IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60649

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

J.D. SANDERS & RICHARD JOHNSON,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Mississippi
(CR-93-128-1 & 3)

(October 20, 1995)

Before REAVLEY, JOLLY, AND WIENER, Circuit Judges.

PER CURIAM*:

Defendants-Appellants J.D. Sanders and Richard Johnson appeal from their convictions on drug-related charges. The foremost issues before us are (1) whether the district court's apparent presentation of contradictory instructions to the jury on an issue

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

crucial to Johnson's defense constituted reversible error, and (2) whether the evidence presented at trial was sufficient to support Sanders's conviction for operating a continuing criminal enterprise (CCE). As we conclude that the record supports both defendants' convictions on all counts and that the district court committed no reversible error, we affirm.

I.

FACTS AND PROCEEDINGS

In August 1993, a federal grand jury for the Northern District of Mississippi returned an indictment charging numerous co-defendants, including Sanders and Johnson, with drug-related offenses.[1] Johnson was charged with one count of conspiracy to distribute and possess with intent to distribute cocaine base (crack) and with four counts of aiding and abetting distribution and possession with intent to distribute crack. Sanders was charged with 29 counts of drug- and firearms-related offenses. Sanders's firearms charges were severed by the district court, however, so only the drug-related charges are implicated in his appeal. At the conclusion of the trial in which several witnesses detailed drug transactions involving Sanders and, to a lesser degree, Johnson, the jury found both defendants guilty on all counts. Both Sanders and Johnson timely appealed their convictions, but Sanders challenges only his CCE conviction and his conviction on one count of distribution and possession with intent to distribute marijuana.

[1]Only Johnson and Sanders are involved in this appeal.

II.

ANALYSIS

As is typical and understandable in cases of this kind, Johnson and Sanders have raised every conceivable issue on appeal.[2] After carefully reviewing the record and the positions of the parties in their briefs and at oral argument, we conclude not only that none of the alleged deficiencies at trial constituted reversible error, but also that just two of the issues raised by Johnson and Sanders are of sufficient merit to warrant a more detailed discussion.

First, the record reflects that in the oral charge of the jury, the district court apparently spoke contradictory instructions on an issue critical to Johnson's defense. Johnson centered his defense on the claim that he was simply a bystander on a number of occasions when drug transactions occurred. It is well established that the mere presence of a defendant in a "climate

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[2]Specifically, Sanders contends that the evidence at trial was insufficient to sustain his conviction for operating a CCE; that the district court should have granted his motion for judgment of acquittal; and that the district court's choice of jury instruction on the CCE charge constituted reversible error.

For his part, Johnson asserts that the evidence was insufficient to support his conviction for conspiracy and for aiding and abetting; that the government should not have been allowed to use its peremptory challenges to exclude certain African-American jurors; and that the district court committed reversible error by failing to inform the parties properly of its proposed action with regard to jury instructions and by fashioning inadequate--and in one instance inconsistent and thus confusing--jury instructions. Johnson also asserts that he should have been given a downward adjustment in sentencing for his allegedly minor role and that his Fifth and Eighth Amendment rights were violated by the differential in punishments imposed by the United States Sentencing Guidelines for violations involving powder cocaine and crack cocaine.

that reeks of something foul" is in and of itself insufficient to support a conviction for conspiracy.[3] After properly instructing the jury on that legal principle, the district court apparently stated, incorrectly, that a mere bystander could in fact be convicted of conspiracy. We have consistently recognized the problematic nature of inconsistent jury instructions: "The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide, and second, it is impossible after the verdict to ascertain which instruction the jury followed."[4] In essence, "[t]he effect of a conflicting instruction is to nullify a correct one."[5]

In this case, however, the district court's apparent mistake was sufficiently remedied to render any resulting error harmless. The jury requested and received a copy of the instructions on the charge at issue. That typewritten copy of the jury instructions read, in relevant part, "Of course mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons, and the fact that they may have associated with each other . . . does not necessarily establish proof of the existence of a conspiracy." The contradictory, erroneous statement is nowhere to be found in the written version of the jury

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[3]See U.S. v. Dean, 59 F.3d 1479, 1485 (5th Cir. 1995); U.S. v. Sandoval, 847 F.2d 179, 185 (5th Cir. 1988).

[4]Nowell By and Through Nowell v. Universal Electric Co., 792 F.2d 1310, 1316 (5th Cir.), cert. denied, 479 U.S. 987 (1986).

[5]Id.

instructions. Accordingly, we are convinced that here the district court's "slip of the tongue," as cured by the straightforward and accurate statement of the applicable law subsequently furnished in writing to the jurors following their request, did not constitute reversible error.

The second issue that merits discussion is Sanders's contention that the record fails to support his conviction for operating a CCE. To convict on a CCE charge pursuant to 21 U.S.C.S. § 848, the government must establish, inter alia, that the defendant acted "in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management."[6] The jury need not unanimously agree on the same five individuals, so long as each juror finds that the defendant supervised, organized, or managed any five subordinates.[7] Indeed, the actual identity of the subordinates is insignificant, as the focus of the CCE statute is the size of the enterprise rather than the character of its members.[8]

The government argues to us that evidence adduced at trial supports a finding that Sanders managed, supervised, or organized

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[6]21 U.S.C.S. § 848(c)(2)(A) (Law. Co-op. Supp. 1995).

[7]U.S. v. Linn, 889 F.2d 1369, 1374 (5th Cir.), cert. denied, 498 U.S. 809 (1989).

[8]Id. (quoting United States v. Markowski, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986)). This principle is particularly pertinent here, as the government at trial presented evidence regarding Sanders's relationship with two unidentified individuals.

up to thirteen individuals, eleven of whom were identified by name and two of whom were not. We recognize that there was a paucity of evidence as to some of those thirteen individuals. Nonetheless, after painstakingly reviewing the record and closely heeding the arguments of the parties on appeal, we are satisfied that a reasonable jury could have found that Sanders managed, supervised, or organized at least five of the thirteen proffered individuals. In so holding, we note that Sanders need only have "organized" or "supervised" or "managed" the individuals in the everyday sense of the word.[9] As "the terms `organize,' `supervise,' or `manage' are used disjunctively in the statute,"[10] the government was not required to establish that Sanders had a direct, supervisory relationship over the individuals in question.

III.

CONCLUSION

For the foregoing reasons, the convictions of Johnson and Sanders are

AFFIRMED.

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[9]See U.S. v. Hinojosa, 958 F.2d 624, 630 (5th Cir. 1992).

[10]Id.