IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2537
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDUARDO CARLOS HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-91-165-10)

(January 7, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Eduardo Hernandez appeals his conviction of, and sentence for, conspiracy to possess with intent to distribute more than five kilograms of cocaine and aiding and abetting possession with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(i) and (b)(1)(A) and 846 and 18 U.S.C. § 2. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

This court thrice has recounted the crimes of the cocaine trafficking operation headed by Jose Ignacio Palomo ("Jose"), which transported cocaine from Guatemala to Houston in trucks and cars and included members of Jose's family and others. The operation used Jose's warehouse in Guatemala City as its base for sending shipments and his mechanic shop in Houston as its base for receiving them.[1] Hernandez, who is Jose's grandson, was convicted after a jury trial and was sentenced to serve two concurrent 151-month prison terms to be followed by two concurrent five-year terms of supervised release.

II.

A.

1.

Hernandez argues that the evidence was insufficient. On such a challenge, we review the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). The conviction must be affirmed if any rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991).

As to the conspiracy count, the government needed to prove beyond a reasonable doubt that two or more persons had an agreement to possess the cocaine with intent to distribute it, that the defendant knew of that agreement, and that he participated in it voluntarily. United States v. Sacerio, 952 F.2d 860, 863 (5th Cir. 1992). The evidence could have been direct or circumstantial. United States v. Valdiosera-Godinez, 932 F.2d 1093, 1095 (5th Cir. 1991), cert. denied, 113 S. Ct. 2369 (1993). The agreement could have been inferred from concert of action. Id. Voluntary participation

[1] I.e., United States v. Palomo, 998 F.2d 253, 255-56, 258 (5th Cir.), cert. denied, 114 S. Ct. 358 (1993) ("Edgar Palomo"); United States v. Andrade, No. 92-2540, slip op. at 3-5 (5th Cir. Oct. 22, 1993) (unpublished); United States v. Rodriguez, No. 92-2539, slip op. at 1 (5th Cir. Mar. 29, 1993) (unpublished).

could have been inferred from a collocation of circumstances. Id.

Circumstantial evidence may prove guilt beyond a reasonable doubt without excluding every reasonable hypothesis of innocence. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983). Merely associating with those in a conspiracy and being "in a climate of activity that reeks of something foul," however, are not enough to prove the defendant's participation. Sacerio, 952 F.2d at 863 (internal quotation marks omitted).

Evidence of aiding and abetting the possession of illicit drugs with intent to distribute need not include proof of actual physical possession of the drugs. United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991). The government, though, must prove that the defendant "became associated with, participated in, and in some way acted to further the possession and distribution of the drugs." Id. at 745-46. In the typical case, convictions for conspiracy and aiding and abetting may rest on the same evidence. Id. at 746.

2.

a.

Cesar Sanchez was a paid Drug Enforcement Administration ("DEA") informant in Guatemala who went to work for Jose. Sanchez accompanied Jose to Jose's warehouse in Guatemala City, where Jose introduced him to Max Silva, who modified vehicle gas tanks to carry cocaine. Sanchez also met Hernandez, who was looking at a motorcycle in the warehouse. While Jose and Silva discussed the modification of the tanks, Hernandez was present, standing five to seven feet away.

Sanchez saw Hernandez at the warehouse one more time. Hernandez asked Sanchez, who was going to drive cocaine to Houston, whether he was nervous about the upcoming trip. Sanchez responded that he was not nervous, and Hernandez laughed.

Before leaving Guatemala, Sanchez asked Jose whether the trip was going to be secure. Sanchez said that Jose responded, "`Look, man, how can you imagine that I put my grandson doing this if he is not secure.' That's all he told me." Sanchez also testified that, on another occasion, while

he was riding in Jose's car, Jose said, "`Look, how do you imagine I can send my grandson driving a van'? [sic] He did a van, and he know he be secure for the job. So I didn't say nothing else. He was upset."

Jose Luis Mendoza Hoyos drove a truck for Jose from Houston to Guatemala. At the same time, Hernandez drove a second vehicle, and Hernandez's mother, Nora, drove a third. When they arrived in Guatemala, Hernandez stayed at Jose's house. Mendoza joined him there later. Mendoza visited Jose's warehouse in Guatemala daily while he was in that country. He went to the warehouse in the company of Hernandez. Jose, Mendoza testified, said words to the effect that he was proud of, or happy about, Hernandez.

Another DEA informant, Auturo Quiroga, testified about a meeting that Jose held with other conspirators in Guatemala. Jose assured them that he considered the trip to Houston to be safe. Jose told them that his grandson had made the trip successfully.

