

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2359
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BRIAN KEITH BABIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-156)

(April 29, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Appellant Babin appeals his conviction for aiding and abetting, and conspiracy to possess with intent to distribute in excess of 50 grams cocaine base. He complains first of the district court's admission of certain evidence, and then that counsel was constitutionally ineffective for not objecting to the admission of this evidence or seeking a curative instruction. We find all arguments meritless and affirm.

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A police officer called by the prosecution testified to his narcotics investigation experience, how cocaine base was manufactured and distributed, and the price that it would bring in quarter-gram dosage units on the street. We review evidentiary rulings for abuse of discretion. United States v. Brown, 7 F.3d 1155, 1163 (5th Cir. 1993).

Appellant first contends that the officer's testimony regarding the manufacture of cocaine and breaking it into rocks was neither necessary nor relevant and was unduly prejudicial and, therefore, should have been excluded under Federal Rule of Evidence 403. He also suggests that the testimony concerning the street value violated Rule 403. We disagree. The street value of the cocaine was relevant to prove intent to distribute which was a key element of the crimes with which Appellant was charged. United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), cert. denied, 113 S. Ct. 1826 (1993). Appellant does not show how the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Likewise, the officer's reference to the imminent division of the cocaine base into rocks was for the purpose of showing its potential for high profit street sales, information relevant to the element of intent to distribute. See Ivy, 973 F.2d at 1188. Appellant's argument that this testimony was unduly prejudicial because it implied that Appellant himself prepared the cocaine for distribution is simply not supported by the record. There is no inference from that testimony that Appellant himself prepared the drug for distribution.

Babin also argues that the officer's testimony was that of an expert and was admitted in violation of Rules 702, 703, and 704 because the witness was never qualified to testify as an expert. His argument misrepresents the witness's testimony. It was Appellant's objection on the basis of relevance, sustained by the district court, which prevented the witness from testifying to the number of narcotics investigations in which he had participated. Additionally, it is clear that the officer's testimony regarding his qualifications did not affect any of Appellant's substantial rights. The officer testified that he had investigated many crack cocaine cases, had seen crack cocaine in cookie and rock form, and that he was part of a joint task force involving state and federal enforcement agencies. This established his qualification to testify regarding how crack cocaine was customarily manufactured, handled and distributed because it was based upon his undercover experience. See United States v. Fuller, 974 F.2d 1474, 1482-83 (5th Cir. 1992), cert. denied, 114 S. Ct. 112 (1993). Appellant's other argument that it was error to allow the witness to testify as to the ultimate issue of intent to distribute is frivolous. United States v. Webster, 960 F.2d 1301, 1308-09 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992).

Finally, Appellant contends that trial counsel was constitutionally ineffective for not objecting to the officer's testimony nor seeking a curative instruction. Having established that the evidence was not improperly admitted, it follows that the ineffectiveness argument must fail. Appellant cannot demonstrate

that counsel's conduct was objectively unreasonable or that counsel was in error.

AFFIRMED.