IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7667

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SERGIO GARZA and RUBEN ANTONIO RODRIGUEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(92-CR-209)

November 15, 1995

Before KING, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Ruben Rodriguez appeals his conviction of engaging in a continuing criminal enterprise ("CCE"), possession of marihuana with intent to distribute, and money laundering. All issues are raised for the first time on appeal. Finding no plain error, we affirm.

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[*]Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Sergio Garza appeals his sentence for conspiracy to possess marihuana with intent to distribute and aiding and abetting the possession with the intent to distribute marihuana. Because we hold that the trial court's factual findings are not clearly erroneous, his sentence is affirmed.

I.

This case arose from an investigation by the Drug Enforcement Administration into a marihuana-trafficking enterprise, leading to the seizure of several loads of marihuana and cash and the eventual arrest of the defendants. The marihuana seizures are referred to as the "Falfurrias Load" (3940 pounds), the "Callaghan Ranch Road Load" (1981 pounds), the "H.E.B. Load" (278 pounds), the "San Marcos Load" (778 pounds), and the "San Antonio House Load" (2627 pounds).

A fifteen-count indictment was returned,[1] alleging that Rodriguez was the head of the marihuana-trafficking enterprise, while Garza was the main supplier of the marihuana and was responsible for managing and planning the details of each shipment. The indictment included a notice that Rodriguez's interest in certain property was subject to forfeiture under 21 U.S.C. §§ 853 and 848 and 18 U.S.C. § 982.

[1] The 15 counts were for CCE in violation of 21 U.S.C. §§ 841(a)(1) and 846 (counts 1 and 2); conspiracy to possess marihuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count 3); money laundering to conceal the source of proceeds in violation of 18 U.S.C. §§ 1956(a)(1)(B)(I) and (2) (counts 4, 5, 6, 8, and 12); money laundering to promote drug-trafficking in violation of 18 U.S.C. §§ 1956 (a)(1)(A)(I) and (2) (counts 10 and 15); and possession with intent to distribute marihuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (counts 7, 9, 11, 13, and 14).

Garza was convicted of conspiracy and aiding and abetting the possession with the intent to distribute marihuana. Rodriguez was convicted of CCE (one count), conspiracy to possess marihuana with intent to distribute (one count), possession with intent to distribute marihuana (four counts), money laundering (four counts), and forfeiture (one count).[2]

Rodriguez filed a post-trial motion for return of seized property under FED. R. CRIM. P. 41(e). In response, the government notified him that the personal property had been forfeited before trial in an uncontested administrative forfeiture proceeding. The district court, exercising its jurisdiction to review administrative forfeitures for violations of procedural due process, held that the forfeiture was properly administered.

II.

Rodriguez's first and primary claim is that his criminal conviction violates the Double Jeopardy Clause of the Fifth Amendment. Rodriguez argues that he was placed in jeopardy, first when his property was forfeited in an uncontested administrative forfeiture and second when he was indicted.

Rodriguez's double jeopardy claim is without merit, because an uncontested administrative forfeiture prior to a criminal conviction does not constitute double jeopardy. United States v. Arreola-Ramos, 60 F.3d 188, 192-93 (5th Cir. 1995). See also

[2] At sentencing, the court dismissed the conspiracy charge against Rodriguez because of the constitutional bar on sentencing a defendant to both conspiracy and CCE.

United States v. Baird, 63 F.3d 1213 (3rd Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995) (No. 95-1202); United States v. Torres, 28 F.3d 1463 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994). Rodriguez's claim that he was not notified of the administrative forfeiture until after trial is irrelevant. He does not challenge the administrative forfeiture itself; rather, he asks that we remand so he can raise the double jeopardy claim and preserve it for appeal. To remand would be pointless, as Arreola-Ramos precludes a double jeopardy claim based upon a prior, uncontested administrative forfeiture.

III.

We review the remaining issues for plain error, because Rodriguez raises them for the first time on appeal. United States v. Calverley, 37 F.3d 160, 162 (5th Cir.) (en banc), cert. denied, 115 S. Ct. 1266 (1995). An appellate court may notice errors to which no objection has been made when the error is "plain" and affects "substantial rights." Id. An error is a deviation from a legal rule in the absence of a valid waiver. Id. at 162-63. Plain error is one "which was 'clear under current law' at the time of trial." Id.

Finally, a substantial right is affected when the error is prejudicial; "it must affect the outcome of the proceeding." Id. at 164. The burden of persuasion lies with the defendant to show prejudice. Id. Ultimately it is in the discretion of the appellate court to correct the assigned error. Id.

IV.

Rodriguez asserts error in the testimony of Nancy Sherk and Larry Lovell. The government introduced their testimony to link Rodriguez to the truck used in the Falfurrias Load. Sherk and Lovell testified about telephone conversations with Rodriguez that linked him to the purchase of the vehicle. Rodriguez contends that the testimony should not have been admitted because the government failed properly to authenticate the voice at the other end of the telephone line.

