

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA

v.

WILLIAM J. GRAHAM,

Defendant.

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Case No. 2:01CR10010

OPINION AND ORDER

By: James P. Jones
United States District Judge

Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for United States of America; John P. Bradwell, Shortridge and Shortridge, P.C., Abingdon, Virginia, for Defendant.

In this criminal case, the defendant has moved for a new trial in on the ground that the jury's verdict was against the weight of the evidence. He also contends that the court erred in allowing testimony of co-conspirators' statements. After a careful review of the evidence, the motion will be denied.

I

The defendant William Graham was charged in a five-count indictment with conspiring to possess with intent to distribute and distributing oxycodone, a schedule II narcotic controlled substance (Count One); knowingly possessing with intent to

distribute and distributing oxycodone (Count Two); knowingly using and carrying a firearm during and in relation to, and possessing it in furtherance of, a drug trafficking crime (Count Four); and knowingly possessing a firearm after conviction of a felony (Count Five). Count Three of the superceding indictment, which is at issue in the present motion, charges in part as follows:

On or about or between July 1999 and January 24, 2001, in the Western District of Virginia and elsewhere, the defendant, WILLIAM “BILLY” GRAHAM did engage in a continuing criminal enterprise by committing a continuing series of felony violations of Title 21, United States Code, Section 841(a)(1), which continuing series of violations was undertaken by defendant in concert with at least five other persons with respect to whom defendant occupied a position as organizer, a supervisory position, and some other position of management, and from which continuing series of violations defendant obtained substantial income and resources.

(Superceding Indictment, Count Three, ¶ 1.) After a three-day trial, the jury found the defendant guilty on all counts. The defendant thereafter filed a timely motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. The motion has been briefed and is ripe for decision.¹

In his motion, the defendant primarily argues that the government’s evidence was insufficient to show that the defendant managed, supervised or organized five

¹ I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

individuals to meet the requirements of the continuing criminal enterprise (“CCE”) statute. *See* 21 U.S.C.A. § 848(c) (West 1999).

II

The government contended at trial that Graham and Carson Payne, aided by several associates, operated a drug distribution ring for OxyContin, a powerful pain medication containing oxycodone, between Ohio and Lee County, Virginia. After initially selling OxyContin pills that had been prescribed to them, Graham began illegally obtaining the drug in Ohio for Payne to sell in Virginia. This arrangement continued for several months until the two separated after a disagreement. Payne was arrested shortly after and divulged information about the enterprise to the government.

Payne, who had previously pleaded guilty to OxyContin distribution in this case, was the government’s first witness. He testified that he and the defendant had grown up as neighbors in Ohio and had subsequently become close friends. In 1999 one of Payne’s cousins came from Lee County to visit Payne in Ohio. During a party at Payne’s residence, the party-goers began to crush and snort OxyContin pills that had been prescribed to Payne for a back injury. Payne testified that his cousin informed him that such pills were selling for a dollar per milligram in Lee County.

Based on this information, Payne decided to travel to Lee County to sell his prescription OxyContin. Payne stated that he had informed Graham that he intended to travel to Lee County to “see how everything went.” (Tr. I at 76.) According to Payne, Graham told him that if his sales went well that they would make arrangements to sell Graham’s OxyContin, which had also been prescribed for a back injury.

Payne testified that during this first sales trip, Randy Gibson sold sixty pills that belonged to Payne and the defendant. Payne returned to Ohio and split the proceeds of between \$1200-\$1800 evenly with the defendant. Based on these successful results, Payne and his wife moved to Lee County to sell OxyContin full time. According to Payne, when Graham came to visit him in Virginia a few days later, Payne sold eighty of the defendant’s forty-milligram OxyContin pills and gave him the proceeds.

Payne stated that he and the defendant then had made a deal whereby the defendant would stay in Ohio to obtain pills and Payne would sell them in Lee County. As a part of this arrangement, Graham would travel to Virginia to deliver pills and retrieve money or Payne would meet him halfway between the two places for the exchange. Later, Dan Sanders began driving Payne and the defendant, along with OxyContin pills, between Ohio and Virginia.

According to Payne, other members of this conspiracy to distribute OxyContin included Beverly and Scott Livesay, Steve Hunnicutt, and Chuck Lodge. Lodge

obtained pills from people in Ohio, which Payne, Graham and Sanders transported to Virginia for the Livesays and Hunnicutt to sell.

