IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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NO. 94-10082
Summary Calendar

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UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

LAWRENCE DANIEL GARZA, Defendant-Appellant.

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Appeal from the United States District Court for the
Northern District of Texas
(3:93-CR-312-G-1)

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(February 8, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM*:

Defendant-Appellant Lawrence Daniel Garza ("Garza") appeals his conviction and sentence for possession with intent to distribute 500 or more grams of cocaine and using and carrying a firearm during and in relation to a drug trafficking crime in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(ii) and 18 U.S.C. § 924(c)(1). We affirm.

I.

On August 16, 1993, Drug Enforcement Administration ("DEA")

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Special Agent Eli Chavez ("Agent Chavez") received information from Steve Gonzalez ("Gonzalez"), a confidential informant, that Tim Mateo Ochoa ("Ochoa") would be receiving three kilograms of cocaine at 710 Madison in Dallas County, Texas. Earlier that day, Gonzalez had arranged to purchase the cocaine for over $63,000.00. Agent Chavez instructed Gonzalez to return to Ochoa's residence to complete the transaction and to page Agent Chavez when he saw the cocaine. Agent Chavez sent Gonzalez back to the 710 Madison residence at about 7:10 p.m.

DEA Agent Matt Fairbanks ("Agent Fairbanks") began his surveillance of the residence at approximately 6:15 p.m. About half an hour later, he observed Garza drive up to the house in a maroon Cadillac. Garza got out of the vehicle, opened the trunk and took out a white sack. Inside the sack was another bag that appeared to be yellow. Agent Fairbanks testified that the bag was approximately the correct size for carrying about three kilograms. Garza took the bag out of the trunk and went immediately inside the 710 Madison residence.

When Gonzalez arrived at the residence, Garza was already there. Gonzalez observed Ochoa go into the dining room and get a grocery sack from Garza containing cocaine wrapped in plastic. Gonzalez told Ochoa that he did not have any money with him and that he would have to leave to retrieve the money, but that he would come right back. As instructed by Agent Chavez, Gonzalez called Agent Chavez's beeper to indicate that there was cocaine in the house. Gonzalez then left the house through the back door.

Upon receiving Gonzalez's page, DEA agents prepared to raid the 701 Madison residence. As they approached the house, Agent Chavez saw someone looking out of the window and then heard people running. The DEA agents knocked the door down and secured the house, but the persons inside had already escaped. Agent Robert Crawford ("Agent Crawford") went into the back yard and saw a barbecue grill with a white plastic bag sticking out from under the lid. Inside the white bag was a brown package containing approximately three kilograms of cocaine.

Agent Chavez testified that he was not able to obtain a warrant on August 16, 1993 because no magistrate judge could be located on such short notice. He also testified that the Cadillac parked outside of the 701 Madison residence was deemed part of the instrument of the crime, and for that reason it was secured and taken to DEA headquarters. When Agent Chavez entered the vehicle to get it ready for towing he found a loaded .380 semi-automatic pistol and $75.00 on the driver's side floorboard.

On August 17, 1993, Agent Chavez contacted Garza and informed him that the DEA had his vehicle. On August 19, 1993 Garza and his brother went to the DEA Headquarters. After DEA Agent Chuck Kelly ("Agent Kelly") read Garza his *Miranda*[1] rights, Garza stated that he owned the firearm, the money and the Cadillac. When Agent Chavez tried to question Garza about driving to the 710 Madison residence, Garza invoked his right to an attorney, and the

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

questioning ceased.

A jury convicted Garza of possession with intent to distribute 500 or more grams of cocaine (count one) and using and carrying a firearm during and in relation to a drug trafficking crime (count two). He was sentenced to a term of 78 months imprisonment on count one, a consecutive term of 60 months imprisonment on count two, a three-year term of supervised release and a $100.00 special assessment.

II.

Garza, proceeding *pro se*, challenges his convictions on both counts on the basis of insufficiency of evidence. Garza failed to move for a judgment of acquittal at the close of all evidence, and neither the pleadings in the record nor the docket sheet reflects that he filed any post-trial motions for acquittal. Accordingly, our review is limited to plain error. *United States v. McCarty*, 36 F.3d 1349, 1358 (5th Cir. 1994). Under the plain error standard, we will reverse only when "there was a manifest miscarriage of justice. Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or . . . because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." *Id.* (internal quotation and citation omitted). In making this determination, the evidence must be considered in the light most favorable to the Government, giving the Government the benefit of all credibility choices and inferences. *United States v. Sparks*, 2 F.3d 574, 585 (5th Cir. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 899, 127 L.Ed.2d 91 (1994).

