

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10464
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROXANNA K. YORK

and

TERRY LEE YORK,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-129-A(2))

(January 26, 1995)

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

PER CURIAM:*

Roxanna and Terry York appeal their convictions of obstructing commerce by robbery; Terry York appeals his conviction of using and carrying a firearm during a crime of violence. The convictions were pursuant to 18 U.S.C. §§ 924(c) and 1951. Finding no error,

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 Pursuant to that rule, the court has determined that this opinion should not be published.

we affirm.

I.

Lorri Hamman testified that she was working at a Texaco station in Fort Worth, Texas, on August 1, 1993. Around 6:30 p.m., York approached her and requested money. Hamman responded, "[y]ou must be kidding." York told Hamman that he had a gun and lifted his shirt to reveal part of a revolver placed in his trousers. According to Hamman, she saw part of the cylinder and trigger of the handgun.

Hamman testified that the handgun shown to her at trial was consistent with the handgun the robber possessed on August 1. Hamman gave York money. York fled the Texaco station. Hamman watched York run under a bridge and past the Hulen Mall. York disappeared after running underneath a bridge, in the direction of a Bennigan's restaurant.

Katherine Hagood testified that she was buying gasoline at the Texaco station on August 1. She saw a van stop in the middle of Hulen Street. York jumped out of the van and ran into the station, then, shortly thereafter, emerged and ran underneath a bridge and out of sight, in the direction of Bennigan's. Hagood identified a photograph of the van.

Adam Hughes testified that he was working at Bennigan's that day. York entered the restaurant and asked to speak with the manager. Hughes notified his manager, who briefly remained in his office while Hughes returned to York. York instructed Hughes to

hand over the restaurant's money. York referred to a .38 caliber handgun tucked into his waist, but Hughes did not see any gun. Hughes's manager, Bill Barwig, came to the front. York again referred to a .38 caliber handgun. Barwig instructed Hughes to give the restaurant's cash to York; Hughes complied with his manager's instruction. York encountered some of Hughes's co-workers as he left Bennigan's. The other employees followed York after Barwig told them that York had robbed the restaurant. Barwig corroborated Hughes's testimony and added that he saw a bulge inside York's shirt when York reached inside his shirt.

Carl Leiss testified that he was working at Bennigan's on August 1. He entered the front door of the restaurant with three of his co-workers around 6:45 or 7:00 p.m. York bumped into him and a co-worker as he left Bennigan's. Shortly thereafter, Barwig told the group that the man had robbed the restaurant.

The Bennigan's group chased York, who pointed a black handgun at the group, which ducked behind a car. York ran to another restaurant and disappeared behind a garbage dumpster. The Bennigan's group separated and circled the building, searching for York. A restaurant patron indicated that York was hiding in some bushes.

York fell out of the bushes. Leiss saw a brown bag and a handgun in York's possession; the gun fell to the ground as York fell. According to Leiss, the gun "made a clanking sound" as it fell. Leiss did not believe the gun sounded like a wooden object when it hit the ground.

York raised himself and ran across Hulen Street. According to Leiss, a man in a blue Chevrolet Lumina minivan chased York around a garbage dumpster. York ran away from the dumpster. The van hit York and knocked him down. York rose and pointed his gun at the Lumina. The van hit York again and knocked him down again. York lifted himself again and pointed his gun at the van. The van again knocked him down. Leiss could not tell whether the handgun was a pistol or a revolver. Leiss testified that the handgun in evidence at the trial was not the weapon he had seen York hold on August 1.

York lifted himself, ran into Hulen Street, pointed his gun at oncoming traffic, and ordered people to exit their cars. According to Leiss, some cars slowed or stopped, but accelerated when York approached them. A van drove up, stopped, and let York enter, then drove off on Hulen Street.

Bennigan's employee Kenneth Harrison testified that he participated in the chase. He saw York holding a gun and point it at the Bennigan's group and at the man in the Lumina van. According to Harrison, the handgun made a scraping, metallic sound when it hit the ground. The handgun in evidence at the trial was not the handgun Harrison saw York holding.

