IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7235
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUSSELL JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Mississippi
(CR 92 113 S)

(September 15, 1993)

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

PER CURIAM:[*]

Russell Johnson[1] was convicted by a jury of two counts of possession with intent to possess "crack" cocaine (count one) and powder cocaine (count 2), in violation of §§ 841(b)(1)(B) and 841(b)(1)(C). The jury ultimately made no finding regarding a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[1]Because two of Johnson's sisters, Valarie and Mary Johnson, testified at trial, Johnson will be referred to as "Russell" hereinafter.

charge under § 843 that he used a communication facility with intent to distribute cocaine (count three). The district court imposed a 75-month term of imprisonment in a guideline range of 70 to 87 months. Russell filed a timely notice of appeal.

I

Russell argues that the district court erroneously denied his motion for mistrial, which was based upon the coercive nature of the events surrounding the polling of the jury.

This court reviews a refusal to grant a mistrial under an abuse-of-discretion standard. U.S. v. Baresh, 790 F.2d 392, 402 (5th Cir. 1986).

A judge's charge to the jury that unduly coerces a verdict was addressed in Allen v. U.S., 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). An Allen charge is reviewed for abuse of discretion. U.S. v. Kelly, 783 F.2d 575, 577 (5th Cir.), cert. denied, 479 U.S. 889 (1986).

"When a verdict is returned and before it is recorded the jury shall be polled at the request of any party . . . . If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged." Fed. R. Crim. P. 31(d). However, "forcing a doubtful juror to state his verdict in the presence of the court, without further deliberation with other jurors, amounts to coercion." U.S. v. Edwards, 469 F.2d 1362, 1367 (5th Cir. 1972). Russell argues that the district court's instruction to return for further deliberation amounted to

an order by the court to convict, "notwithstanding residual doubts."

Initially, the jury rendered a verdict of guilty on counts one and two, and not guilty on count three. The jury was polled, and the non-unanimity became apparent when one juror maintained that, if Russell were "guilty of one he's guilty of all three." The district court sent the jury back for further deliberation with the following comments:

> Well, obviously we need to send the jury back to make sure the counts, the vote is unanimous as to each count. Don't feel bad about this. It happens. And we'll retire the jury and furnish you with a new verdict form. All right. Let the jury be retired.

After the jury left the courtroom, Russell moved for a mistrial on grounds that the jury was confused because of the non-unanimous verdict and that consequently he would be deprived of a fair trial. The district judge overruled the motion, acknowledged that the jury might have been "confused as to whether or not they had to be unanimous on all three counts," and called the jury back for the following instruction:

> You know, members of the jury, sometimes judges and the court staff do this so much and so many cases throughout the year that we perhaps erroneously assume sometimes that you have understood all my instructions to you ... I want to make it clear to you on the verdict, new verdict form furnished you, you may complete your verdict of guilty or not guilty as to those counts separately that you can unanimously agree to, if any. Any counts you cannot unanimously agree to on a verdict of guilty or not guilty, you may leave blank, if you so desire, if you believe that you reached a total loggerhead and that further deliberation and discussion would not help you resolve that. I don't ever encourage a jury to be unable

> to agree, but certainly I respect your right to so do if that's the case. So I don't want to suggest to anybody that they compromise any conscientious beliefs they have one way or another, and I respect your right. Now, nothing I'm saying here should indicate to you that I believe the defendant is guilty or not guilty as to any count ... Do all of you understand that you can complete your verdict form as to those counts that you unanimously agree on, if you do so unanimously agree, and return that into court as the verdict of the jury? ... You've worked pretty long and hard in there, and I want to make sure you're not confused by my instructions to you.

After deliberating once again, the jury returned a verdict of guilty for counts one and two, and "nothing as to count three." The jurors were again polled to assure unanimity. The district court found that the verdicts were unanimous as to counts one and two, and the court ordered a mistrial as to count three. The government then moved to dismiss that count, and the motion was granted.

The supplemental instruction given by the district court was not a traditional Allen charge. See U.S. v. Cheramie, 520 F.2d 325, 330 n.3 (5th Cir. 1975). "Where it is alleged that a supplemental charge coerced the jury in its decision-making, this [C]ourt examines not only the language of the additional instruction but also the facts and circumstances which formed the context for the judge's remarks." Id. at 328.

