**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-8242
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CLEMENTE VALDEZ, JR.,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
(SA-91-CR-109-1)

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(June 3, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Clemente Valdez, Jr., appeals his conviction of conspiracy to possess with intent to distribute marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846; possession with intent to distribute marihuana, in violation of 21 U.S.C. § 841(a)(1); and monetary instrument laundering, in violation of 18 U.S.C.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

§ 1956(a)(1)(A)(i). Finding no reversible error, we affirm.

I.

Valdez was named in a nine-count indictment along with Carlos Enrique Guzman and Antonio Maurico Vela. All were charged with conspiring to possess with intent to distribute in excess of 100 kilograms of marihuana. In addition, Valdez was charged with possession with intent to distribute in excess of 100 kilograms of marihuana and two counts of money laundering.[1] Starting in 1985, Vela and Guzman entered into the marihuana trafficking business together; Valdez was one source of the marihuana. Following trial, the jury found Valdez guilty on all four counts.

II.

On appeal, Valdez challenges the admission of allegedly extraneous-offense evidence given by three different witnesses. First was the testimony of Keith Smith that Valdez and others had threatened to hurt his family. Smith was part of a 350-pound marihuana deal that went bad. Smith testified that he originally went to the Drug Enforcement Administration (DEA) as a result of the threats.

Second was the testimony of Constance Jacks, an IRS agent, who

[1] Although referred to as money laundering in both briefs, both counts charged Valdez with "knowingly and willfully conduct[ing] and attempt[ing] to conduct a financial transaction affecting interstate and foreign commerce . . . which involved the proceeds of a specified unlawful activity."

testified that Valdez's tax returns showed that he had no taxable income in 1986; $10,600 of losses in 1987; and did not file tax returns for 1988 or 1989. Jacks also testified that Valdez's tax returns did not show the money (the subject of the money laundering counts) that had been wired to him from Louisiana.

Third was the testimony of Ricardo Martinez, an employee of the liquor store owned by Valdez and Guzman. Martinez testified that Valdez had burglarized the apartment of an individual that owed him money for a quarter pound of marihuana. None of this testimony was objected to at trial.

Valdez argues that all of this evidence was not relevant to the charges against him and was unduly prejudicial. FED. R. EVID. 404(b) states in relevant part that "[e]vidence 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, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Whether extrinsic offense evidence is admissible under rule 404(b) is governed by an application of the two-part test set out in United States v. Beechum, 582 F.2d 8987, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993). "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice

and must meet the other requirements of [FED. R. EVID.] 403." Id. (internal quotations, citations, and footnotes omitted).

This court generally reviews the district court's admission of evidence under rule 404(b) under a heightened abuse of discretion standard employed for criminal trials. See Carrillo, 981 F.2d at 774. However, when there is no objection at trial, our review is limited to the plain error standard of FED. R. CRIM. P. 52(b). United States v. Olano, 113 S. Ct. 1770, 1777 (1993). Plain error is clear or obvious error that affects substantial rights and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. at 1777-79.

III.

A.

The evidence related to Valdez's tax returns was relevant to the charge of money laundering. As pointed out by Valdez in his brief, an element of money laundering is to show that the transaction involved the proceeds of unlawful activity. Whether Valdez reported his economic activity on his tax return is probative of whether the transactions were lawful. Although this evidence certainly shows that Valdez was engaged in financial activity that he was not reporting on his tax returns, this was part of the crime for which he was being tried. The probative value of the tax return outweighed any prejudice resulting from the implication that Valdez "had bad character" because he did not file his tax returns. See Carrillo, 981 F.2d at 774. Even assuming

that it was error to admit this evidence, this admission was not plain error, as there is no indication that the fairness, integrity, or public reputation of Valdez's trial was seriously affected.

B.

The two other portions of testimony that Valdez challenges are that he threatened a witness and that he was involved in a burglary to satisfy a debt. Assuming that this testimony would fail the Beechum test (in that its relevancy to charges of drug trafficking and money laundering is not readily apparent and that the prejudice resulting from the testimony is), the error in admitting this testimony may result in reversal only if it is plain.

The evidence of Valdez's guilt in this case was overwhelming. Guzman, one of the individuals indicted along with Valdez, testified that he was in the drug trafficking business with Valdez from 1985 until 1990. Additionally, Mark Wilkins testified that he was selling marihuana with Terry Bates. Wilkins testified that Bates purchased his marihuana from Valdez and that the payments were wired to Valdez under the name of Lynn Johnson. Terry Bates also testified to this arrangement. The record shows two such transactions on, respectively, February 10, 1987, and May 26, 1987.

In United States v. Levario Quiroz, 854 F.2d 69, 73-74 (5th Cir. 1988), we reversed a conviction by finding plain error in the admission of extrinsic offense evidence. In Levario Quiroz, the defendant was accused of shooting a police officer, and he argued

that he did it in self-defense. The defendant was the only witness to support this defense. The court noted that the only question for the jury was whether to believe the defendant or the police officer. The court held that the extrinsic evidence testimony was highly prejudicial because "[i]t showed Levario Quiroz had shot two women and, additionally, in the course of admitting the evidence, the jury heard that Levario Quiroz had been indicted for" another shooting in which he claimed self-defense. In that case, the inadmissible evidence had a direct effect on the sole issue before the jury )) whether to believe the defendant or the police officer.

In this case, there is no such direct nexus between the extraneous offense and the questions placed before the jury. Whether Valdez was a violent person has no direct relationship to whether he was selling marihuana and receiving payment for it by wire. Unlike Levario Quiroz, this is not a case where the extrinsic offense evidence would show that Valdez was likely to have committed the charged offense because he previously had committed a similar act. Valdez's argument is limited to the proposition that the jury would have been more likely to convict him of drug dealing and money laundering because the extrinsic offense evidence made a general showing of bad character.

It must be noted that the government specifically mentioned the challenged evidence during closing argument. Such an emphasis tends to increase the prejudicial effect of extrinsic evidence. See United States v. Fortenberry, 860 F.2d 628, 634 (5th Cir. 1988). In this case, however, the overwhelming evidence of

Valdez's guilt precludes a finding that the extrinsic offense evidence seriously affected the fairness, integrity, or public reputation of Valdez's conviction. This is particularly true considering that Valdez has alleged only that the evidence showed that he had bad character generally, not that it had any specific prejudice relevant to the jury's determination of whether he trafficked in marihuana and laundered money. Although the admission of this evidence over an objection at trial may have resulted in reversible error, given the entire record in the case and the lack of an objection at trial, the admission of this evidence was not plain error.

AFFIRMED.