UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4311
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERALD GLENN, SR.,
GARY ALLEN PATTERSON and
TERRY ALLEN PATTERSON,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(1:92-CR-53-8)

(January 10, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

A sixteen-count indictment charged Gary Allen Patterson, a/k/a "10,000" (Gary); Terry Allen Patterson, a/k/a "5,000" (Terry); their father, Gerald Glenn, Sr.; and other known and unknown individuals with a conspiracy to distribute cocaine base (crack) along with individual substantive offenses. At trial, the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

defense rested without calling any witnesses after the Government presented its case through 45 witnesses. The jury convicted the three defendants of the conspiracy charge and Terry as to counts three, four, and six, and Glenn as to three, eleven, and sixteen. The district court sentenced Gary and Terry to life and Glenn to 294 months.

On appeal, only Terry contests the sufficiency of the evidence. He and the co-defendants raise numerous other issues, which, upon careful review, we have found meritless. The convictions and sentences are affirmed.

Terry -- Sufficiency of the Evidence

Terry argues that the evidence was insufficient to convict him of any of the counts: conspiracy (count 1), distribution of cocaine base on or about March 18, 1991 (count three), and on or about March 22, 1991 (count four), and possession with the intent to distribute cocaine base on or about August 2, 1991 (count six).

> [This Court] examine[s] the evidence, together with all credibility choices and reasonable inferences, in the light most favorable to the government. The verdict must be upheld if the [C]ourt concludes that any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. The evidence need not exclude every reasonable hypothesis of innocence . . . . The government, however, must do more than pile inference upon inference. Finally, the standard is the same whether the evidence is direct or circumstantial.

U.S. v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993) (citations omitted).

Count One - Conspiracy

> In order to prove that a defendant conspired to possess crack with intent to distribute it, the government must prove beyond a reasonable doubt that (1) there was a conspiracy to possess with intent to distribute crack, (2) the defendant knew about the conspiracy, and (3) the defendant voluntarily joined the conspiracy.

U.S. v. Sparks, 2 F.3d 574, 579 (5th Cir. 1993) (footnote omitted).

Testimony revealed that the three defendants initially operated their crack distribution from their neighboring two houses on the outskirts of Raywood, Texas, until law enforcement executed a raid, thus resulting in the operations moving to various locations in and around Beaumont, Texas. Controlled drug buys revealed that the defendants, especially Terry and Gary, primarily used drug runners to do the actual selling of crack or cocaine powder, with the defendants orchestrating the transactions by supplying the crack, returning messages from buyers through the use of electronic pagers, and arranging the sales through the runners. Chemical analysis showed the rock-like substances and residue purchased by government agents to be crack. Witnesses testified that the defendants drove expensive automobiles and carried large amounts of cash in small denominations, but had no means of legitimate income.

Terry argues that the Government failed to establish that there was an agreement among the three defendants because the evidence did not indicate joint action. In light of this argument, he also argues that the Government failed to establish that he knew about any conspiracy or that he joined into one. At least three

witnesses testified that the drug activity of the twins and their father was a family organization. Further, the controlled buy of crack on March 18, 1991, involved Terry asking Glenn if he had seven rocks and instructing Glenn to sell the rocks to the undercover officer. "[E]ven a single act can be one from which knowledge and participation in a conspiracy can be inferred." Maseratti, 1 F.3d at 338. The evidence was sufficient to support Terry's conspiracy conviction. See Sparks, 2 F.3d at 579.

Counts 3 & 4 - Distribution of Crack

Count three charged Terry and Glenn with the distribution of cocaine base on or about March 18, 1991, and count four charged Terry with distribution of cocaine base on or about March 22, 1991. The Government had to prove that Terry "(1) knowingly (2) distributed (3) cocaine." U.S. v. Lechuga, 888 F.2d 1472, 1478 (5th Cir. 1989). Terry does not contest that the undercover officer purchased crack on these two dates. He argues that, because he did not physically deliver the crack to the undercover police officer, the evidence is insufficient. The term "distribute" applies to a wide range of conduct. See Lechuga, 888 F.2d at 1478; see also 21 U.S.C. § 802(8) & (11) (referencing "distribute" to the definition for "deliver" which "mean[s] the actual, constructive, or attempted transfer of a controlled substance . . . whether or not there exists an agency relationship").

