

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10665
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ABEL BENAVIDES, RODOLFO LARA BANDA
a/k/a Rudy Banda, ADAM RAMIREZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-116-Y-04)

(June 23, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellants Banda, Ramirez and Benavides were convicted after a jury trial of various offenses related to a conspiracy to distribute marijuana, cocaine and heroin, some of it from a location within 1,000 feet of an elementary school. Banda and Benavides each received, inter alia, 188-month sentences of imprisonment, while Ramirez was sentenced to 48 months. On appeal,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

they raise numerous issues, all of which we find meritless, as will be seen from the following discussion.

BACKGROUND

Guadalupe and Zulema Davila and José Mosqueda-Cortez pleaded guilty to conspiracy to possess with intent to distribute cocaine and heroin.¹ These co-defendants each stipulated to certain facts regarding the conspiracy in which the appellants were allegedly involved. The Davilas' factual resumes were supported by investigative materials contained in FBI records which were prepared based on statements made by the Davilas, Mosqueda, and other individuals involved in the investigation and offense. The statements were corroborated by wire-tap intercepts, confidential informants, and other investigative information obtained by the federal agents and several county and local police agencies.

The Davilas admitted that they sold cocaine, heroin, and marijuana from their residences from some time prior to December 1991 and until at least December 16, 1992. One of their residences was located within 1000 feet of an elementary school. The Davilas relied on other individuals in their illicit drug business including Banda, Benavides, Ramirez, and Mosqueda and at least 20 other individuals.

The Davilas bought kilogram quantities of cocaine, heroin, and marijuana from suppliers and then repackaged them for resale to customers. Appellants Benavides and Ramirez and others

¹ The PSR's of each of the appellants contain the same information with regard to the offense conduct involved in the case.

stored drugs at different residences for the Davilas and would return them to the Davilas' home when the customers arrived to make purchases.

The Davilas stipulated in their factual resumes supporting their guilty pleas that Banda also participated in the conspiracy by finding customers, weighing out drugs, delivering the drugs to buyers, and collecting debts for the Davilas. During the pretrial investigation, two other members of the conspiracy and one of the Davilas' customers related that Banda carried a firearm during the majority of the time that he was involved in the conspiracy. The customer described Banda's gun as either a 9mm or a .45 caliber pistol. In searching Banda's residence pursuant to a search warrant, agents found a 9mm pistol in the master bedroom as well as bags of marijuana, small amounts of heroin, \$600 cash, and a set of scales used to weigh drugs. Zulema Davila stipulated in her factual resume that she and Banda participated in telephone conversations on December 13 and 15, 1992, in furtherance of the distribution of cocaine and heroin.

Neither the factual resumes nor the evidence introduced at trial reflected the specific amount of drugs involved in the conspiracy. Based on investigative materials and eleven reliable sources, it was conservatively estimated that the Davila organization distributed or possessed with intent to distribute heroin in various amounts ranging from 129 grams to large quantities of 12 to 15 kilograms of heroin, 5.5 kilograms to 40 kilograms of cocaine, and between 50 and 200-400 pounds of

marijuana. A specific drug quantity attributable to each defendant was determined based on their scope of involvement in the conspiracy.

Banda objected to the PSR recommendations that he be held accountable for the use or possession of a firearm during the conspiracy, that he not receive a reduction of his offense level based on his minimal participation in the offense, and to the quantity of drugs attributable to him. Banda did not present any evidence to support his objections at the sentencing hearing. The district court adopted the findings in the PSR in their entirety and overruled Banda's objections based on the reasons given in the Addendum to the PSR.

Ramirez objected to paragraphs 3-22 in the PSR insofar as they referred to conduct underlying the charges for which he was acquitted. Ramirez argues that the allegations that he participated in the conspiracy to distribute heroin and cocaine should be disregarded. Ramirez also objected to the reliance on unsupported and conclusional statements in the PSR regarding the extent of his involvement in the offense conduct. Ramirez also argued that the evidence presented at trial was insufficient to show his involvement in cocaine and heroin.