At one time, Jose sent his daughter Nora, Hernandez's mother, to Mexico by air to drive a loaded truck to Houston. Hernandez reserved the flight for his mother. Hernandez's Guatemalan passport showed several trips from the United States to Guatemala between January 1990 and September 1991, including a truck trip to Guatemala in August 1991.

DEA agent James Phenicie testified that, on September 3, 1991, DEA agents observed a pick-up truck arrive at Jose's shop in Houston, and they saw another conspirator arrive by car. An unidentified person arrived by taxi, and then another car arrived. Hernandez opened the gate to the shop for some of these arrivals.

Another truck arrived. Agents recently had seen this truck in Guatemala City. Hernandez looked under the hood of that truck and then locked the shop's gate and front door and left. On the next two days, several conspirators and Hernandez arrived at and departed from the shop. Hernandez unlocked the door himself.

On September 5, Hernandez drove to the shop with Jose and other conspirators as passengers. Hernandez had picked them up at Houston Intercontinental Airport.

On September 9, Hernandez and others stood around the shop while one conspirator cut up a gasoline tank. The next day, Hernandez arrived at the shop while a conspirator removed the gas tank of the truck that agents previously had seen in Guatemala. Hernandez was also present when one of the conspirators informed others that one of their number had been stopped at the United States border while carrying cocaine.

Quiroga testified that, when two conspirators suggested that the detained driver might have been carrying papers identifying the shop, Jose directed Hernandez to take the undercover informants to a motel and directed others present to move the trucks that were at the shop. Hernandez looked uncomfortable and nervous. He did not drive but went in the car with the informants.

Hernandez testified. He gave innocent explanations of his actions. For example, he looked after the shop in Houston for his uncle, opening it, picking up the mail, and cleaning up. He never talked with the conspirators about business, never questioning the source of their money. He once drove a truck to Guatemala for his grandfather, who had purchased some land on which Hernandez was to stay. Hernandez became ill on the trip and merely stayed in Guatemala City for a while. He also had dental work done in Guatemala. When the conspirators were talking business, Hernandez did not listen. He never saw cocaine at the shop or heard that cocaine was in modified gas tanks.

The court denied Hernandez's motions for judgment of acquittal made at the conclusion of the government's case and at the conclusion of all the evidence. The court instructed the jurors that a guilty verdict depended on their finding that Hernandez deliberately associated himself with the criminal venture; mere presence at the scene of a crime was not enough. The jury also was instructed that a deliberate closing of one's eyes to criminal activity can be evidence of knowledge.

The prosecutor argued to the jury that, though Hernandez was a minor participant, he knowingly and voluntarily involved himself in the drug operation. Defense counsel argued that Hernandez was guilty only of associating with his family.

b.

While mere presence in a foul environment does not establish guilt, repeated presence and association with conspirators carrying out the aims of a conspiracy, along with other evidence, may be sufficient evidence of guilt. United States v. Pruneda-Gonzalez, 953 F.2d 190, 196-97 (5th Cir.), cert. denied, 112 S. Ct. 2952 (1992). The government showed that Hernandez was present on many occasions while others participated in the conspiracy. He questioned Sanchez about being nervous, from which Hernandez's knowledge of the transportation of contraband could be inferred. He assisted the conspirators at the shop in Houston. His grandfather even said that Hernandez had driven a load of cocaine, which is evidence of actual participation.

The jury heard this evidence and the arguments. They obviously believed that Hernandez's conduct showed knowing participation in, and assistance to, the activities of Jose's operation. Such a choice is not irrational. Accordingly, the evidence is sufficient to uphold the conviction.

B.

1.

Hernandez argues that two out-of-court statements made by his grandfather were hearsay and, as such, were improperly admitted. Leading up to the first challenged statement, the prosecutor asked informant Quiroga whether he had sought reassurances from Jose about the safety of transporting cocaine from Guatemala to Houston. The following exchange then occurred:

Q And then you sought assurances again that the trip was going to be safe?

A Yes.

Q And [Jose] then said this is so safe that my grandson has even driven a load north?

A Had driven.

Q Had driven a load north?

A In the past.

Q In the past.

You didn't know if it was true or not?

A No.

Q Right now you don't know if it's true or not?

A I don't know.

Q Did it reassure you that driving north would have been safe?

A Well, when he mentioned that it was safe because his grandson did a trip with a pickup, or a car loaded with merchandise, it was safe, you know, that we can do it, also. If his grandson can do it, why not we cannot.