As discussed above, the testimony of the undercover officer, Delco, combined with the tape recording of the March 18th

sale of seven rocks of crack, sufficiently supports that Terry constructively delivered the crack through Glenn by instructing him to sell to Delco. Delco also testified that she paged Terry several times on March 22, 1991, and that she spoke with Anthony Moore and Terry about purchasing another $100 worth of crack. From the last recorded telephone call between Terry and Delco, Delco interpreted Terry's statements to mean that Terry had arranged for someone to sell her the crack because he was very busy at the time. He then put someone else, Byron Rice, on the telephone to speak with her. Rice actually sold Delco the crack later that night and indicated to her that he worked for Terry. This evidence was sufficient to show the constructive delivery of crack by Terry through Rice, thus supporting Terry's distribution conviction. See Lechuga, 888 F.2d at 1478 ("distribution may consist of `acts perpetrated in furtherance of a transfer or sale, such as arranging or supervising the delivery'").

Count Six - Possession with the Intent to Distribute

"Conviction for possession with intent to distribute requires proof of (1) knowing (2) possession (3) with intent to distribute." U.S. v. Anchondo-Sandoval, 910 F.2d 1234, 1236 (5th Cir. 1990). Terry does not contest that the confidential informant, Martin Brown, informed Beaumont law enforcement on August 2, 1991, that Brown expected to receive crack from Terry at a house in the 600 block of Euclid Street and that law enforcement set up a surveillance of Terry approaching and standing next to the passenger side of Brown's vehicle. He also does not contest the

evidence proving that the packages found by police contained crack. Terry argues that, because the testimony of police officers conflict with each other, there is a reasonable doubt whether Terry possessed the crack found by the officers.

Although Brown testified that the package Terry was handing to him when police converged on the scene was a package of white substance wrapped in plastic, two police officers testified that Terry was holding a brown paper bag containing clear-plastic packages of a white substance. These two officers testified that Terry dropped the bag, picked up a plastic package, and began to run from the police. Another officer testified that he observed Terry holding the plastic package as he began to run. Two officers chasing Terry observed Terry throw the plastic package into a weedy area, and another officer testified that he found the plastic package in that general vicinity. Moreover, one of the officers found a plastic package containing a white substance at the place where Terry was standing next to Brown's vehicle. The slight inconsistency in all of the testimony does not negate the overwhelming evidence that Terry possessed the crack found by police. The evidence was sufficient.

Terry -- Judicial Neutrality

Terry argues that the district court abandoned its role of judicial neutrality and became an advocate for the prosecution in its evidentiary rulings, thus denying Terry a fair, impartial trial. This court looks at the trial as a whole in determining whether the district court overstepped the bounds of judicial

neutrality. U.S. v. Lance, 853 F.2d 1177, 1182 (5th Cir. 1988). Moreover, Terry must demonstrate substantial error which prejudiced his case before this court will reverse his conviction. See id.

Terry's primary argument of judicial bias focuses on the district court's questioning of Delco, outside of the jury's presence, after the defendants had objected to the relevancy of the tape and transcript of her first telephone conversation on March 18, 1991. The scope of the questioning and the district court's ruling were proper under Fed. R. Evid. 104(a). In its ruling, the court made a preliminary finding that a conspiracy existed among the three defendants and other persons. This ruling was made outside the presence of the jury, and the district court waited to instruct the jury that all exhibits previously admitted as to certain defendants were to be viewed as admissible as to all defendants and that the jury could view statements made by any alleged conspirator as evidence against the other alleged members of the conspiracy, if the jury believed that there was a conspiracy and that the statements were in fact made.

With scant discussion, Terry cites to four instances of alleged bias involving the district court ruling on Terry's objections based upon question form, relevancy, and hearsay. "Federal judges have wide discretion with respect to the tone and tempo of proceedings before them; they are not mere moderators or hosts at a symposium." U.S. v. Adkins, 741 F.2d 744, 747 (5th Cir. 1984) (internal quotation and citation omitted), cert. denied, 471 U.S. 1053 (1985). Even if the district court skirted the bounds of

propriety, something which a review of the record does not reveal, Terry has failed to show that the error was substantial or that, in light of the overwhelming evidence of his guilt, he was prejudiced. See Lance, 853 F.2d at 1183.

