IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8788

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DIONICIO ANTHONY CRUZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CR-105(2))

(June 24, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Dionicio Anthony Cruz was convicted by a jury of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; knowingly and intentionally using a telephone in causing or facilitating the attempt to possess with the intent to distribute cocaine, in violation of 21 U.S.C. § 843(b); and knowingly and intentionally attempting to possess

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1). He now appeals the district court's judgment of conviction and sentence. Finding no error, we affirm.

I.

Dionicio Anthony Cruz, along with co-defendant Michael Adam Trevino, was indicted on April 7, 1993, with a single count of attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Cruz was arrested on April 9, 1993, and pleaded not guilty before a magistrate judge. After various pre-trial motions, the government filed a superseding indictment on July 21, 1993, which charged Cruz with the attempt count previously raised (Count III), conspiracy to posses with intent to distribute cocaine (Count I), and use of a communication facility in conjunction with a drug trafficking crime (Count II).

Cruz filed a motion to dismiss Counts I and II, alleging violations of the Speedy Trial Act, 18 U.S.C. §§ 3161-74. Cruz simultaneously filed a motion to dismiss or, alternatively, to require the government to make an election between Counts I and III because they were multiplicitous. He then pleaded not guilty to the charges in the superseding indictment.

The district court denied Cruz's motions to dismiss, and the matter proceeded to trial before a jury. The jury found Cruz guilty on all counts, and the district court sentenced Cruz to

ninety-six months of imprisonment and a three-year term of supervised release on Count I, forty-eight months of imprisonment and a one-year term of supervised release on Count II, and ninety-six months of imprisonment and a three-year term of supervised release on Count III. All terms of imprisonment were to run concurrently. The district court also ordered Cruz to pay a special assessment of $150. Cruz now appeals.

II.

Cruz contends that the district court erred in not dismissing Counts I and II of the superseding indictment because that indictment was not filed within thirty days of his arrest, in violation of the Speedy Trial Act (the Act). He also contends that a violation of the Act occurred when more than seventy days had lapsed from the date of his original indictment to the date of trial.

The Act requires that an indictment be filed within thirty days from the date on which the defendant named in the indictment was arrested in connection with the charges set forth in the indictment. See 18 U.S.C. § 3161(b). The Act also requires that a criminal trial must commence within seventy days of a defendant's indictment or appearance, whichever is later, barring periods of excludable delay. See 18 U.S.C. § 3161(a); Henderson v. United States, 476 U.S. 321, 326 (1986). Certain periods are excluded from the computation under the statute, including "[a]ny period of delay . . . resulting from any pretrial motions from

the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(F); see Henderson, 476 U.S. at 326; United States v. Gonzalez, 897 F.2d 1312, 1316 (5th Cir. 1990), cert. denied, 498 U.S. 1029 (1991). Further, if a superseding indictment retains some of the original charges, "motions pending on the original charges toll the running of the speedy-trial clock for the new charges, regardless of when the clock begins to run for the new charges." Gonzalez, 897 F.2d at 1316-17.

To the extent that Cruz challenges the government's failure to comply with § 3161(b) by not returning the superseding indictment within thirty days of his initial appearance, Cruz's argument fails. Cruz was arrested and initially appeared before the magistrate on April 9, 1993. The superseding indictment was returned on July 21, 1993SQ104 days later. Of those 104 days, however, only twenty-one lapsed on the speedy-trial clock.

Although the speedy-trial clock should have commenced running on April 9, 1993, the date on which Cruz was arrested and appeared before the magistrate, it was tolled on that date by the government's motion for pre-trial detention. The clock thereafter remained tolled until April 27, 1993, when the detention hearing was held and an order setting conditions of release was entered.[1] See United States v. Moses, 15 F.3d 774, 777 (8th Cir. 1994) (determining that the period of excludable

[1] On April 22, 1993, Cruz filed a motion to continue the detention hearing until April 27, 1993, which was granted. The hearing had originally been scheduled for April 23, 1993.

delay resulting from the government's motion for detention includes both the date on which the motion was filed and the date on which the motion was decided, pursuant to § 3161(h)(1)(F)), petition for cert. filed, (U.S. May 4, 1994) (No. 93-9115); United States v. Bowers, 834 F.2d 607, 609 (6th Cir. 1987) (same); cf. United States v. Castellano, 848 F.2d 63, 65 (5th Cir. 1988) (excluding the period during which the defendant's motion for detention review was pending). The time period from April 9 through April 27, a total of nineteen days, is thus excluded from computation.

The speedy trial clock was also tolled beginning on May 11, 1993, when Cruz filed additional pre-trial motions. During the tolling period invoked by these motions, the government filed a motion to reconsider conditions of pre-trial release, which was not disposed of until July 9, 1993. The time period from May 11 through July 9, a total of sixty days, is also excluded from computation.

