UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7292
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR LOPER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi
(CR S92-00060-P)

(March 31, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Arthur Neal Loper (Loper) was convicted by a jury of conspiracy to possess cocaine with intent to distribute the same, a violation of 21 U.S.C. § 846. He brings this appeal, challenging, *inter alia*, the use of certain recorded statements at his trial. Finding no reversible 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

On July 7, 1992, Agent Gene Williams, Jr., of the Bureau of Alcohol, Tobacco & Firearms (ATF) received information from a cooperating individual that a Joseph Brown (Brown) from Gulfport, Mississippi, had expressed a desire to purchase five kilograms of cocaine.[1] After learning that Brown had the money together, Agent Williams and the cooperating individual travelled to Gulfport where they met with agents of ATF and the Drug Enforcement Administration (DEA) to plan the investigation.[2] The agents obtained rooms at the Biloxi Beach Motor Inn (the motel) in Biloxi, Mississippi: the cooperating individual in Room 143 and the agents next door in Room 145, a connecting room. With the cooperating individual's consent, the agents set up electronic surveillance of Room 143.[3]

In the morning or early afternoon of July 9, the cooperating individual contacted Brown by telephone from the motel room. Shortly thereafter, Brown and Greg Lizana (Lizana) arrived at the motel room. Brown and Lizana made numerous telephone calls from the telephone in Room 143 in an attempt to find purchasers for the

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[1] The cooperating individual and Brown agreed upon a price of $16,000 per kilogram if all five kilograms were sold to one buyer, or $20,000 per kilogram if sold to five different buyers.

[2] Also on the investigation were agents of the Mississippi Bureau of Narcotics and members of the DEA task force.

[3] The agents made cassette recordings of incoming telephone calls when no prospective defendants were in Room 143. During the entire day of July 9, 1992, a Nagra reel-to-reel recording device ran continuously, picking up conversation in the room. When prospective defendants were present, telephone conversations were not recorded, although the agents were able to record, on the Nagra reel-to-reel device, the side of the telephone conversation carried on in the room.

cooperating individual's five kilograms of cocaine. The phone logs of the motel revealed that one of these telephone calls was to Loper's pager. Lizana carried a phone book in his pocket which contained Loper's telephone numbers at home and for his pager.

Lizana testified that Loper had called him four or five days before the events at the motel in Biloxi to ask if Lizana knew of anyone with some cocaine.[4] After Brown contacted Lizana about the cooperating individual's cocaine, Lizana called Loper's pager from the motel room. When he returned the call, Loper indicated that he had $11,500, enough to purchase half a kilogram of cocaine, and that he would contact his connection to arrange for more money; Loper had previously told Lizana that he wanted to buy five kilograms.[5]

Around 2:00 that afternoon, Lizana and Brown left the motel to go to Loper's house to discuss the cocaine purchase. Also present at Loper's house was Richard Jackson (Jackson).[6] At approximately 3:20 p.m., Brown and Lizana called the cooperating individual at the motel and informed him they were with the "money man" and were getting the money together for the five kilograms. Loper told Brown and Lizana that he would get more money and meet them at a nearby store. This transpired as arranged.

Lizana telephoned the cooperating individual from the store to

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[4] Lizana had known Loper for approximately eight or nine months at that time and knew of Loper's drug trafficking activities.

[5] Lizana's side of this conversation was recorded.

[6] Jackson testified that he had known Loper for several years and had sold drugs with him before.

let him know they were on the way with the money. Using Lizana as the middleman on the telephone, Loper and Jackson negotiated the details of the cocaine purchase with the cooperating individual. Because the cooperating individual wanted to see some money before proceeding further, Lizana arranged for Loper to "flash" some money at the motel room, after which the parties would drive to nearby DeLisle, Louisiana, to consummate the purchase.[7]

Brown dropped Lizana off at the motel then returned to get Loper and Jackson. Between 4:00 and 4:15, Brown and Jackson arrived at the motel in an Oldsmobile. Loper appeared a few minutes later in a red pickup truck. While Loper waited in the parking lot of the motel, Jackson and Brown entered Room 143, where Lizana and the cooperating individual were waiting. Jackson displayed an amount of United States currency to the cooperating individual.[8] Lizana, Brown, and Jackson left the motel room to drive to DeLisle for the actual exchange. They were arrested, along with Loper, when they reached the parking lot.

