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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

YOU LAN XIANG,

Defendant - Appellant.

No. 20-1070

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HUANYU YAN ,

Defendant - Appellant.

No. 20-1071

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CR-00119-RM-1-2)

Blain Myhre of Blain Myhre LLC, Englewood, Colorado, for Defendant – Appellant Huanyu Yan.

Kathleen Shen, Federal Public Defender (Veronica S. Rossman, Assistant Federal Public Defender on the briefs), Denver, Colorado, for Defendant – Appellant You Lan Xiang.

Jason R. Dunn, United States Attorney (Aaron M. Teitelbaum, Assistant United States Attorney on the briefs), Denver, Colorado, for Plaintiff – Appellee United States of America.

Before **TYMKOVICH**, Chief Judge, **McHUGH**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

When law enforcement seizes evidence in good faith reliance on a search warrant issued by a detached and neutral magistrate, that evidence will not be subject to suppression even if a court later invalidates that warrant. See United States v. Leon, 468 U.S. 897, 922 (1984). But exceptions to this good faith rule exist, and suppression is appropriate where an affiant recklessly omits material information from an affidavit in support of a search warrant. United States v. Garcia-Zambrano, 530 F.3d 1249, 1254 (10th Cir. 2008).

After law enforcement executed a search warrant on Mr. Yan and Mrs. Xiang's home ("Doane home") and seized 878 marijuana plants, Defendants moved to suppress arguing the exception to the good faith rule applied. The district court disagreed and denied their motion. Defendants proceeded to a joint jury trial where a jury convicted them of: (1) Conspiracy to Manufacture and Possess with Intent to Distribute 100 or more Marijuana Plants; (2) Manufacturing and Possessing with Intent to Distribute 100 or more Marijuana Plants; and (3) Using and Maintaining a Drug-Involved Premises. At the close of the government's case, Mr. Yan moved for judgment of acquittal, arguing the government offered insufficient evidence to

sustain his conspiracy conviction. The district court denied his motion. Defendants appeal the district court's suppression ruling, and Mr. Yan separately appeals the district court's denial of his motion for judgment of acquittal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

As part of an investigation into a marijuana drug trafficking organization involving Chinese nationals, the government sought a warrant to search various suspected grow houses—including one owned by Mr. Yan and Mrs. Xiang. In the warrant application, the affiant—a Drug Enforcement Administration task force officer—said that the government identified marijuana grow homes, in part, by "looking at utility billing records that list the monthly electrical usage." He explained that, based on his training and experience, few things could account for "large amounts of electrical consumption in residential homes other than the use of lights, ballasts, high volume fans, and automated control and watering systems found in marijuana grows." So a home's steady use of over 1,500 kWh of electricity per month served as "a very good indicator" that it housed a marijuana grow.

Although the affiant identified other suspected grow homes in his affidavit, he specifically identified You Xiang or the Doane home three times. First, the affiant listed the Doane home as a target location because of its steady, excess electrical use. During the most recent 31-day period the Doane home used 13,653 kWh of electricity. And the Doane home's excess use remained steady averaging 9,715 kWh

per month from September 2017 through September 2018. Property records showed "You Xiang" and "Huan Yan" owned the Doane home during that period.

Second, while surveilling the Doane home, the affiant observed a parked car registered to "Youlan Xiang." Third, while surveilling a different address with steady, excess electrical use ("Nevada house") the affiant observed a different car registered to "You Xiang." After executing the warrant, the affiant learned that the "You Xiang" linked to the Nevada house did not match the "You Xiang" that linked to the Doane home. But when the affiant submitted his affidavit, he believed this information linked Mrs. Xiang to two homes with steady, excess electrical use. Finding probable cause, the magistrate judge issued a warrant.

The government executed the warrant and found 878 marijuana plants in the Doane basement. It also found marijuana cultivation equipment like lights and fans. The government then charged Mr. Yan and Mrs. Xiang with: (1) Conspiracy to Manufacture and Possess with Intent to Distribute 100 or more Marijuana Plants; (2) Manufacturing and Possessing with Intent to Distribute 100 or more Marijuana Plants; and (3) Using and Maintaining a Drug-Involved Premises.