Terry -- Plain Error on Evidentiary Issues

Terry raises several evidentiary arguments concerning testimony given by various witnesses. First, Terry argues that the testimony concerning the Louisiana seizure of large amounts of cash from Terry on two occasions was inadmissible pursuant to Fed. R. Evid. 402, 403, and 404(b).

During the suppression hearing held outside the jury's presence, Terry objected to the testimony of Lt. Kowalski as being irrelevant to any of the charged counts. The district court found that the testimony concerning the seizure of $23,820 from the car driven by Terry in Louisiana on September 23, 1991, was relevant to the conspiracy count. This court reviews for abuse of discretion. See U.S. v. Lokey, 945 F.2d 825, 835 (5th Cir. 1991). Because the events occurred during the time of the charged conspiracy, and because the witness testified that the trained drug-detecting dog alerted to the scent of drugs on the money, there was no abuse of discretion.

Terry neither objected to the other testimony concerning the two seizures of money nor objected to Kowalski's testimony on evidential grounds other than relevancy. Therefore, this court reviews for plain error, "`error' that is `plain' and that `affect[s] substantial rights.'" U.S. v. Olano, ___ U.S. ___, 113

S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993); see Fed. R. Evid. 103(d). Because the testimony was relevant and the events were not extrinsic to the conspiracy count, there was no plain error. See Olano, 113 S.Ct. at 1777 (equating "plain" error to "clear" or "obvious" error).

Terry argues that the testimony concerning the acquisition of expensive car stereos by Gary and Terry and the testimony concerning their purchases of stolen clothing with money or with crack was unrelated to the charges in the indictment. He also complains that the entire testimony of Officer Betty Donatto Flagg and the recordings of his conversations with Delco "tended to be more prejudicial than material." Because no objection was made to the district court, this court reviews for plain error. See Olano, 113 S.Ct. at 1776. The purchases by the Patterson brothers were highly relevant to the count of conspiracy. Relevant evidence is amenable to exclusion "if its probative value is substantially outweighed by the danger of unfair prejudice," Fed. R. Evid. 403 (emphasis added), and Terry argues only that there was more prejudice than materiality. Therefore, there was no plain error. See Olano, 113 S.Ct. at 1777.

Gary -- Alleged Death Threat Testimony

Gary argues that the district court erred by denying his motion for mistrial based on Charlotte Ozan's nonresponsive answer to his question on cross-examination. This court reviews for an abuse of discretion. U.S. v. Coveney, 995 F.2d 578, 584 (5th Cir. 1993). The nonresponsive answer arose in the following manner:

Q: At any point up until your testimony here today have you been told or threatened with any type of criminal prosecution?

A: I've been told that he's going to have someone to kill me, but other than that --

Mr. LeMasters: Objection, your Honor, that's nonresponsive, number one, and number two, it's highly prejudicial.

The Witness: That is the truth.

The Court: The question was, have you been promised anything --

The Witness: Oh, promised?

The Court: Promised anything --

The Witness: No, I haven't been promised anything.

The Court: -- By the Government for your testimony?

The Witness: No, I haven't.

The Court: Members of the jury, as to the nonresponsive answer, you will disregard it.

Mr. LeMasters: Thank you, your Honor.

Counsel did not move immediately for a mistrial.

Gary's argument, that the nonresponsive answer was so prejudicial that the district court's curative instruction was ineffective, is defeated by the context of the answer, the context of the entire trial, and the jury's verdict finding Gary not guilty on the two substantive counts. U.S. v. Alfaro, 935 F.2d 64, 68 (5th Cir. 1991) (giving standard which notes that reversible error is predicated upon prejudicial testimony). For these reasons, the district court did not abuse its discretion. See Coveney, 995 F.2d at 584-86.

Gary & Glenn -- Fed. R. Evid. 404(b)

Gary and Glenn argue that the district court erred in permitting a witness, Craig Arceneaux, to testify concerning events beyond the temporal scope of the conspiracy. "The admission of evidence must be upheld unless the district court clearly abused its discretion." Lokey, 945 F.2d at 835. Glenn argues that the testimony represented an impermissible variance from the indictment, thus necessitating reversal. In the alternative, he argues that the testimony was extrinsic evidence under Fed. R. Evid. 404(b) and that the district court failed to make the requisite findings under that rule. See U.S. v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). Gary also argues that the district court failed to conduct the Rule 404(b) analysis.

