

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

SEP 21 1990

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BERNARD EDWARD ANALLA,
Defendant-Appellant.

ROBERT L. HOECKER
Clerk

No. 89-2250
(D.C. No. 89-174-JB)
(D.N.M.)

ORDER AND JUDGMENT*

Before MCKAY, TACHA and BALDOCK, Circuit Judges.**

Defendant-appellant Bernard Edward Analla (Bernard) was convicted by a jury of committing a crime on an Indian reservation: assault resulting in serious bodily injury, in violation of 18 U.S.C. § 1153, 113(f) & 2. He appeals claiming that the district court erred by 1) admitting the victim's statement that "these people" had a reputation for shooting into houses, 2) not admitting a sixteen year-old prior felony

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause therefore is ordered submitted without oral argument.

conviction of an absent codefendant, 3) not granting a two-level downward adjustment for a minor role in the offense, and 4) not granting a two-level reduction for acceptance of responsibility. Finding these contentions without merit after a review of the record and the applicable law, we affirm. Our jurisdiction over this direct criminal appeal arises under 28 U.S.C. § 1291.

I.

Jose Miguel Abeita was shot outside his trailer on the Laguna Indian Reservation early Sunday morning, July 10, 1988. The preceding Saturday afternoon, Abeita was at a bar near Bibo, New Mexico when defendant Bernard, his brother (and absent codefendant) Frank Analla, and Leland Stokes called Abeita outside the bar and challenged him to a fight. Bernard had numchucks, Frank had a rifle and Stokes had a stick or a pipe. Abeita declined the invitation and returned to the bar.

Later that evening, Abeita noticed a car driving slowly by his trailer. Abeita testified that he grabbed a rifle and walked outside. When queried why he didn't stay inside the trailer, Abeita replied that "these people got a reputation of shooting through people's windows" Rec. vol. III at 51. Abeita testified that he confronted Bernard at a distance of approximately fifteen feet whereupon Bernard shot him. Bernard was arrested the next morning. A shotgun was seized from underneath Frank's bed; tests revealed that a shotgun shell found at Abeita's residence was ejected from the same shotgun.

In his defense, Bernard argued that his brother Frank was responsible for the shooting. He sought to impeach Abeita's identification with evidence of intoxication and inconsistent physical evidence. The jury was instructed both on the substantive offense of assault resulting in serious bodily injury and aiding and abetting. The verdict did not distinguish between the substantive offense and aiding and abetting.

II.

Bernard first argues that Abeita's statement concerning the alleged reputation of "these people" for shooting through windows was inadmissible evidence of prior bad acts under Fed. R. Evid. 404(b) and that the trial court committed reversible error by overruling Analla's motion to strike such testimony. We disagree. Abeita's statement was not admitted "to prove the character of [the Anallas, or whoever "these people" are] in order to show action in conformity therewith." Fed. R. Evid. 404(b). Rather, the evidence was admitted to show Abeita's state of mind at the time he left his trailer. Abeita's fortuitous use of the word "reputation" does not automatically place his statement under Fed. R. Evid. 404(b) or 608 when character evidence was neither sought by the prosecution nor offered by the witness. We cannot say that the district court abused its discretion in admitting such evidence. See United States v. Record, 873 F.2d 1363, 1373 (10th Cir. 1989). Obtaining a limiting instruction was the responsibility of the defendant, Fed. R. Evid. 105; Huddleston v.

United States, 485 U.S. 681, 691 (1988), and the defendant should have sought clarification of the ruling denying his objection if confusion existed.

III.

Bernard next complains that the district court made another incorrect ruling on Fed. R. Evid. 404(b) evidence, this time by excluding a prior conviction of Frank. At the time of trial, Frank was a fugitive and unable to testify. Bernard sought to introduce Frank's sixteen year-old assault conviction to bolster the defense argument that Bernard did not actually shoot Abeita. See Appellant's Brief at 15.

Fed. R. Evid. 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Because Frank did not testify at trial, his credibility was not at issue and the prior conviction is therefore irrelevant on the issue of credibility. Similarly, a sixteen year-old conviction has no relevance on the issue of Frank's intent on the morning of the assault. Likewise, a sixteen year-old conviction has only the most tenuous connection with the issue of identity given the vague proffer concerning factual similarity (identifying characteristics) between Frank's conviction and the circumstances of the instant offense. Rather, the only likely use of Frank's assault conviction was to show that he acted in conformity with

his criminal record in assaulting Abeita. Such use plainly is prohibited by Rule 404(b). The district court in no way abused its discretion in excluding the evidence. See Record, 873 F.2d at 1373.

IV.

Bernard next argues that he was entitled to a two-level reduction in sentence for a minor role in the offense. The Sentencing Guidelines provide for a two-level reduction in offense level "[i]f the defendant was a minor participant in any criminal activity" United States Sentencing Comm'n, Guidelines Manual, § 3B1.2(b) (1989). "For purposes of § 3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." Id. comment. (n.3). Here, even if Bernard was found guilty as an aider and abettor, 18 U.S.C. § 2(a) provides that whoever aids and abets an offense against the United States "is punishable as a principal." Thus, aider and abettor liability is not a legal determination that a person is "less culpable" than if he acted as a principal.

Bernard argues that the district court's factual determinations concerning defendant's lack of a mitigating role in the offense are clearly erroneous and that the district court committed legal error by not recognizing its authority to go behind the verdict and consider defense counsel's representations concerning a post-verdict poll of six jurors concerning the

defendant's role in the offense. See United States v. Rutter, 897 F.2d 1558, 1560 (10th Cir. 1990) (under Sentencing Guidelines, factual determinations are reviewed under clearly erroneous standard; legal questions are reviewed de novo). We don't see it that way. The district judge is in command of factual determinations when it comes to sentencing and is in no way bound by the results of the post-verdict conversations with jurors conducted by the defense. This is not a situation in which the district court fails to appreciate its discretion in adjusting for a defendant's role in the offense. Rather, after trying the case, the district court credited the victim's identification of Bernard as the perpetrator. Rec. vol. III at 268, 271. This subsidiary finding of fact is not clearly erroneous. Moreover, the district court's entirely permissible view of the facts, id. at 271-73, supports its ultimate finding that no reduction in offense level under § 3B1.2(b) was appropriate. See United States v. Havens, No. 89-2115, slip op. at 7-8 (10th Cir. Aug. 6, 1990) [1990 WL 110271] (applying clearly erroneous standard to role in the offense determinations under U.S.S.G. § 3B1.2).

V.

Bernard finally argues that the district court erred in refusing his request for a two-level reduction in offense level for acceptance of responsibility. The Guidelines provide for such a reduction "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility his criminal

conduct[.]" U.S.S.G. § 3E1.1(a). "'The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation.'" United States v. Wach, 907 F.2d 1038, 1040 (10th Cir. 1990) (quoting U.S.S.G. § 3E1.1, comment. (n.5)). In light of the district court's subsidiary factual findings at sentencing which are supported by record evidence, we cannot say that the district court was clearly erroneous in its determination that Bernard had not accepted responsibility for his criminal conduct under § 3E1.1. See Wach 907 F.2d at 1040. The denial of Bernard's request a two-level reduction for acceptance of responsibility therefore must stand.

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge