IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6095

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER NARVAEZ,
SAMUEL TREVINO, JR.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 90 0428 12)

(April 22, 1994)

Before KING and WIENER, Circuit Judges, and DOHERTY,[*] District Judge.

PER CURIAM:[**]

The appellants were found guilty after a jury trial of various offenses, such as conspiracy to possess cocaine with intent to distribute, conspiracy to launder money, and aiding and

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[*]District Judge of the Western District of Louisiana, sitting by designation.

[**]Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

abetting money laundering. Each appellant challenges the validity of his convictions. Appellant Trevino also challenges two of the factual findings made by the district court in the course of sentencing.

I. BACKGROUND

A. FACTS

In reviewing the facts of this criminal case in which several convictions were secured, we consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 111 S. Ct. 2064 (1991).

The chain of events that culminated in the instant arrests and convictions began on October 4, 1989. On that date, Texas Department of Public Safety (DPS) Officer Pena made an undercover buy of four kilograms of cocaine from one Enafael Cabrera in Brownsville, Texas. Cabrera was then arrested, and he surrendered to the authorities two additional kilograms of cocaine that he had stored at his house. Cabrera also volunteered information about a house he knew on the outskirts of Harlingen, Texas, where large amounts of cocaine were occasionally stored.

The same day that Cabrera was arrested, DPS officers conducted a raid on the house near Harlingen identified by Cabrera (the "stash house"). Officer Pena testified that Cabrera went into the house first while the DPS officers waited outside.

Shortly after Cabrera returned the officers entered the house themselves. They did not at that time have a search warrant, but they apparently obtained one while they were inside the house. Three persons were present at the time of the raid, namely Alfonso Gonzales, Hermenegildo Sosa and Gaudencio Garcia-Garcia. All three men were arrested. The officers also discovered and seized numerous boxes, duffel bags, and flour sacks inside the house and garage; these containers contained a substance later identified as cocaine. A magazine discovered at the house by the officers was addressed to one Javier Narvaez at a different address, also near Harlingen. The officers also discovered on the property an underground vault buried beneath a chicken coop behind the house. DPS Officer Castillo, who also participated in the raid, testified that the officers loaded the cocaine onto trucks and that weighing later revealed that about 18,000 pounds of cocaine had been seized.

The government also introduced evidence at trial regarding the acquisition and ownership of the stash house. Joan White, president of a title insurance company, testified that an earnest money contract was executed for the purchase of the house on January 21, 1989. The contract listed the buyer as Ernesto Hernandez or his assigns and stated that the total purchase price was $85,000, to be paid in cash. Hernandez did not consummate the sale; the final purchase of the property was made by one Ronald St. John, and the sale involved a note from Mercedes National Bank. The government also called Alicia Valdez, the

real estate agent who showed the property to Hernandez and one Senovio Ramirez on January 21, 1989. Valdez identified the defendant Francisco Javier Narvaez as the man who identified himself to her as "Ernesto Hernandez."

B. PROCEDURAL HISTORY

Ultimately, the appellants were charged along with several other individuals with numerous narcotics and money laundering offenses. The district court employed a policy of considering any motion filed by a defendant as filed on behalf of all defendants. One of the defendants filed a motion to suppress the evidence seized at the stash house, but he withdrew the motion before trial. At a motions hearing held on June 17, 1991, the court gave the other defendants an opportunity to show themselves entitled to a suppression hearing. The government argued that none of the defendants had come forward with evidence demonstrating standing to assert Fourth Amendment rights. Narvaez's attorney argued that Narvaez had standing to assert Fourth Amendment rights in the house because the government itself intended to prove that Narvaez had purchased the house using St. John as a straw purchaser and using the name Ernesto Hernandez as an alias. The government responded that Narvaez was obligated to produce his own evidence and should not be allowed to rely on facts that the government might later prove at trial. The court denied Narvaez an evidentiary hearing for lack of standing.

The appellants and one other defendant, one Israel Espericueta, went to trial from June 17 to July 3, 1991. The jury found Narvaez guilty as charged for thirteen offenses, including conspiracy to possess cocaine with intent to distribute and aiding and abetting money laundering. He was sentenced to life imprisonment on seven counts, 240 months imprisonment on four counts, and sixty months imprisonment on two counts. The jury found Trevino guilty of three offenses, namely conspiracy to possess cocaine with intent to distribute, conspiracy to launder money, and aiding and abetting money laundering. He was sentenced to terms of imprisonment of sixty, 240, and 360 months, all to run concurrently. He also received one five-year term of supervised release and two three-year terms of supervised release, all to run concurrently.

