IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7735
(Summary Calendar)

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JOSE MANUEL BARRERA and
JOSE GUSTAVO BARRERA

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(93-CR-82-1)

(October 19, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Codefendants, Jose Gustavo Barrera (Gustavo) and his father, Jose Manuel Barrera (Manuel), were convicted of conspiracy to possess marijuana with intent to distribute. Manuel was also convicted of possession of marijuana with intent to distribute. Gustavo was sentenced to serve 78 months of imprisonment. Manuel was sentenced to serve two 72-month terms of imprisonment, concurrently. Gustavo appeals his conviction and sentence, asserting that the district court erroneously (1) allowed the admission of Rule 404(b) extrinsic evidence and (2) applied

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.S.G. § 3B3.1 to increase his offense level. Manuel appeals his convictions, asserting prosecutorial misconduct. We affirm.

FACTS

In March 1990, Caesar Cuellar, a deputy sheriff with the Zapata County Sheriff's Office, went to the Circle A Warehouse to recover a car that had been seized. The Circle A Warehouse was a holding place for vehicles which had been seized by the Sheriff's Office. While at the warehouse, Cuellar discovered a van containing marijuana which had been left in the warehouse by a drug task force. Cuellar told another deputy sheriff, defendant Jose Gustavo Barrera, about the van and proposed to Gustavo that they "get together and maybe rip off that warehouse." Gustavo said he would talk to his father, defendant Jose Manuel Barrera, and get back to him. Shortly thereafter, Gustavo told Cuellar that his father, Manuel, "had a couple of guys from the valley that could do the job."

Cuellar, Gustavo, Manuel, and two other men met at a Texas ranch. Cuellar and Manuel discussed the "situation about the warehouse." On the way back from the ranch, Gustavo told Cuellar "[w]ell, my dad is good. He'll get it done." Cuellar obtained a key to the warehouse from a secretary's desk.

On the evening of the burglary, the five men met at Gustavo's house. Both Cuellar and Gustavo were on duty that evening. Cuellar gave the key to Gustavo, who gave it to Manuel, and Gustavo drew a diagram of the warehouse for the men. Cuellar told Manuel to have the men remove the marijuana from the van, place it in the bed of a pickup truck that was in the warehouse, cover the bed with

a tarp, and take the truck from the warehouse. According to one of the men, they chose that evening for the burglary because they knew that Cuellar and Gustavo were going to be on patrol. Later that evening, Manuel, Cuellar, and two other men unloaded the marijuana and abandoned the pickup truck. Four days later, all five men repackaged the marijuana to get rid of the original packages that might contain fingerprints. The conspiracy to burglarize the warehouse was not uncovered until 1992, when Cuellar and Manuel were arrested for stealing 500 pounds of marijuana in a similar incident, and Cuellar was debriefed.

Father and son, Manuel and Gustavo Barrera, were tried by jury on charges of conspiracy to possess, and possession, with intent to distribute marijuana. The jury found Jose Gustavo Barrera guilty of conspiracy to possess with intent to distribute marijuana, a violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. The district court sentenced Gustavo to 78 months of imprisonment. Jose Manuel Barrera was found guilty of both conspiracy to possess, and possession with intent to distribute, marijuana, violations of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, and 18 U.S.C. § 2. The district court sentenced Manuel to two 72-month terms of imprisonment, to be served concurrently. Gustavo challenges his conviction and sentence, and Manuel challenges his convictions. Each appellant presents two issues for our consideration. We shall address separately the arguments of each appellant.

DISCUSSION

APPELLANT JOSE GUSTAVO BARRERA

Issue 1: Did the district court abuse its discretion by allowing extrinsic evidence of subsequent "bad acts" by Gustavo?

Gustavo challenges the district court ruling which allowed introduction of extrinsic evidence about his involvement with Cuellar and Manuel in the 1992 marijuana offense. The contested evidence is Cuellar's testimony that Gustavo helped Cuellar contact Manuel to solicit his participation in the 1992 offense. The Government also introduced telephone records that showed telephone and pager activity between Manuel, Gustavo, and Cuellar. This Court reviews the district court's admission of the evidence under a heightened abuse-of-discretion standard. See U.S. v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993).

Gustavo objected to the testimony prior to trial, and the district court overruled his objection just before Cuellar testified. In overruling Gustavo's objection, the district court analyzed, in detail, the Rule 403 balancing test for the challenged Rule 404(b) extrinsic evidence.[1] The district court considered the

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[1] Federal Rule of Evidence 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

similarity, relevance, possibility of confusion regarding the 404(b) evidence, and concluded by saying, "So I think, for all of those reasons, it's admissible and that the probative value outweighs any unfair prejudice." Defense counsel and the district court then made the following statements:

> [Defense counsel] [W]e would also note that we believe that the cases do hold that the government would have to identify which exception under 404(b) it intends to use.
>
> The Court: Knowledge and intent, counsel. In the Fifth Circuit, a not guilty plea to a conspiracy charge, as I understand it, automatically puts knowledge and intent in issue and it seems to me that knowledge and intent is the whole ball game here.
>
> [Defense counsel]: The court is saying that, but the government has not so indicated.
>
> The Court: Well, is that --
>
> [Asst. U.S. Attorney]: I think that's what I said yesterday, your honor.
>
> The Court: I thought that's what you said. All right. Let's go.

On appeal, Gustavo asserts the following:

> The trial court here erred when it held the November 4, 1992 offense was automatically admissible to prove appellant's knowledge and intent. Under Beechum, the court should have examined the posture of this case, considering whether the issues of knowledge and intent were contested. In our case, appellant did not make an issue of his mens rea. Instead, he denied completely the actus reus.

Gustavo contends that knowledge and intent were not at issue because his defense of innocence had nothing at all to do with knowledge and intent. Gustavo argues that he denied that he acted

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> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, . . .

in the conspiracy; therefore, his intent was not at issue. We disagree.

This Court has previously addressed and rejected this argument in U.S. v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980) where we concluded that the defendant's prior convictions could be admitted although the defendant indicated that he would not actively contest the issue of intent. Id.; see also, U.S. v. Fortna, 796 F.2d 724, 736 (5th Cir.), cert. denied, 479 U.S. 950, 107 S.Ct. 437, 93 L.Ed.2d 386 (1986) (extrinsic-offense evidence may be admissible in some instances even when the defendant removes the issue of intent from the case by conceding it). In the present case, Gustavo did not concede the issue of intent; therefore, his assertion that the evidence had no probative value is unavailing.

Gustavo either misconstrues or mischaracterizes the district court's statement that his knowledge and intent is automatically at issue. The district court did not state that the extrinsic evidence was "automatically admissible". For this reason, we do not address Gustavo's remaining arguments on this issue.[2] We find

[2] Gustavo argues that the district court's determination (that the extrinsic evidence was "automatically admissible" because he entered a not guilty plea to a conspiracy charge) conflicts with the second prong of U.S. v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Relying on U.S. v. Roberts, 619 F.2d 379 (5th Cir. 1980), Gustavo argues that this Court has imposed a "per se" rule of admissibility which "is impossible to square" with Beechum's emphasis on evaluating the posture of the case. We find that the district court made no such determination of "automatic" admissibility and that the district court properly applied both prongs of the Beechum test. Although we need not reach this alleged conflict between Roberts and Beechum, we note that the Roberts court stated:

no error in the district court ruling on the challenged extrinsic evidence.

Issue 2: Did the district court clearly err by increasing Gustavo's base offense level because Gustavo's abuse of a position of trust significantly facilitated the offense?

A court may increase a defendant's offense level by two points if the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense. U.S.S.G. § 3B1.3. The district court determined that Gustavo's "being a Deputy Sheriff certainly contributed in a significant way to concealing this offense." Gustavo argues that the district court erred by increasing his offense level pursuant to U.S.S.G. § 3B1.3 because there is no evidence that he used his position as a deputy sheriff to significantly facilitate the commission of the burglary. He does not argue that he did not occupy a position of public trust.

The district court's determination of the applicability of § 3B1.3 is a "sophisticated factual determination" which must be affirmed unless it is clearly erroneous. See U.S. v. Brown, 941 F.2d 1300, 1304 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991). To determine whether a defendant's position of trust "significantly facilitated" the commission of the

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> It is the district judge's obligation, however, to weigh the probative value of extrinsic offense evidence against its prejudicial effect on the defendant.

Id., 619 F.2d at 383 (citations omitted and emphasis added). Thus, insofar as Gustavo argues that this Court established in Roberts a "per se" rule of admissibility in such cases, his argument is without merit.

offense, the court must decide whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of the job. U.S. v. Fisher, 7 F.3d 69, 70-71 (5th Cir. 1994), citing U.S. v. Brown, 941 F.2d at 1305.

Our review of the record reveals no error in the district court's determination that Gustavo's position as a deputy sheriff significantly facilitated the commission of the offense. The idea to take the marijuana came from Gustavo's colleague, Cuellar. With Cuellar's aid, Gustavo drew a diagram of the warehouse to facilitate the break-in. The co-conspirators had discussed when Gustavo and Cuellar would be on patrol in the area of the planned break-in, and did break into the warehouse and take the marijuana while the two deputies were on patrol. The district court did not clearly err by increasing Gustavo's offense level pursuant to § 3B1.3.

APPELLANT JOSE MANUEL BARRERA

Issue 1: Did the prosecutor's remark improperly bolster testimony damaging to Manuel?

Jose Manuel Barrera argues that the district court erred by allowing the prosecutor to improperly bolster the credibility of Cuellar. He argues that Cuellar's testimony--that he had testified against Manuel regarding the 1992 offense and that Manuel was convicted of that offense--suggested that Manuel was convicted because of Cuellar's testimony; therefore, the jury had to assume that Cuellar's testimony was credible. He contends that the prosecutor improperly bolstered Cuellar's testimony in his closing argument.

Manuel concedes in brief that he failed to object at trial to Cuellar's testimony. Manuel correctly states that the proper standard of review is that of plain error, defined as error so obvious that failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice. See U.S. v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993). quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936).

It is improper for a prosecutor to vouch for a government witness's credibility because it implies that the prosecutor has additional personal knowledge about the witness and facts that confirm the witness's testimony, and it adds to the witness' testimony the influence of the prosecutor's official position. U.S. v. Carter, 953 F.2d 1449, 1460 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 2980, 119 L.Ed.2d 598 (1992). However, the allegedly improper comment must be viewed in light of the argument to which it responded. U.S. v. Thomas, 12 F.3d 1350, 1367 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 1861, 128 L.Ed.2d 483 and 114 S.Ct. 2119, 128 L.Ed.2d 676 (1994).

> Thus, the government "may even present what amounts to be a bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon [the prosecutor] or his witnesses." United States v. Dorr, 636 F.2d 117, 120 (5th Cir. 1981).

Thomas, id.

At the beginning of Cuellar's testimony, the prosecutor asked Cuellar whether he hoped to gain the benefit of a reduced sentence

from his testimony. Cuellar responded that he did and that he also had testified for the Government against Manuel in the 1992 case. Cuellar subsequently identified a judgment of conviction against Manuel from the 1992 case. Both defendants' counsel cross-examined Cuellar about the lenient treatment he expected to receive as a result of his cooperation.

During the closing argument, Manuel's counsel stated that Cuellar pleaded guilty and "began telling the government whatever he could to save his skin[.]" Counsel also noted that unlike Cuellar, Manuel did not plead guilty. During rebuttal, the prosecutor stated:

> Now, [Manuel's counsel] indicated that Mr. Manuel Barrera... that his life changed in November of '92 when Mr. Cuellar falsely implicated him in this case in Corpus Christi, but you heard testimony that Mr. Manuel Barrera... he went to trial, he took a shot, he told us... you know, he told a story and nobody believed him. It was not believable. A jury just like you convicted him in that case.

(Ellipses in original.)

Viewed in context, the prosecutor did not imply in his remarks that he had independent knowledge of Cuellar's credibility. He merely pointed out that the 1992 jury found that Manuel's assertion that Cuellar had falsely implicated him was not credible. The prosecutor's comment inferred that Manuel's previous attack on Cuellar's credibility was unsuccessful. This Court has held that such comments do not rise to the level of vouching because they are not personal assurances of the witnesses veracity. See U.S. v. Heath, 970 F.2d 1397, 1404-05 (5th Cir. 1992), cert. denied, ___ U.S. ____, 113 S.Ct. 1643, 123 L.Ed.2d 265 (1993).

Moreover, even were this Court to assume that the prosecutor's comment was improper bolstering, the prosecutor's comment was made in response to counsel's attack on Cuellar's credibility. This Court has declined to find plain error in a similar situation when the comment was made in response to defense counsel's attack on a witness's credibility. See Thomas, 12 F.3d at 1367-68. Finally, Manuel has failed to show that the alleged error seriously affected the fairness, integrity or public reputation of his trial. See Rodriguez, 13 F.3d at 416-17. Accordingly, we conclude that error, if any, is not reversible.

Issue 2: Did the prosecutor's remark amount to an impermissible comment on Manuel's failure to testify?

Manuel contends that the prosecutor improperly commented on his failure to testify. He asserts that the prosecutor's statement during rebuttal, quoted in the discussion of the preceding issue, led the jury to believe that Manuel did not testify in the instant case because he was not found credible in the 1992 case. Manuel did not raise an objection relevant to the alleged comment on Manuel's failure to testify at trial. Thus, the error is reviewed under plain-error standard. Rodriguez, 13 F.3d at 408.

The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. U.S. v. Dula, 989 F.2d 772, 776 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 172, 126 L.Ed.2d 131 (1993). In deciding whether a statement is a comment on the defendant's failure to testify, a court must determine if the prosecutor's manifest intention was to comment on the accused's failure to testify or was of such a

character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify. Id. The complained-of comments must be viewed within the context of the trial in which they are made. Id.

The context of the prosecutor's statement indicates that his intention was to respond to Manuel's attack on Cuellar's credibility, not to comment on Manuel's failure to testify. Given the context of the remark, it is unlikely that the jury even recognized that the prosecutor's statement could be construed as a comment on Manuel's failure to testify. Because the prosecutor's statement could not be characterized as one which the jury would naturally and necessarily view as a comment on Manuel's failure to testify, there was no error, plain or otherwise, in the statement.

CONCLUSION

For the foregoing reasons, the appellants' convictions and sentences are AFFIRMED.