

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7087
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES STAMPS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(4:92-CR-27)

(November 19, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

Convicted drug dealer Charles Stamps has been sentenced to 19 months imprisonment and other penalties after being found guilty of one count of possession with intent to distribute and distribution of about 27.4 grams of cocaine. On appeal, he raises evidentiary points. Finding that the district court did not abuse its discretion or commit legal error in any of these matters, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Stamps took the stand in his own defense. On cross-examination, he denied ever having any drug dealings with Alexander, a convicted felon who had cooperated with the Federal Drug Task Force agents to catch other drug dealers including Stamps. Stamps specifically denied ever selling Alexander ounces of cocaine on occasions other than the one charged in the indictment. In response to this denial, the government called Alexander back to the stand as a rebuttal witness. Alexander testified that before January 16, 1992, the date of the offense, Stamps had sold him cocaine between 13 and 15 times. This was the extent of his rebuttal testimony. Alexander did not testify to specific facts related to any of the individual sales.

On appeal, Stamps first argues that the rebuttal evidence given by Alexander was character evidence not admissible under Fed. R. Evid. 404(b). The government contends, however, and we agree, that this testimony was not introduced under Rule 404(b) but was offered in rebuttal specifically to contradict Stamps's testimony that he had never sold drugs to Alexander.

In United States v. Lopez, 979 F.2d 1024, 1034 (5th Cir. 1992), cert. denied 113 S. Ct. 2349 (1993), this court held that extrinsic evidence is "material, not collateral, if it contradicts 'any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.'" Id. (internal citation omitted). Such evidence "is admissible under the general standards of Rules 402 and 403 to

contradict specific testimony, as long as the evidence is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice." Id.

The district court here found that the probative value of the rebuttal testimony far outweighed any undue prejudice or confusion of the issues to the jury. Further, the district court instructed the jury that Alexander's testimony was to be used only to assess the weight and credibility of Stamps's testimony, and not as proof of the alleged drug sale on January 16, 1992. The credibility clash between Stamps and Alexander was pointed, because Alexander also testified, and Stamps denied, that Stamps sold him drugs on the date charged in the indictment. The district court did not abuse its discretion in finding that the additional testimony of other sales was not unduly prejudicial in light of the evidence as a whole.

Stamps also contends that he was not given reasonable notice of Alexander's testimony of previous sales as required by Rule 404(b). Obviously, this contention withers in light of the fact that the evidence was not introduced under that rule. In any event, Stamps had received notice both in pretrial proceedings and in the government's proffered testimony in his first trial, that the government sought to make use of his prior dealings with Alexander. The precise number of those transactions is irrelevant given the limited scope of Alexander's rebuttal testimony.

Stamps next contends that although his counsel did not object, the government erred by inquiring whether Stamps had used

cocaine on prior occasions. Stamps replied that he had done so once or twice, including two days before the alleged transaction of January 16, 1992. We review this unobjected-to testimony under the plain error doctrine, a very demanding standard. Stamps does not begin to meet it. His Fifth Amendment allegation is spurious, because Stamps, once on the stand, opened himself to permissible interrogation. Although allowing such a question, if it had been objected to, might have been an abuse of the district court's discretion, allowing the question without objection in this case was not plain error. The evidence tended to show motive. Stamps has not demonstrated how it affected the fundamental fairness of the trial.

Stamps finally contends that the government "destroyed" exculpatory evidence. Why he thinks it is exculpatory is a mystery, even if it appeared that someone other than Stamps had handwritten the telephone number of his workplace on a piece of paper. The paper was given to Alexander during the January 16, 1992, drug sale, and undercover agents testified that they overheard Stamps provide specific information to Alexander on how to contact him at work to make a future buy. The fact that evidence is accidentally lost or destroyed does not constitute a due process violation. "The defendant must show bad faith on the part of government officials." United States v. Gibson, 963 F.2d 708, 711 (5th Cir. 1992). Stamps made no effort to show bad faith.

The judgment of conviction is **AFFIRMED**.