The district court did not abuse its discretion in Johnson's case. The combination of the individual circumstances did not rise above the discretion given to the district court in instructing the jury. See id. at 331; U.S. v. Gambino, 951 F.2d 498, 502 (2d Cir.

1991), cert. denied, 112 S.Ct. 1962 (1992). "`The district court's charge did not refer to the expense of a second trial or the need for the minority to reconsider its votes, imposed no coercive deadline, made no t[h]reats of marathon deliberations, and exerted no pressure for the surrendering of conscientiously held minority views.'" U.S. v. Warren, 594 F.2d 1046, 1050 (5th Cir. 1979) (citation omitted). These are "the coercive elements found impermissible by this [C]ircuit." Id. Rather, the district judge emphasized that, in giving the instruction, he was not recommending unanimity or suggesting any particular verdict.

Further, although the court is generally prohibited from "attempting to extract unanimity by questioning from the bench," because the juror's confusion was the cause of the apparent unanimity, the supplemental instruction given together with a general question whether the instruction was understood, was permissible before retiring the jury under Rule 31(d). See Edwards, 469 F.2d at 1367 & n.5. As indicated by the second verdict and subsequent polling, the supplemental instruction was sufficient to cure any confusion.

We therefore hold, the district court's denial of Russell's motion for a mistrial did not amount to an abuse of discretion.

II

Russell argues that the evidence was insufficient to support his conviction.

Trial testimony indicated that Russell told his sister, Valarie Johnson ("Val"), to pick up a package at the post office. The package, sent from California, was addressed to Val. Val testified that she did not know the return addressee and that Russell had never sent packages to himself in her name before. Val's boyfriend took her to the post office to pick up the Express Mail package, and she inquired at the clerk's window while he waited. Val did not have a receipt. The post office clerk, recalling that someone by the name of "Val" had written some bad checks, went to discuss the matter with his supervisor. Suspicions were aroused when Val left the post office without waiting for the clerk to return. Postal inspectors were then notified about the package. The package was held for inspection.

Russell apparently telephoned later, inquiring about the package, then went to the post office after it had closed to inquire again, ringing the night bell. Russell was not given the package and was told that it was not available. The next day, Russell and Val went to the post office to pick up the package, but the post office was closed. Val testified that she told Russell to wait for the package to be delivered. The package was delivered that afternoon in a controlled delivery while Val was taking a shower.

The following events led up to the controlled delivery: Mike Hesse, a U.S. postal inspector, verified that the return address on the package was non-existent. Hesse testified that fictitious

return addresses were involved in 90% of the cases in which drugs were found in packages. The package was presented to a trained narcotics dog, which alerted that the package contained narcotics. After obtaining a search warrant, the package was opened and found to contain a heavily-taped fabric softener box, which in turn contained a large plastic bag filled with white powder, later found to be nearly 38 grams of cocaine powder, and a napkin containing "rocks, a white rocky substance," later tested to be 9.8 grams of "crack" cocaine. An expert testified that the powdered cocaine was 95% pure, the crack cocaine, 93% pure. Hesse testified that the amounts involved exceeded that normally retained for personal use. He further testified that the controlled substances had a street value of $13,000 and a "pure form" value of $1525.

A controlled delivery involving eight individuals was then organized. The Express package was delivered at Val's residence by a postal service employee, and the return-receipt was signed by Russell's other sister, Mary, who stood in the driveway while agents and detectives waited undercover in three vehicles. Mary then gave the package to Russell, who was also standing in the driveway near the carport at the time of delivery.

When the post office employee delivered the package, the agents were alerted by radio to enter Val's home. Hesse entered the front door with another postal inspector and a police officer. They gained control of several children and adults therein, then searched for the package.

Captain Gregory Harris was assigned to enter through the side door leading from the carport to the kitchen. Upon entering, he observed Russell holding a brown, partially transparent bag in which the express package was discernable. Russell threw the package down, and Harris testified that Mary picked it up. Harris decided to move from the doorway to recover it from Mary, thereby allowing Russell to exit through that door and run away. After Harris recovered the package, he and other agents then pursued Russell, who ran swiftly down a nearby railroad track. When Russell escaped his string of pursuers, Harris returned and delivered the package to Hesse.

