UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-60108

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK WRIGHT, a/k/a "Nitty",

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Mississippi
(CR 1:93-058-S)

(October 4, 1994)

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

PER CURIAM:[*]

Defendant Frank Wright, a/k/a "Nitty", was convicted of conspiring to distribute and possess crack cocaine, in violation of 21 U.S.C. § 841(a)(1), distributing crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A)(iii), and illegally using a communication facility, in violation of 21 U.S.C. § 843(b). Wright now appeals his conviction and sentence.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

We affirm.

I

Robert Ellis, F.C. Chatman, Irahan Avila ("Nuke"), William Raney ("Junkman"), and others trafficked crack cocaine in Columbia, Mississippi. After depleting their initial supply of drugs, they called a person in California known as "Nitty" to purchase more crack cocaine by mail. The United States Postal Service learned of the transaction[1] and intercepted an Express Mail package addressed to Ellis,[2] which contained four and one-half ounces of crack cocaine.

Ellis agreed to make monitored telephone calls to "Nitty." During the course of the calls, Ellis and "Nitty" discussed the prior transaction and planned an additional transaction. "Nitty" identified himself as Frank Wright. A later examination of the Express Mail package revealed many latent fingerprints, including at least six belonging to Frank Wright, III ("Wright").

Wright was indicted for conspiracy to distribute and possess crack cocaine, distributing crack cocaine, and illegally using a communication facility to distribute crack cocaine. A jury convicted Wright on all three counts. Wright now appeals his conviction and sentence, raising four issues. First, he argues that the district court abused its discretion by admitting evidence of his bad character under Fed. R. Evid. 404(b).

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[1] Chatman had already been arrested, agreed to cooperate with the investigation, and informed police of the impending arrival of the package. Chatman's cooperation also led to Ellis' arrest.

[2] State narcotics officers had already arrested Ellis.

Second, he contends that the district court improperly admitted out-of-court statements by his alleged co-conspirators. Third, Wright alleges that evidence introduced at trial was insufficient to support a finding that he and "Nitty" are one and the same. Lastly, he contends that the district court should have granted a downward departure pursuant to United States Sentencing Commission, *Guidelines Manual*, § 5K2.0 (Nov. 1993).

II

A

Wright first argues that the district court abused its discretion when it admitted evidence of his bad character under Rule 404(b).[3] We review a district court's decision to admit evidence under Rule 404(b) for abuse of discretion. *United States v. Carillo*, 981 F.2d 772, 774 (5th Cir. 1993), *aff'd on remand,* 20 F.3d 617 (5th Cir.), *petition for cert. filed,* (July 27, 1994) (No. 94-5448). The two-part test of *United States v. Beechum*[4] governs whether evidence of extrinsic acts or offenses are admissible under Rule 404(b). *See Carillo*, 981 F.2d at 774 (applying *Beechum*); *United States v. Moye,* 951 F.2d 59, 62 (5th Cir. 1992) (same). "First, it must be determined that the extrinsic evidence is relevant to an issue other than the

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[3] Rule 404(b) states that "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) (emphasis added).

[4] 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979).

defendant's character." *Beechum*, 582 F.2d at 911; *see also Moye*, 951 at 61-62 (same). Second, the *Beechum* test requires that "the evidence . . . possess probative value that is not substantially outweighed by its undue prejudice." *Beechum*, 582 F.2d at 911; *see also Moye*, 951 F.2d at 62 (same).

Wright challenges the district court's decision to admit the recorded telephone calls placed by the conspirators to "Nitty." Evidence admitted to show identity or intent, however, is an explicit exception to the prohibition against otherwise inadmissible character evidence. *See* Fed. R. Evid. 404(b); *see also Moye*, 951 F.2d at 62 (holding that admission of extrinsic evidence to show intent satisfies the first part of the *Beechum* test). The telephone calls revealed Nitty's true identity as Frank Wright, III.[5] Further, the recorded conversations were probative of Wright's ownership of the drugs and his intent to use the mails to complete the drug transaction.

The recorded conversations also pass muster under the second part of the *Beechum* test. In comparing the probative value with its prejudicial effect, a "court should consider the overall similarity between the extrinsic and charged offenses." *Moye*, 951 F.2d at 62; *see also Beechum*, 582 F.2d at 911 (holding that the "relevance [of an extrinsic offense] is a function of its similarity to the offense charged"). The challenged

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[5] Nitty instructed Ellis in the first recorded conversation to send the money to Frank Wright. During a second recorded conversation, Nitty stated, "Frank Wright . . . that is my name. But it's my daddy's I.D. I'll get it . . . make sure it is Frank Wright, Jr."

conversations related to a planned drug transaction substantially similar to that for which Wright was charged.[6] The similarity in method of delivery demonstrates the probative weight of the conversations. Further, the danger of prejudice decreases when the trial court uses a limiting instruction to clearly restrict the jury's consideration of the extrinsic evidence. *United States v. White*, 972 F.2d 590, 599 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1651, 123 L. Ed. 2d 272 (1993); *see also United States v. Willis*, 6 F.3d 257 (5th Cir. 1993) (applying *White*); *United States v. Elwood*, 999 F.2d 814 (5th Cir. 1993) (same). The district court instructed the jury that the recorded conversations were admissible only to show Wright's intent, motive, opportunity, plan, or identity. We give great deference to the district court's informed judgment in making Rule 403 balancing decisions and will reverse "only after a clear showing of prejudicial abuse of discretion." *Moye*, 951 F.2d at 62. Wright has not made this showing of prejudice. Consequently, no abuse of discretion occurred where recorded telephone conversations were admitted to prove the seller's identity as the defendant, Frank Wright, III, and his intent to use the mails to complete the drug transaction.

B

Similarly, the district court did not err by admitting testimony by co-conspirators that "Nitty" was the source of the

[6] The challenged telephone calls concerned a subsequent planned transaction, not the transaction for which Wright was convicted.

drugs. Witnesses and co-conspirators Robert Ellis and F.C. Chatman knew the source of the drugs only as "Nitty" until the seller identified himself as Frank Wright III to Robert Ellis in a recorded telephone conversation. Out-of-court statements by co-conspirators are not hearsay if made "during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E); *see also United States v. McConnell*, 988 F.2d 530,533 (5th Cir. 1993) (applying Rule 801); *United States v. Ascarrunz*, 838 F.2d 759, 762 (5th Cir. 1988) (same). The identification of "Nitty" as the source occurred when the conspirators planned the purchase from "Nitty." Accordingly, Avila made the statements during the course of the conspiracy. Further, "a statement that identifies the role of one co-conspirator to another is in furtherance of the conspiracy." *United States v. Magee,* 821 F.2d 234, 244 (5th Cir. 1987); *see also United States v. El-Zoubi*, 993 F.2d 442, 446 (5th Cir. 1993) (applying *Magee*); *United States v. Lechuga*, 888 F.2d 1472, 1480 (5th Cir. 1989) (same); *United States v. Patton,* 594 F.2d 444, 447 (5th Cir. 1979) (holding a statement that identifies the source or purchaser of narcotics in furtherance of a conspiracy). The challenged statements identified "Nitty" to other conspirators as the source of the crack cocaine; therefore, the district court did not err in finding the statement to be in furtherance of the conspiracy.

Furthermore, where the preliminary facts establishing the conspiracy are disputed, as here, the offering party must prove them by a preponderance of the evidence. *Ascarrunz*, 838 F.2d at

762. The evidence supports the district court's preliminary determination that there existed a conspiracy between the declarant and the defendant. *See infra* Part II.D. In making this determination, the district court may consider the hearsay statements sought to be admitted along with other evidence as to the conspiracy's existence and the defendant's participation in it. *Bourjaily v. United States*, 483 U.S. 171, 180, 107 S. Ct. 2775, 2781, 97 L. Ed. 2d. 144 (1987). Thus, the district court did not abuse its discretion when it admitted the out-of-court statements by Nitty's co-conspirators.

C

Defendant Wright also contends that the evidence presented at trial was insufficient for the jury to conclude that he and "Frank Nitty" were the same person. We review the sufficiency of the evidence to determine whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *United States v. Martinez*, 975 F.2d 159, 160-161 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1346, 122 L. Ed. 2d 728 (1993). The jury is solely responsible for determining the weight and credibility of the evidence. *Martinez*, 975 F.2d at 161. Here, the drug purchase from "Nitty" was recorded on tape, during which "Nitty" identified *himself* as Frank Wright. Moreover, the fingerprints on the packaging of crack cocaine mailed from seller "Nitty" to the other members of the conspiracy matched Frank Wright's. Based on this evidence, a reasonable jury could find, as the jury in this case did, that "Nitty" and the defendant are the

same man. Accordingly, we hold that the district court did not abuse its discretion by admitting the out-of-court statements identifying "Nitty" as the source of the crack cocaine.

D

Next, Wright contends that the evidence was insufficient to support his conspiracy conviction. We will uphold a jury verdict so long as a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *Martinez*, 975 F.2d at 160-161. The burden is on the prosecution to prove: 1) the existence of an agreement between two or more persons to violate the narcotics laws; 2) that the defendant knew about the conspiracy; and 3) that the defendant voluntarily participated in the conspiracy. *United States v. Sanchez-Sotelo*, 8 F.3d 202, 208 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1410, 128 L. Ed. 2d 82 (1994). In determining the sufficiency of the evidence to support a finding that a conspiracy existed, we view the evidence in the light most favorable to the Government. *United States v. Shabazz*, 993 F.2d 431, 441 (5th Cir. 1993). The testimony given by co-conspirators Ellis and Chatman at trial showed that a conspiracy to possess and distribute crack cocaine existed between F.C. Chatman, Robert Ellis, Irahan Avila, James Raney, the defendant Frank Wright, and perhaps others. Moreover, the telephone recordings and fingerprint evidence indicate Wright's voluntary and knowing participation in the conspiracy. Therefore, we conclude that the Government met its burden of proof regarding the establishment of the conspiracy.