To prove possession of cocaine with intent to distribute, the Government must prove that Garza knowingly possessed cocaine and intended to distribute it. *See United States v. Sanchez-Sotelo*, 8 F.3d 202, 208 (5th Cir. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 1410, 128 L.Ed.2d 82 (1994). "Possession may be actual or constructive, may be joint among several defendants, and may be proved by direct or circumstantial evidence." *Id.* (internal quotation and citation omitted).

Agent Fairbanks observed Garza stop in front of the 710 Madison residence in a maroon Cadillac, take a white sack that contained a yellow bag out of the trunk of the car and immediately enter into the residence. While inside the house, Gonzalez saw Garza give Ochoa a grocery sack containing cocaine. Although the occupants of the residence fled, the DEA agents were able to recover a plastic bag containing approximately three kilograms of cocaine from inside a barbecue grill. The next day Garza admitted to Agent Chavez that he had parked the Cadillac in front of the 710 Madison residence.

Although Garza expends considerable energy attacking the credibility of Gonzalez because he received consideration from the Government in exchange his cooperation and testimony[2], the jury, as the final arbiter of witness credibility, was entitled to find Gonzalez persuasive.[3] A witness's testimony will be found

[2] Garza's claim that "[t]he Government presented false evidence" is really an attack on informant credibility.

[3] *United States v. Restrepo*, 994 F.2d 173, 182 (5th Cir. 1993).

"incredible" as a matter of law only if it is factually impossible. *United States v. Casel*, 995 F.2d 1299, 1304 (5th Cir. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 1308, 127 L.Ed.2d 659 (1994). Gonzalez's testimony was not incredible on its face. Therefore, we find that a rational jury could have found the elements necessary to convict him of possession of cocaine with intent to distribute.

Garza's contention that he did not use or carry a firearm within the meaning of § 924(c) is also without merit. The Government must prove that Garza knowingly used or carried the firearm during and in relation to the drug trafficking crime. *See United States v. Willis*, 6 F.3d 257, 264 (5th Cir. 1993). However, the Government need not prove that Garza had actual possession of the firearm or that he used it in any affirmative manner, only that the firearm was available to provide protection to Garza in connection with the drug trafficking. *Id.* The Government may meet this burden by proving that the weapon had the potential of facilitating the drug trafficking operation and that the presence of the weapon was connected with the drug trafficking.[4]

The DEA agents found a loaded .380 semi-automatic pistol inside the Cadillac on the floor of the driver's seat. Garza admitted to Agent Chavez that he owned the firearm. Herbert Dedeaux, a forensic chemist for the DEA, testified that he had performed an ion scan on the pistol and found cocaine on the grips, trigger housing and bullets. Therefore, we find that a rational

[4] *United States v. Featherson*, 949 F.2d 770, 776 (5th Cir. 1991), *cert. denied*, ___U.S.___, 112 S.Ct. 1771, 118 L.Ed.2d 430 (1992).

jury could have found that the firearm was available to provide protection to Garza in connection with this drug trafficking offense.[5]

III.

Prior to trial, Garza filed motions to suppress evidence and for a hearing on the voluntariness of any admission or confession. After conducting a colloquy with both parties' attorneys, the district court denied the motions without conducting an evidentiary hearing. Garza argues on appeal that the district court erred in failing to conduct an evidentiary hearing on his motion to suppress evidence from the search of his car and his motion to suppress evidence of his statements to DEA agents.

An evidentiary hearing on a motion to suppress is necessary only if the defendant alleges sufficient facts which, if proven, would justify relief. *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1993). Thus, "[f]actual allegations set forth in the defendant's motion, including any accompanying affidavits, must be sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented." *Id.* (internal quotations and citations omitted).

The district court did not err in declining to grant a hearing on Garza's claim that the evidence from the search of his car should be suppressed. Warrantless, nonconsensual searches of motor vehicles in use on public highways do not violate the Fourth Amendment if the officers conducting the search have probable cause

[5] *See Featherson*, 949 F.2d at 776.

to believe the vehicle contains contraband.[6] Nor is a warrant required before seizing a car from a public place when police officers "have probable cause to believe that the car itself is an instrument or evidence of crime." *United States v. Cooper*, 949 F.2d 737, 747 (5th Cir. 1991), *cert. denied*, ___U.S.___, 112 S.Ct. 2945, 119 L.Ed.2d 569 (1992).

