IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20182

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDGAR MOSQUERA GAMBOA,
ERROL DAN ALLEN,
and
MAXIMINO PALACIOS-BASTIDA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93 82 9)

August 15, 1995

Before SMITH, WIENER, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

I.

FBI agent Robert Doguim set out to infiltrate the cocaine distribution organization of Arana, which was then transporting fifty kilograms of cocaine a week to New York and Pittsburgh. In

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

May 1992, Arana and his wife, Mariella, agreed to let Doguim transport cocaine for them and collect the payment for the contraband. Arana also would receive a commission for all deals between Doguim and any associate introduced to him by Arana.

Servicol International was a Houston paging and money wiring business used by Arana and his drug-trafficking associates as a communications center. Servicol was used to phone Columbian drug contacts, or be "phone patched" from a remote location. Defendant Maximino Palacios-Bastida ("Bastida") owned Servicol and knew that his business was being used extensively by drug traffickers.

In July 1992, Bastida asked Arana to broker twenty kilograms of cocaine for sale. Arana agreed, selling the contraband half to Sam Alvarado and half to Jefferson. Jefferson sent Tyson as his courier to Servicol to pick up the drugs. Soon thereafter, Jefferson had trouble selling all of his cocaine, and could not pay Bastida. Bastida, in turn, could not pay Arana. Arana and Jefferson agreed that the latter would return the unsold portion of the cocaine to Bastida. Courier Tyson delivered the unsold cocaine to Bastida, and defendant Errol Allen delivered the collected money for the other portion of the shipment to Bastida.

Arana supplied Jefferson with a residence, located at 2323 Gentryside in Houston. In April 1992, Arana caused twenty kilograms of cocaine to be delivered to Allen, who was one of the conspirators in the part of the operation managed by Jefferson.

In October 1992, Arana introduced Doguim to New Jersey cocaine trafficker Lucho and his associate "Fernando." Lucho and Fernando,

acting as brokers for another supplier, Don Miguel, introduced Don Miguel to Doguim and Arana. Negotiations at two Houston restaurants ensued, at the culmination of which Doguim was introduced to Don Miguel's supplier and Colombian supervisor, Ricardo Munoz. At the same time, Lucho and Arana negotiated with Doguim to transport cocaine from Houston to New York, Newark, and Chicago. Arana would receive a cut from the profits of this operation.

In November 1992, Arana introduced Doguim to yet another supplier, "Mauricio," who had been sent from Columbia by Medellin to supervise the shipment from Houston to Pittsburgh. At that time, Arana asked Doguim to help him ship 150 kilograms of cocaine to Pittsburgh. That amount was later reduced to thirteen kilograms.

On November 17, 1992, the thirteen kilograms of cocaine were transferred from Arana to Doguim, with Allen as courier. After working with the undercover FBI agents who had been coordinating the operation, local authorities apprehended Allen's car and searched it, seizing the cocaine. Allen first was advised that he was not under arrest. After he refused to consent to a search of the vehicle, he was transported to a police command station, fingerprinted, and released.

On February 26, 1993, another deal went down. In a transfer scripted by defendant Edgar Gamboa, undercover FBI agent Vasquez left a van where it was picked up by Zulney Arboleda, who drove the van into the garage of the Wild Willow stashhouse and shut the garage door. Later, she departed, left the van parked where she

had picked it up, and drove away in her original vehicle. Vasquez returned to the van, which subsequently was discovered to contain 200 kilograms of cocaine.

On March 12, 1993, Gil Atzmon picked up a van filled with boxes containing a total of approximately $2.5 million. Surveillance had placed the van at the Dounray currency stashhouse not long before Atzmon picked it up. Some of the boxes bore Gamboa's fingerprints, and each of them was labeled to indicate the amount of money it contained.

Earlier on March 12, Gamboa had been arrested. When he was stopped, his vehicle contained a loaded Ruger pistol, a pager, and a cellular phone. Also on that day, search warrants were executed at the Dounray money-laundering stashhouse and at Gamboa's McCormick residence. At the latter, several firearms and a bulletproof vest were found, among other things. On March 13, a search warrant was executed at the Wild Willow cocaine stashhouse. Nineteen kilograms of cocaine and over $11,000 in cash were found.

II.

The government's case at trial was based on testimony from informants Arana, Burgess ("Mike Tyson"), and Danny Chand; undercover FBI agents Doguim and Efrain Gutierrez; surveillance; recorded and wire-tapped conversations; and cellular phone toll records. In addition, the government introduced cocaine and currency seized on several occasions.

A seventeen-count indictment was brought against Bastida,

Allen, Gamboa, and other members of their organization. Count 1 charged Bastida, Allen, and Gamboa, along with Arana, Lopez, and Arboleda (who are not before us on appeal), with conspiracy to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). The conspiracy was charged to have lasted from about September 1992, through the time of the indictment, in April 1993. Count 2 charged Allen and Arana with possession with intent to distribute cocaine on November 17, 1992, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Count 3 charged Arana, Lopez, Gamboa, and Arboleda with possession with intent to distribute cocaine on February 26, 1993. Count 4 charged Arana, Lopez, Gamboa, and Arboleda with possession with intent to distribute of cocaine on March 13, 1993. Count 5 charged Gamboa, Atzmon, and Carlos Gamboa with the transfer of $2.5 million, the proceeds of illegal cocaine distribution activity, on March 12, 1993, and in violation of 18 U.S.C. § 1956(a)(1)(A)(i). Counts 6-10 charged Bastida with failure to file currency transaction reports on various occasions.

Gamboa and Allen were convicted on all relevant counts (1,3,4, and 5) and (1 and 2), respectively. Gamboa was convicted on counts 1, 6, 7, 8, 9, 10, 13, 14, 15, 16, and 17; and acquitted on counts 11 and 12 (structuring on November 18 and 25, 1991).

III.

Although he did not request a multiple conspiracies jury instruction, Gamboa argues that he was prejudiced by a variance in

proof between the single conspiracy alleged in count one of the indictment and two conspiracies proven at trial. For this court to reverse a conviction based on a variance between the indictment charges and the proof at trial, Gamboa must prove that (1) a variance arose between the indictment and the government's proof and (2) the variance prejudiced his substantial rights. United States v. Jackson, 978 F.2d 903, 911 (5th Cir. 1992), cert. denied, 113 S. Ct. 2429 (1993). If no variance is established, the inquiry is at an end. We examine three factors in determining whether the government proved the single conspiracy alleged in the indictment: (1) whether there was a common goal of the criminal activity; (2) the nature of the criminal scheme; and (3) whether the participants in the various dealings overlapped. United States v. Morris, 46 F.3d 410, 415 (5th Cir.), cert. denied, 115 S. Ct. 2595 (1995). The evidence is viewed in the light most favorable to the verdict. United States v. Greenwood, 974 F.2d 1449, 1458 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993).

Gamboa argues that the government proved one money-laundering and drug-trafficking conspiracy involving Arana, Bastida, Jefferson, "Tyson," and others. The existence of this conspiracy was largely shown through the testimony of government informant Danny Chand. A second, separate conspiracy, Gamboa argues, was proven between Arana and Agent Doguim. This conspiracy, Gamboa argues, was a "side deal" that did not involve Lucho.

An application of the Morris factors reveals that there was only one conspiracy. First, both of the groupings characterized by

Gamboa as separate conspiracies had as their objective the earning of usable profits through the sale and distribution of cocaine. Second, the nature of the criminal groupings was consistent with a common scheme. Third, the participants in the two groupings overlapped and interacted. We also agree with the government that, even if there were a variance under Morris, Gamboa has failed to show prejudice. The evidence of his involvement was ample.

IV.

Gamboa argues that the proof at trial only showed him to have "conspired" with law enforcement officials. Allen adopts this argument. Gamboa is correct that a defendant cannot be convicted of a conspiracy where his sole coconspirator was a government informant or a law enforcement officer carrying out his duty in an undercover capacity. United States v. Manotas-Mejia, 824 F.2d 360, 365 (5th Cir.), cert. denied, 484 U.S. 457 (1987). A conspiracy may exist among three or more people, however, even if the link connecting many of the coconspirators is a government informer. Id.

Gamboa argues that the most proven at trial was an agreement between himself and agent Gutierrez. Viewing the evidence in the light most favorable to the verdict, we must determine whether any rational trier of fact could have found a conspiracy involving Gamboa and another bona fide conspirator. United States v. Fierro, 38 F.3d 761, 768 (5th Cir. 1994), cert. denied, 115 S. Ct. 1388 (1995). Proof of an overt act in furtherance of the conspiracy is

not required, and the defendant's participation may be proved by circumstantial evidence. United States v. Quiroz-Hernandez, 48 F.3d 858, 866 (5th Cir. 1995). Concert of action, presence among or association with drug conspirators, and evasive and erratic behavior are among the factors that may be considered in determining whether a defendant is guilty of drug conspiracy. United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995). The cellular phone tolls, Gamboa's finger prints on the boxes containing the $2.5 million, and his statements (as related by the government informants and undercover agents who testified at trial), taken together, are sufficient to support the conspiracy conviction.

V.

Allen complains that the district court erred by denying his motion to suppress the evidence seized from the vehicle he was driving on November 17, 1992. The officers searching Allen's car did not have a warrant. The government concedes that this was not an inventory search.

The government argues that the police search of the car driven by Allen was made pursuant to consent (that of the FBI, lessee of the car), and cites several factually inapposite cases in support of this theory. See United States v. Kelley, 981 F.2d 1464, 1468 (5th Cir.), cert. denied, 113 S. Ct. 2427 (1993); United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981); United States v. Horton, 488 F.2d 374, 380-81 (5th Cir. 1973), cert. denied, 416

U.S. 993 (1974). These cases establish that the valid consent of either automobile passenger, in a joint-control situation, legitimizes the search as to both defendants. No representative of the FBI was present in the automobile when it was stopped, however; the concept of joint control thus is inapplicable here. Common authority over the premises searched is "not to be implied from the mere property interest a third party has in the property." United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). The authority justifying third-party consent "does not rest upon the law of property . . . but [] rather on mutual use of the property by persons generally having joint access or control for most purposes." Id. The Matlock court contrasted such a situation to landlord and hotel clerk cases. Id. In short, the government has cited no caselaw supporting its claim that an absent bailee, owner, or lessee can consent to the search of an automobile.

Warrantless searches of an automobile and a closed container within it are justified where there is probable cause that the vehicle and the container contained contraband. United States v. Piaget, 915 F.2d 138, 140 (5th Cir. 1990). We look to the totality of the circumstances in determining whether an officer has probable cause. Illinois v. Gates, 462 U.S. 213, 230 (1983).

Here, the surveillance team knew that the drug trafficker, who had described himself to one of the undercover officers to facilitate their meeting, would arrive at the restaurant for a rendezvous. The undercover rental car was to be delivered to the trafficker, who would leave the area to load thirteen kilograms of

cocaine into the vehicle. The trafficker was then scheduled to return to the scene to return the keys to the undercover officer. The team had observed Allen, who fit the physical description the drug trafficker had given of himself, arrive at the appointed restaurant, speak with the undercover officer, depart the restaurant, and drive off in the undercover rental vehicle as he engaged in countersurveillance. Later, the team observed Allen stop behind a maroon Toyota, open its trunk, and place a box from the Toyota into the undercover rental car. These facts establish an abundance of probable cause. See United States v. Panitz, 907 F.2d 1267 (1st Cir. 1990) (finding warrantless search justified on "sting operation" facts very similar to those of Allen's stop).

Allen argues that even if there was probable cause, there were no exigent circumstances supporting the search. This argument is unpersuasive. The mobility of an automobile creates exigent circumstances. United States v. Delario, 912 F.2d 766, 768 (5th Cir. 1990).