Steve Hunnicutt was the government's next witness. He testified that he had sold OxyContin for Payne and Graham on several occasions, but that in most instances, Payne had supplied Hunnicutt with the pills. Hunnicutt stated that on November 19, 2000, Graham had called him at home and told him to wire \$922 via Western Union to him in Ohio. Hunnicutt testified that this money had been the proceeds of OxyContin pills that Hunnicutt had sold for the defendant.

Heather Wade testified that she had met the defendant through her friends, the Livesays. As part of her regular schedule, Wade went to the Livesay's mobile home to purchase OxyContin pills and after she and Graham had become acquainted, he began selling pills to her directly. She estimated that she had purchased pills from him on ten to twenty occasions. She testified that she had also traded two guitars to him for OxyContin.

Wade stated that she had also purchased drugs from Graham on behalf of her friends. She described the situation as that she "helped [Graham] move some [OxyContin]." (Tr. I at 148.) According to Wade, when friends would call her on the telephone and ask if she knew where to obtain OxyContin, she would then get their money and purchase drugs from Payne or the defendant. Her motivation for this

activity was that if she aided her friends to obtain drugs, and in the future she had no steady supply, they would help her obtain drugs from their sources.

Scott Livesay testified that he had met Payne at a party at the Livesay's mobile home where they had used OxyContin. Later, Payne introduced the Livesays to Graham and they made a deal to sell OxyContin for Payne and the defendant. Under this arrangement, Payne and the defendant would give the Livesays a quantity of pills and as payment for selling them, the Livesays could keep one pill for every nine that they sold. This system is referred to as "making a pill." (Tr. II at 64.)

Livesay testified that Payne and Graham had delivered pills on multiple occasions and had returned later to receive their money. However, if they did not come to pick up the money, Livesay would wire the money to the defendant in Ohio.

One day Graham and two men who Livesay identified as Dan and Chuck, came to the Livesays' home. Livesay testified that the defendant had counted the money that the Livesays had accumulated from sales of OxyContin and once he had determined that they had the correct amount, he gave Livesay additional pills. According to Livesay, Graham had placed a pistol on the couch and told Livesay that the gun was "to protect his interests." (Tr. II at 20.) Livesay stated that Dan and Chuck had watched and told him that they "didn't want anyone to get ripped off." (*Id.*)

In August 2000, Payne and Graham “had a falling out,” according to Livesay. (Tr. II at 22.) After that point the Livesays began dealing with Graham more often than with Payne, and sold for the defendant at least seven times between August and November 2000. The Livesays had developed serious drug habits and became indebted to the defendant for \$1200 because they used pills that they had agreed to sell.

Livesay said that soon after they became indebted to Graham he and his wife had rented a motel room to sort out their drug and marital problems. A few hours after they checked in, Graham, Dan, and Chuck came to the room. Livesay testified that Chuck had knocked on the door and asked for the Livesay’s son. Livesay opened the door slightly with the chain still in place, but before he could shut the door, Graham came from around the corner and placed his foot in the door to prevent Livesay from closing it. Livesay opened the door because he was afraid that the defendant would shoot it down.

When he opened the door, Graham, Dan and Chuck entered the room brandishing pieces of steel cased in leather. According to Livesay, Dan had pulled the phone cord out of the wall and Chuck repeated, “He ain’t going to like this.” (Tr. II at 31-32.) The defendant demanded his money, but Livesay told him that he did not have it. Thereafter, the defendant began searching the room and found \$700 in cash

that Livesay claimed was the proceeds of his wife and children's cashed social security checks. Graham, Dan, and Chuck then left the room with the money.

Beverly Livesay, Scott's wife, gave similar testimony concerning the arrangement with Payne and Graham for selling OxyContin. In addition, she testified that she had purchased a gun for the defendant in exchange for an OxyContin pill. Livesay testified that she had been afraid that she would be blamed for wrongdoing associated with the gun, so she had asked the defendant to complete a bill of sale for the gun, which he did.

She also testified to the encounter at the motel. According to Livesay, Graham, Dan, and Chuck had searched through the room, including her purse, flipped over the mattress and opened drawers looking for the defendant's money. She stated that Dan had ripped the phone out of the wall and later jumped on a table. She stated that she had protested when they found the \$700 because she had intended to use that money for Christmas presents for her children. Graham pointed a gun at her head and demanded the money.

Sanders and Lodge denied that the motel incident had happened as the Livesays described, but Sanders admitted that he had driven Payne and Graham with OxyContin between Ohio and Virginia.

