IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7134
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BOBBIE BANKS,

Defendant-Appellant.

Appeals from the United States District Court for the
Southern District of Mississippi
(W92-00027(BR))

(December 15, 1993)

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

PER CURIAM:*

The underlying facts of this appeal commence on June 4, 1992, when United Parcel Service (UPS) employee, Victor Armstrong, discovered a damaged package. Armstrong inspected the package and observed that it contained clothing and a coffee can. After determining that the package also contained what appeared to be crack cocaine, Armstrong contacted law enforcement officials.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Thomas Cavanaugh, an agent for the Mississippi Bureau of Narcotics, in conjunction with agents from the Drug Enforcement Administration (DEA), executed a controlled delivery of the package to its listed address, 103 Irwin Street, Port Gibson, Mississippi. As Cavanaugh stepped off the UPS truck, Carlos Jackson walked to meet him. Cavanaugh informed Carlos that he had a package for Benny Earl Knox and asked Carlos whether he was Knox. Carlos replied that he was not, but that he was "going to sign for him." Shortly thereafter, the agents executed a search warrant on the residence and found the package lying unopened on the kitchen table.

Lillie Jackson lived in the house at 103 Irwin Street with her children, who included Carlos Jackson and Tara Groves. Bobbie Banks was the father of Tara's two children. Banks did not live in the house, but stayed there occasionally. When Banks arrived on the scene on June 4, he told one of the agents in the house that he was afraid that someone was trying "to set this house up with drugs."

In the course of his investigation, Agent Cavanaugh determined that Bobbie Banks was using the name Benny Earl Knox. Banks was subsequently arrested. While en route to the DEA office, Banks told Cavanaugh that he knew who was mailing the "dope" to Port Gibson and that they were from California. Banks also told Cavanaugh that a similar package had been delivered to his mother's house, but that he did not know who picked it up.

At trial, Lillie Jackson testified that Banks told her son, Carlos, to get the package when it came. When asked whether she knew whether Bobbie Banks used the name Benny Earl Knox, Mrs. Jackson stated that "I have not heard him call himself Benny Earl Knox; but I have heard, you know, maybe other people -- like these guys that came here from California are really all the people that I heard call him that."

Tara Groves testified as a witness for the defense. Groves testified that a man named "Chub" was sending her some clothes for her newborn and that, while she was in the hospital having the baby, she asked Banks to go to her house to look for the package. Groves testified that Chub had previously sent her some clothes for her little girl and that the previous package was addressed to Jack Lewis, but that she did not know Jack Lewis. When asked by the prosecutor what she would have done upon finding drugs in the package that was supposed to contain baby clothes, Groves stated that she would have asked Banks about it because "Chub had affiliated with [Banks]."

Carlos Jackson testified that Banks told him to sign for the package because Tara was supposed to receive some clothes for her baby. Carlos also testified that he never heard anyone refer to Bobbie Banks as Benny Earl Knox. On cross-examination, Jackson denied telling Agent Cavanaugh that Banks used the name Benny Earl Knox. The government later introduced into evidence an audiotape of Jackson's statement taken on June 4, 1992, by Agent Cavanaugh.

In the statement, Jackson stated that Banks told him to get the package and that the package contained shoes. He also stated that Banks was also known as Benny Knox. The government also introduced into evidence an audiotape of Jackson's statement to Banks's attorney shortly before trial. In that statement, Jackson alleged that no one told him to pick up the package and that he knew nothing about it.

Willie Earl Edwards, a Port Gibson police officer, also testified for the defense. Edwards testified that Banks told him that a man had come to Port Gibson with drugs in his vehicle. As Edwards later searched the vehicle, the man told Edwards that he believed that Banks was responsible for the search. Edwards testified that he believed that Chub and other men from California had framed Banks as revenge for the search. The jury found Banks guilty.

I

Banks argues that the district court committed plain error by allowing the admission of the three inadmissible hearsay statements that were highly prejudicial. He argues that the prosecutor exacerbated the prejudice by repeatedly referring to the testimony in his closing argument.

Banks did not object at trial to the introduction of any of the statements. "If there is no contemporaneous objection to testimony whose admissibility is contested on appeal, the `plain error' standard of review applies." U.S. v. Garcia, 995 F.2d 556,

561 (5th Cir. 1993). In order to constitute plain error, the error must have been so fundamental as to have resulted in a miscarriage of justice.

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." Dutton v. Evans, 400 U.S. 74, 88, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). "[A] witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard." Id.

First, on direct examination, Lillie Jackson stated that she heard some men from California refer to Banks as Benny Earl Knox. Lillie Jackson's statement was not hearsay. Jackson was merely testifying as to what she had heard. Thus, there was no error in admitting the statement, plain or otherwise.

Next, on direct examination, the prosecutor asked Agent Cavanaugh whether, during his investigation, he was able to determine who was using the name Benny Earl Knox. Cavanaugh replied, "Yes sir. Bobbie Banks." On cross examination, the following colloquy took place:

BY DEFENSE COUNSEL: And why did you want to arrest Bobbie Banks?

BY AGENT CAVANAUGH: Because I know he goes by the name Benny Earl Knox and I know that package was coming to him.
BY DEFENSE COUNSEL: And how do you know that?
BY AGENT CAVANAUGH: I'd been told by law enforcement authorities before that Bobbie Banks was using the alias of Benny Earl Knox in Claiborne County.
BY DEFENSE COUNSEL: Isn't it true that there's actually a Bennie [sic] Knox that lives in Port Gibson?
BY AGENT CAVANAUGH: Yes, sir. Yes, sir.
BY DEFENSE COUNSEL: But you're still contending thathe's using somebody else's name in the time.

Agent Cavanaugh's statement on direct examination that he was able to determine that Bobbie Banks was using the alias Benny Earl Knox was not hearsay because it is not a statement of someone other than the declarant. See Fed. R. Evid. 801(c). Agent's Cavanaugh's statement that he was told by law enforcement authorities that Banks was using the alias Benny Earl Knox was hearsay; however, the statement was elicited by defense counsel on cross-examination. Furthermore, there was no motion to strike any part of Agent Cavanaugh's previous testimony concerning the alias because it was based solely on this hearsay.

If the injection of allegedly inadmissible evidence is attributable to the actions of the defense, the doctrine of "invited error" applies. U.S. v. Lemaire, 712 F.2d 944, 948-49 (5th Cir.), cert. denied, 464 U.S. 1012 (1983). Without a showing of serious jeopardy to the rights of the defendant, reversal is not required. Id. at 949.

Defense counsel deliberately elicited the hearsay testimony in an apparent strategy to attempt to weaken the impact of the evidence identifying Banks as using the Knox alias. A few moments after the colloquy, defense counsel stated, "So the only thing you had is hearsay testimony that Bobbie Banks may have used Benny Knox as an alias." In his closing argument, defense counsel argued to the jury that the government had not meet their burden of proving that Bobbie Banks used the alias of Benny Earl Knox. Although defense counsel's strategy failed, Banks's rights were not seriously jeopardized.

Third, and finally, on re-direct examination, the prosecutor asked Agent Cavanaugh whether Carlos Jackson had told him, on the day that the package was delivered, for whom it was intended. Agent Cavanaugh responded that Jackson told him that "the package was for Benny Earl Knox, and I said -- also known -- he said Bobbie Banks."

The government acknowledges Cavanaugh's statement as hearsay, but argues that the harmless-error doctrine applies. The introduction of inadmissible evidence is harmless and reversal is not required "[u]nless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." U.S. v. Williams, 957 F.2d 1238, 1242 (5th Cir. 1992).

Because Banks did not object to Agent Cavanaugh's statement that Carlos Jackson told him that Banks was also known as Benny Earl Knox, this Court's review is limited to whether the admission

of the statement resulted in a miscarriage of justice. Before the trial concluded, the government introduced an audiotape of Jackson taken by Agent Cavanaugh on June 4, 1992. On the tape, Jackson acknowledges that Banks was also known as Benny Earl Knox. The introduction of Agent Cavanaugh's statement did not result in a miscarriage of justice.

II

Banks next argues that the evidence was insufficient to support a guilty verdict. He argues that he was not the intended recipient of the crack; therefore, he did not have knowing possession of the drugs or knowledge of the conspiracy.

Banks was convicted of possession with intent to distribute crack cocaine and conspiracy for the same offense. To prove possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a), the government must show (1) knowing, (2) possession, (3) with intent to distribute. U.S. v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S.Ct. 332 (1992). To convict Banks of conspiracy to possess crack with intent to distribute, the government had to prove beyond a reasonable doubt (1) the existence of an agreement between two or more people to possess with the intent to distribute crack, (2) Banks's knowledge of the conspiracy, and (3) Banks's voluntary participation in the conspiracy. See Sparks, 2 F.3d at 579.

Lillie Jackson testified that she heard Banks tell her son to get the package when it came. She also testified that she heard

people from California refer to Banks as Benny Earl Knox. The testimony of Banks's defense witnesses that Banks thought the package contained baby clothes could reasonably be rejected by the jury as not credible. A reasonable juror could find that Banks's use of an alias to receive the package demonstrated that he knew that it did not contain only baby clothes. See U.S. v. Marchant, 803 F.2d 174, 175, 177 (5th Cir. 1986)(use of an alias to receive pornography through the mail supports an inference of guilty knowledge). Also damaging to Banks's case was Tara's statement when asked by the prosecutor what she would have done upon finding that the package of baby clothes contained drugs. Groves stated that she would have asked Banks about it.

The evidence was sufficient to establish that Banks was the intended recipient of the drugs. Because the drugs were obviously shipped by a second party, the evidence was also sufficient to establish that Banks knowingly agreed to participate in the conspiracy. Further, the amount of crack cocaine involved, $12,000 to $15,000 worth, was sufficient to infer the intent to distribute. See U.S. v. Romero-Reyna, 867 F.2d 834, 836 (5th Cir. 1989).

III

Banks also argues that the district court erred by denying his requested jury instruction that the testimony of a witness who hopes to gain more favorable treatment should be regarded with care and caution. He argues that the evidence adduced at trial established that Lillie Jackson, Carlos Jackson, and Tara Groves

were potential defendants in the case; therefore, the instruction was warranted.

A cautionary accomplice instruction may be appropriate if an accomplice testifies against a defendant. See U.S. v. Bernal, 814 F.2d 175, 183 (5th Cir. 1987). Carlos Jackson and Tara Groves testified as a defense witnesses. Their testimony was intended to be favorable to Banks. Thus, the cautionary instruction was not substantively correct as applied to the testimony of Carlos Jackson and Tara Groves.

Lillie Jackson testified against Banks; however, the district court correctly determined that Jackson was not a possible defendant in the case and had not been favored with better treatment in exchange for her testimony. Nothing in the record indicates that Mrs. Jackson was considered a possible defendant in the case.

Banks argues that Mrs. Jackson may also have been concerned about Carlos's and Tara's liability; therefore, the jury should have been instructed "to take this potential into consideration[.]" The district court did instruct the jury that, in assessing a witness's credibility, it should consider whether the witness had a particular reason not to tell the truth or whether they had a personal interest in the outcome of the case. Thus, the district court's refusal to give Banks's requested instruction was not an abuse of discretion.

IV

Banks also argues that the district court committed plain error by allowing the prosecutor to insinuate that the witness, Carlos Jackson, had been arrested with crack cocaine and was a member of a gang.

As a general rule, Fed. R. Evid. 608(b) prohibits the admission of extrinsic evidence, including evidence of conduct that has not resulted in conviction of a crime, solely for the purpose of attacking the credibility of the witness. U.S. v. Martinez, 962 F.2d 1161, 1164 (5th Cir. 1992); U.S. v. Blake, 941 F.2d 334, 338 (5th Cir. 1991), cert. denied, 113 S.Ct. 596 (1992). Extrinsic evidence may, however, be admissible if it tends to show bias in favor of, or against, a party. Martinez, 962 F.2d at 1165. The probative value of admitting the evidence must substantially outweigh any prejudicial effect under Fed. R. Evid. 403. Id.

During his cross-examination of Jackson, the prosecutor asked Jackson what kind of tatoo he had on his chest. Jackson responded "Eight ball." The prosecutor also asked Jackson to explain a drawing found in Jackson's closet. When the prosecutor asked Jackson whether the drawing said "Eight Ball Possee" and "Naming a few," Banks's attorney objected, arguing that "[t]his has nothing to do with my client[.]" The prosecutor argued that the questioning was relevant to Jackson's credibility and his loyalty to Banks. The district court overruled the objection, and the

prosecutor asked Jackson whether "those names do exist." Jackson responded, "No. You know, they exist but, you know, not really."

The government argues that Banks's objection to the admission of the gang testimony was on the basis of relevancy; therefore, the objection was not effective to preserve appellate review of Banks's argument that the testimony was improper impeachment evidence. In responding to Banks's objection at trial, however, the prosecutor argued that the evidence was relevant to truthfulness and to bias. Thus, the admissibility of the evidence was before the district court in the overall context of impeachment material, and Banks's objection is sufficient to preserve appellate review.

In U.S. v. Abel, 469 U.S. 45, 49, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), the Supreme Court held that testimony regarding a defense witness's and the defendant's gang membership was permissible extrinsic evidence of bias. The Court reasoned that the evidence was relevant because "[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." Id. at 51.

Banks argues that any the evidence of Jackson's gang membership was not relevant because the government never introduced evidence that Banks also belonged to the gang; therefore, bias could not be established. See Martinez, 962 F.2d at 1164. This argument is not without merit; nevertheless, there still is no basis for reversible error. In the first place, the evidence is

harmless to Bank's himself since it only suggests Jackson's gang membership. Second, it is harmless to Banks's case.

The prosecutor's stated reason for introducing the testimony was to impeach Carlos Jackson's veracity as a witness and to establish Jackson's bias for Banks. The government introduced into evidence an audiotape of Jackson's statement to Agent Cavanaugh on June 4, 1992, and an audiotape of Jackson's statement to Banks's attorney shortly before trial. In each tape, Jackson gave a different account of the incident, both of which differed from the version he gave at trial. Because Jackson's credibility was undoubtedly so damaged by his giving three versions of the incident, any effect the evidence of gang activity had on the jury's verdict was harmless. See Williams, 957 F.2d at 1242.

Banks also argues that a witness may not be impeached by evidence of arrests not resulting in conviction and that possession of a controlled substance is not admissible evidence of conduct probative of truthfulness. Banks did not timely object to the introduction of the testimony regarding Jackson's arrest. Thus, review is limited to plain error, error so fundamental as to have resulted in a miscarriage of justice. Martinez, 962 F.2d at 1166.

When the prosecutor asked Jackson whether he had been "found to have 12 rocks in [his] socks the other day" and whether Jackson had been arrested or charged with possession of crack, Jackson responded negatively. The prosecutor then abandoned that line of

questioning. As discussed above, Jackson's credibility was thoroughly undermined by the prosecutor's introduction of tape recordings of Jackson's contradictory statements. The prosecutor's limited reference to Jackson's arrest did not result in a miscarriage of justice.

V

Banks argues that his trial counsel rendered ineffective assistance of counsel. He argues that his counsel's failure to move to exclude the damaging hearsay evidence and the inadmissible evidence of Jackson's arrest and gang activity was deficient and that reversal of his conviction is required.

A claim of ineffective assistance of counsel generally cannot be addressed on direct appeal unless the claim has been presented to the district court; otherwise there is no opportunity for the development of an adequate record on the merits of that serious allegation. U.S. v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992).

Banks presented his claim of ineffective assistance in the district court at sentencing. Banks made vague assertions of ineffectiveness including a claim that his trial counsel came to see him only once before trial. Claims of ineffective assistance can be resolved only on direct appeal when the record has provided substantial details about the attorney's conduct. U.S. v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991). The record in this case is devoid of substantial details regarding trial counsel's conduct. Accordingly, we decline to address the merits of this claim without

prejudice to Banks's right to raise the issue in a proper § 2255 motion. See U.S. v. Higdon, 832 F.2d 312, 314 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

VI

For reasons stated herein, the conviction of Bobbie Bank is

A F F I R M E D.