

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :       CRIMINAL  
  :       :  
  :       :  
  :       :  
  :       :  
CLINTON LACKEY                             :       NO. 01-515

MEMORANDUM

Dalzell, J.

June 7, 2002

After a three day jury trial, defendant Clinton Lackey was convicted of possession with intent to distribute a controlled substance, cocaine base ("crack"), in violation of 18 U.S.C. § 841(a), possession with intent to distribute a controlled substance within one thousand feet of a school in violation of 21 U.S.C. § 860(a), and carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). Before us is Lackey's motion for judgment of acquittal in which he challenges the sufficiency of the evidence adduced at trial in two respects.

Lackey, who acknowledges that he possessed the crack found on him, first argues that there was insufficient evidence to prove beyond a reasonable doubt that he intended to distribute it -- an essential element of possession with intent to distribute a controlled substance under 21 U.S.C. § 841(a) -- and, hence, of the derivative offenses. As a second claim, Lackey surmises from the fact that the jury sent out a request for a clarifying instruction on the meaning of "distribute," and whether the sharing of drugs falls within it, that the jury convicted him based upon a finding that he intended to share the

crack. That finding, Lackey argues, cannot be reconciled with the evidence since, he asserts, "no evidence was offered as to the 'sharing' of the particular drugs in question." Furthermore, Lackey reasons that if he was indeed convicted of drug trafficking because he intended to share the drugs, his conviction for carrying a firearm during and in relation to the drug trafficking offense must be set aside because the only evidence offered that the firearm was carried in relation to drug trafficking pertained to dealing, and not sharing. We consider these weighty arguments in turn and at some length.

#### Legal Standard

On a post-trial motion for judgment of acquittal challenging the sufficiency of the evidence, our review of a jury verdict is "highly deferential." United States v. Hart, 273 F.3d 363, 371 (3d Cir. 2001) (quoting United States v. Helbling, 209 F.3d 226, 238 (3d Cir. 2000)). "It is not for us to weigh the evidence or to determine the credibility of witnesses." United States v. Aguilar, 843 F.2d 155, 157 (3d Cir. 1988). We "must view the evidence in the light most favorable to the verdict, and must presume that the jury has properly carried out its functions of evaluating credibility of witnesses, finding the facts, and drawing justifiable inferences," United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." Aguilar, 843 F.2d at 157 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "We must determine whether the evidence submitted at trial, when viewed in the light most favorable to the government, would allow a rational trier of fact to convict." Hart, 273 F.3d at 371 (quotations omitted).

We now rehearse the pertinent evidence against these standards.

#### The Evidentiary Record

The Government established the circumstances of Lackey's arrest through the testimony of surveillance officer Michael Spicer, backup patrol arresting officers Timothy Riley and William Landis, and driver Ameen Lee.

On January 3, 2001, the Philadelphia Police Department's Narcotics Strike Force conducted surveillance of 620 North Shedwick Street, a suspected drug house. When Officer Spicer saw an individual, later identified as Clinton Lackey, enter and exit the front door of the house and return to a white Mazda, he radioed backup patrol officers. Officers Riley and Landis stopped the Mazda three blocks away. They observed Lackey in the passenger seat holding a bag of marijuana. Lackey had in his pocket a bag containing 2.045 grams of crack in 41 tinted packets. In Lackey's waistband he had a nine millimeter semiautomatic handgun. Lackey did not have a pager, cell phone, or cash. The officers searched Lackey and the car, but did not

find paraphernalia for drug distribution (such as scales, cutting materials, or bags), or paraphernalia for drug use (such as cigars or cutting paper).

Officer Spicer, testifying as an expert on narcotics trafficking, opined that the circumstances of Lackey's crack possession were consistent with distribution and not use. Spicer based his opinion on his experience in making around five hundred drug related arrests that users of drugs typically do not carry firearms. Spicer stated: "I've never arrested someone who I arrested who I deemed to be a user or buyer who had a firearm." What is more, due to the severe penalties under Pennsylvania law for carrying unlicensed firearms, carrying such a weapon would bring the offense of drug possession to a "higher level," Spicer stated, and users of drugs do not tend to risk the additional "heat."

Spicer testified that the quantity of crack Lackey possessed, 2.045 grams packaged in forty-one bags<sup>1</sup>, was consistent with distribution rather than personal use. Spicer reported that in his experience crack users do not buy in bulk. Users buy small amounts, generally one to two bags, with ten bags being a large one-time buy. He explained that crack users buy only small amounts at a time to avoid overdosing and elevating their offenses to felony level. The two grams of crack Lackey had,

---

<sup>1</sup> Each bag was about thumbnail size. The trial testimony established that the bags in question were "nickel" or "nick" bags. A "tre" bag sells for three dollars, a "nickel" bag for five dollars, and a "dime" bag for ten dollars.

