IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10119

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND LAVON BONE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-434-D (03))

(December 14, 1994)

Before KING, JOLLY, and DeMOSS Circuit Judges.

PER CURIAM:[*]

Raymond Lavon Bone was convicted in a jury trial for conspiracy to possess and distribute a phenylacetic acid knowing and having reasonable cause to believe that it would be used to manufacture methamphetamine in violation of 21 U.S.C. § 846 and for possession of phenylacetic acid with the intent to manufacture methamphetamine in violation of 21 U.S.C. § 841(d)(2). Bone appeals his convictions, alleging insufficient

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

evidence, improper admission of extrinsic offenses, and abuse of discretion in continuing the trial in his absence. We affirm.

I. BACKGROUND

Bone was arrested during undercover operations by Dallas police officers, Dan Moses and Ed Matis, who posed as dealers of phenylacetic acid and of the methamphetamine derived from that acid. Matis testified that a confidential informant arranged a meeting attended by Matis, Moses, the informant, and Joe Bob Mulkey, one of Bone's alleged coconspirators. At that meeting, according to Matis's testimony, Mulkey stated that he would "broker" the purchase of the phenylacetic acid for his "main man" Donald Mack Martin, another codefendant and alleged coconspirator.

Later that same day, Moses and Matis met with Mulkey and Martin. At that second meeting, the men agreed that Matis would supply Martin with thirty pounds of phenylacetic acid which Martin and his "cook" would convert into methamphetamine. In exchange for supplying the phenylacetic acid, Matis was to receive two pounds of "finished product." The men further agreed that Martin would give Matis his Blazer as collateral to ensure that Martin returned with the finished product.

Over the next several days, Matis talked to Martin to finalize the transfer of the phenylacetic acid and the Blazer. The men arranged to meet behind a restaurant, and at the contemplated exchange, Martin informed Matis that another person

would arrive to transport the acid. Eventually, a man, who Matis identified at trial as Bone, arrived in a Ford truck. Later testimony revealed the truck was owned by Bone's company, Bone Brothers. Matis further testified that Bone remained in the truck, and appeared nervous during the transaction.

Matis also recounted that Martin explained that Bone was his "cook" and that the two "were in the business [of] manufacturing methamphetamine." Matis also explained that Martin informed him that it would take about four days to convert the phenylacetic acid into methamphetamines, and that the process would take no more than a week because Bone, who Martin described as "my partner," had to meet with his parole officer on April 10. Finally, Matis testified that while the men were placing the acid in the bed of Bone's truck, Martin carried one of the containers past the open driver's side window. Despite the powerful and repugnant smell of the chemical, Bone did not alter his behavior but continued to act nervous. After the chemical was placed in the truck, Matis gave a signal, and an "arrest team" placed the men under arrest. Subsequently, Bone was indicted and tried.

On the second day of trial, Bone failed to appear, and the district court judge ordered a one hour recess. Bone's counsel was unable to locate Bone through Bone's family and friends, and the government's attempts to locate Bone at local hospitals and law enforcement agencies were similarly fruitless. The government informed the court that it had out-of-town witnesses that would be inconvenienced by any delay, but the district

court, after concluding that Bone was voluntarily absent, recessed the trial until the next day.

The following day, Bone again failed to appear, and his whereabouts remained a mystery. The district court then conducted an evidentiary hearing to determine whether it would be proper to continue the trial under Federal Rule of Criminal Procedure 43(b). In reaching its decision, the court considered: "first, the likelihood the case c[ould] proceed soon with the defendant present; second[], the difficulty of rescheduling the case; third, the burden on the government if the case is continued; and fourth, inconvenience to the jurors." After hearing counsel's arguments and weighing these factors, the district court determined that the trial should continue despite Bone's absence.

Subsequently, Sergeant Michael Bratcher, a member of the arrest team, testified that after the arrest he removed a gym bag from the truck. The bag contained several items of male clothing, a portable phone, and a cigarette case containing marijuana cigarettes. Bone's probation officer, Lisa Lambeth, also testified. Lambeth stated that on two occasions, Bone had reported to her office smelling like "precursor chemicals used to manufacture amphetamines and methamphetamines." Additionally, Lambeth testified that in April of 1981, Bone submitted a urine test which revealed that he had used methamphetamines. Additionally, an acquaintance of Bone, Milton Ray Thomas, appeared at trial. Thomas testified that between December, 1988

and March, 1989 he observed Bone "cook" or manufacture methamphetamine four or five times.

At the conclusion of the trial, the jury convicted Bone of both the conspiracy and the possession counts of the indictment. Subsequently, the district court sentenced Bone to 120 months for conspiracy and to thirty-eight months for possession. The sentences were to run consecutively. Bone appeals his conviction.

II. STANDARD OF REVIEW

In evaluating an insufficiency of the evidence claim, we are reluctant to upset the findings of a jury, and thus, we do not inquire whether the "evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt." United States v. Pigrum, 922 F.2d 249, 254 (5th Cir.), cert. denied sub nom. Allen v. United States, 500 U.S. 936 (1991). Rather, we will "sustain the verdict if a rational trier of fact could have found all elements of the offense beyond a reasonable doubt." United States v. Osum, 943 F.2d 1394, 1404 (5th Cir. 1991); see also United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993) ("The standard of review in assessing a challenge to the sufficiency of the evidence in a criminal case is whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt."), cert. denied, 114 S. Ct. 1310 (1994). Moreover, as we have often noted, "[o]n appeal this court must

view the evidence and . . . all inferences reasonably drawn from it, in the light most favorable to the verdict." Osum, 943 F.2d at 1404; accord Mergerson, 4 F.3d at 341. Further, we note that this standard applies regardless of whether the conviction is based on direct or circumstantial evidence. Mergerson, 4 F.3d at 341.

Additionally, we will not disturb the district court's decision to admit extrinsic offense evidence under Federal Rule of Evidence 404(b) absent a clear showing of abuse of discretion. United States v. Bruno, 809 F.2d 1097, 1106 (5th Cir.), cert. denied, 481 U.S. 1057 (1987). Finally, we evaluate a district court's decision to continue a trial when a defendant has voluntarily absented himself after the trial has commenced for abuse of discretion. United States v. Hernandez, 842 F.2d 82, 85 (5th Cir. 1988).

III. DISCUSSION

A. Insufficiency of the Evidence

Bone argues that there was not enough evidence in the case to support his conspiracy. Specifically, Bone alleges that most of the evidence adduced against him was circumstantial and that the limited direct evidence offered against him was out-of-court statements admitted in violation of the Confrontation Clause. We find these contentions to be without merit.

Bone correctly notes that for an out-of-court statement to be admissible under the Confrontation Clause of the Sixth

Amendment, the declarant must be unavailable and the statement must have some indicia of reliability, such as falling within a stated exception to the hearsay rule. United States v. Flores, 985 F.2d 770, 775 (5th Cir. 1993). We have held, however, that "both of the inquiries generally required to satisfy the Amendment . . . [may] be dispatched in cases where the statements met the requirements of Rule 801(d)(2)(E)." United States v. Saks, 964 F.2d 1514, 1525 (5th Cir. 1992) (citing Bourjaily v. United States, 483 U.S. 171 (1987)). Under Federal Rule of Evidence 801(d)(2)(E), a statement by a coconspirator is not hearsay. Fed. R. Evid. 801(d)(2)(E); see also United States v. McConnell, 988 F.2d 530, 533 (5th Cir. 1993) (discussing the Rule). In order to fit into that exception, "a statement must have been made (1) by a coconspirator of a party, (2) during the course of the conspiracy, and (3) in the furtherance of the conspiracy." McConnell, 988 F.2d at 533.

In the instant case, it is clear that Martin's statements fit into the exception. Martin was a coconspirator, the "broker" of the transaction. Further, his statements were made during the preparation and the execution of the transfer of the acid. In regard to the third requirement, we have noted that "the determination of whether a statement was made in furtherance of a conspiracy can, in the appropriate circumstances, be made by reference to the statement alone." McConnell, 988 F.2d at 533. This is such a case; it is clear that Martin's statements that Bone was the cook and his partner were made in the attempt to

gain the confidence of Matis. Accordingly, we find that the statements fall within the coconspirator exception and do not violate the Confrontation Clause.

Bone also argues that there was insufficient evidence to uphold his conviction. To obtain a conviction for conspiracy to posses and distribute a phenylacetic acid under 21 U.S.C. § 846, the government is required to establish, beyond a reasonable doubt: "(1) the existence of an agreement between two or more people to violate the narcotics laws; (2) the defendant knew of the conspiracy, and (3) the defendant voluntarily participated in the conspiracy." United States v. Arzola-Amaya, 867 F.2d 1504, 1511 (5th Cir.), cert. denied, 493 U.S. 933 (1989); accord United States v. Lopez, 979 F.2d 1024, 1029 (5th Cir. 1992), cert. denied sub nom. Ramirez v. United States, 113 S. Ct. 2349 (1993); United States v. Carter, 953 F.2d 1449, 1454 (5th Cir.), cert. denied sub nom. Hammack v. United States, 112 U.S. 2980 (1992). The elements of the conspiracy need not be proven by direct evidence; rather, they may be inferred from circumstantial evidence. Carter, 953 F.2d at 1454; Arzola-Amaya, 867 F.2d at 1511. Thus, voluntary participation and agreement may be proven by concert of action. Lopez, 979 F.2d at 1029; Arzola-Amaya, 867 F.2d at 1511. Similarly, knowledge of the conspiracy may be established by the surrounding circumstances. Lopez, 979 F.2d at 1029; Arzola-Amaya, 867 F.2d at 1511. Finally, as the Supreme Court recently made explicit, "in order to establish a violation of 21 U.S.C. § 846, the Government need not prove the commission

of any overt acts in furtherance of the conspiracy." United States v. Shabani, 63 U.S.L.W. 4001, 4003 (U.S. Nov. 1, 1994); accord Carter, 953 F.2d at 1454.

In the instant case, there was ample evidence from which a rationale jury could have found all of the elements of conspiracy beyond a reasonable doubt. First, there was testimony that Martin referred to Bone as "my partner" and the "cook." Second, Matis described that when Bone arrived at the scene of the exchange he appeared nervous. Third, the jury heard statements that Bone did not react to the powerful and noisome fumes of the acid wafting into his open window. Fourth, Bone's parole officer, Lambeth, testified that she had smelled the acid on Bone's person on two previous occasions. Finally, the jury heard testimony from Thomas, an acquaintance of Bone, that he had seen Bone manufacture methamphetamines from phenylacetic acid on previous occasions. Construing this testimony in the light most favorable to the government, we find that there is little doubt that a rational jury could have concluded that there was an agreement to manufacture methamphetamines, that Bone knew of the agreement, and that he voluntarily participated in the scheme.[1]

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[1] Bone also seems to argue that there was insufficient evidence to uphold his conviction on the second count of the indictment, as he stated, "it will be evident from our discussion of the conspiracy count that [the] . . . conviction on the other substantive drug-related offense with which he was charged (i.e. possession of phenylacetic acid) is not supported by substantial evidence." As described above, we reject this proposition, and find the evidence sufficient to sustain the possession conviction. Moreover, since this claim is not developed in his brief, we afford it no further consideration. See Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993) ("[O]nly the issues

B. Admission of Extrinsic Offenses

Bone also contends that the district court erred in allowing evidence of Bone's other bad acts. Specifically, Bone argues that the district court should have excluded: Lambeth's testimony about Bone's smelling like phenylacetic acid and positive urine test for methamphetamine; Thomas's testimony about the previous drug manufacturing operation; and evidence of the marijuana found in Bone's truck. During the trial, Bone's counsel objected only to Lambeth's and Thomas's testimony.

We review alleged violations of Rule 404(b) under the two-pronged test of United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). Beechum requires us to verify: (1) that the evidence of extraneous conduct is relevant to an issue other than a defendant's character, and (2) that the evidence possesses probative value that is not substantially outweighed by its undue prejudice and is otherwise admissible under Rule 403. Id.

Before allowing the testimony of either Lambeth or Thomas, the district court conducted a thorough Beechum analysis. The district court found that the "defendant's defense will revolve around the question of why Mr. Bone was present on the occasion in question." The district court then concluded "that this issue

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presented and argued in the brief are addressed."); United States v. Ballard, 779 F.2d 287, 295 (5th Cir.) (holding that a party who offers only a "bare listing" of alleged errors "without citing supporting authorities or references to the record" abandons those claims on appeal), cert. denied, 475 U.S. 1109 (1986).

goes directly to motive, intent, preparation, knowledge, and absence of mistake or accident." We agree. Bone's defense centered around the contention that he was in the wrong place at the wrong time, and evidence of other dealings with phenylacetic acid and methamphetamines clearly can show absence of motive, intent, preparation, knowledge, or absence of mistake. Thus, we find that the district court did not abuse its discretion in finding that Lambeth's and Jackson's testimony met the first prong of the Beechum test.

