UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7563
Summary Calendar

UNITED STATES OF AMERICA,,

Plaintiff-Appellee,

versus

JOSE RUBEN PENA, JR., et al,

Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas
(CR-M93-016-01,03&02)

(September 29, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Jesus Maria Pena, Jose Ruben Pena, Jr., and Leonardo Galvan, Jr., appeal their convictions and sentences related to drug conspiracy and possession charges.

The appeals of Jose Ruben Pena, Jr. and Leonardo Galvan, Jr., raise only one issue, an issue also raised by Jesus Maria Pena.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The single issue that all three defendants raise is whether the trial court committed plain error in failing to conduct a hearing to determine whether a communication between a juror and the court's law clerk was harmless. Because the defendants did not request a hearing at the time that they were advised of this communication, and did not file an objection or request that any further action be taken, the plain error standard of review applies. The error is not plain because it is not "clear" or "obvious" that the communication at issue involved "a matter pending before the jury." See United States v. Fryar, 867 F.2d 850, 853 (5th Cir. 1989). The only communication referred to by the defendants is the juror's statement to the law clerk that it bothered her that a relative, presumably of one of the defendants, was taking notes during the trial and spoke to counsel during the trial. The defendants have not demonstrated how this communication had any bearing on the matter pending before the jury or was prejudicial to the defendants. It is, therefore, not clear or obvious and we will not review it.

Thus, having rejected the only issues that Jose Ruben Pena, Jr. and Leonardo Galvan, Jr. raise, their convictions and sentences are affirmed.

We return now to the issues raised by Jesus Maria Pena. After carefully considering the arguments that he has raised in his comprehensive brief, we hold, with respect to each of the respective points raised on appeal, as follows:

1. The admissibility of expert testimony is reviewed by us under the manifest error standard of review. United States v. Moore, 997 F.2d 55, 57 (5th Cir. 1993). Here, the district court allowed Sergeant Sandoval to testify as an expert based on his twelve years of law enforcement experience and upon facts within his personal knowledge. He gave his opinion with respect to whether counter-surveillance was being conducted by a vehicle on the night that he was conducting surveillance of the defendants. Generally, expert opinion is admissible under the Federal Rules of Evidence so long as it satisfies the requirements set forth in those rules, see Fed. R. Evid. 701, et. seq., and the expert's testimony may take the form of an opinion if it serves to inform the jury about affairs not within the understanding of the average person. Moore, 997 F.2d at 57. Here, we do not think that the district court erred in concluding that Sandoval's opinion was admissible and certainly we cannot conclude that it was manifest error.

2. Jesus Maria Pena next raises the sufficiency of the evidence both with respect to the conspiracy conviction and the simple possession conviction. With respect to the conspiracy, from the record of this case, it is clear to us that a reasonable jury could have determined that the evidence reflected that 1) Jesus Pena conducted counter-surveillance while the other codefendants participated in loading the large amount of marijuana into the vehicle, 2) that after the initial loading operation, Jesus drove

Ruben Pena from his residence to the warehouse, and 3) that he agreed to meet with the other co-conspirators at the Conoco store after the loading operation was completed. With respect to the sufficiency of the evidence to support Pena's simple possession conviction on Count 3 for the possession of 807 grams of marijuana found in his pickup truck, he did not make a motion for judgment of acquittal from this count. Whether we view this issue under the plain error standard or not, we arrive at the same conclusion and that is that viewing the evidence in the light most favorable to the government, a rational jury could have found that Pena was in possession of the marijuana found in the partially uncovered ice chest located in the open bed of Pena's pickup truck, which he had exited shortly before the marijuana was discovered. Consequently, this issue lacks merit.

3. Pena next claims that he was entitled to an adjustment of his base offense level for his minimal participation in the crimes charged. The district court reduced Pena's offense level by two levels, determining that he was a minor participant in the offense. The record supports the view that Pena was an integral part of the entire loading operation. Therefore, the district court's finding that Pena was not a minimal participant is not clearly erroneous.

4. Pena next argues that the district court clearly erred in concluding that Pena knew or should have known that more than 1,000 pounds of marijuana were involved in the conspiracy and in determining that he was accountable for more than 1,000 pounds of

marijuana for sentencing purposes. He argues that the trial court's findings are erroneous because the prosecution did not open each of the packages found in the tanker to determine if they contained marijuana. The officers testified that the packages smelled of marijuana. Pena did not present any evidence to controvert the government's assertion that the packages contained marijuana or that its method of weighing the drugs was inaccurate. We thus conclude that the district court's finding that the drug conspiracy involved 1,012 pounds of marijuana was not clearly erroneous.

5. The next issue Pena presents is whether the district court failed to make sufficient findings as to the amount of drugs that Pena knew or should have known were involved in the conspiracy. Although the district court did not expressly make a finding of the amount of drugs involved in the conspiracy "reasonably foreseeable" to Pena, by determining the actual amount involved in this limited conspiracy, by accepting the government's argument regarding reasonably foreseeability, and by adopting the PSR, the district court implicitly determined that the drug quantity involved was reasonably foreseeable to Pena.

6. Finally, Pena argues that the district court erred in interrupting his closing argument to instruct the jury that the weight of the marijuana involved in the offense was not a factor to be determined by the jury. Pena concedes that this court has held that proof of the drug quantity involved in the offense is not the

element of a drug conspiracy crime, but is a factor to be considered at sentencing. In other words, the quantity of drugs involved does not go to guilt or innocence of the crimes with respect to which Pena was charged, and the court's instruction to the jury to that effect was not erroneous.

Having considered each of the arguments made by the defendants in this case, we conclude that each and every point lacks any merit that requires the reversal of the judgment of conviction and the sentences imposed. Therefore, the district court is, in all respects

A F F I R M E D.