IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8683

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE RAMON RODRIGUEZ-SANTILLAN,
a/k/a Jose Ramon Rodriguez,
RITO GANDARA, and MIGUEL MEDINA-REYES,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(EP-93-CR-0008)

(August 15, 1994)

Before REYNALDO G. GARZA, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Miguel Medina-Reyes and Jose Rodriguez-Santillan appeal their convictions of possession and conspiracy to possess cocaine with the intent to distribute it. They challenge the constitutionality of their sentences and alleging prosecutorial misconduct. Medina-Reyes also claims that the district court erred in denying his

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 Pursuant to that rule, the court has determined that this opinion should not be published.

motion for severance. Rito Gandara challenges the sufficiency of the evidence supporting his conviction of conspriracy to possess cocaine with intent to distribute it. Finding no error, we affirm all three convictions.

I.

A.

Medina-Reyes was the leader of a narcotics trafficking conspiracy that operated between 1989 and 1992 out of El Paso. Abel Cardenas worked for Medina-Reyes, as did Medina-Reyes's stepson, Hector Rubio. Abel's younger brothers, Steve and Juan, also joined the conspiracy.

In August 1989, Juan began working for Abel, primarily transporting drugs from Houston to Chicago and cash from Chicago to Houston. During that period, Juan would fly from El Paso to Houston, pick up a cocaine-laden car in Houston, deliver that car to Chicago, and then return the empty car and drug money to Houston. On Juan's first trip, Medina-Reyes provided him with the El Camino car that he drove from Houston to Chicago. Thereafter, Juan transported drugs for Medina-Reyes on several trips.

As the drug distribution network expanded, Abel, Juan, and Medina-Reyes moved the operation to El Paso. At that time, Juan met Medina-Reyes's distant cousin, Jose Ramon Rodriguez-Santillan, who picked up the cocaine-filled cars outside a motel in Chicago.

A number of vehicles were used to transport the cocaine in false compartments that had been built into the vehicles, and each

vehicle typically carried between 45 and 70 kilograms of cocaine. On return trips, cash was carried in the hidden compartments. The cash usually totaled between $250,000 and $1 million. Abel estimated that he had transported between 1,000 and 2,000 pounds of cocaine to Chicago, and Juan estimated that he had transported "a little over a ton" to Rodriguez-Santillan in Chicago.

By 1991, Rito Gandara had become associated with Abel. He permitted Abel to park the drug-filled cars in front of Gandara's house. In November 1991, Gandara was present at a Holiday Inn outside Chicago with his wife and children, Juan and Abel Cardenas, and Rubio. Jose Arellano arrived at the hotel to drop off a car, and Gandara, his wife, Abel, and Abel's girlfriend drove the car back to El Paso. Gandara told Internal Revenue Service agents that he had delivered a car to Chicago at Abel's request, but at trial Gandara denied making the statement.

On November 18, 1991, a U.S. Border Patrol Agent, Ricardo Ruiz, stopped one car north of Las Cruces, New Mexico. Ruiz noticed that the driver appeared nervous and that the trunk had been modified and appeared to contain a false bottom. A subsequent search of the car revealed approximately 60 kilograms of cocaine hidden in a false compartment. Ruiz turned the case over to the Drug Enforcement Administration ("DEA").

Later that morning, the DEA office in El Paso received a call from an unidentified man who claimed that he had information concerning the checkpoint seizure. On the following day, DEA agents met with the man, who identified himself as Steve Cardenas.

At a later meeting, the agents met his brother Juan. Steve and Juan subsequently became confidential informants for the government.

Based upon information provided by Steve and Juan, DEA agents began surveillance on a house in El Paso. On November 20, 1991, agents observed several individuals leave the house and load boxes into a Chevy Blazer. Agents followed the Blazer, stopped it, identified themselves as DEA agents, and asked the driver whether they could examine the vehicle and its contents. The driver identified himself as Hector Rubio and consented to a search of the vehicle. Agents recovered boxes containing plastic wrapping, latex-type material, and cocaine residue. Rubio then agreed to a search of his residence, which revealed $30,000 cash in two bundles in the dishwasher, $6,000 cash in a bag, a newspaper article discussing the Las Cruces search, two pistols, and various documents and receipts. The search also uncovered identification papers for Medina-Reyes in one of the bedrooms.

At another residence, DEA agents observed Jose Arellano load the trunk of a Ford Taurus. The agents followed that car, stopped it, and obtained consent from Arellano to search the vehicle. The search revealed sixty bricks of cocaine hidden below a false bottom in the trunk.