Arceneaux testified that he began to sell drugs for Terry in 1987. He stopped selling for Terry in 1988 and resumed his sales in 1991 when he was released from state prison. After his release, he also began to sell drugs for Gary. Arceneaux did not testify about dealing drugs through Glenn. After Arceneaux stated that he sold drugs for Terry beginning in 1987, all three defendants objected to the testimony as being extraneous and highly prejudicial. No one requested a Rule 404(b) analysis, see U.S. v. Osum, 943 F.2d 1394, 1401 (5th Cir. 1991), and the district court instructed the jury that it could use the testimony to help explain his connection to the defendants if it so chose, although it could not consider the extraneous events as part of the conspiracy.

The indictment charged the three defendants with conspiracy to possess with the intent to distribute crack from on or about 1989 until on or about April 15, 1992. Arceneaux's testimony about his pre-indictment dealings with Terry was extrinsic to the indictment, thus negating Glenn's argument concerning a variance. But see Lokey, 945 F.2d at 834 (noting that prior acts are not extrinsic to a conspiracy charge when those acts are relevant to the establishment or structure of the conspiracy). Even if the district court erred by failing to analyze the evidence under Rule 404(b) and to make the necessary findings on the record, the error is harmless as to Glenn and Gary. Fed. R. Evid. 103(a); Fed. R. Crim. P. 52(a). Arceneaux testified that his drug association with Gary did not begin until within the period of the conspiracy and he did not mention dealing drugs with Glenn. Moreover, in light of the overwhelming evidence of Glenn and Gary's guilt on count one, any error concerning the admission of this evidence did not affect their substantial rights. See U.S. v. Skillern, 947 F.2d 1268, 1274 (5th Cir. 1991), cert. denied, 112 S.Ct. 1509 (1992).

Gary -- Drug Quantity

Gary argues that the district court erred in overruling his objection to paragraphs 76-77 of his PSR, which attributed 156 ounces of crack to Gary's distribution efforts. This court reviews for clear error the district court's findings concerning drug quantity. Maseratti, 1 F.3d at 340. "A factual finding is not

clearly erroneous as long as it is plausible in light of the record of the case as a whole." Id.

The probation officer determined that Steve Wilson sold for Gary three ounces of crack per week for one year. Gary objected to this determination based upon Wilson's cross-examination which indicated that Wilson might have met Gary only in early 1991, not in the spring of 1990, thus reducing the one year to 26 weeks. The district court overruled this objection based upon Wilson's testimony viewed as a whole, and under the standard of review, there was no clear error.

Gary, in support of his argument, adds the additional argument that Wilson testified that he sold two or three ounces per week through Gary and that the probation officer used the higher number, three ounces. In his objections to the PSR, Gary conceded that three ounces was correct.

Gary -- Enhancement for Possession of a Firearm

Gary argues that the district court erred by increasing his offense level for possession of a dangerous weapon under U.S.S.G. § 2D1.1(b)(1). The enhancement was based upon Ozan's statements that she turned over to police the handgun Gary gave her on January 10, 1991, and was based upon investigation that Gary acquired the handgun in exchange for crack. This court reviews for clear error. U.S. v. Eastland, 989 F.2d 760, 769 (5th Cir.), cert. denied, 114 S.Ct. 246 (1993).

Gary makes several arguments as to the propriety of the enhancement: 1) neither Ozan nor Donatto Flagg testified at trial

about this incident, 2) the evidence does not establish that the firearm's availability was in furtherance of the conspiracy, and 3) the lack of specificity in the PSR concerning when Gary obtained the weapon. "The PSR is considered reliable and may be considered as evidence by the trial judge in making factual sentencing determinations." U.S. v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). The PSR stated that the weapon was acquired by Gary during the time of the conspiracy in a crack sale. See § 2D1.1, comment. (n.3) (noting that the two-level increase should be applied "unless it is clearly improbable that the weapon was connected with the offense"). Further, it was Gary's responsibility to demonstrate that the information within the PSR was unreliable or inaccurate. See U.S. v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). In his objections, Gary did not challenge the allegation that he had acquired the firearm through trafficking. Because Gary failed to carry his burden at sentencing and because the district court properly relied upon the PSR, there was no clear error. See Lghodaro, 967 F.2d at 1030.

for these reasons, the appellants' judgments and sentences are AFFIRMED.