II. STANDARDS OF REVIEW

Narvaez challenges the district court's denial of an evidentiary hearing regarding his motion to suppress the evidence seized at the stash house. We have recognized that district courts have some discretion in deciding whether to hold an evidentiary hearing on a motion to suppress. United States v. Harrelson, 705 F.2d 733, 737 (5th Cir. 1983); see also United States v. Mejia, 953 F.2d 461, 465 (9th Cir. 1991) ("A trial court's decision whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion."), cert. denied, 112 S. Ct. 1983 (1992). A district court must grant an

evidentiary hearing only if the defendant has alleged sufficient facts which, if proved, would justify relief. Harrelson, 705 F.2d at 737; 3 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 675 (1982). General or conclusory assertions, founded upon mere suspicion or conjecture, will not suffice. Harrelson, 705 F.2d at 737. We note that the overruling of a motion to suppress is generally sufficient to preserve the point for appeal and renders further objection at trial unnecessary. Lawn v. United States, 355 U.S. 339, 353 (1958); United States v. Pacheco, 617 F.2d 84, 85 n.1 (5th Cir. 1980).

Trevino contends that his conviction was based on insufficient evidence. In reviewing his challenge we consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. Pigrum, 922 F.2d at 253. The test is not whether the evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence. Id. at 254.

A sentencing court's factual findings must be supported by a preponderance of the evidence, and we review such findings under the clearly erroneous standard. The sentencing court's interpretations of the guidelines, being conclusions of law, are reviewed de novo. United States v. McCaskey, 9 F.3d 368, 372

(5th Cir. 1993), petition for cert. filed (U.S. Mar. 4, 1994) (No. 93-8169). The sentencing court's finding regarding the amount of drugs attributable to a defendant for sentencing purposes is a finding of fact subject to clearly erroneous review. United States v. Pofahl, 990 F.2d 1456, 1487 (5th Cir.), cert. denied, 114 S. Ct. 266, and cert. denied, 114 S. Ct. 560 (1993). A factual finding that a firearm is connected to a drug-related offense is likewise reviewed for clear error. United States v. Webster, 960 F.2d 1301, 1310 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992).

III. FRANCISCO JAVIER NARVAEZ

Appellant Narvaez raises several challenges to his convictions. He contends that the district court improperly denied him an evidentiary hearing regarding his standing to assert Fourth Amendment rights in the stash house, that jury misconduct deprived him of an impartial trial, and that the prosecution made improper comments regarding Narvaez's failure to testify or rebut the prosecution's evidence. We consider each claim in turn.

A. Fourth Amendment

We first consider whether the district court abused its discretion in denying Narvaez's request for an evidentiary hearing regarding the motion to suppress the evidence discovered at the stash house. At the outset we dismiss the government's contention that Narvaez utterly failed to present the issue to

the district court because Narvaez never filed a motion to suppress. We have already noted that one defendant filed such a motion and that the court below made it a policy to consider each defendant's motions as they might benefit any of the defendants. When the district court granted the motion of Narvaez's codefendant to withdraw his motion to suppress it nevertheless allowed Narvaez an opportunity to show himself entitled to relief under the Fourth Amendment.

It is well-established that a defendant's Fourth Amendment rights are violated only when the challenged governmental conduct violated his legitimate expectation of privacy rather than that of a third party. United States v. Payner, 447 U.S. 727, 731 (1980); Rakas v. Illinois, 439 U.S. 128, 140 (1978); WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.3 (2d ed. 1987). Narvaez's argument is that he had a legitimate expectation of privacy in the stash house because he, rather than St. John, was the equitable owner of the house. We have recognized that a de facto owner or a lawful possessor of property may have a legitimate expectation of privacy in that property. United States v. Dotson, 817 F.2d 1127, 1135 (5th Cir.), modified on other grounds, 821 F.2d 1034 (5th Cir. 1987).

The question before us is whether Narvaez alleged sufficient facts to entitle him to an evidentiary hearing regarding his standing to raise Fourth Amendment rights in the stash house. These factual allegations must be sufficiently definite, specific, detailed, and nonconjectural to enable the district

court to determine that a substantial claim is presented. Harrelson, 705 F.2d at 737; United States v. Migely, 596 F.2d 511, 513 (1st Cir.), cert. denied, 442 U.S. 943 (1979); Cohen v. United States, 378 F.2d 751, 761 (9th Cir.), cert. denied, 389 U.S. 897 (1967). The question is complicated because in the instant case Narvaez did not file a motion to suppress on his own behalf, nor did he file any affidavits or other evidence in support of his claim that an evidentiary hearing was necessary. As the government pointed out at the motions hearing, Narvaez attempted to rely on what he speculated the government would attempt to prove at trial and did not "present his facts or his own proof to the court."