After the arrest at Las Cruces, the cocaine shipments stopped. Nevertheless, several trips were made to Chicago to bring cash back to El Paso. Abel Cardenas made such a trip in December 1991 with Gandara. In Chicago, Medina-Reyes, Rodriguez-Santillan, and Abel

loaded money into a van, inside the back seat. The money was wrapped and taped, and Medina-Reyes had marked the money-filled packages with his initials, "M.R." Upon returning to El Paso, Abel turned over the money, which amounted to roughly $1 million, to Rodriguez-Santillan.

Juan Cardenas also made several trips to Chicago to transport money back to El Paso. Around February 2, 1992, Juan received $600,000 from Rodriguez-Santillan in Chicago. At a prearranged meeting on February 6, DEA agents met with Juan in Albuquerque in order to document the fact that the hidden compartment was loaded with cash. Agents retrieved the cash, photographed it, replaced it, and let Juan continue on his trip. Juan proceeded as planned and transferred the money to Abel, who turned over the money to Rodriguez-Santillan.

Later in February, again directed by Rodriguez-Santillan, Juan made a second trip to Chicago to retrieve roughly $2 million. Juan met with Rodriguez-Santillan in Chicago, and Rodriguez-Santillan loaded roughly $1.9 million in cash into the van that Juan had left outside the Holiday Inn. Following a prearranged, staged pull-over and search of the van on its return trip, DEA agents seized the money hidden in the van. Some of the money was in bundles marked "$40,000," "$10,000," and "M.R." DEA agents seized a total of $1,920,540.

Finally, in later 1992, DEA agents set up surveillance of Rodriguez-Santillan's residence, shared with Rodolfo Avitia-Reyes and Medina-Reyes. A search of a vehicle leaving that residence

revealed 233 pounds of marihuana hidden in the car. The agents obtained search warrants for that address and another El Paso residence. On December 11, 1992, agents executed the warrants, arrested Medina-Reyes and Rodriguez-Santillan, and seized roughly 360 pounds of marihuana. Gandara was arrested a few months later.

B.

Medina-Reyes, Rodriguez-Santillan, and Gandara were charged in a superseding indicted on March 3, 1993, with conspiracy to possess cocaine and marihuana with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and conspiracy to launder the proceeds of drug transactions, in violation of 18 U.S.C. §§ 371 and 1956(a)(1)(A)(1). Medina-Reyes and Gandara were also charged with two counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Medina-Reyes and Rodriguez-Santillan were additionally charged with one count of possessing marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and two counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(1).

Medina-Reyes filed a motion for severance pursuant to FED. R. CRIM. P. 8(b) and a motion for severance for prejudicial joinder under FED. R. CRIM. P. 14. The district court denied both motions. Following a four-day jury trial, Medina-Reyes and Rodriguez-Santillan were convicted on all counts, and Gandara was convicted of one count of possession of cocaine with intent to distribute.

II.

Medina-Reyes and Rodriguez-Santillan claim that the sentencing scheme established in 21 U.S.C. §§ 846 and 841 violates the Sixth Amendment's guarantee of trial by jury by requiring the district court, rather than the jury, to determine factors relevant to sentencing. We review the constitutionality of federal statutes de novo. United States v. Wicker, 933 F.2d 284, 287-88 (5th Cir.), cert. denied, 112 S. Ct. 419 (1991).

Section 841(a) provides,

> [I]t shall be unlawful for any person knowingly or intentionally))
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

Section 841(b) details the penalties for § 841(a) violations, and under § 846, a person who conspires to violate § 841 is sentenced as one who commits the substantive offense.

The Sixth Amendment does not require that every finding of fact underlying a sentencing decision be made by a jury rather than a judge. Walton v. Arizona, 497 U.S. 639, 647-49 (1990). "[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turn on specific findings of fact." McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986). Whether a Sixth Amendment right to a jury trial attaches depends upon whether a particular fact is an "element of the offense" or merely a "sentencing factor that comes into play only after the defendant has been found guilty." Id. at 86.

This court has consistently held that the quantity of a

substance possessed under § 841(a) is not an element of the offense and is relevant only to sentencing. United States v. Valencia, 957 F.2d 1189 (5th Cir.), cert. denied, 113 S. Ct. 254 (1992). For a penalty under § 841(b)(1) to apply, the quantity of a controlled substance must be proven by the government at sentencing by a preponderance of the evidence. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Thus, as every court to consider the constitutionality of these provisions has concluded, §§ 841 and 846 are constitutional. Cf. United States v. Harris, 932 F.2d 1529, 1539 (5th Cir.) (rejecting the "tired argument that the sentencing guidelines are unconstitutional since they permit the district court to resolve factual disputes without the benefit of a jury"), cert. denied, 112 S. Ct. 270 (1991); see also Buckley v. Butler, 825 F.2d 895, 903 (5th Cir. 1987) ("[T]he absence of any `bright line' test in [McMillan] does not authorize us to disregard the fundamental differences between sentencing and guilt determination."), cert. denied, 486 U.S. 1009 (1988).

III.

Medina-Reyes and Rodriguez-Santillan also claim that the district court's admission of testimony concerning unrelated misconduct by those other than the defendants was plain error, and that the prosecutor committed gross misconduct by eliciting and emphasizing this testimony. Because neither defendant objected to the testimony or closing argument, the statements are reviewed for plain error. In other words, we will reverse the conviction only

if "the prosecutor's comments, taken as a whole in the context of the entire case, substantially prejudiced defendant's rights. Plain error may be recognized `only if the error is so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice.'" United States v. Montemayor, 684 F.2d 1118, 1124 (5th Cir. 1982) (quoting United States v. Okenfuss, 632 F.2d 483, 485 (5th Cir. 1980)).

The testimony and argument of which Medina-Reyes and Rodriguez-Santillan complain on appeal concerns drug transactions involving Juan Cardenas. For example, defendants complain that the prosecutor asked Juan, "Getting to the summer of 1992, you worked with your brother Abel involving some contracts that had nothing to do with these two individuals, is that correct?" Juan Cardenas testified that he had assisted the DEA on the unrelated cases during 1992 and that, as a result of his efforts and assistance, the DEA recovered several hundred kilograms of cocaine in California and over a ton of marihuana in North Carolina. Agent Hester verified this information in his testimony. And, during closing argument, the prosecutor emphasized this information in order to explain the extent to which Juan Cardenas put himself at risk.

Medina-Reyes and Rodriguez-Santillan contend that this testimony and argument were inflammatory and highly prejudicial and in violation of FED. R. EVID. 103, 404(b), and 608(b). Rule 404(b) provides in 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 . . . ." The purpose of the testimony was to demonstrate Juan Cardenas's motive for testifying and to explore his possible bias, not to prove character. Moreover, the prosecutor purposely included in the question the phrase "that had nothing to do with these two individuals." The closing argument similarly commented on Juan Cardenas's motive and bias. At no point did the prosecution attempt to relate these other transactions to the defendants.

Neither did the evidence violate rule 608(b), which provides in part, "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, . . . may not be proved by extrinsic evidence." Rule 608(b)'s application "is limited to instances where the evidence is introduced to show a witness's general character for truthfulness." United States v. Opager, 589 F.2d 799, 801 (5th Cir. 1979). Evidence tending to uncover bias or motive for testifying truthfully is distinct from such evidence and is admissible notwithstanding rule 608(b). United States v. Martinez, 962 F.2d 1161, 1164-65 (5th Cir. 1992). The evidence did not attempt to prove Juan Cardenas's truthfulness, but rather explained his motive for testifying and his possible bias. Thus, the evidence was properly admitted. The district court's jury charge that "you are [not] called upon to return a verdict as to guilt or innocence of any other person or persons not on trial as a defendant in this case" further eliminated any possible prejudice.

IV.

Medina-Reyes argues that the district court erred in denying his motion for severance under FED. R. CRIM. P. 14. We review the district court's decision for abuse of discretion. United States v. Sherrod, 964 F.2d 1501 (5th Cir.), cert. denied, 113 S. Ct. 832 (1992). Reversal is warranted "only if the appellant can demonstrate compelling prejudice against which the trial court was unable to afford protection." United States v. Williams, 809 F.2d 1072, 1084 (5th Cir.), cert. denied, 484 U.S. 896 (1987).

Rule 14 provides, in part, "If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment . . . , the court may order . . . separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Medina-Reyes claims that two of his co-defendants at the time of the indictment, Jose Arellano and Rodriguez-Santillan, would give exculpatory testimony if called as witnesses. To be eligible for severance on that basis, a defendant must establish (1) a bona fide need for the testimony, (2) the substance of the testimony, (3) its exculpatory nature and effect, and (4) that the co-defendants will in fact testify. Williams, 809 F.2d at 1084.

The district court found that the supporting affidavits were not particularly exculpatory. Arellano's affidavit merely stated that he did not know Medina-Reyes. Rodriguez-Santillan's affidavit simply stated that he denied working for Medina-Reyes and knew of no drug trafficking conducted by him. In addition, the district

court found that there was no evidence that either co-defendant would testify at Medina-Reyes's separate trial but not at a joint trial.

Both factors weigh against Medina-Reyes's motion. Therefore, the district court did not abuse its discretion. Moreover, even if Medina-Reyes would have benefited from a separate trial, he failed to demonstrate compelling prejudice from his joint trial that would warrant reversal of his conviction.[1]

V.