Under FED. R. EVID. 901(a), a telephone conversation must be authenticated as a condition precedent to its admission. United States v. Williams, 993 F.2d 451, 458 (5th Cir. 1993). This requirement is satisfied by evidence reliable enough to show that it is what its proponent claims it to be. First State Bank v. Maryland Casualty Co., 918 F.2d 38, 40 (5th Cir. 1990).

Rule 901(b)(6) provides that authentication can occur for a

> [t]elephone conversation [], by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business, and the conversation related to business reasonably transacted over the telephone.

The illustrations in rule 901(b) are not exclusive; "[a]ll that is necessary in authenticating a phone call is that the proponent offer sufficient authentication to make a prima facie case that would allow the issue of identity to be decided by the jury." First State Bank, 918 F.2d at 41.

A.

Nancy Sherk was a title clerk for Transport Trade Service, the company from which the truck was purchased. She spoke with Rodriguez twice over the phone while preparing paperwork for the purchase. In both instances, she received a telephone call from a man identifying himself as Ruben Rodriguez, a representative of Gateway Express, who told her that he would send payment via Federal Express. Sherk subsequently received a money order listing Gateway Express as the remitter, inside an envelope with Rodriguez's name on it.

Rodriguez argues that Sherk's testimony should not have been admitted, because the government failed to show that she recognized Rodriguez's voice. Rodriguez relies on United States v. Pool, 660 F.2d 547, 560 (5th Cir. Unit B Nov. 1981), for the proposition that "a telephone call out of the blue from one who identifies himself as X may not be, in itself, sufficient authentication of the call as in fact coming from X."

The narrow holding of Pool is inapplicable. There, the only evidence of authenticity was the telephone call itself; there was no circumstantial evidence that could be used to make a prima facie case of admissibility. Thus, the mere existence of a phone call with self-identification by the caller was insufficient for authentication. Id.

Rodriguez has failed to show plain error; the circumstantial evidence supporting authenticity was not clearly insufficient under Pool. See Calverley, 37 F.3d at 162. Sherk testified that she

received a telephone call from a man identifying himself as Rodriguez. Sherk later received payment for the truck in the method described by the caller. The envelope inside the Federal Express package had Ruben Rodriguez's name on it. Guadalupe Rodriguez also testified that Ruben Rodriguez arranged the purchase of the truck.

B.

Lovell testified that he spoke by telephone with Nancy Rogers at Transport Trade Services about the sale of the Freightliner. Rogers gave him Rodriguez's name and phone number, whereupon he called the number and asked to speak to Ruben Rodriguez. The party at the other end of the phone identified himself as that person, answered questions concerning the purchase of the truck, and admitted knowing Guadalupe Rodriguez.

Rodriguez argues that Lovell's testimony is inadmissible on two grounds. First, relying upon the business-number example in rule 901(b)(6), Rodriguez argues that the government failed to introduce evidence that the number Lovell called was that of a business. Second, Rodriguez attacks the reliability of the evidence supporting authenticity, because the government failed to demonstrate that Nancy Rogers is the same person as Nancy Sherk.[3]

Rodriguez's first ground for challenging Lovell's testimony is without merit. What Rodriguez ignores is that the illustrations in

[3] According to the government, Lovell mistakenly referred to Nancy Sherk as Nancy Rogers.

rule 901(b)(6) are not exclusive, but are intended only to provide examples of properly authenticated evidence. The telephone conversation between Lovell and Rodriguez can be authenticated through a method other than the one detailed in the business-number example of rule 901(b)(6).

Rodriguez's second argument against admissibility fails to show plain error.[4] It was not "clear under current law" that the circumstantial evidence of authenticity was insufficient. Sherk's testimony provides evidence that the telephone number she received was from Rodriguez. Guadalupe Rodriguez corroborated Sherk's testimony. The fact that the speaker at the end of the line discussed the purchase of the vehicle and admitted knowing Guadalupe Rodriguez provides sufficient circumstantial evidence that Nancy "Rogers" provided Lovell with the same phone number Rodriguez gave to Nancy "Sherk."

V.

Rodriguez next complains of the exchange between district court and the government over "the mafia." During closing arguments, the following colloquy took place:

GOVERNMENT: Do you think the Mafia lets people in that they don't trust?

[4] We review Lovell's testimony for plain error because the error asserted on appeal differs from the objection raised at trial. See United States v. Greenwood, 974 F.2d 1449, 1463 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). Although Rodriguez objected to Lovell's testimony, the objection stated that "[u]less he knew his voice, it would be hearsay." On appeal, Rodriguez asserts two different reasons for why the telephone conversation was not properly authenticated.

