scope and structure of the criminal operation and of the activities of others can be an indicium of minimal participation, as can be the performance of a

single, isolated act of little significance. U.S.S.G. § 3B1.2 at comment. (nn.1-2). However, according to the Guidelines, a downward adjustment for minimal participation should be used "infrequently." Id. at comment. (n.2).

"A party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment." United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). "The appropriate analysis for the district court is whether the [defendant] has proved by a preponderance of the relevant and sufficiently reliable evidence the facts necessary to support the adjustment." Id.

The district court adopted the finding in Crain's pre-sentence investigation report (PSI) that minimal participant status was not appropriate. A PSI generally bears sufficient indicia of reliability to be considered by the trial court as evidence in making a factual determination required by the sentencing guidelines. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). Further, the evidence presented at trial does not reflect Crain's "minimal participation" in the conspiracy. See supra Part III.

The record thus belies Crain's assertion that he was a minimal participant in the conspiracy. Consequently, we will not disturb the district court's finding that Crain was not a minimal participant.

VI.

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence as to each Harris and Crain.