UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8781

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RUBEN CHAPA-IBARRA, MARTIN LUJAN GARCIA,
and REYNALDO YBARRA TREVINO,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(P 93 CR 054 (1))

February 24, 1995

Before JONES, DUHÉ, and STEWART, Circuit Judges.

DUHÉ, Circuit Judge:[1]

Defendants Ruben Chapa-Ibarra (Chapa), Martin Lujan Garcia (Lujan), and Reynaldo Ybarra Trevino (Trevino) appeal their convictions resulting from their participation in a drug conspiracy. We affirm.

BACKGROUND

Appellants and other co-conspirators distributed marijuana from the Big Bend area to Dallas between 1985 and 1993. Chapa controlled the conspiracy, Trevino served as his lieutenant, and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Lujan loaded and transported the drugs. The conspirators used various locations to store drugs and guns. Chapa apparently forced Trevino and Lujan from the conspiracy in January 1992.

In June 1993 after a two year investigation, the DEA executed search warrants on Chapa's residence and Trevino's residence and ranch. At Trevino's residence, the agents found drug ledgers and firearms in a roll-top desk. They found cash, a safe deposit key, and documents that linked Trevino to Chapa. The agents obtained a warrant and searched Trevino's safe deposit box.

A grand jury indicted Appellants and fourteen co-conspirators in an eight count indictment. The indictment named Chapa in all eight counts, Lujan in four counts, and Trevino in three counts. Thirteen co-conspirators pled guilty, and many of them testified for the Government against Appellants. A jury convicted Appellants on all counts, except it acquitted Chapa and Lujan on a possession with intent to distribute charge for April 17, 1992. Appellants appeal their convictions and sentences.

DISCUSSION

I. Convictions

Chapa challenges the district court's handling of the trial in three ways. First, he contends that the court should have granted his motion for a mistrial after a government witness gave an improper answer. Second, he contends that the court abrogated judicial neutrality in four different instances. Third, he contends that the court improperly limited his time allotted for closing argument. Trevino also challenges his conviction on the

ground that the district court improperly denied his motion to suppress evidence seized in a search of his residence and safe deposit box.[2]

We review a district court's denial of a motion for a mistrial for abuse of discretion. United States v. Coveney, 995 F.2d 578, 584 (5th Cir. 1993). Chapa contends that the nonresponsive answer of a Texas park ranger constitutes grounds for a mistrial. The direct examination went as follows:

> Q. And, sir, what happened to the vehicle that was starting to approach from behind?
> A. The vehicle turned off its lights and at that point I thought it really suspicious, so I told the driver, Emiterio, to go into Lajitas, you know, to slow it down and not to be drinking any more.
> Q. And what did you do?
> A. I proceeded to get in my vehicle, and as I was approaching the vehicle over there, I noticed a blue Toyota as I was approaching, I noticed a couple of shadows or a shadow and I fell in behind a Toyota pickup. And I noticed there were no occupants in it. I radioed in to the Alpine Police Department a license plate number and I had a hunch I already knew the vehicle, it belonged to a Chapa person that is a known trafficker and --
> MR. BOAZ: Objection, your Honor. Not responsive.
> COURT: Sustained.
> MR. BOAZ: I ask the jury be instructed to disregard that.
> COURT: The last part of the answer, you will disregard.
> MR. BOAZ: I move for a mistrial.
> COURT: Denied.

7 Record 151-52.

Despite the court's curative instruction, Chapa contends that the nonresponsive answer caused substantial prejudice incapable of cure. We disagree. Because overwhelming evidence described the

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[2] Trevino does not contest the contemporaneous search of his ranch.

workings of the Chapa conspiracy to the jury, the nonresponsive answer had minimal effect on the jury. Furthermore, the quoted testimony described events on April 17, 1992. The jury acquitted Chapa of the possession with intent to distribute count tied to that date. The district court did not abuse its discretion by refusing to grant a mistrial.

Chapa next contends that the court abrogated its judicial neutrality in four instances. When reviewing a claim of judicial misconduct, we focus on the totality of the circumstances and consider factors "such as the context of the remark, the person to whom it is directed, and the presence of curative instructions." United States v. Lance, 853 F.2d 1177, 1182 (5th Cir. 1988). For us to overturn the conviction, the error must be substantial and cause prejudice to the defendant. Id.

