UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10027

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

STEVE GALAVIZ, JERRY PIPHER,
and HUMBERTO MARTINEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(4:92 CR 155 Y)

August 2, 1995

Before WISDOM, DUHÉ, and BARKSDALE, Circuit Judges.

DUHÉ, Circuit Judge:[1]

Defendants Steve Galaviz, Jerry Pipher, and Humberto Martinez appeal their convictions for drug conspiracy, distribution of cocaine, and possession of a firearm during the commission of a drug crime. They attack their convictions and sentences by alleging various errors by the trial court. We affirm.

BACKGROUND

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In a 56 count superseding indictment, the Government indicted Defendants Galaviz, Pipher, and Martinez, along with 18 others. A jury convicted the Defendants of a single drug conspiracy connected to kingpin Jose Angel Castorena to distribute in excess of five kilograms of cocaine. The jury also convicted Galaviz of three substantive one-quarter kilogram cocaine distributions and Pipher and Martinez of one each. Finally, the jury convicted Galaviz and Pipher of possession and use of a firearm during a drug transaction under 18 U.S.C. § 924(c). At sentencing, the court refused to apply to Defendants the ten year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). Instead, the court sentenced Galaviz and Pipher for the three substantive distributions and Martinez for one.

The three distributions occurred in Fort Worth, Texas, at businesses owned by Pipher. In the first distribution, DEA Agent Robert Rangel met with Galaviz, Gustavo Castro and Martinez brought the cocaine, and Rangel paid Martinez. In the second distribution, Rangel met with Galaviz and Pipher, and Galaviz assured Rangel that Pipher was his partner in the drug business. Rangel paid Galaviz what money he had, Castro delivered the cocaine, and Rangel paid Pipher the balance of the money the next day. Pipher brandished a black pistol with light grips to persuade Rangel to pay the balance. In the third distribution, Rangel met with Galaviz, who showed Rangel how to make crack cocaine. Pipher was present on the premises, but did not agree with Galaviz's idea to make crack cocaine. After Rangel and Galaviz made a gram or so of crack

cocaine, Galaviz gave it to Rangel in addition to another one-quarter kilogram of cocaine.

DISCUSSION

I. PROPER VENUE

Galaviz and Martinez contend that the Government's evidence of proper venue in the Northern District of Texas was insufficient. We disagree. The Government must establish venue by a preponderance of the evidence. United States v. Winship, 724 F.2d 1116, 1124 (5th Cir. 1984). The Government put forth evidence to show that Galaviz and Martinez engaged in a drug transaction in Fort Worth, but offered no evidence to show that Fort Worth was in the Northern District of Texas. Nevertheless, at the close of the Government's evidence, the trial court took judicial notice that Fort Worth is in the Northern District of Texas. We conclude that the Government showed proper venue.

II. MATERIAL VARIANCE

Galaviz contends that the conspiracy alleged in Count 1 of the superseding indictment differs from the conspiracy proved at trial. He asserts that the Government never proved a connection between his drug sales and Castorena because Castro, who supplied Defendants with cocaine and testified against them, did not testify to the identity of his supplier. Consequently, the conspiracy proved at trial included Defendants and Castro, but not Castorena.

Nevertheless, we reverse for a material variance only if it prejudices defendant's substantial rights. United States v. Faulkner, 17 F.3d 745, 760 (5th Cir.), cert. denied, 115 S. Ct. 193

(1994). Our concern is whether the indictment has so informed a defendant that he can prepare his defense without surprise and has protected him against a second prosecution for the same offenses. United States v. Lokey, 945 F.2d 825, 834 (5th Cir. 1991).

In addition to proving an agreement between Galaviz, Pipher, Martinez, and Castro, the Government proved that Defendants distributed cocaine on specific occasions. The superseding indictment informed Defendants of the broad conspiracy as well as three particular drug distributions in which they were implicated. The evidence at trial neither surprised Defendants nor raised a distinctly different set of facts. Furthermore, the district court did not impose the mandatory minimum sentence that would have been applicable to conspiracy to distribute in excess of five kilograms of cocaine. We conclude that the material variance did not prejudice Galaviz's substantial rights.

III. EVIDENTIARY RULINGS

We review a district court's evidentiary rulings for abuse of discretion. United States v. Capote-Capote, 946 F.2d 1100, 1105 (5th Cir. 1991), cert. denied, 112 S. Ct. 2278 (1992).