Mrs. Xiang moved to suppress the evidence law enforcement seized from their home arguing that elevated electrical usage could not support a probable cause determination. Mr. Yan joined her motion. The government filed a consolidated response arguing the affidavit set forth probable cause, in part, because the affiant believed the information linking Mrs. Xiang to two homes with steady, excess electrical use. The government also argued that even if the affidavit did not support a

probable cause determination, the executing officers seized the evidence in good faith reliance on the warrant. So the good faith exception to the warrant requirement applied. Mrs. Xiang argued the affiant's reckless failure to confirm the car owners' identities prevented application of the good faith exception.

The affiant acknowledged his failure to confirm whether the car owners were the same person at a hearing on the motion to suppress. He explained that during the investigation he relied on information from an analyst and that analyst did not provide him with a middle name for the "You Xiang" linked to the Nevada house. So he did not recognize a difference between You *Tang* Xiang—the man linked to the Nevada house—and Defendant You *Lan* Xiang—the woman linked to the Doane home. The district court denied Defendants' motion to suppress finding that the affiant acted negligently or just "screw[ed] up." So the affiant's conflation of two people named You Xiang did not invalidate the warrant and the good faith exception applied.

Defendants proceeded to a joint jury trial where Mrs. Xiang testified that she did not conspire with her husband to grow or distribute marijuana. She described their marriage as "traditional" and "conservative" so they rarely communicated and sometimes went days without talking. So, she swore, she had no idea he operated a marijuana grow in their basement.

On cross examination, the government challenged Mrs. Xiang's obliviousness. The government questioned her about money. It confirmed that since moving to Colorado she and Mr. Yan worked mainly in restaurants, yet somehow managed to

buy two homes and multiple cars. Mrs. Xiang explained that they made these purchases with savings and money from China.

The government also questioned Mrs. Xiang about her placement of a plastic floor covering over a carpeted hall connecting the garage, basement stairs, and kitchen. Mrs. Xiang explained that she placed plastic floor there and nowhere else because the garage hall had heavier foot traffic. Mrs. Xiang then admitted to getting a marijuana prescription but denied ever filling it.

The government ended Mrs. Xiang's cross examination by questioning her about the things she purported to be unaware of. According to Mrs. Xiang, she did not see her husband move marijuana plants or cultivation equipment into their basement. She did not hear her husband install cultivation equipment. She did not notice that her husband installed a second door to the basement. She did not hear fans running, or see her husband move marijuana out of the house. And she never smelled anything unusual in the house or on her husband's clothes—not even when she did his laundry.

During this cross examination Mrs. Xiang also testified that she *did not* suspect her husband "was doing something" in the basement. The government then confronted her with a prior inconsistent statement made to the DEA where she said she *did* suspect her husband "was doing something." After that confrontation, Mrs. Xiang clarified that at trial she meant she did not suspect that her husband maintained a marijuana grow but perhaps he was doing something else. Mr. Yan did not testify.

Mr. Yan moved for a judgment of acquittal at the end of the government's case, arguing the government failed to introduce sufficient evidence to sustain a conspiracy conviction. The district court denied his motion. The jury found Mrs. Xiang and Mr. Yan guilty on all counts. Both Defendants separately appealed.

II.

Defendants argue that the district court erred in denying their motion to suppress because the affiant's reckless failure to confirm the car owners' identities invalidated the warrant.

Mr. Yan separately argues that the district court erred in denying his motion for a judgment of acquittal because the government offered insufficient evidence to support a conspiracy conviction. Mrs. Xiang does not challenge this issue on appeal.

A.

Concluding the good faith exception applies, we affirm the district court's denial of Defendants' motion to suppress. We review de novo the district court's application of the good faith rule. United States v. Knox, 883 F.3d 1262, 1268 (10th Cir. 2018). And we review for clear error "the district court's findings regarding . . . the intentional or reckless character" of an affiant's false statements. Garcia-Zambrano, 530 F.3d at 1254. We will conclude the district court clearly erred only if we are "left with the definite and firm conviction that a mistake has been committed." United States v. De la Cruz-Tapia, 162 F.3d 1275, 1277 (10th Cir. 1998) (internal quotation marks and citation omitted).

We begin our analysis by discussing the good faith exception to the warrant requirement. We then address Defendants' argument that a Franks issue prevents us from applying the good faith exception. Concluding the district court did not clearly err in assessing the reckless character of the affiant's omission, we find no Franks issue exists and apply the good faith exception.

1.

Under the good faith exception "even if a warrant is not supported by probable cause, evidence seized in good-faith reliance on that warrant is not subject to suppression."[1] Knox, 883 F.3d at 1270 (citing Leon, 468 U.S. at 922). This exception to the warrant requirement exists because "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination . . . [and] [p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Leon, 468 U.S. at 921.

That being said, we recognize situations in which the good faith exception does not apply and suppression remains appropriate. See United States v. Corral-Corral, 899 F.2d 927, 933 (10th Cir. 1990). One of those situations exists where (1)

[1] Defendants first argue that high electrical consumption, alone, does not establish probable cause under the Fourth Amendment. Defendants next argue the good faith exception does not apply because the affiant recklessly omitted identifying information for You Xiang. Leon permits us to decide whether to turn directly to the good faith issue, or whether to first address the Fourth Amendment issue. 468 U.S. at 925. Exercising our discretion here, we turn immediately to a consideration of the officers' good faith and offer no opinion on whether probable cause existed. See id.

"the affiant knowingly or recklessly . . . omitted material information from an affidavit in support of a search warrant" and (2) without those material omissions "the corrected affidavit does not support a finding of probable cause."[2,3] Garcia-Zambrano, 530 F.3d at 1254 (citing Franks v. Delaware, 438 U.S. 154, 155–56 (1978)). In that situation, a district court must void the search warrant and suppress the evidence seized under it. Id.

2.

A presumption of validity applies to affidavits supporting search warrants. Franks, 438 U.S. at 172. So to succeed on a Franks claim, Defendants must make a *substantial* showing of recklessness. United States v. Moses, 965 F.3d 1106, 1111 (10th Cir. 2020). And to establish such recklessness, evidence must exist "that the officer in fact entertained serious doubts as to the truth of his allegations." Kapinski v. City of Albuquerque, 964 F.3d 900, 908 (10th Cir. 2020) (internal quotation marks and citation omitted). "[N]egligence or innocent mistake[s] are insufficient . . . ." Franks, 438 U.S. at 172.

Defendants argue a Franks issue exists because the affiant recklessly omitted material information from the affidavit which would have distinguished You *Tang*

[2] Defendants do not argue on appeal that the affiant acted knowingly. So we only analyze whether the affiant acted recklessly.

[3] A Franks issue exists where (1) the affiant acted with reckless disregard for the truth, and (2) the omitted information was material. 438 U.S. at 155–56. Because the district court did not clearly err in finding the affiant did not act recklessly, we do not address the materiality of the affiant's omission.

Xiang—the man linked to the Nevada house—from Defendant You *Lan* Xiang—the woman linked to the Doane home. They believe the affiant's omission of the middle name for either You Xiang may have caused the magistrate judge to believe "these individuals were the same person when making the probable cause determination." And so the magistrate judge may have incorrectly believed Ms. Xiang to be associated with two homes with steady, excess electrical use.

During the investigation, the affiant observed a vehicle parked at the Nevada house and had an analyst run the license plate. The analyst reported back that the car belonged to "You Xiang." The affiant also ran a report for the Nevada house address through a law enforcement database—Consolidated Law Enforcement And Records ("CLEAR"). Based on the CLEAR report the affiant believed the Doane home to be an associated address for the Nevada house. When the affiant prepared the affidavit, he thought the "You Xiang" linked to the car outside the Nevada house matched the "You Xiang" linked to the Doane home.