Kathy Rauschuber testified that she was the manager at a Denny's restaurant in Fort Worth. According to Rauschuber, York entered her restaurant on August 2, 1993. He announced a robbery and began to lift his shirt. Rauschuber gave York some money. York left Denny's.

Fort Worth police SWAT-team officer Katherine Mary Tucker

testified that she and her partner placed a van under surveillance on the afternoon of August 2, 1993. Around 6:00 p.m., Tucker saw a woman enter the driver's side of the van and a man enter the passenger's side. Tucker identified Roxanna York ("Roxanna") as the driver and York as the passenger.

Tucker and her partner followed the van to an apartment building, where a second man entered the van. The van drove to Denny's restaurant. Along the way, Tucker observed York rise from his seat, walk to the rear of the van, bend over as if rooting through items in the van, and return to his seat. York exited the van shortly before it arrived at Denny's. Tucker lost sight of the van after it arrived at the restaurant.

According to Tucker, York walked to the front door of Denny's. A woman opened the door and looked out. York entered the restaurant, and the woman walked behind the cash register. York emerged from the restaurant about two minutes later and ran away.

Fort Worth SWAT-team officer Michael Lane testified that he also followed the van to Denny's. According to Lane, he saw a man exit the van and attempt to enter the restaurant through a rear door. After trying the rear door, the man walked to the front. The man emerged from the restaurant shortly thereafter and ran.

The police gave chase. A police officer identified himself, but the man continued to run. Lane stopped his car, leapt from the vehicle, and caught the man, whom Lane identified as York. Lane took from York the Smith & Wesson handgun introduced into evidence at York's trial.

Fort Worth SWAT-team leader Kevin Morton testified that he and another officer were outside Denny's on August 2. When York ran from the restaurant, officers who were observing the van informed Morton that the van was parked behind some businesses south of Denny's. Morton turned into the alley behind those businesses and saw the van. According to Morton, he saw Lane approach York while Brown approached the van. The van drove away from Brown and toward Morton at a high rate of speed. The van stopped. Morton averred that Roxanna sat in the driver's seat of the van.

Fort Worth police detective Russell Marsh read a statement given by York on August 2. York confessed to having robbed Bennigan's, Texaco, and Denny's but did not admit to having carried a handgun during the August 1 robberies. He did admit that he carried a gun during the Denny's robbery.

Marsh summarized a statement given to him by Roxanna. According to Marsh, Roxanna told him that she had been a passenger in a van shortly before August 2. The driver took the van to a restaurant. She waited in the van. She saw a chase. She followed the chase and then drove away.

Marsh testified that Roxanna told him that she had been a passenger in the same van on August 2. The driver took the van to a location near Denny's and parked. She waited in the van. Shortly thereafter she observed a chase. Police officers approached the van and took Roxanna into custody.

York testified that he had whittled a wooden replica of a Beretta .380 caliber automatic pistol in July 1993. He fastened

the pieces of the replica with nails and screws and colored it with shoe polish. According to York, he used the replica during the August 1 robberies. Also according to York, Roxanna had no advance knowledge of the robberies. York admitted that he had used a real gun to rob Denny's.

Roxanna testified that she and York were fighting in the van on August 1. York suddenly jumped from the van on Hulen Street. Roxanna drove until she cooled off. She saw the Lumina van hit York. York pointed a gun at Roxanna. He climbed into the van and put the gun to her head, telling her, "'[d]rive or I'll kill you.'"

According to Roxanna, she slept in the van while York drove on August 2. She woke up while the van was parked and inquired about York's whereabouts. She became angry and started driving the van away.

II.

York contends that the government presented insufficient evidence to support his conviction of using a firearm in connection with a crime of violence during the August 1 robberies. Specifically, York argues that there was insufficient evidence to show that the object he used on August 1 was a handgun. York's contention is unavailing.

A reviewing court will affirm a jury verdict so long as there is evidence sufficient to allow a reasonable jury to find a defendant guilty beyond a reasonable doubt. The reviewing court will view the evidence and all inferences from the evidence in the

light most favorable to the verdict. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd, 462 U.S. 356 (1983).

