IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1769

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH EVANS,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-45-A)

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(July 21, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*] Kenneth Evans was convicted of one count of conspiracy to distribute and possess with intent to distribute cocaine and more than fifty grams of cocaine base, in violation of 21 U.S.C. § 846, two counts of possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1), and one count of using or carrying a firearm during and in relation to a drug trafficking crime, in violation

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

of 18 U.S.C. § 924(c). Evans appeals his conviction and sentence. Finding no error, we affirm.

I.

Kenneth Evans was named, along with twenty-three other co-defendants, in a multi-count indictment returned by the grand jury for the Fort Worth Division of the United States District Court for the Northern District of Texas on August 26, 1992. The case against Evans was severed, and he was tried separately on June 1 and 2, 1993. At the trial, the government offered evidence that Evans participated in sales of crack cocaine in 1991 and 1992.

Randolph Brown testified that on May 28, 1992, while acting as a Federal Bureau of Investigation informant, he went to the Pesky Rabbit Car Care ("the Pesky Rabbit") in Fort Worth, Texas, to purchase crack cocaine. According to Brown, the Pesky Rabbit was a front for cocaine distribution used by a group known as the Douglas organization. At the Pesky Rabbit, Brown reached an agreement with Arthur Douglas to buy crack cocaine. At that point, Douglas phoned Evans, who came to the Pesky Rabbit. They discussed the deal, and then Brown and Evans met later to complete the transaction.

Edward Salame testified that on February 7, 1991, when he was working as an undercover narcotics officer for the Fort Worth Police Department, he purchased two ounces of crack cocaine from Frederick Turner, Altonio Douglas, and Kenneth Evans at Turner's

house. Salame talked to Turner, who sent Douglas and Evans to bring the cocaine back to his house. Salame testified that both Douglas and Evans had semi-automatic handguns.

Don Phillips, who was indicted and convicted for possession with intent to distribute more than five grams of cocaine base, testified that in January and February of 1992, he sold crack cocaine at Fay's Pilot Grill, in Fort Worth, Texas. He testified that he was working for Evans, who was working for Altonio Douglas. Evans brought the cocaine to the sellers every day and collected the money they made from the sales.

Several other witnesses also testified for the government as to Evans' involvement in the Douglas organization. When the government rested unexpectedly at the end of the first day's testimony, the court instructed Evans' counsel to call any witnesses he wanted to present, but he had already dismissed the witnesses until the next day. When the court denied Evans' requested continuance, the government and Evans stipulated to Evans' wife's testimony. After Evans' counsel stated the stipulated evidence, both sides rested.

On June 2, 1993, the jury returned its verdict, finding Evans guilty as charged in each count against him in the indictment. After Evans' conviction, the court ordered that a presentence investigation be done by the probation officer. Evans filed certain objections to the findings in the report.

On August 20, 1993, a hearing was held on Evans' objections. After overruling all of Evans' objections, the district court

sentenced Evans to life imprisonment for the conspiracy charge, concurrent forty-year sentences for the two charges of possession with intent to distribute and distribution of cocaine base, and a consecutive sixty-month sentence for using and carrying a firearm in relation to a drug trafficking crime. The court ordered Evans to serve a five-year term of supervised release if he is ever released from incarceration but did not assess a fine. Evans filed a timely notice of appeal.

II.

Evans contends that the district court erred by determining, pursuant to section 3B1.1(b) of the Sentencing Guidelines, that he was a manager or supervisor of a criminal activity that involved five or more participants and that was otherwise extensive. According to Evans, he had no contact with the majority of the co-conspirators named in the indictment and acted as a mere drug courier.

Before sentencing, Evans objected to the statement in the presentence report (PSR) that the offense level be raised three points based on his role as a supervisor or manager. During the sentencing hearing, however, the district court overruled Evans' objection.

A defendant's offense level may be increased by three levels if he "was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. s 3B1.1(b).