Defendants argue that the affiant should have taken extra steps to confirm the identities of You Tang Xiang and You Lan Xiang because they only shared a name and otherwise were linked to different cars and different addresses. And the affiant could have done so by using readily available information like the CLEAR database or Department of Motor Vehicle photos.[4] By failing to do so, Defendants argue, the affiant acted recklessly.

[4] Mr. Yan apparently argues this conflation of You Tang Xiang and Mrs. Xiang is worse because You Tang Xiang is a man and Mrs. Xiang is a woman. He

The district court which found that the affiant's conflation of You Tang Xiang and You Lan Xiang amount to "at best, negligence" or frankly just a "screw up." The district court reasoned that the analyst told the affiant the car belonged to "You Xiang." And the record lacked evidence that the analyst's records included a middle name and the analyst failed to communicate that information. So the affiant did not act with reckless disregard for the truth by reporting that information in the affidavit. The district court also found it compelling that the CLEAR report on the Nevada house listed the Doane address as an associated address. So although the affiant could have investigated further and learned what he did post-warrant, "that the You Xiang associated with Nevada [wa]s, in fact a different Xiang," the affiant did not act recklessly by reporting information he learned from the analyst and the CLEAR report.

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argues that "[h]ad the names been, for example, Rob and Roberta or Al and Allison, no reasonable person would have failed to further investigate the identities before signing the affidavit." But we find this argument unpersuasive because Rob and Roberta are facially different first names, as are Al and Allison. The affiant specified in the affidavit that "You Xiang" owned the Doane home. And then he specified that "You Xiang" owned the car parked at the Nevada house. "You Xiang" and "You Xiang" are identical names. The middle name causes the issue.

True, the affiant noted in the affidavit that "Youlan Xiang" owned the car parked at the Doane home. But property records showed "You Xiang" owned the Doane home. And the CLEAR report for You Lan Xiang listed "Youlan Xiang," "You L Xiang" and "You T Xiang" as aliases for "You Lan Xiang." The report also listed "You Lan Xiang" as a utility subscriber at the Nevada house and person associated with the Nevada house. We do not believe one reference in the affidavit to Mrs. Xiang as "Youlan Xiang" renders the affiant's conduct reckless.

We agree with the district court. The record lacks evidence that the affiant entertained serious doubts as to the truth of his allegations. So the district court did not clearly err in finding the affiant's omission was, at most, negligent. Because negligence alone cannot establish a Franks issue, the good faith exception to the warrant requirement applies and precludes the suppression of the evidence seized from the Doane home.

B.

Concluding the government offered sufficient evidence, we affirm the district court's denial of Mr. Yan's motion for a judgment of acquittal. We review the sufficiency of the evidence and the district court's denial of a motion for judgment of acquittal de novo. United States v. Delgado-Uribe, 363 F.3d 1077, 1081 (10th Cir. 2004). In doing so we view "the evidence in the light most favorable to the [g]overnment" and assess whether "any rational trier of fact could have found the defendant guilty . . . beyond a reasonable doubt." Id. (quoting United States v. Vallo, 238 F.3d 1241, 1246–47 (10th Cir. 2001)). "[W]e consider all of the evidence, direct and circumstantial, along with reasonable inferences, but we do not weigh the evidence or consider the relative credibility of witnesses." United States v. Griffith, 928 F.3d 855, 868–69 (10th Cir. 2019) (quoting United States v. Pickel, 863 F.3d 1240, 1251 (10th Cir. 2017)). When conducting this "highly deferential" review, we will reverse "only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 869.

To sustain a conspiracy conviction, the government must prove beyond a reasonable doubt that "(1) two or more persons agreed to violate the law, (2) [the defendant] knew the essential objectives of the conspiracy, (3) [the defendant] knowingly and voluntarily participated in the conspiracy, and (4) the alleged co-conspirators were interdependent." Id. "A jury may infer guilt from the surrounding circumstances," Delgado-Uribe, 363 F.3d at 1083 (internal quotation marks and citation omitted), but it may not infer guilt by "piling inference upon inference," United States v. Dewberry, 790 F.3d 1022, 1028 (10th Cir. 2015).

