IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2415

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OZIEL GONZALES MARTINEZ and
HECTOR GONZALEZ MARTINEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR H 92-279-3)

(February 11, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

A jury convicted Hector Gonzales Martinez and his brother Oziel Gonzalez Martinez on drug charges. The district court sentenced Hector to concurrent 262-month prison terms on the first three counts, concurrent five-year terms of supervised release, and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a $150 special assessment. The court also sentenced Oziel to concurrent 210-month terms on a number of counts, concurrent five-year terms of supervised release, and a $250 special assessment.

II.

Hector argues that he was deprived of a fair trial by the prosecutor's efforts to elicit a description of Hector's Mexican residence from Rogelio Garcia-Valdez, a government witness. As Hector makes this argument for the first time on appeal, we consider it under the plain error standard. See United States v. Vaquero, 997 F.2d 78, 83 (5th Cir.), cert denied, 114 S.Ct. 614 (1993). In the overall context of the trial, any prejudicial effect from the prosecutor's brief remarks about Hector's house was insignificant. Hector never asked for a curative instruction, and there was strong evidence of Hector's guilt. The prosecutor's comments cast no doubt on the correctness of the jury's verdict, and did not amount to plain error.

III.

Hector alleges that the district court erred in admitting written reports of undercover officer Zeke Cavazos' October 24, 1992 and November 10, 1992 conversations with Hector. We reverse a trial court's evidentiary ruling only for abuse of discretion. United States v. Anderson, 933 F.2d 1261, 1267-68 (5th Cir. 1991). Hector contends that the exhibits are hearsay. This argument rests on an erroneous premise. The reports were not admitted for the truth of the matter being testified to, meaning that they fall

outside the hearsay definition. The court did not abuse its discretion when it decided to admit the exhibits.

IV.

Oziel asserts that the evidence was insufficient to support the conspiracy convictions. In assessing this challenge, we consider the evidence in the light most favorable to the government, and afford the government all reasonable inferences and credibility choices. The evidence is sufficient if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt based on the evidence presented at trial. United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989); United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd, 462 U.S. 356 (1983).

To establish a drug conspiracy, the government must prove beyond a reasonable doubt (1) the existence of an agreement to import or to possess with intent to distribute, (2) knowledge of the agreement, and (3) voluntary participation in the agreement. United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 113 S.Ct. 1291 (1993). Much of the evidence supporting Oziel's conspiracy convictions consisted of the testimony of Rogelio Garcia-Valdez, who provided ample evidence of Oziel's involvement in the drug trade.

Oziel challenges the credibility of Garcia-Valdez's testimony. The uncorroborated testimony of an accomplice or co-conspirator will support a conviction, provided that his testimony is not incredible or otherwise unsubstantial on its face. United States

v. Singer, 970 F.2d 1414, 1419 (5th Cir. 1992). We will not declare testimony incredible as a matter of law unless it is so unbelievable on its face that it defies physical laws. United States v. Carrasco, 830 F.2d 41, 44 (5th Cir. 1987). None of Garcia-Valdez's testimony was unbelievable on its face.

V.

Oziel contends that Garcia-Valdez's testimony implicating him in heroin trafficking in 1991 and Cavazos's testimony concerning Hector's drug-contacts should have been excluded as extrinsic-acts evidence. See Fed. R. Evid. 404(b). He contends that the district court violated the two-step test of United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). As the record reveals that Oziel did not make this objection to either Garcia-Valdez's or Cavazos's testimony at trial, we review for plain error. Fed. R. Evid. 103(d).

Oziel's argument that Fed. R. Evid. 404(b) prohibits Garcia-Valdez's testimony is misdirected. That rule applies only to evidence of extrinsic offenses. United States v. Maceo, 947 F.2d 1191, 1198 (5th Cir. 1991), cert. denied, 112 S.Ct. 1510 (1992). The indictment charged Oziel with, among other things, conspiring to import heroin from February 1, 1990 until November 13, 1992, and with conspiring to possess heroin with intent to distribute from February 1, 1991 until November 13, 1992. Garcia-Valdez's testimony concerning Oziel's 1991 heroin-trafficking was not extrinsic and Beechum does not apply.

Oziel's argument that the court erred in admitting Cavazos's testimony is also meritless. Under Beechum, the district court must make on-the-record findings as to probative value and prejudicial effect when such balancing is requested by a party. Maceo, 947 F.2d at 1199. As no such request was made in this case, the absence of on-the-record findings was not plain error.

AFFIRMED.