

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-40548  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TIFFANY SHEPHARD,  
ANDRE DONNELL ROUTT,

Defendants-Appellants.

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Appeal from the United States District Court  
For the Eastern District of Texas

(1:94-CR-12(3))

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(June 13, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:\*

BACKGROUND

In a consolidated trial, Tiffany Shephard and Andre Routt were convicted by jury of conspiracy to possess with intent to distribute five kilograms or more of cocaine. Shephard was

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentenced to 290 months imprisonment and five years supervised release. Routt was sentenced to life imprisonment and five years supervised release. Both defendants timely appealed.

#### OPINION

During voir dire, the government moved to excuse venireman McCray for cause. Routt and Shephard objected, requesting the opportunity to question McCray to determine the possibility of rehabilitation. The court granted the government's motion without allowing any further questioning.

Routt argues that he was deprived of a fair trial by an impartial jury because the district court excused a venireman who did not demonstrate bias without affording Routt the opportunity to present further questions. Shephard incorporates Routt's argument by reference.

Absent an abuse of discretion, this court defers to the judgment of the district court as to the conduct and scope of voir dire. United States v. Rodriguez, 993 F.2d 1170, 1176 (5th Cir. 1993), cert. denied, 114 S. Ct. 1547 (1994). This court reviews the district court's ruling as to a venireman's impartiality only for manifest abuse of discretion. United States v. Munoz, 15 F.3d 395, 397 (5th Cir.), cert. denied, 114 S. Ct. 2149 (1994).

Despite its importance, the adequacy of voir dire is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

The questioning of venireman McCray transpired as follows:

MS. BALDO<sup>1</sup>: Anyone in the room who . . . has some type of strong religious beliefs or convictions and you just feel that cannot sit in judgment of another person? Because, of course, that is what you would be doing, you would have to listen to the evidence and make a judgment or determination as to whether they're guilty or not guilty. Yes, sir?

McCRAY: It would be kind of hard for me to make a judgment against another person and I didn't really know it. I mean, I would have to definitely know it.

MS. BALDO: Okay. So you think you might, Mr. McCray, you might have to raise the government's burden, you might have to know a hundred percent before you --

McCRAY: I mean, now, that's just my way. I mean, this is me.

In criminal cases, the government holds the burden to prove every element of the charged crime beyond a reasonable doubt. United States v. Crain, 33 F.3d 480, 486 (5th Cir. 1994), cert. denied, 115 S. Ct. 1142 (1995).

Given juror McCray's statement that he would hold the government to a higher burden of proof and the district court's observation of his demeanor and credibility, the district court did not commit a manifest abuse of discretion in dismissing juror McCray for cause without the opportunity for additional questioning. Drew v. Collins, 964 F.2d 411, 417 (5th Cir. 1992), cert. denied, 113 S. Ct. 3044 (1993).

Shephard argues that she was denied a fair trial because the district court improperly allowed evidence regarding conspiratorial activities, extraneous offenses, and other bad acts committed by

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<sup>1</sup>Ms. Baldo represented the United States at trial.

herself and others at times outside those alleged in the indictment, January 1, 1991, to May 1992.

Although Shephard does not cite her argument to specific testimony, it is assumed that she refers to government witnesses Delvin Livingston, Earl Riptoe, and Gerald Duffy, who testified about conspiracy acts involving Shephard that occurred before 1991. Specifically, the witnesses testified that beginning in the late 1980s, Shephard's home was the contact point for those involved in the conspiracy. Shephard arranged meetings between dealers from Mississippi and local distributors, allowed the out-of-town dealers to stay in her home and make transactions there, and occasionally cooked the cocaine in her home.

The district court allowed the evidence under Fed. R. Evid. 404(b) because it established motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The court granted Shephard a running objection as to all of the evidence admitted.

The proper test to apply in deciding the admissibility of other acts depends on whether the offered evidence is "intrinsic" or "extrinsic." United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990). Evidence of extraneous acts is "`intrinsic' when the evidence of the other act and the evidence of the crime charged are `inextricably intertwined' or both acts are part of a `single criminal episode' or the other acts were `necessary preliminaries' to the crime charged." Id. Rule 404(b) does not apply to intrinsic evidence. United States v. Ridlehuber, 11 F.3d 516, 521

(5th Cir. 1993). Although the government's testimonial evidence may be viewed as describing acts that are intertwined with the charged conspiracy, the testimony related to acts not charged in the indictment that are chronologically remote to the conspiracy alleged. Thus, the evidence will be analyzed as extrinsic. See Williams, 900 F.2d at 824-25.

