IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8643

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRUCE MARLIN CHAVEZ, and
JESUS GEARDO LEON-ENRIQUEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(EP-92-CR-416-4)

(May 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Co-defendants Bruce Marlin Chavez and Jesus Geardo Leon-Enriquez each appeals his judgment of conviction and sentence rendered by the district court. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

A. Factual Background

In November 1991, Juan Cardenas (Juan) contacted the Drug Enforcement Agency (DEA) in El Paso, Texas, agreeing to become a confidential informant. As a result, the DEA began an investigation of his half-brother, Ramon Abel Cardenas-Hernandez (Ramon), and others with whom Juan had been admittedly involved in drug trafficking. As part of their investigation, DEA agents rented a warehouse in El Paso to use to store cocaine received from Ramon.

In June 1992, Juan notified DEA agents that Ramon, Jorge Bermudez-Casas (Bermudez-Casas), and Jose Garcia (Garcia) were preparing to transport cocaine from El Paso to California. On June 23, 1992, Bermudez-Casas and Garcia transported 200 kilograms of cocaine to the El Paso warehouse, where Juan assisted then in secreting the cocaine in barrels of oil. After Bermudez-Casas and Garcia left, Juan contacted Ramon and told him that the cocaine shipment was ready to go. The next day, Juan, a DEA agent, and a cooperating truck driver loaded the barrels onto a tractor-trailer and transported them to California, where they were delivered to Ramon.

On July 29, 1992, Juan notified DEA agents that Ramon and Bermudez-Casas were preparing to receive 250 kilograms of cocaine from Garcia and to transport it to California. The next day, DEA Agent Sal Martinez, working undercover, picked up Juan and Bermudez-Casas in a van, and all three men proceeded to a "stash"

house in El Paso that belonged to Garcia. They drove into the garage and loaded approximately 192 bundles of cocaine into the van. They then drove to the warehouse where they unloaded the cocaine and secreted it in barrels of oil. Later that day, the three men picked up more cocaine from Garcia's house and from the residence of Bruce Marlin Chavez (Chavez), another "stash" house, before taking it to the warehouse and also secreting it in barrels of oil.

In September 1992, Dennis Haught (Haught), Garcia's brother-in-law who was responsible for coordinating the "stash" houses, followed Jesus Geardo Leon-Enriquez (Leon-Enriquez) and another man to Leon-Enriquez's house, where Haught received a box containing cocaine from Leon-Enriquez. On October 28, 1992, Haught and Bermudez-Casas returned to Leon-Enriquez's house where they picked up two more boxes containing cocaine from Leon-Enriquez. They then took these two boxes to Chavez's house and attempted to conceal them in a secret compartment in the Volkswagen they were driving. When they had difficulty with the secret compartment, Chavez left to purchase cement to glue the carpeting over the secret compartment. After the cement proved of no use, they left the boxes in Chavez's garage with Chavez's permission. Later that day DEA agents searched Chavez's house and seized the cocaine. They also searched Leon-Enriquez's house and seized large sums of money, a small quantity of cocaine, and other drug paraphernalia.

B. Procedural History

On November 17, 1992, a grand jury returned an indictment against Chavez and Leon-Enriquez, along with others who are not parties to this appeal, for federal drug violations. A four-count superseding indictment issued on December 15, 1992, specifically charging Chavez and Leon-Enriquez with conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) (Count I), and with possession with intent to distribute cocaine on October 28, 1992, in violation of 21 U.S.C. § 841(a)(1) (Count IV). In addition, Chavez was charged with possession with the intent to distribute cocaine on July 30, 1992, in violation of 21 U.S.C. § 841(a)(1) (Count III).

Trial was held in the United States District Court for the Western District of Texas, and a jury convicted Chavez on Counts I and IV, and Leon-Enriquez on Count IV. The court then sentenced Chavez to 121 months imprisonment on each count to run concurrently, a five-year term of supervised release on each count to run concurrently, and a special assessment of $100. The court also sentenced Leon-Enriquez to 121 months imprisonment, a five-year term of supervised release, and a special assessment of $50. Chavez and Leon-Enriquez now appeal.