In the instant case, the DEA agents had probable cause to believe Garza's car was an instrument of crime. Agent Fairbanks observed Garza remove a package later determined to contain three kilograms of cocaine from the trunk of the Cadillac. Thus, prior to seizing the vehicle, the DEA agents had information linking it to Garza's criminal activity, making the seizure of the vehicle as evidence proper.[7] When the DEA agents entered the Cadillac to prepare it for towing to DEA headquarters, they found the .380 semi-automatic pistol on the floor on the driver's side. Once the police had probable cause to seize the car as an instrument of the crime, the search was reasonable.[8] Nevertheless, the DEA agents waited until after they had obtained a warrant from the magistrate judge to search the vehicle. Because Garza failed to raise any factual allegations in the district court, which if proven would justify suppressing evidence from the search of the car, there was

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[6] *See California v. Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985).

[7] *See Cooper*, 949 F.2d at 748.

[8] *See Chambers v. Maroney*, 399 U.S. 42, 52, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (finding no constitutional distinction between seizing a car without a warrant and an immediate warrantless search of the vehicle).

no ground for convening a hearing.

Nor did the district court err in not granting an evidentiary hearing on Garza's claim that his statements to the DEA agents were inadmissible because they were in violation of his Fifth and Sixth Amendment rights. When Garza spoke to Agent Chavez on the telephone, his Fifth Amendment right against self-incrimination had not attached because Garza was not in custody.[9] He had no right to counsel because no judicial proceeding had been initiated against him.[10] Garza, accompanied by his brother, then voluntarily went to DEA headquarters to recover the Cadillac. There, Agent Kelly administered Garza's *Miranda* warnings before he was asked any questions. After making a few statements to the agents, Garza invoked his right to counsel. We find that these voluntary statements were properly admitted into evidence.

IV.

After trial, Garza's defense counsel filed a motion for leave to contact jurors "to investigate the change in their deliberations occurring over the evening of November 5-6, 1993, and whether any potential improprieties could have occurred to change the deadlocked nature of the deliberations overnight." The district court denied the motion, and Garza challenges this ruling on appeal.

"In order to justify the extraordinary step of examining the

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[9] *See United States v. Howard*, 991 F.2d 195, 200 (5th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 395, 126 L.Ed.2d 343 (1993).

[10] *Id.* at 201.

jury concerning its verdict, a defendant must make a preliminary showing of misconduct on the part of the jury, or that the jury based its verdict on matters outside the record." *United States v. Chavis*, 772 F.2d 100, 110 (5th Cir. 1985). Garza has not made such a showing in either his motion or brief. He merely offers conjecture and speculation to support his claim. Therefore, we find that the district court's denial of the motion to contact jurors was proper.

V.

Garza argues that the district court failed to give the special jury instruction defense counsel requested identifying the suspect credibility of paid informant Gonzalez. This issue is raised for the first time on appeal.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional case. *United States v. Rodriguez*, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. *United States v. Olano*, ___U.S.___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. *Id.* at 1777-78; *Rodriguez*, 15 F.3d at 414-15; FED. R. CRIM. P. 52(b). We lack the authority to relieve an appellant of this

burden. *Olano*, 113 S.Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." *Id.* at 1778 (quoting FED. R. CRIM. P. 52(b)). As the Court stated in *Olano*:

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in *United States v. Atkinson*, [297 U.S. 157, 56 S.Ct. 391, 80 L.Ed.2d 555] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

*Id.* at 1779 (quoting *Atkinson*, 297 U.S. at 160). Accordingly, our discretion to correct an error pursuant to Rule 52(b) is narrow.[11] This Court recently approved, in an *en banc* decision, the approach adopted by the *Rodriguez* panel. *See United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994) (en banc).

"A court's refusal to deliver a requested jury instruction is reversible error only if the instruction: (1) was substantially correct; (2) was not substantially covered in the charge delivered to the jury; and (3) concerned an important issue so that the failure to give it seriously impaired the defendant's ability to present a given defense." *United States v. Vaquero*, 997 F.2d 78, 86 (5th Cir.) (internal quotation and citation omitted), *cert. denied*, ___U.S.___, 114 S.Ct. 614, 126 L.Ed.2d 578 (1993). In this case, the district court gave a cautionary instruction

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[11] *Rodriguez*, 15 F.3d at 416-17.

substantially similar to the instruction requested by Garza's attorney. Therefore, we find that Garza has made no showing whatsoever that the refusal to deliver his requested instruction at the time constituted error, plain or otherwise.

Finally, to the extent Garza is claiming ineffective assistance of counsel, this claim cannot be resolved on direct appeal because the record has not been developed sufficiently to allow this Court to fairly evaluate its merit.[12] If Garza wishes this Court to address the merits of his ineffective assistance claim, he has the right to raise the issue in a proper proceeding pursuant to 28 U.S.C. § 2255.[13]

VI.

For the reasons articulated above, Garza's conviction and sentence is AFFIRMED.

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[12] *See United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S.Ct. 1051, 98 L.Ed.2d 1013 (1988).

[13] *Higdon*, 832 F.2d at 314.