

FILED
United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

Christopher M. Wolpert
Clerk of Court

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 20-3184

ORLANDO CORTEZ-NIETO,

Defendant - Appellant.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 20-3189

JESUS CERVANTES-AGUILAR,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Kansas
(D.C. Nos. 2:18-CR-20030-JAR-1 & 2:18-CR-20030-JAR-2)

Paige Nichols, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, District of Kansas, for Defendant - Appellant Orlando Cortez-Nieto.

Candace Caruthers, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, and Shira Kieval, Assistant Federal Public Defender, on the briefs), Office of the Federal Public Defender, Districts of Colorado and Wyoming, for Defendant - Appellant Jesus Cervantes-Aguilar.

James A. Brown, Assistant United States Attorney (Duston J. Slinkard, Acting United States Attorney, and Emma J. Staats, Legal Intern, with him on the brief), Office of the United States Attorney, District of Kansas, for Plaintiff - Appellee.

Before **HARTZ**, **HOLMES**, and **BACHARACH**, Circuit Judges.

HARTZ, Circuit Judge.

Defendants Orlando Cortez-Nieto and Jesus Cervantes-Aguilar were convicted by a jury of four methamphetamine offenses committed within 1,000 feet of a playground. After their convictions Defendants filed motions for judgment of acquittal. The district court granted the motions in part, setting aside the convictions on the ground that there was insufficient evidence that any of the offenses of conviction occurred within 1,000 feet of a playground but entering judgments of conviction on lesser-included offenses—the four offenses without the proximity element.

In their consolidated appeal, Defendants raise three issues. First, they claim (a) that a jury instruction stating that the jury should not consider the guilt of any persons other than Defendants improperly precluded the jury from considering that two government witnesses were motivated to lie about Defendants to reduce or eliminate their own guilt and (b) that the prosecutor improperly magnified this error by explicitly arguing that the jurors could not consider the witnesses' guilt in assessing their credibility. We reject this claim because the instructions, taken as a whole, were unlikely to mislead the jury and the prosecutor's argument likely

reduced the possibility of misunderstanding the instructions. Second, Defendants contend that the district court should not have imposed judgments of conviction on the lesser-included offenses after determining that the original charges had not been proved because the jury had not been instructed on the lesser-included offenses. We hold that the district court simply performed its duty, and Defendants were not prejudiced by the absence of lesser-included-offense instructions. Third, Defendants assert that remand is necessary to correct a clerical error in the judgment forms. The government concedes the point, and we agree. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district-court judgments except that we remand for correction of the clerical error.

I. BACKGROUND

On December 1, 2017, a fire broke out at a residence on Cleveland Avenue in Kansas City, Kansas. Firefighters and a search-and-rescue crew responded to the scene, but when they arrived the fire was already extinguished, and it had caused little to no damage to the residence. No one was in the house. The house was within walking distance of Klamm Park, which has a baseball field, tennis courts, and playgrounds.

Investigators looking for the cause of the fire discovered inside the residence some \$200,000 worth of methamphetamine and various items used in methamphetamine manufacturing, including empty cans of acetone, heating devices, thermometers, pails, pots, and coolers. The investigators suspected that an apparatus

set up in the residence's basement was a clandestine methamphetamine lab designed to convert liquid methamphetamine to its crystalline form.

Further search of the residence turned up several receipts (dated less than 10 days before the fire) for goods purchased from general-merchandise, hardware, and automotive stores in Kansas City. Among other things, the receipts listed boxes, coolers, thermometers, pails, and spray bottles. And, most notably, 11 receipts reflected the purchase of acetone, sometimes in quantities as large as a gallon (the function of acetone in producing marketable methamphetamine was not disputed at trial). Law-enforcement officers obtained video-surveillance footage from the stores named on the receipts, which showed Defendants purchasing the items on the receipts.

Defendants were arrested and indicted on four counts: (1) conspiracy to manufacture over 50 grams of methamphetamine within 1,000 feet of real property comprising a playground; (2) manufacturing and attempting to manufacture 50 grams or more of methamphetamine within 1,000 feet of a playground; (3) possession with intent to distribute 50 grams or more of methamphetamine within 1,000 feet of a playground; and (4) opening, using, and maintaining a residence for the purpose of manufacturing methamphetamine within 1,000 feet of a playground. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), 846, 856(a)(1), 860(a).

Defendants did not challenge at trial, and have conceded on appeal, that they bought the materials listed on the receipts found at the Cleveland Avenue residence. But they have argued that they had no knowledge of the methamphetamine lab and

only purchased those materials at the request of others. The issue of knowledge was the focus of the trial.

To tie Defendants to the Cleveland Avenue residence, the government offered a fair amount of nontestimonial evidence. A FedEx parcel shipped on November 22 and addressed to Mr. Cortez-Nieto at the residence was found in the house, as was a sticky note on which was written the name “Orlando” and a phone number for which Mr. Cortez-Nieto was the named subscriber. In addition, police found within the home a camouflage-style coat that matched the coat worn by Mr. Cortez-Nieto on the videos of his store purchases. As for Mr. Cervantes-Aguilar, officers found a receipt for sending a money transfer on November 24 that bore his name and the Cleveland Avenue address. They also found a “ledger” (a blue spiral book of index cards on which were recorded apparent financial transactions), which testimony (as explained below) tied to Mr. Cervantes-Aguilar. And investigators obtained a Kansas certificate of title dated November 13 showing that someone acting with a power of attorney for Mr. Cervantes-Aguilar purchased a Honda on November 12 and listed Mr. Cervantes-Aguilar’s address as the Cleveland Avenue residence. (Mr. Cervantes-Aguilar changed the address on the title a few days after the fire.)

Two siblings connected to the house, Celia Suarez and Victor Suarez, were witnesses for the prosecution. Celia had rented the Cleveland Avenue house a few weeks before the fire. She testified under an agreement with the government to provide complete and truthful information; in return, the government promised that her statements would not be used against her in any federal prosecution. Celia told

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