UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2912

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIO JUAQUIN-ROJAS a/k/a
Manuel Enrique Martinez-Espinosa,
MIJAIL HURTADO-ROJAS, and
FELIX GERMAN-HURTADO,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-106)

(August 24, 1994)

Before REAVLEY, JONES and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

A jury convicted appellants Julio Juaquin-Rojas ("Julio"), Mijail Hurtado-Rojas ("Mijail"), and Felix German-Hurtado ("Felix") for conspiring to distribute over 50 kilograms of cocaine. Mijail and Felix were also convicted of aiding and abetting the possession with intent to distribute over 50 kilograms of cocaine. All appellants appeal their convictions claiming

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

insufficient evidence and improper sentence calculations. Finding no error, we affirm.

BACKGROUND

In the beginning of 1992, the Drug Enforcement Agency ("DEA") set up a sting operation to apprehend drug dealers importing cocaine from Colombia to the United States.[2] A cooperating individual ("CI") informed the DEA that Colombian drug dealers sought the services of an individual to transport a substantial amount of cocaine to Texas. To accommodate the drug dealers, DEA Officer Dwayne Pacheco and the CI arranged to meet with members of the drug organization. Pacheco, using a false name, posed as a cocaine transporter and agreed to fly 800 kilograms of cocaine from Costa Rica to the United States. The Colombian drug traffickers agreed to pay $4000 per kilogram for Pacheco's services.

The agreement called for delivery of the cocaine in two separate shipments. When Pacheco arrived in Corpus Christi, Texas with the first shipment of 275 kilograms[3] on March 24, 1992, he and the CI made contact with the Colombian drug organization as agreed. They were instructed to take a portion of the cocaine to Houston where they were to contact a person identified only as "Ciego."

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[2] The facts here are presented in the light most favorable to the jury's verdict. See United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992).

[3] This first shipment was originally to be 300 kilograms, but the Colombians lost 25 kilograms, which was never recovered, during an airdrop over the coast of Costa Rica.

Upon arrival in Houston on March 28, Officer Pacheco and the CI were instructed to go to the Sharpstown Mall in Houston, Texas and call Ciego to arrange a meeting. However, after contacting Ciego from the mall, Ciego told Pacheco and the CI that he believed that they were under police surveillance because of what Ciego was hearing on his police scanner. Ciego refused to show up at the mall.

The next day Pacheco, the CI, and Ciego agreed to meet in Corpus Christi, Texas on April 1, 1992. Ciego and an unidentified woman finally met Pacheco and the CI on April 1 as planned, where Ciego -- later identified as the appellants' co-defendant Cardenas[4] -- paid Pacheco a partial payment for the transportation costs of $79,980.[5] Cardenas told Pacheco and the CI to deliver 50 kilograms of the shipment to a Houston hotel the next day. Cardenas told Pacheco and the CI to use fictitious names from now on in order to evade any attempts at official tracking.

As instructed, Pacheco and the CI arranged to transport 50 kilograms of the cocaine to Houston. The cocaine was transported in three Igloo coolers placed in a white minivan. The DEA placed transmitters in the coolers to alert officials as to when the coolers were moved as well as when the cocaine was removed from the coolers. Pacheco and the CI drove the minivan to a hotel and telephoned Cardenas. Cardenas arrived at the hotel and while there received a cellular phone call from someone who Cardenas told

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[4] Jaime Jose Cardenas is not a party to this appeal.

[5] The amount was supposed to be $80,000, but the payment was $20 short.

the delivery of the cocaine was imminent. Pacheco then gave Cardenas the keys to the minivan, and Cardenas drove away not realizing that he was being trailed by several DEA agents by car and aircraft.

Cardenas drove the minivan for approximately 45 minutes to an apartment complex located on the northwest side of Houston. He was observed parking the car and entering an apartment in the complex. Minutes after entering, another individual -- identified later as Felix German-Hurtado, one of the appellants -- exited the apartment, opened the hatch to the van, removed two of the coolers containing the cocaine, and carried them to the apartment. The DEA agents noticed that Felix appeared to be nervous and anxious the entire time.

Special Agent Schumacher, wanting to discover the exact apartment number, casually walked by the apartment into which Felix had disappeared with the two coolers. As he did so, Schumacher noticed that the apartment door was ajar and saw several individuals inside the apartment. As Schumacher returned to his vehicle, Felix exited the apartment and returned to the minivan to retrieve the third cooler when he noticed Schumacher. At this point, Agent Schumacher pretended to be lost and asked Felix for directions to a certain apartment. Felix told Schumacher that he did not know where the requested apartment number was located and again returned to the apartment carrying the last cooler.

