UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1766
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO OMAR CAVAZOS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-18-A)

(May 2, 1994)

Before POLITZ, Chief Judge, GARWOOD and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:[*]

Eduardo Omar Cavazos appeals his conviction by a jury of conspiracy to possess marihuana with intent to distribute and possession of marihuana with intent to distribute in violation of 21 U.S.C. §§ 841(a) and 846. He also appeals his sentence. Finding no reversible 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Cavazos was apprehended at DFW Airport en route to Albany, New York from McAllen, Texas. His traveling companion, Eduardo Martinez, had luggage containing 22.72 kilograms of marihuana. Keys fitting that luggage were in Cavazos's wallet. Cavazos disclaimed knowledge of the marihuana. Martinez, however, testified that Cavazos had hired him to transport it to Albany. The jury returned guilty verdicts. After sentencing, Cavazos timely appealed.

Cavazos contends that the prosecutor repeatedly referred to his failure to testify in violation of his fifth amendment right against incrimination. He is mistaken. The cited comments refer not to Cavazos's silence but to the lack of evidence in support of his "mere presence" defense. "It is not error to comment on the defendant's failure to produce evidence on a phase of the defense upon which he seeks to rely."[1]

Cavazos also contests the admission of Martinez's testimony about a prior delivery of marihuana to Albany a few weeks before the arrests. According to Martinez, he was recruited by Cavazos and accompanied by Cavazos's brother. Cavazos himself made the second trip because, as Martinez explained, "it was his turn." Whether deemed proof of the conspiracy itself[2] or proof of

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[1] **United States v. Dula**, 989 F.2d 772, 777 (5th Cir.), cert. denied, 114 S.Ct. 172 (1993).

[2] See **id.** ("Evidence of an uncharged offense arising out of the same transaction or series of transactions as the charged offense is not an 'extrinsic' offense within the meaning of Rule 404(b) [of the Federal Rules of Evidence]"); see also **United States v. Stouffer**, 986 F.2d 916 (5th Cir.), cert. denied, 114 S.Ct. 115 and 114 S.Ct. 314 (1993).

Cavazos's intent in accompanying Martinez on the second, ill-fated delivery,[3] that evidence obviously was admissible.

Next Cavazos complains that the trial judge favored the prosecution. This contention is without foundation; the judge conducted the trial in an evenhanded manner. Cavazos also asserts ineffective assistance of trial counsel. That contention is baseless with regard to counsel's failure to object to the prosecutor's "absence of evidence" argument; as noted, the argument was proper. Similarly, trial counsel did not err in failing to object to the court's jury instruction on extrinsic acts. Tracking our pattern charge, the court began by saying "You have heard evidence of the acts of the defendant which may be similar to those charged in the indictment, which were committed on other occasions."[4] Cavazos contends there is no record basis for that assertion. He errs. Also without merit is Cavazos's complaint about trial counsel's acceptance of the overruling of his objection to the admission of evidence of the first marihuana delivery; as discussed above, that ruling was correct. We decline to decide the remaining challenges to trial counsel's performance for lack of an adequate record, without prejudice to Cavazos's right to raise

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[3]See **United States v. Hooker**, 997 F.2d 67, 76 (5th Cir. 1993) ("Evidence showing involvement in prior drug related activity is admissible under Rule 404(b) as evidence of knowing participation in a conspiracy.").

[4]Fifth Circuit Pattern Jury Instructions (Criminal), No. 1.30 at 43 (1990).

those matters in collateral proceedings.[5]

Finally, Cavazos contests the two-level enhancement of his sentence under U.S.S.G. § 3B1.1(c) for his organizing role in the enterprise. Reviewing for clear error,[6] we find more than ample record support for the trial court's determination of that fact.

AFFIRMED.

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[5]See **United States v. Higdon**, 832 F.2d 312 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

[6]**United States v. Watson**, 988 F.2d 544 (5th Cir. 1993), cert. denied, 114 S.Ct. 698 (1994).