UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-4573

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOEL CAMPOS, LAZARA DOMINGUEZ, and GILBERTO DOMINGUEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas
(CR1-01-130-4)

(April 14, 1994)

Before POLITZ, Chief Judge, and REAVLEY and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

Defendants Joel Campos ("Campos"), Lazara Dominguez ("Lazara"), and Gilberto Dominguez ("Gilberto") appeal their convictions for conspiracy to import,[1] conspiracy to possess with intent to distribute,[2] and possessing with intent to distribute,[3] more than five kilograms of cocaine. We affirm Lazara's conviction

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] *See* 21 U.S.C. §§ 952, 963 (1988).

[2] *See id.* § 846.

[3] *See id.* § 841(a)(1).

in all respects, but we reverse for lack of sufficient evidence the convictions of Gilberto and Campos on the charges of conspiracy to import. Gilberto's and Campos' convictions on the remaining counts are reversed and remanded for new trial, because the government violated the disclosure requirements of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

I

Jesus Fajardo, a native Colombian, moved to Houston from Florida hoping to start a cleaning business with the help of a Houston man named Ferdinand.[4] There Fajardo met Lazara Dominguez at a birthday party at a friend's house. Fajardo learned that Lazara was involved in drug trafficking. Because he had neither found work nor started a cleaning business in Houston, Fajardo asked Lazara for a loan, which she refused. Fajardo then asked Lazara for a job, and she agreed to employ him as a cocaine dealer if he could develop a group of purchasers.[5] Fajardo successfully completed one sale to "a chicano woman," but his friends, the Lasso brothers, twice rejected his wares as too expensive. Ferdinand

[4] Ferdinand offered to help Fajardo with the cleaning business when they met at a football field in Fort Lauderdale. Because Fajardo was experiencing financial difficulties in Florida, he decided to accept Ferdinand's help, and moved to Houston. Over the next several weeks, Ferdinand stopped by Fajardo's house on occasion. Whenever Fajardo inquired about financing for his cleaning business, Ferdinand responded that they would have to wait.

[5] Fajardo gave conflicting testimony regarding the length and nature of his relationship with Lazara. On direct examination Fajardo testified that after he met Lazara at the birthday party he saw her only once more before the events which led to their arrest. On redirect examination, however, Fajardo recanted and testified that he had worked for Lazara selling cocaine. We present the facts in the light most favorable to the government.

also refused to buy Fajardo's cocaine on one occasion because it was too expensive.

Several weeks after Fajardo met Lazara, Ferdinand gave Fajardo a pager and told Fajardo to expect a page from a man in Colombia who would give him instructions to go to a particular location. Ferdinand said that Fajardo should refer to himself as "Ferdinand" when he communicated with this man. Ferdinand also provided Lazara's phone number and told Fajardo to call Lazara for further instructions each time he was paged.

An hour or two later Fajardo received a page. When Fajardo answered the page, he spoke to a man named Carlos, who said he was bringing eight kilos of cocaine from Colombia, and that Fajardo had to give him $32,000 for the cocaine. Carlos was actually a confidential informant working undercover for the United States Customs Service.[6] Fajardo then called Lazara, as instructed by Ferdinand, and told her about the conversation with Carlos. Lazara was happy about the Colombian source, and she told Fajardo to call her back after he was contacted again.

Soon Fajardo received another page from Carlos. When Fajardo answered the page, he and Carlos attempted to arrange a meeting in Beaumont, but they had trouble doing so because Carlos did not

[6] Fajardo's pager number had been given to a drug courier in Colombia along with 8 kilograms of cocaine. The courier was instructed by the owners of the cocaine to call the pager number for instructions after he arrived in the United States. The courier actually was another United States Customs Service informant, and at the direction of Customs Service agents he gave the 8 kilos of cocaine to Carlos, who called Fajardo from a United States Customs Service office.

speak Spanish, and he and Fajardo spoke only limited English.[7] Fajardo then met with Lazara and her girlfriend at a shopping center, where they called Carlos from a cellular phone in Lazara's Nissan Pathfinder.

The next morning Carlos again paged Fajardo. Fajardo called Lazara and was instructed to tell Carlos to wait because Lazara did not have the money. Later that day, Fajardo and Lazara drove to Beaumont to talk to Carlos at the Holiday Inn on Interstate 10. When they arrived at the Holiday Inn, Lazara waited in the car while Fajardo entered the motel and feigned making a telephone call as he looked around the lobby. Because he saw a lot of people there, Fajardo returned to the car, and he and Lazara decided that the situation looked "strange" and "dangerous." Lazara said that the police might be there, and they drove away without speaking to Carlos. Later that night, however, Carlos phoned Fajardo's home, and they agreed to meet the next day at the Holiday Inn. Fajardo informed Lazara, and she agreed to meet him at a gas station in Houston.

The following day, Fajardo drove his black Toyota to the gas station and met Lazara, who was driving her red Nissan Pathfinder. Lazara was accompanied by her brother, Gilberto Dominguez, and by Joel Campos. From the gas station the foursome drove to a Mexican restaurant, with Lazara, Gilberto, and Joel riding in Lazara's

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[7] Carlos, a Filipino, primarily spoke Tagalog.

Nissan and Fajardo driving his Toyota.[8] As soon as they arrived at the Mexican restaurant, Lazara left in Fajardo's Toyota while the three men went inside the restaurant. Before leaving, Lazara told the men "to be careful with the car [Nissan] because that's where the money was."[9] Lazara gave Fajardo the keys to the Nissan.

While at the Mexican restaurant, Gilberto and Fajardo discussed the trip to Beaumont the day before, and Gilberto said he had told Lazara that "all of that" sounded very strange. Campos

[8] Since neither Gilberto, Lazara, nor Campos testified, the evidence did not reveal the substance of any conversation which took place between those individuals in the Nissan Pathfinder en route to the Mexican restaurant.

[9] Fajardo's account of events which took place a few hours later revealed that the Nissan contained roughly $32,000 which was paid to the confidential informant in exchange for the cocaine.

was seated at the table during this conversation.[10] Lazara returned to the restaurant 30-45 minutes later.

Lazara and Campos then drove the Nissan to Beaumont, with Gilberto and Fajardo following in Fajardo's Toyota.[11] On the way to Beaumont, Fajardo received a page from Carlos and used Gilberto's cellular phone to answer the page. Fajardo and Carlos arranged to meet in the Holiday Inn parking lot at 3:00 p.m. Upon

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[10] It does not appear from the record that Gilberto described the previous day's events in Campos' presence. For that matter, it is unclear from the evidence what events Gilberto was referring to when he said that "all of that" was very strange. Fajardo testified as follows:

> Q When you and Gilberto and Joel Campos went inside the restaurant, did you talk to Gilberto Dominguez?
>
> A Yes, he told me he saw everything very strange and that he was telling his sister that and she wouldn't pay attention to him.
>
> Q And what was he referring to?
>
> A Well, that the day before we had come here to Beaumont and that had happened, that everything was very strange.
>
> Q Did he say what he had told his sister about the incident in Beaumont?
>
> A That his sister had made a comment to him?
>
> Q Yes, did he talk to his sister))did he indicate he had talked to his sister about what had happened the day before in Beaumont?
>
> A Yes. Yes, he was telling me that he was telling his sister that all of that was very strange and she paid no attention.

1st Supp. Record on Appeal, vol. 6, at 137-38.

[11] The evidence does not reflect any conversation or other events that took place in the Nissan en route to Beaumont. The evidence also does not reveal where the $32,000 was located in the Nissan at that time.

arriving in Beaumont, the four travelers stopped at the Iron Skillet Restaurant, across Interstate 10 from the Holiday Inn. Gilberto and Campos went inside the Iron Skillet and sat at a table from which they could view the red Nissan where it was parked outside the restaurant.[12]

Fajardo and Lazara drove the Toyota across Interstate 10 to the Holiday Inn parking lot, where Carlos was waiting. Carlos approached the driver's side of the car with a bag containing approximately eight kilos of cocaine, and inquired about the money. Lazara and Fajardo inspected the cocaine, and Carlos placed it in their vehicle. Fajardo and Lazara explained that the money was at the restaurant and asked Carlos to go there with them, but Carlos refused. Lazara agreed to wait in the motel parking lot with Carlos while Fajardo retrieved the money, to guarantee that Fajardo would return. Fajardo then left the motel in the Toyota and drove back to the Iron Skillet restaurant.