RODRIGUEZ'S COUNSEL: I'm going to object to "The Mafia."

THE COURT: Well, I'm not sure the jury is sophisticated enough that we're not talking about The Mafia of great fame?

Rodriguez claims the court's comments were prejudicial, because the "comment makes the hearer jump to the conclusion that if we are not talking about The Mafia of Great Fame, then we must be talking about some Mafia of lesser fame."

The court's comments did not "seriously prejudice the defendant." See United States v. Canales, 744 F.2d 413, 434 (5th Cir. 1984). It is unreasonable to interpret the comments the way Rodriguez would have us do. The more likely interpretation is that the court responded to the defendant's objection and instructed the jury that the prosecution was not referring to the actual Mafia. The "mafia of great fame" reference was only a clever way of saying that the prosecution was speaking figuratively. This is in fact supported by the court's comment that "[w]e'll leave that as hyperbole here."

VI.

Rodriguez complains that the following instruction created confusion:

> The government doesn't have to prove that it succeeded. In fact, obviously, at least several of the instances involved here were not successful. Or at least not ultimately successful. They were loads that were apprehended. Although if you accept the testimony of Diaz, Rodriguez, and Alardin, there were apparently other loads that were successful. But be that as it may, success is not one of the elements. [Emphasis added.]

The complained-of fault is that the reference to "Rodriguez" is ambiguous. Although the court was referring to Guadalupe Rodriguez, the instruction did not highlight that fact. Because Guadalupe Rodriguez testified briefly, defendant Rodriguez argues that the jury could have forgotten her testimony. Thus, he reasons, the jury could and did infer that the reference to "Rodriguez's" testimony was a reference to testimony by the defendant outside the presence of the jury.

Taken in the context of the entire proceedings, the ambiguity in the jury instructions did not deprive Rodriguez of a fair trial. See United States v. Preston, 608 F.2d 626, 636 (5th Cir.), cert. denied, 446 U.S. 940 (1980). The court's comments amounted to only a few seconds in the trial. See United States v. Onori, 535 F.2d 938, 943 (5th Cir. 1976). While the comments were directed to the jury, the court made a curative instruction——advising the jury that it was the sole trier of fact. See United States v. Saenz, 747 F.2d 930, 945 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985) (finding no plain error when the court instructs the jury that the prosecution has met one of the elements of its case, if a curative instruction was given).

VII.

Rodriguez contends that the district court should have granted his motion for acquittal under FED. R. CRIM. P. 29, because the testimony of his co-conspirators should have been excluded. The basis of his claim is that there was insufficient independent

evidence of a conspiracy to admit the hearsay statements of co-conspirators under FED. R. EVID. 801(d)(2)(E). See United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 971 (1979). Absent the testimony of the co-conspirators, Rodriguez contends that there was insufficient evidence to support the verdict.

Rodriguez has failed to show plain error. Rodriguez did not specify which statements he objects to as hearsay. The admissibility of co-conspirator testimony does not constitute error if the appellant fails to specify to which statements he objects. United States v. Acosta, 763 F.2d 671, 680 (5th Cir.), cert. denied, 474 U.S. 863 (1985) (upholding admission of co-conspirator testimony under James when appellant failed to identify specific hearsay statements).

VIII.

Garza's only challenge is to the district court's determination of what amount of marihuana should be attributed to him for the purpose of sentencing. We review a district court's findings as to the quantity of drugs implicated by a crime under the clearly erroneous standard. United States v. Mitchell, 31 F.3d 271, 277 (5th Cir.), cert. denied, 115 S. Ct. 455 (1994). Factual findings are not clearly erroneous if they are "plausible in light of the record as a whole." United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir.), cert. denied, 115 S. Ct. 180 (1994).

There was sufficient evidence to support the finding that

2,273 pounds of marihuana could be attributed to Garza's conduct. The sentencing guidelines allow conspirators to be sentenced on the basis of their own conduct or the reasonably foreseeable conduct of co-conspirators. United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994). The presentence report concluded, and the district court concurred, that 2,273 pounds was within the scope of the conspiratorial agreement and reasonably foreseeable. A presentence report "generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990).

Additional evidence supports attributing 2,273 pounds of marihuana to Garza. He admits being caught with the H.E.B. Load (278 pounds). Lucio Diaz testified that Garza owned a portion of the Falfurrias Load (3940 pounds) and other unspecified loads. Diaz also testified that Garza and Rodriguez would converse about the condition of a given load after the marihuana was loaded into a tractor trailer. Guadalupe Rodriguez, a courier, testified that he met with Rodriguez and Garza at a gas station and that he called Garza when he arrived at the final destination. Garza would pick up Guadalupe and take him to the place where the load was to be delivered.

AFFIRMED.