

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OCT - 2 1990

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD SHAWN MARKLEY and
LISA ANN MARKLEY,
Defendants-Appellants.

Nos. 90-3022
90-3023
(D.C. No. 89-10039-01)
(D. Kansas)

ORDER AND JUDGMENT*

Before LOGAN, MCWILLIAMS, and ANDERSON, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendants Richard Shawn Markley and Lisa Lynn Markley appeal their convictions for conspiracy and possession with intent to distribute more than 500 grams of cocaine (counts I and III) and distribution of four ounces of cocaine (count II), in violation of

* 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.

21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. § 2. On appeal, they argue that the district court erred in (1) denying Lisa Markley's motion for judgment of acquittal on counts I and II based on insufficient evidence; (2) allowing the government to introduce evidence of prior uncharged acts pursuant to Fed. R. Evid. 404(b); (3) refusing to give a more restrictive Fed. R. Evid. 404(b) limiting instruction; (4) refusing to instruct the jury on simple possession of cocaine in regards to count III; (5) refusing to delete language from the jury instructions on defendants' right not to testify; and (6) imputing possession and control of all the recovered cocaine to both defendants at sentencing. We affirm.

I

Defendant Lisa Markley first argues that the district court erred by denying her motion for acquittal on counts I and II (conspiracy and distribution). She asserts that the government's chief piece of evidence, a recording of a telephone conversation between her and an informant, lacked the substance necessary to convict her of conspiracy to distribute cocaine. Further, she contends that the evidence showed that she was a mere bystander in the sale of cocaine to the informant, which is insufficient to support her conviction for distribution of cocaine.

Fed. R. Crim. P. 29(a) provides that on a motion for acquittal, the issue is whether, taken in the light most favorable to the government, there is substantial evidence from which a reasonable jury might properly find the defendant guilty beyond a reasonable doubt. United States v. Peveto, 881 F.2d 844, 860 (10th Cir.), cert. denied, 110 S. Ct. 348 (1989). The standard is

the same for appellate review. Id. In the instant case, an informant testified that, based on his past encounters with Lisa Markley, the exchange of words over the telephone indicated that she was in a position to sell him cocaine.¹ In addition, she was present at the time of the cocaine sale that was the subject of count II, and later was apprehended with over 400 grams of cocaine in her vehicle and .17 grams in her purse. Based on this evidence, a reasonable jury could conclude beyond a reasonable doubt that defendant Lisa Markley was involved in a conspiracy to distribute and participated in the sale of cocaine.

II

Defendants next contend that the district court improperly admitted evidence of prior uncharged crimes under Fed. R. Evid. 404(b). The uncharged crimes involved earlier cocaine sales between defendants and the government's informant. Defendants argue that such evidence should have been allowed only as rebuttal and that the district court made insufficient findings before allowing the introduction of this evidence.

Fed. R. Evid. 404(b) provides that evidence of other bad acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before admitting this type of evidence, however, this court has held that the government must first demonstrate how the proffered evidence is relevant to an issue in the case. The district court

¹ The court grants defendants' motion, concurred in by the government, to supplement the appellate record with document #65, the tape of the telephone conversation introduced at trial, as government's ex. 1. The court heard and considered that tape recording in deciding the appeal.

then must weigh the probative value against potential prejudice and articulate the precise basis for admitting the evidence. United States v. Record, 873 F.2d 1363, 1375 & n.7 (10th Cir. 1989).

An examination of the record indicates that the requirements of Record were satisfied in this case. The government articulated its basis for admitting the prior drug transactions, focusing on intent and lack of mistake. II R. 64-68. The district court then considered the probative value of the evidence against potential prejudice and articulated its reason for admitting the evidence. Id. at 77-79. The district court did not err in admitting the Fed. R. Evid. 404(b) evidence.

III

In connection with the district court's Fed. R. Evid. 404(b) ruling, defendant Lisa Markley argues that the court should have given an instruction limiting the evidence to counts I and III (conspiracy and possession with intent to distribute). She contends that the prior bad acts evidence did not apply to the distribution count, and that the instruction given was prejudicial because it permitted the jury to consider the evidence as to all counts. This argument, although presented separately, is identical to that discussed in Part II. The district court determined that the Fed. R. Evid. 404(b) evidence would be admitted as to all counts. II R. 75. As we have held above, the district court acted properly in its determinations.

IV

Defendants next argue that the district court abused its discretion in refusing to give a lesser included offense instruction in connection to count III (possession with intent to distribute). They contend that the evidence presented supported an instruction on simple possession of cocaine.

A lesser included offense instruction is warranted if (1) there has been a proper request; (2) the lesser included offense consists of some, but not all, of the elements of the offense charged; (3) the element differentiating the two offenses is a matter in dispute; and (4) a jury could rationally convict on the lesser offense and acquit on the greater. United States v. Young, 862 F.2d 815, 820 (10th Cir. 1989). In the present case, defendants did not satisfy the third and fourth requirements stated in Young. Defendants presented no evidence that the seized cocaine was for personal use. Further, the sale evidence and the quantity of cocaine seized (over 500 grams) does not support a charge of simple possession. Thus, we find no error in the court's refusal to give the lesser included offense instruction.

V

Defendants argue that the district court's instruction on a defendant's right not to testify was improper because it included references to a defendant who chooses to testify. Defendants, who did not testify, assert that such reference was highly prejudicial and an abuse of discretion. Although we agree with defendants that a portion of the instruction was inapplicable, when viewed in light of the very substantial evidence against the defendants, we

hold that any error in this regard was harmless.

VI

Finally, defendants argue that the district court erred in determining the quantity of cocaine possessed by each defendant for purposes of sentencing. The district court determined that defendants possessed jointly 692 grams of cocaine. Lisa Markley contends that she possessed only the amount she was apprehended with, 443.8 grams, and not any amounts found in a trailer owned by her brother. Richard Markley asserts that he possessed only the 83 grams he sold and the 165.7 grams of cocaine found in the trailer but not any possessed by his sister.

Fact findings by the district court under the Sentencing Guidelines are reviewed under the clearly erroneous standard. United States v. Harris, 903 F.2d 770, 778 (10th Cir. 1990). The quantum of proof required for factual determination under the Guidelines is a preponderance of the evidence, with the burden of proof allocated to the government for sentence increases. United States v. Kirk, 894 F.2d 1162, 1164 (10th Cir. 1990). Here, the government presented evidence that both defendants were living in the trailer and that Lisa Markley removed the 443.8 grams of cocaine from the trailer just before her arrest. Further, the evidence showed that both defendants were present during a three ounce sale of cocaine to an informant at the trailer. Based on these facts, the government met its burden, and we cannot say that the district court's determination of joint possession was clearly erroneous.

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge