

APPENDIX

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 24 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HECTOR MARTINEZ-ROBOS,

Defendant-Appellant.

No. 20-50205

D.C. No.

3:19-cr-00369-DMS-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISELA ROSA ACUNA,

Defendant-Appellant.

No. 20-50341

D.C. Nos.

3:19-cr-00369-DMS-2

3:19-cr-00369-DMS

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, Chief District Judge, Presiding

Argued and Submitted June 6, 2022
Pasadena, California

Before: M. SMITH, BADE, and VANDYKE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants Rosa Isela Acuna and Hector Martinez-Robos ask this court to vacate their convictions and Martinez-Robos' sentence for importation of cocaine in violation of 21 U.S.C. §§ 952, 960 and 18 U.S.C. § 2. The parties are familiar with the facts, and so we do not recount them here. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We affirm.

1. Both defendants argue that the district court erred in not instructing the jury that their co-defendant's out-of-court statements could not be used against the non-declarant defendant pursuant to *United States v. Sauza-Martinez*, 217 F.3d 754 (9th Cir. 2000). However, *Sauza-Martinez* requires a limiting instruction in a joint trial when incriminating hearsay evidence is admissible against one defendant but not another. 217 F.3d at 760. Here, the defendants' statements were not hearsay because they were not offered for the truth of the matter asserted. *See* Fed. R. Evid. 801(c)(2). *Sauza-Martinez* does not apply, so no limiting instruction was required.

2. Both defendants contend that cell phone photos of a crystalline substance were inadmissible against them pursuant to Federal Rules of Evidence 403 and 404(b). We disagree. The photos tend to prove a material point and they are sufficiently similar to the charged offenses. *See United States v. Vo*, 413 F.3d 1010, 1018 (9th Cir. 2005). The photos were taken and stored on Acuna's phone, and the case agent testified that the substance appeared to be methamphetamine. The district court was not required to give a limiting instruction that the photos were

inadmissible against Martinez-Robos. The photos were permissibly admitted against Martinez-Robos because there was sufficient evidence of his involvement in the other act and there was no unfair prejudice.

3. The district court also did not plainly err in giving the jury instructions on the mens rea requirements for the 21 U.S.C. § 960(a) importation offense that did not follow *McFadden v. United States*, 576 U.S. 186 (2015). *McFadden* concerned a statute that is not at issue here. Neither the Supreme Court, this court, nor the model jury instructions has extended *McFadden* to the 21 U.S.C. § 960(a) importation offense charged here.

4. The prosecutor did not improperly rely on hearsay statements of Martinez-Robos in closing as evidence of Acuna's guilt. Martinez-Robos' statements were not offered for the truth of the matter asserted and so were not hearsay. *See* Fed. R. Evid. 801(c)(2). The Confrontation Clause does not apply to non-hearsay, and so the prosecutor was free to use Martinez-Robos' statements against Acuna. *See United States v. Mitchell*, 502 F.3d 931, 966 (9th Cir. 2007).

5. As to Martinez-Robos, the prosecutor did not violate *Griffin v. California*, 380 U.S. 609 (1965), make an improper argument, or misstate the evidence during summation. The prosecutor's reference to Martinez-Robos' decision not to testify was not improper because it did not suggest that the jury could use his decision as evidence of guilt. *See Lakeside v. Oregon*, 435 U.S. 333, 338 (1978). The

prosecutor did not misstate the defense expert's testimony on cross examination, and permissibly asked the jury to make inferences from it.

6. No new trial is required for either defendant based on a theory of cumulative error. Because we find no errors, there is also no cumulative error.

7. Finally, we note that Martinez-Robos concedes that his sentence is correct under current law. *See United States v. Collazo*, 984 F.3d 1308, 1321-29 (9th Cir. 2021) (en banc). We express no view on whether his sentence must be reversed if the view of the *Collazo* dissent were governing law.

AFFIRMED.



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Proposed Legislation

United States Code Annotated

Title 21. Food and Drugs (Refs & Annos)

Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)

Subchapter II. Import and Export (Refs & Annos)

21 U.S.C.A. § 960

§ 960. Prohibited acts A

Effective: December 21, 2018

[Currentness](#)

(a) Unlawful acts

Any person who--

- (1) contrary to [section 825](#), [952](#), [953](#), or [957](#) of this title, knowingly or intentionally imports or exports a controlled substance,
 - (2) contrary to [section 955](#) of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or
 - (3) contrary to [section 959](#) of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,
- shall be punished as provided in subsection (b).

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving--

(A) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of--

- (i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
- (ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 280 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.¹

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. Notwithstanding [section 3583 of Title 18](#), any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(2) In the case of a violation of subsection (a) of this section involving--

(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(B) 500 grams or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 28 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(G) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.¹

the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding [section 3583 of Title 18](#), any sentence imposed under this paragraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or flunitrazepam, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4), be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding [section 3583 of Title 18](#), any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results.