A. Admission of Castro's Plea Agreement

Martinez contends that the court's admission of Castro's plea agreement offered by the Government both improperly bolstered Castro's testimony and suggested Defendants' guilt by their association with him. We disagree. First, the admission of a plea agreement in which the witness has agreed to testify truthfully or face prosecution for perjury is not improper bolstering of a

witness. United States v. Edelman, 873 F.2d 791, 795 (5th Cir. 1989). Second, when the Government offers a witness's guilty plea simply to show candor to the jury and to minimize a defendant's ability to impeach the witness for bias, the trial court should admit the evidence. United States v. Black, 685 F.2d 132, 135 (5th Cir.), cert. denied, 459 U.S. 1021 (1982). Martinez does not contend that the Government overemphasized Castro's guilty plea to the jury. Consequently, we conclude that the district did not abuse its discretion by admitting Castro's guilty plea into evidence.

B. Admission of Galaviz's Guns

Galaviz contends that the trial court abused its discretion by admitting into evidence two firearms seized at Galaviz's residence. The court initially excluded the firearms when the Government offered them during its case-in-chief. During Galaviz's case-in-chief, however, his wife testified on direct examination that federal officers had searched Galaviz's residence and had seized some guns. On rebuttal, the court admitted the Government's reoffer of the firearms to prove that it seized the guns during its search of Galaviz's residence.

Galaviz opened the door to the Government when his wife testified on direct examination about the guns. When a defendant opens up a subject at trial, he cannot complain on appeal that evidence relating to that subject prejudiced him. United States v. Deisch, 20 F.3d 139, 154 (5th Cir. 1994). Because Galaviz opened

the door on the subject of his guns, the trial court did not abuse its discretion by admitting the guns into evidence.

C. Admission of Mark Nelson's Testimony

Galaviz also contends that the court should have excluded the testimony of Mark Nelson, an Oklahoma Highway Patrolman. Nelson testified during the Government's rebuttal that he stopped two individuals in a speeding automobile possessing Pipher's dealer tags, and that he found two kilograms of cocaine in an arm rest inside the car. Galaviz argues that Nelson's testimony is not relevant to the offense charged and was unfairly prejudicial. In determining whether to admit the evidence, the trial court balances it to determine whether its probative value is substantially outweighed by any unfair prejudice to the opposing party. **Fed. R. Evid.** 403.

The two individuals in the automobile were Jose Cervantes and Armando Espinosa, who were co-defendants named in the superseding indictment. During the Defendants' case-in-chief, Pipher testified on direct examination that his only association with Cervantes and Espinosa was to rent them pagers in the context of a legitimate business activity. Further, Pipher testified that he alone determined on which vehicles dealer tags would be placed. Nelson's testimony rebuts Pipher's testimony by tending to show that he had an illicit connection with Cervantes and Espinosa. Because the probative value of Nelson's testimony is not substantially outweighed by its prejudice to the Defendants, we conclude that the trial court did not abuse its discretion.

IV. SUFFICIENCY OF EVIDENCE ON POSSESSION OF FIREARM

DEA Agent Robert Rangel testified that Pipher brandished a black pistol with light grips at Pipher's business with Galaviz present. The Government did not introduce this gun as evidence, but the Defendants did. It was a starter pistol, but it had been capped and its barrel and cylinders filled with lead. We must determine whether any reasonable jury could have found Galaviz and Pipher guilty beyond a reasonable doubt of carrying or using a firearm during a drug trafficking crime. See United States v. Martinez, 975 F.2d 159, 160-61 (5th Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993).

The Government argues that Rangel's testimony provides sufficient evidence even without production of the gun. Testimony about the carrying or use of a gun during a drug trafficking crime may be sufficient by itself to convict a defendant under § 924(c). See United States v. Castillo, 924 F.2d 1227, 1230 (2d Cir. 1991); United States v. Harris, 792 F.2d 866, 868 (9th Cir. 1986). In those cases, however, the gun was not produced at trial. In this case, Defendants introduced the starter pistol seized by the DEA from Pipher's office. They contend that Pipher's starter pistol is not a firearm as defined by the statute:

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; . . . .

18 U.S.C. § 921(a)(3) (1988). Defendants assert that the starter pistol could not expel a projectile nor could be modified so as to expel a projectile because of the lead filling.