Spicer stated, cannot possibly be smoked in a single day. Although it could be smoked in three days, such use would be "extreme."

Spicer observed that Lackey's appearance and physique, which he had witnessed when Lackey approached and left the house on North Shedwick Street, was not that of a crack user. Lackey was heavysset, not emaciated. He did not exhibit jitteriness or "the clap," the constant motion of the jaw endemic to crack users that is most intense when they have not gotten their fixes. Spicer noted that Lackey traveled some distance to buy crack, in contrast to the typical crack user who buys drugs close to home. Lastly, Spicer refuted the suggestion that Lackey could use the 1.78 grams of marijuana and 2.045 grams of crack to "turbo," or smoke combined, in that there was not enough marijuana to combine with crack to make turbos. He also reported that heavy users of crack do not smoke turbos because doing so dilutes the effect of crack.

On cross-examination, Lackey's able counsel elicited that Spicer has never formally debriefed a crack addict or a crack dealer. Also, Spicer testified that it is more profitable for a drug seller to buy a rock of cocaine, cook it, cut it and process it, and then sell it, than to buy and resell the drug in processed form.

Andrew Callaghan, a Philadelphia Police Detective who

works in the DEA Task Force<sup>2</sup>, also testified as a narcotics expert. Callaghan shared Spicer's opinion that the circumstances rendered Lackey's possession of crack consistent with distribution but not use, but that his possession of marijuana was consistent with use. Callaghan stressed the importance of Lackey's firearm. The officer testified that in about 1600 drug related arrests he has made, he has never arrested a user with a firearm. He has, however, arrested dealers with firearms. Callaghan attributed this disparity to two factors. Drug users avoid the heightened criminal exposure coming from possessing a gun. In Philadelphia, it is a misdemeanor to possess drugs, and a felony to possess a gun. Second, Callaghan testified that most drug users sell their guns for crack. But drug dealers carry firearms to protect their operations.

Callaghan noted the other circumstances attending Lackey's arrest. Lackey did not possess drug use paraphernalia, in contrast with most of the arrests Callaghan has made of drug users, who had such paraphernalia. The reason crack users carry such paraphernalia is because they need to smoke right away. Lackey's hygiene, appearance, and weight were inconsistent with crack addiction.

Callaghan turned to the quantity of crack, two grams. Callaghan stated that the heaviest users he has met smoked one gram per day. Callaghan stated that he has never seen a user buy

---

<sup>2</sup> Although the Philadelphia Police Department employs him, Callaghan works for the DEA Task Force and reports to the DEA.

forty-one bags in one transaction. While he has seen users buy this quantity of crack, those heavy users did so in bulk and not in small bags. For the same two hundred dollars that the bags found on Lackey are worth, a heavy user can acquire a 3.5 to 7 gram rock. Callaghan testified that while it is possible that Lackey was addicted to crack, it is not possible that he smoked two grams himself because he did not display the manifestations of heavy and prolonged crack use, such as loss of employment, depletion of resources, and loss of weight. In fact, Lackey maintained and even gained weight in the months before the arrest.

The defense presented the testimony of Clinton Lackey and his "wife", Deonna Mears, which, if believed, showed that Lackey abused crack. Lackey, a high school graduate, had several jobs; he testified that he used the income from these jobs to support his crack habit. Lackey stated that he became turned on to crack in October of 1998, at the age of 17. A friend, Mr. Falk, shared a joint with him in his car. Mr. Falk also brought him to a house on North Shedwick Street where a man named "Dread" sold crack and other drugs. Lackey stated that shortly after receiving the introduction from Mr. Falk he began going to 620 North Shedwick Street himself. He stated he began using crack "on and off," and his usage increased after he graduated from high school in June of 1999. His habit was at its most severe between late 2000 and mid-2001. He continued using crack after his arrest in this case. Lackey testified that he needed crack

and that "when [he] had the money [he'd] cop all [he] could cop" until he ran out. Lackey smoked three to four times a day. Each of these highs consisted of three to four bags of crack combined with marijuana if he smoked a "blunt" and four to five bags of crack combined with marijuana if he smoked a "Dutchmaster." Lackey stated that by late 2000 he was spending \$100 to \$200 per week, buying crack every other day, in varying amounts. He stated he only bought crack from Dread.

Lackey testified that he carried the nine millimeter handgun found in his waistband during his arrest for self protection. He stated that in November 1999 a close "friend" of his tried to rob him at gunpoint. He said that three weeks later he bought the nine millimeter handgun to protect himself against other confrontations with this "friend".

