UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3224

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

SYLVESTER CLAY,

Defendant-Appellant,

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 92 82 F)

(February 17, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant, Sylvester Clay, a/k/a Pee Wee, was convicted of conspiracy to distribute in excess of ten kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988); distribution of approximately 996.2 grams of cocaine, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1); and possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 924(c). Clay appeals both his conviction and sentence. We affirm.

I

On September 20, 1989, a search warrant was executed by agents of the Drug Enforcement Administration on two apartments on Audubon Street, New Orleans, Louisiana. Approximately 13.1 kilograms of cocaine were seized from the Audubon Street premises. The owner of the seized cocaine, Jaime Cifuentes, initially avoided detection during the September 20th search, but was later arrested in Miami on similar charges.

At trial, Cifuentes testified that he met the defendant, Sylvester Clay, around March 1988 when he began to supply Clay with an average of 30 to 40 kilograms of cocaine per month. Cifuentes continued to serve as a supplier for Clay until execution of the warrant. Cifuentes further testified that the authorities who searched the Audubon Street premises missed 10 kilograms of cocaine which were recovered by Cifuentes and subsequently sold to Clay the following day, September 21, 1989.

Two other conspirators, Michael Short and Pierre Parsee, testified regarding the structure of Clay's drug organization. Michael Shorts testified that he worked for Clay as a drug dealer from March 1989 until his arrest in 1991. He stated that he would contact Clay to arrange pricing for the cocaine and then contact Pierre Parsee, Clay's right-hand man, to arrange delivery of the drugs. Shorts received one kilogram of cocaine each week for his efforts.

Pierre Parsee testified that from 1988 through October or November of 1989, he bought cocaine from Clay. After that time, he became Clay's right-hand man and began accepting and delivering cocaine for his boss. Parsee contacted Clay through a personal phone number, utilizing various codes employed by Clay for screening calls. Parsee said Clay encouraged his organization members to carry guns for their protection during drug deals. Parsee further testified than on June 5, 1991, he was contacted by Johnell Jones regarding one kilogram of cocaine which was ultimately delivered by Lawson Parker per Clay's authorization. Parker was arrested on June 5, 1991, and a search of Parker's vehicle disclosed 996.2 grams of cocaine and a .44 caliber six-shot revolver. Clay was subsequently arrested on February 15, 1992.

Clay was convicted by a jury for conspiracy to distribute cocaine, distribution of cocaine, and possession of a firearm during a drug trafficking crime. Clay was sentenced to 262 months of imprisonment on each of the drug counts, and further sentenced to a 60-month term of imprisonment on the gun count, to be served consecutively to the other terms. Clay challenges his conviction and sentence, contending that: (a) the evidence is insufficient to support any of the three counts of conviction; (b) the district court erred in admitting extrinsic evidence regarding the use of weapons; and (c) the district court committed plain error in determining his base offense level.

II

A

Clay asserts that the evidence was insufficient to support his conviction for conspiracy to distribute cocaine, distribution of cocaine, and possession of a firearm during a drug trafficking crime. Clay bases his insufficiency argument on the doubtful credibility of the government's witnesses.[1]

The standard for evaluating the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the Government *and resolving all reasonable inferences and credibility choices in favor of the jury's verdict*, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983); *United States v. Montemayor,* 703 F.2d 109, 115 (5th Cir.), *cert. denied* 464 U.S. 822 (1983). It is not necessary that the evidence excludes every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except guilt. *Bell*, 678 F.2d at 549.

(1)

To establish a drug conspiracy, the Government must prove: 1) the existence of an agreement between two or more persons to

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[1] Clay has succinctly stated his argument as follows: "None of the government's witnesses was able to offer more than his word that he had engaged in narcotics dealing with [Clay]. Frankly, the unsupported testimony of convicted dope dealers, so recently converted to the paths of honor and good-citizenship, does not satisfy the basic requirement of sufficiency of the evidence."

violate federal narcotics law; 2) that the defendant knew of the agreement; and 3) that the defendant voluntarily participated in the agreement. *United States v. Gallo*, 927 F.2d 815, 820 (5th Cir. 1991). The Government is not required to present direct evidence in order to prove the existence of the drug conspiracy and the agreement between the co-conspirators and the defendant. *Id*. Circumstantial evidence, such as the co-conspirator's concerted actions, may be sufficient for a jury to infer the existence of a conspiracy. *Id*. (citing *United States v. Magee*, 821 F.2d 234, 239 (5th Cir. 1987) and *United States v. Vergara*, 687 F.2d 57, 61 (5th Cir. 1982)). "Although mere presence at the scene of the crime or close association with co-conspirators will not alone support an inference of participation in a conspiracy, presence or association is one factor that the jury may rely on, along with other evidence, in finding conspiratorial activity by a defendant." *Id*. (citing *Magee*, 821 F.2d at 239 and *United States v. Natel*, 812 F.2d 937, 940-41 (5th Cir. 1987)). No proof of an overt act is necessary. *United States v. Medina*, 887 F.2d 528, 530 (5th Cir. 1989).

Jaime Cifuentes testified that he supplied Clay with 30 to 40 kilograms of cocaine per month. Clay would pay between $18,000 and $19,000 for each kilogram. Pierre Parsee testified that he bought cocaine from Clay from 1988 through 1989. He thereafter became Clay's right-hand man, accepting and making cocaine deliveries for Clay's customers. Michael Shorts' testimony established that he worked for Clay from March 1989 to 1991. Shorts' tasks included contacting Clay for cocaine price quotes and arranging drug

deliveries through Parsee. Shorts was compensated with one kilogram of cocaine per week for his services. The record contains sufficient evidence to uphold Clay's conviction for conspiracy to distribute cocaine.

(2)

"A conviction for distributing cocaine requires proof that the defendant (1) knowingly (2) distributed (3) cocaine." *United States v. Bryant*, 991 F.2d 171, 176 (5th Cir. 1993) (citing *United States v. Gordon*, 876 F.2d 1121, 1125 (5th Cir. 1989)). "An overt act of one partner [in crime] may be the act of all without any new agreement specifically directed to that act." *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489, 1496 (1946) (citing *United States v. Kissel*, 218 U.S. 601, 608, 31 S.Ct. 124, 126, 54 L.Ed. 1168, 1178 (1910)). "A conspirator can be held liable for the substantive acts of a co-conspirator as long as the acts were reasonably foreseeable and done in furtherance of the conspiracy." *United States v. Maceo*, 947 F.2d at 1191, 1198 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1510 (1992). In this case, there is no evidence to show that Clay personally distributed cocaine, but sufficient evidence to establish that cocaine was distributed by co-conspirators and that such distribution was reasonably foreseeable as a necessary or natural consequence of such conspiracy.

Parsee testified that he arranged a delivery of approximately one kilogram of cocaine at Clay's behest on June 5, 1991. Parsee arranged for another one of Clay's employees, Lawson Parker, to

make the delivery. Charles E. Smith, a special agent with the Bureau of Alcohol, Tobacco, and Firearms, arrested Parker and searched his vehicle. The search uncovered a brown bag containing approximately one kilogram of cocaine and a loaded .44 caliber revolver. Parsee's testimony is sufficient evidence to show that Clay could have reasonably foreseen Parker's distribution of cocaine in furtherance of the drug conspiracy.

(3)

To support a conviction for the use of a firearm in relation to a drug trafficking offense, the Government must prove that the defendant (1) used or carried a firearm, (2) during or in relation to a drug trafficking crime. *United States v. Elwood*, 993 F.2d 1146, 1150-51 (5th Cir. 1993). The evidence must "show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking; a showing that the weapon was used, handled or brandished in an affirmative manner is not required." *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir. 1989). A showing that the weapon facilitated, or could have facilitated the drug trafficking offense is sufficient evidence. *United States v. Capote-Capote*, 946 F.2d 1100, 1104 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 2278 (1992). The defendant's use of a firearm in relation to a drug trafficking crime may be established by the presence of a loaded firearm in the location where a defendant has been trafficking in controlled substances. *See id*. (citing *United States v. Blankenship*, 923 F.2d 1110, 1115 (5th Cir.), *cert. denied*, 111 S.Ct. 2262 (1991). As with the

distribution count, Clay did not personally possess the gun, but is liable for the foreseeable acts of his conspirators done in furtherance of the narcotics trafficking conspiracy. *Maceo*, 947 F.2d at 1198.

In this case, a search of Lawson Parker's vehicle following his arrest on June 5, 1991 for the delivery of approximately one kilogram of cocaine disclosed a .44 caliber revolver on the floorboard behind the passenger seat of the vehicle. This fact is sufficient to establish that Parker was carrying the gun in relation to a drug trafficking offense. Further, testimony by Pierre Parsee, Clay's right-hand man, reveals that Parker usually carried a gun and that Clay "advised everyone in his organization to have a gun in their range." Parsee also stated that Clay knew that Parker and others carried weapons in the course of narcotics trafficking, and that he and Clay had discussed the use of weapons. In view of the above testimony, which highlights Clay's encouragement and knowledge of firearm possession by organization members, sufficient evidence has been shown to sustain the conviction on the gun count.

B

Clay also argues that the district court erred in admitting extrinsic evidence under Fed. R. Evid. 404(b).[2] The evidence in

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[2] Rule 404(b) provides in relevant part:

(b) *Other crimes, wrongs or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

question was the testimony of Michael Shorts concerning his use of weapons while engaged in drug dealings for Clay. Clay contends that this evidence was not relevant to the gun count and was unduly prejudicial. At trial, the district court admitted the evidence without specifically addressing Rule 404(b). However, the error, if any, resulting from the admission of Shorts' testimony is harmless. *See* Fed.R.Evid. 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.") "An error is harmless if the reviewing court is sure, after viewing the entire record, that the error did not influence the jury or had a very slight effect on its verdict." *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980); *United States v. Underwood*, 588 F.2d 1073, 1076 (5th Cir. 1979).

The evidence of Clay's guilt was overwhelming: The testimony showed that Clay received and distributed 30 to 40 kilograms of cocaine per month. Testimony also showed that Clay was well aware of the dangerous aspects of the narcotics trafficking business and knew of his co-conspirators' use of weapons to protect themselves and their commodities. Due to the harmlessness of any error, we need not decide whether the district court erred in admitting extrinsic evidence regarding the use of weapons.

C

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absence of mistake or accident.

Lastly, Clay argues that the district court erred in sentencing him based on 14.1 kilograms of cocaine. He contends that the district court should have sentenced him solely on the approximate one kilogram of cocaine seized from Parker on June 5, 1991. Clay asserts that the additional 13.1 kilograms of cocaine, seized from Cifuentes on September 20, 1989, was in no way connected to him.

The quantity of drugs on which a sentence is based is a factual finding made by the district court. *United States v. Palomo*, 998 F.2d 253, 258 (5th Cir.), *cert. denied*, 114 S.Ct. 358 (1993). Although such factual findings are usually reviewed for clear error, we will review for plain error, as no objections were raised to the findings at sentencing. *United States v. Hoster*, 988 F.2d 1374, 1380 (5th Cir. 1993); *United States v. Surasky*, 974 F.2d 19, 21 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1948 (1993). Importantly, "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). Therefore, we hold that the district court did not commit plain error in sentencing Clay based on 14.1 kilograms of cocaine.

III

For the foregoing reasons, we **AFFIRM**.