IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2205
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LAMBERT R. LUCIOUS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H-92-141-1)

(April 4, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Lambert Lucious appeals his conviction of conspiring to import and possess more than one kilogram of heroin with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(i), 952, 960, and 963. Finding no reversible error, we affirm.

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

DEA agent Paul J. Roach testified that he purchased eight grams of heroin for $3,000 from a man named Brent Gillory in Houston in late September or early October 1991. Gillory introduced Roach to Anthony Omagbemi and Vincent Aitaegbebhunu ("Vincent"). Roach then purchased 32 grams of heroin for $9,000 from Vincent and Omagbemi in October 1991.

Roach testified that the heroin was packaged in some kind of rubber or latex, which he recognized as similar to the packaging used by couriers who had been swallowing heroin to smuggle it into the United States. Roach testified that Houston had been "deluged" with heroin arriving in this manner.

Roach subsequently purchased 100 grams from Omagbemi and Vincent in December 1991. Roach later met with a number of other Nigerians and negotiated for a large multi-kilogram deal. During the course of these negotiations, Lucious was not mentioned as a source. This deal never materialized, however, and in January 1992, the DEA made nine arrests.

Roach testified that Anthony Omagbemi and Charles Igbokwe, two of those arrested, informed the DEA that Lucious was their boss. Each of the men gave detailed statements concerning Lucious's smuggling operation, which the DEA verified through telephone records, Customs records, and interviews with witnesses. The telephone records revealed that Lucious made numerous telephone calls to a Houston beauty shop operated by Vincent and Omagbemi and to Omagbemi's home.

Vincent testified that in October 1991, Omagbemi told him about going to Nigeria and carrying drugs back for Lucious. Vincent stated that in October 1991, Omagbemi told him he got some drugs for Lucious. Vincent indicated that he helped Omagbemi find a buyer for the drugs. The buyer turned out to be Roach.

Vincent also testified that Lucious called the beauty shop once and tried to convince him to travel to Nigeria to smuggle heroin back to the United States. Vincent testified that he participated in the 100-gram sale to Roach and that his source for the heroin was Victor Bala. Vincent further stated that he engaged in negotiations with Roach for a multi-kilogram heroin deal, but he could not find anyone to supply the dope.

Vincent was arrested shortly after this deal fell through. He testified that Lucious was not involved in the negotiations for the unsuccessful multi-kilogram deal. Vincent stated that he had never seen Lucious until the day of trial.

On the second day of trial, the government shifted the focus of its case from Houston to Lucious's smuggling operation between New York City and Lagos, Nigeria. Omagbemi and Edwin Williams testified that they smuggled heroin from Nigeria to the United States for Lucious. Both men were recruited by Lucious in Houston. Omagbemi and Williams testified that in Nigeria, Lucious had the heroin placed inside balloons, and they swallowed the balloons after eating a greasy okra soup, which made it easier to get the balloons down.

Omagbemi testified that he made several trips to Nigeria for

Lucious, starting in September 1990, and continuing until December 1991. Lucious paid for all the expenses on these trips and paid Omagbemi several thousand dollars for each trip. Omagbemi testified that in September 1991, in Houston, Lucious gave him four or five balloons filled with heroin in payment for past trips. Omagbemi stated Brent Gillory sold the contents of one of these balloons to Roach for $3,000. According to Omagbemi, he and Vincent sold the remaining balloons to Roach for $9,000.

Williams and Omagbemi were arrested on drug smuggling charges at the JFK airport in New York on December 21, 1991, upon their return from Nigeria. They both pleaded guilty to importing heroin into the United States and agreed to testify against Lucious.

At the close of the government's case, Lucious moved for judgment of acquittal, arguing that the government had failed to prove he was involved with more than one kilogram of heroin as charged in the indictment. The government responded that quantity is not an element of the offense and explained that it had not accused Lucious of involvement in the negotiations between Roach and Vincent. Rather, the government asserted that it had introduced this evidence as background information to explain to the jury how the DEA learned about Lucious.

The court expressed its dismay at the manner in which the government presented its case, stating, "If that's true, all this testimony should never have been admitted, all the other stuff about what these other people did shouldn't be admitted, it had nothing to do with Vincent, Vincent is not a part of this conspir-

acy." The court noted that "evidence was admitted of a [Rule] 404(b) or total extraneous circumstances that had nothing to do with this particular case . . . . [W]e had a half-day of testimony about Paul Roach and Vincent, about their dealings with each other about another conspiracy that didn't even involve these people." The court took the motion under advisement and allowed the case to proceed.

At the conclusion of the case, Lucious moved for a mistrial based upon the admission of the extrinsic act and hearsay testimony of Roach and Vincent. The court denied the motion, stating that it would instruct the jury to disregard the testimony. The court then instructed the jury to disregard entirely the testimony of Roach and Vincent, explaining that the testimony was not relevant to the determination whether Lucious committed the offense charged in the indictment. The jury convicted Lucious on both counts.

II.

Lucious first argues that the district court erred by denying his motion for a mistrial based upon the admission of the testimony of Roach and Vincent concerning extrinsic offenses presented in violation of FED. R. EVID. 404(b) and United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). He maintains that instructing the jury not to consider this testimony was insufficient to cure the error.

"This court will reverse a district court's refusal to grant a mistrial only for an abuse of discretion." United States v.

Limones, 8 F.3d 1004, 1007 (5th Cir. 1993), petitions for cert. filed (U.S. Feb. 28, 1994) (Nos. 93-8123, 93-1360). Moreover, "where a motion for a mistrial involves the presentation of prejudicial testimony before the jury, a new trial is required only if there is a `significant possibility' that the prejudicial evidence had a `substantial impact' upon the jury verdict, viewed in light of the entire record." Id. at 1008 (quoting United States v. Escamilla, 666 F.2d 126, 128 (5th Cir. 1982)).

Whether extrinsic act evidence is admissible under rule 404(b) is governed by the two-part Beechum test. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993). "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Fed. R. Evid. 403." Id. (internal quotation marks and citations omitted). In United States v. Robinson, 700 F.2d 205, 213 (5th Cir. 1983), this court decided to require "an on-the-record articulation by the trial court of Beechum's probative value/prejudice inquiry when requested by a party."

Lucious did not lodge a rule 404(b) objection to this testimony. His failure to do so explains why the court did not follow the Beechum and Robinson mandates. Assuming the court erred in admitting the evidence, Lucious has failed to demonstrate that it had a substantial impact on the jury's verdict or that it resulted in a miscarriage of justice. See United States v. Garza,

990 F.2d 171, 176-77 (5th Cir.) (reviewing erroneous admission of extrinsic act evidence for plain error), cert. denied, 114 S. Ct. 332 (1993).

Lucious contends the testimony could have confused the jury; that implicating him in a 22-kilogram deal in Houston could have inflamed prejudice in the jury; that, as the district court recognized, Roach provided some of the clearest testimony at the trial; that the prosecutor's opening statement emphasized the extrinsic crime evidence; and that the jury may have been influenced by a "home town" effect, that is, because the jury heard so much about narcotics smuggling through New York, it may have placed undue weight on the extrinsic offense evidence, most of which took place in Houston.

In view of the testimony of Omagbemi and Williams, however, it is unlikely that the extrinsic act testimony from Roach and Vincent had a substantial impact on the jury's verdict. See United States v. Baresh, 790 F.2d 392, 402 (5th Cir. 1986). Omagbemi and Williams testified in explicit detail concerning their smuggling activities with Lucious. Their testimony was consistent regarding various aspects of the smuggling operation and was sufficient to support Lucious's conviction. Id. at 403 (noting substantial independent evidence of guilt allayed danger of prejudice resulting from erroneous admission of rule 404(b) evidence).

Moreover, the district court instructed the jury to disregard the testimony of Roach and Vincent in its entirety. See Garza, 990 F.2d at 177-78 (finding no plain error in erroneous admission

of rule 404(b) evidence in light of district court's instruction that defendant not on trial for that crime). The court explained that the testimony of Roach and Vincent was not relevant to determine whether Lucious engaged in the conspiracy alleged in the indictment. Jurors are presumed to follow their instructions. Zafiro v. United States, 113 S. Ct. 933, 939 (1993).

Finally, it is important to note that the prosecutor did not emphasize the extrinsic act evidence in his closing argument but, instead, stressed that the jury was not to consider the testimony of Roach and Vincent. Id. at 565; see Garza, 990 F.2d at 177-78; United States v. Fortenberry, 914 F.2d 671, 673-74 (5th Cir. 1990), cert. denied, 499 U.S. 930 (1991). Accordingly, the district court did not abuse its discretion in denying Lucious's motion for a mistrial, and no miscarriage of justice resulted from the admission of the evidence.

III.

Lucious next argues that the district court committed reversible error by allowing hearsay testimony from Roach and Vincent under FED. R. EVID. 802(d)(2)(E) and by failing to follow the procedures for determining the admissibility of that testimony under United States v. James, 590 F.2d 575, 582 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979). The government points out that Lucious made several hearsay objections during Roach's testimony, which the district court sustained. During Vincent's testimony, Lucious made one hearsay objection, which the district

court overruled because the prosecutor argued that the answer was permissible under rule 802(d)(2)(E). Vincent then testified that Omagbemi said he got some drugs from Lucious and that those drugs were ultimately sold to Roach.

Statements by coconspirators during the course and in furtherance of a conspiracy are not hearsay. FED. R. EVID. 801(d)(2)(E). James established a procedure for district courts to follow in determining whether to allow testimony under rule 802(d)(2)(E). James held that the "district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator." 590 F.2d at 582.

A district court may, however, allow the introduction of challenged testimony subject to the government's subsequent establishment of an adequate foundation. United States v. Rocha, 916 F.2d 219, 239 (5th Cir. 1990), cert. denied, 111 S. Ct. 2057 (1991). If the government fails to do so, the court must exclude the testimony and determine whether the prejudice arising from the erroneous admission of the testimony can be cured by a cautionary instruction or whether a mistrial is required. James, 590 F.2d at 583.

Here, after determining that Lucious was not involved in a conspiracy with Vincent, the district court instructed the jury to disregard the testimony of Roach and Vincent in its entirety and denied Lucious's motion for a mistrial. We review the denial of a mistrial motion for an abuse of discretion. Limones, 8 F.3d at

1007. A mistrial is required only when there is a significant possibility that the evidence had a substantial impact on the jury's verdict, viewed in light of the entire record. Id. at 1007-08.

As previously discussed, Omagbemi and Williams provided substantial evidence against Lucious, and their testimony was sufficient to support his conviction standing alone. Thus, in light of the entire record, it is unlikely that the erroneously admitted testimony had a substantial impact on the jury's verdict. Moreover, the district court instructed the jury to disregard the testimony, thereby curing any potential prejudice from his testimony. See United States v. Willis, 6 F.3d 257, 263 (5th Cir. 1993)

AFFIRMED.