Graham testified that he had participated in drug distribution, but only because Payne had threatened to harm his children if he did not. According to Graham, Payne normally came to Graham's house unannounced and forced him to drive Payne to Virginia. Graham denied he had sold his prescription OxyContin pills, and stated that he had only delivered pills and collected money on Payne's behalf. He testified that Payne had never remunerated him for his services and that Payne's demands on his time required him to quit his bartending job.

Graham stated that this arrangement had continued from June through November 2000, when Payne told Graham that he could end his participation in the drug business if he made one more trip to Virginia. Graham thereafter delivered additional pills to the Livesays and he and Payne received a wire transfer of the proceeds in Ohio.

Four days later, according to Graham, the Livesays invited him to a party at a motel in Lee County. He testified that he had traveled to the party, even though he does not drink, because Dan Sanders was a "sucker for a free beer." (Tr. III at 59.) He denied threatening the Livesays or collecting money from them. Contrary to the Livesays' testimony, Graham stated that the Livesays had been arguing and that he and Sanders had tried to calm them down. Because Lodge was "jumpy" around people who argue, they decided to return to Ohio that night. (Tr. III at 64-65.)

III

“When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial.” *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). A court may consider the credibility of witnesses in its review of the evidence, but the court’s “discretion should be exercised sparingly.” *Id.* at 1486.

[A] person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C.A. § 848(c).

The defendant only challenges the proof that he organized, supervised or managed five individuals under the CCE statute. The Fourth Circuit has instructed that these terms should be construed using their common meanings and should be applied disjunctively. *See United States v. Butler*, 885 F.2d 195, 200 (4th Cir. 1989). Thus,

the five individuals need not be involved with each other, nor must the defendant have a relationship with five individuals at the same time. *Id.*

In addition, the defendant need not have the same type of relationship with all five individuals. In other words, he may manage some and organize others. *Id.* Organization under the statute, unlike management and supervision, does not require a showing of control by the defendant. *Id.* at 201. A defendant may exercise control even though he does not deal directly with an individual when he delegates authority to other individuals to exercise control on his behalf. *Id.* at 200-01.

I find that the weight of the evidence at trial showed that the defendant managed, supervised or organized at least five individuals. The defendant concedes that the evidence was sufficient as to Beverly and Scott Livesay. Additionally, I find that the evidence is sufficient as to Hunnicutt, Sanders, Lodge, and Payne.

The defendant argues that the evidence was insufficient as to Steve Hunnicutt. Although Hunnicutt testified that he had been supplied pills by Payne on most occasions, he also testified that the defendant had supplied him with OxyContin. Hunnicutt also testified that the defendant had telephoned him at his home and instructed him to wire transfer drug proceeds to the defendant in Ohio. A receipt of this money transfer was admitted into evidence. (Govt. Ex. 4.)

Payne's testimony further explained the defendant's relationship with Hunnicutt. Payne testified that he and the defendant had entered into an agreement whereby the defendant would supply Payne with pills and Payne would sell them in Lee County. Payne then delegated sales of the pills to Hunnicutt and others with the agreement that they would receive one pill for every nine that they sold as part of the agreement with the defendant. Hunnicutt testified that the defendant had been present on most occasions when Payne had given him pills.

Based on the evidence, the defendant exercised control over Hunnicutt through his agreement with Payne and by dealing directly with Hunnicutt when he instructed him to return the drug proceeds to him in Ohio. The fact that Payne dealt with Hunnicutt on most occasions does not insulate the defendant from liability under the CCE statute. *See Butler*, 885 F.2d at 200-01. This is ample evidence to show that the defendant managed, supervised or organized Hunnicutt in the criminal enterprise.

I also find that the evidence was sufficient as to Dan Sanders. "A person who knew about the drug operation, took orders directly from the defendant, and helped in the drug business, can be found to have been a part of the defendant's organization." *United States v. Heater*, 63 F.3d 311, 317 (4th Cir. 1995.)

Sanders testified that he had knowingly transported the defendant and OxyContin for the defendant between Ohio and Virginia. In addition, the Livesays both testified

that Sanders had accompanied Graham to their hotel room, ripped the phone out of the wall, and searched their room for the defendant's drug money. Thus, because Sanders had knowledge of the drug operation and acted on the defendant's behalf, the evidence supports the verdict.

