IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2839

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN FRANCISCO VIDEA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-0025)

(February 3, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Juan Francisco Videa (Videa) was convicted for conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), possession with intent to distribute cocaine, and aiding and abetting the underlying

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

substantive offense in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2. Videa appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In May of 1991, members of the Houston High Intensity Drug-Trafficking Area Task Force (HIDTA) arrested Roman Suarez (Suarez), among others, and seized 519 kilograms of cocaine. Suarez was responsible for coordinating the importation and distribution of cocaine in Houston for the Medellin Cartel of Columbia (the cartel). Following Suarez's arrest, he began cooperating with the HIDTA. Suarez provided information to the HIDTA which led to the arrest of several other individuals, including Videa.

At Videa's trial, Suarez testified that he was in charge of several large shipments of cocaine that were flown into northern Mexico from Columbia. The cocaine was flown to Mexico in one large load, approximately 600-700 kilograms of cocaine, which was then broken down in Mexico into smaller loads of about 100 kilograms and transported to Houston in "load vehicles." Suarez's group was responsible for transporting the cocaine from the border to various locales in Houston where the vehicle would be left for someone else to pick up. Suarez would ensure that the cocaine was stored in a "stash house" and eventually delivered to another member of the cartel for distribution.

Suarez further testified that in 1986 or early 1987, he was introduced to Videa by a member of the cartel. Videa then began assisting Suarez in stashing cocaine. Videa's responsibilities

were to pick up the cocaine from a load vehicle when it arrived in Houston, stash the cocaine, and deliver it to another person who would then distribute the cocaine. The first load that Videa agreed to store for Suarez consisted of approximately 500 kilograms. According to Suarez, Videa stashed at least five or six loads over approximately three years, involving as many as fifteen different load vehicles.

Communication between the cartel members in Columbia, Mexico, and Houston was accomplished by using high-frequency radios. Suarez stated that a high-frequency radio was installed at Videa's house in order for Suarez to communicate with individuals in Mexico and Columbia to determine when shipments of cocaine would be arriving. HIDTA conducted a surveillance of Videa's home and observed a high-frequency radio antenna on his house.

Antonio Rios testified that Suarez told him to call Videa, in April or May of 1990, about the arrival of 45 kilograms of cocaine. Rios phoned Videa and then met him the next day at a Denny's restaurant. The two then went to a motel, and Videa took possession of the cocaine from Rios. Videa later paid Rios. Rodrigo Rodriguez also testified that sometime in 1989 he delivered a tote bag containing 10 kilograms of cocaine to Videa in a motel room.

Suarez also testified that in September 1990, 200 kilograms of cocaine arrived in Houston. Videa was responsible for delivering 160 kilograms of the cocaine to Willie, a member of

the cartel, and for selling 40 kilograms to pay the Mexican smugglers. Videa was supposed to drop off a truck containing the 160 kilograms of cocaine in the Galleria shopping mall parking lot. Willie picked up the truck, but the cocaine was not in the truck. Willie called Suarez and told him that the truck was empty. Videa told Suarez that he personally loaded the truck and that Steve Ballon had driven the truck to the Galleria.

Suarez called a meeting of everyone involved in the delivery of the cocaine. However, Suarez was unable to determine what had happened to the cocaine. Naturally, the cartel was unhappy to learn that some of its cocaine was missing, and it called a meeting in Columbia with everyone that was involved in the transaction except Suarez, who remained in Houston to take care of some business. About a week later, Suarez received a phone call from members of the cartel, and he was told that they wanted to talk to him about a problem with Videa. When Suarez arrived in Columbia, Videa told Suarez that he had kept the cocaine and had already sold some of it. Videa returned the remaining cocaine and cocaine proceeds. Videa also told the cartel that he had already spent about $160,000 of the proceeds on a house and that he would give the cartel the house. Because the cartel threatened to kill him, Videa remained in Columbia until the cocaine and money were returned to the cartel. Not surprisingly, Suarez ceased utilizing Videa to stash cocaine.