II.

Chavez contends that the remarks made by the prosecutor during cross-examination and closing argument constitute a

violation of his right to a fair trial under Doyle v. Ohio, 426 U.S. 610 (1976). We disagree.

During the trial, Chavez testified on his own behalf. He testified that undercover DEA agent Martinez had come to his door with a suitcase, saying "I got you a suitcase. I picked it up. It was full of cocaine." He also testified that he had thought that Martinez was merely bringing him this suitcase, which belonged to a friend of Garcia and which he had asked Garcia to borrow for a trip he was taking, on Garcia's instructions. When questioned about the ensuing conversation between him and Martinez concerning cocaine, he testified that he had "gone along" and participated in the conversation "to play detective" because he had suspected Garcia of drug dealing for some time.

At the time of his arrest, Chavez did not relate to the arresting officers what he testified to at trial. Instead, Chavez only commented by asking why he was being arrested and denying any knowledge of narcotics trafficking.

Chavez now objects to the following discussion during cross-examination:

> PROSECUTOR: Now, after you were arrested, Mr. Chavez--Well, the story that you've told today, this is the first time you've told the story, is that correct, other than maybe your attorney?
>
> CHAVEZ: Yes, sir.
>
> PROSECUTOR: All right. You saw [DEA agent] Martinez the night you were arrested, is that right?
>
> CHAVEZ: Yes, sir.
>
> PROSECUTOR: Did you recognize him?

CHAVEZ: Yeah, I think I did.

PROSECUTOR: Did you say anything to him concerning this conversation? Did he talk to you about this conversation?

CHAVEZ: Yes, he did.

PROSECUTOR: And did you remember the conversation at that time?

CHAVEZ: He told me something about--

THE COURT: His question was, did you remember the conversation at that time?

CHAVEZ: No.

Chavez also objects to the following statement during the prosecutor's closing argument:

> Finally, ladies and gentlemen, when you look at everything in this case, consider when he was arrested, . . . none of this, none of what you heard from the witness stand ever got told to the police that day. None of that explanation, because it didn't happen. You look at the law, you look at the evidence and you look at your common sense. These two guys are guilty. It's your duty to find them guilty.

Chavez thus contends that the prosecutor directly commented on his right to remain silent in violation of Doyle.

In Doyle, the Supreme Court held that the Due Process Clause prohibits impeachment of a defendant's exculpatory story at trial by using the defendant's immediate post-arrest, post-Miranda[1] warnings silence. Doyle, 426 U.S. at 619. Comments such as Chavez's, i.e., that he had no knowledge of drug trafficking, have been treated as being tantamount to "silence." See United States v. Laury, 985 F.2d 1293, 1302 n.7 (5th Cir. 1993). Although virtually any remarks by a prosecutor concerning such

[1] Miranda v. Arizona, 384 U.S. 436 (1986).

"silence" will constitute a Doyle violation, those remarks must be evaluated in context. "A prosecutor's . . . remarks constitute comment on a defendant's silence if the manifest intent was to comment on the defendant's silence, or if the character of the remark was such that the jury would naturally and necessarily so construe the remark." United States v. Carter, 953 F.2d 1449, 1464 (5th Cir.), cert. denied, 112 S. Ct. 2980 (1992). The manifest intent of the prosecutor's remarks in the instant case, particularly those made during closing argument, was to suggest that Chavez's explanation at trial was a recently fabricated exculpatory story. Hence, those remarks constituted comment on Chavez's silence, and a Doyle violation occurred. See id.; Laury, 985 F.2d at 1303.

We normally review a Doyle violation for harmless error. Laury, 985 F.2d at 1304. Because Chavez failed to object at trial to the prosecutor's remarks, however, we review the Doyle violation for plain error. Id. at 1304. "Plain error is error so great that it cannot be cured at trial; the error must be obvious, substantial, and so basic and prejudicial that the resulting trial lacks the fundamental elements of justice." Id. (internal quotations and citations omitted). This court will reverse only to prevent a grave miscarriage of justice. Id.

