**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 94-20700**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**versus**

**DANIEL ANIBAL MORALES and**
**AMERICO GUSTAVO MORALES,**

**Defendants-Appellants.**

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**Appeal from the United States District Court**
**for the Southern District of Texas**
**(92-CR-169-1)**

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**November 8, 1996**

Before GARWOOD, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:[*]

In contesting their convictions for conspiracy to possess with the intent to distribute cocaine, Daniel Anibal Morales and Americo Gustavo Morales challenge the sufficiency of the evidence and contend that the district court committed reversible error by admitting evidence pursuant to FED. R. EVID. 404(b). We **AFFIRM**.

I.

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[*] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

The appellants were charged, along with ten others, in a 31-count indictment. Both appellants were charged with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846; in addition, Daniel Morales was charged with conducting a continuing criminal enterprise and with six substantive possession and distribution counts. One of the co-defendants was a fugitive at the time of trial, and another's motion for severance was granted. Accordingly, the case proceeded to trial against the appellants and eight others.

As for those eight co-defendants, the jury was unable to reach a verdict on all of the counts against one, and on all but one of the counts against another; it acquitted the rest. And, it acquitted Daniel Morales of all charges except the conspiracy count, for which it also convicted Americo Morales.

II.

The sufficiency question is addressed first because the evidence was presented in this fashion at trial. The district court did not decide to admit the Rule 404(b) evidence until after the Government had presented all of its other evidence.

A.

As they did in their motion for judgment of acquittal at, among other times, the close of all the evidence, the appellants contend that the evidence was insufficient to support their convictions. The appellants having so moved, we employ the

following well-established standard of review for this challenge: the evidence is viewed in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the jury; and, it is sufficient if a rational trier of fact could have found that it established guilt beyond a reasonable doubt. *E.g.*, ***United States v. Montoya-Ortiz***, 7 F.3d 1171, 1173 (5th Cir. 1993). "To establish a conspiracy under 21 U.S.C. § 846, the government must prove that a conspiracy existed, that each co-defendant knew of the conspiracy, and that each co-defendant voluntarily joined in it." ***Id***. (internal quotation marks and citation omitted).

Four of the Government's witnesses testified about numerous cocaine purchases from the appellants from August 1986 through November 1989. There was evidence that Daniel Morales was the supervisor, and that Americo Morales conducted transactions only at his direction. The appellants contend, however, that the testimony of these witnesses does not support their convictions because all of these witnesses were convicted felons, facing lengthy sentences; all of them had made deals with the Government pursuant to which they would not be prosecuted for their participation in the conspiracy; and each had hopes of a sentence reduction in exchange for his testimony. The appellants do not (and, indeed, in good faith, cannot) deny that, if believed, the testimony of the four unindicted co-conspirators overwhelmingly supports their

convictions; instead, they maintain that the testimony was unworthy of belief, as evidenced by the jury's acquittal of all of their co-defendants, and its acquittal of Daniel Morales on the substantive charges and the continuing criminal enterprise charge.

The appellants' sufficiency challenges are without merit. Needless to say, the grounds presented to show a lack of credibility of the Government's witnesses furnishes no basis for reversal, because the making of credibility determinations is within the exclusive province of the jury. *E.g.*, ***United States v. Lindell***, 881 F.2d 1313, 1322 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). "It is well established that a conspiracy conviction may be based upon the uncorroborated testimony of a co-conspirator, even when that testimony is from one who has made a plea bargain with the government, provided that the testimony is not incredible or otherwise insubstantial on its face." ***United States v. Gadison***, 8 F.3d 186, 190 (5th Cir. 1993). "To be considered incredible as a matter of law, a witness' testimony must assert facts that the witness physically could not have observed or events that could not have occurred under the laws of nature." ***Id***. (internal quotation marks, brackets, and citation omitted). The testimony of the four co-conspirators, although subjected to vigorous and relentless cross-examination, does not fall within that exception.

Nor does the jury's rendering of verdicts of acquittal as to other counts and other defendants furnish a basis for reversal. It is more than well-settled that "[a] jury can render inconsistent verdicts, even where the inconsistency is the result of mistake or compromise." ***United States v. Scurlock***, 52 F.3d 531, 537 (5th Cir. 1995) (internal quotation marks and citation omitted). Moreover, the power of a jury to return a verdict of not guilty for impermissible reasons is "unreviewable". *See* ***United States v. Powell***, 469 U.S. 57, 63 (1984) (quoting ***Harris v. Rivera***, 454 U.S. 339, 346 (1981)).

