IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3477
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE JAMES DOUGHTY,
a/k/a James Doty,

Defendant-Appellant.

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No. 92-3630
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELLIS CURRY,

Defendant-Appellant.

Appeals from the United States District Court for the
Eastern District of Louisiana
(CR-91-438-L)

April 23, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

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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

In this case, we review the convictions and sentences of two individuals convicted of conspiring to distribute crack cocaine. Willie James Doughty challenges the sufficiency of the evidence, the district court's jury instructions, and the sentence he received. Ellis H. Curry pled guilty and challenges only the sentence the district court imposed. We find no reversible error in either case. We therefore affirm.

I

In 1990 and 1991, federal narcotics agents investigated the sale of crack cocaine around the Paul Davis Sawmill Road in St. Helena Parish, Louisiana. On six different occasions, the agents purchased crack cocaine from Ellis H. Curry and others in or around the Curry residence along Sawmill Road. Although Ellis Curry did not live at the Curry residence, Charlesteen Curry, Barbara Jean Curry, and Michael Moore did live there. On one occasion, an agent called Ellis Curry and told Curry that he would like to purchase some crack cocaine. Curry told the agent that he would not be around and instructed the agent to "go to his mother's house and see either Little Michael or Barbara Jean." On another occasion, Curry told an agent that everyone in the area worked for him. Despite Curry's contention that he did not organize this drug operation, he admitted to the probation officer that he helped

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profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Barbara Jean Curry, Evelyn Curry, Michael Moore, and James Doughty obtain the drugs they sold.

Willie James Doughty was one of the people who worked with Curry. On May 15, 1991, Doughty approached a couple of federal agents and asked them if they wanted to purchase some crack cocaine. The agents indicated that they wanted to buy two twenty dollar rocks of cocaine. Doughty went into the Curry residence, talked to someone, and learned that one fifty dollar rock of cocaine was available. When Doughty returned, the agents agreed to purchase the fifty dollar rock. A few minutes later, the agents paid for the cocaine, and Doughty handed over the crack cocaine.

II

In September of 1991, the government indicted Curry, Doughty and others for conspiring to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 846. A month later, the grand jury returned a substantially identical indictment that corrected technical errors, including the spelling of Doughty's name.

In March of 1991, Curry pled guilty. The probation officer prepared a presentence report ("PSR") in which he recommended that the district court increase Curry's base offense level by four levels under Sentencing Guideline § 3B1.1(a) because Curry was a leader or organizer of a criminal activity involving five or more participants. Curry objected to this enhancement.

On June 30, 1993, the district court held a sentencing hearing to resolve Curry's objections to the PSR. A federal agent involved

in the investigation testified about his dealings with Curry. Despite the government's evidence concerning Curry's role in the drug operation, Curry did not present evidence to contradict the government's position. Based on the PSR and the other evidence, the district court found that Curry was a manager or supervisor of a criminal activity involving five or more participants. Pursuant to Sentencing Guideline § 3B1.1(b), the district court increased Curry's base offense level three levels and sentenced Curry to, inter alia, 72 months imprisonment followed by five years of supervised release.

Doughty, on the other hand, chose a jury trial. The government tried Doughty and a co-defendant in March of 1992. At the close of the evidence, the district court held a conference to review the proposed jury instructions. Doughty raised no objection to the court's proposed jury instructions. After the jury selected a foreman but before the jury began deliberating, however, Doughty asked the court to deliver a "mere presence" instruction. Finding that this instruction did not fit the facts and that delivering the single instruction would unduly emphasize the instruction, the court refused to give the instruction. Subsequently, the jury returned a guilty verdict.

After the jury returned the verdict, Doughty renewed his motion for a judgment of acquittal. In May of 1992, the district court denied it. The next month, the district court held a sentencing hearing. Doughty objected to several of the probation

officer's conclusions in the PSR. Nevertheless, despite Doughty's opportunity to present contrary evidence, he failed to do so. Thus, the district court sentenced Doughty based on the evidence in the PSR and the district court's recollection of the evidence at trial. The district court sentenced Doughty to 24 months imprisonment and three years of supervised release.

Both Curry and Doughty filed timely notices of appeal. Curry appeals only the district court's sentence. Doughty, however, appeals both his conviction and his sentence. The government filed an unopposed motion to consolidate the two appeals that was granted by the clerk of the court.

III

A

We begin with Doughty's argument that the district court reversibly erred when it refused to deliver the mere presence jury instruction that both Doughty and the prosecution requested. The requested jury instruction provided that:

> The mere presence at the scene of an event even with the knowledge that the crime is being committed or the mere fact that certain persons may have associated with each other, may have assembled together and discussed common names, interests, does not necessarily establish proof of the existence of a conspiracy. A person who has no knowledge of a conspiracy, who happens to act in a way which advances some purpose of the conspiracy does not thereby become a conspirator.

Because the district court has substantial latitude in tailoring jury instructions, we review the district court's refusal to include a defendant's proposed jury instruction for an abuse of

discretion. United States v. Chaney, 964 F.2d 437, 444 (5th Cir. 1992). The district court abuses its discretion only when the failure to give the instruction prevents the jury from considering the defendant's defense. United States v. Masat, 948 F.2d 923, 928 (5th Cir. 1991). The district court does not abuse its discretion unless the requested instruction is "1) substantially correct, 2) was not substantially covered in the charge delivered to the jury; and 3) concerns an important issue so that the failure to give it seriously impaired the defendant's ability to present a given defense." United States v. McKnight, 953 F.2d 898, 903 (5th Cir. 1992).

Although this jury instruction is substantially correct, the district court did not abuse its discretion when it refused to give this instruction. The instruction is not warranted in this case because the evidence did not justify such an instruction. The government presented evidence—unrefuted by the defense—that Doughty was not merely present at the scene of the drug transaction, but that he actually participated in the conspiracy by selling, retrieving, and delivering drugs on at least one occasion, which occurred at the Curry residence when other persons were present.

Moreover, the instruction was simply unnecessary because the given instructions adequately covered the situation so as to allow full consideration of Doughty's defenses. The district court instructed the jury that, inter alia, in order to find the

defendant guilty of conspiracy, the evidence must establish beyond a reasonable doubt:

> 1) That the defendant reached an agreement or understanding with at least one other person to commit a crime. In this case, to distribute cocaine hydrochloride or cocaine base; and
>
> 2) That the defendant knew the purpose of the agreement and joined in it willfully, that is with the intent to further the unlawful purpose.

The court went on to instruct the jury that a finding of a buyer-seller relationship was not sufficient to sustain a conspiracy conviction. The court also defined "willfully" and "knowingly" for the jury. These instructions, viewed in context with the court's other instructions, covered all of the relevant issues in the instruction that Doughty requested. Additionally, we agree with the district court that separately giving Doughty's mere presence instruction would overemphasize the instruction. Thus, without hesitation, we conclude that the district court did not abuse its discretion when it refused to give the mere presence instruction that Doughty requested.

B

Doughty also argues that the district court committed plain error when it failed to provide a jury instruction on venue. The failure to provide a jury instruction on venue is reversible error when the evidence puts venue at issue and the defendant requests the instruction. United States v. Winship, 724 F.2d 1116, 1125 (5th Cir. 1984).

The district court did not err for two obvious reasons. First, Doughty failed to request the instruction. Second, and more importantly, the venue was proper in the Eastern District of Louisiana. In a conspiracy case, venue is proper in any district where the parties to the conspiracy committed an overt act in furtherance of the conspiracy. United States v. Pozos, 697 F.2d 1238, 1244 (5th Cir. 1983); United States v. Maceo, 947 F.2d 1191, 1201 (5th Cir. 1991). Venue was proper in this case because Ellis Curry, one of the managers of the conspiracy, sold cocaine in the Eastern District of Louisiana.

C

Doughty also challenges the sufficiency of the evidence against him. Doughty argues that the government did not provide sufficient evidence to prove that he conspired with other individuals. When we review the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir. 1991). We must affirm the verdict if a rational trier of fact could have found that the government proved the essential elements of the offense beyond a reasonable doubt. United States v. Carter, 953 F.2d 1149, 1154 (5th Cir. 1992). In this connection, the government may use circumstantial evidence to prove all of the elements of the conspiracy. Id.