Although Allen argues that none existed in this case because he was driving the car directly back to the undercover officers, any number of things could have happened to prevent the drugs from reaching their intended destination. Allen could have noticed the surveillance on him and decided not to return the car as planned. He could have decided to double-cross the undercover agents by absconding with the cocaine and attempting to keep all of the profits from its sale for himself. Or, he could have been carjacked or had mechanical problems requiring him to leave the car

and get help. In short, the delivery of the car into the hands of the undercover agents was in no way guaranteed. The district court committed no error in admitting the fruits of the search against Allen and Gamboa.

VI.

Gamboa asserts that insufficient evidence supported his conviction for possession with intent to distribute the 200 kilograms of cocaine delivered to the government on February 26, 1993. He points out that his fingerprints were not found on the individual packages of cocaine (no fingerprint testing was done) and that he was not shown to have been in any place where the 200 kilograms originated. Accordingly, Gamboa argues that the government proved neither actual nor constructive possession of the cocaine.

Possession of contraband may be either actual or constructive. Constructive possession is ownership, dominion, or control over the conveyance in which the contraband is concealed. United States v. Posner, 868 F.2d 720, 722-23 (5th Cir. 1989). A conviction for aiding and abetting the possession of narcotics with the intent to distribute requires that the defendant participated in and associated himself with the venture in a way calculated to bring about the its success. United States v. Williams, 985 F.2d 749, 753 (5th Cir.), cert. denied, 114 S. Ct. 148 (1993).

Gamboa's conviction on count 3 was amply supported by the evidence. Agent Gutierrez testified that he was given the pager

number "710-1465" to communicate with the supplier of the cocaine. When Gamboa was arrested, that pager was found in his possession. Lucho told Agent Gutierrez that the person in possession of the 200 kilograms of cocaine would meet with them at Doneraki's restaurant on February 26. Gamboa showed up, advising the others that he had received approval from Colombia to release the load. At that time, Lucho greeted Gamboa as "Maestro," meaning master or teacher in Spanish. Furthermore, Gamboa exercised control over and supervised the transfer of the 200 kilograms. He asked what kind of vehicle was going to be used to transport the cocaine, approving the use of a van, as it would be large enough to conceal the weight of the load. Cellular phone toll records show that Gamboa made a number of calls to other conspirators on February 26, and the jury could properly infer that these calls were made to supervise and coordinate the transfer of the cocaine in Gamboa's constructive possession.

The facts, viewed in the light most favorable to the verdict, show that Gamboa's subordinates had actual possession and control over the 200 kilograms of cocaine. Therefore, the jury could have inferred that Gamboa had at least constructive possession.

VII.

On March 13, 1993, a search warrant was executed at the Wild Willow stashhouse. Nubia Arboleda, who was present at the time of the search, falsely identified herself to government agents as Denise Green. Nineteen kilograms of cocaine were found in a box in

the garage of the stashhouse.

Gamboa argues that his conviction for possession with intent to distribute these 19 kilograms was not supported by sufficient evidence. He claims that agents found nothing connecting him to the residence during their search of it. Furthermore, and somewhat inconsistently, he claims that social ties between the Gamboa and Arboleda families provide an innocent explanation for the multitude of cellular phone calls he made to the stashhouse. Finally, he points out that he was arrested the day before the execution of the search warrant, and argues that the cocaine could have been placed in the stashhouse after his arrest.

This conviction also was supported by sufficient evidence. As discussed above, there was adequate evidence linking both Gamboa and Arboleda to the larger conspiracy. Accordingly, Gamboa would be guilty of the substantive possession offense committed by Arboleda in furtherance of he conspiracy even if he would not have individually had constructive possession of the cocaine in the Wild Willow stashhouse. Both Gamboa and Arboleda were followed to 16615 Dounray, the stashhouse for the money-laundering operation. Documents seized inside that house included the Wild Willow stashhouse address and phone number. Gamboa was the only person observed driving the Infiniti, and toll records show a number of calls from its cellular phone to the Wild Willow stashhouse. Although Gamboa claims that any connection between these calls and drug transactions is purely speculative, the large number of calls made at the time when drug transfers were scheduled entitled the

jury to infer otherwise.

