UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3449
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN LUTCHER,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CR 92-590 "N"(2))

(February 17, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Melvin Lutcher (Lutcher) appeals his conviction of possession with intent to distribute over three kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1). We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

The facts giving rise to Lutcher's conviction are essentially uncontested and arise from separate investigations conducted by the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA).

Sometime in 1992, Lutcher approached Watsey Alexander (Alexander) to propose dealing in cocaine; Alexander had a prior drug-related conviction.[1] He believed Alexander had recently received money from the settlement of a personal injury suit, and suggested that Alexander begin selling drugs while unable to work due to the injury.[2] Lutcher first asked Alexander to finance an automobile detail shop to use as a front for selling drugs but later changed his mind and proposed that the two men go to Los Angeles, California, to buy cocaine.

Alexander approached law enforcement agents in St. Charles Parish, Louisiana, with information about Lutcher's proposals; he was directed to contact the DEA. DEA Special Agent Mark Lusco established Alexander as a cooperating individual and began the investigation of Lutcher. With Alexander's consent, the DEA recorded telephone calls and monitored several meetings between Alexander and Lutcher during the month of October 1992. According to Alexander, who testified for the government at Lutcher's trial, Lutcher had shipped his car to California to sell it and planned to

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[1] Alexander testified that he had known Lutcher for about ten years and had sold cocaine to him in 1991.

[2] Contrary to this belief, the suit was still pending at the time of Lutcher's trial.

use the money to buy four kilograms of cocaine. Alexander agreed to accompany him on the trip, ostensibly to buy one kilogram of cocaine. Although Alexander gave Lutcher some money, fronted by the DEA, for a rental car, the California trip did not materialize due to transportation problems.

The DEA and FBI investigations crossed paths on November 24, 1992. Lutcher called Alexander and told him he had found a source for cocaine. Alexander picked him up, and the two men drove to Kenner, Louisiana, to the Cycle Shop, a motorcycle dealership owned by Carl Caruso (Caruso).[3] While Alexander waited in the showroom, talking to Mrs. Caruso, Lutcher and Caruso went back to Caruso's office to discuss the purchase of two kilograms of cocaine.[4]

Unbeknownst to the DEA or Alexander, Caruso was working as a cooperating individual for the FBI.[5] DEA Agent Lusco's partner, surveilling the meeting at the Cycle Shop, noticed Special Agent Michael Heimbach (Heimbach) of the FBI in the area and realized the Cycle Shop was the center of a joint DEA and FBI investigation unrelated to the Lutcher investigation.

Caruso first came to the attention of the FBI in October 1991, when agents approached him about his contact with a known drug

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[3] Caruso testified that he met Lutcher in the mid-1980's in connection with motorcycling activities. He had asked Lutcher to help establish him in the drug business, but Lutcher declined. According to Caruso, Lutcher had approached him before October 3, 1992, to inquire about purchasing cocaine.

[4] Because Alexander was wearing a wire, the DEA recorded the conversation between Alexander and Mrs. Caruso. They did not discuss drugs.

[5] Likewise, the FBI was unaware of the DEA investigation of Lutcher and of Alexander's role as an informant.

dealer. Caruso turned over to the agents $60,000 that he was holding for the dealer. Agent Heimbach developed Caruso as a cooperating individual, but later learned that Caruso was continuing his illegal activities on the side.

On October 8, 1992, Caruso was stopped at the New Orleans airport. He consented to a search of his luggage, which contained $84,500 in cash. He admitted that he intended to use the money to purchase three kilograms of cocaine in Los Angeles. Caruso was arrested and taken to the central FBI office in New Orleans.[6] He pleaded guilty to an indictment involving the three kilograms of cocaine.[7] Caruso agreed to cooperate with the FBI and consented to the installation of a video camera in his office.

On November 11, 1992, Lutcher came to the Cycle Shop and met with Caruso in the office. During this meeting, which was recorded on videotape, Lutcher proposed buying some cocaine from Caruso. Lutcher returned to the Cycle Shop on November 24, this time accompanied by Alexander. Again, he and Caruso discussed dealing in cocaine. Caruso told Lutcher he would have some cocaine in a few weeks and would contact him; Lutcher gave him his telephone number for that purpose.

Caruso called Lutcher on December 11, 1992, to inform him that the cocaine would be available to be picked up Monday, December 14.

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[6] Although Mrs. Caruso was present at the airport, there was no evidence of her involvement, and she was not arrested.

[7] Caruso later told the agents he had dealt in more than 200 kilograms of cocaine. He was not charged with this conduct because the government was bound by the plea agreement not to prosecute him for any conduct other than the three kilograms. Caruso was awaiting sentencing at the time of Lutcher's trial.

On the 14th, Caruso called Lutcher to tell him the drugs had arrived. Lutcher contacted Alexander to arrange a ride to Caruso's shop. Alexander tried to telephone his contacts at the DEA; he left a message when he was unable to reach them. Alexander and Lutcher arrived at the Cycle Shop, which was under surveillance by the FBI.[8] Both men met with Caruso in his office; this meeting was recorded on videotape. Caruso gave Lutcher three kilograms and one ounce of cocaine. As Lutcher left the office with Alexander, FBI agents entered and arrested both men.[9]

Lutcher pleaded not guilty to one count of possession with intent to distribute three kilograms of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1). A jury convicted him following a three-day trial, and the district court sentenced him to eighty-four months' imprisonment, five years' supervised release, and a fifty dollar special assessment.

Lutcher appeals, raising two challenges to his conviction.

Discussion

I. Limitation of Cross-Examination

Lutcher contends that he was deprived of his Sixth Amendment confrontation rights when the district court improperly limited his cross-examination of government witnesses Heimbach and Albert Winters (Winters), the Assistant United States Attorney who drafted the plea agreement for Caruso. We review the court's rulings for

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[8] When Alexander saw the undercover car, he believed the DEA had gotten his message and arranged for the surveillance.

[9] Alexander was later released after his relationship with the DEA became known.

an abuse of discretion. *United States v. Ruiz*, 987 F.2d 243, 248 (5th Cir.), *cert. denied*, 114 S.Ct. 163 (1993). The district court's discretion in limiting cross-examination arises only after the defendant has had sufficient cross-examination to satisfy the Sixth Amendment by bringing to the jury's attention facts from which the jury could draw inferences concerning the witness's credibility. *United States v. Vasilios*, 598 F.2d 387, 389 (5th Cir.), *cert. denied*, 100 S.Ct. 456 (1979).

The challenged limitations before us concern Lutcher's attempts to attack the credibility of Caruso. He alleges that the prosecution of Caruso was tainted by his relationship to Jim Letten (Letten), an Assistant United States Attorney in the Eastern District of Louisiana, who was married to Caruso's half-sister. Furthermore, he calls into question the circumstances of Caruso's arrangements with the government, suggesting that Caruso cooperated in return for a promise that Mrs. Caruso would not be charged and for leniency in his own sentence. The government introduced this evidence in its direct examinations of Heimbach, Winters, and Caruso himself.

Lutcher now complains that he should have been allowed to pursue these areas more fully on cross-examination of Heimbach and Winters. He does not, however, allege any specific facts he was prohibited from eliciting during cross-examination of either witness. Nor does he complain that he was not allowed to fully cross-examine Caruso.

A. Heimbach

Lutcher asserts that the district court unconstitutionally limited his cross-examination of Heimbach concerning Caruso's criminal conduct, recruitment as an informant, plea dealings with the government, and relationship to Assistant United States Attorney Letten. Each of these areas of potential impeachment was brought out by the government. On direct examination, Heimbach explained how Caruso came to the attention of the FBI and became a confidential informant. Heimbach made clear that Caruso did not deal honestly with the FBI and continued his illegal activities on the side. The jury knew that Caruso pleaded guilty to possession of three kilograms of cocaine but later admitted involvement with 200 kilograms, conduct with which the government was precluded by law from charging him. Heimbach acknowledged that Mrs. Caruso was at the airport with Caruso when agents found $84,5000 in his suitcase, but stated that there was no evidence of her involvement with Caruso's activities. Finally, Heimbach testified that Letten did not participate in any way with the government's case against Caruso.

Lutcher followed up on these topics during cross-examination. He questioned Heimbach concerning Caruso's veracity (or lack thereof) in his dealings with the FBI. The defense emphasized Caruso's illiteracy in its attempt to show Mrs. Caruso aided him in his drug business. Finally, Lutcher explored the extent of Caruso's criminal activity, including his potential eligibility to be charged with continuing criminal enterprise. The court did limit Lutcher's investigation into Letten's involvement in Caruso's

case, stating that absent a clear sign of impropriety, it would not allow defense counsel to impugn the reputation of the federal prosecutor. This limitation was not improper, because there was overwhelming, uncontradicted evidence that Letten was not involved in the investigation, or prosecution, of Caruso.

Caruso admitted that his cooperation with the FBI investigation would, in all likelihood, substantially reduce the length of his sentence. Furthermore, contrary to his claim on appeal, the district court did not prevent Lutcher's inquiry into whether Caruso's plea agreement included special treatment for his wife; Lutcher simply did not ask this question during his cross-examination of Caruso.

Lutcher's cross-examination of Heimbach was adequate to protect his Sixth Amendment rights. To the extent cross-examination of Heimbach was limited, it did not relate to his credibility but to Caruso's, and full cross-examination was allowed of Caruso and his interest in testifying for the government was thereby, and otherwise, fully exposed. The district court did not abuse its discretion in limiting further examination of Heimbach on these topics.

B. Winters

Lutcher complains that his examination of Winters was unconstitutionally limited concerning Caruso's potential sentence without a plea agreement. He attempted to question Winters about possible sentences under the Guidelines and the effect of the 200 kilograms of cocaine as relevant conduct. The district court agreed with the government that the line of questioning was

speculative, commenting that other witnesses had conceded that Caruso's culpability greatly exceeded the conduct covered by the plea agreement. Similarly, the court restricted Lutcher's questions to Winters about statutory provisions. The court indicated that Lutcher could make a proffer in these respects later, but Lutcher did not avail himself of the opportunity. Finally, Lutcher was allowed to question Winters about Mrs. Caruso's involvement, as well as other sentencing matters.

The district court did not abuse its discretion.

II. Instructions to the Jury

Lutcher complains of two asserted errors in an instruction given by the district court during the trial. The trial court generally has wide discretion in wording the jury instructions. In reviewing the instructions to the jury, we should consider the charge as a whole, in view of the charge, the evidence presented, and the arguments of counsel, to determine whether the jury understood the issues presented. *Mozeke v. Int'l Paper Co.*, 933 F.2d 1293, 1296 (5th Cir. 1991). "The test is whether the jury was misled in any way." *Id*.

A. Extrinsic evidence

During the government's examination of Alexander, the jury heard a tape recording between Alexander and Lutcher discussing the trip to California to purchase cocaine. Lutcher's attorney requested, and received, a limiting instruction concerning extrinsic evidence:

> "Ms. Schlueter: Your Honor, at this time I would like to ask you to specifically instruct the jury that Mr. Lutcher is not on trial for anything arising out of

> the LA conversation allegedly that Mr. Watsey [Alexander] had with him.
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> "The Court: I think you've got a point there, Counsel.
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> "It is in order for the jury to have the information that is coming from these tapes in order for you all to have a basis to make up your own mind ultimately about whether or not it is more likely than not, indeed, whether the Government has carried the burden that it has of proof beyond a reasonable doubt as to the single event that is the charge in this case. That is the one instance of possession with intent to distribute approximately three kilograms of cocaine. This background information is only there for the purpose of you making your own ultimate determination as to whether it is more likely than not that this leads to a conclusion with respect to the charge that has been brought.
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> "*In other words, the Government has a right to attempt to show that, in support of their contention that someone has committed a particular crime, has a right to try to show that in other instances at other times that individual had a propensity to deal in that kind of cocaine, for example.* It isn't, and you must remember this, it isn't evidence of this particular charge. That is going to have to be shown in a specific circumstance where the Government is going to have to introduce evidence to show that on a certain date alleged the defendant actually possessed with intent to distribute three kilograms of cocaine. I'm not going to try to anticipate how the Government does that. It is up to them to put on their case as they deem appropriate. *The point is that they do have a right to set a stage or at least for you to have an understanding of the defendant's background or prior experience or involvement in certain matters that could then be indicative of the fact that he did, indeed, participate in the single event that is the basis for this trial*." (Emphasis added.)

