

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60514
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

COTTRELL D. RAGLAND,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(5:94-CR-3BRS)

(March 1, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Cottrell D. Ragland was convicted by a jury for attempted possession with the intent to distribute cocaine base and unlawful use of a communication facility in furtherance of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a controlled substance offense, in violation of 21 U.S.C. §§ 846 and 843(b). Ragland asserts as error the purported amendment of his indictment without re-submission to the grand jury, admission of evidence of other crimes, sufficiency of the evidence to convict, the trial court's jury instruction on deliberate ignorance, and alleged selective prosecution. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

At Ragland's trial, U.S. Postal Inspection Service Agent William Brake testified that, on August 6, 1993, he conducted a controlled delivery of an Express Mail package after a narcotics dog alerted to the package, which was later determined to contain crack cocaine. The package was addressed to "Ronald Ashley, 21 Wilderness Heights Road, Natchez, Mississippi 39120"; the sender's name and address were shown as "James Thompson, 2600 Fonderon Road, Houston, Texas 87609." As no one was at the address to receive the package when Brake attempted to deliver it in Natchez, he returned it to the local post office to wait and see whether anyone would call for it. The next day a person who identified himself as the addressee, Ronald Ashley, appeared and asked for the package. When confronted by officers, the man dropped the package and exclaimed, "`it ain't any of mine.'" The individual was later identified as Cedric Green.

After Green was debriefed, Brake obtained a subpoena for Ragland's handwriting exemplars and fingerprint charts. When he

was eventually interviewed, Ragland stated that he had traveled to Houston by bus on August 2, 1993, returning on August 5, 1993. After Brake obtained Ragland's handwriting exemplars and fingerprints, the parties stipulated that the handwriting on the Express Mail label was Ragland's and that a fingerprint found on the cardboard Express Mail box was his as well. Ragland's prints were not found inside of the box or on its contents.

Natchez Police Department officer Lee Anthony Ford and Adams County Sheriff's Department deputy Chuck Mayfield testified that they saw Ragland come to the post office while Green was being debriefed. They stated that Ragland was acting strangelySO"looking all around"SQand that he left after he noticed that the post office was closed.

Katrina Ashley testified that Ragland is the father of her children, that she had resided at 21 Wilderness Heights Road, that she was renting that house on August 6-7, 1993, but that she was not then residing there. Apparently no one was residing there on those dates.

Green testified that he overheard Ragland, Tyrell Crawford, and Carlos Owens talking about some drugs that were supposed to be arriving. Green went to the post office and identified himself as Roland Ashley to obtain the package.

Tyrell Crawford testified as follows. On August 6, 1993, he, Ragland and Carlos Owens drove around in a car. Ragland was looking for a postal carrier. When they spotted the carrier, Ragland told the driver to stop. They did so, and Ragland asked

the carrier whether she had a package for Katrina Ashley's house.

Ragland moved to dismiss the indictment on the ground that the government had failed to show that he knew what was in the package when he placed it in the mail in Texas.¹ The district court denied the motion.

Ragland testified that he had traveled to Texas with his fiancée to purchase a car for her and that Green had asked him to bring a package back from Texas for him. According to Ragland, the package was delivered to him by Green's cousin. Ragland was told over the telephone by Green that he needed the package before he left for school, so they decided to send the package by overnight mail. Ragland mailed the package, using a false return address, and called Green to advise him that the package had been mailed. Green was upset when Ragland returned from Texas because the package had not yet arrived, so Ragland went looking for the postal carrier to determine whether she might have the package. Ragland went to the post office after he heard that Green had been arrested.

The jury returned guilty verdicts on both counts of the indictment, and the district court sentenced Ragland, at the bottom of the guideline imprisonment range, to serve concurrent terms of imprisonment of 151 months on Count I and 48 months on Count II,

¹Although counsel characterized the motion as a motion to dismiss the indictment, the motion should be regarded as a motion for judgment of acquittal, as counsel argued that the evidence was insufficient to sustain a conviction. See Fed. R. Crim. P. 29(a). Counsel later corrected himself and characterized the motion as a Rule 29 motion.

together with a five-year term of supervised release. Ragland was ordered to pay a \$4,000 fine and a \$100 special assessment. This appeal followed.²

II

ANALYSIS

A. Amendment of Indictment

The backing sheet of the indictment reflected that Ragland was being charged with a "conspiracy to attempt to possess with intent to distribute cocaine base." The indictment itself charged that Ragland did "knowingly and willfully attempt to knowingly and intentionally possess with the intent to distribute . . . cocaine base." Ragland argues that the indictment is defective and that the district court's instructions to the jury constructively amended the indictment without re-submission to the grand jury. As Ragland raises this issue for the first time on appeal, we review it under the "plain-error" standard.

When a defendant in a criminal case has forfeited an error by failing to object in the trial court, we may remedy the error only in the most exceptional case. United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (en banc); United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, 113 S. Ct. 1770, 1777-79 (1993).

²Because Ragland was delayed in finding appellate counsel, the district court found that excusable neglect justified the untimely filing of his notice of appeal.

