UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10481
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PETE EARL TAYLOR, a/k/a Alex Dewayne Cooper,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(2:93-CR-42-1)

(July 12, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Pete Taylor appeals from his conviction and sentence for possession with intent to distribute cocaine, and conspiracy to commit same. We **AFFIRM**.

I.

Taylor was stopped for speeding on Interstate 40 near Amarillo, Texas, by Trooper Scott Woolery and Sergeant Leroy Oliver of the Texas Department of Public Safety Highway Patrol Service. Taylor, who was traveling with a passenger, Alise Anderson,

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 Pursuant to that rule, the court has determined that this opinion should not be published.

produced a California driver's license identifying him as Alex Cooper. Following a radio check of Taylor's vehicle, a blue Jaguar, Trooper Woolery issued Taylor a speeding citation and, noting that contraband was often carried through Texas on I-40, asked Taylor if he could "look inside" the vehicle. Taylor agreed, and he and his passenger exited the car. Trooper Woolery found a black leather satchel on the back-seat floorboard, containing two "bricks" of cocaine wrapped in laundry-softener sheets. After placing Taylor and Anderson under arrest, Trooper Woolery found an additional two bricks of cocaine in a suitcase on the back seat.

At the police station, Taylor explained that a man named "Neil" had approached him in a barber shop in California, and asked him to drive a car to Memphis, Tennessee, to a person named "Val", in return for $ 1,000 and a return plane ticket. Taylor stated that Anderson was just "along for the ride". To assist the investigation, Taylor produced Val's pager number in Tennessee. Although investigators succeeded in contacting someone at that number, they were unable to locate or identify that person, or make contact again.[2]

The Government charged Taylor with one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and one count of conspiracy to commit the same, 21 U.S.C. §§ 841(a)(1), 846. A jury convicted Taylor on both

[2] Taylor had been given a pager number. The investigator left the number of the DPS office on the pager, and an unidentified person returned the call. Taylor then spoke with that person briefly, but the person hung up and could not be reached again.

counts, and he was sentenced, *inter alia*, to two concurrent terms of 210 months imprisonment.

II.

A.

Taylor challenges the sufficiency of the evidence on the conspiracy and substantive counts. But, he did not renew his motion for acquittal, made at the close of the Government's evidence, after the close of his own evidence. Therefore, our review is limited to whether his conviction resulted in a miscarriage of justice. ***United States v. Inocencio***, 40 F.3d 716, 724 (5th Cir. 1994). Viewing the evidence in the light most favorable to the Government, we determine only whether "the record is devoid of evidence pointing to guilt". ***Id***.

Taylor urges there is insufficient evidence of an agreement to commit an illegal act. However, "[n]o evidence of overt conduct is required. A conspiracy agreement may be tacit, and the trier of fact may infer an agreement from circumstantial evidence." ***United States v. Thomas***, 12 F.3d 1350, 1358 (5th Cir.), *cert. denied*, 114 S. Ct. 1861 (1994). The Government offered the following evidence: (1) the car Taylor was driving was leased and insured by Floyd Neil Small; (2) Taylor contracted with "Neil" to drive the car to Memphis for $1,000 and a free plane ticket home; (3) Taylor was given a pager number for "Val", whom he was to contact in Memphis; (4) the car contained four "bricks" of cocaine that did not belong to Taylor; and, (5) the cocaine was located in unlocked, easily

accessible luggage in the back seat of the car. From these circumstances, the jury's conclusion that Taylor had conspired to transport cocaine hardly amounts to a miscarriage of justice.

Likewise, Taylor's conviction on the substantive count was not a miscarriage of justice. "Knowledge of the presence of contraband may ordinarily be inferred from the exercise of control over the vehicle in which it is concealed." ***United States v. Shabazz***, 993 F.2d 431, 441 (5th Cir. 1993) (citation omitted).

B.

Taylor complains next that the court reporter failed to record adequately the proceedings in his case, in violation of the Court Reporter Act, 28 U.S.C. § 753.

First, Taylor contends that the jury selection process was inadequately reported, in that there was no recording of the removal of jurors for cause, or the Government's peremptory challenges. Our review of the record reveals that the entire voir dire was recorded, as well as the district court's dismissal of three jurors for cause. As to the peremptory challenges, the district court employed a method whereby the parties exercise their challenges out of open court, with neither party disclosing directly to the other whom it has struck. The method by which to select the jury is left with the sound discretion of the district court. ***United States v. Sarris***, 632 F.2d 1341, 1342-43 (5th Cir. 1980). As such, no record was necessary, because the peremptory

strikes were not exercised in open court.[3] *See* 28 U.S.C. § 753(b).

Taylor complains also that the court reporter failed to transcribe a tape played for the jury.[4] The Government notes that the tape was authenticated and admitted into evidence *without objection*. The record states: "An audio tape was played." Under similar circumstances, our court has held that the failure to transcribe tapes played to the jury was harmless error. ***United States v. McCusker***, 936 F.2d 781, 785 (5th Cir. 1991); ***United States v. Mendoza***, 574 F.2d 1373, 1379 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978). And, under these circumstances, the fact that Taylor is represented by new counsel is insignificant. ***McCusker***, 936 F.2d at 1379 n.4.

C.

Taylor contends that inadmissible hearsay was introduced against him. But, because he did not object to this evidence at trial, we review only for plain error. *E.g.* ***United States v. Calverley***, 37 F.3d 160, 162-64 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1266 (1995). Plain error exists only when an error is obvious, and effects the substantial rights of the defendant. ***Id***.

