

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7683
(Summary Calendar)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
EDDIE RODRIGUEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-B-93-083)

(December 2, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendant, Eddie Rodriguez, appeals his convictions for various narcotics offenses and for carrying a firearm during a drug-trafficking offense. Rodriguez asserts that (1) the district court abused its discretion by refusing to allow the admission of tape-recorded conversations between a confidential informant and his co-defendant and (2) there is insufficient evidence to support his convictions. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Marcus Olguin was arrested on narcotics charges after he negotiated the sale of approximately ten ounces of heroin to a confidential informant. Olguin immediately told the agents that he wanted to cooperate; however, he initially gave the agents a false story about where he got the heroin. When the agents told Olguin that his explanation was not credible, he related that he got the cocaine from Crispin Rodriguez ("Crispin").

As federal agents listened-in, Olguin called Crispin and told him that the deal went fine and that he had the money from the sale of the sample. Olguin and Crispin agreed to meet at a local pancake house to complete the sale. Surveillance of the pancake house was arranged, and Olguin was given a package that looked like money. United States Customs Agent Steve Monks and several other federal agents participated in the surveillance operation. Shortly after midnight, two men exited a vehicle and approached Olguin. Agent Monks identified the defendant, Eddie Rodriguez (Rodriguez), Crispin's cousin, as one of the men. Watching from an unmarked car, Agent Monks observed the men talking and, when he saw Olguin raise the envelope of "money," he moved his vehicle in to effect an arrest. The other federal agents joined him and arrested Olguin, Crispin, and Rodriguez. The agents seized 11 ounces of heroin from the vehicle and discovered that Rodriguez was carrying a firearm. Rodriguez was indicted for the following counts: Count 1, conspiracy to possess

with intent to distribute more than 100 grams of heroin, in violation of 21 U.S.C. §§ 841, 846; Count 2, possession with intent to distribute more than 100 grams of heroin, in violation of 21 U.S.C. § 841; and Count 4, carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. §§ 2, 924(c).

The jury found Rodriguez guilty as charged. The district court sentenced Rodriguez to three 60-month sentences, two of which are to be served consecutively. Rodriguez appeals, asserting that the district court erred in excluding transcripts of coconspirators' conversations and asserting that the evidence was insufficient to support his convictions. We disagree.

DISCUSSION

EXCLUSION OF EVIDENCE

During the government's case in chief, Marcus Olguin testified as follows: Olguin, Crispin, and Rodriguez were co-workers for approximately two years. Olguin asked Crispin whether he knew anyone that had heroin for sale and Crispin replied that Rodriguez did. The three of them (Olguin, Crispin, and Rodriguez) discussed the price of the heroin and Rodriguez told him to "let the deal be made." Rodriguez gave Olguin the sample to be taken the confidential informant, and Rodriguez and Crispin were in the car when the sample was delivered. Later, Rodriguez obtained the bulk of the heroin and gave it to Olguin for delivery. During cross-examination, Agent Monks acknowledged that Marcus Olguin never mentioned that Rodriguez was involved in

the conspiracy until four days before the trial was scheduled to begin.

Rodriguez's counsel cross-examined Olguin at length. Later, during Rodriguez' case-in-chief, defense counsel sought to call Olguin and Agent Monks as witnesses so that he could authenticate and introduce transcripts of the tape-recorded conversations between the confidential informant and Olguin. The Government objected, arguing that the basis of the transcripts was to impeach Olguin and that counsel had every opportunity to do this when he had Olguin on cross-examination. The district court sustained the objection, noting that the transcripts could be used only as an aid in understanding and appreciating the tape recordings and that counsel had failed to play the tape recordings during his cross-examination of Olguin. The transcripts and the tapes were admitted into evidence for the purpose of preserving the objection for appeal in accordance with Fed.R.Evid. 103(a)(2).

Rodriguez argues that the district court should have allowed him to re-call Olguin and Agent Monks as defense witnesses, thereby allowing him to authenticate and introduce into evidence the tape-recorded conversations between the informant and Olguin. He argues that the only evidence of his involvement in the conspiracy came from Olguin's testimony; therefore, the transcripts were important impeachment evidence. He also argues that he had not excused Olguin as a witness; therefore, Olguin was available to testify.

Rodriguez also argues that the transcripts do not merely impeach Olguin, but also are highly probative evidence that Rodriguez was not involved in any conspiracy. He argues that "the conversations took place during the height of Olguin's participation in his conspiracy with Crispin Rodriguez, yet not once during this critical time, in any of the recordings, is the name of Appellant, Eddie Rodriguez, mentioned."¹

The district court's exclusion of evidence is reviewed for an abuse of discretion. United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993). Even if an abuse of discretion in the exclusion of evidence is found, the error is reviewed under the harmless-error doctrine. United States v. Liu, 960 F.2d 449, 452 (5th Cir), cert. denied, sub nom Ting v. United States, ___ U.S.___, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992). The district court has the power to control the trial and limit testimony; therefore, the court may exclude testimony that is cumulative and marginally relevant. See United States v. Wallace, 32 F.3d 921,

¹ The Government argues that, because Rodriguez failed to raise this ground for admission of the evidence at trial, this Court should review the issue for plain error, rather than for abuse of discretion. Because we find no reversible error under either standard of review, we do not address the issue of whether the failure to offer *certain grounds* in support of the introduction of evidence mandates plain error review. See United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 500 U.S. 924 (1991) ("Closer scrutiny may also be appropriate when the failure to preserve the precise grounds for error is mitigated by an objection on related grounds. United States v. Brown, 555 F.2d 407, 420 (5th Cir. 1977), cert. denied, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978).") For a detailed discussion of plain error, see Lopez, Id., United States v. Rodriguez, 15 F.3d 408, 414-417 (5th Cir. 1994), and United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993).

929 (5th Cir. 1994,) (district court did not abuse its discretion by refusing to compel the testimony of witnesses when review of defense counsel's offer of proof revealed that the testimony was brought out by other testimony).

Under either the plain-error or the abuse-of-discretion standard, the district court's ruling need not be disturbed. Through cross-examination by Rodriguez's counsel, the jury heard testimony that there was no evidence linking Rodriguez to the offenses except for Olguin's assertions which were made four days prior to the initial trial date. Rodriguez's counsel attacked Olguin's credibility during cross-examination of Olguin and Agent Monks. The cross-examination was thorough and intense.

A review of the transcripts reveals no information which either implicates nor exculpates Rodriguez. Rodriguez was not mentioned during the taped conversation, though there were references to persons in Houston and to other unnamed co-conspirators. Introduction of the transcripts to prove that Rodriguez' name was not mentioned in the conversations between Crispin and Olguin would have been cumulative. Because the tape recordings would have supplied evidence that was merely cumulative, the district court did not abuse its discretion by refusing to allow Rodriguez to re-call Olguin and Monks as witnesses.² Wallace, Id. Moreover, under the plain error

² Citing Fed. R. Evid. 613(b), the government argues that Rodriguez failed to lay a proper predicate for the admissibility of the extrinsic evidence because he failed to offer Olguin an opportunity to explain or deny the statements. Because we find no abuse of discretion in the district court's refusal to admit

standard, even if we were to assume *arguendo* that the district court plainly erred, Rodriguez has failed to show that the alleged error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See United States v. Rodriguez, 15 F.3d 408, 416-17 (5th Cir. 1994). Thus, under either standard of review, error, if any, was harmless.

SUFFICIENCY OF THE EVIDENCE

Rodriguez argues that the evidence was insufficient to support his convictions for conspiracy to possess with intent to distribute heroin, and for possession with intent to distribute heroin.

Rodriguez moved for a judgment of acquittal at the close of the Government's case in chief, but did not renew his motion at the close of all evidence. Consequently, this Court's review is limited to determining whether the convictions resulted in plain error. See United States v. Pierre, 958 F.2d 1304, 1310-11 (5th Cir.) (en banc), cert. denied, Sub nom Harris v. United States 113 S. Ct. 280, 121 L.Ed.2d 207 (1992); United States v. Thomas, 12 F.3d 1350, 1358 (5th Cir. 1994), cert. denied, ___ U.S. ___, 114 S.Ct. 1861, 128 L.Ed.2d 483 (1994) (finding the plain error standard proper where the defendant fails to move for judgment of acquittal at the close of evidence). Under the plain error standard, we reverse only where there was a manifest miscarriage of justice. Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or because the evidence on _____
the transcripts, we do not address this argument.

a key element of the offense was so tenuous that a conviction would be shocking. Pierre, 958 F.2d at 1310 (1992) (internal quotations and citations omitted). To prove possession of heroin with intent to distribute, the Government must prove that Rodriguez knowingly possessed heroin and intended to distribute it. See United States v. Sanchez-Sotelo, 8 F.3d 202, 208 (5th Cir. 1993), cert. denied, ___ U.S. ___ 114 S.Ct. 1410, 128 L.Ed.2d 82 (1994) (citations and internal quotations omitted). To convict Rodriguez of conspiring to possess heroin with the intent to distribute it, the Government must prove: (1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that Rodriguez knew about the conspiracy, and (3) that Rodriguez voluntarily participated in the conspiracy. Id. The elements of the conspiracy offense may be inferred from circumstantial evidence and an agreement may be inferred from "concert action". Id.