(4) In the case of a violation under subsection (a) with respect to less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants regardless of weight, less than 10 kilograms of hashish, or less than one kilogram of hashish oil, the person committing such violation shall be sentenced in accordance with [section 841\(b\)\(1\)\(D\)](#) of this title.

(5) In the case of a violation of subsection (a) involving a controlled substance in schedule III, such person shall be sentenced in accordance with [section 841\(b\)\(1\)](#) of this title.

(6) In the case of a violation of subsection (a) involving a controlled substance in schedule IV, such person shall be sentenced in accordance with [section 841\(b\)\(2\)](#) of this title.

(7) In the case of a violation of subsection (a) involving a controlled substance in schedule V, such person shall be sentenced in accordance with [section 841\(b\)\(3\)](#) of this title.

(c) **Repealed.** [Pub.L. 98-473, Title II, § 225](#), formerly § 225(a), Oct. 12, 1984, 98 Stat. 2030, as amended by [Pub.L. 99-570, Title I, § 1005\(c\)](#), Oct. 27, 1986, 100 Stat. 3207-6

(d) Penalty for importation or exportation

A person who knowingly or intentionally--

- (1) imports or exports a listed chemical with intent to manufacture a controlled substance in violation of this subchapter or subchapter I;

(2) exports a listed chemical in violation of the laws of the country to which the chemical is exported or serves as a broker or trader for an international transaction involving a listed chemical, if the transaction is in violation of the laws of the country to which the chemical is exported;

(3) imports or exports a listed chemical knowing, or having reasonable cause to believe, that the chemical will be used to manufacture a controlled substance in violation of this subchapter or subchapter I;

(4) exports a listed chemical, or serves as a broker or trader for an international transaction involving a listed chemical, knowing, or having reasonable cause to believe, that the chemical will be used to manufacture a controlled substance in violation of the laws of the country to which the chemical is exported;

(5) imports or exports a listed chemical, with the intent to evade the reporting or recordkeeping requirements of [section 971](#) of this title applicable to such importation or exportation by falsely representing to the Attorney General that the importation or exportation qualifies for a waiver of the 15-day notification requirement granted pursuant to [paragraph \(2\)](#) or [\(3\)](#) of [section 971\(f\)](#) of this title by misrepresenting the actual country of final destination of the listed chemical or the actual listed chemical being imported or exported;

(6) imports a listed chemical in violation of [section 952](#) of this title, imports or exports such a chemical in violation of [section 957](#) or [971](#) of this title, or transfers such a chemical in violation of [section 971\(d\)](#) of this title; or

(7) manufactures, possesses with intent to distribute, or distributes a listed chemical in violation of [section 959](#) of this title.²

shall be fined in accordance with Title 18, imprisoned not more than 20 years in the case of a violation of paragraph (1) or (3) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (3) involving a list I chemical, or both.

CREDIT(S)

(Pub.L. 91-513, Title III, § 1010, Oct. 27, 1970, 84 Stat. 1290; Pub.L. 98-473, Title II, §§ 225, formerly 225(a), 504, Oct. 12, 1984, 98 Stat. 2030, 2070; renumbered § 225 and amended Pub.L. 99-570, Title I, §§ 1004(a), 1005(c), 1302, 1866(e), Oct. 27, 1986, 100 Stat. 3207-6, 3207-15, 3207-55; Pub.L. 100-690, Title VI, §§ 6053(c), 6475, Nov. 18, 1988, 102 Stat. 4315, 4380; Pub.L. 101-647, Title XII, § 1204, Title XXXV, § 3599J, Nov. 29, 1990, 104 Stat. 4830, 4932; Pub.L. 103-200, §§ 4(b), 5(b), Dec. 17, 1993, 107 Stat. 2338, 2339; Pub.L. 103-322, Title IX, § 90105(a), Title XXXIII, § 330024(d)(2), Sept. 13, 1994, 108 Stat. 1987, 2151; Pub.L. 104-237, Title I, § 102(c), Title III, § 302(b), Oct. 3, 1996, 110 Stat. 3100, 3105; Pub.L. 104-305, § 2(b)(2)(B), (C), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(b), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, § 3(b)(2), Feb. 18, 2000, 114 Stat. 9; Pub.L. 107-273, Div. B, Title III, § 3005(b), Nov. 2, 2002, 116 Stat. 1806; Pub.L. 109-177, Title VII, §§ 716(b)(1)(A), 717, Mar. 9, 2006, 120 Stat. 267; Pub.L. 110-425, § 3(i), Oct. 15, 2008, 122 Stat. 4832; Pub.L. 111-220, §§ 2(b), 4(b), Aug. 3, 2010, 124 Stat. 2372; Pub.L. 113-260, § 3(b), Dec. 18, 2014, 128 Stat. 2931; Pub.L. 115-391, Title IV, § 401(b), Dec. 21, 2018, 132 Stat. 5221.)

Notes of Decisions (332)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. The period probably should be a comma.

21 U.S.C.A. § 960, 21 USCA § 960

Current through P.L. 117-167. Some statute sections may be more current, see credits for details.

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