The evidence at trial showed that Chavez's house was used as a "stash" house. In July 1992, Juan, DEA agent Martinez, and Bermudez-Casas went to Chavez's house to pick up a suitcase with 24 kilograms of cocaine. The suitcase had a luggage tag with

Chavez's name and address. In October 1992, Haught and Bermudez-Casas went to Chavez's house to load cocaine, which they had picked up from Leon-Enriquez, in a secret compartment in the Volkswagen being used to transport the cocaine. Because Haught and Bermudez-Casas had difficulty with the secret compartment, Chavez purchased cement to glue the carpet down over the secret compartment. Chavez then permitted them to store cocaine in his garage after they were unsuccessful in concealing it in the secret compartment. During the consensual search of Chavez's house, DEA agents seized 28 kilograms of cocaine.

Considering the evidence introduced at trial, we conclude that the prosecutor's error was not so substantial or prejudicial that Chavez's trial lacked the fundamental elements of justice. See Laury, 985 F.2d at 1304. Hence, the prosecutor's comments did not constitute plain error.

III.

Leon-Enriquez argues that the trial court erred in finding that there was sufficient evidence to support his conviction and thus in denying his motion for judgment of acquittal. We disagree.

This court reviews the district court's denial of a motion for judgment of acquittal de novo. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). On a sufficiency of the evidence challenge, we consider the evidence in the light most favorable to the government, including all reasonable inferences

that can be drawn from the evidence. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 111 S. Ct. 2064 (1991). The test is not whether the evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. Id. The jury is the final arbiter of the weight of the evidence and the credibility of the witnesses. Restrepo, 994 F.2d at 182.

Leon-Enriquez argues that the evidence does not support his "knowing" possession of cocaine. He specifically contends that the government failed to prove his "knowledge" of the contraband contained in boxes he handled or carried.

To establish an offense under 21 U.S.C. § 841(a)(1), the government must prove that the defendant had knowing possession of the illicit substance with intent to distribute. United States v. Cardenas, 9 F.3d 1139, 1158 (5th Cir. 1993); United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992). The elements of the offense may be proven by circumstantial evidence alone. Cardenas, 9 F.3d at 1158. Possession may be actual or constructive and may be joint among several defendants. Id. This court has defined "constructive possession" as "'the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance.'" Id. (quoting United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir. 1989)).

The evidence at trial established that during a valid search of Leon-Enriquez's house, DEA agents seized from the master bedroom a black briefcase containing $2,100 and a vial of cocaine, a shoebox containing $11,670 and a small digital scale, a set of triple-beam scales, and a bottle of Inositol--a non-controlled substance that can be used to dilute cocaine. The agents also seized a Tenecia Model 1479 scale with trace amounts of a white powdery substance from a hall bathroom and an Accuweigh scale from the garage. The agents also found a small notebook with names and prices such as $45 and $60 listed next to the names. The notebook was not seized, however, because the warrant did not permit the agents to seize "documents." One of the DEA agents testified at trial that the items found in Leon-Enriquez's house were consistent with someone in the household selling cocaine or other controlled substances at the street level.

Haught testified that in September 1992 when he complained to Garcia that he was not being paid for his role in the organization, he was told to meet with a man at a Taco Cabana on the east side of El Paso. Once there, two men--one of whom was Leon-Enriquez--got his attention, and he followed them to Leon-Enriquez's residence. Leon-Enriquez and the other man then got out of the car and went into the garage, returning with a box that contained 16 kilograms of cocaine which they gave to Haught. Haught also testified that on October 28, 1992, he and Bermudez-

Casas returned to Leon-Enriquez's house and that Leon-Enriquez gave them two boxes of cocaine.

From this evidence, viewed in the light most favorable to the jury verdict, the jury could have reasonably concluded that Leon-Enriquez knowingly possessed cocaine with intent to distribute. The district court thus did not err in denying Leon-Enriquez's motion for judgment of acquittal.

IV.

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence as to each Chavez and Leon-Rodriguez.