Rodriguez challenges the knowledge element of both offenses. He argues, as he did in the district court, that he knew nothing about the heroin sale and that he "was at the wrong place at the wrong time." He argues that the only evidence against him was Olguin's testimony which was not credible; therefore, the jury must have convicted him for impermissible reasons, such as his association with Crispin or because of his mere presence at the pay-off. Rodriguez also argues that there was no evidence that he actually possessed the heroin; therefore, the evidence was insufficient to support his conviction for possession with intent

to distribute. He argues that the record is devoid of evidence establishing that he had possession or constructive possession of the heroin.

It was within the sole province of the jury as the fact finder to decide the credibility of these witnesses and to choose among reasonable constructions of evidence. United States v. Garza, 990 F.2d 171, 173 (5th Cir.), cert. denied, ___ U.S. ___ 114 S. Ct. 332, 126 L.Ed.2d 278 (1993). An appellate court will not ordinarily supplant the jury's determination of credibility with that of its own. United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, ___ U.S. ___ 113 S. Ct. 1346, 122 L.Ed.2d 728 (1993). A witness' testimony will be found "incredible" as a matter of law only if it is factually impossible. See United States v. Casel, 995 F.2d 1299, 1304 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1308, 127 L.Ed.2d 659 (1994) (citations omitted). The test for "incredibility" of a witness is an extremely stringent one, because the appellate court does not weigh the credibility of witnesses. Id.

Olguin testified that Rodriguez gave him the sample of the heroin that was delivered to the informant. He further testified that, on the day of the sale of the bulk of the heroin, the three men met at Crispin's house and Rodriguez left in Olguin's station wagon. Rodriguez was gone about thirty minutes, and when he returned, the heroin was in the back of the car in an ice chest. This testimony sufficiently established that Rodriguez had

possession of the heroin. Olguin's testimony was such that a rational jury could choose to rely upon it. See and compare, Casel, 995 F.2d at 1304-1305. Even a rational jury could have found the elements necessary to convict Rodriguez of the drug-trafficking convictions. Thus, we find neither a record which is devoid of evidence on these convictions nor evidence so tenuous that a conviction would be shocking.³

Rodriguez also claims that there was no relationship between his carrying a firearm and the underlying drug-trafficking offense. To sustain his conviction, the Government must prove that Rodriguez knowingly used or carried the firearm during and in relation to the drug-trafficking crime. See United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993). However, the Government need not prove that Rodriguez used the firearm in any affirmative manner, but only that the firearm was available to provide protection to Rodriguez in connection with his engagement in drug trafficking. Id. The Government may meet this burden by proving that the weapon had the potential of facilitating the drug-trafficking operation and that the presence of the weapon was connected with the drug trafficking. United States v. Featherson, 949 F.2d 770, 776 (5th Cir. 1991), cert. denied,

³ Having found sufficient evidence to support Rodriguez' convictions for conspiracy and possession, we need not address his argument that his conviction for carrying a firearm during and in relation to a drug-trafficking crime must be vacated because the evidence on the drug-trafficking charges was insufficient.

__ U.S. __, 112 S.Ct. 1698, 1771, 118 L.Ed.2d 408 and __ U.S. __, 113 S.Ct. 361, 121 L.Ed.2d 274 (1992).

The record reveals that Rodriguez carried the gun, concealed in the front waistband of his pants, at the time he picked up the payment for the drugs. As with the foregoing challenges to sufficiency, even a rational jury could have found beyond a reasonable doubt that Rodriguez used the firearm to facilitate the drug-trafficking offense. Featherson, 949 F.2d at 776. Accordingly, under the plain error standard, Rodriguez' conviction of this offense was not a miscarriage of justice.

CONCLUSION

For the foregoing reasons, Rodriguez' conviction is affirmed.

AFFIRMED.