UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50054

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CURTIS WAYNE SHANNON,

Defendant-Appellant.

Appeals from the United States District Court
For the Western District of Texas
(SA-92-CR-282)

(October 7, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Defendant Curtis Wayne Shannon was convicted by a jury of conspiring to distribute more than fifty grams of cocaine base ("crack cocaine"), in violation of 21 U.S.C. § 846; and distributing crack cocaine in violation of 21 U.S.C. § 841(a)(1). Shannon appeals on the grounds that (1) there was insufficient evidence to support the distribution conviction, (2) there was insufficient evidence to support the conspiracy to distribute

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conviction, (3) there was a material variance between the conspiracy indictment and the conspiracy proved, and (4) the court abused its discretion by admitting expert testimony on the manufacture of crack cocaine.[1] Finding no reversible error, we AFFIRM.

I

Gilbert Villarreal, an undercover agent with the Drug Enforcement Administration ("DEA"), bought three ounces of crack cocaine from Luz Guerra in the parking lot of a San Antonio restaurant. Guerra arrived with two ounces of crack cocaine in her possession and obtained a third from her source, whom she referred to as "Dino." Surveillance officers witnessed the sale and transfer of crack cocaine from Guerra to Villarreal.

Several days later, Villarreal ordered more crack cocaine from Guerra and met her the next day to complete the sale. Guerra was accompanied by her sister, Esmerelda Guerra, and her brother, Jimmy Reyes. Both Guerra and Reyes told Villarreal that the source of

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[1] In his *pro se* notice of appeal, Shannon also claims ineffective assistance of counsel. "The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been [raised] before the district court since no opportunity existed to develop the record on the merits of the allegations." *United States v. Thomas*, 12 F.3d 1350, 1368 (5th Cir.) (quoting *United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1051, 98 L. Ed. 2d 1013 (1988)), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1861, 128 L. Ed. 2d 483 (1994). The only exception to this rule is the rare case where the record is fully developed in the trial court. *Higdon*, 832 F.2d at 314. Such is not the case here. Because Shannon did not complain of ineffective assistance of counsel in the trial court and the record was not sufficiently developed below, we will not address this issue.

the crack cocaine would be "Dino." Upon arriving at the restaurant, Guerra made a phone call. A short time later a gray 1977 Mercury Cougar arrived, and both Guerra and Reyes pointed to the car and said that it was "Dino" arriving with the "stuff." Guerra entered "Dino's" car and rode away from the restaurant with him. Soon thereafter, a DEA agent observed Shannon hand a small package to Guerra as they stood in Guerra's front yard near the Cougar. A short time later, Guerra returned to the restaurant in the gray car and delivered four ounces of crack cocaine to Agent Villarreal. At various times and at locations in close proximity to the restaurant where the sale from Guerra to Villarreal took place, four DEA agents identified the driver of the gray 1977 Mercury Cougar as Curtis Wayne Shannon. Surveillance officers witnessed both the meeting between Shannon and Guerra and the sale and exchange of crack cocaine from Guerra to Villarreal.

Villarreal met Guerra a third time to buy fifteen ounces of crack cocaine, to be delivered in three-ounce lots. After delivery of the first three ounces, which were not purchased from Shannon, the agents believed that Guerra, Reyes, and Esmerelda were growing suspicious. The agents terminated the surveillance and arrested all three. Shannon was arrested approximately six weeks later, and was convicted of conspiring to distribute and distributing crack cocaine.

II

Shannon contends that there is insufficient evidence to support his conviction on the conspiracy to distribute and

distribution charges, and that there was a material variance between the indictment for conspiracy and the conspiracy proved at trial. We find these assertions to be without merit.

A

Shannon argues that the testimony of co-conspirator Luz Guerra, by itself, is insufficient to support his conviction on the crack cocaine distribution charge. Shannon insists that Guerra's testimony should be given no probative weight because she entered into a plea bargain with the government.

We review a sufficiency of the evidence claim to determine "whether *any* reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *United States v. Casilla*, 20 F.3d 600, 602 (5th Cir. 1994) (quoting *United States v. Martinez*, 975 F.2d 159, 160-61 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1346, 122 L. Ed. 2d 728 (1993)) (emphasis in original), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 25, 1994) (No. 94-5388). In doing so, we view the evidence and the inferences that may be drawn from it in the light most favorable to the factfinder's verdict. *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir. 1994); *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2952, 119 L. Ed. 2d 575 (1992).

This circuit has firmly 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). In a jury trial, "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.* (quoting *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991)).

Guerra testified that she purchased crack cocaine from Shannon on the first two occasions. The jury believed Guerra's testimony, and found beyond a reasonable doubt that Shannon was guilty of distributing crack cocaine. We are obligated to "accept all credibility choices [that] tend to support the jury's verdict." *United States v. Restivo*, 8 F.3d 274, 280 (5th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3707 (U.S. Mar. 28, 1994) (No. 93-1630). Also, Guerra's testimony does not stand alone. Five law enforcement officers corroborated significant details of her testimony. We hold that the evidence before the jury was sufficient to support Shannon's conviction for distribution of crack cocaine.

B

Shannon also asserts that insufficient evidence exists to support his conviction for conspiracy to distribute crack cocaine. Again, the standard by which we review the sufficiency of the evidence is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt based on the evidence presented. *Martinez*, 975 F.2d at 160-61. In a drug conspiracy prosecution under 21 U.S.C. § 846, the government must

prove beyond a reasonable doubt that a conspiracy existed and that the accused knew of the conspiracy and voluntarily joined it. *Thomas*, 12 F.3d at 1356. No evidence of overt conduct is required. A conspiracy agreement may be tacit, and the trier of fact may infer agreement from circumstantial evidence. *Faulkner*, 17 F.3d at 768-69; *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1348 (5th Cir. 1988). Reyes testified that Shannon was the source of the crack cocaine that was supplied to Villarreal. Most importantly, Guerra testified that she purchased crack cocaine from Shannon which she later sold to Agent Villarreal. The jury finding))that Shannon knew that Guerra planned to resell the crack cocaine he was supplying to her and, despite that knowledge, sold it to her anyway))was reasonable. *See Thomas*, 12 F.3d at 1356 (identifying elements necessary to convict defendant of conspiracy as existence of plot, defendant's knowledge of plot, and defendant's willing participation). We hold that Guerra's testimony, in concert with the circumstantial evidence, was sufficient to support Shannon's conspiracy conviction.

C

Shannon further argues that a material variance exists between the indictment for conspiracy and the evidence presented at trial, and contends that he was indicted for a single conspiracy encompassing all three transactions in which Guerra sold crack cocaine to Villarreal. Shannon insists that, at best, the government only proved his involvement in two individual conspiracies, the first and second drug transactions. He asserts

that the evidence shows that he was not involved in the last transaction, and, hence, it was error for him to be tried on a conspiracy count that included that date within the allegation.

We examine whether prejudice has resulted from a material variance using a harmful error analysis. *Thomas*, 12 F.3d at 1357; *United States v. Lokey*, 945 F.2d 825, 832 (5th Cir. 1991). "[T]o obtain reversal, [defendants] . . . must demonstrate that the variance affected their substantial rights." *Thomas*, 12 F.3d at 1358; *United States v. Hernandez*, 962 F.2d 1152, 1159 (5th Cir. 1992) (describing underlying concern that the defendant is both notified of charges to enable defense preparation and protected against future prosecution for the same offense). There is no variance affecting a defendant's substantial rights "when the indictment alleges . . . a single conspiracy, but the `government proves multiple conspiracies and a defendant's involvement in at least one of them . . . .'"[2] *United States v. Carreon*, 11 F.3d

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[2] The question of whether there was a single conspiracy or multiple conspiracies was not submitted to the jury. Rule 30 of the Federal Rules of Criminal Procedure provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." Fed. R. Crim. P. 30. Shannon did not object. Plain error may be noticed by the court if it affects substantial rights, despite the fact it was not brought to the court's attention. Fed. R. Crim. P. 52(b). Even so, for us to reverse Shannon's conviction based on the trial court's failure to charge the jury on multiple conspiracies, Shannon would have to show "plain error." *United States v. Rodriguez*, 15 F.3d 408, 415 & nn.8,9 (5th Cir. 1994) (quoting *United States v. Olano*, ___ U.S. ___, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508 (1993)). This has not been done. Shannon has not shown "clear" or "obvious" error, nor has he "ma[d]e a specific showing of prejudice to satisfy the `affecting substantial rights' prong of Rule 52(b)." *Id.* (citing *United States v. Olano*, ___ U.S. at ___, 113 S. Ct. at 1776).