We agree with the government that the district court did not abuse its discretion in denying Narvaez an evidentiary hearing on his motion to suppress. At the motions hearing in the instant case, Narvaez never alleged that he owned the stash house, in his own right or through a straw purchaser; he offered mere conjecture that the government would attempt to prove his ownership at trial through a straw purchaser.[1] As the government states in its brief, "Narvaez neither volunteered nor identified any evidence to prove that he owned, rented, leased, managed or had control over the premises." If Narvaez had wished to raise an issue regarding his standing to assert Fourth Amendment rights

[1] We note that the original motion to suppress by one of Narvaez's codefendants has apparently not been included in the record on appeal, and Narvaez does not rely on any factual allegations that may have been made in that motion for support.

in the stash house, certainly he was in the best position to produce evidence to the district court of his ownership, whether equitable or otherwise. There being no factual allegation by Narvaez that would have shown him to have Fourth Amendment rights in the stash house, we conclude that he did not make the minimal showing necessary to require an evidentiary hearing.

B. Jury Misconduct

Narvaez also argues that he is entitled to a new trial based on several instances of alleged jury misconduct. He complains of three notes to the court from the jury as demonstrating that the jury began deliberating before they were retired for that purpose. One note expressed a desire for information about the financial status of Narvaez's family in Mexico and revealed the juror's knowledge or beliefs regarding currency exchange rates and average salaries of physicians in Mexico. The second note requested outline summaries of various facts such as seizures and arrests, as well as transcripts of certain witness testimony. The third note, apparently referring to evidence that Narvaez visited his brother in Mexico, asked whether customs records existed to document occasions on which Narvaez's car crossed the United States-Mexico border. Narvaez also complains that the district court allowed the jury to consider charts and schematics that had not been introduced into evidence.

The government responds that Narvaez made no objection at the time the jurors sent their notes to the court. The government also points out that these arguments were raised in

the district court for the first time in Narvaez and Trevino's motion for new trial, which was filed on July 17, 1991SQfourteen days after the jury returned its guilty verdicts on July 3. A motion for new trial must be made within seven days after a verdict of guilty unless the motion is predicated on newly discovered evidence, in which case the motion may be made any time within two years of the final judgment. FED. R. CRIM. P. 33. The district court has no jurisdiction to consider a new trial motion that is filed late. United States v. Mayo, 14 F.3d 128, 132 (2d Cir. 1994); United States v. DiBernardo, 880 F.2d 1216, 1223 (11th Cir. 1989); United States v. Brown, 587 F.2d 187, 189 (5th Cir. 1979). The district court denied the defendants' motion for new trial because it was not timely filed and, in the alternative, on the merits for failure to justify a new trial.

Because Narvaez's motion for new trial was not based upon newly discovered evidence, the motion was not timely and his arguments regarding jury misconduct were not properly presented to the district court. See United States v. Ugalde, 861 F.2d 802, 808-09 (5th Cir. 1988) ("[D]efendants who allege jury tampering carry the burden of showing due diligence if they wish to gain the benefit of the longer two-year period for their motion."), cert. denied, 490 U.S. 1097 (1989). Narvaez's failure to present these arguments to the district court, of course, means that we review the alleged errors for plain error. FED. R. CRIM. P. 52(b); United States v. Roberts, 913 F.2d 211, 216 (5th Cir. 1990), cert. denied, 111 S. Ct. 2264 (1991); United States

v. Birdsell, 775 F.2d 645, 652-53 (5th Cir. 1985), cert. denied, 478 U.S. 1032 (1986). Plain error is error so obvious and substantial that our failure to notice it would affect the fairness, integrity, or public reputation of the judicial proceedings and would result in manifest injustice. McCaskey, 9 F.3d at 376.

Narvaez has not demonstrated plain error on this record. He does not identify any specific information outside the trial record that was considered by the jury in its deliberations, nor does he explain how the jury notes to the court demonstrate the jury's inability to perform its function impartially. Additionally, the district judge was careful to give clear instructions to the jury before they retired in response to the jury notes. The judge explained why the general practice is not to provide transcripts of witness testimony, and he also explained that it is not the function of the court to require additional evidence to be brought forward. Plain error is a very difficult burden to satisfy on appeal, and we conclude that Narvaez has not done so with respect to his complaints of jury misconduct.