On July 13, 1993, the government filed other pre-trial motions, which were disposed of on July 16, 1993. A total of four more days is thus excluded from computation.

The total amount of time to be excluded from the date of Cruz's arrest to the date of the superseding indictment is eighty-three days; the total time lapsing on the speedy-trial clock from the date of arrest to the date of the superseding indictment is thus twenty-one days. Hence, no violation of § 3161(b) occurred.

Cruz also argues that a violation of § 3161(c)(1) occurred because more than seventy days lapsed from the date of the original indictment to the date of his trial. We disagree.

A time period of 137 days lapsed from April 9, 1993, when Cruz was arrested and first appeared before the magistrate, until August 23, 1993, when Cruz's trial began. As set forth above, eighty-three days of this period is excludable time. On July 28, 1993, Cruz filed motions to dismiss or for the government to make an election among counts of his superseding indictment. These motions were disposed of on August 2, 1993, and thus six more days are excludable. The total amount of time to be excluded from the period between Cruz's arrest to the date of his trial is eighty-nine days; the total time lapsing on the speedy-trial clock during this period is thus forty-eight days. Therefore, no violation of § 3161(c)(1) occurred.

III.

Cruz also contends that his Sixth Amendment right to a speedy trial was violated. Again, we disagree.

We examine such a claim under the four-pronged balancing test set forth in Barker v. Wingo, 407 U.S. 514, 540 (1972). Nelson v. Hargett, 989 F.2d 847, 851 (5th Cir. 1993). Barker directs us to consider and balance (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. Barker, 407 U.S. at 530; Nelson, 989 F.2d at 851. The length of delay under a

Barker analysis is determined from the time of arrest or indictment, whichever came first, to the time of trial. Nelson, 989 F.2d at 851.

Although the four Barker factors are not rigid requirements, and a constitutional deprivation may be found without "mechanical factor-counting," id.; see Barker, 407 U.S. at 533, the length-of-delay factor constitutes a threshold requirement for the defendant, necessitating inter alia a showing that the government's actions "crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett v. United States, 112 S. Ct. 2686, 2690-91 (1992) (citation omitted). Thus, unless there is some delay which is presumptively prejudicial, there is no necessity to go into Barker's balancing process. Barker, 407 U.S. at 530. We generally require a delay of at least one year to trigger Barker's balancing analysis of a speedy-trial claim. Nelson, 989 F.2d at 852.

The "delay" at issue in this case is less than five months, running from April 9, 1993, the date of arrest, to August 23, 1993, the time of trial. Accordingly, the delay is not presumptively prejudicial, and Cruz is unable to demonstrate any violation of his Sixth Amendment right to a speedy trial.

IV.

Cruz next contends that the district court abused its discretion in refusing to question jurors about his prior convictions during voir dire. He argues that "[t]here was no

means implemented by the trial judge below to discover any bias that members of the jury panel held towards Cruz because he was a convicted felon."

The conduct and scope of voir dire is within the sound discretion of the district court, subject to the essential demands of fairness. See United States v. Rodriguez, 993 F.2d 1170, 1176-77 (5th Cir. 1993), cert. denied, 114 S. Ct. 1547 (1994); United States v. Gassaway, 456 F.2d 624, 625-26 (5th Cir. 1972). An abuse of discretion will be found when there is insufficient questioning to produce some basis for defense counsel to exercise a reasonably knowledgeable right of challenge. Rodriguez, 993 F.2d at 1176. However, our central inquiry is whether the district court's overall examination, coupled with its charge to the jury, affords a party the protection sought. See id; United States v. Corey, 625 F.2d 704, 708 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981).

Cruz specifically requested that the following question be asked during voir dire:

> The Defendant has previously been convicted of a criminal offense. The law says that a prior conviction is a factor you may consider in deciding, as with any witness, whether to believe the testimony of the Defendant in this trial, but it does not necessarily destroy the Defendant's credibility. The fact that the Defendant has previously been found guilty of another crime does not mean that the Defendant committed the crime for which he is on trial, and you must not use the prior conviction as proof of the crime charged in this case. Do you accept and enforce this principle? Would you apply it if you were chosen as a juror in this case?

Before commencing voir dire, the district court asked specifically Cruz's attorney about this proposed question,

inquiring whether Cruz was going to testify. After being informed that Cruz was going to testify and that Cruz's attorney wanted to voir dire the jury on the issue of Cruz's three prior convictions, all of which arose out of a single episode involving an assault on a police officer, the court denied Cruz's request to conduct voir dire and denied the proposed question "except as covered by the court." The court then made it clear that it would, however, allow the parties to raise any concerns they might develop during voir dire on a case-by-case basis in a bench conference.