Mary testified on behalf of Russell, alleging that she and Val had been expecting packages from relatives in Germany. She testified further that Russell was expecting a package from Germany for his upcoming birthday. She denied having picked up the package after Russell threw it. A letter carrier also testified that he had delivered other packages to the residence after the incident.

Russell maintained throughout trial that the evidence was insufficient to convict him. Upon the close of the government's evidence, Russell moved for judgment of acquittal. The motion was denied. At the close of all evidence, Russell renewed his motion for acquittal. The motion was again denied. Russell now argues that, because of the "extremely circumstantial nature of the evidence presented," a rational juror could not find him guilty, even when viewed in the light most favorable to the government.

"In order to convict a defendant of possession of a contraband with intent to distribute . . . the government must prove beyond reasonable doubt the defendant's possession of the illegal substance, knowledge, and intent to distribute." U.S. v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992) (citation omitted), cert. denied, 113 S.Ct. 1291 (1993). The elements of guilty knowledge and intent to distribute can be proved by circumstantial evidence. "The test is not whether the evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." U.S. v. Salazar, 958 F.2d 1285, 1294 (5th Cir.), cert. denied, 113 S.Ct. 185 (1992). We weigh all reasonable inferences derived from the evidence in a light most favorable to the verdict. U.S. v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). Contrary to Russell's contention, the circumstances of this case clearly allow an inference of Russell's guilt.

Although Russell argues that the evidence failed to prove that he had any personal interest in the package, the evidence demonstrates that Russell exhibited a keen interest in the package up to the time of its delivery. Russell was later found in actual possession of the package, which he had quickly inserted in the brown plastic bag after Mary gave it to him. His interest in the package ended only when he was observed by the officers. His

decision to throw down the package allows an inference of his guilty knowledge.

Furthermore, Russell then fled. Although not alone determinative, Russell's undisputed flight from the scene after tossing the package is a factor strongly supporting an inference that he committed the elements of the drug offense knowingly and intentionally. See U.S. v. Lopez, 979 F.2d 1024, 1030 (5th Cir. 1992), cert. denied, 113 S.Ct. 2349 (1993). Russell argues that he fled in the confusion resulting from the mass invasion of law enforcement officers and that the testimony presents some uncertainty whether the authorities announced themselves as postal agents and ordered him to stop. Although Harris was unsure whether such an announcement was made, he testified that Russell was specifically told to halt by one of the postal inspectors while he was fleeing. Considered in a light most favorable to the verdict, Russell's flight, considered together with his tossing of the package after his initial interest in it, undoubtedly allows an inference of his guilt.

Further, Russell's intent to distribute may also be inferred from the evidence; the amount of cocaine involved exceeded that reasonably used for personal consumption. See Ojebode, 957 F.2d at 1223 (citation omitted); see U.S. v. Kaufman, 858 F.2d 994, 1000 (5th Cir. 1988) (amount of marijuana possessed by defendant found not to be for personal consumption), cert. denied, 493 U.S. 895 (1989).

In summary, because the evidence presented at trial supports Russell's conviction, i.e., a reasonable juror could have found him guilty as charged.

III

Finally, Russell argues that, because he was acquitted of the charge in count three, using a communication facility to commit a felony, a rational jury could not have found him guilty of counts one and two. Russell analogizes to severance law, citing U.S. v. Almeida-Biffi, 825 F.2d 830 (5th Cir. 1987), and argues that the verdicts were "irreconcilable," because in order to believe the core of one count, the jury must necessarily disbelieve the core of the other. Russell contends that his convictions must therefore be reversed, supporting his analogy to severance law by alleging that there is "no case law directly on point." Russell's analogy is misguided and ignores relevant law.

In a multiple-count indictment, "even if the counts were overlapping, the law does not require consistency of verdict between the separate counts. Inconsistent verdicts may simply be a reflection of the jury's leniency." U.S. v. Peña, 949 F.2d 751, 755 (5th Cir. 1991) (citations omitted). Because the jury was free to find Russell guilty of counts one and two without rendering a verdict on count three, Russell's argument is meritless.

A F F I R M E D.