At trial, a Government witness gave the hearsay statement that Floyd Small, a nontestifying alleged co-conspirator, told the

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[3] The record does contain the list of prospective jurors, indicating the peremptory strikes exercised by each party. Obviously, had Taylor made a ***Batson*** challenge, it would have been in the record.

[4] The tape was of Taylor's telephone conversation, made in cooperation with the investigators, with the contact-person in Memphis.

Federal Bureau of Investigation that he had loaned Taylor the car he was driving when apprehended. Assuming, *arguendo*, that admission of this testimony was "obvious" error, we find that it did not affect Taylor's substantial rights, because it did not likely change the outcome of the trial. ***Id***. at 164. The evidence reveals several connections between Taylor and Floyd Small, e.g., evidence that Floyd Small had leased and insured the car, and Taylor's testimony that "Neil" employed him to transport the car to Memphis (Small's middle name is Neil). The admission of cumulative evidence on this point did not affect Taylor's substantial rights. *See* ***United States v. Beaumont***, 972 F.2d 91, 95-96 (5th Cir. 1992).

D.

Taylor makes several claims regarding misconduct and overreaching by the prosecution in its closing argument. Once again, Taylor failed to object to these instances at trial; once again, we review only for plain error.

1.

First, the prosecution referred to the fact that Taylor did not offer his legal name to the authorities, and remarked that "[i]f ... you are innocent, you don't lie about your name". Taylor claims this statement was an impermissible comment on his election to remain silent. *E.g.* ***Doyle v. Ohio***, 426 U.S. 610 (1976). "The defendant bears the burden of showing that the jury necessarily construed the prosecutorial argument as a comment on his failure to testify." ***United States v. Jones***, 648 F.2d 215, 218 (5th Cir. 1981). Here it is far from obvious that the jury necessarily so

interpreted the prosecution's statement. Rather, it appears that the statement was directed only to what Taylor affirmatively misrepresented -- his identity. There is no plain error. *See* ***United States v. Collins***, 972 F.2d 1385, 1408 (5th Cir. 1992) (finding no error, plain or otherwise, when context of statement did not necessarily implicate defendant's failure to testify), *cert. denied*, 113 S. Ct. 1812 (1993).

2.

Taylor next contends that the prosecution intentionally mislead the jury in its suggestion that Taylor's alias, "Alex Cooper", was a recent fabrication, when in fact, he had used that name on occasion for several years. We disagree. The prosecution commented on the fact that although Taylor used his legal name (Pete Taylor) in California, when he was stopped in Texas he "suddenly" became Alex Cooper. Taylor stipulated that he used his legal name in California. That Taylor may have used the Alex Cooper alias before does not make the prosecution's statement false or misleading.

3.

Finally, Taylor complains that the prosecution argued its own unsupported opinions to the jury by suggesting that (1) using false names and incomplete names is "how dope dealers work"; (2) Taylor gave his consent to search his car to prevent the appearance that he was hiding something; and (3) Taylor's payment for driving the car to Memphis ($1,000 and a free plane ticket) was "too good to be true". Our review of the record reveals that these comments were

either based directly on the evidence, or an offering of logical inference from it. As our court recently held, such statements are not erroneous. ***United States v. Campbell***, 49 F.3d 1079, 1084 (5th Cir. 1995) (prosecutor was either "summarizing the evidence as he saw it or was asking the jury to make logical inferences from that evidence").[5]

E.

Taylor has raised an ineffective assistance of counsel claim based on trial counsel's failure to object to the various errors discussed above. "Unless the district court has developed a record on the defendant's [ineffective assistance} allegations, we cannot fairly evaluate the merits of the claim." ***United States v. Bounds***, 943 F.2d 541, 544 (5th Cir. 1991). The record is not in a posture to permit a fair review of this claim. *See* ***United States v. Andrews***, 22 F.3d 1328, 1345 (5th Cir.), *cert. denied*, 115 S. Ct. 346 (1994). Taylor may bring this claim in a later proceeding pursuant to 28 U.S.C § 2255.

F.

Taylor urges us to reconsider our holding in ***United States v. Rich***, 992 F.2d 502 (5th Cir.), *cert. denied*, 114 S. Ct. 348 (1993), that consent to "look in" a vehicle amounts to consent to search luggage found in the vehicle. Even were we so inclined, we cannot overrule another panel of our court.

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[5] Taylor also urges that the cumulative effect of his claimed errors was a fundamental unfairness of the proceedings against him. We are unpersuaded.

G.

Taylor's final claim is that the district court erred by enhancing his sentence for failure to state his true identity, based on U.S.S.G. § 3C1.1 (1993) (obstruction of justice). There was no objection to this enhancement; again, we review only for plain error.

Taylor refers us to application note 4(a) to § 3C1.1, which specifically exempts the act of "providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation". Taylor insists his conduct did not hinder the investigation. However, even assuming it did not, Taylor did more than provide a false name "at arrest". He maintained his false identity for 12 days following his arrest, including at his detention hearing before a magistrate. In doing so, he concealed his extensive criminal history, and the fact that he was on parole at the time of the offense. Under these circumstances, the district court's enhancement under § 3C1.1 was far from plain error.

III.

For the foregoing reasons, the judgement is

AFFIRMED.