The record indicates that Cruz's attorney availed himself of the court's invitation to raise his concerns during voir dire. For example, in an on-the-record bench conference, defense counsel informed a prospective juror, whose husband was a police officer, that "the evidence in this case may show that my client has been previously convicted of a crime that involved an altercation with a police officer." The court then permitted Cruz's attorney to question this prospective juror as to whether Cruz's involvement in that altercation would prevent her ability to "sit fairly and impartially in a criminal case." Although the juror responded that she could be impartial, the court excused this juror for cause. The court also excused for cause another prospective juror who had been a former policeman, after Cruz's attorney began questioning him during an on-the-record bench conference. Cruz's attorney did not attempt to seek further

individual examination of any prospective juror regarding the impact of Cruz's previous convictions.

Moreover, at the outset of voir dire, the district court instructed the prospective jurors regarding the absolute standard of impartiality required of all jurors as the finders of fact and the dangers of personal bias and prejudice. At the close of voir dire, the district judge again asked the prospective jurors to indicate if there was any reason why any of them should not serve as a juror but received no response. Further, after Cruz testified to the fact that he had three prior convictions, the district court instructed the jury in its charge:

> You have been told that the defendant was found guilty in 1977 of two counts of attempted capital murder and one count of deadly assault of a police officer. These convictions have been brought to your attention only because you may wish to consider them when you decide, as with any other witness, how much of the defendant's testimony you will believe in this trial. The fact that the defendant was previously found guilty of other crimes does not mean that the defendant committed the crimes for which the defendant is on trial. You must not use these prior convictions as proof of the crimes charged in this case.

The court also instructed the jury in its charge to assess Cruz's credibility as it would that of any witnessSQi.e., by examining whether Cruz impressed the jury as honest, whether he had a reason not to tell the truth, whether he had a good memory, and whether his testimony differed from that of other witnesses. Before retiring the jury to deliberate, the district court again specifically inquired whether any juror felt that "anything has happened here that raises a question about your ability to serve

impartially and fairly and without disqualification," but the court received no affirmative response.

Although the district court could have paid more heed during its voir dire examination to the risk of the bias Cruz's attorney raised, under the circumstances of this specific case we cannot say that Cruz has shown that the court's failure to ask the proposed question regarding his prior convictions during voir dire was an abuse of discretion.

V.

Cruz further contends that the district court erred in denying his motion to dismiss Counts I and III of the superseding indictment or, in the alternative, to require the government to elect either Count I or Count III. He first argues that the conspiracy offense charged in Count I and the attempt offense charged in Count III were multiplicitous because both counts were charged in violation of 21 U.S.C. § 846. Cruz also argues that the district court recognized and acknowledged the multiplicity of these offenses by adopting the government's proposed instruction to the jury on the definition of conspiracy.

We apply the test enunciated in Blockburger v. United States, 284 U.S. 299, 304 (1932), to determine whether conduct which violates two statutory provisions constitutes more than one offense. See United States v. Singleton, 16 F.3d 1419, 1422 (5th Cir. 1993). The mandate of Blockburger is satisfied if, based on the statutory elements, either statutory provision requires proof

of an additional fact which the other does not. Id. This court has already determined that under the test enunciated in Blockburger, an attempt, when prohibited in a statute, may be prosecuted and punished as a substantive crime separate and apart from the offense of conspiracy for the same factual episode. United States v. Anderson, 651 F.2d 375, 378-79 (5th Cir. Unit A 1981); cf. United States v. Marden, 872 F.2d 123, 125-26 (5th Cir. 1989) (addressing federal prosecution for attempt following state prosecution for conspiracy). Hence, Cruz's first argument is meritless.

We read Cruz's second argumentSQthat the district court recognized the multiplicity of these offenses by adopting the government's proposed instruction to the jury on the definition of conspiracy[2]SQas being an argument that the jury instruction given by the district court was inappropriate. However, Cruz failed to object to this instruction at trial. When a defendant fails to object to a jury instruction at trial and raises the issue first on appeal, we will uphold even an inaccurate jury instruction provided no plain error has resulted from the inaccuracy. United States v. Birdsell, 775 F.2d 645, 654 (5th Cir. 1985), cert. denied, 476 U.S. 1119 (1986). Plain error is clear or obvious error that affects substantial rights and undermines "the fairness, integrity or public reputation of

[2] The district court instructed the jury that "conspiracy" was "a combination or agreement between two or more persons who have joined together to attempt to accomplish some unlawful purpose." On appeal, Cruz objects to the district court's inclusion of the phrase "to attempt."

judicial proceedings." United States v. Olano, 113 S. Ct. 1770, 1779 (1993).