C. Improper Comments by the Prosecution

Narvaez alleges that the prosecution improperly commented on Narvaez's failure to testify. He has not, however, quoted a single improper comment or cited even one passage in the voluminous record in his brief to substantiate his allegations. This has forced the government to speculate in its reply brief as

to the specific comments Narvaez relies upon. Additionally, Narvaez does not argue that he objected to any improper comments; this failure to object would again require him to show plain error even if he had cited the pertinent passages to us. FED. R. CRIM. P. 52(b).

We will not comb the record ourselves in a quest for arguably improper comments by the government. Narvaez's claim is deemed waived. FED. R. APP. P. 28(a)(4), (5); see also United States v. Ballard, 779 F.2d 287, 295 (5th Cir.) (holding that a party who offers only a "bare listing" of alleged errors "without citing supporting authorities or references to the record" abandons those claims on appeal), cert. denied, 475 U.S. 1109 (1986).

IV. SAMUEL TREVINO, JR.

Appellant Trevino challenges his conviction on the ground that the jury verdicts were supported by insufficient evidence. He also challenges the sentence imposed on him. We consider his arguments in turn.

A. SUFFICIENCY OF THE EVIDENCE

Trevino was convicted of conspiracy to possess cocaine with intent to distribute, conspiracy to launder money, and aiding and abetting money laundering. We first review the elements of these crimes. In order to prove the crime of conspiracy, the government must prove: (1) a conspiracy existed; (2) the defendant knew of the conspiracy; and (3) the defendant

voluntarily participated in it. United States v. Maceo, 947 F.2d 1191, 1197 (5th Cir. 1991), cert. denied, 112 S. Ct. 1510 (1992). In order to prove that a defendant has aided and abetted a crime under 18 U.S.C. § 2, the government must prove: (1) the defendant associated with the criminal venture, (2) the defendant participated in the venture, and (3) the defendant sought by action to make the venture successful. United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991). The money laundering statute under which Trevino was prosecuted for aiding and abetting provides that

> [w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activitySQ
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . [commits an offense].

18 U.S.C. § 1956(a)(1)(A)(i). Thus, to prove money laundering, the government must show that the defendant (1) conducted or attempted to conduct a financial transaction, (2) knew that the transaction involved the proceeds of unlawful activity, and (3) did so with the intent to promote or further unlawful activity. United States v. Ramirez, 954 F.2d 1035, 1039 (5th Cir.), cert. denied, 112 S. Ct. 3010 (1992).

With respect to Trevino's convictions for conspiracy, we note that the agreement between the other conspirators and the defendant need not be proved by direct evidence, but may be inferred from concert of action. United States v. Magee, 821 F.2d 234, 239 (5th Cir. 1987). Although mere presence at the

scene of the crime or close connection with co-conspirators will not alone support an inference of participation in a conspiracy, presence or association is one factor that the jury may rely on, along with other evidence, in finding conspiratorial activity by a defendant. Id.

The government cites the following evidence in support of Trevino's convictions. Narvaez operated a backhoe service business out of his residence in Harlingen, and Trevino admits that he was a business partner in that enterprise. Alfonso Gonzales, a member of the conspiracy, testified at trial that Narvaez stored drugs at his residence before the stash house was acquired. He also testified that Narvaez indicated to him that the backhoe business was intended to serve as a "front" for the drug conspiracy. Trevino's name and phone number also appeared on a list of phone numbers written by Gonzales. Edward Krafka, who lived near the stash house, testified that he took care of the grapefruit orchard on the stash house property and that Trevino served as a translator for him and the person Krafka knew as "Mr. Hernandez." Krafka testified that once, when he drove onto the stash house property to tend the orchard, he came upon Trevino and "Hernandez" on their knees peering into the underground vault. When the two men became aware of Krafka's approach they quickly closed the lid and stood up. They then asked Krafka if he had noticed any dead chickens in the orchard and said that they were burying a dead chicken, a story Krafka testified that he found unbelievable. Gonzales testified that

the underground vault was used to store both cocaine and United States currency, and that the vault at times held approximately six tons of cocaine or up to six or seven million dollars.

Gonzales also testified about an occasion in September of 1989 in which a substantial amount of money was brought to the stash house in secret compartments in a recreational vehicle. He testified that Trevino was one of the four men who helped unload the money, and that he was told by Trevino and others that a second vehicle carrying money was taken to Trevino's residence in Harlingen. That money was later moved to the stash house, and Gonzales testified that some fourteen or fifteen million dollars were carried in the two vehicles. One of the leaders of the conspiracy, Jaime Rivas, testified that Trevino was a member of the conspiracy who would work at the stash house when a load of cocaine would arrive. Rivas also testified that he invested some of the money received for cocaine in the backhoe business and that the backhoe business was a front for the cocaine conspiracy. Finally, Rivas testified that Trevino personally participated in one occasion when cocaine was unloaded from a truck at the stash house and that Narvaez paid Trevino for his role in the conspiracy in Rivas's presence at Narvaez's house. Rivas estimated that Trevino was paid nine or ten thousand dollars. Rivas confirmed that he and Trevino had unloaded money from a truck at Trevino's "lot" on one occasion and that this money was later taken to Mexico.

We conclude that the evidence was plainly sufficient to support all of Trevino's convictions. Testimony from coconspirators Gonzales and Rivas plainly inculpated Trevino as an active member of the conspiracy with respect to both the drugs and the large amounts of currency funneled through the stash house. We have held that a conspiracy conviction may be based upon the uncorroborated testimony of a coconspirator even when such testimony is from one who made a plea bargain with the government, provided that the testimony is not incredible or otherwise insubstantial on its face. United States v. Gadison, 8 F.3d 186, 190 (5th Cir. 1993). The evidence also showed that Trevino helped unload millions of dollars of currency at the stash house, and the jury could reasonably infer that these funds represented proceeds from illegal activity. The money laundering statute broadly defines a "transaction" as including a "transfer, delivery, or other disposition" of proceeds of unlawful activity. 18 U.S.C. § 1956(c)(3). Mere transportation of such proceeds therefore qualifies as a "transaction." United States v. Dimeck, 815 F. Supp. 1425, 1432 (D. Kan. 1993); see also Ramirez, 954 F.2d at 1040 (stating that the statutory elements may be satisfied if the defendant "transferred, delivered, moved, or otherwise disposed of the money"). We hold that Trevino's convictions are supported by sufficient evidence.

B. SENTENCING

Trevino contends that the sentencing court erred in attributing 1500 kilograms or more of cocaine to him for

sentencing purposes under the sentencing guidelines. He also contends that his base offense level was improperly enhanced by two levels for weapon possession. We note that the version of the sentencing guidelines in effect on October 18, 1991, applies to Trevino because a sentencing court must apply the version of the guidelines effective at the time of sentencing unless application of that version would violate the Ex Post Facto Clause of the Constitution. United States v. Mills, 9 F.3d 1132, 1136 n.5 (5th Cir. 1993).

1. *Quantity of Drugs*

The presentence investigation report (PSR) recommended that 1500 or more kilograms of cocaine (the uppermost range recognized by the sentencing guidelines) should be attributed to Trevino for sentencing purposes, and the sentencing court adopted this recommendation. Thus, Trevino's base offense level for his conviction for conspiracy to possess cocaine with intent to distribute was forty-two. United States Sentencing Commission, Guidelines Manual, § 2D1.1(c)(1) (Nov. 1990).[2] We note that a PSR generally bears sufficient indicia of reliability to be considered by the trial court as evidence in making the factual determinations required by the sentencing guidelines. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). Trevino now contends that the sentencing court erred in attributing more than

[2] All citations to the sentencing guidelines in this opinion are to the version effective November 1, 1990, unless otherwise indicated.

1200 kilograms of cocaine to him for sentencing purposes because he could not reasonably foresee that the conspiracy involved more than that amount. Trevino derives this lesser quantity of drugs from evidence showing that this was roughly the amount of drugs he personally assisted in unloading.

Of course, under the sentencing guidelines a defendant convicted of a narcotics offense is not necessarily sentenced according to the amount of drugs he personally possessed or distributed. Under U.S.S.G. § 1B1.3(a)(1), Trevino's base offense level should have been determined according to all conduct of his coconspirators "in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." U.S.S.G. § 1B1.3 comment. (n.1). Thus, Trevino's base offense level should take into account not only drugs that he personally possessed with intent to distribute but also drugs possessed by his coconspirators with intent to distribute, if this possession satisfies the test set forth in the guidelines commentary to § 1B1.3. See Stinson v. United States, 113 S. Ct. 1913, 1919-20 (1993) (holding that the sentencing commission's commentary to the guidelines must be given controlling weight by courts applying the guidelines unless the commentary is violative of the Constitution or federal statute, or plainly erroneous or inconsistent with the guidelines themselves).

We cannot conclude that the sentencing court's factual finding that more than 1500 kilograms of cocaine should be

considered as relevant conduct with respect to Trevino was clearly erroneous. Even if Trevino personally assisted with the unloading of only 1200 kilograms of cocaine, there was sufficient evidence to support the conclusion that his coconspirators possessed much more than 1200 kilograms in furtherance of the common conspiracy and that this fact was reasonably foreseeable to Trevino. Most significant in this regard was the evidence that Trevino also helped unload millions of dollars in cash from a truck on his own property, and that this cash was eventually transported to the stash house. The sentencing court could have concluded from this evidence that Trevino was fully aware of the magnitude of the cocaine conspiracy of which he was a part and sentenced him on this basis. We find no error in the sentencing court's finding with respect to the amount of cocaine attributable to Trevino.

2. *Weapon Possession*

Section 2D1.1(b)(1) of the relevant version of the sentencing guidelines provided that a defendant's base offense level should be increased by two levels "[i]f a dangerous weapon (including a firearm) was possessed during commission of the [drug] offense." The sentencing court applied this adjustment to Trevino in determining his sentence. Trevino claims that this ruling constituted reversible error.

According to the PSR, two firearms were discovered during the raid on the stash house. Trevino argues that this discovery cannot justify applying the enhancement of U.S.S.G. § 2D1.1(b)(1)

to his base offense level because the government never proved who precisely possessed those firearms and because the government never proved that firearms were present during the criminal conduct in which Trevino personally participated.

The government may prove possession of a firearm during a drug offense by showing that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of a drug transaction occurred. United States v. Eastland, 989 F.2d 760, 770 (5th Cir.), cert. denied, 114 S. Ct. 246, and cert. denied, 114 S. Ct. 443 (1993). "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 comment. (n.3). If the defendant being sentenced was not at the location where the drugs and weapons are found, the defendant may nevertheless be held accountable "for a co-defendant's reasonably foreseeable possession of a firearm during the commission of a narcotics trafficking offense." United States v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990). Possession of a firearm by a coconspirator is usually foreseeable because firearms are common "tools of the trade" in drug conspiracies. United States v. Mergerson, 4 F.3d 337, 350 (5th Cir. 1993), cert. denied, --- S. Ct. ---, 1993 WL 558090 (U.S. Mar. 21, 1994). The district court must make a factual finding that the defendant personally possessed the weapon or that he could have reasonably foreseen the possession of a weapon

by a coconspirator. United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991).

At Trevino's sentencing hearing, the court overruled Trevino's objection to the recommendation contained in the PSR that the weapons enhancement should apply to Trevino. The court stated, "You were associated with [the stash house] up to and through the time of the seizure. The weapons were connected to the offense and it was reasonably foreseeable to you and anybody else involved in this transaction that firearms would be involved." The court also adopted the PSR. Given the evidence that firearms were present at the stash house at the time of the raid and the sentencing court's findings, we cannot say that the application of the weapons enhancement to Trevino was clearly erroneous.

Trevino also contends that he should not have received the weapons enhancement because two of his codefendants who were actually present at the stash house at the time of the raid pleaded guilty and did not receive the weapons enhancement. The Sixth Circuit has reversed a sentencing court for a similar disparity:

> It is particularly inequitable to impute the possession of a weapon to co-conspirators who did not commit the conduct relevant to the enhancement, when the act of weapons possession is not used against the co-conspirator who allegedly did commit the relevant conduct. For these reasons, we find that it was an abuse of discretion for the district court, without any explanation, to apply the weapons possession enhancement to the sentences of Davis and Blanton, when the court had decided not to apply the enhancement to the sentence of co-conspirator Williams.

United States v. Williams, 894 F.2d 208, 213 (6th Cir. 1990). Abuse of discretion, however, does not describe the applicable standard of review in this circuit; the applicability of the weapons enhancement is a factual determination by the sentencing court. Either the evidence is sufficient to support this finding or it is not. We conclude that it is sufficient.

We find no error in the sentencing court's decision to apply the weapons enhancement of U.S.S.G. § 2D1.1(b)(1) to Trevino.

V. CONCLUSION

For the foregoing reasons, we AFFIRM the judgments of conviction and sentence as to both Narvaez and Trevino.