Ramirez attached his own affidavit to his objections to the PSR Addendum, attesting that he did not knowingly distribute cocaine or heroin for the Davilas. He also stated that he was not aware that his father-in-law Abel Benavides was involved in cocaine and heroin distribution activities. During the sentencing hearing,

the only evidence offered by Ramirez was in conjunction with his request for a downward departure. Ramirez's counsel also argued, that in light of Ramirez's acquittal from the cocaine and heroin charges, the consideration of the information in the PSR concerning Ramirez's involvement in the cocaine and heroin distribution violated his due process rights and double jeopardy. The district court overruled Ramirez's objections and adopted the findings of the PSR and the PSR Addendum. Abel Benavides did not file any objections to the PSR.

DISCUSSION

BANDA

Banda first argues that the district court erred in increasing his offense level by two points for possession of a firearm. Banda alleges that a pistol seized from his home belonged to his wife, who used it for personal protection; that only one witness at trial testified that he had seen Banda with a firearm; and that his acquittal on the firearm count indicated that the jury did not believe that he possessed a firearm.

Section 2D1.1(b)(1) of the Guidelines provides that a defendant's offense level is to be increased by two levels if a gun is possessed during a drug-related crime. "The adjustment [for possession of a firearm] should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment. (n.3). The Government has the burden of proving that the adjustment is warranted under a preponderance-of-the-evidence standard. United

States v. Sparks, 2 F.3d 574, 587 (5th Cir. 1993), cert. denied, 114 S. Ct. 899 (1994).

In determining possession of a weapon, "what matters is not ownership but accessibility." United States v. Mitchell, 31 F.3d 271, 278 (5th Cir.) (internal punctuation and citation omitted), cert. denied, 115 S. Ct. 455 (1994). An acquittal on an offense charged in the indictment "`does not necessarily preclude consideration of underlying facts of the offense at sentencing so long as those facts meet the reliability standard.'" United States v. Carter, 953 F.2d 1449, 1459 (5th Cir.) (citation omitted), cert. denied, 112 S. Ct. 2980 (1992).

During the presentence investigation, Mosqueda and two other individuals, Freeman Johnson, a co-conspirator, and Morris Hawthorne, a Davila cocaine customer, reported that Banda carried a weapon during the majority of the time that he was involved in the conspiracy. Hawthorne specifically described the type of weapon used by Banda. Further, a weapon was found during a search of Banda's home in the same location that drugs and drug paraphernalia were discovered. There was reliable evidence in the PSR to support the finding that Banda possessed and actually used a weapon during drug-trafficking activities. As a result, the district court's determination that Banda's offense level should be increased for the use of a weapon was not clearly erroneous.

Banda next contends that the district court erred in not reducing his total offense level based on his minimal participation in the offense. Banda argues that the case involved a conspiracy

commencing in December 1991 and continuing until September 1993 but that his involvement was limited to the period between May 1992 and December 1992. Further, the evidence at trial showed that Banda was seen at the Davila home only occasionally.

Section 3B1.2(a) provides for a four-level reduction for a minimal participant in the offense. A minimal participant is one who is "plainly among the least culpable of those involved in the conduct of a group" and who demonstrates a "lack of knowledge or understanding of the scope and structure of the enterprise." § 3B1.2, comment. (n.1). A district court should not award the minor participation adjustment simply because a defendant's participation is somewhat less than the other participants. Moreover; we review only for clear error the sentencing court's determination that a defendant did not play a minor or minimal role in the offense. U.S. v. Zuniga, 18 F.3d 1254, 1261, (5th Cir.) cert. denied, 115 S. Ct. 214 (1994). Banda has not provided any reliable evidence to rebut the information from the PSR, related above, that connected him in a substantial way to the conspiracy. Because the evidence reflected that Banda was more than a minimal participant, the district court's determination that he was not entitled to a reduction of his offense level for minimal participation was not clearly erroneous.

Banda next asserts that the district erred in holding him accountable for 2925.23 kilograms of marijuana equivalency. This was allegedly a greater amount of drugs than was reasonably foreseeable to him. Banda again relies on the trial testimony

indicating that he participated in drug transactions only occasionally. He points out that he was in the area for only eight months and was working full-time during that period, and he argues, the evidence showed that he participated in only one transaction.

"[A] defendant who participates in a drug conspiracy is accountable for the quantity of drugs, which is attributable to the conspiracy and reasonably foreseeable to him." Mitchell, 31 F.3d at 277. "The computation of the amount of drugs for which an individual shall be held accountable at sentencing represents a factual finding, which must be established by a preponderance of the evidence." Id. The finding will be upheld on appeal unless it is clearly erroneous.

Based on conservative estimates, the Davilas, who were the leaders of the conspiracy, were held accountable for 3-5 kilograms of heroin, 20 kilograms of cocaine, and at least 100 pounds of marijuana. The PSR recommended that Banda be held accountable for 2.7 kilograms of heroin, 1 to 2.5 kilograms of cocaine, and at least 50 pounds of marijuana because he was involved in the conspiracy between May 1, 1992, until at least December 16, 1992. These calculations were based on a review of transcripts of intercepted wiretaps, laboratory reports, evidence discovered during residence searches, and statements of confidential informants and cooperating witnesses. The PSR's approach to estimating the quantity of drugs attributable to Banda was proper. United States v. Puig-Infante, 19 F.3d 929, 942 (5th

Cir.)(internal citations omitted), cert. denied, 115 S. Ct. 180 (1994).

Banda has not presented any evidence other than his self-serving assertions that his involvement was less than that stated in the PSR. In his objections, Banda argued that he should be held accountable for 20 grams of heroin, 50 grams of cocaine, and five kilograms of marijuana because he lived in the area where the conspiracy occurred for eight months only and maintained a full-time job. In response to Banda's objection, the probation officer stated that Banda was specifically asked during the pretrial investigation to give an estimate regarding the specific amount of drugs that he was responsible for distributing and, on advice of counsel, Banda chose not to comment on the offense or drug amounts involved.

There was reliable evidence in the PSR that it was reasonably foreseeable to Banda that the conspiracy involved at least the amount of drugs attributable to him in the PSR. Thus, the district court did not clearly err in holding him accountable for that amount of drugs.

Banda argues that the district court committed clear error in adopting the PSR without resolving specifically disputed issues of fact pertaining to his sentencing objections. Based on the record, this point is not well-taken. Fed. R. Crim. P. 32(c)(3)(D) requires the district court to make specific findings as to all contested facts contained in the PSR that the court finds relevant in sentencing. United States v. Sherbak, 950 F.2d 1095,

1098 (5th Cir. 1992). The adoption of the findings in the PSR satisfies Rule 32 because it reflects that the district court "at least implicitly, weighed the positions of probation department and the defense and credited the probation department's facts." Id. at 1099.

Banda bore the burden of proving that the contents of the PSR are "materially untrue, inaccurate, or unreliable." United States v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992). Because he furnished no relevant affidavits or other evidence to rebut the information contained in the PSR, the district court was free to adopt its findings without further inquiry or explanation. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990).

Banda argues next that the district court abused its discretion in denying his motion for severance, causing him to suffer "compelling prejudice" as a result of being tried with the much more culpable Benavides and Ramirez. A district court's denial of a motion for severance is reviewed for abuse of discretion. United States v. Villarreal, 963 F.2d 725, 731 (5th Cir.), cert. denied, 113 S. Ct. 353 (1992). Generally, persons indicted together should be tried together. United States v. Rocha, 916 F.2d 219, 227-28 (5th Cir. 1990), cert. denied, 500 U.S. 934 (1991). This rule is based on the preference in the federal system for joint trials of those defendants indicted together. Zafiro v. United States, 113 S. Ct. 933, 937 (1993). Nevertheless, a district court may grant a severance of defendants to prevent a prejudicial joinder. See Fed. R. Crim. P. 14.

A party whose motion was denied can prevail on appeal if he shows specific and compelling prejudice, against which the district court was unable to provide protection (with, e.g., limiting instructions) and then only if the possible prejudice outweighs the public interest in the economy of judicial administration. United States v. Lindell, 881 F.2d 1313, 1318-19 (5th Cir. 1989), cert. denied, 493 U.S. 1087 (1990). Factors relevant to showing compelling prejudice include whether evidence directed toward the guilt of one codefendant will "spill over" to another defendant. See Rocha, 916 F.2d at 228. An appropriate limiting instruction is, however, sufficient to prevent the threat of prejudice of evidence that is incriminating against one codefendant but not another. Id. at 228-29.

