UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-4204

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WHITNEY ALFRED, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(92-CR-60024)

(November 24, 1993)

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

PER CURIAM:[*]

Defendant Whitney Alfred was tried before a jury and convicted of conspiring to possess and possessing crack cocaine with the intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (1988), using a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1), and being a convicted felon in possession of a firearm, in violation of 18

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. § 922(g)(1). Alfred now appeals his conviction and sentence. We affirm.

I

Danny Antoine, a confidential government informant, arranged to purchase three ounces of crack cocaine from Kevin Adams. Antoine informed New Iberia, Louisiana police of the impending transaction and contacted Adams to arrange a site where the purchase could be consummated. Officer Troy Gant, wearing a "body mike" and transmitter, then accompanied Antoine to the agreed-upon parking lot. When Adams, accompanied by Alfred, arrived at the scene, Antoine approached their vehicle and asked whether they had the drugs. Although Adams replied that he had the drugs, Antoine and Adams could not agree whether to conduct the deal in Gant's or Adams's vehicle. Adams and Alfred, instructing Antoine and Gant to follow them, then drove out of the parking lot. When officers endeavored to stop the vehicle, Adams, who was driving, attempted to flee. During the short pursuit that followed, the driver's door of the vehicle was opened and a bag containing approximately sixty-four grams of crack cocaine tossed out. However, officers eventually apprehended both Adams and Alfred and recovered the bag of cocaine. Officers also found a handgun between the front seats of the car driven by Adams.

II

Alfred first challenges the sufficiency of the evidence supporting his conviction for possession of a firearm by a convicted felon. Specifically, Alfred contends that the government

failed to introduce evidence demonstrating that he previously had been convicted of a felony offense. The government, not surprisingly, argues that it did introduce proof of Alfred's previous conviction and that Alfred's objection is based on a skewed reading of the record. We agree.[1]

The government at trial simultaneously offered three items in evidence. The prosecutor stated that the first item, a stipulation regarding laboratory testing of the sixty-four grams of crack cocaine, was marked as "Government Exhibit Number 1"; the second item, "certified documents of the 15th Judicial District Court in and for Lafayette Parish," was marked as "Government Exhibit Number 3"; and the third piece of evidence, a stipulation regarding certain fingerprint cards, was marked as "Government Exhibit Number 12." After the prosecutor read the stipulations to the jury, the district court announced, "They'll be received." Unbeknownst to the parties, however, the court reporter transcribed that the district court admitted only exhibits one and twelve in evidence. Moreover, the "certified documents" evidencing Alfred's prior convictions were not marked as exhibit number 3, as the prosecutor stated, but as exhibit number eleven. Alfred contends these two

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[1] Because Alfred failed to move for a judgment of acquittal based on the grounds he now alleges require reversal, we restrict our review of his claim to whether his conviction resulted in a manifest miscarriage of justice. *United States v. Vaquero*, 997 F.2d 78, 82 (5th Cir. 1993), *petition for cert. filed* (1993); *United States v. Galvan*, 949 F.2d 777, 782 (5th Cir. 1991). "Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or . . . [if] the evidence on a key element of the offense was so tenuous that a conviction would be shocking." *Galvan*, 949 F.2d at 782-83. "In making this determination, the evidence . . . must be considered `in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices.'" *United States v. Ruiz*, 860 F.2d 615, 617 (5th Cir. 1988).

facts verify his claim that the government did not offer proof of his prior felony conviction in evidence.

Examining the record as a whole, however, we do not find the court reporter's mistaken transcription of the district court's ruling and the government's mismarking of the pertinent exhibit sufficient to support a finding that the government did not introduce proof of Alfred's prior conviction. Instead, the record demonstrates that the government offered, and the district court admitted, the certified copies of Alfred's guilty plea and the state court's judgment of conviction in evidence. Moreover, after the government described the contents of the three exhibits being offered, Alfred stated that he had "[n]o objection" to them. Thus, we find that the district court admitted the government's proof of Alfred's prior felony conviction in evidence.[2] Consequently, we find sufficient evidence to uphold Alfred's conviction.

III

Alfred next contends that the district court erred by admitting evidence of other crimes, wrongs, or acts without a specific determination))pursuant to Fed. R. Evid. 404(b) and *United*

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[2] Other facts also support this conclusion. For example, the certified copies are marked as a government exhibit. Moreover, the district court clerk's exhibit list indicates that exhibit number 11, described as "certified copies of documents of the 15th Judicial District Court," was offered *and admitted* in evidence after exhibit number 1))the stipulation regarding laboratory testing of the crack))but before exhibit number 12))the stipulation regarding the fingerprint cards. Exhibit number 12, also admitted in evidence without objection, refers to "the conviction of a Whitney Alfred on March 19, 1991, in Cause No. 599950 of the 15th Judicial Court in and for Lafayette Parish for Aggravated Battery." Finally, although Alfred fails to address whether the district court allowed exhibit 11 to go with the jury during deliberation, the certified copies of Alfred's plea and prior conviction are included in the record on appeal, thus implying that the copies were admitted in evidence and examined by the jury.

