IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-40010
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE LENAIR JOHNSON,

Defendant-Appellant.

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Consolidated With

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No. 94-40024
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMMY LEE BUCHANAN,

Defendant-Appellant.

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Appeals from the United States District Court for the
Eastern District of Texas
(4:93-CR-18-2)

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(July 11, 1994)

Before GARWOOD, SMITH and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:[*]

Defendants-appellants Terrance Lenair Johnson (Johnson) and Tommy Lee Buchanan (Buchanan), who were tried together, appeal their drug offense convictions. Their cases have been consolidated for appeal. We affirm.

Appellants were each charged in both counts of a two-count indictment, count one alleging that on or about January 12, 1993, in Denton County, Texas, they possessed crack cocaine with intent to distribute it, contrary to 21 U.S.C. § 841(a)(1), and count two alleging that at the same time and place they conspired with each other and others unknown to possess crack cocaine with intent to distribute it, contrary to 21 U.S.C. § 846. Following a jury trial, Buchanan was found guilty of both counts, while Johnson was found guilty of count one but not guilty of count two (conspiracy).[1]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The district court sentenced Buchanan to 210 months' imprisonment on each count, the sentences to run concurrently with each other; Johnson was sentenced to 210 months' imprisonment on count one; in the case of each 25 of the 210 months was to be consecutive to the sentence each respectively had previously received in cause #7:92CR023K in the United States District Court for the Northern District of Texas, and the remaining 185 months was to be concurrent with said prior sentence. Neither defendant was fined; each was assessed 5 years' supervised release. The district court determined that the applicable guideline range for each was 168 to 210 months. No complaint is made on appeal

On appeal, Johnson and Buchanan each complain of the admission of evidence concerning a prior crack cocaine possession incident involving both of them, which occurred on August 18, 1992, in Burkburnett, Texas, on the Oklahoma border and something in the neighborhood of 200 miles northwesterly of Denton. Johnson's second, and final, claim is that the evidence is insufficient to support his conviction. Buchanan's second, and final, claim is that the district court erred in its answer to the jury's question concerning his plea. Concluding that none of these contentions present reversible error, we affirm.

Facts

On January 12, 1993, at approximately 11:00 p.m., Texas Department of Public Safety (DPS) Trooper Jeff Corzine (Corzine) made a traffic stop of a Mustang with heavily tinted windows heading north on Interstate 35 in Denton, Texas. Because Corzine could not determine the number of persons inside the vehicle, due to the tinted windows, he approached the vehicle with caution. Corzine identified himself to the driver, Buchanan, and asked the driver to exit the vehicle and step back. Buchanan complied.

When Corzine informed Buchanan of the reason for the traffic stop, a low-hanging muffler, Buchanan immediately dropped to his knees to inspect the underside of the car, behavior which Corzine viewed as highly unusual. Buchanan did not have his driver's license with him. Corzine instructed Buchanan to stand in a certain location, but Buchanan kept moving around and appeared very

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respecting the sentences.

nervous. Upon questioning, Buchanan said that he was driving to Oklahoma to take his girlfriend home. He also said there was another passenger, "Terry" Johnson.

Corzine approached the passenger side of the vehicle to question "Terry" and have him exit the vehicle. The passenger identified himself as Johnson,[2] and appeared extremely nervous. Johnson asked Corzine for permission to walk to a nearby gas station in order to use the restroom.[3] Johnson also said that they had been driving without any particular destination. Corzine requested Johnson to return to the vehicle, and he called for backup.

Based upon Corzine's computer check of the defendants' names, Corzine decided to arrest both men.[4] After backup arrived, the officers proceeded to arrest and handcuff Buchanan and then Johnson. DPS Trooper Donald Wortman, in assisting the other passenger, Lesia Williams, out of the vehicle, felt a hard hand-sized object in the pocket of the coat which had been draped over Williams' knees and tucked under her legs. Buchanan claimed the coat as his. From the subsequent inventory inspection, Corzine found a pager above the passenger-side visor and, in the coat, a

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[2] Corzine testified that Johnson gave his name as "Terry," not "Terrance," and that usually a person will state their full name under these circumstances.