Counsel for Lutcher objected to the district court's suggestion that the government could use extrinsic evidence to prove that Lutcher had a propensity to commit the crime charged, and requested that the court give the pattern Fifth Circuit instruction. The district court denied this request.

In its charge to the jury at the close of trial, however, the district court gave a correct instruction on extrinsic evidence:

> "During this trial, you have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.
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> "If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment."

Lutcher contends that the court's erroneous instruction during trial improperly permitted the jury to consider the California trip as evidence supporting his guilt of the charged offense.

The government suggests that the evidence of the California trip was not extrinsic, but was part of the same scheme or plan as the purchase of cocaine from Caruso in New Orleans. Arguably, the evidence tends to support this theory: the purchase from Caruso was closely related in time to the planned trip to California, and Alexander was part of both arrangements.

We need not decide the matter on this ground, however, as it is clear no prejudice resulted to Lutcher from the court's instruction. Lutcher never claimed that he had not purchased the cocaine from Caruso and did challenge the video evidence of his meetings with Caruso. From the beginning, his defense was entrapment. Extrinsic evidence is admissible to show motive or intent to commit a crime, and to prove predisposition in response to an entrapment defense.

There is no evidence, and no claim, that Lutcher did not engage in the conduct constituting the charged offense; and this

was established by direct and overwhelming evidence. Because the complained of evidence was admissible to prove predisposition, any error from the initial extrinsic act instruction was clearly harmless.

B. Burden of proof

Finally, Lutcher argues that the district court erroneously instructed the jury that the government had only to prove his guilt by a preponderance of the evidence rather than by evidence beyond a reasonable doubt. In the same instruction to the jury discussed above, the district court twice used the phrase "more likely than not":

> "It is in order for the jury to have the information that is coming from these tapes in order for you all to have a basis to make up your own mind ultimately about *whether or not it is more likely than not*, indeed, whether the Government has carried the burden that it has of proof beyond a reasonable doubt as to the single event that is the charge in this case. That is the one instance of possession with intent to distribute approximately three kilograms of cocaine. *This background information is only there for the purpose of you making your own ultimate determination as to whether it is more likely than not that this leads to a conclusion with respect to the charge that has been brought*." (Emphasis added.)

Lutcher, however, objected *only* to the extrinsic acts element of the instruction, not to the court's characterization of the burden of proof. Without an objection at trial to the ground raised on appeal, we are limited to a review for plain error. *United States v. Heath*, 970 F.2d 1397, 1407 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1643 (1993). Plain error is "'error so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and

result in a miscarriage of justice.'" *United States v. Surasky*, 974 F.2d 19, 21 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1948 (1993) (quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, 111 S.Ct. 2032 (1991)).

The district court's comments appear to be nothing more than a slip of the lip. In the same instruction, the court correctly stated the government's burden of proof beyond a reasonable doubt. Furthermore, in its charge to the jury at the close of trial, the court instructed the jury on the correct burden of proof and amply defined reasonable doubt.[10] The previous misstatement does not constitute plain error.

Conclusion

For the reasons stated above, Lutcher's conviction and sentence are

AFFIRMED.

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[10] The court's charge contained the following language:

> "The government has the burden of proving the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove his innocence. If you find that the government has failed to prove the defendant guilty beyond a reasonable doubt, you must find that defendant not guilty.
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> "The government's burden of proof is heavy. Nevertheless, it does not mean that the government must prove the defendant's guilt beyond all possible doubt. Rather, it means the government must exclude any `reasonable doubt' concerning the defendant's guilt.
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> "A `reasonable doubt' is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing nature that you would be willing to rely and act upon it without hesitation in the most important of your own affairs."