In any event, as the district court noted in denying the appellants' post-verdict motions for judgment of acquittal, there was other evidence in addition to the testimony of the four unindicted co-conspirators. The Government introduced evidence of Americo Morales' November 15, 1986, arrest and March 31, 1987, guilty plea for possession with the intent to distribute more than 28 but less than 200 grams of cocaine.

The Government also presented the testimony of a DEA Agent and a Customs Agent that, on February 2, 1989, Officers conducting surveillance observed Darryl Campbell (one of the four witnesses) drive into Papa's Garage (owned by Daniel Morales); that after Campbell was inside the garage, some individuals came out of it and looked up and down the street to see if any vehicles were following Campbell; that, upon leaving the garage approximately five minutes

later, Campbell detected surveillance and attempted to escape; that he was arrested following a high-speed chase; and that two kilograms of cocaine were seized from him.

Campbell agreed to cooperate with the authorities, and placed a telephone call to Daniel Morales that same day, regarding the balance of money he owed Daniel Morales for the cocaine. During that recorded conversation, Daniel Morales told Campbell that he was "f------ worried" because Campbell had told him "30 minutes". When Campbell replied that he had gotten caught in traffic, Morales responded, "S---! I can't move ... they ... they don't want to leave man." Campbell stated that he was waiting on "them guys to bring me that other money." Daniel Morales asked Campbell how long it was going to be; when Campbell replied that he might not bring the money until the following morning, Daniel Morales told Campbell to call him and let him know. Daniel Morales explained:

> I don't want them to be sitting here for an hour, hour and a half and then think you skip. I know you not gonna skip but s---, call me, tell me: Hey Papa, they haven't come in yet. Tell me something.

Campbell spoke to Daniel Morales again the following morning; that conversation also was recorded. Campbell told Daniel Morales that he was "waiting on the guy to call me so I can drop that off to him and I'll bring that money to you." Daniel Morales asked, "Before noon?" Campbell replied that he probably would do it

before noon; Daniel Morales told Campbell to "keep in touch with me".

B.

For the other issue on appeal, the district court is charged with reversible error for admitting evidence of extraneous offenses pursuant to Rule 404(b). It provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

In ruling on the admissibility of evidence under Rule 404(b), the district court applies a two-part test:

> First, it must be determined that the extrinsic offense is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [FED. R. EVID.] 403.

***United States v. Dula***, 989 F.2d 772, 777 (5th Cir.) (citing ***United States v. Beechum***, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979)), *cert. denied*, 510 U.S. 859 (1993). "The district court's admission of extrinsic acts evidence

may be reversed only upon a clear showing of an abuse of discretion." ***United States v. Broussard***, 80 F.3d 1025, 1039 (5th Cir.), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 1996 WL 480524 (1996). As hereinafter demonstrated, there was no such showing.

1.

At the conclusion of the Government's case-in-chief, and over Daniel Morales' objection, the district court permitted the Government to introduce Rule 404(b) evidence against him. It was offered to show Daniel Morales' knowledge of drug activity and his intent to join the conspiracy.

A Texas Ranger testified that, working undercover, he purchased a three-gram sample of cocaine from Daniel Morales on April 11, 1983, at which time Daniel Morales rubbed cocaine on his gums and snorted cocaine; and that he met with Daniel Morales again on May 19, 1983, and discussed three potential deals: (1) Daniel Morales supplying 25 kilograms of cocaine per month; (2) the purchase by Daniel Morales of one kilogram of cocaine; and (3) the transportation of cocaine by Daniel Morales for $1000 per kilogram. None of the possible deals discussed in that meeting were consummated. In 1985, Daniel Morales was charged with delivery of a controlled substance, the April 1983 three-gram sale to the Ranger; in March 1986 he pleaded guilty, received deferred adjudication, and was placed on probation for ten years.

On cross-examination, Morales' counsel repeatedly questioned the Ranger about whether he had attempted to "lure" Morales into committing more serious crimes, and asked the Ranger if he was familiar with the law of entrapment. On redirect, over Daniel Morales' objection, the Ranger testified that Morales was predisposed to commit the crime of delivery of cocaine.