All four instances concern comments by the court when Chapa attempted to impeach by bias co-conspirators testifying for the Government. Chapa contends he was attempting to show that the court could depart downwards on a sentence only if the government filed a § 5K motion. Chapa complains that the court's comments, which informed the jury that it is the court which determines the sentence, prevented Chapa from emphasizing his point. In the first two instances, however, Chapa's questions do not test the witnesses' knowledge but rather ask the witnesses to agree with inaccurate statements of the law. The last two instances have

nothing to do with a § 5K motion. The court's comments were proper.[3]

Finally, Chapa contends that the trial court should have given him more time to present his closing argument. We review a district court's time limitation on closing argument for abuse of discretion. United States v. White, 589 F.2d 1283, 1289 (5th Cir. 1979). Chapa's argument borders on the frivolous. Chapa asked for thirty minutes to perform his argument, although he thought he could perform it in twenty minutes especially if he had the night to work on his argument. The court gave him the night and twenty-five minutes to perform. After Chapa had used twenty-five minutes, the court did not cut him off but let him complete his presentation over the next two transcript pages. We see no abuse of discretion.

Trevino contends that the DEA seized evidence in violation of his Fourth Amendment rights. We undertake a two-step review when a district court denies a motion to suppress evidence seized pursuant to a warrant: (1) whether the good-faith exception to the exclusionary rule applies; and (2) whether probable cause supports the warrant. United States v. Satterwhite, 980 F.2d 317, 320 (5th Cir. 1992). The second step is unnecessary if, as in this case, the good-faith exception applies and the case does not present a novel Fourth Amendment question. Id.

Trevino contends that the warrants' supporting affidavits were so lacking in probable cause that a reasonable officer could not

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[3] When counsel properly explored a witness's knowledge about a § 5K motion, the court did not interrupt. See, e.g., 6 Record 179-82.

have relied on the warrants. The good-faith exception does not apply if the supporting affidavit is a "bare bones" affidavit. Id. Bare bones affidavits contain only conclusory statements without supporting facts and circumstances that would allow a magistrate independently to determine probable cause. Id. at 321. We review de novo the objective reasonableness of an officer's reliance on a warrant. Id.

The affidavits in this case are not bare bones affidavits. The affidavit supporting the warrant for the search of Trevino's residence stated that two co-conspirators had admitted to making deliveries of marijuana to both Trevino's ranch and residence. Because a safe deposit key was found in the search of Trevino's residence, the DEA submitted an affidavit requesting a search warrant for the safe deposit box. From the documents, guns, and cash found at Trevino's residence, the DEA believed that the box contained either documents or cash. The affidavits state sufficient facts to allow a reasonable officer to rely on the warrants.

Trevino also argues that the facts contained in the affidavits are stale because he withdrew from the conspiracy in January 1992.[4] The facts asserted in the affidavit must be closely related to the present in order to justify a finding of probable cause at the time the magistrate issued the warrant. United States v. Craig, 861 F.2d 818, 821 (5th Cir. 1988). Nevertheless, if the facts show a

[4] It is not clear whether the DEA knew of Trevino's withdrawal at the time of the swearing of the warrants.

longstanding and ongoing pattern of criminal activity, the information is not stale. Id. at 822. Although Trevino withdrew from the conspiracy in January 1992, he had been a part of it for a number of years. See infra Part II (detailing the evidence that shows Trevino's involvement before October 1991). Because Trevino's ongoing participation covered several years, the lapse of time between January 1992 and June 1993 does not render stale the information contained in the affidavits. We conclude that the district court properly applied the good-faith exception and denied Trevino's motion to suppress.

II. Sentences

Trevino challenges four parts of his sentence: (1) the base offense level based on an amount of drugs; (2) a two-level enhancement for possession of a dangerous weapon; (3) a three-level enhancement for his role as supervisor or manager; and (4) denial of a two-level reduction for acceptance of responsibility. Lujan also challenges the enhancement of his sentence for possession of a dangerous weapon.

Trevino contests the amount of drugs allotted to him by arguing that he was a member of the conspiracy only between October 1991 and January 1992. The PSR allotted 8815 pounds of marijuana to Trevino, which resulted in a base offense level of 34. The amount of drugs for which a defendant is held responsible at sentencing constitutes a factual finding, which we review for clear error. United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096, cert. denied, 114 S. Ct.