The district court carefully instructed the jury that in determining whether a defendant was a member of the alleged conspiracy, that they should consider only the evidence pertaining to the defendant and might not convict him except on proof of his guilt beyond a reasonable doubt. Banda has not shown that he suffered specific and compelling prejudice, not remedied by the district court's instructions, as a result of the evidence presented against his co-defendants at trial. The district court did not abuse its discretion in denying the motion for severance.

Banda finally contends that the district court erred in refusing to inquire into whether the Government's peremptory challenge of one venireperson was motivated by race. Banda complains that the district court refused to conduct a Batson

hearing although the defense showed the challenged juror was black and that the Government had a history of challenging black venirepersons in the Northern District of Texas.

There is a three-step process for making a Batson objection:

(1) a defendant must make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

United States v. Clemons, 941 F.2d 321, 324 (5th Cir. 1991) (citing Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion)). In order to carry his burden of showing a prima facie case of racial discrimination, the defendant is required to "come forward with facts, not just numbers alone." United States v. Branch, 989 F.2d 752, 755 (5th Cir.)(citation omitted), cert. denied, 113 S. Ct. 3060 (1993).

The sole evidence presented by the defense here was the fact that the juror was black and counsel's representation that blacks had been historically excluded from juries in that jurisdiction. The district court determined that the mere showing that the prosecution had struck a black venireperson did not establish a prima facie case of racial discrimination. We agree. See Branch, 989 F.2d at 755.

RAMIREZ

Ramirez argues first that the district court failed to give specific reasons, as required by Fed. R. Evid. 402, 403, and 404(b), for the admission of certain tape recordings he characterizes as "extrinsic evidence." Ramirez argues that the court was required to articulate on the record its findings regarding the probative value of the evidence and its potential prejudice.

We are inclined to disagree with the premise of Ramirez's argument. "[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.) (internal quotations and citation omitted), cert. denied, 115 S. Ct. 531 (1994). 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.

The transcripts of intercepted phone conversations to which Ramirez objected all concern drug deals, and in several cases involved Benavides as well as Ramirez. The evidence was relevant to prove Ramirez's participation in the conspiracy and for the jury to infer his intent and knowledge in regard to the illegal use of

a communication facility. From their dates and circumstances, the district court could determine the relevance of these conversations and the fact that they were intertwined with the conspiracy, rather than separate "bad acts" that required Rule 404(b) balancing. In the event such balancing was required, however, the court did not abuse his discretion and did make sufficient findings.

Ramirez argues that the district court failed to make specific findings in response to Ramirez's objections regarding the quantity of drugs attributable to him under a relevant-conduct analysis. Ramirez argues that his "relevant conduct" should not have included any amount of heroin or cocaine and that he should not be held accountable for conduct occurring before he joined the conspiracy. The PSR, he asserts, contained many conclusional statements without factual support, and thus the district court could not simply adopt those general assertions. Both Ramirez and allegedly his counsel² submitted affidavits challenging the evidentiary basis underlying the PSR's conclusions.

As previously discussed, the district court's adoption of the findings in the PSR satisfied Rule 32 because it reflects that the district court "at least implicitly, weighed the positions of probation department and the defense and credited the probation department's facts." Sherbak, 950 F.2d at 1099. Ramirez had the burden of proving that the contents of the PSR are "materially untrue, inaccurate, or unreliable." Navejar, 963 F.2d 732, 735

² The record does not, however, contain counsel's affidavit nor is it referenced in the sentencing hearing except in a very brief statement by the government that is not relevant here.

(5th Cir. 1992). Ramirez's affidavit did not persuade the district court, and its findings are legally adequate and not clearly erroneous.

Ramirez argues that, to the extent that the district court made findings regarding the drug quantity involved, it erred in relying on the factual resumes of co-defendants in making such findings. This is plainly wrong. In sentencing determinations, the court is not bound by the rules of evidence and may consider any relevant information without regard to its admissibility provided the information considered has sufficient indicia of reliability. See U.S.S.G. § 6A1.3(a). Therefore, the district court was free to consider the stipulated facts in the factual resumes of the co-defendants. Further, Ramirez was also implicated in the heroin-and-cocaine conspiracy by Zulema Davila's testimony at trial and her statements given during the presentence investigation. Thus, there was reliable evidence in addition to the factual resume that the district court could rely on in making its determination.

Ramirez argues that even if the district court implicitly found that he was involved in the distribution of cocaine and heroin, such findings are clearly erroneous. Ramirez argues that the drug quantities determined by the PSR have no basis in fact and, thus, the district court's adoption of those findings was clearly erroneous. Ramirez also argues that there was no evidence of his involvement in the distribution of heroin presented at trial

or during the presentence investigation.³ Ramirez also argues that there was insufficient evidence presented concerning his involvement in the distribution of cocaine. Ramirez argues that Mrs. Davila's trial testimony concerning his involvement in a sale of cocaine was confusing and contradictory. He argues that the testimony could have been construed as stating that Ramirez was involved in a sale of marijuana rather than cocaine.

A defendant's base offense level for drug-trafficking offenses may be based on both "drugs with which the defendant was directly involved [under § 1B1.3(a)(1)(A)], and drugs that can be attributed to the defendant in a conspiracy as part of his 'relevant conduct' under § 1B1.3(a)(1)(B)." United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994); see § 2D1.1(a)(3). "Relevant conduct" includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.'" Carreon, 11 F.3d at 1230 (quoting § 1B1.3(a)(1)(B)). Factual findings concerning a defendant's relevant conduct for sentencing purposes are not clearly erroneous if they are "plausible in light of the record read as a whole." Puig-Infante, 19 F.3d at 942.

The PSR recommended that Ramirez be held accountable for 2.7 kilograms of heroin, 2.5 kilograms of cocaine, and 73 pounds of marijuana. The PSR stated that the estimate was based on the fact

³ Ramirez's brief again refers to counsel's affidavit filed as an attachment to his objections and attachment to the affidavit which allegedly contains a summary of Davila's statements to the FBI. Ramirez contends that the summary makes no mention of his involvement in heroin distribution. As previously discussed, neither the affidavit nor its attachments are attached to the objections to the PSR.

that Ramirez assisted his father-in-law Abel Benavides in distributing heroin, cocaine, and marijuana. Although the PSR noted that Ramirez was primarily responsible for the distribution of marijuana, he was known to collect drug debts for Davila and Benavides, who primarily distributed cocaine and heroin. PSR ¶ 13.

Contrary to Ramirez's assertions in his brief, the PSR also reflects that Zulema Davila related to an FBI agent that Adam Ramirez participated in a sale of heroin and cocaine while the Davilas were residing at the Avenue K residence between May 1992 and December 1992.

There is reliable evidence in the PSR that Ramirez was personally involved in all aspects of the conspiracy, including the distribution of heroin and cocaine. Although his own involvement in that aspect of the conspiracy may have been limited, it was certainly reasonably foreseeable to him that his father-in-law and the other co-conspirators were substantially involved in the distribution of heroin and cocaine. Thus, the district court's findings regarding the type and amount of drugs attributable to Ramirez was not clearly erroneous.

Ramirez argues that the district court erred in holding him accountable for quantities of cocaine and heroin because he was acquitted of the charges involving those drugs by the jury. Ramirez argues that the Government should have been required to prove his involvement with those drugs for sentencing purposes by clear and convincing evidence. Ramirez argues that the higher standard has been adopted in some limited circumstances. Ramirez

concedes that this court has held that "relevant conduct" may include conduct for which a defendant is acquitted, but urges the court to adopt the Ninth Circuit's position on this issue.

As previously discussed, this court has determined that a sentencing court may rely on facts that underlie a charge on which the defendant has been acquitted as long as the Government establishes the facts by a preponderance of the evidence. Carter, 953 F.2d at 1459. A prior panel opinion may be overruled only by an "overriding Supreme Court decision," a change in statutory law, or this court sitting en banc. See United States v. Zuniga-Salinas, 952 F.2d 876, 877 (5th Cir. 1992) (en banc). Therefore, Ramirez's argument is precluded by the law of this court.

BENAVIDES

Benavides argues that the district court erred in admitting evidence of an extraneous offense involving marijuana because he was not on trial for any marijuana offenses. A co-conspirator, Mosqueda-Cortez, testified that he learned from Banda that Banda and Benavides had gone to a source in South Texas, allegedly a cousin of Banda's, and returned with fifty pounds of marijuana and one kilo of cocaine. Benavides argues that Mosqueda did not participate personally in the alleged transaction. Benavides argues that he could not compel Banda to testify at trial so that he could not impeach the testimony. Benavides argues that evidence of an oral confession by a nontestifying defendant should have been excluded because it violated his right to a fair trial and his right of confrontation and cross-examination.

This Court reviews the district court's rulings on admission of evidence for an abuse of discretion. United States v. Triplett, 922 F.2d 1174, 1180 (5th Cir.), cert. denied, 500 U.S. 945 (1991). Bruton v. United States, 391 U.S. 123, 136-37 (1968) established a rule barring the admission in a joint trial of the incriminating pretrial statements of a nontestifying defendant. However, Bruton has been limited to instances in which the admission of the incriminating statements was not within a firmly rooted exception to the hearsay rule. United States v. Saks, 964 F.2d 1514, 1525 (5th Cir. 1992).

Under Fed. R. Evid. 801(d)(2)(E), a statement made by a co-conspirator during the course and in furtherance of a conspiracy is not hearsay. United States v. McConnell, 988 F.2d 530, 533 (5th Cir. 1993). When determining the applicability of that rule, the district court must first decide that there is evidence of a conspiracy involving the out-of-court declarant and the defendant and that the statement was made in the course of and in furtherance of the conspiracy. United States v. Ascarrunz, 838 F.2d 759, 762 (5th Cir. 1988). The Government need prove these facts only by a preponderance of the evidence.

Here, there is a good argument that the statement was related to the conspiracy that was the subject of the indictment because it reflected that Banda and Benavides obtained cocaine as well as marijuana in their trip to the Valley. The statement was made in furtherance of the conspiracy because Banda asked Mosqueda,

who was also working with the Davilas, to assist him in disposing of the drugs.⁴

Nevertheless, it was not totally clear based on the limited evidence presented at trial whether the trip was part of the Davila conspiracy or a separate conspiracy in which Banda and Benavides were involved. But, even if Banda's statement was admitted in violation of Bruton, "the error may be harmless if the statement's impact is insignificant in light of other evidence against the defendant." United States v. Kelly, 973 F.2d 1145, 1150 (5th Cir. 1992). Because there was overwhelming evidence of Benavides' guilt presented at trial, the admission of Mosqueda's testimony, if erroneous, was harmless.

Benavides also argues that the evidence was not relevant to the charge that he was involved in a conspiracy involving cocaine and heroin and was more prejudicial than probative. Benavides argues that the admission of the "bad character" evidence violated Rule 402 and 403. Mosqueda's testimony concerning the Banda and Benavides trip to the Valley was "inextricably intertwined" with the evidence of the crime charged and, thus, was admissible as intrinsic evidence. Royal, 972 F.2d at 647. However, even if the evidence was extrinsic offense of another offense, the district court determined that the testimony was relevant and not so prejudicial as to outweigh its probative value. The court specifically determined that the evidence was relevant to

⁴ The PSR reflects that Zulema Davila was aware that Banda and Benavides made the trip and returned with marijuana and cocaine. It could be inferred therefore that these drugs were to be distributed as part of the Davila conspiracy.

issues other than the defendant's character. The evidence was relevant to whether Benavides intended to be involved in a conspiracy that involved the distribution of controlled substances and intended to use a communication facility to distribute marijuana. Further, the testimony was very limited and not highly prejudicial. The admission of the evidence was not an abuse of discretion. See Dillman, 15 F.3d at 391.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgments of the district court regarding appellants' convictions and sentences.

AFFIRMED.