[3] On cross-examination, Corzine testified that he did not believe that Johnson used the restroom when the facilities were readily available.

[4] Upon cross-examination of both defendants, the Government elicited the facts that Johnson and Buchanan were in violation of their conditions of release, from another proceeding, by being out of the Northern District of Texas.

battery-operated electronic scale, and triple-packaged cocaine base weighing 184.19 grams.

Prior to trial, the Government gave notice to the defendants of its intention to introduce evidence of a prior act, that of August 18, 1992, in Burkburnett, pursuant to FED. R. EVID 404(b). Before this evidence was presented to the jury during the Government's case-in-chief, the district court found that it was relevant to state of mind and intent, an issue raised in the case, and that the probative value was not substantially outweighed by any unfair prejudice. The court ordered that the Rule 404(b) witnesses refrain from mentioning the gun which was involved in the prior act.

Two officers with the Burkburnett, Texas, Police Department testified that, on August 18, 1992, at approximately 1:40 a.m., a window-tinted automobile, proceeding north toward Oklahoma on Interstate 44, was stopped by Officer Brayton for traffic violations. Buchanan, who was driving, and Johnson were the occupants of the vehicle. Officer Burchett observed a black leather bag stuffed between Johnson's legs as he sat in the vehicle. Burchett removed Johnson's hand from the bag in order to retrieve it from the vehicle. Subsequent inspection of the bag revealed approximately 225 grams of cocaine base similarly packaged to the cocaine base found 5 months later in the coat.

After the jury had been selected and sworn,[5] and the court had

[5] Which was following relatively full *voir dire* by the court, by the Assistant United States Attorney, and by counsel for each of the defendants.

given its preliminary instructions to the thus empaneled jury, including an admonition that the defendants had pleaded not guilty, but before any evidence was presented, Buchanan's counsel brought to the court's attention that Buchanan, who had previously pleaded not guilty, wished to plead guilty to the possession count and that he wanted this information relayed to the jury. The court would not accept the plea because the deadline for a change of plea had passed, and because taking such a plea could be unfairly prejudicial to Johnson.

Johnson and Buchanan testified at trial. On direct examination, Johnson testified as to his involvement in the Burkburnett incident. He stated he and Buchanan were going to Oklahoma. Johnson denied that the leather bag was between his legs, and he also stated that the Burkburnett officers had a pistol and shotgun pointed at his face. On cross-examination, the Government brought out that Johnson, from the Burkburnett incident, was convicted of possession with the intent to distribute cocaine base and of using a firearm in a drug trafficking offense. The district court allowed the questions and testimony because Johnson opened the door to the gun issue by mentioning on direct the officers' display of arms. Johnson denied knowledge of the drugs found in Denton.

Buchanan testified that he possessed the drugs found in the coat, and admitted his guilt of count one. He denied telling Johnson that drugs were in the vehicle, and he denied that there was any drug agreement between Johnson and himself. Buchanan admitted that he also had pleaded guilty to possessing the cocaine

base in the Burkburnett case. He also stated that the police did not find the bag between Johnson's legs because the bag was hidden under the back passenger seat and that the gun was not in plain view because it was next to the drugs. Buchanan admitted that the gun was his.

The jury found Buchanan guilty on both counts while finding Johnson guilty only on the possession count.

Discussion

I. Burkburnett Evidence

Both Johnson and Buchanan challenge the admission of the Burkburnett evidence. This Court reviews for abuse of discretion. *See United States v. White*, 972 F.2d 590, 598 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1651 (1993). "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 . . . intent . . . ." FED. R. EVID. 404(b). "Interpreting [Rule 404(b)], this circuit holds that such evidence is admissible if (1) it is relevant to an issue other than the defendant's character, and (2) the probative value of the evidence substantially outweighs the undue prejudice." *White*, 972 F.2d at 599 (citing *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979)).