I also find that the evidence is sufficient as to Chuck Lodge. Payne testified that Lodge had purchased pills in Ohio for Graham, who in turn had transported them to Payne to sell in Virginia. Scott Livesay testified that Lodge had accompanied the defendant during a drug transaction between Livesay and the defendant. Livesay testified that Lodge had done little during the meeting but had stated that he had not wanted anyone to be "ripped off" (Tr. II at 19-20), indicating that he was involved in the arrangement.

In addition, Scott Livesay testified that Lodge had knocked on their hotel room door in order to obtain the defendant's admittance to the room. Lodge then entered brandishing a weapon, stating, "He isn't going to like this," and helped the defendant search the room for the defendant's drug money. (Tr. II at 28-35.)

Accordingly, the evidence is sufficient that Lodge was involved in the drug enterprise as a supplier and that he acted in the interests of the defendant in enforcing adherence to the rules of the enterprise on at least two separate occasions.

Although the CCE statute only requires that the defendant manage, supervise of organize five individuals, I also find that the evidence is sufficient as to Payne. Under the CCE statute, a defendant may organize an individual without exercising control over him. *See Butler*, 885 F.2d at 201. In plain language, organize means “to set up an administrative structure for” or “to persuade to associate in an organization.” Merriam-Webster’s Collegiate Dictionary 819 (10th ed. 1996).

Payne testified that after his initial sales in Lee County he and Graham had entered into an agreement under which the defendant would obtain pills in Ohio and transport them to Payne to sell in Virginia. While the evidence at trial did not reveal that the defendant managed or supervised Payne, it is at least arguable that this distribution agreement evidences that the defendant organized Payne.²

I find that the testimony of Payne, Beverly and Scott Livesay, and Hunnicutt to be generally credible. While there were certainly inconsistencies in the testimony, it was proper for the jury to have based its verdict on that testimony. The evidence at trial, taken as a whole, proves that the defendant managed, supervised, or organized

² On the other hand, I agree with the defendant that the evidence was questionable as to Wade. She testified that she had purchased pills from the defendant for herself and others. However, there was no evidence that the defendant was aware that Wade was distributing for him or that she received any compensation from the defendant for these sales.

five individuals, and does not weigh so heavily against the verdict that it would be unjust to enter judgment.

IV

In his motion, Graham also requests a new trial on several additional grounds. First, the defendant contends that the jury's findings that the defendant used a firearm in relation to a drug trafficking offense and that he possessed a firearm after being convicted of a felony, was against the weight of the evidence.

The defendant submits that the only evidence at trial to support his conviction of these offenses came from the testimony of the Livesays. According to the defendant, their testimony should not have been accepted by the jury because it was contradictory and contrary to the testimony of witnesses Sanders and Lodge.

I find that the evidence was sufficient to support the jury's verdict on these counts. Beverly Livesay testified that she had purchased a handgun for Graham in exchange for an OxyContin pill in August 2000. Graham signed a "bill of sale" for Beverly when he received the gun from her.

Scott Livesay testified that Graham had the same gun when he entered their motel room. Beverly testified that the defendant had pointed the gun at her head during the motel encounter. Both identified Government's Exhibit 1 as the gun that they had

seen. In addition, the Livesays testified that the defendant's purpose at their hotel room was to collect money that they owed him for drugs.

I find that the testimony of the Livesays was generally credible. Therefore, I find that the evidence was sufficient that the defendant used a firearm in relation to a drug trafficking offense during the period charged in the indictment based on their testimony. In addition, this testimony establishes that the defendant, who was a convicted felon, possessed a firearm during the period charged in the indictment. Despite Sanders' and Lodge's testimony that the motel events did not occur as the Livesays described, the evidence, taken as a whole, does not weigh so heavily against the verdict that it would be unjust to enter judgment.

The defendant also challenges the jury's rejection of his duress defense as against the weight of the evidence. Graham presented evidence that he had been involved in drug trafficking only because Payne had threatened his family if he did not comply with his demands. Sanders testified that he had overheard these threats. To the contrary, the government presented evidence that the defendant participated knowingly and willingly in the acts charged in the indictment.

The jury was instructed on the duress defense and returned a verdict of guilty on all counts. While the defendant presented evidence that if believed by the jury may

have supported this defense, the evidence does not weigh so heavily against the verdict that it would be unjust to enter judgment.

The defendant's final contention that hearsay statements were improperly admitted under the co-conspirator exception to the hearsay rule was raised at trial and will be denied for the reasons stated on the record at that time.

V

For the foregoing reasons, it is **ORDERED** that the defendant's motion for new trial [Doc. No. 137] is denied.

ENTER: April 18, 2002

United States District Judge