1225, 1239 (5th Cir. 1994) (quoting *United States v. Jackson*, 978 F.2d 903, 911 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2429, 124 L. Ed. 2d 649 (1993)). Substantial rights are affected, however, when a defendant is subjected to a transference of guilt. *Id.* We have stated previously that "there is strong reason to presume that the jury's attention was properly focused" and that transference of guilt did not occur when the defendant was tried alone. *See Hernandez*, 962 F.2d at 1159 (trying defendant by himself leads to conclusion that jury was concentrating on defendant's conduct and was not confusing defendant's actions with those of others). Shannon is the lone defendant in this case. Also, Shannon had ample notice of the charges against him enabling him to prepare a defense and nothing suggests that Shannon would be at risk for a second prosecution. *See id.* (reinforcing "substantial rights" of defendant). The jury found beyond a reasonable doubt that Shannon had conspired with Guerra and Reyes to distribute crack cocaine on at least two occasions. Here the government proved and the jury found Shannon's participation in a conspiracy to distribute crack cocaine beyond a reasonable doubt. Therefore, even if the government has proved more than one conspiracy there is no justification for reversal on the basis of a material variance, if one did in fact exist, because Shannon's substantial rights were not affected.

III

Finally, Shannon argues that the trial court's admission of Agent Joel Reece's expert testimony pertaining to the manufacture

of crack cocaine was unfairly prejudicial. Shannon complains that Reece's testimony improperly implied, and gave the jury the impression, that Shannon manufactured crack cocaine.

The trial judge has wide latitude in determining what evidence to admit, and we will not disturb that determination absent a clear abuse of discretion. *See United States v. Anderson*, 933 F.2d 1261, 1267-68 (5th Cir. 1991) (noting great deference given to evidentiary decisions of trial judge). All relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Presenting testimony from someone with specialized knowledge to assist the trier of fact in understanding the evidence or determining a fact in issue is explicitly sanctioned by the Rules of Evidence. Fed. R. Evid. 702; *see also United States v. Fuller*, 974 F.2d 1474, 1483 (5th Cir. 1992) (admitting testimony of professionally qualified person to inform jury about definition of terms as they relate to illegal enterprise), *cert. denied*, ___ U.S.___, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993); *United States v. Landry*, 903 F.2d 334, 338-39 (5th Cir. 1990) (permitting testimony about the methods of drug dealers).

Agent Reece's testimony was relevant and admissible because it bore directly on the charged offenses and permitted a clearer

understanding of the other evidence presented to the jury. Fed. R. Evid. 702. Reece's expert testimony served to educate the jury about crack cocaine distribution and to inform them that the quantities of drugs sold from Shannon to Guerra to Villarreal were not user quantities, but, rather, were distributer quantities. Reece testified generally about the manufacture and distribution of crack cocaine, stating that normally the people who manufacture the crack cocaine are not the people who distribute it. More specifically, Reece testified that there were 25 to 50 "user quantities" contained in one ounce of crack cocaine and expressed the expert opinion that three to four ounces of crack cocaine are not user amounts but are distributable amounts.

In addition to informing the jury about user quantities, the testimony tended to prove the existence of an "unknown" co-conspirator, the manufacturer, and to establish the positions of both Shannon and Guerra in the distribution chain. The jury could not have been left with the impression that Shannon was the manufacturer because Reece testified that someone in Shannon's position as a street seller was normally not the manufacturer. No evidence was presented or testimony adduced by the prosecution that linked Shannon to the manufacture of crack cocaine. The government neither accused Shannon of being a manufacturer nor argued that point to the jury in closing. Allowing Agent Reece's expert testimony was not an abuse of discretion and, therefore, is not reversible error.

IV

For the foregoing reasons, we **AFFIRM**.