For purposes of section 3B1.1, the sentencing court must examine the "contours of the underlying scheme." United States v. Mir, 919 F.2d 940, 945 (5th Cir. 1990). Accordingly, an increase for a managerial role does not depend on the specific role of the defendant in the offense for which he was convicted, but the increase is based on the defendant's role in conduct encompassed within the scope of the offense and any relevant conduct. United States v. Eastland, 989 F.2d 760, 769, n. 18 (5th Cir.), cert. denied, 114 S. Ct. 246, and cert. denied, 114 S. Ct. 443 (1993). Factors the sentencing court should consider include

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. s 3B1.1(b) comment. (n.4). Additionally, the defendant's role in a criminal activity for the purposes of section 3B1.1 may be deduced inferentially from available facts. United States v. Manthei, 913 F.2d 1130, 1135 (5th Cir. 1990).

This court will disturb a district court's determination regarding a defendant's role in a criminal activity only if it is clearly erroneous. United States v. Barretto, 871 F.2d 511, 512 (5th Cir. 1989). A finding is not clearly erroneous if it is plausible in light of the record read as a whole. United States v. Whitlow, 979 F.2d 1008, 1011 (5th Cir. 1992). In resolving disputed factual matters at sentencing, the district court may consider any relevant evidence with sufficient indicia of

reliability. Manthei, 913 F.2d at 1138. A PSR generally has that type of reliability. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990).

The PSR reflects that Evans brought crack cocaine to various locations every morning and gave the drugs to his distributors to sell. He also collected drug proceeds from the distributors and procured additional cocaine when supplies were low. Phillips testified that he received $1,000 per week to sell crack cocaine for Evans and Altonio Douglas. Turner and Cedric Anderson, a co-defendant who was dismissed from the federal conspiracy suit because of juvenile status but was testifying as part of a plea agreement in a state case, also testified that they received crack cocaine from Evans to sell. Certain confiscated drug notes submitted as exhibits at trial revealed that a man named "Ken," confirmed by Anderson's testimony as being Kenneth Evans, paid approximately $335,165 to Eddie Franklin Douglas for drugs.

Evans argues that he merely distributed drugs and did not have a managerial role. He argues that there is no evidence that he recruited on behalf of the criminal enterprise, exercised power to hire or fire organization members, or enjoyed a greater share of the organizations's proceeds. The PSR, however, reflects that Evans made decisions regarding how much crack cocaine to bring to his distributors, that the distributors worked under him, and that he played a significant role in the financial aspects of the conspiracy. Although Evans' role in the conspiracy involved the transportation of drugs, the evidence

indicates that Evans was much more than a mere courier. Thus, the district court's finding that Evans acted in such a capacity is not clearly erroneous.

III.

Evans argues that the district court erred in not finding him to be a minimal participant in the conspiracy. Evans raised this objection before the district court, but the district court overruled it at the sentencing hearing. We review a district court's decision to deny minimal-participant status for clear error. United States v. Franco-Torres, 869 F.2d 797, 801 (5th Cir. 1989).

Under section 3B1.2(a) of the sentencing guidelines, a sentencing court may decrease the offense level by four levels if the defendant was a minimal participant in the criminal activity. That section is intended "to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, comment. (n.1). In determining whether such a reduction is warranted, the sentencing court may consider the defendant's lack of knowledge or understanding of the scope and structure of the criminal enterprise or of the activities of the other participants. Id. According to the sentencing guidelines, this downward adjustment should be used "infrequently." U.S.S.G. § 3B1.2, comment. (n.2). "It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a

single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." Id.

The contention that Evans' role was "minimal" is untenable. Because the evidence before the district court does not clearly show "minimal participation" by Evans, as that term is explained in section 3B1.2 and its application notes, the district court's failure to find that Evans was a minimal participant does not amount to clear error.

IV.

Evans argues that the district court clearly erred in not limiting his liability to the amount of crack cocaine he personally distributed. The court determined that he knew or reasonably should have known that the conspiracy distributed fifteen kilograms or more of cocaine during the period in which the conspiracy operated. Based on this determination, the court found that his base offense level was 42.

According to Evans, he did not have contact with eighteen of the twenty-four defendants, and his contact with the remaining defendants was extremely brief. He further contends that the total amount of distributed cocaine base of which he had knowledge or that he reasonably could have foreseen was eighty-one grams, so that his offense level should have been 32 instead of 42. Evans objected to the PSR recommendation of level 42, but

his objection was overruled by the district court at the sentencing hearing.