First, an appellant who raises an issue for the first time on appeal has the burden of showing that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). We lack the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, even when the appellant carries this burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

The standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, our discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

A constructive amendment occurs when the trial court allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment. United States v. Arlen, 947 F.2d 139, 144 (5th Cir. 1991), cert. denied, 112 S. Ct. 1480 (1992). Ragland's argument is erroneously premised on the notion that the indictment charged a conspiracy and not an attempt. That is simply not so. The inclusion of the words

"conspiracy to" on the backing sheet of the indictment did not affect the substance of the actual indictment which was attached to the backing sheet and which was also signed by the grand jury foreman.

Even assuming arguendo that the wording of the backing sheet in this case could create an ambiguity sufficiently clear and obvious as to be considered "plain" error, such error would not affect Ragland's substantial rights. In support of his motion for judgment of acquittal, Ragland argued that the government failed to prove that he had attempted to possess with intent to distribute cocaine base. Ragland clearly understood that he had been charged with an attempted crime and not a conspiracy. Because Ragland's substantial rights have not been affected, we have no authority to grant relief on this issue, even if we were inclined to do so which we are not.

B. Evidence of Other Crimes

During cross-examination, officer Ford was asked why he listed a 1988 Ford Mustang as being part of the property taken during a search of Ragland's home. The government objected on the ground of relevance but the district court overruled that objection. In response to the question on cross-examination, Ford admitted that the automobile was listed on the return from the search warrant that authorized the search of the residence but that the car was not found on the property. The court permitted Ford to explain his answer. Then, after Ford began to explain his answer, the defense objected that certain testimony regarding the results of Ford's

investigation was hearsay. The court overruled the objection because the defense had opened the door to evidence regarding the automobile. When allowed to proceed, Ford explained that his investigation had revealed that "the car that was seized facilitated the crime in Texas of bringing the drugs to the post office and mailed them [sic]." The defense renewed its objection and asked the court to declare a mistrial, but the court refused. Ragland contends that Ford's statement was inadmissible under Fed. R. Evid. 404(b) because it pertained to other crimes, so that the trial court should have granted his motion for a mistrial.

We review the district court's determination on the admissibility of allegedly extrinsic evidence under an abuse-of-discretion standard. United States v. Dillman, 15 F.3d 384, 391 (5th Cir.), cert. denied, 115 S. Ct. 183 (1994). The threshold question, though, is whether the act in question is extrinsic or intrinsic. "An act is not extrinsic, and Rule 404(b) is not implicated, where the evidence of that act and the evidence of the crime charged are inextricably intertwined." United States v. Garcia, 27 F.3d 1009, 1014 (5th Cir.) (internal quotations and citation omitted), cert. denied, 115 S. Ct. 531 (1994). Such "intrinsic" evidence includes evidence of acts that "are part of a single criminal episode" or "were necessary preliminaries to the crime charged." United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992) (internal quotations and citations omitted), cert. denied, 113 S. Ct. 1258 (1993). Intrinsic evidence is admissible to allow the jury to evaluate all of the circumstances under which

the defendant acted. Id.

Here, the government did not elicit the testimony, and it was not offered by the government to impugn Ragland's character. Even if Ford's statement were imputed to the government it was not inadmissible under Rule 404(b) because it did not pertain to matters which were extrinsic to the charged offense. Ford's testimony that the automobile was used to transport narcotics to the post office pertained to acts which were preliminary to the crime charged. The evidence was thus intrinsic and was not inadmissible under Rule 404(b).

C. Sufficiency of the Evidence

Ragland contends that the evidence of guilt was insufficient to support his convictions. In evaluating the sufficiency of the evidence, we must consider the evidence in the light most favorable to the verdict and determine whether a rational jury could have found the essential elements of the offense beyond a reasonable doubt, giving the government the benefit of all reasonable inferences and credibility choices.³ Glasser v. United States, 315 U.S. 60, 80 (1942).

To support a conviction, the evidence need not exclude every hypothesis of innocence. United States v. Leed, 981 F.2d 202, 207 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993). "What a jury is permitted to infer from the evidence in a particular case is governed by a rule of reason, and juries may properly use their

³The Glasser standard applies because Ragland timely moved for judgment of acquittal. United States v. Pruneda-Gonzalez, 953 F.2d 190, 195 (5th Cir.), cert. denied, 112 S. Ct. 2952 (1992).

common sense in evaluating that evidence." Id. (quotation and citation omitted).

"To be convicted of attempt under 21 U.S.C. § 846, a defendant `must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting,' and `must have engaged in conduct which constitutes a substantial step toward commission of the crime[.]'" United States v. Stone, 960 F.2d 426, 433 (5th Cir. 1992) (citations omitted). To convict a defendant of possession with intent to distribute, a jury must find beyond a reasonable doubt that the defendant knowingly possessed drugs and intended to distribute them. United States v. Hernandez-Palacios, 838 F.2d 1346, 1349 (5th Cir. 1988). The jury may infer intent to distribute from proof of possession of a large quantity of drugs. Id. To prove a violation of § 843(b) the government must establish that the defendant used a communication facility (here, the United States mail) to "make easier or less difficult, or to assist or aid" the possession or distribution of a controlled substance either by the defendant or another person. United States v. Gonzalez-Rodriguez, 966 F.2d 918, 921 (5th Cir. 1992) (quotation and citation omitted); see 21 U.S.C. § 843(b).

The package involved here contained 270 grams of cocaine base. The jury could have inferred from this quantity and the other circumstances of this case that Ragland knowingly used the United States mail in an attempt to possess and distribute cocaine base. Ragland traveled to Texas and mailed a package containing narcotics

to his girlfriend's vacant residence, using a false return address. After returning from Texas, Ragland was overheard discussing an expected drug shipment. Ragland drove around looking for the mail carrier in an attempt to retrieve the package. Although the jury could have believed Ragland's explanation for these actions, it obviously did not. See United States v. Carter, 953 F.2d 1449, 1455 (5th Cir), cert. denied, 112 S. Ct. 2980 (1992). The jury could have inferred from Ragland's actions that he knew that the package contained illegal drugs, and it obviously did so.

D. Deliberate Ignorance Instruction

Ragland complains that the district court should not have instructed the jury on "deliberate ignorance." We review a district court's jury instructions to determine "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." United States v. Investment Enterprises, Inc., 10 F.3d 263, 268 (5th Cir. 1993) (internal quotations and citation omitted). "Before a deliberate ignorance instruction may properly be given, the evidence at trial must raise two inferences: the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and the defendant purposely contrived to avoid learning of the illegal conduct." Id. (internal quotations and citation omitted). The instruction "serves to inform the jury that it may consider evidence of the defendant's charade of ignorance as *circumstantial proof of guilty knowledge*." Id. at 269 (internal quotations and

citation omitted). A trial court may instruct a jury on deliberate ignorance even if the government proceeded on the theory that the defendant had actual knowledge of illegal activity. United States v. Peña, 949 F.2d 751, 757 (5th Cir. 1991).

The district court here instructed the jury:

You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent or careless or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Ragland objected that there was no evidence of deliberate ignorance, and he makes that same argument on appeal.

Ragland denied knowing what was in the package and offered an elaborate explanation for mailing the package from Houston and for searching for the package when he returned. Ragland asked the jury to conclude that his proclaimed ignorance of the contents of the package was inadvertent. We conclude that under the circumstances the district court properly instructed the jury to consider whether Ragland's claimed ignorance was deliberate. See United States v. Fierro, 38 F.3d 761, 772 (5th Cir. 1994) (defendant's argument, claiming a lack of guilty knowledge, supported deliberate ignorance instruction).

E. Discriminatory Prosecution

Ragland's final claim of error is that he was denied equal protection because the government's decision to prosecute him was discriminatory. To prevail on a claim of selective prosecution, a defendant must show that he was singled out for prosecution while

others similarly situated who committed the same crime were not prosecuted, and that the government's "prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." United States v. Garth, 773 F.2d 1469, 1476 (5th Cir. 1985) (internal quotations and citation omitted), cert. denied, 476 U.S. 1140 (1986). The defendant must show that "the government selected its course of prosecution `because of,' rather than `in spite of,' its adverse effect upon an identifiable group." United States v. Sparks, 2 F.3d 574, 580 (5th Cir. 1993) (citations omitted), cert. denied, 114 S. Ct. 720, and cert. denied, 114 S. Ct. 899, and cert. denied, 114 S. Ct. 1548 (1994). The defendant must "present facts sufficient to create a reasonable doubt about the constitutionality of a prosecution." United States v. Jennings, 724 F.2d 436, 445 (5th Cir.) (internal quotations and citations omitted), cert. denied, 467 U.S. 1227 (1984).

Ragland notes that Carlos Owens and Tyrell Crawford were not prosecuted, and that officer Ford engaged in "unusual conduct" by shredding his investigatory notes. But Owens and Crawford were not situated similarly to Ragland. The evidence implicating them in the crime was much weaker, and the government could have declined to prosecute them for that reason.

Ragland argues that Owens was not prosecuted because of his relationship to law enforcement officers. When Ford took Owens's statement, he was accompanied by Owens's father, a police

detective. Green had implicated Owens in the crime but Ford had omitted that fact from his investigatory report. Ford explained that he had concluded that the drugs were going to Ragland and not to Owens.

Even assuming *arguendo* that Owens was similarly situated, Ragland has not shown that he was the victim of invidious discrimination. Ragland does not contend that the government prosecuted him because of his race or religion. See Garth, 773 F.2d at 1476. Neither does Ragland argue that he was prosecuted because he was a member of an identifiable group. Instead, Ragland argues that Owens was not prosecuted because Owens was related to a police officer. Alone, the prosecution of one individual while not prosecuting another does not constitute constitutionally proscribed selective prosecution. Moreover, Ragland cannot show that he would not have been prosecuted if Owens had been prosecuted. Ragland's constitutional rights were not violated when the government chose to prosecute him and not to prosecute Owens.

AFFIRMED.