There was ample evidence from which the jury could have concluded that York used a handgun on August 1. Hamman believed that York showed her part of a handgun at the Texaco station. Leiss and Harrison testified that they saw York drop a handgun and that the gun sounded metallic. They also saw York waive a handgun at the Lumina and at traffic. Finally, Roxanna testified that York put a gun to her head on August 1 and told her to drive away.

III.

York next contends that his convictions of obstruction of commerce by robbery and use of a firearm in a crime of violence constitute double jeopardy. York concedes that his argument is foreclosed by United States v. Martinez, 28 F.3d 444 (5th Cir.), cert. denied, 115 S. Ct. 281 (1994). According to York, he wishes to preserve his contention because he believes the issue is subject to consideration by the Supreme Court.

IV.

Roxanna contends that the district court improperly directed the court reporter to reread to the jury a portion of Tucker's testimony. Roxanna's contention is unconvincing.

"The trial judge has broad discretion in responding to a jury request to reread testimony." United States v. Sandoval, 847 F.2d

179, 186 (5th Cir. 1988). During deliberations, the jury sent the district judge a note asking, "'[a]ccording to the female SWAT officer's testimony, who was driving the van when it arrived at the Denny's?'" Over Roxanna's objection, the court directed the court reporter to examine the record of Tucker's testimony and read the testimony relevant to the jury's question:

QUESTION: Tell the jury what you observed at about 6:00 p.m.

ANSWER: At about 6:00 p.m., I observed a white female enter the driver's side of the van and a white male enter the passenger side of the van.

. . . .

QUESTION: Could you tell whether the driver of the vehicle changed, or was there ever an opportunity for the driver of the vehicle to change?

ANSWER: Not while I was observing it.

The court later found that the statements were "sufficiently in context to have a meaning." The court also received a note from the jury indicating that the rereading of the testimony was adequate.

The record reflects no abuse of discretion. The court reporter accurately recounted Tucker's testimony. Nothing in Tucker's testimony tended to contradict the reporter's recapitulation.

v.

Roxanna next contends that there was insufficient evidence to support her conviction of obstructing commerce by robbery and

aiding and abetting. Roxanna's contention is unconvincing.

To convict a defendant of aiding and abetting under 18 U.S.C. § 2, the Government must prove (1) that the defendant associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed. The defendant must share the principal's criminal intent and engage in some affirmative conduct designed to aid the venture.

United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991) (citations omitted).

The government presented sufficient evidence from which the jury could conclude that Roxanna aided and abetted the robbery of Denny's. Tucker observed Roxanna enter the driver's side of the van and saw her drive the van to a location near Denny's. According to Morton, Roxanna was sitting in the driver's seat when he stopped the van and arrested the occupants. Also according to Morton, the van drove away when Brown approached it.

The jury could have inferred Roxanna's guilty knowledge from evidence that she had attempted to flee. United States v. Kalish, 690 F.2d 1144, 1155 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983). Additionally, Roxanna's testimony that she slept while York drove to Denny's and then awoke and drove away angrily after she inquired about his whereabouts is implausible, particularly in light of the police testimony. "'[A] less than credible explanation' is part of the overall circumstantial evidence from which knowledge may be inferred." United States v. Arzola-Amaya, 867 F.2d 1504, 1512 (5th Cir.), cert. denied, 493 U.S. 933 (1989).

VI.

Roxanna finally contends that the district court incorrectly adjusted her offense level upward for use of a firearm. She argues that the government presented no evidence that she knew that her husband had used a firearm on August 2.

The sentencing guideline provision governing robbery directs district courts, "if a firearm was brandished, displayed, or possessed, increase by 5 levels[.]" U.S.S.G. § 2B3.1(b)(2)(C). A defendant may be held accountable if his co-defendant's use of a weapon was reasonably foreseeable. United States v. Baker, No. 89-1554, slip op. at 7-8 (5th Cir. Jan. 24, 1990) (unpublished).

York's use of a handgun on August 2 was reasonably foreseeable to Roxanna. According to Roxanna, York held a gun to her head on August 1, when he told her to drive away.

AFFIRMED.