"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. . . ." Fed. R. Evid. 404(b). This court reviews the district court's decision whether to admit Rule 404(b) evidence under a heightened abuse of discretion standard. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993).

Before admitting extrinsic offense evidence under Rule 404(b), the court must first determine (i) that the evidence is relevant to an issue other than the defendant's character, and (2) that the evidence possesses probative value that is not substantially outweighed by the danger of undue prejudice and meets the other requirements of Fed. R. Evid. 403. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). Character evidence is not excluded because it has no probative value, but because it may lead a jury to convict the accused on the ground of bad character deserving punishment regardless of guilt. Carrillo, 981 F.2d at 774.

If an extrinsic offense requires the same intent as the charged offense and the jury could find that the defendant committed the extrinsic offense, then the extrinsic offense is relevant to an issue other than the defendant's character, and the first prong is satisfied. Beechum, 582 F.2d at 911-13. "In every conspiracy case . . . a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he `affirmatively take[s] the issue of intent out of the case.'" United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980) (quoting United States v. Williams, 577 F.2d 188 (2d Cir.), cert. denied, 439 U.S. 868 (1978)). However, the district court must still "weigh the probative value of the extrinsic evidence against its prejudicial effect." Id.

Shephard placed the issue of intent before the court by entering a not-guilty plea. Shephard's prior involvement in the conspiracy was relevant and probative of her intent. The probative value of admitting such evidence was not outweighed by any prejudicial effect because the extrinsic evidence revealed acts identical to those for which Shephard was on trial and there was little other independent evidence of intent. See Roberts, 619 F.2d at 383-84. Additionally, the district court repeatedly instructed the jury and limited the use of the extrinsic evidence.

The district court did not abuse its discretion by admitting the evidence of Shephard's extraneous acts relative to her role in the conspiracy.

Before trial, Shephard requested information concerning any Rule 404(b) evidence that the government planned to offer at trial. The government advised Shephard that it would elicit Rule 404(b) testimony from Riptoe and Duffy, but failed to disclose that it would also present such testimony from Livingston. The government did advise Shephard that Livingston would testify. Before Livingston's testimony, Shephard objected to the admission of any Rule 404(b) evidence due to insufficient notice. The district court determined that Shephard was not unduly prejudiced by the late notice and overruled the objection, allowing Livingston to testify to the extraneous offenses.

Shephard argues that the district court erred when it allowed Rule 404(b) testimony from Livingston because the government failed to provide adequate notice of such testimony, denying her a fair trial.

A district court "holds great latitude in the management of the discovery process." United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991) (citing FED. R. CRIM. P. 16(d)(2)). This court will review alleged errors in the administration of discovery rules under an abuse-of-discretion standard and "will not reverse on that basis unless a defendant establishes prejudice to his substantial rights." Id. Likewise, district courts retain wide latitude regarding the extent and scope of cross-examination. See United

States v. Barksdale-Contreras, 972 F.2d 111, 115 (5th Cir. 1992), cert. denied, 113 S. Ct. 1060 (1993).

Although Shephard alleges that she was denied a fair trial because she could not prepare an adequate defense, she does not adequately establish any denial of her substantial rights. Livingston's testimony corroborated Duffy and Riptoe's testimony, of which Shephard received proper notice. Livingston's testimony concentrated on Routt's role in the conspiracy, and he spoke very little as to Shephard's involvement. Additionally, the district court allowed Shephard the opportunity to recall Livingston later in the trial for further cross-examination. Shephard did not avail herself of this opportunity. The district court did not abuse its discretion in allowing the testimony despite short notice.