1552, and cert. denied, 115 S. Ct. 282 (1994). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir.), cert. denied, 115 S. Ct. 180 (1994).

The PSR relied on four facts to show Trevino's involvement in the conspiracy before October 1991: (1) his presence at a 1986 marijuana sale at Chapa's Dallas residence; (2) tax and utility statements of Chapa's Dallas residence found in the June 1993 search of Trevino's residence; (3) the use of Trevino's ranch during 1989 and 1990 to store and distribute marijuana; and (4) his presence during a 1989 delivery of marijuana to his ranch. These facts demonstrate Trevino's pre-1991 connection to the conspiracy. We see no clear error in Trevino's base offense level.

Trevino contends that the district court should have held an evidentiary hearing to determine the date of Trevino's entry into the conspiracy.[5] We review a district court's denial of an evidentiary hearing for abuse of discretion. United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). Because the court had sufficient information to find that Trevino was part of the conspiracy before October 1991, we conclude that the court did not abuse its discretion in refusing to hold an evidentiary hearing.

Both Lujan and Trevino contend that the district court's factual finding that they possessed weapons is clearly erroneous.

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[5] Trevino also raises, but does not argue, the district court's denial of evidentiary hearings concerning the two enhancements to his sentence. A question posed for appellate review but not argued is waived. Harris v. Plastics Mfr. Co., 617 F.2d 438, 440 (5th Cir. 1980).

Possession of a weapon under U.S.S.G. § 2D1.1 may be shown either through personal possession or the reasonably foreseeable possession of a co-conspirator. See United States v. Mergerson, 4 F.3d 337, 350 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994). Personal possession requires "a temporal and spatial relationship between the weapon, the drug trafficking activity, and the defendant." Id. Alternatively, one co-conspirator's use of a firearm may be foreseeable because firearms are "tools of the trade" in drug conspiracies. Id.

The PSRs on Lujan and Trevino found that the use of firearms by co-conspirators was reasonably foreseeable to them. As an alternative basis for applying the enhancement in Trevino's case, his PSR noted that the search of Trevino's residence uncovered weapons in a desk where Trevino kept drug records connecting him to Chapa. Although the district court focused on Trevino's personal possession of the weapons, the court explicitly disallowed Trevino's objection for the reasons set forth in the PSR.

It was reasonably foreseeable to Lujan and Trevino during their involvement in the conspiracy that their co-conspirators possessed firearms. The PSRs found that the conspiracy bought and distributed firearms, based on the testimony of Timothy Bandy and George Allen Edwards. Edwards testified that he had picked up a load of weapons at Trevino's ranch and had given Chapa a gun. Bandy testified that he had bought a gun for Chapa. In addition, Chapa pulled a gun on Lujan in January 1992, and Chapa possessed a firearm when he was arrested. We conclude that the court committed

no clear error in finding that it was reasonably foreseeable to Lujan and Trevino that their co-conspirators possessed weapons.[6]

Trevino next contends that the court improperly applied U.S.S.G. § 3B1.1(b)'s three-level enhancement to him for the role of manager or supervisor in the conspiracy. Trevino did not make this objection at sentencing, however. We review for plain error an argument raised for the first time on appeal. United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (en banc). To qualify for plain error review, the error asserted must be legal and not factual. See id. at 162-63. Whether a defendant is a manager or supervisor is a factual determination. See United States v. Valencia, No. 94-40063, 1995 U.S. App. LEXIS 1593, at *4 (5th Cir. Jan. 26, 1995). Because Trevino asserts a factual error, we will not review the court's application of § 3B1.1(b) to Trevino.

Lastly, Trevino contends that the district court should have given him a two-level deduction under U.S.S.G. § 3E1.1 for acceptance of responsibility. Because the district court is in a unique position to evaluate a defendant's acceptance of responsibility, our review of this issue is extremely deferential. U.S.S.G. § 3E1.1 commentary n.5. Section 3E1.1 does not apply when a defendant contests his guilt factually at trial. See § 3E1.1 commentary n.2. Trevino required the government to establish his guilt beyond a reasonable doubt. He still maintains that he was not a member of the conspiracy before 1991. We conclude that the

[6] Because we affirm Trevino's § 2D1.1 enhancement on the basis of foreseeability, we need not consider whether he personally possessed firearms during his stint in the conspiracy.

district court properly denied application of § 3E1.1 to Trevino.

CONCLUSION

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