After a few moments had passed, Felix emerged from the apartment, this time carrying a cellular phone and car keys. Felix

seemed to notice DEA Agent McCormick standing nearby and looked directly at him. He then appeared to notice Schumacher standing next to the apartment that Felix had just exited. Felix then glanced back again to look at Agent McCormick, giving the agents the impression that he knew that he was under surveillance. Felix attempted to gain entry to a gray Ford Explorer parked near the van. It was at this point that the DEA agents arrested Felix.

The monitoring devices in the coolers indicated that the cocaine had been removed from the coolers just moments before Felix exited the apartment. Fearing the destruction of evidence, three DEA agents entered the apartment. No one was in the front room of the apartment, but the agents heard voices coming from a bedroom. Through the open door to the bedroom, the agents discovered that the room was void of furniture. However, three individuals -- later identified as Julio, Mijail, and Cardenas -- were in the room leaning over the coolers while moving or counting the packages of cocaine. One of the coolers was completely empty, as was part of another. Most of the cocaine had been taken from the coolers and was now surrounding the three men in several stacks on the floor. A few of the packages of cocaine had been placed in a small bag.

When the agents announced their presence, Julio, Mijail, and Cardenas first moved in the direction of an open closet in which an automatic pistol and full magazine clips were later recovered. After several more requests by the agents for the suspects to exit the bedroom, all three men surrendered to the

agents without incident. They were then arrested and taken into custody.

DISCUSSION

Sufficiency of the Evidence

In reviewing a claim based on insufficient evidence, this court must decide while viewing the evidence in the light most favorable to the jury's verdict whether a rational jury could have found the essential elements of the offense beyond a reasonable doubt. See United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992). To establish a conviction for conspiracy to possess cocaine, the government was required to establish (1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that the defendant knew of the agreement, and (3) that he voluntarily participated in the agreement. See id. (citing United States v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991)). It is not necessary for the government to establish the agreement by direct evidence. The jury may infer such an agreement from the circumstances. See United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991) (citing United States v. Singh, 922 F.2d 1169, 1173 (5th Cir.), cert. denied, 111 S. Ct. 2066 (1991)). Although presence or association with others is one factor that a jury may take into consideration in finding the existence of a conspiracy, it is well established in this circuit that mere presence at the crime scene or close association without more will not support an inference of participation in the conspiracy. See id. (citing United States v. Fitzharris, 633 F.2d 416, 423 (5th Cir. 1987)). "[T]he government

may not prove up a conspiracy merely by presenting evidence placing the defendant in a 'climate of activity that reeks of something foul.'" Id. (from Jackson quoting United States v. Galvan, 693 F.2d 417, 419 (5th Cir. 1982)). However, a jury may consider presence, association, and other evidence to determine that the defendant was participating in a conspiracy. See id.

To establish a conviction for possession of cocaine, the government was required to establish (1) possession, (2) knowledge, and (3) intent to distribute. See id. at 745-56. However, a jury may infer an intent to distribute cocaine from the defendant's possession of a large amount of the drug. See id. at 745 (citing United States v. Hernandez-Palacios, 838 F.2d 1346, 1379 (5th Cir. 1988)). Here, the government proceeded on the theory that the appellants aided and abetted the possession with intent to distribute cocaine. Therefore, the government was required only to establish that "the appellants became associated with, participated in, and in some way acted to further the possession and distribution of the drugs." Id. at 746-47 (citing Singh, 922 F.2d at 1173.). Generally, the same evidence supporting the conspiracy will also support an aiding and abetting conviction. See id. at 746.

Our review of the record persuades us that there is sufficient evidence to support the appellants' convictions.

Julio Juaquin-Rojas

The jury convicted Julio of conspiracy. The evidence against Julio indicated that he was in the apartment when the DEA

officers entered to effectuate the arrests. Officer Schumacher testified that while looking into the apartment bedroom for several minutes he saw Julio moving and appearing to inventory the packages of cocaine alongside Mijail and Cardenas immediately preceding their arrest. R: 5:180-82; 6:79. Julio was looking into one of the ice chests from which the cocaine had just been removed, R: 5:185, and the packages of cocaine were positioned all over the floor where Julio and the other appellants were crouched. The photographs of the apartment taken immediately after the arrest of the appellants support the DEA officers' testimony in this regard inasmuch as the photos depict the packages of cocaine stacked in piles of five or ten packages each. See government exhibits 16, 17c, and 17d. When the police announced their presence and advised the appellants to stay where they were, Julio and the other two suspects ran in the direction of a closet in the bedroom. R. 5:188; 6:70; 7:46. Later, an automatic pistol with full ammunition clips was recovered from that closet. R. 6:21. See also government exhibit 18.

Upon arrest, Julio did not give the officers his real name, but instead identified himself as Manuel Enrique Espinosa-Martinez. R. 7:58. In Julio's possession at the time of his arrest was a Panamanian identification card -- with a photograph of Julio -- and a temporary Texas identification card both bearing the name Manuel Enrique Espinosa-Martinez. R. 7:60-61; 68. The address on the Texas identification card was actually Felix's

address, but when asked, Julio indicated that the address belonged to Julio. R. 7:68.

Subsequent to the arrests, DEA agents found a leather satchel containing $8000 on the countertop in the kitchen of the apartment. At trial, Julio admitted that the money belonged to him. The money, consisting of different denominations, was bundled together with rubber bands in a similar fashion to money recovered in other narcotics cases. R. 6:195. See also government exhibit 26a. Julio testified he left Colombia with $9000 to come to the United States; he claimed that his parents had given him the money to pay for treatment of lymphoma cancer.[6] R. 7:134. Julio testified that he spent $1600 for a false passport and travel expenses from Colombia to New York. R. 7:130. At first, he testified that he spent around $100 for a plane ticket from New York to Houston, but then stated that he could not remember the exact amount that he spent for that leg of the trip. R. 7:132. He admitted that $9000 was a lot of money in Colombia. R. 7:134. He also testified that prior to his arrest he knew what cocaine looked like and had seen it packaged similar to the way that the cocaine was packaged at the apartment. R. 7:135.

Based on the evidence presented at trial, it was reasonable for the jury to conclude that Julio was more than merely present at a crime scene and guilty of conspiracy to possess cocaine. Not only was Julio present at the crime scene at the time

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[6] The parties do not dispute that Julio is in fact suffering from lymphoma cancer.

of the arrests, upon arrest he gave authorities an alias and had two separate identification cards verifying his alias. At trial, he himself admitted ownership of a large sum of suspiciously bundled cash recovered from the apartment. Additionally, he moved in the direction of the closet containing a weapon when the police announced their presence in the apartment, giving rise to the reasonable inference that Julio was attempting to gain access to the weapon. Furthermore, it is reasonable for the jury to have inferred that Julio's account of the facts -- including his assertions that he paid only $100 to fly from New York to Houston and that he received $9000 cash from his parents to come to the United States -- was wholly fabricated. Finally, it was reasonable for the jury to infer that Cardenas, who was so careful to instruct Pacheco and the C.I. to use fictitious names in order to avoid detection, would not have brought such a large quantity of cocaine into an occupied apartment filled with people not involved in the drug business and permitted strangers to the transaction to remain in a room while cocaine was being sorted and left about the floor. It is not likely that Cardenas would have jeopardized his business by exposing it to persons not involved in his business. See Chavez, 947 F.2d at 745.

The evidence presented at trial against Julio supports the conclusion that Julio was more than merely in the wrong place at the wrong time. There was sufficient evidence to convict Julio of conspiracy to possess cocaine. See also United States , 981

F.2d 192 (5th Cir. 1992), cert. denied, ___ U.S. ___, 114 S. Ct. 356 (1993).

Mijail Hurtado-Rojas

The jury convicted Mijail, Julio's older brother, of conspiracy as well as aiding and abetting the possession of cocaine with intent to distribute. Mijail was one of the three individuals found in the apartment hovering over the coolers apparently inventorying the packages of cocaine when the agents entered the apartment. R. 5:180-82; 6:15l; 6:116. He and the others were peering into one of the ice chests and were surrounded by the packages of cocaine which were in stacks of five or ten on the floor. R. 5:185-86. After the agents revealed their presence, Mijail and the others moved across the room toward the closet containing the automatic pistol and the loaded ammunition clips. R. 5:188; 6:21; 6:70.

Additionally, the evidence at trial indicated that Mijail had been paged by Felix on several occasions during the sting operation, R. 7:16-17, and that Felix carried with him Mijail's pager and telephone numbers in his pocket phone book. R. 7:41. These numbers were concealed with tape in Felix's pocket phone book and could only be read when the phone book was held to the light. R. 7:44-45.

It was reasonable for the jury to infer from this evidence that Mijail had agreed with others to violate the narcotics laws, knew of the agreement, and voluntarily participated in the agreement. Additionally, it was reasonable for the jury to

infer that Mijail aided and abetted the possession with the intent to distribute the cocaine, considering all of the facts indicated above as well as taking into consideration the large quantity of drugs involved. See Chavez, 947 F.2d at 745. When viewed in the light most favorable to the jury's verdict, the evidence is sufficient to support Mijail's conviction for both offenses.

Felix German-Hurtado

The jury convicted Felix of conspiracy and aiding and abetting possession with intent to distribute. The evidence against Felix indicated that the DEA agents tracked Cardenas as he drove the van containing the three cocaine-filled coolers to an apartment complex. Less than a minute after Cardenas parked the van and entered an apartment, Felix exited the apartment, walked directly to the rear of the van, and removed two of the ice chests. R. 5:169-70; 6:22-24; 6:33-52. While appearing very apprehensive, anxious, nervous, and continuously looking around him, Felix entered the apartment with the two ice chests and exited the apartment for a second time just moments later, hands empty. R. 5:170-73; 6:33. See United States v. Garza, 990 F.2d 171, 174 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 332 (1993). At this time, Felix appeared to notice DEA Agent Schumacher nearby, so to remove any developing suspicion, Agent Schumacher approached Felix, pretended to be lost, and asked where some apartment was located. R. 5:173. Felix replied that he did not know and proceeded to take the third and final ice chest into the apartment. R. 5:174. Within moments, the electronic monitors indicated to the agents

that the cocaine had been removed from the ice chests. Felix was still in the apartment. R. 7:104.

Shortly thereafter, Felix exited the apartment carrying car keys and a cellular phone. He seemed to notice the presence of at least two of the DEA agents in the parking lot and was arrested before being able to flee in a Ford Explorer parked next to the van. R. 6:48-49; 7:103-05.

The cellular phone in his possession was registered to an Erica McCloud. The testimony at trial indicated that it was not uncommon for drug traffickers to use cellular phones registered under names other than their own in order to avoid detection by the authorities. R. 6:207-09. Records from the phone companies indicated that there were several phone calls placed from the cellular phone confiscated from Felix to both the pager and the cellular telephone confiscated from Cardenas, R. 6:215-17, as well as phone calls from the cellular phone confiscated from Cardenas to the cellular phone seized from Felix. R. 7:14-15. Additionally, he had in his possession a pocket telephone book containing the phone numbers of a cellular phone and pager confiscated from Mijail. R. 7:41.

This evidence is more than sufficient to support the jury's conviction of Felix for both conspiracy and possession with intent to distribute.

Amount of Cocaine

Julio and Mijail complain that the district court erred by failing to make a specific finding attributing the 50 kilograms

of cocaine to them. We review a district court's findings regarding the quantity of drugs for sentencing purposes for clear error. See United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). The district court's findings in this regard are clearly erroneous only when this court, after reviewing the entire evidence, is left with the definite and firm conviction the district court has made a mistake. See id. at 457-58 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)).

For all appellants, the district court adopted the presentence report with minor changes specific to each appellant and sentenced the appellants based on approximately 50 kilograms of cocaine. The evidence at trial clearly indicated that both Julio and Mijail were in the apartment surrounded by 50 kilograms of cocaine and appearing to count or inventory the drug when the DEA agents entered the apartment. Julio and Mijail were sentenced based on the amount of the drug actually seized from the apartment. This was not error.

Enhancement for Weapon

Mijail and Felix complain that the district court erred in enhancing their sentences by two levels for possession of a firearm. See Sentencing Guideline § 2D1.1(b)(1). We find no merit in this argument.

Under the guidelines, the district court should increase a defendant's offense level by two levels if a weapon was present unless the weapon was not connected with the offense. See U.S.S.G. § 2D1.1, comment 3; United States v. Villarreal, 920 F.2d 1218,

1221 (5th Cir. 1991) (citing United States v. Hewin, 877 F.2d 3, 5 (5th Cir. 1989)). It is not necessary that the weapon play such a role as to warrant prosecution of the defendant for an independent firearm offense. See id. Rather, the applicability of this enhancement provision turns on the placement of the weapon coupled with its ready accessibility to the defendants. See id. at 1222.

In the instant case, Mijail was found with two of his co-defendants in a virtually empty room containing 50 kilograms of cocaine, three ice chests from which cocaine had just been removed, and a bag containing an assault pistol with full magazine clips. It is clear from the record that when the DEA agents announced their presence, the three men in the room moved in the direction of the closet containing the weapon. The district court did not err in concluding that the weapon was connected with the offense and therefore suitable for enhancement of the appellants' convictions pursuant to U.S.S.G. § 2D1.1.

Minimal Participant

Felix complains that the district court erred in not reducing his offense level, pursuant to U.S.S.G. § 3B1.2 on the grounds that he was a minimal participant in the offense. We find this argument to be without merit. Felix was in the apartment when Cardenas arrived with the coolers filled with cocaine. It was Felix who carried all three of the coolers from the minivan to the apartment. Additionally, at the time of his arrest, Felix was in possession of a cellular phone that had both made and received calls from a cellular phone confiscated from Cardenas.

The evidence against Felix does not suggest the reduction of his offense level under § 3B1.2. This guideline provision is to be used infrequently and only in cases where the defendant's lack of knowledge of understanding of the scope and structure of the enterprise suggests that he was a minimal participant. See id., comments 1 & 2. This is not such a case.

CONCLUSION

For these reasons, the judgment of the district court is AFFIRMED.