IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60662
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

ARTURO MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(1:93-CR62-PR)

(April 4, 1995)

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Arturo Martinez appeals his conviction for conspiracy to possess with intent to distribute marijuana and for interstate travel in aid of an unlawful activity. Finding no merit in his arguments, we affirm the judgment of the district court.

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.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. FACTUAL AND PROCEDURAL BACKGROUND

Between 1987 and 1992, the defendant and various other parties allegedly participated in a large-scale marijuana distribution operation. Martinez and eight co-defendants were charged with conspiracy to possess with intent to distribute over 500 kilograms of marijuana (Count I). In addition, Martinez and seven of his co-defendants were charged with two counts of aiding and abetting travel in interstate commerce between Texas and Mississippi to promote the distribution of marijuana (Counts II and III). Martinez and the same seven co-defendants were also charged with possession with intent to distribute over 400 pounds of marijuana (Count IV). Prior to trial, however, the government dismissed Count IV as to Martinez.

Six of Martinez's co-defendants pleaded guilty and testified for the government. The two remaining co-defendants were separately scheduled for trial. Martinez independently proceeded to trial and was convicted on counts I, II, and III. He appeals his convictions, arguing that a Batson violation occurred during jury selection and contending that improper evidence was admitted relating to time periods when he was not an active member of the conspiracy. Martinez also argues that the evidence was insufficient to support his conviction.

II. ANALYSIS AND DISCUSSION

A. A Batson Violation?

Martinez, a Mexican-American, contends that the prosecutor offered a pretextual explanation for the peremptory strike of a

black venire member. In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that a prosecutor violates the Equal Protection Clause when potential jurors are challenged solely on the basis of their race. See United States v. Clemons, 941 F.2d 321, 323 (5th Cir. 1991); United States v. Moreno, 878 F.2d 817, 820 (5th Cir. 1989). This Batson rule applies to both federal and state criminal cases. See United States v. Cobb, 975 F.2d 152, 155 n.2 (5th Cir. 1992). As we have stated, the process for examining an objection to peremptory challenges under Batson is as follows:

> (1) a defendant must make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Clemons, 941 F.2d at 324. If the district court required an explanation for the peremptory strike, as in Martinez's case, we will review "only the district court's finding of discrimination *vel non*." Forbes, 816 F.2d at 1010. Because the issues presented in a Batson challenge turn on evaluations of credibility, the district court's findings are reviewed under a clearly erroneous standard. See Clemons, 941 F.2d at 325.

At the jury selection, without requiring Martinez to make a prima facie showing of discrimination, the district court asked the prosecutor to explain the strike. The prosecutor stated that he had "all positives [about the prospective juror] until he indicated [that] his brother was in Parchman for marijuana." The district court accepted that explanation as "race neutral," and as a

consequence, no Batson violation was established. The district court's acceptance of the prosecutor's race-neutral explanation was not clearly erroneous. See, e.g., United States v. Fisher, 22 F.3d 574, 577 (5th Cir. 1994); United States v. Guerra-Marez, 928 F.2d 665, 673 (5th Cir. 1991).

B. Improper Admission of Evidence?

Martinez argues that the government was improperly allowed to present prejudicial and irrelevant evidence that related to a time period when Martinez had ceased to be involved in the conspiracy. He also contends that "any cautionary instruction given by the [c]ourt was insufficient considering there was a viable alternative, that is to disallow the offered evidence."

Evidence is relevant if it has "any 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. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Fed. R. Evid. 403. We have noted, however, that the exclusion of evidence under Rule 403 should occur only sparingly:

> Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing.

United States v. Pace, 10 F.3d 1106, 1116 (5th Cir. 1993) (internal quotation omitted). When a trial judge's determination as to the admissibility of evidence is questioned on appeal, we review under an abuse of discretion standard. See id. at 1115.

An evaluation of Martinez's argument requires some additional factual background. Roger Sherman testified that in 1988 and 1989, he was involved in seismographic work in the Texas oil fields. Sherman met Martinez in Harlingen, Texas in 1988, and Martinez offered to sell marijuana to Sherman. Sherman purchased three pounds, and he gave samples of Martinez's marijuana to Keith Lee and Roy Sanders. Lee agreed to purchase a large shipment of marijuana, and Martinez shipped between 500-600 pounds of marijuana back to Lee in Mississippi. The marijuana was successfully shipped because Sherman had allowed Martinez to modify Sherman's seismographic equipment such that 500-700 pounds of marijuana could be hidden in the water tank. This marijuana shipment to Lee was the first of several shipments that the Lee organization concealed in Sherman's seismographic equipment and transported from Texas to Mississippi. Martinez supplied the marijuana for the first two or three loads, but when he raised his price, Lee began buying marijuana from Leandro Rendon and Larry Rendon. According to Leandro Rendon, the Lee organization continued to ship the marijuana to Mississippi in Sherman's seismographic equipment, but Martinez did not supply any marijuana to the Lee organization after November or December of 1989.