Medina-Reyes also moved under FED. R. CRIM. P. 8(b) to sever the offenses charged against him from those charges against other defendants. Joinder is a matter of law reviewed de novo. United States v. Fortenberry, 914 F.2d 671, 675 (5th Cir. 1990), cert. denied, 499 U.S. 930 (1991).

Rule 8(b) provides in part, "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 8 is to be broadly construed in favor of initial joinder. Id. Additionally, the transaction requirement of rule 8 is flexible. Id. In cases in which defendants are charged with different substantive offenses on different dates, the charge that they have membership in the same conspiracy "legitimizes" their

[1] The district court instructed the jury to consider and evaluate separately the charges against each defendant.

initial joinder in one indictment. United States v. Lindell, 881 F.2d 1313, 1318 (5th Cir. 1989), cert. denied, 493 U.S. 1087 (1990). Moreover, rule 8(b) recognizes "a preference in the federal system for joint trials of defendants who are indicted together." Zafiro v. United States, 113 S. Ct. 933, 937 (1993).

Medina-Reyes was the key figure in the indictment, as he is the only defendant named in all seven counts. All defendants were charged with a three-year conspiracy to possess controlled substances with the intent to distribute them, and all of the substantive offenses charged occurred within the time-period specified in the conspiracy counts. Therefore, there was sufficient connection among the counts and among the defendants for the district court to find that Medina-Reyes and his co-defendants are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

VI.

Finally, Gandara contends that the evidence was insufficient to support his conviction for possession of cocaine with intent to distribute. The standard for reviewing a conviction allegedly based upon insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt. United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir.) (citation omitted), cert. denied, 113 S. Ct. 330 (1992). The evidence is reviewed in the light most

favorable to the government, drawing all reasonable inferences in support of the verdict. Jackson v. Virginia, 443 U.S. 307 (1979). But if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction should be reversed. United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992) (citations omitted). It is not necessary that the evidence exclude every reasonable hypothesis of innocence, United States v. Stone, 960 F.2d 426, 430-31 (5th Cir. 1992); the jury is free to choose among reasonable constructions of the evidence, United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd, 462 U.S. 356 (1983). The only question is whether a rational jury could have found that the evidence established each essential element of the offense beyond a reasonable doubt. United States v. Jackson, 700 F.2d 181, 185 (5th Cir.) (citation omitted), cert. denied, 464 U.S. 842 (1983).

To obtain a conviction under § 841(a)(1), the government must prove beyond a reasonable doubt that Gandara (1) knowingly (2) possessed cocaine (3) with the intent to distribute it. Possession may be actual or constructive and may be established by circumstantial evidence. United States v. Ornelas-Rodriguez, 12 F.3d 1339, 1346 (5th Cir.), cert. denied, 1994 U.S. LEXIS 4729 (1994). Suspicious circumstances, in conjunction with control over illegal narcotics, can give rise to an inference of knowing possession. United States v. Pineda-Ortuno, 952 F.2d 98, 102 (5th Cir.), cert. denied, 112 S. Ct. 1990 (1992). Finally, the intent

to distribute may be inferred from the possession of a large amount of narcotics. United States v. Ayala, 887 F.2d 62, 68 (5th Cir. 1989).

Sufficient evidence supports the jury's conclusion that Gandara drove the narcotics-filled car to Chicago in November 1991, that he knew the narcotics were in the car, and that the drugs were intended for distribution. Abel testified that Gandara knew Abel was in the drug smuggling business and allowed him to park cars in front of his house. Steve Cardenas testified that vehicles were altered and loaded at Gandara's house. And Abel testified that Gandara was present when Abel built a false compartment in a car.

Arellano testified that he made a drug-running trip to Chicago in a Ford Taurus in November 1991 and that, when he arrived at the hotel, Gandara was present with Juan and Abel Cardenas. Gandara, Abel, and their families returned the Taurus to El Paso, and Gandara helped Arellano re-register the Taurus in Arellano's name. Gandara's employees testified that Gandara missed work for three weeks in November 1991, allegedly because he was having an appendicitis operation, but neither Gandara's wife and nor his daughter mentioned any operation during this time period.

Given Gandara's obvious knowledge of the general operation, the vehicles used, and the false compartments, and given his presence at the hotel and absence from work for three weeks, the jury was justified in concluding that Gandara knowingly possessed the cocaine. The quantity of drugs supported the inference that it was intended for distribution. Moreover, Gandara's claim that the

verdicts were inconsistent (because of his acquittal on the other counts), even if true, would not alone warrant reversal. United States v. Straach, 987 F.2d 232, 240-41 (5th Cir. 1993).

AFFIRMED.