VIII.

Next, Gamboa challenges the sufficiency of the evidence supporting his money-laundering conviction for the $2.5 million transferred on March 12, 1993. The elements of money-laundering are (1) the conduct or attempted conduct of a financial transaction; (2) which the defendant knows involves the proceeds of unlawful activity; (3) with the intent to promote or further the unlawful activity. 18 U.S.C. § 1956(a)(1)(A)(i). Gamboa argues that the government failed to show that he transferred, delivered, moved, or otherwise disposed of the money.

The evidencetrial showed that Gamboa opened the garage door of the Dounray money-laundering stashhouse seconds before the arrival of the van which would later carry the $2.5 million. His fingerprints were found on some of the boxes containing the money. Each box was labeled with the amount of money contained therein. Also, toll records showed a number of calls from Gamboa's cellular phone to the Dounray money-laundering stashhouse. Gamboa's argument does not overcome our standard of review. Viewed in the light most favorable to the verdict, the evidence is sufficient to support the money-laundering conviction.

IX.

Bastida avers that the court erred by refusing to submit his proposed instruction on entrapment. Although Bastida did not

testify at trial, he claims that facts elicited during the cross-examination of informant Danny Chand were sufficient to raise the issue. In order to be entitled to an entrapment instruction, the defense must show government conduct creating a substantial risk that the offense would have been committed by a person other than one who was ready to commit it. United States v. Menesses, 962 F.2d at 420, 429-30 (5th Cir. 1992). Once this showing has been made, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the act before any enticement took place. Jacobson v. United States, 112 S. Ct. 1535, 1536 (1992).

Bastida quotes the relevant portion of Chand's cross-examination in his brief. In the cross-examination, Chand related that he told Bastida that he, Chand, had people with a lot of money behind him. Although this statement may have alerted Bastida to the possibility that Chand would continue being a valuable money-laundering customer into the future, Bastida was already laundering for Chand at the time it was made. Thus, the defense did not carry its burden at trial of proving enticement. See United States v. Ivey, 949 F.2d 759, 769 (5th Cir. 1991), cert. denied, 113 S. Ct. 64 (1992). Even if enticement had been proven, the government would have established predisposition in rebuttal. The fact that Bastida was already laundering money before the challenged comments by Chand is dispositive.

Allen and Gamboa adopted by reference Bastida's entrapment argument. However, we consider the claim only as to Bastida, as it

is fact specific. See, e.g., United States v. Stouffer, 986 F.2d 916, 921 n.4 (5th Cir.), cert. denied, 114 S. Ct. 314 (1993).

X.

Allen argues that the district court erred by instructing the jury, over defense objection, that it could convict on the basis of "deliberate ignorance." A deliberate ignorance instruction is appropriate where the evidence at trial raises the inference that (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct and (2) purposely contrived to avoid learning of it. United States v. Lara-Velasquez, 919 F.2d 946, 951 (5th Cir. 1990).

The crux of Allen's complaint is that neither the government nor the defense's theory at trial was deliberate ignorance. The government argued that Allen had actual knowledge he was being paid to transport cocaine, while Allen argued that he had no knowledge whatsoever. This claim is meritless. The deliberate ignorance theory was an appropriate, well-supported alternative theory in light of the defense's claim of total ignorance.

Allen, who is college-educated, testified that he "had no idea" what was in the packages "Chico" paid him $350 each to deliver. (He had earlier told undercover agents that he was paid $1350 a delivery.) This testimony is facially incredible. Some knowledge or suspicion of wrongdoing on the part of Allen is also shown by his reaction when stopped by the police on November 17, 1992. Narcotics Division officer H. C. Riddle testified that Allen

told him he was driving a rental car, leased by his employer, that had been parked at the house of his girlfriend. This lie, coupled with Allen's testimony that he had no knowledge of anything illegal about his delivery activities, supports the deliberate ignorance instruction.

XI.

Gamboa challenges the enhancement of his sentence under U.S.S.G. § 3B1.1(a) for his role as a manager or supervisor of the cocaine distribution organization. The guidelines provide that:

> If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by three levels.