Defendants' reading of the statute, however, is too limiting. A firearm that is unloaded and inoperable is still a firearm under § 921(a)(3). United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989); United States v. York, 830 F.2d 885, 891 (8th Cir. 1987), cert. denied, 484 U.S. 1074 (1988). In York, the pistol lacked a firing pin, and the cylinder did not line up properly with the gun barrel. The Eighth Circuit held the pistol to be a firearm because the pistol was designed to expel a projectile by the action of an explosive. York, 830 F.2d at 891.

In this case, the statute covers a starter pistol because it is specifically named and because it is designed to expel a projectile by the action of an explosive. The statute also covers the frame of a starter pistol. Consequently, the fact that Pipher filled his starter pistol with lead does not remove it from the firearm definition. Pipher brandished the frame of his starter pistol during a drug transaction at which his partner Galaviz was present. Because Pipher's starter pistol is a firearm as defined by the statute, we conclude that the evidence was sufficient to sustain the § 924(c) convictions.[2]

V. SENTENCING ISSUES

A. Denial of Acceptance of Responsibility

[2] Consequently, we need not consider the firearms seized at Galaviz's residence.

Galaviz contends that the district court should have granted him a two-level reduction in his sentence for acceptance of responsibility under U.S.S.G. § 3E1.1. We disagree. Our review of a district court's denial of acceptance of responsibility is even more deferential than clear error review. United States v. Bermea, 30 F.3d 1539, 1577 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995) and cert. denied, 115 S. Ct. 1825 (1995). A defendant who contests his factual guilt at trial is not entitled to acceptance of responsibility. See U.S.S.G. § 3E1.1 commentary n.2. Galaviz contested his factual guilt at trial; he still contests it on appeal. We conclude that the district court properly denied application of § 3E1.1.

B. Relevant Amount of Cocaine

Pipher contends that the district court erred by including the 741.15 grams of cocaine distributed in the three sales by Galaviz in Pipher's relevant conduct. Pipher asserts that the court should have considered only the 247.42 grams of cocaine distributed in the second distribution for which the jury convicted him. Relevant conduct for a conspiracy includes "all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). The quantity of cocaine reasonably foreseeable to Pipher is a question of fact, which we review for clear error. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

The PSR found that Galaviz's distribution of the 741.15 grams of cocaine was reasonably foreseeable to Pipher. Pipher contends

that he neither knew nor should have known about the other two distributions. Nevertheless, all three distributions took place at his businesses, and Galaviz was his drug partner. Pipher may not have condoned Galaviz's production of crack cocaine, but Pipher was present on the premises during the third distribution and did not forbid production. We see no clear error in the district court's calculation of drug quantity for Pipher's relevant conduct.

C. Denial of Minor Participant Role

Martinez contends that the trial court erred by not reducing his sentence by two levels for his role as a minor participant in the conspiracy under U.S.S.G. §3B1.2(b). Martinez's PSR recommended application of both the minimum mandatory sentence and § 3B1.2(b). Martinez objected to the minimum mandatory sentence, and the court sustained his objection. Then, after consulting with the probation officer, the court denied the § 3B1.2(b) reduction over Martinez's objection. Martinez continues his objection before us, contending that the record does not support the district court's denial of the reduction.

When a defendant is convicted of an offense significantly less serious than his actual criminal conduct warrants and he receives a lower offense level as a result, § 3B1.2 does not apply unless the defendant's conduct was on the minor end of the offense of which he was convicted. Lampkins, 47 F.3d at 181 n.3 (citing U.S.S.G. commentary n.4). This logic applies also to a defendant who, although not convicted of a lesser offense, is sentenced as if he had been. Id.; see also United States v. Lucht, 18 F.3d 541,

555-56 (8th Cir.) (refusing to apply § 3B1.2 to defendants who pled guilty to drug conspiracy and a smaller amount of drugs rather than standing trial for the activities of the whole conspiracy), cert. denied, 115 S. Ct. 363 (1994). As we very recently held, "[W]hen a sentence is based on an activity in which a defendant was actually involved, § 3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal." United States v. Atlanda, No. 94-20736, slip op. at 6 (5th Cir. July 24, 1995).

The district court calculated Martinez's base offense level solely from the first distribution, for which he supplied the cocaine and collected the purchase money. His role in the offense was not substantially less culpable than the other participants in that distribution. Because Martinez was not a minor participant in the first distribution, he is not entitled to a minor participant reduction under § 3B1.2.

CONCLUSION

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