As long as the total amount of drugs to be distributed by a conspiracy is reasonably foreseeable by an individual conspirator, that conspirator is to be sentenced on the basis of the total amount of drugs distributed by the conspiracy--not just the amount distributed by the individual conspirator. United States v. Patterson, 962 F.2d 409, 414 (5th Cir. 1992). The sentencing court, moreover, is not limited to actual amounts seized or specified in the indictment. United States v. Giraldo-Lara, 919 F.2d 19, 21 (5th Cir. 1990). The district court's determination of the weight of drugs that a defendant is responsible for under the guidelines is a factual determination that we review for clear error. United States v. Smith, 13 F.3d 860, 864-65 (5th Cir. 1994), cert. denied, ___ S. Ct. ___, 1994 WL 194309 (U.S. May 31, 1994)(No. 93-8896).

The PSR reflects that the Douglases organized and controlled a multi-kilogram crack cocaine distribution ring on the south side of Fort Worth, Texas. Trial testimony and information obtained from cooperating witnesses revealed that the organization distributed between five and fifteen kilograms of crack cocaine per week out of various crack houses and businesses owned, operated, or controlled by the Douglases. Evans brought cocaine to two of the organization's locations every morning for distribution, and he collected the proceeds and obtained more drugs when necessary.

Although Evans might not have had specific knowledge of the exact quantity of cocaine being distributed and sold by this vast network, the evidence shows that Evans reasonably should have known that he and his co-conspirators had distributed at least fifteen kilograms of cocaine during the conspiracy's existence. Further, seized notes from the house of one of the Douglas brothers who controlled the drug ring listed Evans' first name and pager number. These notes also showed that Evans and seven other individuals had paid the Douglases a total of $434,000 from drug proceeds. This amount is the equivalent of more than fifteen kilograms of crack cocaine.

Based on the facts available to the sentencing court, it was not clearly erroneous for the court to find that Evans knew or reasonably should have foreseen that the conspiracy involved at least fifteen kilograms of crack cocaine in an eighteen-month period. Street dealers testified at trial to selling anywhere between 210 grams to 2.5 kilograms per week individually. As a manager or supervisor, it is likely that Evans knew about or that he certainly should have foreseen the large quantities of cocaine being distributed. His argument, therefore, lacks merit.

V.

Evans argues that his conviction for using and carrying a firearm in relation to a drug-trafficking crime is not supported by sufficient evidence. According to Evans, the evidence merely

shows that on one occasion, when he was not involved in a drug trafficking offense, he jokingly waved a firearm.

To evaluate the sufficiency of the evidence, we examine the evidence in the light most favorable to the prosecution, making all reasonable inferences and credibility choices in favor of the verdict. United States v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, 112 S. Ct. 2288 (1992). The evidence is sufficient if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. Id.

In general, the jury is solely responsible for determining the weight and credibility of the evidence. See United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993). This court, therefore, will not substitute its own determination of credibility for that of the jury. See Martinez, 975 F.2d at 161. Additionally, the scope of appellate review remains the same regardless if the evidence is direct or circumstantial. United States v. Lorence, 706 F.2d 512, 518 (5th Cir. 1983).

To prove a violation of 18 U.S.C. s 924(c), the government must show beyond a reasonable doubt that the defendant used or carried a firearm in connection with a drug trafficking crime. United States v. Ivy, 973 F.2d 1184, 1189 (5th Cir. 1992), cert. denied, 113 S. Ct. 1826 (1993). This court has broadly interpreted that section. In Ivy, for example, this court ruled that this statute merely requires "'evidence that the firearm was

available to provide protection to the defendant in connection with his engagement in drug trafficking.'" Id.

The evidence shows that on February 7, 1991, Salame, an undercover drug agent, went to Frederick Turner's house to buy two ounces of crack cocaine. Turner instructed Evans and Altonio Douglas, who were in the driveway of the house, to procure two ounces of cocaine for him. Evans and Douglas agreed to do so and walked to their car. As they were driving away, Salame noted that they were holding semi-automatic handguns and pointing them at various objects in a joking manner. A few minutes later, Evans and Douglas returned with the cocaine.