The defense presented a photograph of Clinton Lackey smoking crack. The photograph was reportedly taken in May of 2000. Lackey testified that other than the photographer, "Syed", Mr. Falk (who introduced him to crack), Deonna Mears, and a friend Nycole Webb (who also testified), no one else knew about his crack habit. Lackey also testified that he discovered at a party at a bar that drinking alcohol improves a crack high. Lackey also admitted that his weight did not decline during his time of allegedly heavy crack use. He testified that he weighed 200 pounds in November 1999, 200 pounds in November 2000, and 210 pounds in January 2001.

Finally, Lackey testified that on January 3, 2001 he

bought the crack only for himself. He said he had marijuana at home already. He testified he slipped Dread a hundred dollars, and Dread said "I'll take care of you." On seeing that Dread gave him more crack than he paid for, two hundred dollars' worth, Lackey said "Bet," or that he had gotten a good deal.

Lackey's "wife", Deonna Mears, stated that she observed Lackey smoking crack in October of 2000. She also found rolled cigar paper, plastic packets containing residue in Lackey's clothes when doing the laundry, and boxes of cigars in his car. She stated that Lackey became aggressive and that he fell behind in paying the bills. Mears moved out in late December.

The defense also presented a Department of Justice study on incidence of firearm possession by crime. The study captured a national sample of state and federal inmates in urban and rural areas and found, in pertinent part:

Prison inmates

State

Federal

<u>Offense</u>	<u>Number</u>	<u>Percent who possessed a firearm during offense</u>	<u>Number</u>	<u>Percent who possessed a firearm during offense</u>
<u>Drug offense</u>				
Possession	91,511	7.8%	9,959	7.0%
Trafficking	116,578	8.6%	39,769	9.1%

Confronted with these statistics on cross-examination, Officer Spicer and Detective Callaghan noted that the study reported

firearm possession rates in the United States generally, not in Philadelphia. They testified that the rates in the study do not correspond with their experience at all. As noted, Officer Spicer and Detective Callaghan testified they have made hundreds of arrests for drug possession<sup>3</sup> and never once found a firearm.

The defendant's narcotics expert, Robert Devlin, testified that Lackey's crack possession was consistent with both distribution and personal use, and that, without more evidence, he could not rule out either one as a possibility.

Devlin testified that two grams of crack is not a lot of crack for an advanced user of crack to buy, and would last a heavy user about three days. In street parlance, the forty-one bags which Lackey bought are equivalent to two "bundles," a "bundle" being twenty to twenty-five bags. In Devlin's experience a middle to late stage crack user can buy two or three bundles. Devlin opined that Lackey was "well into" the "middle stage" of crack addiction. Devlin added that while crack addiction progresses more rapidly than addiction to other substances, an early to middle stage crack user can be a "functional addict," holding a job. Devlin disputed Spicer's

---

<sup>3</sup> Spicer testified that he has made about 500 drug related arrests and Callaghan that he has made about 1500 to 1600 such arrests. As their testimony involved "specialized knowledge" far beyond what ordinary lay people could be expected to know, and the officers' experience amply qualified them to opine about drug users' and traffickers' habits, we allowed the testimony in each case pursuant to Fed. R. Crim. Evid. 702. Our Court of Appeals recently joined other Circuits in blessing such testimony. See United States v. Perez, 280 F.3d 318, 341-42 (3d Cir. 2002).

claim that Lackey did not show the outward manifestations of crack addiction, stating that, in fact, the symptoms that Officer Spicer pointed to were withdrawal systems, which manifest only when one comes off of a high. He also testified that frequenting a seller who is not in one's neighborhood is normal for a user who wishes to avoid detection and stigma by preserving anonymity, and stay with a seller he trusts. Devlin testified that he has seen crack users arrested with user paraphernalia and without it.

David Leff, the other narcotics expert for the defense, testified that Lackey's possession of the crack was consistent with use rather than distribution. He stated that the quantity of drugs was consistent with what a moderate to heavy user would buy, in that it would last a moderate user, who smokes one-half to one gram a day, two days. Leff observed that the crack was packaged in the most salable form ready for use. He testified that in his experience a dealer is no more or less likely to carry a gun than a user. Leff emphasized that neither paraphernalia for distributing nor using drugs was in evidence.

### Analysis

Were we the finder of fact, we might well have hesitated to convict, finding that there is reasonable doubt as to whether Lackey intended to distribute the crack. To some extent the case involved a battle of experts, with no titans on either side, and a reasonable finder of fact could have found Lackey's experts more persuasive.

But of course we are not the finder of fact. The narrow question we must resolve is whether any rational juror could find beyond a reasonable doubt that Clinton Lackey intended to sell the crack. Viewing the record in the light most favorable to the Government, as we must, a reasonable jury could be persuaded by the presence of the drugs, the gun, and the testimony of Government experts that carrying a gun correlates with drug distribution and not drug use. A rational jury could on this record conclude that a man with Clinton Lackey's stature and physique could not smoke two grams of crack. In short, viewed most favorably to the Government, the jury could beyond a reasonable doubt find from this record that Lackey intended to distribute the drugs in question.

