IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60480

Summary Calendar

UNITED STATES of AMERICA,

Plaintiff-Appellee,

versus

DALE DUNBAR and LUIS MUNOZ
a/k/a LUIS SANTINI,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:94cr24WS)

(April 25, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Dale Dunbar and Luis Munoz seek review of their convictions on conspiracy and possession charges. Finding sufficient evidence to support the convictions and rejecting Dunbar's other arguments, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

On January 18, 1994, a Hinds County Deputy Sheriff stopped a car occupied by Roy Wayne Duncan, a hitchhiker, and Allan Piette, the owner of the car. Piette and Duncan consented to a search of the car. In the car's trunk, the officer found two suitcases containing almost fifty pounds of marijuana. The officer also found two syringes and some heroin in Piette's shirt pocket.

After his arrest, Piette agreed to cooperate and called his supplier, Dale Dunbar, in an attempt to get Dunbar to come to Jackson, Mississippi. Piette told Dunbar, who lived in Brownsville, Texas, that he needed help because his car had broken down in Jackson. Piette called Dunbar back the next day and Dunbar told him that someone from Houston would be arriving at the Jackson airport on a Northwest Airlines flight at around 2:30 p.m. That person turned out to be Munoz.

The government set up surveillance at the airport and videotaped Munoz's arrival. Piette brought the suitcases of marijuana with him to the airport. Although Munoz and Piette recognized each other immediately and talked briefly, Munoz proceeded to walk alone to the rental car counter. Police arrested Munoz, searched him, and found a pager and approximately $3,300 in cash.

Meanwhile, Dunbar contacted law enforcement officers in Texas stating that he had information about a drug smuggling ring. On January 21, 1994, Dunbar met with Customs Agent Steve White and told the agent that someone named Robert had approached Dunbar and

Piette with an offer to transport marijuana to Atlanta, Georgia. Dunbar stated that he declined the offer, but did observe Robert and Piette prepare the marijuana for transport. Dunbar also provided the two suitcases used to carry the drugs and some plastic wrap for packaging the marijuana. Dunbar told the agent that Piette had left for Atlanta in a car that Dunbar had sold to him and that when he arrived in Atlanta, Dunbar was supposed to put Piette in touch with Robert.

Although both Piette and Dunbar denied the existence of any conspiracy, a jury found Dunbar and Munoz guilty of conspiracy to possess with intent to distribute marijuana and found Dunbar guilty of possession with intent to distribute. Munoz and Dunbar have filed this timely appeal.

II.

A.

Both Dunbar and Munoz allege that there is insufficient evidence supporting their conspiracy convictions. We disagree. As to Dunbar, there is more than adequate evidence supporting the jury's verdict. When Piette called Dunbar and told him that his car had broken down, the following exchanges took place:

PIETTE: Yeah, I had them tow [the car] in.

DUNBAR: Oh Man. Not with that in it, did you?

PIETTE: Naw.

DUNBAR: Huh?

PIETTE: Nah. I stashed it.

* * *

DUNBAR: Well, boy. What did you do? Hide that on the side of the road?

PIETTE: Yeah.

DUNBAR: Safe place?

PIETTE: Yeah.

The following day, when Piette called Dunbar, Dunbar expressed similar concerns about the safety of the "stuff." Moreover, Dunbar told Piette that someone was coming to Jackson to get a car and that they should "keep on going."

Munoz argues that the evidence is insufficient to sustain his conviction because the government failed to prove that there was an agreement to violate the law and that he knew about and voluntarily participated in the agreement. Munoz contends that he was merely a mechanic sent to fix the car. The jury was entitled to disbelieve Munoz's theory of the case. During the telephone conversations between Piette and Dunbar, Dunbar never indicated that he was sending Munoz to repair the car. Indeed, when Munoz arrived at the airport, he proceeded to rent a car, which is consistent with the government's theory that Munoz was sent to help Piette complete delivery of the marijuana. Finally, a close association between Piette and Munoz can reasonably be inferred because Dunbar referred to Munoz using a code name and Piette indicated that he understood to whom Dunbar was referring. Piette and Munoz also recognized each other immediately at the airport. Munoz gave Piette a piece of paper with a pager number on it and told Piette to get a room and to call him on his pager. When Munoz

was arrested, officers found no tools and, during the course of the arrest, Munoz received a page from Dunbar's number.

The facts of this case demonstrate presence and association under very suspicious circumstances. Based on the cumulative effect of the evidence surrounding Dunbar's sending of Munoz to the Jackson airport and Munoz's interaction with Piette after arrival, a reasonable jury could have inferred Munoz's knowing and conspiratorial participation.

B.

Dunbar also argues that there was insufficient evidence supporting his conviction for possession. Possession may be constructive, which is "the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance." United States v. Cardenas, 9 F.3d 1139, 1158 (5th Cir. 1993) (citation and internal quotation marks omitted), cert. denied, 114 S. Ct. 2150 (1994).

There was evidence that Dunbar supplied the marijuana and that the shipment was prepared in Dunbar's presence at his residence. The taped telephone conversations show Dunbar directing Piette's activities and arranging for Munoz to fly to Jackson to complete the delivery of the marijuana to Atlanta. Thus, a rational jury could have found that Dunbar exercised control and dominion over the marijuana.

C.

Dunbar argues that he was deprived of due process and a fair trial by the prosecutor's remarks during closing argument.

Specifically, Dunbar claims that the prosecutor's statements that Dunbar's counsel had been "entertaining" and that "his law is bigger than [the prosecution's] law" were prejudicial.

Dunbar did not object to these statements and so we review for plain error only. See United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995). An appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain, and that it affects substantial rights. Id. at 164. In the overall context of Dunbar's trial, any prejudicial effect from the prosecutor's brief remarks about Dunbar's counsel was insignificant. Dunbar never asked for a curative instruction and there was strong evidence of his guilt. See id. (to affect substantial rights, the error must be prejudicial).

Dunbar also complains that the prosecutor told the jury during closing argument that Dunbar's counsel "wrung" his hands. Dunbar objected and the district court instructed the jury to recall whether defense counsel had actually wrung his hands. The prosecutor then apologized for any mischaracterization of counsel's acts. A prosecutor's improper comments "may constitute reversible error where the defendant's right to a fair trial is substantially affected." See United States v. Neal, 27 F.3d 1035, 1050-51 (5th Cir. 1994) (citation and internal quotation marks omitted), cert. denied, 115 S. Ct. 1165 (1995). Given the overwhelming evidence of Dunbar's guilt, the prosecutor's reference to defense counsel's hand-wringing was inconsequential.

D.

Dunbar claims that the district court erred in failing to instruct the jury that it could find him guilty of the lesser included offense of misprision of a felony. The district court did not err because misprision of a felony is not a lesser included offense of either the offense of conspiracy or the offense of possession. See United States v. Vasquez-Chan, 978 F.2d 546, 554-55 (9th Cir. 1992) (element of misprision of a felony -- affirmative concealment of a felony -- is not an element of either conspiracy or possession).

III.

For the foregoing reasons, Dunbar and Munoz's convictions are AFFIRMED.