E

Lastly, Wright argues that the district court erred by refusing to depart downward from the guideline range because the Sentencing Guidelines, which punish crack cocaine 100 times more severely than powder cocaine, have a disparate impact on African-American males.[7] Previously, we have rejected both due process and equal protection challenges to the tougher sentence range for crack cocaine.[8] Wright does not challenge these decisions. Instead, he attempts to distinguish his claim from our prior decisions by arguing that the disparate impact on African-American males requires a downward departure under 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0.

Section 3553(b) provides that the sentencing court may impose a sentence outside the applicable guideline if the court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing

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[7] In his brief, Wright cites case law from other federal districts for the proposition that over 90% of those prosecuted for distributing crack cocaine are black males. The 100:1 ratio exists because U.S.S.G. § 2D1.1 equates 100 grams of cocaine powder to 1 gram of cocaine base via Drug Equivalency Tables. The relevant guideline for 125.7 grams of cocaine base is established in U.S.S.G. §§ 2D1.1(a)(3),(c) and warrants a range of imprisonment of 121 to 151 months. If treated the same as cocaine powder, the guideline imprisonment range would be 27 to 33 months.

[8] *See United States v. Watson*, 953 F.2d 895, 898 (5th Cir.) (subjecting equal protection claim to rationality review and concluding that "the fact that crack cocaine is more addictive, more dangerous, and can therefore be sold in smaller quantities is reason enough for providing harsher penalties for its possession"), *cert. denied*, ___ U.S.___, 112 S. Ct. 1989, 118 L. Ed. 2d 586 (1992); *United States v. Thomas*, 932 F.2d 1085, 1090 (5th Cir.) ("Treating the two substances [crack cocaine and powdered cocaine] differently is thus not a due process violation . . . ."), *cert. denied*, ___ U.S.___, 112 S. Ct. 887, 116 L. Ed. 2d 791 (1992).

Commission . . . ." 18 U.S.C. § 3553(b) (1988). Under the Sentencing Guidelines, the "[p]resence of any such factor may warrant departure from the guidelines, under some circumstances, *in the discretion of the sentencing court*." U.S.S.G. § 5K2.0. When a sentence falls within the applicable guideline range, the only issue on review is whether the sentence was imposed in violation of the law or as a result of an incorrect application of the guidelines. *See United States v. Buenrostro*, 868 F.2d 135, 136-37 (5th Cir. 1989) (citing 18 U.S.C. §§ 3742(d),(e)), *cert. denied*, 495 U.S. 923, 110 S. Ct. 1957, 109 L. Ed. 2d 319 (1990). The district court sentenced Wright within the range dictated by the correct guideline. *See* U.S.S.G. § 2D1.1.[9] The district court chose not to depart despite Wright's objection to the constitutionality and disparate impact of the 100:1 ratio, stating that Congress should be given the opportunity to "correct [the different treatment] if in fact they are convinced it has a disproportionate impact on the races [of the defendants] . . . "[10] Instead, the district court found "no reason to depart from the sentence called for by the application of the guidelines inasmuch

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[9] Section 2D1.1 directs a guideline range of 121 to 151 months. The statutory term of imprisonment for the possession and distribution counts is no less than 10 years, no more than life, pursuant to 21 U.S.C. § 841(b)(1)(A). The use-of-mails count brings not more than four years pursuant to 18 U.S.C. § 843(c). Wright was sentenced to imprisonment for a term of 121 months on each of counts 1 and 2 and a term of 48 months on count 3, all such terms to run concurrently.

[10] In fact, Congress has considered the equanimity in cocaine sentencing on several occasions; for example, although H.R. 3277, 103d Cong., 1st Sess. (1993), was proposed to eliminate the disparity created by certain minimum sentence requirements relating to crack cocaine offenses, it has not been enacted.

as the facts as found are of the kind contemplated by the Sentencing Commission." Because the trial court properly exercised its discretion and imposed a sentence within the applicable guideline range, we will not grant relief. *See Buenrostro*, 868 F.2d at 139 ("A claim that the district court refused to depart from the guidelines and imposed a lawful sentence provides no ground for relief."). Therefore, we uphold the district court's decision that the alleged disparate impact of crack cocaine sentencing does not warrant a downward departure under U.S.S.G. § 5K2.0.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.