It is also significant that Lackey took the witness stand. As with any witness, the jury could disbelieve parts of Lackey's testimony and on that basis choose to discredit it entirely, thereby on that basis rejecting his claim that he only intended to use the crack.

Finally, evidence helpful to the prosecution emerged in the defendant's case-in-chief. Lackey testified that he maintained and even put on weight before his arrest, when he supposedly smoked crack heavily. The expert testimony was nearly unanimous that steady crack abuse causes weight loss.

For these reasons, we reject the defendant's challenge to the sufficiency of the evidence of his intent to distribute. Recalling that proof beyond a reasonable doubt assumes "a vital

role in the American scheme of criminal procedure" and "operates to give concrete substance to the presumption of innocence", Jackson v. Virginia, 443 U.S. 307, 315 (1979) (quotations omitted), we are confident the jury applied this standard, as it was instructed, rationally to the conflicting views it heard.

As to Lackey's second argument addressed to the sufficiency of evidence, and in particular regarding the sharing of drugs, he may well be right that social sharing and not selling drugs will not sustain a conviction for carrying a firearm during and in relation to the drug trafficking offense.<sup>4</sup> But we need not reach that interesting question because there is no reason to believe that the jury convicted Lackey because they found he intended to share the drugs and not sell them. To impute that finding is nothing more than speculation.

Lackey relies on the fact that the jury sent out to the Court the question: "We are debating the definition of 'distribute'. Is 'sharing' a Blunt distributing?" Also, during

---

<sup>4</sup> To be convicted of the firearm offense, Lackey must have carried the gun not only during but also in relation to the drug trafficking offense of which he is guilty--here, possession with intent to distribute crack. 18 U.S.C. § 924(c). This independent requirement, possessing the firearm "in relation to" the drug trafficking offense, means that the gun must have had some purpose, role, or effect that furthers or facilitates the drug trafficking offense. Smith v. United States, 508 U.S. 223, 237-38 (1993); United States v. Yednak, 187 F. Supp. 2d 419, 424-425 (W.D. Pa. 2002).

In this case, there was testimony that the handgun Lackey carried had a purpose or role to further or facilitate the drug trafficking offense. For example, Callaghan testified that drug dealers carry guns to protect their operations and defend their territory.

their deliberations the jury asked the Court to read back the testimony of Deonna Mears. When we reached the part about how friends of Lackey's whom Mears did not know had come to the house, the jury asked us to stop.

As to the question, the jury perceptively noticed that we neglected to include a definition of "distribute" in our charge. We had, without objection, given only a definition of "intent to distribute." The jury's question thus properly asked us to close an open loop. We responded with the following supplemental charge from Judge Sand's treatise:

The word "distribute" means to deliver a narcotic. "Deliver" is defined as the actual, constructive or attempted transfer of a narcotic. Simply stated, the words distribute and deliver mean to pass on, or to hand over to another, or to cause to be passed on or handed over to another, or to try to pass on or hand over to another, narcotics.

Distribution does not require a sale.

Hon. Leonard B. Sand, Modern Federal Jury Instructions (MB) ¶ 56.01, Inst. 56-11 (June 1993).

As to Mears's testimony about "friends of Clinton's" coming over to the house whom she did not know, we cannot say what significance the jury ascribed to this testimony. That testimony, however, is as consistent with an inference that Lackey sold drugs in the house as that he shared them gratuitously. Indeed, the fact that the visitors were strangers would seem more consistent with selling than socializing.

We of course cannot know why the jury asked the

questions it did and what specific facts led it to convict Lackey. But we must presume that the jury carried out its functions properly and followed both our original charge and supplemental instruction. Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985)("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."); see also Coleman, supra, 811 F.2d at 807; United States v. Newby, 11 F.3d 1143, 1147 (3d Cir. 1993).

For all these reasons, we conclude that the evidence, viewed favorably to the Government, proved beyond a reasonable doubt that Lackey intended to distribute the drugs. We also hold that the evidence also proved beyond a reasonable doubt that Lackey carried the gun "in relation to" that drug trafficking crime. We therefore are constrained to deny Lackey's motion for acquittal.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :     CRIMINAL  
  :  
  :  
  :  
  :  
  :  
  :  
CLINTON LACKEY                             :     NO. 01-515

ORDER

AND NOW, this 7th day of June, 2002, upon consideration of defendant Clinton Lackey's motion for judgment of acquittal, and the Government's response thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that the defendant's motion is DENIED.

BY THE COURT:

\_\_\_\_\_  
Stewart Dalzell, J.