The government presented sufficient evidence to prove all of the elements of the crime. To secure a conviction for conspiracy

under 21 U.S.C. § 836, the government must prove 1) that two or more individuals agreed to violate the narcotics law, 2) that the charged co-conspirator knew of the conspiracy and intended to join it, and 3) that the co-conspirator participated in the conspiracy. Id. At trial, the government offered ample evidence that a conspiracy to sell cocaine existed and that, on six different occasions, members of the conspiracy sold drugs to federal agents in front of Curry's mother's house. Doughty executed one of those sales. The government also proved that other people helped Doughty complete the sale in which he participated. Taking the evidence in the light most favorable to the verdict, this evidence is sufficient to convince a reasonable jury that Doughty conspired to sell drugs.[1]

D

Having rejected Doughty's arguments challenging his conviction, we now consider his argument that the district court

[1]Doughty's reliance on United States v. Lewis, 902 F.2d 1176 (5th Cir. 1990) and United States v. Guerra-Marez, 928 F.2d 665 (5th Cir. 1991) is misplaced because neither case is factually similar to the case before us. In Lewis, the government's evidence at trial established that Lewis associated with a man named Wade who was involved in a drug transaction. The government's other evidence established only that Wade called Lewis after flushing the contents of a controlled cocaine delivery down the toilet and that a police officer had an "enigmatic conversation" with an unidentified man who called Lewis's beeper after he was arrested. In Guerra-Marez, on the other hand, the government had no proof that Wenseslada Reyes-Moya worked with the alleged co-conspirator. The fact that both defendants had a common goal did not prove a conspiracy. In the case before us, however, there is evidence linking Doughty to Curry's drug operation.

imposed an excessive sentence. Doughty contends that the district court erred when it determined the amount of cocaine he distributed and when it determined his criminal history. We will affirm the district court's sentence "so long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous." United States v. Headrick, 963 F.2d 777, 779 (5th Cir. 1992). Factual findings that are plausible in the light of the record taken as a whole are not clearly erroneous. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991).

(1)

We begin with Doughty's challenge to the district court's conclusion that Doughty distributed .54 grams of cocaine. In the PSR, the probation officer determined that Doughty distributed .54 grams of cocaine. The probation officer based his conclusion on information provided by the Louisiana State Police Laboratory. At the sentencing hearing, Doughty did not contest the fact that he sold .54 grams of cocaine. Instead, Doughty argued that the court should not use any weight because, at trial, the government did not introduce any evidence concerning the weight of cocaine he distributed. It does appear that at the sentencing hearing the district court was under the mistaken impression that a Louisiana State policeman testified about the weight of the cocaine at trial when it ruled against Doughty's objection to the weight of the cocaine.

If Doughty had any evidence concerning the weight of the cocaine, then the district court's error would have been serious. Yet, despite the fact that the district court gave Doughty every opportunity to challenge the probation officer's factual conclusions, Doughty did not present contrary evidence. Indeed, even now Doughty practically admits that he sold .54 grams of cocaine; he only argues that at trial the government failed to prove the amount of cocaine. Doughty's argument fails because the government was not required to prove the weight of the cocaine at trial. United States v. Brown, 887 F.2d 537 (5th Cir. 1989).

The government can wait until the sentencing hearing to present its evidence and, like the district court, the government can rely on the probation officer to determine the amount of cocaine. Furthermore, in sentencing a defendant, a district court can rely on hearsay evidence including evidence in a PSR. United States v. Byrd, 898 F.2d 450 (5th Cir. 1990). Because the only evidence in the record indicates that Doughty sold .54 grams of cocaine, we will affirm the district court's decision to base Doughty's sentence on .54 grams of cocaine.

(2)

Doughty also contends that the district court erred in calculating his criminal history. Doughty argues that the government failed to prove "when, if ever, Doughty was incarcerated on his prior sentence." Doughty further argues that he "may have served his sentence before the ten year cleansing period."

Sentencing Guideline § 4A1.1(b) awards two criminal history points for any prior sentence of imprisonment of it least sixty days. For sentences under sixty days, the Sentencing Guidelines award only one point. U.S.S.G. § 4A1.1(c).

The district court did not err in awarding Doughty two criminal history points. Doughty committed the instant offense on May 15, 1991. The PSR establishes that Doughty was arrested July 2, 1980, for the attempted burglary of a United States Post Office. Doughty was found guilty of that offense on September 18, 1981, and the court sentenced him to six months of imprisonment on October 13, 1982. The Sentencing Guidelines provide that "[a]ny other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted."[2] U.S.S.G. § 4A1.2(e)(2). Because Doughty was sentenced within ten years of committing the instant offense, the district court was required to count the prior sentence. Because the six-month sentence was well beyond the sixty-day minimum, Doughty's prior sentence results in two criminal history points. U.S.S.G. § 4A1.1(b). Doughty's argument that the government failed to prove he served the sentence is without merit because a PSR provides

[2]The Sentencing Guidelines use two different rules in determining whether a prior sentence counts toward a defendant's criminal history. Sentences over a year and a month count if the defendant served any part of the sentence in the fifteen years prior to committing the instant offense. Sentences less than one year and a month only count if the prior sentence was imposed within ten years of the instant offense. See U.S.S.G. § 4A1.2(e).

reliable evidence that the defendant served the sentence and that the court did not suspend the sentence. United States v. Sanders, 942 F.2d 894, 898 (5th Cir. 1991). Furthermore, Doughty offered no contrary evidence indicating that he did not serve the sentence.

IV

We now turn to Ellis Curry's appeal. Curry contends that the district court imposed an improper sentence because the government failed to prove that Curry managed or supervised a criminal activity involving five or more people. As we have earlier noted, we will affirm the district court's sentence "so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). The district court's factual findings are not clearly erroneous when they are plausible in the light of the record taken as a whole. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991); United States v. Mejia-Orosco, 867 F.2d 216, 221 (5th Cir. 1989).

The sentencing guidelines direct the district court to increase the defendant's base offense level by three levels if "the defendant was a manager or supervisor [of a criminal activity] (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b); United States v. Klienebreil, 966 F.2d 945, 955 (5th Cir.

1992).[3] Before the district court increases the defendant's base offense level under this section, the district court must find that the defendant and at least four other individuals were involved in the criminal activity. United States v. Alfaro, 919 F.2d 962, 967 (5th Cir. 1990).

The probation officer found that Curry was a leader of the criminal activity and recommended that the district court increase Curry's base offense level by four levels pursuant to U.S.S.G. § 3B1.1(a). The district court decided not to follow this recommendation. Instead, the district court found that Curry was a manager or supervisor of the criminal activity and increased his base offense level by only three levels.

The district court's finding that Curry managed or supervised a criminal activity involving at least five individuals was not clearly erroneous. When making sentencing decisions, the district court may consider all relevant, reliable information including a PSR. Alfaro, 919 F.2d at 966. Curry admitted to the probation officer that he helped Barbara Jean Curry, Evelyn Curry, Michael Moore, and James Doughty obtain the drugs they sold. On other occasions, he boasted about the number of people working for him and directed federal agents to purchase crack cocaine from other individuals that worked for him. All of this information was

[3]If the defendant was an organizer or leader of a criminal activity, the sentencing guidelines direct the district court to increase the defendant's base offense level by four levels. U.S.S.G. § 3B1.1(a)

before the district court when it made its decision. Furthermore, Curry did not present any evidence to rebut the government's evidence that he was a manager or supervisor of the conspiracy. Instead, Curry relied solely on the unsworn assertions of his counsel even though previously we have held that such assertions are not reliable. Id.

It is now on appeal that Curry contends for the first time that the government failed to prove that five or more individuals were involved in the criminal activity. Because Curry did not raise this issue at his sentencing hearing, we review for plain error. United States v. Pattan, 931 F.2d 1035, 1042 (5th Cir. 1991). Under this standard, we will reverse only if the district court made a purely legal error, and the failure to address the issue would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

There was no plain error here. On the contrary, the record fully supports the district court's finding that five or more people were involved. It seems clear that, at a minimum, Ellis Curry, Barbara Jean Curry, Evelyn Curry, Michael Moore, and James Doughty were involved. Although, the record indicates there were other participants as well, the participation of these five individuals provides sufficient support for the district court's finding.

V

For all of the foregoing reasons, we AFFIRM Doughty's conviction and the sentence the district court imposed. Similarly, we AFFIRM the sentence that the district court imposed on Ellis Curry after he pled guilty to conspiracy to distribute cocaine hydrochloride and cocaine base.

A F F I R M E D.