Mr. Yan argues the government failed to meet its burden because it did not offer sufficient evidence of an agreement to violate the law. He recognizes that the Government "need not show an *express* agreement to support a conspiracy charge." United States v. Clark, 717 F.3d 790, 805 (10th Cir. 2013). But he argues that the inferences supporting a conspiracy charge "must be more than speculation and conjecture." Dewberry, 790 F.3d at 1028. And here, he argues, the jury convicted him based only on speculation because the evidence shows that Mrs. Xiang knew nothing about what Mr. Yan did in the basement. She only resided in the home with him at various times while he operated the marijuana grow. He emphasizes that although they shared a space, the two rarely interacted and that she had not been in the Doane basement since they bought the home years earlier. He also contends Mrs. Xiang never saw the Doane home's energy bills and the two kept their finances separate. And Mrs. Xiang testified to that effect, categorically denying she knew anything about Mr. Yan's criminal venture. So, he argues, the government did not

offer sufficient circumstantial evidence from which a jury could reasonably infer the couple conspired together.

We agree with Mr. Yan that "a defendant's presence at the crime scene . . . is not sufficient in and of itself to support an inference of participation in the conspiracy." United States v. Riggins, 15 F.3d 992, 994 (10th Cir. 1994) (internal quotation marks and citation omitted). But presence still remains "a material and probative factor which the jury may consider." Id. And "where the government presents evidence tending to show that the defendant was present at a crime scene under circumstances that logically support an inference of association with the criminal venture, a reasonable juror could conclude the defendant was a knowing and intentional criminal conspirator." United States v. Snow, 462 F.3d 55, 68 (2d Cir. 2006) (internal quotation marks and citation omitted).

Mrs. Xiang lived in the home during times relevant to Mr. Yan's conspiracy charge. And although mere presence cannot support a conspiracy conviction, her presence in the home does not stand alone. The Doane home housed a grow operation with 878 marijuana plants. It also housed marijuana cultivation equipment. Based on the size of the grow, a jury could reasonably infer that Mrs. Xiang was aware of and consented to Mr. Yan's criminal activity in their home. See, e.g., United States v. Akridge, 243 F. App'x 572, 574 (11th Cir. 2007) (unpublished) ("Based on the number of marijuana plants and the presence of a scale in their residence, a jury could have reasonably inferred that [the defendant's] wife was aware of and consented to the distribution of marijuana.").

Mrs. Xiang also testified and swore she did not engage in the crimes charged. But "a statement by a defendant, if disbelieved by the jury may be considered as *substantive* evidence of the defendant's guilt." United States v. Brown, 53 F.3d 312, 314 (11th Cir. 1995). So "when a defendant chooses to testify, [s]he runs the risk that if disbelieved the jury might conclude the opposite of h[er] testimony is true." Id. (internal quotation marks and citations omitted).

Mrs. Xiang's testimony about her marijuana prescription and placement of a plastic floor covering could support the reasonable inference that she was not the innocent, subservient wife she claimed herself to be. After the government confronted Mrs. Xiang with an inconsistent statement at trial, she admitted she suspected her husband "was doing something" in the basement. She just denied knowing he maintained a marijuana grow down there.

So too when Mrs. Xiang testified that she and her husband bought two homes and multiple cars with savings and money from China, the jury could choose to disbelieve her testimony. See United States v. Fox, 902 F.2d 1508, 1515 (10th Cir. 1990) ("It is not our function to assess the credibility of the witness on appeal; that task is reserved for the jury." (citation omitted)). The jury also could reasonably conclude, despite her testimony to the contrary, that Mrs. Xiang saw the marijuana plants and cultivation equipment, heard Mr. Yan install the cultivation equipment and extra door, and smelled an unusual odor in the house and on Mr. Yan's clothes. On whole, the circumstances at the Doane house could support a reasonable inference that Mrs. Xiang was a knowing and intentional conspirator.

The combination of this evidence, construed in the light most favorable to the government, supports the jury's conclusion that Mrs. Xiang agreed to violate the law with her husband.

AFFIRMED.