States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979))that such evidence was admissible. Because Alfred failed to object to the evidence he now argues was inadmissible under Rule 404(b), we may reverse only if the admission of the evidence constitutes plain error. *United States v. Greenwood*, 974 F.2d 1449, 1462 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2354, 124 L. Ed. 2d 262 (1993); *United States v. Marrero*, 904 F.2d 251, 259 (5th Cir.), *cert. denied*, 498 U.S. 1000, 111 S. Ct. 561, 112 L. Ed. 2d 567 (1990).[3]

Alfred specifically argues that the district court committed plain error by allowing officer Lennis Landry to testify that he believed Alfred was "in the crack cocaine business."[4] We believe that Landry's testimony was admissible both as an explanation of

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[3] Alfred also argues that the district court did not conduct the two-part *Beechum* inquiry to determine whether the evidence was admissible. However, "[a] defendant must object on Rule 404(b) grounds in order to require a district court to conduct a *Beechum* hearing." *Greenwood*, 974 F.2d at 1462 n.8. Thus, because Alfred failed to object to the challenged evidence, the district court was not required to engage in a *Beechum* analysis *sua sponte*.

[4] On cross-examination, Alfred questioned Landry about the police report that Landry prepared shortly after Alfred's arrest. The report stated that "Adams informed investigators that he could make drug purchases from volume drug dealers in Lafayette." Landry stated that it was Alfred who actually made the statements referred to in the report, not Adams. On redirect examination, the following exchange occurred:

> Q: But [Alfred] said he could set up drug deals?
> A: He said he could do all the list of names that I [previously testified about], that he could make purchases from those individuals.
> Q: Why was he telling you that he could make purchases from those individuals?
> A: Well, it's been my experience . . . that anybody that could make purchases from the names of that he furnished -- I personally made drug purchases from one of the persons that he listed, and it was hard, so I assumed that if he could make purchases from these individuals that he had to be close to them or in the crack cocaine business.

why Alfred's statement regarding his ability to purchase crack from certain individuals was significant and as evidence demonstrating Alfred's criminal intent. *See Marrero*, 904 F.2d at 259. Moreover, in light of the overwhelming evidence of Alfred's guilt of the charged offenses,[5] the introduction of Landry's testimony was not plain error. *Greenwood*, 974 F.2d at 1463.

IV

Alfred's final contention is that he is entitled to a downward adjustment in his sentence for minimal or minor participation in the offenses.[6] The guidelines state that a minimal participant is one who demonstrates a "lack of knowledge or understanding of the scope and structure of the enterprise." U.S.S.G. § 3B1.2, comment. (n.1). Similarly, a minor participant is one who is "less culpable than most other participants, but whose role could not be described as minimal." *Id.* (n.3). As most offenses are committed by actors of roughly equal culpability, the minimal participant adjustment

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[5] For example, Antoine testified that when he told Adams he wanted to make the deal in the vehicle driven by officer Gant, Alfred replied that "it ain't going down like that." Alfred then told Antoine to get in the vehicle driven by Adams. When Antoine refused, Adams and Alfred told Antoine and Gant "to follow them [because] they wanted to meet somewhere else." Moreover, Antoine testified that when he originally approached Adams's vehicle, Alfred had possession of the bag of crack. Thus, the evidence adduced at trial demonstrated that Alfred not only had possession of the crack, but exerted control over the terms and location of the drug purchase.

[6] The sentencing guidelines provide:

> Based on the defendant's role in the offense, decrease the offense level as follows:
> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
> In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. § 3B1.2 (Nov. 1992).

"is designed to be applied infrequently." *United States v. Nevarez-Arreola*, 885 F.2d 243, 245 (5th Cir. 1989).

The presentence investigation report ("PSR") found that Alfred should not receive the downward adjustment for minimal or minor participation. Alfred did not object to the PSR, and the district court explicitly adopted it. Consequently, Alfred may not now raise objections to it absent plain error. *United States v. Lopez*, 923 F.2d 47, 49 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991). "Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *Id.* Because the issue of whether Alfred was a minimal or minor participant is a question of fact that the district court resolved during sentencing without objection, we refuse to reach the merits of his claim.

V

For the foregoing reasons, we AFFIRM the judgment of the district court.