UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5266
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY DONELL BUCHANAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(92-60032-16)

(May 19, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Convicted by a jury of conspiracy to possess with intent to distribute cocaine and cocaine base, Terry Donell Buchanan appeals. Finding no error, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Buchanan was among a score of individuals indicted in connection with cocaine and cocaine base trafficking between Houston, Texas and south central Louisiana. At various times between 1987 and 1992 Don Paul Jackson, Farice Daigle, Jr., Gavin Gailes, and their associates traveled to Houston to purchase the drugs and returned to Lafayette and Opelousas to distribute them. Buchanan was one of their suppliers.

Most of the indictees pleaded guilty. Buchanan went to trial. He was convicted of the conspiracy count, charging a violation of 21 U.S.C. § 846, and acquitted of the substantiave count, possession with intent to distribute in contravention of 21 U.S.C. § 841(a)(1). After being sentenced to a 235-month term of imprisonment, Buchanan timely appealed.

Analysis

Buchanan assigns numerous errors, which we address *seriatim*.[1]

1. Insufficient evidence.

Buchanan maintains that the government did not present sufficient evidence to sustain his conviction and that his motion for acquittal should have been granted. He contends that the only evidence of his involvement came from three conspirators whose testimony was incredible as a matter of law. Each testified in exchange for a recommendation of leniency from the government and,

[1]At the threshold the government seeks reconsideration of our order allowing Buchanan to supplement the appellate record insofar as the order pertains to material not presented to the district court. We may not consider such material and have not done so herein. The government's motion, therefore, is unnecessary.

according to Buchanan, each contradicted the others. We are not persuaded.

Our inquiry is a deferential one. Viewing the evidence in the light most favorable to the prosecution, we ask whether a rational jury could have found guilt beyond a reasonable doubt.[2] We must leave credibility choices to the jury, accepting same unless the testimony defies physical laws. Inconsistencies and mistakes do not *per se* constitute factual impossibility.[3] Further, a conviction may rest solely on the testimony of a coconspirator, even one who has entered into a plea bargain with the government, provided that the testimony is not insubstantial on its face.[4]

Jackson, Daigle, and Gailes each implicated Buchanan. Jackson testified to observing Buchanan "counting drugs" at a Quality Inn in Houston and to purchasing two kilograms of cocaine from him on a later trip. Daigle testified that he and James Jones, deceased by the time of the indictment, traveled to Houston to obtain cocaine. Daigle was not present during the actual purchase but Jones told him afterwards that Buchanan was the supplier. That appears to be the Quality Inn transaction attested to by Jackson. Both Daigle and Gailes testified to a subsequent trip to Houston with Jackson. Jackson made the initial arrangements and Daigle spoke with Buchanan by telephone when they arrived. Shortly

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[2]**United States v. Gadison**, 8 F.3d 186 (5th Cir. 1993).

[3]**Gadison**; **United States v. Greenwood**, 974 F.2d 1449 (5th Cir. 1992), cert. denied, 113 S.Ct. 2354 (1993).

[4]**Gadison**.

afterward a woman driving a white BMW delivered the cocaine that Daigle had ordered. A white BMW was registered in Buchanan's name. Although the testimony contained mistaken dates and other inconsistencies, taken together it was not incredible as a matter of law. The evidence was sufficient to support the conspiracy conviction.

2. Rule 404(b) evidence.

Buchanan challenges the admission of evidence of cocaine transactions unrelated to the conspiracy with which he was charged. His contention is foreclosed by circuit precedent.

We engage in a two-step process in reviewing admission of evidence of extrinsic acts under Rule 404(b) of the Federal Rules of Evidence. First, we examine whether the evidence is relevant to an issue other than the defendant's character.[5] We repeatedly have held that evidence of other narcotics activity is probative of intent in a drug conspiracy trial.[6] Second, we evaluate whether the probative value of the extrinsic evidence is substantially outweighed by its prejudicial effect.[7] The probative value of the extrinsic evidence herein was heightened by Buchanan's attacks on the credibility of the witnesses providing the government's

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[5]**Gadison**, citing **United States v. Beechum**, 582 F.2d 898 (5th Cir. 1978) (*en banc*), cert. denied, 440 U.S. 920 (1979).

[6]See, e.g., **United States v. Henthorn**, 815 F.2d 304 (5th Cir. 1987); **United States v. Mergist**, 738 F.2d 645 (5th Cir. 1984). A plea of not guilty to a conspiracy charge puts intent at issue. **Id.**

[7]**Gadison**.

inculpatory evidence.[8] The government was entitled to introduce the extrinsic evidence.

3. Coconspirator statement.

As noted, Daigle testified that Jones had identified Buchanan as his source of a cocaine purchase. Buchanan assigns error to the district court's refusal to declare a mistrial after Daigle unexpectedly made that statement. We find no error.

Statements by coconspirators are admissible upon proof by a preponderance of evidence that there was a conspiracy involving the declarant and the defendant and that the statement was made during the course of and in furtherance of the conspiracy.[9] The statements themselves may be considered in determining the existence of the predicate facts. The evidence discussed above amply establishes that Jones and Buchanan were part of a conspiracy. "Ordinarily, a statement that identifies the role of one coconspirator to another is in furtherance of the conspiracy."[10] Buchanan vigorously contends that the indicia of reliability necessary to take an extrajudicial statement outside the realm of hearsay are lacking. In **Bourjaily**, the Supreme Court rejected the requirement of an independent inquiry into the reliability of

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[8]See **Henthorn**; **Beechum**.

[9]Fed.R.Evid. 801(d)(2)(E); **Bourjaily v. United States**, 483 U.S. 171 (1987).

[10]**United States v. Lechuga**, 888 F.2d 1472, 1480 (5th Cir. 1989) (internal citation omitted).

statements satisfying the Rule 801(d)(2)(E) predicate.[11] The challenged statement was admissible.

Buchanan also complains that the district court did not make Rule 801(d)(2)(E) findings. He did not, however, request such findings, instead erroneously arguing that the statement was barred by **Bruton v. United States**.[12] In any event, the district court made the requisite findings when it determined that the statement fell within the ambit of **United States v. Patton**.[13]

4. Refusal to include jury instruction.

Law enforcement authorities apprehended Jackson, Daigle, and Jerome Wilford as they emerged from a taxi cab. Wilford was carrying a suitcase containing cocaine. According to Jackson, Daigle agreed to pay him $10,000 if he would execute an affidavit that the cocaine belonged solely to him, Jackson. Jackson did so but testified that he received only $2,000. The district court included the following caution in the jury charge addressing witness credibility:

> There has been testimony that Don Paul Jackson, one of the witnesses for the government, lied under oath in an affidavit on an earlier occasion. A person who lies when he is sworn to tell the truth is guilty of perjury. Whether Don Paul Jackson is telling the truth in this trial is for you to decide. But the fact that he lied under oath on an earlier occasion should make you

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[11]Buchanan's objection further founders because he focuses on Daigle's credibility instead of Jones's. Daigle was available for cross-examination; Jones, the declarant, was not. Moreover, he improperly relies on evidence not submitted to the district court in making his attack.

[12]391 U.S. 123 (1968).

[13]594 F.2d 444 (5th Cir. 1979).

cautious about believing him now.

Buchanan asked for a similar instruction with respect to Daigle; the request was refused. The district court explained that Daigle had testified that he truly believed that the cocaine belonged to Jackson. Buchanan complains of that ruling.

We review the refusal of a defendant's proposed jury instruction for abuse of discretion, reversing only if the requested instruction is (1) correct; (2) was not substantially covered in the charge; and (3) concerns an important point and the lack of the instruction seriously impaired the defendant's ability to effectively present his defense.[14] We perceive no abuse of discretion herein. As the district court observed, Daigle was firm in his insistence that the cocaine belonged to Jackson. He admitted, however, that the affidavit was false insofar as it stated that he did not know of the cocaine. The instructions as given did not impair Buchanan's ability to use this testimony to challenge Daigle's credibility.

5. Sentencing.

The district court attributed nine ounces of cocaine base to Buchanan for purposes of sentencing. Buchanan challenges that determination. The district court relied on the Presentence Investigation Report, which recited a Drug Enforcement Administration estimate of the narcotics sold by Buchanan to Jones at the Quality Inn transaction observed by Jackson. PSR findings based on specified results of a law enforcement investigation bear

[14] **United States v. Aggarwal**, 17 F.3d 737 (5th Cir. 1994).

sufficient indicia of reliability to support a sentencing determination.[15] The district court's decision to accept this finding despite Buchanan's attack on Jackson's credibilitiy was not clearly erroneous.

AFFIRMED.

[15]**United States v. Gracia**, 983 F.2d 625 (5th Cir. 1993); **United States v. Vela**, 927 F.2d 197 (5th Cir.), cert. denied, 112 S.Ct. 214 (1991).