The government introduced testimony and documentary evidence relating to marijuana shipments that occurred after Martinez had been replaced as the supplier to the Lee organization. There was evidence relating to the marijuana seized in December of 1989 and relating to the method of shipping the marijuana in Sherman's seismographic equipment. The district court admitted the evidence to prove the ***existence*** of a conspiracy through the use of the same modus operandi, but the court instructed the jury to disregard the evidence "for the purpose of determining whether or not this particular defendant ***participated*** in the conspiracy." (emphasis added). The court noted that its limiting instruction was intended to convey to the jury that it must not only find the existence of a conspiracy, but it must also find that Martinez joined that existing conspiracy.

We find no abuse of discretion in the district court's admission of this evidence, even though it related to periods of time where Martinez was not an active participant in the conspiracy. The evidence challenged by Martinez was relevant and admissible because it demonstrated that the Lee organization had shipped marijuana from Texas to Mississippi by concealing the marijuana in Sherman's seismographic equipment. Thus, the evidence helped to establish the existence of a widespread conspiracy and the method used by the conspirators to conceal their drug shipments. See, e.g., United States v. Puig-Infante, 19 F.3d 929, 936 (5th Cir. 1994) (noting that a conspiracy conviction requires proof of the existence of a conspiracy and of a defendant's

participation in the conspiracy). The dangers of unfair prejudice did not substantially outweigh the probative value of evidence explaining the modus operandi used by the conspirators.

In addition, the prejudicial effect, if any, of this relevant evidence was diminished by the district court's limiting instruction. See, e.g., Bruton v. United States, 391 U.S. 123, 135 (1968) (stating that curative instructions may be sufficient to cause a jury to disregard particular pieces of evidence); United States v. Elwood, 999 F.2d 814, 816-17 (5th Cir. 1993) ("The independent prejudicial effect, however, was diminished by, among other things, . . . the district court properly instruct[ing] the jury on three occasions of the limitations in the consideration of the . . . evidence."); United States v. Pace, 10 F.3d 1106, 1116 (5th Cir. 1993) (noting that the trial court's curative instruction, in part, rendered the admission of questionable testimony harmless). Moreover, "juries are presumed to follow their instructions," Zafiro v. United States, 113 S. Ct. 933, 939 (1993) (internal quotation omitted), and nothing in this case convinces us that the jury did not comply with the district court's instruction to consider the evidence only as proof of the existence of the conspiracy, and not as proof of Martinez's participation in the conspiracy. Simply put, we find no abuse of discretion in the district court's admission of the evidence.

C. Insufficient Evidence?

Martinez also contends that the evidence is insufficient to support his conviction because there is no credible evidence that

he committed an offense within the relevant statute of limitations. He discredits any witness testimony against him by stating that the witnesses were "drug addicts, convicted felons, persons given favorable treatment by the government in exchange for their testimony, and the like."

In evaluating the sufficiency of the evidence, a reviewing court 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. See United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992). Our evaluation must give the government the benefit of all reasonable inferences and credibility choices. See id.

The indictment in this case issued on December 15, 1993. Although the indictment alleged that the drug conspiracy occurred between January of 1987 and August of 1992, the government had to prove that Martinez committed the charged offenses after December 15, 1988. See 18 U.S.C. § 3282 (providing a five-year limitations period). Leandro Rendon testified that Martinez was involved in shipping 500-600 pounds of marijuana from Texas to Mississippi in January or February of 1989, and he stated that the shipment was concealed in Sherman's seismographic equipment. In addition, Roy Sanders testified that Martinez supplied Lee with 720 pounds of marijuana in August of 1989.

"A conviction may be based even on uncorroborated testimony of an accomplice or of someone making a plea bargain with the government, provided that the testimony is not incredible or

otherwise insubstantial on its face." United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991). Testimony generally should not be declared incredible as a matter of law "unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature." Id. The testimony of Rendon and Sanders is not incredible or insubstantial on its face, and it was corroborated by other evidence. As the ultimate arbiter of witness credibility, the jury was entitled to believe the witnesses, and a rational jury had enough evidence to support Martinez's conviction.[1]

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[1] Martinez argues that he was "effectively withdrawn" from the conspiracy when Lee switched to another supplier. Aside from the fact that such an alleged "withdrawal" occurred after December 15, 1988, "[w]ithdrawal from a joint criminal enterprise . . . requires that the proponent show that he affirmatively took actions inconsistent with the object of the enterprise, and communicated his intent to withdraw in a manner reasonably calculated to reach his cohorts." United States v. Stouffer, 986 F.2d 916, 922 (5th Cir. 1993). There is no evidence that Martinez took any actions inconsistent with the object of the conspiracy or that he communicated an intent to withdraw. Thus, we cannot agree that Martinez had "effectively withdrawn" from the marijuana conspiracy.