On February 4, 1992, Videa was charged along with several other defendants. A grand jury returned a two count indictment

charging Videa with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), possession with intent to distribute cocaine, and aiding and abetting the underlying substantive possession offense in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2. A jury found Videa guilty of both counts, and the district court sentenced Videa to 300 months imprisonment on each count to run concurrently, and five years supervised release, and ordered him to pay a $100 mandatory special assessment. After trial, Videa filed a motion for judgment of acquittal notwithstanding the verdict and, in the alternative, for a new trial which the district court denied.

II.

Videa raises the claim that the district court erred in denying his motion for judgment of acquittal notwithstanding the verdict and, in the alternative, for a new trial.[1] Videa's motion for judgment of acquittal notwithstanding the verdict requested the district court to enter a judgment of acquittal pursuant to FED. R. CRIM. P. 29(c). In his alternative motion for new trial, Videa requested a new trial for the following reasons: (1) the trial court erred in denying his motion for acquittal

[1] The government contends that Videa's motion for new trial was improperly filed because it was filed nine days after the jury's verdict and not within seven days as required under FED. R. CRIM. P. 33. However, the government's contention is erroneous because FED. R. CRIM. P. 45 provides that "[w]hen a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Therefore, Videa's motion was timely filed.

made at the conclusion of the evidence; (2) his conviction was contrary to the weight of the evidence; and (3) his conviction was not supported by substantial evidence.

A. Denial of motion for judgment for acquittal

We review the district court's denial of a motion for judgment for acquittal *de novo*. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). "`The well established standard in this circuit for reviewing a conviction allegedly based on insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt.'" Id. We view the evidence in the light most favorable to the government to determine whether the government proved all elements of the crimes alleged beyond a reasonable doubt. United States v. Skillern, 947 F.2d 1268, 1273 (5th Cir. 1991), cert. denied, 112 S. Ct. 1509 (1992). Furthermore, the evidence does not have to exclude every reasonable hypothesis of innocence. United States v. Leed, 981 F.2d 202, 205 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993).

In order to find Videa guilty of a conspiracy under 21 U.S.C. § 846, the government must prove (1) the existence of an agreement to import or possess controlled substances with intent to distribute them; (2) Videa's knowledge of the agreement; and (3) Videa's voluntary participation in the agreement. Id. The government is not required to prove the existence of the agreement between the co-conspirators by direct evidence; the

agreement may be inferred from circumstantial evidence. United States v. Natel, 812 F.2d 937, 940 (5th Cir. 1987). The government does not have to show an overt act in furtherance of the conspiracy. Id. While presence at the scene of the crime or close association with another involved in a conspiracy will not by itself support an inference of participation in a conspiracy, presence or association is a factor that a jury may rely upon, along with other evidence, in finding conspiratorial activity by the defendant. Id.

To convict Videa of possession with intent to distribute cocaine, the government must prove that Videa knowingly possessed cocaine with intent to distribute. United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992). "Proof of intent to distribute may be inferred from the presence of distribution paraphernalia, large quantities of cash, or the value and quality of the substance." Id.

To convict Videa of aiding and abetting under 18 U.S.C. § 2, the government must prove that Videa (1) was associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed. United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991). Furthermore, the evidence that supports a conviction for conspiracy can also be used to support a conviction for aiding and abetting the possession of illegal narcotics with the intent to distribute. Id.

We conclude that there was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that Videa

was guilty of conspiracy, possession with intent to distribute, and for aiding and abetting. Contrary to Videa's contention that the government did not produce any direct evidence of Videa's guilt of the charged crimes, the government introduced direct evidence, as seen in part I of this opinion, of Videa's knowing participation in the conspiracy and substantive offense through the testimony of three co-conspiratorsSQSuarez, Rios, and Rodriguez. The three co-conspirators testified about the operation of the conspiracy, about their roles in the conspiracy, and about Videa's role as the person responsible for stashing the cocaine and delivering it to distributors in Houston. See Restrepo, 994 F.2d at 182 (noting that "the uncorroborated testimony of an accomplice or co-conspirator can be sufficient to support the verdict"); United States v. Greenwood, 974 F.2d 1449, 1457 (5th Cir. 1992) (same), cert. denied, 113 S. Ct. 2354 (1993); United States v. Singer, 970 F.2d 1414, 1419 (5th Cir. 1992) (same).

B. Denial of motion for new trial

Videa also asserts that the district court erred in denying his motion for new trial. The decision to grant or deny a motion for new trial based on the weight of the evidence is within the sound discretion of the trial court. United States v. Dula, 989 F.2d 772, 778 (5th Cir.), cert. denied, 114 S. Ct. 172 (1993). We will reverse the trial court's decision only if we find its decision to be a clear abuse of discretion. Id. at 778.

We cannot find how the district court could have abused its discretion in denying Videa's motion for new trial. The government presented direct evidence, through three co-conspirators, of Videa's involvement in the conspiracy. Furthermore, Videa argues only that there is insufficient evidence to support the jury's verdict and does not present this court with any argument as to how the district court abused its discretion, i.e., that the district court abused its discretion in making the same witness credibility choices as the jury. Therefore, we conclude that the district court did not err in overruling Videa's motion for new trial. See United States v. Martinez, 763 F.2d 1297, 1312-13 (11th Cir. 1985) (stating that "[m]otions for new trials based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really `exceptional cases'").

III.

Finally, Videa argues that the district court erred in calculating the amount of drugs involved in the cocaine conspiracy for the purpose of determining his guideline sentence. Specifically, Videa argues that the district court should have found that he was accountable for only 55 kilograms of cocaine and not 1500 kilograms.

The factual findings made by a district court in its determination of a defendant's relevant conduct for sentencing purposes are subject to the "clearly erroneous" standard of review on appeal. United States v. Buckhalter, 986 F.2d 875, 879

(5th Cir.), cert. denied, 114 S. Ct. 203, and cert. denied, 114 S. Ct. 210 (1993). Factual findings made in support of a sentencing determination must be supported by a preponderance of the evidence. Id. We will uphold the district court's sentence as long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993).

At sentencing, Videa's only objection to the district court's determination that he handled at least 1500 kilograms of cocaine was that the evidence at trial only established that Videa handled "approximately" 1500 kilograms of cocaine and not "at least" 1500 kilograms of cocaine. Videa did not argue that the district court should have found that Videa was responsible for only 55 kilograms of cocaine. On appeal, however, Videa argues that this court should follow United States v. Maseratti, 1 F.3d 330 (5th Cir. 1993), and vacate Videa's sentence.

Even assuming that Videa made a proper objection at the sentencing hearing and that his claim should be reviewed under the clearly erroneous standard and not the plain error rule, see United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (stating that "when a new factual or legal issue is raised for the first time on appeal," the plain error standard applies), cert. denied, 111 S. Ct. 2032 (1991), we conclude that the district court's determination that 1500 kilograms was the correct amount of cocaine attributable to Videa for purposes of sentencing was not clearly erroneous. In Maseratti, we noted that a new amendment

to the guidelines, effective November 1, 1992, clarified section 1B1.3's application and made it clear that "it was not necessarily the intent of the Sentencing Commission to hold persons who buy or sell drugs to a major distributor responsible for all the drugs bought or sold by that distributor." Therefore, according to Videa he should not be held accountable for the entire amount of drugs handled by Suarez.

Videa's argument is totally without merit. The district court did not hold Videa accountable for the "entire amount of drugs handled by Suarez." In fact the district court specifically stated that:

> Let me say it like this clear for the record. As far as the court is concerned, the 1500 being the minimum is at least the amount of cocaine handled by Mr. Videa based not just upon what the testimony was, but also based upon some of the reports that I have beensQthat have been made available to me and that you have reviewed . . . . I believe that the evidence is compelling and sufficient for me to find that Mr. Videa handled in excess of, more than 1500 kilograms.

According to this passage, it is clear that the district court held Videa accountable only for the amount of cocaine that he personally handled. Furthermore, contrary to Videa's argument that Rios's and Rodriguez's trial testimony was the only "testimony putting an exact amount of drugs into Videa's hands," the testimony of Suarez and the presentence investigation report, which the district court relied on in reaching its determination, further support the district court's determination that Videa was responsible for at least 1500 kilograms of cocaine. Moreover, even though Videa objected to his presentence investigation report, he offered no rebuttal evidence to refute any of the

facts in the report. Because Videa presented no rebuttal evidence to refute any of the facts in the presentence report, the district court was free to adopt those facts without further inquiry. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). We conclude that the district court's determination was not clearly erroneous.

IV.

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence.