IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10438
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JIMMY WAYNE NANNY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-306-R)

(February 2, 1995)

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

PER CURIAM:*

Jimmy Nanny appeals his conviction of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Finding no error, we affirm.

I.

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* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

On February 28, 1992, at about 1:00 p.m., Dallas Police Officers Darrel Dugan and Gerald Runnels were on uniform patrol when they saw Patricia Davis in the parking lot of the Alamo Plaza Motel. Davis, who was known to the officers as a local prostitute, approached the officers and told them that Nanny had abducted her sister, Sharon Davis, also a prostitute, at gunpoint and was keeping her in one of the motel rooms. Patricia Davis gave officers a description of Nanny's weapon and told them in which room her sister was being held.

The officers went to investigate and knocked on the door of room 322. A couple of minutes later, Sharon Davis answered the door; she was nude, upset, and did not want to talk. She whispered to the officers that Nanny had been holding her hostage and had crawled out the back window to an adjacent room. Sharon Davis also told the officers that Nanny was armed and had taken the firearm with him.

Additional officers arrived, and the manager provided a pass key to the adjacent room. Upon entering room 320, Dugan noticed that Nanny was lying in bed on his back with his hands behind his head and out of view; Nanny's hands may possibly have been under a pillow. He was ordered to put his hands up, and he complied. While Nanny was being arrested, Runnels went directly to the front of the bed where Nanny's head had rested and recovered a loaded revolver and holster. Runnels testified that he could not remember whether he had found the revolver underneath the pillow, the mattress, or the bed.

Melvin Curry was renting the room where Nanny was found. He testified that after entering the room, he noticed that the rear window was broken. He also testified that he did not give anyone permission to enter his room and that the gun found there was not his.

At trial, Sharon Davis recanted a statement she had given to the government prior to trial implicating Nanny with the possession of a firearm. She testified that she had never seen Nanny with a gun. She explained that she and Nanny had been lovers and had used drugs together. On one occasion, she was able to purchase drugs on credit by telling the drug dealers that they would get paid when Nanny received an insurance check he was expecting. Later, she began to fear the drug dealers she had failed to pay. She testified that she concocted the story about Nanny kidnapping her because she believed that with his arrest the drug dealers would not hold her responsible for the debt.

II.

A.

Nanny argues that the district court erred when it allowed Patricia Davis to testify concerning Nanny's possession of a firearm prior to his arrest. He contends that this "extrinsic offense" evidence should have been excluded because it is unreliable and its admission violated FED. R. EVID. 404(b).

We review the admission of allegedly extrinsic evidence under an abuse-of-discretion standard. United States v. Dillman, 15 F.3d

384, 391 (5th Cir.), cert. denied, 115 S. Ct. 183 (1994). An inherent danger in admitting evidence of other acts is that the jury might convict the defendant for the extrinsic offense rather than for the offense charged. United States v. Ridlehuber, 11 F.3d 516, 521 (5th Cir. 1993). Rule 404(b) guards against this danger by excluding extrinsic act evidence that is relevant only to the issue of the defendant's character. "Even if the extrinsic act evidence is probative for 'other purposes' recognized by Rule 404(b), such as showing motive or intent, the probative value of the evidence must be weighed against its prejudicial impact." Id.

Nevertheless, "[a]n act is not extrinsic, and Rule 404(b) is not implicated, where the evidence of that act and the evidence of the crime charged are inextricably intertwined." United States v. Garcia, 27 F.3d 1009, 1014 (5th Cir.), cert. denied, 115 S. Ct. 531 (1994) (internal quotations and citation omitted). Intrinsic evidence also includes evidence of acts that "are part of a single criminal episode" or "were necessary preliminaries to the crime charged." United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992) (internal quotations and citations omitted), cert. denied, 113 S. Ct. 1258 (1993). Such evidence is admissible to allow the jury to evaluate all of the circumstances under which the defendant acted. Id.

At trial, the district court permitted the prosecutor to question Patricia Davis, over defense counsel's objection, about a gun that Nanny had allegedly possessed prior to his arrest.

Davis's testimony on this issue was not consistent. On direct examination, she testified that she had seen Nanny with a weapon sometime during the two days prior to his arrest, but she also testified that she could not remember whether she had actually seen a weapon during this time. Davis further testified that, on the day before Nanny's arrest, she saw her sister with Nanny and that her sister was hysterical. Nanny told Patricia to get back and made a hand gesture that made her believe he had a gun.

On cross-examination, Patricia stated that she could not be sure whether Nanny really had a gun, but she had heard that he did. She also testified that she had seen Nanny with a gun on some unspecified date at least three days before his arrest, and she was not sure whether it was the same gun that forms the basis of the conviction in question.

With respect to Patricia Davis's testimony that Nanny possessed a firearm in the course of kidnapping her sister, rule 404(b) is inapplicable, as the challenged evidence was not extrinsic to the charged offense. That Nanny had possessed a firearm during the kidnapping of Sharon Davis was an important piece of information told to the police by Patricia Davis. The government sought to strengthen the link between Nanny and the recovered firearm through its questioning of Patricia on direct. Because evidence that Nanny was seen with a revolver in the days immediately preceding his arrest is directly relevant to the crime for which he was on trial))knowing possession of a firearm by a felon))the court did not abuse its discretion in admitting that

complained-of testimony.

On the other hand, Patricia Davis's testimony that she had seen Nanny with a gun on some unspecified date arguably was extrinsic offense evidence, not admissible under rule 404(b). The admission of this testimony, if error, was harmless error, however, "in light of the entirety of the proceedings." See United States v. Hays, 872 F.2d 582, 587 (5th Cir. 1989). A non-constitutional trial error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776 (1946). In light of the evidence that Nanny kidnapped Sharon Davis at gunpoint and later broke into Melvin Curry's room where he was arrested in close proximity to the firearm, we conclude that any error had no effect, or slight effect, on the jury's decision.

B.

At trial, Sharon Davis recanted a statement she had given to the government prior to trial implicating Nanny with the possession of a firearm. The government cross-examined Davis regarding her prior inconsistent statement and offered the statement into evidence. Nanny contends that the court erred by not giving a limiting instruction to the jury informing it that the statement could be used only to impeach Sharon Davis's credibility and could not be used as evidence of Nanny's guilt. Because Nanny failed to request a limiting instruction, this argument is reviewed under the "plain error" standard. See United States v. Waldrip, 981 F.2d

799, 805 (5th Cir. 1993); United States v. Garcia, 530 F.2d 650, 654-56 (5th Cir. 1976).

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, we 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, 113 S. Ct. 1770, 1777-79 (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. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; FED. R. CRIM. P. 52(b). This court lacks 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:

> [T]he standard that should give the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (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). Thus, our discretion to correct an error pursuant to rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17. We recently approved the approach adopted by the Rodriguez panel. See United States v. Calverley, 37 F.3d 160 (5th Cir. 1994) (en banc).

In cases involving whether the district court must sua sponte instruct the jury as to the limited use of impeachment evidence, "[p]lain error appears only when the impeaching testimony is extremely damaging, the need for the instruction is obvious, and the failure to give it is so prejudicial as to affect the substantial rights of the accused." United States v. Barnes, 586 F.2d 1052, 1058 (5th Cir. 1978) (internal quotation and citation omitted).

The district court did not commit plain error under the particular facts of this case. The evidence of Sharon Davis's prior testimony was damaging but, in view of the other evidence against Nanny not extremely damaging. The government had already presented evidence that Nanny had possessed a firearm in the course of kidnapping Sharon Davis. Melvin Curry testified that no one else had access to his room and denied ownership or possession of the firearm found there. Nor was the need for the limiting instruction obvious. "Counsel may refrain from requesting an instruction in order not to emphasize the potentially damaging evidence, and for other strategic reasons." Waldrip, 981 F.2d at 805. Thus, any error was not clear or obvious.

C.

Nanny challenges the sufficiency of the evidence that he possessed the firearm. In assessing a challenge to the sufficiency of the evidence, "this Court views the evidence, whether direct or circumstantial, and all reasonable inferences drawn from the evidence, in the light most favorable to the jury's verdict . . . [to] determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993). "It is not necessary that the evidence exclude every reasonable hypothesis of innocence . . .; the jury is free to choose among reasonable constructions of the evidence." United States v. Pennington, 20 F.3d 593, 597 (5th Cir. 1994) (internal citations omitted). But "if the evidence gives equal or nearly equal circumstantial support to a finding of guilty and a finding of not guilty, reversal is in order." United States v. Cavin, 39 F.3d 1299, 1305 (5th Cir. 1994).

An essential element for conviction under § 922(g)(1) is the knowing possession of the firearm. United States v. Speer, 30 F.3d 605, 612 (5th Cir.), cert. denied, 115 S. Ct. 603 (1994). It is the only element Nanny challenges. Possession of a firearm may be actual or constructive. Id. "Constructive possession is the exercise of, or the power or right to exercise dominion and control over the item at issue[.]" Id. (internal quotation and citations omitted). Constructive possession may be proven with circumstantial evidence. United States v. McKnight, 953 F.2d 898, 901 (5th

Cir.), <u>cert. denied</u>, 112 S. Ct. 2975 (1992).

The evidence supports the jury's determination that Nanny knowingly possessed the firearm. A reasonable jury was entitled to disbelieve Sharon Davis's trial testimony and credit testimony that Nanny had kidnapped Sharon Davis and that he had possession of a revolver. When police found Nanny, he was lying in bed on his back with his hands behind his head and out of view. While Nanny was being arrested, Runnels went directly to the front of the bed where Nanny's head had rested and recovered a loaded revolver and holster. Melvin Curry testified that he had not given anyone permission to enter his room and that the gun found there was not his. Thus, there is sufficient evidence that Nanny was in constructive possession of the gun in violation of § 922(g)(1).

AFFIRMED.