Buchanan argues that the Burkburnett evidence was irrelevant to the conspiracy count in light of Buchanan's testimony admitting guilt of the possession count. However, the evidence was admitted before Buchanan testified, and although he had stated to the court

that he would admit guilt of possession, he was not bound to do so. In any event, "[i]n a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence." *United States v. Prati*, 861 F.2d 82, 86 (5th Cir. 1988) (footnote omitted). Buchanan's argument that the events of the prior act and the present charge are dissimilar is wholly unpersuasive. To the contrary, the high degree of similarity between the two strongly argues for admission, as the Government has urged, here and below. Johnson argues that the evidence was unnecessary to prove the specific intent of the possession count. Johnson mistakenly ignores the point that the Government had to prove constructive possession of the drugs as to Johnson. "[K]nowledge and intent are elements of constructive possession." *United States v. Willis*, 6 F.3d 257, 262 (5th Cir. 1993). In light of Johnson's not guilty plea to both counts, the evidence was relevant to prove his state of mind and intent to commit the offenses. *See id*.

Both appellants argue that the evidence failed the second prong, that the probative value of the evidence was substantially outweighed by its unduly prejudicial nature. The arguments primarily focus on the prejudicial nature of the evidence about the gun. The testimony concerning the weapon involved in the Burkburnett incident did not come into evidence when the Government offered its Rule 404(b) evidence. It was not offered or admitted until after Johnson opened the door to the gun issue during his direct examination. Moreover, Johnson's conviction of the Burkburnett felony firearm offense was admissible for impeachment

purposes. No limiting instruction in this regard was requested by either appellant, and, indeed, Buchanan did not even object to the gun evidence. Buchanan, during his direct examination, testified that the gun was next to the bag of drugs, drugs which Buchanan admitted were his.

The district court gave a limiting instruction (limiting the prior act evidence to "state of mind and intent") after each Burkburnett police officer testified, along with a similar limiting instruction found within the general charge to the jury. In light of the limiting instructions and of the strong similarities between the prior act and the charged acts, the district court did not abuse its discretion by allowing the introduction of the evidence. *See White*, 972 F.2d at 599.

II. Sufficiency of the Evidence, Johnson

Johnson argues that the evidence was insufficient to prove that he knowingly possessed the cocaine base found in Buchanan's coat. At no time did Johnson move in the district court for judgment of acquittal.

> "Consequently, this Court's review is limited to determining whether the district court committed plain error or whether there was a manifest miscarriage of justice. Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or . . . because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir.) (en banc) (citations and internal quotations omitted), *cert. denied*, 113 S.Ct. 280 (1992).

As with any sufficiency review, credibility choices and reasonable inferences are made in favor of the verdict. We note that Johnson's acquittal of the conspiracy count does not in any way

inure to his benefit in our review of the sufficiency of the evidence on the possession count. *See United States v. Powell*, 105 S.Ct. 471 (1984); *United States v. Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992).

"The essential elements to convict on the possession charge are (1) knowing (2) possession of drugs (3) with intent to distribute." *Pierre* at 1311. Johnson does not contest the sufficiency as to the third element. "Possession of contraband may be either actual or constructive. In general a person has constructive possession if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located." *United States v. McKnight*, 953 F.2d 898, 901 (5th Cir.) (citation omitted), *cert. denied*, 112 S.Ct. 2975 (1992). Constructive possession may entail joint possession. *Id*.

Johnson and Williams were passengers in Buchanan's Mustang. Corzine testified that the tinted windows prevented him from seeing how many people occupied the vehicle or the activities of the occupants. The cocaine base was found in Buchanan's coat which had been draped over Williams' legs, well within reach of Johnson.

Johnson and Buchanan testified at trial that Johnson did not have knowledge of the drugs in the vehicle. In explaining his presence in the vehicle on January 12, five months after being arrested with Buchanan in another Oklahoma headed, tinted window vehicle holding a bag of very similarly wrapped crack between his legs, Johnson told the jury that Buchanan had apologized to him, that he could not hold a grudge against anyone, and that he did not

know exactly where they were going, but that (although he was a good common law husband who lived with and loved his wife and two children) he was going to Denton to meet another woman from Chickasha, Oklahoma, who had written to him while he was in jail after the Burkburnett arrest. Buchanan, however, told the arresting officer they were going to Oklahoma, and Johnson told the officer they had no particular destination. Both Buchanan and Johnson acted highly nervous and suspiciously. A pager was immediately in front of Johnson. The jury was entitled to find Johnson's testimony not credible. *See United States v. Prudhome*, 13 F.3d 147, 149 (5th Cir.) (noting the jury is entitled to discredit defense testimony), *cert. denied*, 1994 WL 145301 (U.S. May 16, 1994). We hold that the evidence was clearly sufficient under the *Pierre* standard, and, indeed, would likely be sufficient under the ordinary standard where proper motion for judgment of acquittal has been made.

III. Reply to Jury Question

Buchanan argues that the district court reversibly erred in answering the jury's question presented to the court after deliberations began. Approximately one hour after deliberations began, the jury sent a question to the district court asking, "Did Tommy Lee Buchanan plead guilty on both counts?" With the express approval of Johnson and the Government, the district court answered, "You should rely on your own recollection as to what Mr. Buchanan testified to and consider his testimony along with all of the other evidence in this case." Buchanan objected to this instruction, requesting that the jury be instructed that Buchanan

did not plead guilty to both counts.

"The trial judge retains his discretion to tailor his jury instructions when he must supplement them during the jury's deliberations." *United States v. Duvall*, 846 F.2d 966, 977 (5th Cir. 1988). Buchanan argues that the question posed by the jury was a legal question, not a factual one, and that, by the court's answer, the jury's confusion over the issue remained, thus possibly creating the basis of the guilty verdict on the conspiracy count. His argument is confusing. Although Buchanan states he is not contending that the instruction impermissibly shifted the burden of proof, he follows this by arguing that he "was placed in the tenuous situation of being believed guilty of conspiracy unless the jury could be told he did not plead guilty." Twice, Buchanan opines that the original charge did not cover the jury's question.

"A determination of the prejudicial nature of a supplemental charge can only be made after reviewing both the original and supplemental charges as a whole. Reversible error does not occur so long as the combined charges viewed as a whole accurately reflect the legal issues." *United States v. Taylor*, 680 F.2d 378, 381 (5th Cir. 1982) (citations omitted). At the beginning of trial, just after the jury was sworn, the jury was correctly instructed that "The Defendants pled not guilty to the charges." In the charge given after closing arguments and just before the jury retired, the district court instructed that Buchanan admitted to possessing the cocaine base with the intent to distribute it. The jury was also then instructed that "Each count, and the evidence pertaining to it, must be considered separately," and "The

Indictment in this case charges the defendants with separate offenses called counts." The charge instructed that the defendants were each presumed innocent, that the indictment was not evidence, and that the guilt of each defendant must have been established by the evidence beyond a reasonable doubt before a guilty verdict could be returned. The supplemental charge, which restated the original charge's instruction concerning the controlling nature of the jury's "recollection and interpretation of the evidence," did not favor either side. Buchanan never formally pleaded guilty. All that was in issue was his testimony. There was no request, by the jury or Buchanan, that his testimony be reread. The government did not argue that Buchanan had pleaded guilty to conspiracy. Buchanan's counsel argued that though he was guilty of possession he was not guilty of conspiracy. Buchanan does not argue that the jury did not have the original charge (to which there were no objections) before it, and they clearly did. Therefore, although the jury expressed some confusion over its recollection as to Buchanan's *testimony*, under all the circumstances of this particular case we conclude that the district court did not commit reversible error in its answer to the jury's question. *See United States v. Allie*, 978 F.2d 1401, 1409 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1662 (1993).

Accordingly, the conviction and sentence of each appellant is hereby

AFFIRMED.