Routt also objects that the district court considered unindicted and temporally remote previous acts when determining his base offense level for sentencing. Based on testimony of cooperating witnesses, the Probation Officer concluded that Routt participated in an on-going scheme to distribute crack cocaine since 1987, interrupted only by his incarceration from July 1990 to February 1991. The Probation Officer counted these previous acts as "relevant conduct" and included the associated amount of cocaine (4,363.3 kilograms) in Routt's base offense level. Id. at ¶ 34. Routt objected to the inclusion of the previous conduct, arguing that it was not relevant within the meaning of U.S.S.G. § 1B1.3(a)(2) because it did not pass the test of similarity, regularity, or proximity. Adopting the factual findings of the



Presentence Investigation Report (PSR), the district court overruled Routt's objection, finding that the 4,363.3 kilograms were attributable to Routt's criminal behavior and that the previous behavior passed the test of § 1B1.3(a)(2).

This court will uphold a district court's sentence as long as it is a correct application of the sentencing guidelines to factual findings that are not clearly erroneous. United States v. Register, 931 F.2d 308, 313 (5th Cir. 1991). The district court's application of the guidelines, however, is reviewed de novo. United States v. Palmer, 31 F.3d 259, 261 (5th Cir. 1994). A district court may adopt facts contained in the PSR without further inquiry if the facts have an adequate evidentiary basis and the defendant does not present rebuttal evidence. United States v. Puig-Infante, 19 F.3d 929, 943 (5th Cir.), cert. denied, 115 S. Ct. 180 (1994). A defendant who objects to consideration of information by the sentencing court bears the burden of proving that the information is "materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

Routt did not offer evidence at sentencing to dispute the accuracy or reliability of the information related in the PSR. Thus, the district court's factual findings are not clearly erroneous.

Routt argues that the district court's application of the guidelines was in error because the previous conduct was temporally remote to the alleged conduct and involved different people and,

thus, should not be viewed as relevant conduct. Unadjudicated extraneous offenses may be considered by the court as relevant conduct in determining a defendant's offense level. § 1B1.3(a)(2); United States v. Bryant, 991 F.2d 171, 177 (5th Cir. 1993). Relevant conduct includes quantities of drugs not specified in the count of conviction, if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. Id.

To determine whether certain prior conduct qualifies as relevant under § 1B1.3(a)(2), this court must consider the similarity, regularity, and temporal proximity of the conduct. United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992), cert. denied, 113 S. Ct. 1323 (1993). When the conduct alleged to be relevant is temporally remote from the conduct underlying the conviction, and the relevance of the extraneous conduct depends primarily on its similarity to the conviction. It is not enough that the extraneous conduct merely amounts to the same offense. United States v. Fagan, No. 92-1996, slip op. at 8 (5th Cir. Sept. 2, 1993)(unpublished). Rather, the district court must consider whether specific similarities exist between the offense of conviction and the temporally remote conduct. Id. A district court's factual findings regarding relevant conduct are reviewed for clear error. Bryant, 991 F.2d at 177.

The conduct in the indictment, of which Routt was found guilty, occurred between January 1, 1991, and May 1992. The challenged conduct occurred from late 1980s to January 1991. The

district court found the challenged conduct to satisfy temporal proximity because the evidence showed that Routt "continuously dealt drugs by way of cooking crack cocaine or distributing crack cocaine or powder cocaine from 1987 until the date that he was imprisoned . . . [and] it is reasonable to assume that had he not been incarcerated he would have still been dealing drugs." The district court considered the previous conduct to be similar because the evidence showed that all of the individuals named in the indictment were also participants in his activities from January of 1991 to May of 1992, the time frame listed in the indictment.

The evidence revealed that Routt's involvement in cocaine distribution beginning in 1987 was continuous and unequivocal. Routt's previous conduct involved the same contacts and distributors as his previous conduct and he performed the same function and role in the conspiracy. Thus, the quantities of drugs included in the base offense level calculation but not specified in the count of conviction were part of the same course of conduct or part of a common scheme or plan as the count of conviction. See Bryant, 991 F.2d at 77.

Although Routt's activity might be considered temporally remote, the district court was not clearly erroneous in finding that it was sufficiently similar to be considered relevant conduct under § 1B1.3(a)(2). See Fagan, No. 92-1996, slip op. at 8-10 (activity 2½ years previous was temporally remote, but sufficiently similar).

The district court's finding that Routt's previous conduct was relevant to the offense of conviction is not clearly erroneous.

AFFIRMED.