The Government also presented the testimony of a DEA Special Agent, who testified that, while acting in an undercover capacity, he met with Daniel Morales at Papa's Garage on May 5 and July 5, 1991, and on August 26 and 27, 1992, to discuss the purchase of cocaine. Daniel Morales was arrested shortly after the final meeting, at which he had agreed to supply ten kilograms to the Agent. (Although Daniel Morales objected at trial to the admission of the Agent's testimony because it was not connected temporally to the time period covered by the alleged conspiracy and continuing criminal enterprise, he does not contend on appeal that the testimony was admitted erroneously. Needless to say, he has abandoned that objection. *E.g.,* ***United States v. Krout***, 66 F.3d 1420, 1432 (5th Cir. 1995) (because appellant "did not truly develop" point "in his brief, the point is abandoned"), *cert. denied*, ___ U.S. ___, 116 S. Ct. 963 (1996); ***United States v. Lucien***, 61 F.3d 366, 370 (5th Cir. 1995) (although appellant raised argument in the district court, "he has abandoned ... [that] argument on appeal by failing to adequately brief the issue");

***United States v. Beaumont***, 972 F.2d 553, 563 (5th Cir. 1992) (where appellant began his brief with the assertion that the evidence was insufficient to convict him, but failed to make any argument whatsoever to support that contention, the issue was abandoned), *cert. denied*, 507 U.S. 1020, 1054 (1993).)

a.

Daniel Morales contends that the district court erred by admitting the Ranger's testimony because it was too remote. We disagree. "Although the remoteness of the extrinsic acts evidence may weaken its probative value, the age of [a] prior conviction does not bar its use under Rule 404." ***United States v. Broussard***, 80 F.3d at 1040 (upholding admission of evidence of one defendant's prior conviction which was more than ten years old). It is true that the conversations occurred 11 years before the trial; but, they occurred only a little over two years prior to the inception of the charged conspiracy, which covered August 1985 through November 1989.

b.

Daniel Morales contends further that proof of the 1983 incident should have been limited to the fact of his 1986 conviction, because the evidence of his use of cocaine shed no light on his knowledge of a conspiracy to possess cocaine. Again, we disagree. The evidence of his personal cocaine use during the April 1983 transaction "demonstrated [his] familiarity with illicit

drugs and was therefore relevant on the question of knowledge". ***United States v. Lindell***, 881 F.2d at 1319 (holding that evidence of defendants' personal cocaine use was relevant to knowledge in marijuana conspiracy prosecution).

c.

Next, Daniel Morales asserts that the admission of the Ranger's testimony about predisposition deprived him of a fair trial, because the issue of entrapment was collateral, and the point of cross-examination was not entrapment, but the fact that Daniel Morales had not risen to the bait offered. We find no abuse of discretion.

Although the point of counsel's cross-examination obviously was to show that Daniel Morales had not taken advantage of the Ranger's offer of the opportunity to commit crimes involving large amounts of cocaine, it also could be interpreted most reasonably as implying that the Ranger had attempted to entrap Daniel Morales into committing more serious crimes. In light of the Ranger's testimony on direct examination that the three grams purchased from Daniel Morales in April 1983 (the transaction that formed the basis for his 1986 conviction) were intended as a sample, and that the purpose of that transaction was to allow him to determine the quality and value of the cocaine, the questions also could be interpreted reasonably as implying that Daniel Morales' conviction for delivery of cocaine was the product of entrapment, because the

purchase of a sample carries with it the implication that it is only part of a larger quantity to be purchased if the sample proves satisfactory. Accordingly, the district court did not abuse its discretion by permitting the Government, on redirect examination, to elicit testimony that Daniel Morales was predisposed to commit the crime of delivery of cocaine.

d.