Q And if you weren't an informant with DEA, you would have been assured that it was safe, wouldn't you? Because he let his grandson do it?

A Yes.

Hernandez did not object.

The other challenged statement, to which Hernandez did object, came in informant Sanchez's testimony that Jose told him and Quiroga that Nora had made trips to the United States with cocaine. The following exchange then occurred:

Q Did you-all discuss anything further about the trip or the arrangement or the destination at that time in the warehouse in Guatemala City?

A Yeah. He gave us instructions how to do the trip, what time we should call him here, as soon as we get here. And that it's going to be very easy for us. Don't worry. It's not a problem, you know. "I drive down there with my family and nobody stops me, too," he told me.

Id.

Similar out-of-court statements by Jose were admitted at other points in the trial. Quiroga testified that Jose said that the trip was so safe that his grandson Eduardo had made one successfully, but Hernandez did not object. Quiroga also testified that Jose repeated that his grandson had driven safely, and Hernandez did not object. Sanchez testified that Jose said that he would not have sent his grandson on the trip if it were not safe. Hernandez made an objection that the court overruled.

2.

Appellate review of a trial court's evidentiary rulings is "highly deferential," and we will reverse only for an abuse of discretion. United States v. Anderson, 933 F.2d 1261, 1267-68 (5th Cir. 1991). When there is no objection at trial, our review is limited to the "plain error" standard of FED. R. CRIM. P. 52(b). See United States v. Olano, 113 S. Ct. 1770, 1777 (1993). As analyzed below, under either the "abuse of discretion" standard or the "plain error" standard, the result is the same.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. FED. R. EVID. 801(c). A statement by a co-conspirator made in furtherance of a conspiracy, however, is not hearsay, FED. R. EVID. 801(d)(2)(E); United States v. Arce, 997 F.2d 1123, 1128 (5th Cir. 1993), and is admissible if a conspiracy existed, if the declarant and the defendant were members of that conspiracy, and if the statement was made in the course of and in furtherance of the conspiracy, United States v. Valdez, 861 F.2d 427, 431 (5th Cir. 1988), cert. denied, 489 U.S. 1083 (1989).

3.

As shown above, a conspiracy existed, and Jose and Hernandez were members of it. The district judge in this case presided in the other Palomo family cases described above and was familiar with the conspiracy. The testimony showed that Jose made the statements in an effort to convince persons in the conspiracy that driving cocaine to the United States could be done safely. Even if the objections were properly made, the admission of the challenged out-of-court statements would not have been erroneous.

C.

1.

Hernandez argues that the district court erred in refusing to instruct the jury that his failure to flee prior to trial could be an indication of his consciousness of innocence. He states that, in the

appropriate case, the government is entitled to an instruction that evidence of flight could be an indication of the defendant's consciousness of guilt. "What's good for the goose is good for the gander," he argues.

Hernandez testified that his mother and grandfather urged him to flee the United States while awaiting trial, but he refused. He requested an instruction that included the language, "His refusal to flee, if proved, is a fact which may be considered in determining his guilt or innocence." The court denied the requested instruction, but told the parties they were free to argue the probity of Hernandez's lack of flight.

2.

This Court reviews a jury charge to determine whether, as a whole, it clearly and correctly states the law as applied to the facts of the case. United States v. Lara-Velasquez, 919 F.2d 946, 950 (5th Cir. 1990). A trial court has substantial latitude in fashioning an instruction that fairly and adequately covers the issues. United States v. Allibhai, 939 F.2d 244, 251 (5th Cir. 1991), cert. denied, 112 S. Ct. 967 (1992). We will reverse for abuse of discretion when (1) a requested instruction was substantially correct; (2) the actual instructions did not substantially cover the same substance; and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present a given defense. United States v. Arditti, 955 F.2d 331, 339 (5th Cir. 1992), cert. denied, 113 S. Ct. 597 (1992) and 113 S. Ct. 980 (1993).

3.

Evidence of an accused's flight is generally admissible as tending to establish guilt. United States v. Williams, 775 F.2d 1295, 1300 (5th Cir. 1985), cert. denied, 475 U.S. 1089 (1986). The principle is well established. United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977) (citing cases and treatises going back to Allen v. United States, 164 U.S. 492, 500-01 (1896)).

We are aware of no authority to support Hernandez's argument that evidence of refusal to flee

is probative of innocence. Furthermore, even with respect to the inferences to be drawn from flight, the Federal Judicial Center Committee to Study Criminal Jury Instructions recommended that a flight instruction not be given routinely but that the subject generally should be left to argument. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[10], at 401-78 through 401-79 (1993). That is exactly what the district court did in the instant case with respect to the nonflight question. Hernandez has made no showing that the requested instruction was substantially correct.

III.

A.

1.

Hernandez argues that the amount of cocaine upon which his sentence was based was too great. He argues that, because the trial evidence showed that 114 kilograms of cocaine were transported into the United States, the court should not have based his sentence upon 227 kilograms, the total involved in the conspiracy.

2.

We review a sentence under the Sentencing Guidelines to determine whether the district court correctly applied the guidelines to factual findings that are not clearly erroneous. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990). A clearly erroneous finding is one that is not plausible in light of the record viewed in its entirety. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985). Legal conclusions regarding the guidelines are freely reviewed. Manthei, 913 F.2d at 1133.

For sentencing purposes, a conspirator is held accountable for all reasonably foreseeable acts of his co-conspirators. U.S.S.G. § 1B1.3(a)(1)(B) & comment. (n.2); United States v. Devine, 934 F.2d 1325, 1337 (5th Cir. 1991), cert. denied, 112 S. Ct. 349 (1991) and 112 S. Ct. 952 (1992). The government argues that Hernandez has waived this issue because he has not provided this court with the portion of the sentencing transcript that establishes the amount. Hernandez did supply a transcript

of that portion of the sentencing hearing in which the court found the total amount foreseeable by him.

3.

The district court established the amount during the portion of the sentencing hearing pertaining to Jose and two other conspirators. Andrade, slip op. at 8, 23. Hernandez has not supplied that portion of the transcript. Nevertheless, the issue may be considered, as we already have held that the finding that the conspiracy involved 227 kilograms is not clearly erroneous. See Edgar Palomo, 998 F.2d at 258; Andrade, slip op. at 23.

The only question remaining, then, is whether the entire amount was reasonably foreseeable by Hernandez. He was present on numerous occasions at Jose's warehouse in Guatemala City and Jose's shop in Houston, and he had access to the shop and admitted others to it. He made many trips between the two cities with the conspirators, and he assisted the conspiracy. Given that ongoing involvement with several conspirators in two cities, the district court did not clearly err in finding the total amount foreseeable.

B.

1.

Hernandez argues that the district court erroneously denied him a downward departure. He argues that he is entitled to one because his involvement in the conspiracy was on account of duress and extraordinary family ties. The district court denied the departure, which Hernandez had requested on the basis of U.S.S.G. §§ 5K2.12, 5H1.6.

2.

A refusal to depart is unreviewable unless the refusal was in violation of the law. United States v. Mitchell, 964 F.2d 454, 462 (5th Cir. 1992). The district court may depart downward if the

defendant committed the offense because of coercion or duress. U.S.S.G. § 5K2.12, p.s.; United States v. Vela, 927 F.2d 197, 200 (5th Cir.), cert. denied, 112 S. Ct. 214 (1991). "Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency." U.S.S.G. § 5K2.12, p.s.; see Vela, 927 F.2d at 200. Family ties and responsibilities generally may not be considered in sentencing; they may be considered only in extraordinary cases. 28 U.S.C. § 994(e); U.S.S.G. § 5H1.6, p.s.; United States v. Carr, 979 F.2d 51, 54 (5th Cir. 1992); United States v. Burch, 873 F.2d 765, 768 (5th Cir. 1989).

3.

In refusing to depart on the basis of coercion or duress, the district court recited the law correctly and found that the influence described in the guideline was "far beyond what we're involved with here." Hernandez has asserted no violation of law in the refusal to depart on the basis of § 5K2.12.

Hernandez argues that his family circumstances were extraordinary because of the influence that his grandfather had over him. In refusing to use § 5H1.6 as a basis for departure, the district court stated the law correctly, cross-referenced its finding with respect to § 5K2.12, and added that, after Hernandez married, his mother-in-law and wife caused a lessening of the grandfather's influence. Hernandez argues that this reference to the mother-in-law and wife refers to Hernandez's refusal to flee after the crimes and not to events occurring during the crimes.

Hernandez did testify that he consulted his mother-in-law and wife about his mother's and grandfather's advice to flee before trial. Hernandez, however, was married in December 1990; the events of this conspiracy occurred in 1991. The district court did not limit its comment about the mother-in-law's and wife's influence to the time after the crimes. Hernandez has shown no violation of law. The refusal to depart, therefore, is unreviewable.

The conviction and sentence are AFFIRMED.