Viewed in the light most favorable to the prosecution, making all reasonable inferences and credibility choices in favor of the verdict, the evidence supports the conviction for using and carrying a firearm in relation to a drug trafficking crime. Although Evans might have waved the firearm in a joking manner, the jury reasonably could have inferred that Evans knowingly used the gun to provide protection in connection with the underlying drug offense. See Ivy, 973 F.2d at 1189. Evans' argument, therefore, lacks merit.

VI.

Evans contends that the district court abused its discretion and violated his constitutional rights by not letting him present any evidence in his own behalf. The record shows that after the government rested at 5:20 p.m. on June 1, 1993, defense counsel

notified the court that the defense was not resting and that he had two witnesses he wanted to present, but that he had already excused them until the next day. After defense counsel advised the court that it would take forty-five minutes to secure Evans' wife, the only witness who had already been sworn, the court asked defense counsel about her testimony. Defense counsel explained that she would testify that she had never seen contraband, large sums of money, or anything else that would be associated with a large-scale drug dealer in their house. The government stated that it would stipulate to this evidence. When defense counsel's request for a recess was denied, he stated into the record and to the jury the testimony Evans' wife would have presented. Defense counsel did not attempt to summarize the alleged testimony of the second witness, a family friend.

On appeal, Evans argues that the court erred by denying his request for a recess, an act which allegedly precluded him from presenting evidence from his wife and the family friend. Evans contends that both witnesses would have testified that in their daily contact with Evans, they never saw him in possession of drugs, drug paraphernalia, large sums of currency, weapons, or anything else associated with the drug trade. They also would have testified that he had no contact with approximately eighteen of the other defendants named in the indictment.

The denial of a motion for continuance will be reversed only if the appellant demonstrates an abuse of discretion resulting in serious prejudice. United States v. Correa-Ventura, 6 F.3d 1070,

1074 (5th Cir. 1993). In light of the evidence of Evans' guilt and the fact that much of the testimony he wanted to present was stipulated into the record, any possible error caused by the district court in refusing to grant the recess did not result in serious prejudice. Evans' argument, therefore, lacks merit.

VII.

Evans argues that during closing arguments, the prosecutor made certain improper comments that amount to reversible error. Specifically, he argues that the prosecutor (1) mischaracterized the evidence by stating that the name "Kenneth Evans" appeared on a number of seized dope notes that showed "Ken" only; and (2) bolstered the testimony of Cedric Anderson, who testified that the "Ken" mentioned in the dope notes was Evans, by suggesting to the jury that Anderson should be believed because he was eighteen years old, had a bad life, and had cut himself off from his family. According to Evans, the comments "significantly" contributed to his conviction for conspiracy because the testimony of Anderson, whose credibility was "extremely" suspect, was vital to connect Evans to the conspiracy.

This court can reverse a conviction based on prosecutorial misconduct if the prosecutor's remarks were both inappropriate and harmful. United States v. O'Banion, 943 F.2d 1422, 1431 (5th Cir. 1991). In doing so, we must determine whether the remarks affected substantial rights of the defendant. Id. In other words, we must decide "'whether the misconduct casts serious

doubt upon the correctness of the jury's verdict.'" United States v. Kelley, 981 F.2d 1464, 1473 (5th Cir.) (citation omitted), cert. denied, 113 S. Ct. 2427 (1993). In making that determination, we consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of the appellant's guilt. United States v. Sanchez-Sotelo, 8 F. 3d 202, 211 (5th Cir. 1993), cert. denied, 114 S. Ct. 1410 (1994).

Attorneys are "'accorded wide latitude during closing argument, and this court gives deference to a district court's determination regarding whether those arguments are prejudicial and/or inflammatory.'" Willis, 6 F.3d at 263 (citation omitted). Accordingly, this court will not lightly overturn a criminal conviction solely on the basis of a prosecutor's arguments. O'Banion, 943 F.2d at 1431.

In this case, the prosecutor largely summarized Cedric Anderson's testimony. Anderson testified that he was eighteen years old, was currently incarcerated, did not graduate from high school, and had supported himself by selling drugs. Anderson further testified that the "Ken" mentioned in the dope notes was Evans. The district court, moreover, explained to the jury that what the lawyers stated was not evidence and that the jury should be guided only by what was presented as evidence. The comments were not inappropriate, and even if they could be so considered, they did not affect Evans' substantial rights.

## III.

For the foregoing reasons, we AFFIRM the judgment of the district court.