Loper was charged with, and convicted of, conspiracy to possess with intent to distribute cocaine.[9] At the sentencing hearing, the district court imposed the statutory minimums of 120

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[7] Loper expressed some reluctance to Lizana and Jackson about flashing the money at the motel; he feared either that he would be robbed or that there was a police set-up. The cooperating individual's plan prevailed, however.

[8] This money totalled approximately $10,500.

[9] Loper's co-defendants, Brown, Lizana, and Jackson, were charged in the same indictment. All three pleaded guilty to the charged offense and were sentenced in separate proceedings. They are not party to this appeal.

months imprisonment and 8 years supervised release, a $6,456.80 fine, and a $50 special assessment.

Loper now appeals his conviction.

Discussion

I. Evidence of Recorded Statements

Loper first argues that the district court erred in allowing the government to introduce evidence of the conversations recorded in Room 143 on July 9. We review the admission of evidence at trial for an abuse of discretion. *United States v. Coleman*, 997 F.2d 1101, 1104 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 893 (1994).

The government sought to introduce the original Nagra tape recording made of Room 143 on July 9, the original cassette recording of two telephone conversations made to Room 143 on July 9 when no prospective defendants were present in the motel room, and redacted copies of both recordings. Over an objection by the defense, the district court admitted the tapes and the redacted copies. Transcripts prepared from the redacted copies were marked for identification purposes only. The redacted copies of the Nagra tape recording and the cassette recordings of the telephone calls were played to the jury. The transcripts of these recordings were published to the jury.[10]

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[10] In the Nagra recording made on July 9 at 1:46 p.m., Lizana referred to the fact that Loper had not yet returned his page:

> "F---king Neil [sic] ain't called back yet, Neil [sic], see what I mean . . . he went to get some money. This boy is buying like 2 or 3 . . . They left with him and when he and Petey went down to Pascagoula, ah, yesterday, they offered a pound of weed, him and Petey

The district court admitted evidence of the statements on the theory that they fell within the co-conspirator exception to the hearsay rule. FED. R. EVID. 801(d)(2)(E). Under this exception, statements of co-conspirators made during the course and in furtherance of the conspiracy are admissible when offered against a party provided the government demonstrates the existence of a conspiracy by a preponderance of the evidence. *United States v. Beaumont*, 972 F.2d 553, 565 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1953 (1993).

The government satisfactorily proved the existence of the conspiracy. Loper contends, however, that the contested statements were made by co-conspirators at a time before he joined the conspiracy, and thus fall outside this exception to the hearsay rule. There was ample evidence to the contrary. Lizana testified that Loper called him four or five days before July 9 to ask if he had any cocaine available. Furthermore, Loper "recruited" Jackson

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bought, ah, what it was, two or three ounces of . . . ."

In a later part of the Nagra recording, made at 2:16 p.m., Lizana refers to Loper as his "partner" in a conversation with the cooperating individual.

The cassette recording of an incoming telephone call to Room 143 at 3:35 p.m., of a conversation between the cooperating individual and Lizana, contains the following:

"Lizana: (Talking to someone else) Yeah, he's [the cooperating individual] goin [sic] ahead Joe . . . (To cooperating individual) Hey, hey man, the dude, the dude, we got the dudes with the money, man.
"CI: Yeah, I know they right there, what's, what's that old boy name again?
"Lizana: Neal!
"CI: Let me holler at Neal . . .
"Lizana: Ah, he, he, just went in the store to get us some drinks and s--t, man."

to participate in the transaction on the morning of July 9, evidencing his involvement in the conspiracy prior to the time the statements were recorded that afternoon.[11]

Even if we were to find that Loper did not join the conspiracy until later, Lizana's testimony on the stand paves the way for the admission of the bulk of the statements. The government played the recordings to the jury during its direct examination of Lizana. Prior to the playing of the tapes, Lizana testified about the events of July 9 and described of his own account the content of his conversations in Room 143 and over the telephone.

A statement is not hearsay if not offered to prove the truth of the matter asserted. FED. R. EVID. 801(c). In this instance, the recordings fall outside of the hearsay definition. The government did not offer the tapes to prove the truth of any statement on the tapes. Rather, the tapes were offered to show that the statements to which Lizana had testified, subject to cross-examination, were in fact made.

The district court did not abuse its discretion in allowing the government to introduce this evidence.

II. Transcripts of Recorded Statements

Loper also challenges the government's use of the redacted transcripts of the recorded statements at his trial. The decision to permit a jury to have the use of transcripts is within the sound

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[11] Jackson testified that "[O]n the morning of . . . July 9th, I went to visit Neal. And when I went to visit Neal that morning, he more or less told me that he had a friend that was coming in into [sic] town, and, you know, he was going to be bringing in some drugs."

discretion of the district court. *United States v. Rena*, 981 F.2d 765, 767 (5th Cir. 1993). In this case, the district court marked the transcripts for identification purposes only; they were never formally introduced into evidence, nor were they given to the jury during its deliberations.

During the trial, the government played the redacted tapes for the jury and provided transcripts of those tapes for listening purposes. The government also used the transcripts in questioning its witnesses. The defense did not object to either use. Although Loper now claims that the district court should have given a limiting instruction to the jury on the use of the transcripts, he did not request such an instruction below.

We thus review Loper's claims for plain error. Plain error is error so obvious that our failure to address it would result in a miscarriage of justice. *United States v. Surasky*, 974 F.2d 19, 21 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1948 (1993).

We conclude that no plain error is implicated here. Loper has made no showing that the transcripts were inaccurate, nor has he attempted to rebut the government's evidence to the effect that the transcripts were accurate and that the recording equipment was functioning properly. Our conclusion is further supported by the simple fact that the contents of the transcripts do not add significantly to the testimony of the government's witnesses. *See United States v. Rena*, 981 F.2d at 767-769 (no plain error where defense failed to object to use of transcripts obtained through wiretap; although transcripts contained synopses of conversations and parenthetical interpretations, meanings of key words in

transcripts were clear even without extraneous commentary).

The district court did not abuse its discretion in permitting the government to use the transcripts to question witnesses and to aid the jury in listening to the redacted tapes.

III. Evidence of Prior Drug Dealings

Loper next contends that the district court abused its discretion in admitting evidence of extrinsic offenses. Before trial, defense counsel made a motion *in limine* to prevent the government from introducing evidence of Loper's previous drug activities. The district court reserved its ruling on the motion until the time the government proposed introducing the challenged evidence.

Both Lizana and Jackson referred to Loper's prior drug trafficking activities in their testimony.[12] The defense did not

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[12] On redirect examination, Lizana testified to his knowledge of Loper's drug activities:

> "Q. . . . Did you have any hesitancy whatsoever -- when [Loper] said, `I can do five kilos,' did you believe him?
> "A. I believed him at the time.
> "Q. Why did you believe him at the time?
> "A. Because that's what he asked me to help him find.
> "Q. All right. What, if anything, indicated to you that he could move five kilos of cocaine?
> "A. Well, I've known him just about almost a year or so, and I've known him to be trafficking drugs."

Jackson testified on direct examination as follows:

> "Q. All right. Do you know what, if anything, Mr. Loper does for a living?
> "A. Well, when I was together -- we sold drugs together, sir. That's all I know of.
> * * * * * *
> "Q. All right. How did [Loper] know that you had the money?
> "A. Because we had worked together before.

object, however, nor did it call upon the district court to rule on the motion *in limine.* Furthermore, Loper did not challenge, either before the district court or on appeal, the sufficiency of any limiting instruction on this issue. Because there was no objection below, we review the admission of the extrinsic evidence for plain error.

The Federal Rules of Evidence prohibit the admission of evidence of extrinsic offenses to prove the character of the defendant in an attempt to show that he acted in conformity therewith. FED. R. EVID. 404(b). This same evidence, however, may be admissible for the purpose of proving, *inter alia*, motive or intent. *Id*. The test for determining the admissibility of extrinsic act evidence is set forth in *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (*en banc*), *cert. denied*, 99 S.Ct. 1244 (1979). First, the court must decide whether the extrinsic offense evidence is relevant to an issue other than the character of the defendant. Second, any undue prejudice created by the evidence must not substantially outweigh its probative value. *Id*.

Although the contested evidence would not be admissible to show Loper's propensity for committing drug offenses, it is admissible to show that he had the motive and intent to participate

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"Q. Worked together. What do you mean worked together before?
"A. Well, basically, you know, I was a drug dealer. So I had the drugs I brought from Texas, brought them to Mississippi. I gave them to him. He sold them and brought my money back. That's basically how it worked."

in the cocaine transaction.[13] The intrinsic facts are not disputed: Loper did not challenge the government's evidence placing him at the motel on July 9 at the time of the arrests nor its evidence that Lizana had called his pager earlier that day. The evidence of his prior drug activities was logically relevant to the government's burden establishing his intent to participate in the conspiracy.

No plain error resulted from the admission of this evidence.

IV. Jury Instruction

Finally, Loper contends that the district court should not have refused his request for a jury instruction on withdrawal from the conspiracy. We will not overturn a district court's refusal to give a requested instruction absent an abuse of discretion. *United States v. Thomas*, 12 F.3d 1350, 1365 (5th Cir. 1994) (on petition for rehearing).

Loper asserts that he withdrew from the conspiracy when Brown, Lizana, and Jackson agreed to take the money to the motel to show it to the cooperating individual. Loper told Jackson that he did not want to go into the motel, nor did he want Jackson to go alone. He characterizes these as a refusal to continue with the object of the conspiracy.

The evidence at trial is to the contrary. Jackson testified that Loper was apprehensive about the transaction, fearing either

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[13] Loper put his intent at issue when he pleaded not guilty to the conspiracy charge. *United States v. Gadison*, 8 F.3d 186, 192 (5th Cir. 1993).

that they would be robbed or that it was a police setup.[14] Jackson stated that Loper never indicated that he did not want to complete the transaction, but only that he was reluctant to meet at the motel room. After Jackson entered the motel room, showed the cooperating individual the money, and returned to the pickup truck where Loper was waiting, Loper expressed interest in the viability of the transaction, asking Jackson about what had occurred in the motel room. Furthermore, when Loper saw the law enforcement agents in the parking lot, he warned Jackson to run. Finally, Lizana testified that, although Loper expressed some apprehension about meeting at the motel, Loper had never indicated to him that he did not want to go through with the planned transaction.

Contrary to Loper's contention, the evidence does not support his claim that he withdrew from the conspiracy. The district court did not abuse its discretion in refusing to submit the requested jury instruction.

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[14] The district court questioned Jackson directly on this point:

> "THE COURT: Of your own knowledge, do you know why [Loper] told you not to go [to the motel] and why he said he was not going?
> "[JACKSON]: Because it goes back to -- because of this right here: Because he felt like that he was either going to get robbed when we got down there -- you know, meaning somebody was going to be down there without -- you know, without the drugs, and you get robbed or shot, or because the police were there, and you get set up.
> "THE COURT: Did he tell you that?
> "[JACKSON]: Yes, sir. He said he felt like, you know, it was a police thing all along because he said he felt like something was wrong.
> "THE COURT: Were you expecting to see him drive up in a red pickup when he did?
> "[JACKSON]: No, sir, I wasn't."

Conclusion

For the reasons stated above, Loper's conviction and sentence are

AFFIRMED.