Additionally, we find that the district court did not abuse its discretion in finding that the second prong of the Beechum test was met. Although the district court did not make an express statement regarding the second prong of the test, the district court did note that "the evidence is admissible . . . in balancing rules 404(b) and 403." From this statement it is clear that the district court determined that neither the prejudicial effect of the evidence nor any other consideration of Rule 403 required exclusion of the evidence. See United States v. Anderson, 933 F.2d 1261, 1274 (5th Cir. 1991) ("The absence of a specific 404(b) ruling under Beechum does not require a remand. The issue is not complicated and can easily be resolved from the record.") The district court gave Bone's counsel ample opportunity to argue the prejudicial impact of the testimony, and the court determined that it did not outweigh the evidence's probative value. In light of our "great deference to the district court's determination of the second Beechum inquiry,"

United States v. Elwood, 999 F.2d 814, 816 (5th Cir. 1993), we find no abuse of discretion in the admission of the evidence.

Bone's counsel did not object to admission of the evidence of the marijuana cigarettes. Since this error is raised for the first time on appeal, "we will review this belated challenge only for plain error." United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). Under the plain error standard, an appellant who raises an issue for the first time on appeal must show, that there has been an error, that the error was "plain", and that the error affected substantial rights. Id.; United States v. Olano, 113 S.Ct. 1770, 1776-79 (1993). In this case, Bone fails to demonstrate error.

Bone correctly notes that, "[e]vidence of an uncharged offense arising out of the same transaction or series of transactions as the charged offense is not an `extrinsic' offense within the meaning of Rule 404(b), and is therefore not barred by the rule." United States v. Dula, 989 F.2d 772, 777 (5th Cir.), cert. denied, 114 S. Ct. 172 (1993). It does not follow from this, however, that admission of the evidence of marijuana constitutes plain error. As we have noted, intrinsic evidence "`is admissible so that the jury may evaluate all of the circumstances under which the defendant acted.'" United States v. Maceo, 947 F.2d 1191, 1199 (5th Cir. 1991) (quoting United States v. Randall, 887 F.2d 1262, 1268 (5th Cir. 1989)), cert. denied sub nom. Bauman v. United States, 112 S. Ct. 1510 (1992). Here the district court considered the evidence of the marijuana

in conjunction with its Beechum analysis, and determined that it was admissible. Thus, the district court implicitly concluded that the evidence did not violate Rule 403. We find no error, plain or otherwise, in this determination.

C. Continuing the Trial

Finally, Bone argues that the district court erred in continuing the trial in his absence. We disagree. Federal Rule 43(b) provides that, "[t]he further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present, is voluntarily absent after the trial has commenced . . . ." Fed. R. Crim. P. 43(b); see also Hernandez, 842 F.2d at 85 (discussing the Rule).

In deciding whether to proceed with a trial when a defendant is voluntarily in absentia, a district court has "`only narrow discretion[,] . . . because the right to be present at one's own trial must be carefully safeguarded.'" Hernandez, 842 F.2d at 85 (quoting United States v. Benavides, 596 F.2d 137, 139 (5th Cir. 1979)). In exercising this discretion, the district court must consider several factors: "the likelihood that the trial could soon take place with the defendant[] present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, particularly in multiple-defendant trials; and inconvenience to the jurors." Id.; accord Benavides, 596 F.2d at 139-40.

In the instant case, the district court explicitly made such an inquiry. After Bone failed to appear at trial, the district court provided Bone's attorney with time to locate the missing defendant. Moreover, after efforts to locate Bone proved unsuccessful, the district court conducted an evidentiary hearing, and carefully considered the above-described factors. After a thorough analysis, the district court determined that the burden of retrial on the government, while slight, militated in favor of proceeding with the trial. The district court also found that the difficulty of rescheduling "weigh[ed] in favor of trial in absentia." Specifically, the district court noted that "delay is the cause of fading memory" and expressed "concern about the availability of the witness, Milton Ray Thomas, if the case is continued." Finally, the district court determined that the inconvenience of retrial on the jurors was "neutral." Only after this thorough analysis did the district court find that the trial should continue. In light of the district court's careful application of the Benavides factors, we find no abuse of discretion in the decision to continue the trial.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.