U.S.S.G. § 3B1.1(b). The district court's finding that Gamboa was a manager or organizer is a finding of fact, which we review only for clear error. The court relied, independently, upon both prongs of § 3B1.1(b) in making its determination, but Gamboa objected only to the finding that he supervised five or more participants. Accordingly, we review the finding that Gamboa supervised five or more participants for clear error, but the finding that he supervised an "otherwise extensive" criminal activity only for plain error. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995). In light of the proof at trial, as discussed in response to Gamboa's sufficiency challenges, the finding that Gamboa supervised an "otherwise extensive" criminal activity is certainly not plainly erroneous. No relief is warranted.

XII.

Gamboa also challenges the district court's enhancement of his sentence for possession of a firearm in connection with the drug offense under U.S.S.G. § 201.1(b)(1). We review this finding of fact for clear error. United States v. Vaquero, 997 F.2d 78, 84 (5th Cir.), cert. denied, 114 S. Ct. 614 (1993). If a defendant proves that there was no connection between the firearm possessed and the narcotics offense, the enhancement is inappropriate. United States v. Villareal, 920 F.2d 1218, 1222 (5th Cir. 1991).

A defendant may be held accountable for a co-defendant's possession of a firearm during the commission of a narcotics trafficking case if the possession was reasonably foreseeable. United States v. Sparks, 2 F.3d 574, 587 (5th Cir. 1993), cert. denied, 114 S. Ct. 720 (1994). Firearms are "tools of the trade" of those engaged in drug activities. United States v. Aquilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990); United States v. Ortiz-Granados, 12 F.3d 39, 43 (5th Cir. 1994); U.S.S.G. § 2D1.1, comment. n.3.

Gamboa was arrested shortly after departing the currency stashhouse on Dounray, and the loaded pistol found inside his Landcruiser was present there with two other implements of the drug trade. Also found were a cellular phone (582-4042) and a pager (710-1465). Five more guns were found at Gamboa's house on McCormick street, and he also possessed a bullet-proof vest. The presence of all of these "tools of the drug trade" supports the inference that the pistol in the Landcruiser was also connected to

Gamboa's drug-trafficking activities.

An independent basis for affirming the enhancement for the possession of a firearm is the shotgun Atzmon had in the trunk of his rental vehicle. Gamboa did not challenge the district court's finding that Atzmon's possession was reasonably foreseeable to him. The district court's application of the firearm possession enhancement was adequately supported under either basis.

XIII.

Gamboa challenges the district court's finding that 392 kilograms of cocaine were attributable to him. The sentencing guidelines hold a defendant accountable for sentencing purposes for all reasonably foreseeable acts in furtherance of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3(a)(1)(B). Section 2D1.1(c)(3) of the guidelines provides for a base offense level of 38 where between 150 and 500 kilograms of cocaine are attributable.

The district court found that the 200 kilograms seized on February 26 and the 19 kilograms seized on March 13 were directly attributable to Gamboa. Furthermore, the court adopted the presentence report's conversion of the $2.4 million seized from the maroon van driven by Atzmon, the $255,000 seized from the Dounray money-laundering stashhouse, and the $11,000 seized from the Wild Willow cocaine stashhouse into an additional 171.96 kilograms of cocaine. In making this calculation, the court valued the cocaine at $16,000 per kilogram.

Gamboa challenged these findings, arguing that the money

should have been converted to cocaine at a rate of $24,000 per kilogram. The district court overruled Gamboa's challenges to the PSR, finding that the 200 kilograms alone easily satisfied the requirements of § 2D1.1(c)(3). We agree with the district court. The 200 kilograms were loaded from the Wild Willow stashhouse and delivered to agent Gutierrez on Gamboa's orders. They were obviously foreseeable to him. As this cocaine alone puts him at a base offense level of 38, we need not address the remainder of his cocaine attribution arguments. Even if he could demonstrate error, it would be harmless. See United States v. Montoya-Ortiz, 7 F.3d 1171, 1182 (5th Cir. 1993).

AFFIRMED.