Even if we assume arguendo that the court's instruction on the definition of "conspiracy" was inaccurate, Cruz has not shown that such an instruction resulted in plain error. The court's instruction also made it clear that in order to convict Cruz of the conspiracy offense charged in Count I, the government had to establish beyond a reasonable doubt

> 1. that two or more persons made an agreement to commit the crime of possession of cocaine with intent to distribute . . . ; and
> 2. that the defendant, Dionicio Anthony Cruz, knew the unlawful purpose of the agreement and joined into it willfully, that is, with the intent to further the unlawful purpose.

The court also instructed the jury that to convict Cruz of the attempt offense charged in Count III, the government had to establish beyond a reasonable doubt that Cruz "intended to possess a quantity of cocaine with the intent to deliver it to another person" and that Cruz "did something that was a substantial step toward committing the crime." The court further defined "substantial step" as "conduct that strongly supports the firmness of the defendant's attempt to possess with intent to distribute a quantity of cocaine . . . [or], [i]n other words, the defendant's conduct must be more than a remote preparation." Hence, the district court adequately instructed the jury as to the distinction between the attempt charge and the conspiracy charge.

VI.

Cruz also contends that the district court erred by denying his request to give a lesser-included offense instruction, concerning an attempt to possess cocaine, with the court's required instruction on the elements of the conspiracy charged in Count I.

The statutory elements test is the proper method for determining whether a defendant is entitled to a lesser-included offense instruction in a federal criminal trial. United States v. Buchner, 7 F.3d 1149, 1152 (5th Cir. 1993), cert. denied, 114 S. Ct. 1331 (1994); see United States v. Browner, 937 F.2d 165, 167 (5th Cir. 1991). In accordance with this "elements" test, "an offense is not lesser included unless each statutory element of the lesser offense is also present in the greater offense." Browner, 937 F.2d at 168.

Attempt to possess cocaine with intent to distribute requires proof that the defendant made a substantial step toward the commission of the crime. See United States v. Stone, 960 F.2d 426, 433 (5th Cir. 1992). A defendant is said to have made a "substantial step" when it is shown that he undertook an overt act which evidenced strong commitment to the criminal venture. See United States v. August, 835 F.2d 76, 77-78 & n.2 (5th Cir. 1974). A conviction for involvement in a drug conspiracy is based on proof of an agreement between two or more people to commit an unlawful act together but does not require proof of any overt conduct on a particular defendant's part. United States v.

Ayala, 887 F.2d 62, 67 (5th Cir. 1989); United States v. Hernandez-Palacios, 838 F.2d 1346, 1348 (5th Cir. 1988). Hence, because an attempt offense contains an element not part of a conspiracy offense, the district court did not err by refusing to give Cruz's requested lesser-included offense instruction.

VII.

Finally, Cruz contends that the district court's instruction that questions asked by lawyers were not evidence was an incorrect instruction on the law. He specifically challenges the following part of the district court's charge:

> If a lawyer asks a question which contains an assertion of fact, you may not consider the assertion as evidence of that fa[c]t. The lawyer's statements are not evidence.

He argues that although a question in and of itself may not be evidence, when the question is coupled with the applicable response from the testifying witness, both the question and the response are evidence. Although he cites no authority to support this novel argument, he nonetheless suggests that the instruction given by the district court was "obviously prejudicial" to his ability to develop evidence through his cross-examination of witnesses.

In reviewing instructions to the jury, we consider whether the district court's charge as a whole is a correct statement of the law and whether it clearly instructs the jurors as to the principles of law applicable to the factual issues confronting them. United States v. O'Banion, 943 F.2d 1422, 1429 (5th Cir.

1991); United States v. Lara-Velasquez, 919 F.2d 946, 950 (5th Cir. 1990). We note that it is proper to instruct the jury that comments or questions by counsel are not substantive evidence. See United States v. Stouffer, 986 F.2d 916, 924 (5th Cir.), cert. denied, 114 S. Ct. 115 (1993); United States v. Onori, 535 F.2d 938, 944-45 (5th Cir. 1976) (upholding the district court's instruction to the jury that a lawyer's leading question for purposes of cross-examination was not to be considered as evidence); see also 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.08 (4th ed. 1992) (providing the following instruction: "The questions asked by a lawyer for either party to this case are not evidence. If a lawyer asks a question of a witness which contains an assertion of fact, therefore, you may not consider the assertion by the lawyer as any evidence of that fact. Only the answers are evidence."); 1 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.13 (3d ed. 1977) (providing an instruction in identical language to that used by the district court in the instant case). Further, when read as a whole, the district court's charge indicates that the district court properly instructed the jury that in determining the facts, it must "consider only the evidence presented at trial, including the sworn testimony of the witnesses, the stipulation entered into by the parties[,] and the exhibits," and that "any statements, objections, or arguments made by the lawyers are not evidence." Hence, the district court's charge indicates that the

court correctly instructed the jury concerning applicable law. Cruz's contention is thus meritless.

VIII.

For the foregoing reasons, we AFFIRM the judgment of the district court.