Daniel Morales contends that the Ranger's testimony "had no probative value and was substantially outweighed by the danger of unfair prejudice" because his counsel stipulated in his written objection to the admission of extraneous offenses that he was not contesting the question of intent. It is well-settled in this circuit that "[t]he mere entry of a not guilty plea in a conspiracy case raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence." ***United States v. Broussard***, 80 F.3d at 1040. Such evidence is admissible unless the defendant "affirmatively take[s] the issue of intent out of the case." ***United States v. Roberts***, 619 F.2d 379, 383 (5th Cir. 1980) (internal quotations and citation omitted). "Faced with a plea of not guilty, the prosecution is under no obligation to wait and see whether the defendant argues the non-existence of an element of crime before the prosecution presents evidence establishing that element." ***United States v. Buchanan***, 633 F.2d 423, 426 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

Contrary to the assertion in his brief, Daniel Morales' counsel did not stipulate, in his written objection or at any other time, that he was not contesting the question of intent. In his written objection, he stated only that "Morales is not raising a defense of mistake or accident, and therefore the issue of intent is not one that is before this jury." And, at a hearing on the admissibility of the evidence, counsel stated:

> We're not contesting that Mr. Morales had some innocent intent in being around cocaine. I don't think that any of the defendants are taking that position.... Yet the Government is seeking to justify the inclusion of all this extremely prejudicial evidence, as if we were taking that position. Mr. Morales' defense is that the Government is failing to fulfill its burden of proof.... We're not saying that he didn't have the intent. We have not said that he did not have knowledge or expertise in matters relating to cocaine. And surely, there has been an overwhelming amount of evidence on the fact that there was some kind of agreement between the co-conspirators and Mr. Morales.

Those statements are not enough to affirmatively remove the issue of intent, because intent was an essential element that the Government had the burden of proving. *Cf*. ***Roberts***, 619 F.2d at 383 (stating that counsel's indication in his motion to exclude extrinsic offense evidence that he would not actively contest the issue of intent was insufficient to affirmatively remove the issue from the case, because "[t]hat alone did not reduce the burden on the prosecution to establish intent, as an element of the offense, beyond a reasonable doubt").

e.

Part of the analysis in weighing the probative value of Rule 404(b) evidence against its prejudicial effect "hinges upon the government's need for the testimony to prove intent." ***United States v. Henthorn***, 815 F.2d 304, 308 (5th Cir. 1987). Our court has upheld the admission of such evidence against defendants who attack the credibility of the Government's witnesses. *See* ***id***.; ***United States v. Buchanan***, 70 F.3d 818, 831 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1340, 1366 (1996). Daniel Morales contends that the district court unfairly considered his co-defendants' attacks on the credibility of the Government's witnesses in assessing the Government's need for the Rule 404(b) evidence, because his counsel tried to limit his cross-examination and had no control over his co-defendants' cross-examination.

Although it is true that, during cross-examination, Daniel Morales did not attack the credibility of the Government's witnesses to the same extent as did his co-defendants, counsel's opening statement, presented prior to the Government's presentation of evidence, is consistent with his co-defendants' theme of attempting to persuade the jury that the Government's witnesses were unworthy of belief. Counsel suggested that Darryl Campbell's motive for testifying was that he had "developed an intense homesickness for the fancy cars that the Government attorneys have already described and that he much preferred to be out driving them

than ensconced in some humility inside the walls of a federal correctional institution." Counsel stated further:

> Now, I don't want to bore you with this theme that you've already heard from some of the other lawyers that everybody who gets near Darryl Campbell somehow ends up coming out of it as though he's been rolling around in a pig sty. The motive for that is yet to be shown on cross-examination.

Counsel also suggested that Campbell's incarceration gave him a motive to fabricate his expected testimony against Daniel Morales:

> There is a tremendous inflationary effect from being locked up in prison if you think your creative writing skills will get you free, even if it means everybody you ever knew, including a car mechanic, goes down the tubes in the process.

Accordingly, the district court did not abuse its discretion by considering the attacks on the credibility of the Government's witnesses in assessing the Government's need for the Rule 404(b) evidence.

2.

Although Americo Morales asserts that the district court erred by admitting Rule 404(b) evidence against him, he does not specify any such evidence; instead, he purports to adopt Daniel Morales' contentions regarding the admission of such evidence. At oral argument, counsel acknowledged that evidence of Americo Morales' March 1987 conviction was intrinsic and, therefore, outside the scope of Rule 404(b). Accordingly, he challenges only the Rule 404(b) evidence admitted against Daniel Morales, asserting that,

because they are brothers, there was a "spillover" effect. This contention is unavailing; the jury was instructed that the evidence could be considered only against the defendant against whom it was offered, and not against the other defendants.

III.

For the foregoing reasons, the judgments are

***AFFIRMED.***