Special Agent Roger Bowers of the United States Customs Service testified that he followed Fajardo as he left the Holiday Inn parking lot and drove to the Iron Skillet Restaurant. Fajardo parked his Toyota))containing the cocaine))next to Lazara's Nissan Pathfinder outside the restaurant. Agent Bowers then followed Fajardo into the restaurant and saw him having a conversation with Gilberto and Campos at the table where they had been seated. Fajardo testified that during this conversation he and Gilberto

[12] Although Gilberto and Campos could have seen the Nissan from where they were seated, no evidence showed that they actually looked at the parked vehicle at any time.

discussed Lazara's whereabouts, and then Fajardo said "that the drugs were in the car and to go look at it."[13] Gilberto gave Fajardo the keys to the Nissan, and Fajardo placed the Toyota keys on the table. Gilberto and Campos were able to observe the black Toyota from where they were seated.[14]

Fajardo left the restaurant and drove the Nissan back to the Holiday Inn parking lot, where Lazara and Carlos were waiting. A bag containing $32,000 in cash was situated between the driver and passenger seats of the Nissan. When Fajardo arrived at the parking

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[13] Fajardo testified as follows about the conversation which took place inside the Iron Skillet restaurant:

> Q Did you walk up to the table where Gilberto and Joel Campos were?
>
> A Yes.
>
> Q Did you talk to Gilberto and Joel Campos?
>
> A Gilberto asked me where was his sister. I told him she was at the hotel waiting for me. And I said "I'm going to get her," and I told her that the drugs were in the car and to go look at it, that I was going to get his sister.

1st Supp. Record on Appeal, vol. 6, at 145-46. Since Fajardo testified that he "told *her* that the drugs were in the car," when he was speaking to two men, the record does not clearly show to whom Fajardo was speaking when he mentioned the drugs. However, Fajardo's testimony, viewed in the light most favorable to the government, supports the conclusion that Fajardo was speaking to Gilberto. The evidence also supports the conclusion that Fajardo mentioned the drugs within Campos' hearing. After his arrest Campos told Special Agent Bowers that he had not heard any part of the conversation between Gilberto and Fajardo in the Iron Skillet restaurant; but Campos' post-arrest statement was contradicted by Bowers' testimony that Fajardo, Gilberto, and Campos were standing in close proximity to each other in the restaurant, and that all three men were having a conversation.

[14] No evidence showed that either Gilberto or Campos actually looked at the Toyota parked outside the restaurant.

lot, Lazara gave the bag to Carlos and told him that it was complete))$32,000.[15] After giving Carlos the money, Lazara shook his hand and told him that they would meet again on the next voyage, and that the contact in Colombia had promised another delivery. As Fajardo and Lazara drove away from the parking lot, they were arrested.

Once Fajardo and Lazara were arrested, Special Agent Dan Dobbs of the United States Customs Service entered the Iron Skillet restaurant and observed Gilberto and Campos by a bank of pay phones within the restaurant. Agent Dobbs testified that both Gilberto and Campos appeared nervous or upset.[16] Agent Dobbs continued his surveillance outside the restaurant and saw Gilberto and Campos exit the restaurant and sit on the curb. After twenty minutes, Gilberto and Campos walked to a nearby Exxon station where they asked the attendant to call a cab for them. Gilberto and Campos were arrested as they waited for their cab.

After being advised of their constitutional rights, Gilberto and Campos were separated and interviewed by Special Agent Bowers. Gilberto stated that he had ridden to Beaumont with two men))Campos and a third man))in a Nissan, but he did not know the name of the third man, nor did he know what had happened to the third man

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[15] There is conflicting evidence as to whether Lazara or Fajardo handed the bag of money to the confidential informant. Again, we present the facts in the light most favorable to the jury's verdict.

[16] Agent Bowers followed Fajardo out of the Iron Skillet restaurant after Fajardo met with Gilberto and Campos. After Gilberto was arrested, according to Fajardo's testimony, Gilberto told Fajardo that he thought somebody had been following Fajardo.

because that man had left the restaurant to meet someone. Gilberto said he did not know who the third man had gone to meet. Campos stated that he had ridden to Beaumont with Gilberto and a female in a red Nissan Pathfinder,[17] and that the female had left him and Gilberto at the restaurant, but he did not know what had happened to the female. Campos said he didn't know why they had come to Beaumont, and he denied the presence of a third man. Campos said he did not have anything to do with a conversation in the Iron Skillet restaurant and he did not hear any part of that conversation.[18]

A pager was recovered from Campos, but the keys to the black Toyota which Fajardo placed on the table at the Iron Skillet Restaurant were never recovered. Fajardo testified that after he and the others were in custody, he asked Gilberto about the keys to his Toyota and Gilberto replied that he had made them disappear. Gilberto also told Fajardo that he thought he saw someone follow Fajardo from the Iron Skillet Restaurant, and he and Campos left and called a taxi.

Lazara, Gilberto, and Campos were all indicted for conspiracy to possess cocaine with intent to distribute, possession of cocaine

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[17] Fajardo testified that Gilberto rode to Beaumont in the Toyota. Consequently, the jury could have concluded that Campos lied when he told Special Agent Bowers that Gilberto rode in the Nissan.

[18] Because Campos' post-arrest statement was contradicted by the testimony of Special Agent Bowers, who testified that Campos, Gilberto, and Fajardo were standing in close proximity to one another in the restaurant, having a conversation, the jury could have concluded that Campos' post-arrest statement was untrue.

with intent to distribute, and conspiracy to import cocaine. They were tried before a jury and convicted on all counts. The district court sentenced Lazara to 168 months imprisonment on each count, with the sentences to run concurrently. Gilberto and Campos were both sentenced to 120 months imprisonment on all three counts, with the sentences to run concurrently.

Lazara appeals her conviction, contending that (1) under *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), she is entitled to a new trial because the government knew or should have known that it sponsored false testimony; (2) she is entitled to a new trial because the government suppressed material exculpatory evidence, in violation of *Brady v. Maryland;* (3) the district court erred by refusing to instruct the jury to disregard Fajardo's testimony, which was incredible as a matter of law; (4) the district court erred in admitting evidence of unadjudicated criminal acts under Fed. R. Evid. 404(b); and (5) the district court erred in refusing Lazara's request for disclosure of Fajardo's attorney's notes. Gilberto and Campos appeal their convictions, contending that (1) the evidence is insufficient to support their convictions; (2) they are entitled to new trials under *Agurs* and *Brady;* and (3) they were denied their Sixth Amendment right of cross-examination by the admission of extrajudicial statements of non-testifying co-defendants, in violation of *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

II

A

Both Gilberto and Campos challenge the sufficiency of the evidence to sustain their convictions.[19] "In deciding the sufficiency of the evidence, we determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt."[20] *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2952, 119 L. Ed. 2d 575 (1992). "It is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt."[21] *Id.* However, "[i]f the `evidence viewed in the light

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[19] We hold that the evidence was insufficient to support Campos' and Gilberto's convictions for conspiracy to import cocaine. *See infra* part II.A.3. We discuss the evidence on the remaining counts, *see infra* parts II.A.1. and II.A.2., in order to (1) decide whether Campos and Gilberto are entitled to a judgment of acquittal on account of insufficiency of the evidence; and (2) illustrate the circumstantial nature of the case against Gilberto and Campos, which requires reversal and remand for new trial under *Brady v. Maryland*.

[20] We apply this standard of review because Campos and Gilberto preserved their sufficiency claims by moving for a judgment of acquittal at trial. The "manifest miscarriage of justice" standard is applied where the defendant fails to preserve his or her sufficiency claim. *See United States v. Galvan,* 949 F.2d 777, 782-83 (5th Cir. 1991) (where defendant failed to move for directed verdict or for judgment of acquittal).

[21] This standard of review was established by the en banc court in *United States v. Bell,* 678 F.2d 547 (5th Cir. 1982) (en banc), *aff'd,* 462 U.S. 356, 103 S. Ct. 2398, 76 L. Ed. 2d 638

most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,' this court must reverse the convictions." *United States v. Sanchez,* 961 F.2d 1169, 1173 (5th Cir.) (quoting *Clark v. Procunier,* 755 F.2d 394, 396 (5th Cir. 1985)), *cert. denied,* ___ U.S. ___, 113 S. Ct. 330, 121 L. Ed. 2d 248 (1992). "We accept all credibility choices that tend to support the jury's verdict." *United States v. Anderson,* 933 F.2d 1261, 1274 (5th Cir. 1991). Moreover, juries are "free to choose among all reasonable constructions of the evidence." *United States v. Chaney,* 964 F.2d 437, 448 (5th Cir. 1992).

1

Both Gilberto and Campos were convicted of conspiracy to possess, with intent to distribute, more than five kilograms of cocaine, in violation of 21 U.S.C. § 846.[22] To sustain a conspiracy conviction under § 846, the Government must prove (1) the existence of an agreement between two or more persons to violate federal

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(1983). There we explicitly abandoned an earlier formulation of the standard))that if the government relied on circumstantial evidence, an acquittal was required unless the evidence was inconsistent with every reasonable hypothesis of innocence. *See id.* at 549 n.3, *cited in United States v. Michelena-Orovio,* 719 F.2d 738, 743 n.4 (5th Cir. 1983) (en banc), *cert. denied,* 465 U.S. 1104, 104 S. Ct. 1605, 80 L. Ed. 2d 135 (1984).

[22] "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846. 21 U.S.C. § 841(a)(1), which is found in the same subchapter as § 846, provides that, "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance." *Id.*

narcotics laws; (2) that the defendant knew of the agreement; and (3) that the defendant voluntarily participated in the agreement. *United States v. Gallo,* 927 F.2d 815, 820 (5th Cir. 1991). "Although each element of the conspiracy charge must be proved beyond a reasonable doubt, no element need be proved by direct evidence, but may be inferred from circumstantial evidence." *United States v. Espinoza-Seanez,* 862 F.2d 526, 537 (5th Cir. 1988). An agreement may be inferred from "concert of action," voluntary participation from "a collocation of circumstances," and knowledge from "surrounding circumstances." *Id.* (citations omitted).[23] "The government need not prove the existence of a formal agreement to establish a conspiracy . . . ." *United States v. Williams-Hendricks,* 805 F.2d 496, 502 (5th Cir. 1986).[24]

However, "[w]e have . . . stressed that we will not lightly infer a defendant's knowledge and acquiescence in a conspiracy." *United States v. Jackson,* 700 F.2d 181, 185 (5th Cir.), *cert.*

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[23] The government is not required to prove an overt act in furtherance of the conspiracy. *United States v. Medina,* 887 F.2d 528, 530 (5th Cir. 1989); *United States v. Kupper,* 693 F.2d 1129, 1134 (5th Cir. 1982). "A defendant can escape conviction neither on the ground that he joined the conspiracy long after its inception nor because he played only a minor role in the plot." *United States v. Gardea Carrasco,* 830 F.2d 41, 44 (5th Cir. 1987) (footnote omitted).

[24] "[T]he agreement between the conspirators may be silent and need not be spoken. `What the evidence in the case *must* show beyond a reasonable doubt is . . . [t]hat two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment . . . .'" *Williams-Hendricks,* 805 F.2d at 502 (quoting *Pattern Jury Instructions: Criminal Cases* (compiled by Committee on Pattern Jury Instructions District Judges Association, Fifth Circuit 1983), 61-62 (conspiracy instruction)).

denied, 464 U.S. 842, 104 S. Ct. 139, 78 L. Ed. 2d 132 (1983). "[M]ere association with persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy." *United States v. Galvan,* 693 F.2d 417, 420 (5th Cir. 1982) (citing cases). Furthermore, "evidence of a `mere knowing presence' is insufficient to convict a person of participation in a conspiracy." *United States v. Robertson,* 659 F.2d 652, 656 (5th Cir. Unit A 1981).[25] Nevertheless, presence at the scene of the crime and close association with co-conspirators are factors that the jury may rely on, along with other evidence, in finding conspiratorial activity by a defendant. *Gallo,* 927 F.2d at 820 (quoting *United States v. Magee,* 821 F.2d 234, 239 (5th Cir. 1987)).

Neither Gilberto nor Campos contends that the government failed to prove the existence of a conspiracy to violate the narcotics laws. Instead, Gilberto and Campos argue that the government failed to prove they knowingly and voluntarily participated in the conspiracy.

a

The evidence against Gilberto, viewed in the light most favorable to the government, readily demonstrates Gilberto's knowledge of and participation in an agreement to possess drugs.

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[25] It is not enough for the evidence to place the defendant in "a climate of activity that reeks of something foul." *Galvan,* 693 F.2d at 419. Neither may the government simply "`pile inference upon inference upon which to base a conspiracy charge.'" *Williams-Hendricks,* 805 F.2d at 502 (quoting *United States v. Sheikh,* 654 F.2d 1057, 1063 (5th Cir. 1981), *cert. denied,* 455 U.S. 991, 102 S. Ct. 1617, 71 L. Ed. 2d 852 (1982), *overruled on other grounds, United States v. Zuniga-Salinas,* 952 F.2d 876, 879 (5th Cir. 1992) (en banc)).

When Fajardo entered the Iron Skillet restaurant, he told Gilberto "that the drugs were in the car and to go look at it." Gilberto then gave Fajardo the keys to the Nissan Pathfinder containing the money. Gilberto knew, when he gave Fajardo the keys to the Nissan, that he was in effect giving Fajardo the money: at the Mexican restaurant in Houston Lazara had told the three men to "be careful with the car [Nissan Pathfinder] because *that's where the money was*." After receiving the Nissan keys from Gilberto, Fajardo placed the keys to the Toyota))which contained "the drugs"))on a table near both Gilberto and Campos. It is apparent that Gilberto then took possession of the keys, because he later told Fajardo that he had made them disappear.

Based on Fajardo's statement that drugs were in the Toyota, the jury could have concluded that Gilberto knew about the conspiracy to possess drugs. Gilberto could reasonably be expected to infer that he, along with Fajardo, was involved in a drug deal. Furthermore, Gilberto's participation in the conspiracy was readily apparent from his conduct after he heard Fajardo mention "the drugs." The exchange of car keys between Gilberto and Fajardo in the Iron Skillet was essentially an exchange of "the drugs" for "the money," and Gilberto was aware of it. Gilberto's participation in that exchange supports the government's theory that Gilberto agreed to travel to Beaumont and watch over the money and the drugs while they were in the vehicles parked at the Iron Skillet restaurant. Therefore, the jury reasonably concluded that

Gilberto knowingly and voluntarily took part in a conspiracy to possess drugs.[26]

The jury was also entitled to infer that Gilberto agreed to possess the drugs *with intent to distribute,* because of the distributable quantity of cocaine involved in the transaction. Once a jury concludes that a defendant is guilty of conspiring to possess cocaine, it is entitled to infer from the quantity of cocaine involved that the defendant is guilty of conspiring to possess the cocaine with intent to distribute it.[27] Fajardo and

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[26] Gilberto relies on several cases where convictions for conspiracy to possess controlled substances with intent to distribute have been reversed for lack of sufficient evidence. We have reviewed those cases, and they are distinguishable. *See United States v. Bell,* 954 F.2d 232, 238 (4th Cir. 1992) (no evidence tended to show the existence of an agreement to do an unlawful act), *cert. denied,* ___ U.S. ___, 114 S. Ct. 112, 126 L. Ed. 2d 77 (1993); *United States v. Blessing,* 727 F.2d 353, 356 (5th Cir. 1984) (evidence of a mere "connection" with a conspiracy placed the defendant in a "climate of activity that reek[ed] of something foul," but did not prove that the defendant "had the deliberate, knowing, and specific intent to join the conspiracy"), *cert. denied,* 469 U.S. 1105, 105 S. Ct. 777, 83 L. Ed. 2d 773 (1985); *United States v. Jackson,* 700 F.2d 181, 185 (5th Cir. 1983) (evidence showed only that defendant was present at the scene of criminal activity and associated with criminals); *United States v. Palacios,* 556 F.2d 1359, 1363-65 (5th Cir. 1977) (co-defendant's prior statement incriminating defendant, which co-defendant later repudiated, was not admissible to show guilt, and therefore the only evidence supporting defendant's conviction was his association with drug trafficker); *Causey v. United States,* 352 F.2d 203, 207 (5th Cir. 1965) (where defendant had opportunity to enter into conspiracy, but failed to seize that opportunity).

[27] *See Michelena-Orovio,* 719 F.2d at 756-57 ("[O]nce the jury had reasonably concluded . . . that the defendant was guilty of conspiracy to import marijuana, it was entitled to infer from the quantity involved that the defendant was also guilty of participation in the conspiracy to possess the marijuana with intent to distribute it."), *cited in Williams-Hendricks,* 805 F.2d at 503 n.5 (upholding conviction for conspiracy to possess with intent to distribute, based on distributable quantity of contraband).

Lazara received from the confidential informant roughly eight kilograms of 82% pure cocaine, which United States Customs Service Agent Kevin Jeter testified was a quantity of cocaine appropriate for distribution rather than personal use.[28] Therefore, the jury reasonably inferred that Gilberto conspired to possess the cocaine with intent to distribute it, and Gilberto's sufficiency argument is without merit.

b

Campos' sufficiency claim presents a closer question, because there was very little evidence to indicate Campos' knowing participation in the conspiracy, and all of it was circumstantial. The only direct evidence which would tend to show that Campos participated in the conspiracy is the fact that he voluntarily accompanied the other conspirators to Beaumont, and then assumed a position in the Iron Skillet restaurant which would have permitted him to keep an eye on the Nissan Pathfinder where it was parked outside. However, Campos engaged in that incriminating conduct during a period of time where no direct evidence showed his knowledge of the conspiracy. The only direct evidence that Campos knew about the conspiracy is the fact that he heard Fajardo refer to "the drugs" in the Iron Skillet restaurant, and that happened after Campos arrived in Beaumont and assumed his position in the

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[28] *See Bell,* 954 F.2d at 235 ("[T]hirteen plus grams of crack [cocaine base] . . . is a `large quantity,' supporting the factfinder's inference that an intent to distribute existed."); *United States v. Lentz,* 823 F.2d 867, 869 (5th Cir.) (noting that cocaine for personal use is normally only 20% pure), *cert. denied,* 484 U.S. 957, 108 S. Ct. 354, 98 L. Ed. 2d 380 (1987).

Iron Skillet.[29] See *United States v. White,* 569 F.2d 263, 267 (5th Cir.) ("[T]here must be proof . . . that a conspiracy existed, that the accused knew it and, *with that knowledge,* voluntarily joined it." (emphasis added)), *cert. denied,* 439 U.S. 848, 99 S. Ct. 148, 58 L. Ed. 2d 149 (1978). Nevertheless, a reasonable jury could have found that Campos knowingly and voluntarily entered into the conspiracy, because the circumstantial evidence supports a finding that Campos was aware of the conspiracy not only after Fajardo's comment about the drugs, but also beforehand, when Campos voluntarily accompanied Gilberto, Lazara, and Fajardo to Beaumont.

Although neither presence at the scene of a conspiracy, nor association with conspirators will alone sustain a conspiracy conviction, Campos' presence and association are factors which the jury was entitled to consider. *See Gallo,* 927 F.2d at 820 (quoting *Magee,* 821 F.2d at 239).

Moreover, the fact that Fajardo mentioned in the Iron Skillet that "the drugs" were in the Toyota, and then turned the keys to the Toyota over to Gilberto and Campos, supports an inference that Campos was a member of the conspiracy. The jury was entitled to

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[29] At the Mexican restaurant, Gilberto mentioned the "very strange" events of the preceding day, and we know from Fajardo's testimony at trial that those events involved an aborted attempt to meet with the confidential informant. Furthermore, Lazara told the three men outside the Mexican restaurant "to be careful with the car because that's where the money was." Those statements in Campos' presence, when considered in the light most favorable to the government and in light of all the evidence, lend circumstantial support to the conclusion that Campos knew about the conspiracy. The evidence does not, however, directly reveal specific events or statements other than Fajardo's reference to "the drugs" which should have put Campos on notice that a conspiracy to possess cocaine was afoot.

consider the unlikelihood that Fajardo would (a) state in the presence of an individual unconnected with the conspiracy that he had drugs, (b) reveal that the drugs were located in the trunk of his car, and (c) place the keys to his car on a table where the innocent person had access to them. *Cf. United States v. Chavez,* 947 F.2d 742, 745 (5th Cir. 1991) ("The jury . . . was entitled to consider the unlikelihood that the owner of such a large quantity of narcotics [336 kilograms of cocaine and 550 pounds of marijuana] would allow anyone unassociated with the conspiracy to be present during the unloading."). It is improbable that Fajardo would imperil the success of the enterprise by giving an individual not initiated into the conspiracy an opportunity to steal the drugs or to disclose the conspirators' criminal activity to the authorities, and the implausibility of that scenario seriously discredits the possibility that Campos was an innocent bystander. To a lesser extent, the same can be said of Lazara's statement, in Campos' presence at the Mexican restaurant in Houston, that "the money" was in her Nissan Pathfinder. In combination with the other circumstantial evidence, Lazara's statement supports the conclusion that Campos was a member of the conspiracy before the conspirators arrived at the Mexican restaurant.[30]

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[30] Our reasoning here is consistent with our decision in *United States v. Littrell,* 574 F.2d 828 (5th Cir. 1978), where we reversed Littrell's conviction for conspiracy to possess cocaine with intent to distribute because the evidence failed to prove that Littrell knew his vehicle contained drugs when he drove to the scene of the drug deal. *See id.* at 832-34. We refused to "presume that Littrell knew of the drug operation," noting that "it might be an asset for . . . a courier to be uninformed about the nature of his delivery, since he would have no reason to be nervous or

Campos' false post-arrest statements also circumstantially support a finding that Campos knowingly participated in the conspiracy. "`It is proper to show that an alleged conspirator lied in order to prove consciousness of guilt, even if the lie does not constitute a part of the conspiracy.'"[31] The defendant's consciousness of guilt may support an inference that the defendant is in fact guilty.[32] "In addition, . . . efforts to assist in the

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apprehensive about a task he believed to be perfectly legitimate." *Id.* at 833. In this case as well, it might have been to the benefit of the conspiracy if some of the individuals who served its purposes had done so unknowingly. However, if that had been the nature of Campos' role, it is reasonable to infer, Fajardo and Lazara would not have made the disclosures to Campos which they made at the Iron Skillet restaurant and the Mexican restaurant in Houston.

Campos argues that the absence of further conversation regarding a drug deal, at the Mexican restaurant and at the Iron Skillet restaurant, may be considered by this Court in deciding whether Campos was involved in the conspiracy. Campos cites *United States v. Vasquez-Chan,* 978 F.2d 546, 553 (9th Cir. 1992) (fact that alleged co-conspirators never referred to defendant in any of their conversations impugned conclusion that defendant aided and abetted offense). Although the absence of further conversation in Campos' presence may be relevant, it is within the exclusive province of the jury to weigh conflicting inferences. The absence of further conversation regarding the drug transaction does not persuade us that the jury's inference of Campos' involvement in the conspiracy is an unreasonable one.

[31] *Robertson,* 659 F.2d at 657 (quoting *United States v. Green,* 594 F.2d 1227, 1230 (9th Cir.), *cert. denied,* 444 U.S. 853, 100 S. Ct. 108, 62 L. Ed. 2d 70 (1979)); *cf. United States v. Martinez-Mercado,* 888 F.2d 1484, 1491 (5th Cir. 1989) (holding that "inconsistency in [the defendant's] explanations certainly allow[ed] for an inference of [his] guilty knowledge").

[32] *See United States v. Basey,* 816 F.2d 980, 1005 (5th Cir. 1987) (holding that evidence showing consciousness of guilt, along with other evidence against defendant, enabled jury to infer that defendant knew of conspiracy and had a role in it); *United States v. Holbert,* 578 F.2d 128, 129-30 (5th Cir. 1978) ("[F]alse exculpatory statements may be used . . . as substantive evidence tending to prove guilt. When a defendant voluntarily and intentionally offers an explanation and this explanation is later

concealment of a conspiracy may help support an inference that an alleged conspirator had joined the conspiracy while it was still in operation." *Robertson,* 659 F.2d at 657 (citing *United States v. Freeman,* 498 F.2d 569, 576 (2nd Cir. 1974)).

Speaking to Agent Bowers following his arrest, Campos lied repeatedly in an apparent attempt to disassociate himself from Fajardo and the Toyota containing the drugs. Although Gilberto apparently rode to Beaumont with Fajardo in his Toyota, Campos told Agent Bowers that Gilberto had ridden to Beaumont with him and Lazara in the Pathfinder. Campos also denied that another man had come to Beaumont with them, that he had met another man in the Iron Skillet restaurant, and that he had heard any part of the conversation between Gilberto and the other man in the restaurant. The jury could reasonably have regarded these lies as attempts to conceal the conspiracy, and as evidence of Campos' consciousness of his own guilt. If, as Campos asserts, he was merely an innocent bystander, it is reasonably inferable that he would have had no reason to lie to a federal agent as he did.[33] Campos' false post-

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shown to be false, the jury may consider whether the circumstantial evidence points to a consciousness of guilt, and the significance to be attached to any such evidence is exclusively within the province of the jury." (citations omitted)).

[33] Admittedly, there are other explanations for Campos' conduct. An innocent individual might lie in a panicked attempt to distance himself from criminal activity for which he fears he will be wrongly blamed. However, the jury is entitled to choose among reasonable constructions of the evidence, *Bell,* 678 F.2d at 549, and we view the evidence and the inferences that may be drawn from it in the light most favorable to the jury's verdict. *Id.*

arrest statements therefore support the jury's implicit finding of knowing participation.[34]

The jury also could have considered Agent Dobbs' testimony that Campos appeared nervous after Fajardo departed the Iron Skillet, followed by Agent Bowers. "In the absence of facts which suggest that the defendant's nervousness or anxiety derives from an underlying consciousness of criminal behavior, evidence of nervousness is insufficient to support a finding of guilty knowledge." *United States v. Diaz-Carreon,* 915 F.2d 951, 954 (5th Cir. 1990). However, where, as here, other evidence supports a

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[34] Campos cites several decisions of the Second Circuit for the proposition that "falsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt." *United States v. Gaviria,* 740 F.2d 174, 184 (2d Cir. 1984); *see also United States v. Nusraty,* 867 F.2d 759, 765 (2d Cir. 1989) (holding that false exculpatory statements, accompanied only by evidence of presence and association, were merely "evidence from which it could be inferred that the appellant . . . surmised he was implicated in some sort of criminal activity); *United States v. DiStefano,* 555 F.2d 1094, 1104 (2d Cir. 1977); *United States v. Johnson,* 513 F.2d 819, 824 (2d Cir. 1975). That rule does not benefit Campos, because this is not a case where the evidence is as hospitable to an interpretation consistent with innocence as it is to an interpretation consistent with guilt. For similar reasons, Campos' reliance on our decision in *Holloway v. McElroy,* 632 F.2d 605 (5th Cir. 1980), *cert. denied,* 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), is misplaced. There we found that inconsistent post-arrest statements, *standing alone,* were insufficient to support a finding that the defendant, convicted of voluntary manslaughter, had not acted in self-defense. *See id.* at 640-41 ("The circumstantial evidence cited by the State as supporting a finding of the absence of self-defense consists of discrepancies between Holloway's story as told to the interviewing officers and his testimony at trial . . . ."). Because Campos' false post-arrest statements are not the only evidence supporting the jury's verdict, *Holloway* is inapposite.

finding that the defendant's nervousness derives from consciousness of criminal conduct, nervous behavior may support a finding of guilt. *See id.* While consciousness of guilt is not the only inference which could be drawn from Campos' nervousness, it is a reasonable inference, and we view all reasonable inferences in the light most favorable to the jury's verdict.

Considering the totality of the circumstantial evidence, we conclude that the jury could have found beyond a reasonable doubt that Campos was not an innocent bystander, but a member of the conspiracy. In light of Fajardo's and Lazara's statements about the drugs" and "the money," as well as Campos' nervous behavior and false post-arrest assertions, the jury could have reasonably inferred that Campos traveled to Beaumont with the full knowledge that he was involved in a conspiracy to possess drugs.[35]

This is not a case, as Campos argues, where nothing more than presence and association, leading to suspicion and innuendo, is available to support the jury's verdict. Neither is this a case in which the totality of the evidence, viewed in the light most favorable to the prosecution, gives equal or nearly equal support to a theory of guilt and a theory of innocence, *see Sanchez,* 961 F.2d at 1173, or "demonstrates that there is a plausible, rational, innocent explanation for almost every action, thus lending some reasonable doubt to an inference of guilt." *See United States v. Sacerio,* 952 F.2d 860, 864 (5th Cir. 1992). Viewed in isolation,

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[35] The distributable quantity of cocaine involved in this case supports the jury's inference that Campos conspired to possess the drugs *with intent to distribute*. *See supra* part II.A.1.a.

each piece of evidence against Campos could support warring inferences))some indicative of guilt and others of innocence. However, "[n]either the jury nor this Court is required to examine each circumstance in isolation." *United States v. Gonzales,* 866 F.2d 781, 783 (5th Cir.) (citing *Magee,* 821 F.2d at 239), *cert. denied,* 490 U.S. 1093, 109 S. Ct. 2438, 104 L. Ed. 2d 994 (1989).[36] Furthermore, Campos concedes that "[w]here the record supports conflicting inferences, the court must presume that the jury resolved such conflicts in favor of the prosecution and must defer to that resolution." The evidence is sufficient to sustain the jury verdict finding Campos guilty of conspiracy to possess cocaine with intent to distribute.[37]

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[36] "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." *United States v. Lechuga,* 888 F.2d 1472, 1476 (5th Cir. 1989) (quoting *Coggeshall v. United States (The Slavers, Reindeer),* 69 U.S. (2 Wall.) 383, 17 L. Ed. 911, 914-15 (1865)).

[37] Like Gilberto, Campos relies on a number of judicial decisions in which convictions for drug offenses were reversed because of insufficiency of the evidence. The cases upon which Campos relies are distinguishable, and do not require reversal in this case. *See United States v. Ocampo,* 964 F.2d 80, 82-83 (1st Cir. 1992) (no evidence of participation in conspiracy: defendant merely resided at apartment where conspiracy-related conduct occurred); *Sanchez,* 961 F.2d at 1180 (no evidence of participation in conspiracy); *Bell,* 954 F.2d at 238 (4th Cir. 1992) (no evidence of agreement to do unlawful act); *Sacerio,* 952 F.2d at 864-66 (mere presence and association supported guilty verdict); *Nusraty,* 867 F.2d at 765 (only false exculpatory statement, presence and association supported guilty verdict); *United States v. Moreno-Hinojosa,* 804 F.2d 845, 847 (5th Cir. 1986) (evidence insufficient to support possession conviction, even though defendant made false post-arrest statements); *Gaviria,* 740 F.2d at 184 (2d Cir. 1984) (only presence and false post-arrest statement supported guilty verdict); *United States v. Hyson,* 721 F.2d 856, 862-63 (1st Cir. 1983) (no evidence of participation in conspiracy: defendant

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Campos also challenges the sufficiency of the evidence to support his conviction for possessing, with intent to distribute, more than five kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1).[38] Under *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L. Ed. 1489 (1946), "a conspirator can be held liable for the substantive acts of a co-conspirator as long as the acts were reasonably foreseeable and done in furtherance of the conspiracy." *United States v. Maceo,* 947 F.2d 1191, 1198 (5th Cir. 1991) (citing *Pinkerton,* 328 U.S. at 647-48, 66 S. Ct. at 1184-85), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1510, 117 L. Ed. 2d 647 (1992). Because the government proved that Campos conspired to possess cocaine with intent to distribute it, *see supra* part II.A.1.b., he is responsible for his co-conspirators' possession of the cocaine, which was reasonably foreseeable to him, and was done in furtherance of the conspiracy. Furthermore, because of the distributable quantity of the cocaine involved, the evidence is sufficient to support Campos' conviction for possession of cocaine with intent to distribute. *See Williams-Hendricks,* 805 F.2d at 500

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merely resided at apartment where conspiracy-related conduct occurred); *United States v. Soto,* 716 F.2d 989, 991-93 (2d Cir. 1983) (same).

[38] "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance." 21 U.S.C. § 841(a)(1). The three elements of this offense are (1) knowing (2) possession of the controlled substance (3) with intent to distribute it. *Williams-Hendricks,* 805 F.2d 500 (5th Cir. 1986) (quoting *United States v. Vergara,* 687 F.2d 57, 61 (5th Cir. 1982)).

(stating that "intent to distribute may be inferred from the possession of a large quantity of an illegal substance").

3

Campos and Gilberto also challenge their convictions for conspiracy to import cocaine, in violation of 21 U.S.C. §§ 952, 963 (1988).[39] They contend, and the government conceded at oral argument, that their convictions must be overturned unless they knew the object of the conspiracy was to bring cocaine into the United States from abroad. We agree. "Conspiracy to import a controlled substance into the United States requires proof of an agreement to commit every element of that substantive offense," *United States v. Conroy,* 589 F.2d 1258, 1270 (5th Cir.), *cert. denied,* 444 U.S. 831, 100 S. Ct. 60, 62 L. Ed. 2d 40 (1979), and it is an essential element of importation that the controlled

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[39] 21 U.S.C. § 952(a) provides that "[i]t shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter . . . ." Under 21 U.S.C § 963 "[a]ny person who . . . conspires to commit any offense defined in this subchapter [including § 952] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy." *Cf.* 21 U.S.C. § 960(b) (providing penalties for violations of § 952) and § 812(c) (schedules of controlled substances). "[A] conviction for conspiracy to import a controlled substance may be sustained although the defendant engaged only in the conspiracy's distribution or delivery aspects after the contraband entered the country; importation is not complete until the drugs reach their final destination." *United States v. Osgood,* 794 F.2d 1087, 1094 (5th Cir.), *cert. denied,* 479 U.S. 994, 107 S. Ct. 596, 93 L. Ed. 2d 596 (1986). "[A] conspiracy to import illicit drugs does not automatically terminate when the substance crosses the border." *United States v. Reynolds,* 511 F.2d 603, 607 (5th Cir. 1975).

substance be transported into the United States from some other location.[40] Although "it is not necessary that the members of the conspiracy know all the details of the plan, . . . they must be aware of the essential nature and scope of the enterprise . . . ." *Id.* at 1269. Therefore, to be convicted for conspiracy to import, the defendant must know that the object of the conspiracy was importation of the controlled substance from outside the United States.[41] Furthermore, the defendant's "[k]nowledge of the conspiracy must be clear and unequivocal . . . ." *United States v. Suarez,* 608 F.2d 584, 586 (5th Cir. 1979).

Gilberto and Campos contend that even if they were members of a conspiracy to possess cocaine with intent to distribute, they were not aware that the cocaine was arriving from Colombia or that importation was a goal of the conspiracy. The government concedes

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[40] *See* 21 U.S.C. § 952 *supra* note 39; *United States v. Hernandez-Palacios,* 838 F.2d 1346, 1349 (5th Cir. 1988) (stating that "[a]n importation conviction requires . . . proof that the defendant played a role in bringing the [controlled substance] from a foreign country into the U.S."), *cited in Martinez-Mercado,* 888 F.2d at 1491.

[41] *See Osgood,* 794 F.2d at 1095 (holding that evidence supported conviction for conspiracy to import where record revealed, *inter alia,* "that Osgood . . . knew of the [contraband's] . . . foreign place of origin"); *United States v. Corbin,* 734 F.2d 643, 652 (11th Cir. 1984) (upholding convictions for conspiracy to import where "it was uncontroverted that the marijuana came from Colombia, and it would be reasonable for the jury to conclude that the appellants knew as much"); *cf. United States v. Londono-Villa,* 930 F.2d 994, 998 (2nd Cir. 1991) ("[I]n order to establish the offenses defined in [21 U.S.C.] §§ 952, 960, and 963, the government is required to prove that the defendant knew or intended that the destination of the narcotics would be the United States."); *Conroy,* 589 F.2d at 1270 (holding that a conviction for conspiracy to import marijuana "must be supported by proof that [the defendant] knew the marijuana was destined for the United States").

that no direct evidence shows Campos' or Gilberto's knowledge of the cocaine's foreign origin. The evidence does not reveal conversations in their presence in which a foreign country was mentioned, or any other events which would have put Campos or Gilberto on notice that the drugs came from Colombia. However, the government contends that Lazara's and Fajardo's knowledge of the foreign origin of the cocaine can be imputed to Campos and Gilberto because of the coordinated efforts of all four co-conspirators to effectuate the purpose of the conspiracy. We disagree.

"[A] defendant will not be held to have knowledge of any illegal importation solely on the basis of evidence that one or more of his alleged co-conspirators had such knowledge." *United States v. Bollinger,* 796 F.2d 1394, 1405 (11th Cir. 1986) (noting that "several of the people with whom [the defendant] came into contact were aware of the destination of the cocaine"), *cert. denied,* 486 U.S. 1009, 108 S. Ct. 1737, 100 L. Ed. 2d 200 (1988). Furthermore, although the evidence supports the jury's finding that Gilberto and Campos knowingly participated in the conspiracy to possess cocaine with intent to distribute, it does not follow that either Lazara or Fajardo informed Gilberto or Campos that the drugs were being imported from Colombia: if Campos and Gilberto went to Beaumont to act as lookouts during the drug deal, knowing about the foreign origin of the drugs would not have enabled them to carry out that function more effectively. Neither were Campos and Gilberto so central to the management of the conspiracy that it is reasonable to infer that they were privy to all important

information about the enterprise. Once Campos and Gilberto were enlisted, at a relatively late stage in the game, their only apparent function was to keep an eye on the vehicles parked at the Iron Skillet restaurant, away from the scene of the drug transaction where Lazara and Fajardo suspected that the police might be present. To conclude from these facts that Gilberto and Campos were informed of the foreign origin of the cocaine would amount to mere speculation, rather than a reasonable inference from the evidence.

At oral argument the government conceded that no decision of this Court requires us to impute to Gilberto and Campos Lazara's and Fajardo's knowledge that the cocaine was arriving from a foreign country. Neither have we found a decision requiring such a result. *United States v. Corbin,* 734 F.2d 643 (11th Cir. 1984), which the government cites in its brief, is distinguishable. There the Eleventh Circuit affirmed the convictions for conspiracy to import because "there was more than sufficient basis for a reasonable juror to conclude that each of the appellants participated in the conspiracy with knowledge of its general objective." *Id.* at 652. "[I]t was uncontroverted that the marijuana came from Colombia, and it [was] reasonable for the jury to conclude that the appellants knew as much, given their coordinated efforts to offload the boat in close conjunction with those physically responsible for bringing the marijuana into the country." *Id.* Gilberto and Campos, by contrast, had no contact with the person who physically brought the cocaine into the United

States, and they were not present when the cocaine arrived in this country by ship. There is therefore considerably less support in this case for an inference that Campos and Dominguez knew the drugs had arrived from abroad.

In *United States v. Reynolds,* 511 F.2d 603 (5th Cir. 1975), we affirmed Reynolds' conviction for conspiracy to import cocaine from Jamaica. *See id.* at 607. The evidence did not indicate that Reynolds traveled to Jamaica or overheard conversations in which Jamaica was mentioned. *See id.* at 604-05.[42] It indicated only that Reynolds was mentioned by co-conspirators as a possible source of money for the importation scheme; that the co-conspirators were supposed to meet Reynolds at a party to collect money from him, and tried to call him from the party several times; that Reynolds discussed investing in cocaine with the co-conspirators and sampled cocaine at their hotel room; and that Reynolds bought a package of cocaine for $5,000 and agreed to buy more in the future. *See id.* Reynolds' knowledge of the foreign origin of the drugs was inferable partly from his contact with individuals who had such knowledge. *See id. Reynolds* is distinguishable, however, because Reynolds was an investor in the illegal conspiracy. Unlike Campos and Dominguez, who apparently were merely lookouts during the transaction, Reynolds could be expected to make some inquiry about the source of the cocaine before he purchased $5,000 worth of it and agreed to buy more in the future. Therefore, *Reynolds* does not

[42] In *Reynolds* we did not explicitly decide whether the defendant's knowledge of the foreign origin of the drugs was proven.

support affirmance of Campos' and Gilberto's convictions for conspiracy to import.

In *United States v. Merritt,* 736 F.2d 223 (5th Cir. 1984), *cert. denied,* 476 U.S. 1142, 106 S. Ct. 2250, 90 L. Ed. 2d 696 (1986), we affirmed several convictions for conspiracy to import marijuana, even though there was little evidence from which the jury could have inferred that the defendants were aware of the foreign origin of the drugs.[43] In *Merritt* 1,500 pounds of marijuana was offloaded from a 55-foot vessel known as the M/V FORTY at a dock in eastern Louisiana. *See id.* at 226-27. The dock where the marijuana was offloaded was near Lake Pontchartrain, which could be reached from the dock via a series of bayous and canals. *See id.* Lake Pontchartrain, in turn, is connected to Lake Borgne, which opens into the Gulf of Mexico. *See id.* at 226. The hold of the M/V FORTY, where the marijuana was carried, "contained food products from Colombia and Venezuela," *id.* at 227, from which it was inferable that the craft and its cargo had come from those countries. The convictions of Charles McGill and John Hartsel for conspiracy to import were affirmed even though it was not shown either that they entered the hold of the M/V FORTY and saw the foreign food, or that anyone said in their presence that the marijuana came from abroad.[44] *See id.* at 228, 232. The evidence

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[43] In *Merritt* we did not explicitly decide whether the defendants were aware of the foreign origin of the drugs.

[44] The same is true of the conviction of Patrick Murray. However, because Murray owned the M/V FORTY, *see Merritt,* 736 F.2d at 232, it was reasonable to infer that he knew where the vessel's journey had originated.

against McGill merely showed that he was aboard a speed boat which guided the M/V FORTY to the offloading site from Lake Pontchartrain, and that the skipper of the M/V FORTY had McGill's business card at the time of his arrest, and tried surreptitiously to dispose of it. *See id.* at 227-28. The evidence against Hartsel showed that he was present at the offloading site on the morning after the marijuana was unloaded, and that he knew marijuana was there. *See id.* at 232.

Although the evidence supporting an inference of McGill's and Hartsel's knowledge of the foreign origin of the marijuana was minimal, it nevertheless exceeds the complete absence of evidence supporting a finding that Campos and Gilberto knew the cocaine came from Colombia. It was inferable from the evidence in *Merritt* that both McGill and Hartsel knew the marijuana arrived on a 55-foot ocean-going vessel,[45] which could have put them on notice that the marijuana was brought in from overseas. Here, by contrast, Campos and Gilberto were lookouts at a drug deal alongside an interstate in Beaumont. Nothing about that situation suggests that the drugs were being imported.

Although "no case will reproduce the same pattern of facts as the case before us," *Espinoza-Seanez,* 862 F.2d at 537, the Second Circuit's decision in *United States v. Londono-Villa,* 930 F.2d 994 (2d Cir. 1991), provides a helpful analogy. Londono-Villa helped transport from Colombia to Panama a large quantity of cocaine which

[45] The M/V FORTY was the type of vessel normally used for transporting work crews in the offshore oilfields. *See id.* at 226.

was then imported into the United States. *See id.* at 995-96. The Second Circuit held that the evidence was insufficient to support Londono-Villa's conviction for conspiracy to import because it did not show that Londono-Villa knew the drugs were destined for the United States. *See id.* at 1001. The court noted several facts which bear a strong resemblance to the facts of this case:

> The testimony showed that Londono was not involved in any of the lengthy negotiations for the sale of the cocaine; he was not present at most of the meetings but rather came into the picture only at the end . . . . There was no evidence that Londono had been told that the United States was to be the ultimate destination of the cocaine, and no evidence that the United States was ever mentioned in his presence.

See id. Similarly, in this case, no evidence showed conversations in Gilberto's or Campos' presence, or statements to them, which would have revealed that the drugs came from outside this country. Neither was Gilberto or Campos involved in any negotiations concerning the drug deal. Also, Gilberto's and Campos' involvement in the conspiracy began only in its final stages. *Londono-Villa* therefore supports by analogy our determination that the government failed to prove Campos' or Gilberto's knowledge that importation was the purpose of the conspiracy.

In light of the foregoing, we conclude that a jury could not have found beyond a reasonable doubt that Gilberto or Campos knew the cocaine came from outside the United States. Consequently, Gilberto and Campos are entitled to a judgment of acquittal on the charges of conspiracy to import cocaine.

B

Lazara, Gilberto, and Campos next contend that they are entitled to a new trial because the government violated the disclosure requirements of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Brady,* the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S. Ct. at 1196-97. The appellants contend that the prosecutors withheld from the defense certain notes taken during plea negotiations with Jesus Fajardo, which reveal prior inconsistent statements that could have been used to impeach Fajardo at trial.

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Jesus Fajardo was originally a defendant in this case, and met with Assistant United States Attorney ("AUSA") Melissa Baldo to discuss the possibility of a plea agreement. According to Baldo's notes from that meeting, Fajardo, communicating through a non-certified interpreter, told how he first came to Houston, how he met Lazara, and about the cocaine transaction and surrounding events. At the end of the meeting, Baldo told Fajardo that the information he offered "wasn't enough and [she] thought he was holding back." No plea agreement was reached at that time, and Fajardo pled guilty without a plea agreement several weeks later. About two weeks after Fajardo entered his plea, he met again with Baldo, and with AUSA James Jenkins, who took notes at the meeting. Fajardo again discussed how he came to be in Houston, how he met

Lazara, and the cocaine transaction.[46] The government then agreed with Fajardo that, in return for his testimony at trial, the government would file a Rule 35(b) motion for downward departure at his sentencing,[47] and would not prosecute his girlfriend, Elizabeth Murillo. Soon thereafter, and before Fajardo was sentenced, he testified at trial. Appellants' *Brady* claims are premised on inconsistencies between Fajardo's pre-trial statements to the prosecutors and his testimony at trial.

The most crucial inconsistency concerns the meeting which occurred between Fajardo, Gilberto, and Campos in the Iron Skillet restaurant. According to AUSA Baldo's notes, Fajardo said at the first meeting that "there was no conversation" at the Iron Skillet.[48] AUSA Jenkins' notes from the second meeting, by contrast, contain the following rough transcription of Fajardo's

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[46] The government asserts, without reference to the record, that a non-certified interpreter was used at this second meeting. Because the record reflects that Fajardo required the assistance of an interpreter at the first meeting and at trial, we accept the inference that an interpreter was present at the second meeting as well. However, the government's assertion that the interpreter was non-certified is completely unsupported by the record.

[47] *See* Fed. R. Crim. P. 35(b) ("The court, on motion of the Government . . . may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense . . . .").

[48] The entire passage from Baldo's notes concerning the meeting in the Iron Skillet reads:

> Defendant left Lazara and went to restaurant and Gilberto gave Defendant the keys to the Pathfinder where the money was.
> Defendant says there was no conversation.
> Defendant says he put the keys to the Toyota on the table and either Gilberto or Joel picked them up.

statements: "I went to table to where Gilberto [and] Joel were))I told him the merchandise was in my car . . . ." Finally, at trial Fajardo testified as follows:

> Q Did you walk up to the table where Gilberto and Joel Campos were?
>
> A Yes.
>
> Q Did you talk to Gilberto and Joel Campos?
>
> A Gilberto asked me where was his sister. I told him she was at the hotel waiting for me. And I said "I'm going to get her," and I told her that the drugs were in the car and to go look at it, that I was going to get his sister.

The prosecutors' notes reveal several other statements by Fajardo which are inconsistent with his testimony at trial. At the first meeting Fajardo stated that he had moved to Houston from Florida with "approximately $5,800 in savings to live on." However, Fajardo stated in the second meeting, and testified at trial, that he had brought $4,000 in savings from Florida. Fajardo also stated in the first meeting that Ferdinand had not given him his phone number; but at trial Fajardo testified that Ferdinand had given him a phone number that did not work. In addition, at the first meeting Fajardo told Baldo that Ferdinand had introduced him to Lazara at a shopping mall, where she was waiting with a girlfriend near a public phone. At trial, however, Fajardo testified that Ferdinand gave him Lazara's number, and that he called Lazara and arranged the meeting at the shopping mall. At trial Fajardo did not mention that Ferdinand was present at the shopping mall. Lastly, regarding the first trip to Beaumont, Fajardo said at the first meeting that he "got scared" when he went

inside the Holiday Inn. At the second meeting Fajardo said that he "didn't see anybody" at the Holiday Inn, but Lazara said "it was dangerous." At trial Fajardo testified that, when he went inside the Holiday Inn he "could see a lot of people there" and "that's why [he] went back to the car."[49]

During trial AUSA Baldo informed the defense by letter that Fajardo had stated in the first interview that no conversation occurred in the Iron Skillet. Lazara's counsel requested that the government be required to disclose all of its records of conversations with Fajardo. The district court denied this request, but included copies of the prosecutors' notes in a sealed record for use on appeal.

2

Lazara, Gilberto, and Campos contend that the government violated the requirements of *Brady v. Maryland* by failing to allow defense counsel access to their notes from the two pre-trial meetings with Fajardo. They contend that they were entitled to use

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[49] Lazara asserts that the prosecutors' notes reveal an additional inconsistency. In the second interview with the prosecutors Fajardo reported that, as Lazara was leaving the Mexican restaurant in Houston, she "told [Fajardo], Gilberto [and] Joel to watch the red truck because the [money] was in the red truck." According to Lazara, Fajardo testified differently at trial))that Lazara made the statement about the truck and the money only to Gilberto and Joel. Lazara's assertion is not supported by the record, which contains the following testimony by Fajardo:

> Q And before she left, did she talk to you and Gilberto and Joel Campos?
>
> A Yes, she said to be careful with the car because that's where the money was.

1st Supp. Record on Appeal, vol. 6, at 136-37.

the prior inconsistent statements reflected in the prosecutors' notes to impeach Fajardo at trial. "When the `reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the] general rule" of *Brady*. *Giglio v. United States,* 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972), *quoted in United States v. Bagley,* 473 U.S. 667, 677, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481 (1985).

To prevail on their *Brady* claim, the appellants must show that the evidence contained in the government attorneys' notes was (1) suppressed, (2) favorable, and (3) material. *Williams v. Whitley,* 940 F.2d 132, 133 (5th Cir. 1991). It is undisputed that the evidence in question was suppressed, as the government had it and never provided it to the defense.[50] Furthermore, since Fajardo's inconsistent statements would have been admissible to impeach him,[51] evidence of those statements was favorable to the appellants. Consequently, as in many *Brady* cases, the pivotal question is whether the evidence suppressed was material.

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[50] *See United States v. Cravero,* 545 F.2d 406, 420 (5th Cir. 1976) ("In the context of the *Brady* requirement, `any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense.'" (quoting *Giles v. Maryland,* 386 U.S. 66, 96, 87 S. Ct. 793, 808, 17 L. Ed. 2d 737 (1967) (White, J., concurring)), *cert. denied,* 430 U.S. 983, 97 S. Ct. 1679, 52 L. Ed. 2d 377 (1977).

[51] "It is well-settled that evidence of a prior inconsistent statement is admissible to impeach a witness." *United States v. Devine,* 934 F.2d 1325, 1344 (5th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 954, 117 L. Ed. 2d 121 (1992).

"[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . ." *Bagley,* 473 U.S. at 675, 105 S. Ct. at 3380 (footnote omitted). Nondisclosure deprives the accused of a fair trial only if the evidence is material, in the sense that "`there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *United States v. Weintraub,* 871 F.2d 1257, 1261 (5th Cir. 1989) (quoting *Bagley,* 473 U.S. at 682, 105 S. Ct. at 3383). "`A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *Id.* We evaluate the materiality of *Brady* evidence in light of the other evidence in the record.[52]

3

As to Gilberto and Campos, the prior inconsistent statements revealed in the prosecutors' notes were material. Fajardo's testimony concerning his meeting with Campos and Gilberto in the Iron Skillet was vital to the government's case, and Fajardo's

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[52] *See Edmond v. Collins,* 8 F.3d 290, 293 (5th Cir. 1993) ("The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state."); *Monroe v. Blackburn,* 607 F.2d 148, 152 (5th Cir. 1979) ("It is necessary for us to consider [alleged *Brady* material] in light of the other evidence of guilt offered by the prosecutor."), *cert. denied,* 446 U.S. 957, 100 S. Ct. 2929, 64 L. Ed. 2d 816 (1980); *United States v. Anderson,* 574 F.2d 1347, 1356 (5th Cir. 1978) (In deciding the materiality of impeachment evidence under *Brady,* "[w]e must assess both the weight of the independent evidence of guilt and the importance of the witness' testimony, which credibility affects.").

prior inconsistent statements))particularly the statement that he had said "the merchandise" was in his car))had the potential to undermine the credibility of Fajardo's testimony.

Fajardo's statement in the Iron Skillet))that "the drugs were in the car"))is the most damaging piece of evidence against Gilberto and Campos. That statement compels the conclusion that the exchange of car keys in the Iron Skillet restaurant was an exchange of drugs for money, and directly proves Gilberto's knowing participation in the conspiracy. *See supra* part II.A.1.a. Furthermore, the fact that Fajardo would mention "the drugs" within Campos' hearing proves circumstantially that Campos was a member of the conspiracy. *See id.* Had the defense successfully discredited Fajardo's testimony on that point via his prior inconsistent statements, the weight of the government's evidence would have been seriously diminished.[53] The case against Gilberto, rather than including direct evidence of his participation in the conspiracy, would have been based chiefly on circumstantial evidence. The case against Campos, which was already purely circumstantial, would have been weakened considerably.

Furthermore, given access to Fajardo's prior inconsistent statements, the defense could have impeached Fajardo's testimony by showing that he purposely embellished his original story to curry favor with the government. The notes from the interviews with

[53] Fajardo's credibility in general was seriously damaged by his admission that he lied under oath during the trial. *See infra* part II.B.4. However, neither that admission nor the other damaging impeachment evidence which was before the jury, pertained specifically to Fajardo's account of the Iron Skillet meeting.

Fajardo reveal that his testimony evolved between his first and second meetings with the prosecutors. Fajardo initially said that no conversation occurred in the Iron Skillet, but in the second meeting Fajardo claimed to have said that "the merchandise" was in his car. The change in Fajardo's statements worked to the government's benefit, since it increased the evidence tending to show that Campos and Gilberto were aware of a drug deal. Furthermore, the prosecutors' notes reveal a clear motive for Fajardo to embellish his story: AUSA Baldo pronounced at the end of the first interview that Fajardo's proffer of evidence "wasn't enough" to justify a plea bargain. In *Monroe v. Blackburn,* 607 F.2d 148 (5th Cir. 1979), *cert. denied,* 446 U.S. 957, 100 S. Ct. 2929, 64 L. Ed. 2d 816 (1980), the government failed to disclose "impeachment evidence of the sort that [went] directly to a substantive issue and could [have been] used in urging that . . . in-court testimony ha[d] been `improved' by the erroneous addition of what the prosecution needed to support its theory." *Id.* at 152. We concluded that there was "at least a reasonable likelihood that the suppressed evidence could have affected the verdict." *Id.* The same is true here.

The government contends, nevertheless, that Fajardo's prior inconsistent statement about "merchandise" was not material because (1) drug traffickers use the word "merchandise" as a code word for drugs, and therefore the two terms are interchangeable; and (2) neither Campos nor Gilberto responded to Fajardo's remark, and "[i]f Gilberto . . . and . . . Campos were, in fact, innocent

parties, Fajardo's comment should have elicited a response, regardless of whether that comment was that there was `merchandise,' or `drugs,' or `stuff' in the car." Neither of these arguments is responsive to the defendants' contention that Fajardo gave inconsistent accounts of the meeting at the Iron Skillet restaurant, which exposed his testimony about that meeting to impeachment. These arguments are therefore meritless.

We are also unpersuaded by the government's argument that "to the extent that a non-certified interpreter was used during the [second] debriefing, and a certified interpreter was used during the trial, we do not know whether Fajardo used the same word or different words at the debriefing and at trial." First of all, the government has not identified, and we have not found, any support in the record for the statement that a non-certified interpreter was used at the second interview with Fajardo. Moreover, that different interpreters with different credentials were used at trial and at the pretrial debriefing would go to the weight and credibility of the evidence. *See Lindsey v. King,* 769 F.2d 1034, 1040 (5th Cir. 1985) ("It was for the jury, not the prosecutor, to decide whether the contents of an official police record [upon which *Brady* claim was based] were credible . . . ."). Assuming that different interpreters were used, that fact is not so damaging to the impeachment value of Fajardo's pretrial statement that it becomes immaterial.[54]

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[54] Our decision in *United States v. Nixon,* 881 F.2d 1305 (5th Cir. 1989), is distinguishable in this regard. In *Nixon* we held that an FBI teletype describing a government witness's out-of-

The government also contends that it was not required to disclose Fajardo's pretrial "merchandise" statement because Campos and Gilberto heard Fajardo's comment in the Iron Skillet restaurant, and "the Government is not obliged to furnish a defendant with information which he already has, or [which] with any reasonable diligence he can obtain himself." This argument is also meritless. Gilberto and Campos argue that they were entitled to know about Fajardo's statement to the government's attorneys at the pretrial debriefing. The defendants' presence at the Iron Skillet restaurant did not afford them access to Fajardo's statements in meetings with the prosecutors.

Therefore, the government's failure to disclose evidence tending to impeach a crucial witness undermines our confidence in the jury's result, and there is a reasonable probability that the verdict would have been different had that evidence been disclosed.

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court proffer of evidence was not *Brady* material because it "[did] not reflect the actual testimony given by [the government witness] at the proffer." *Id.* at 1310. "The teletype represent[ed] a third-hand attempt to characterize [the witness's] proffer . . . by an agent not present at the event . . . ." *Id.* Here, by contrast, the prosecutors were present and took notes as Fajardo's statements were translated. Also distinguishable is our decision in *Weintraub,* where we held that Drug Enforcement Administration ("DEA") summaries of government witnesses' out-of-court statements, known as DEA 6's, did not constitute *Brady* material. *See id.*, 871 F.2d at 1260. The DEA reports were "short, concise[] summaries of the witnesses' version of the facts as recounted to the agents," and "one of the reports at issue summarized [the government witness's] statements made in three separate interviews conducted over the course of two and a half months." *Id.* In *United States v. Merida,* 765 F.2d 1205 (5th Cir. 1985), we noted that DEA 6's "did not contain substantially verbatim recitals" of witnesses' statements. *Id.* at 1215, *cited in Weintraub*. In this case the prosecutors' notes appear to be substantially verbatim recitals of Fajardo's statements, rather than summaries of his version of the facts. *Weintraub* is therefore distinguishable.

See Giglio, 405 U.S. at 154-55, 92 S. Ct. at 766 (reversing conviction under *Brady* where government failed to disclose that coconspirator, on whose testimony government's entire case rested, had been promised by prosecutor that he would not be prosecuted, in return for his testimony); *Lindsey,* 769 F.2d at 1042 (reversing conviction under *Brady* where prosecution withheld prior inconsistent statement of one of two key identification witnesses); *Martinez v. Wainwright,* 621 F.2d 184, 188 (5th Cir. 1980) (holding that non-disclosure of rap sheet of murder victim, which tended to corroborate defendant's claim of self-defense, entitled defendant to relief under *Brady* because rap sheet "may well have proved critical to the jury"). Gilberto and Campos are therefore entitled to a new trial on the charges of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute.[55]

4

As to Lazara, however, the evidence suppressed by the government was not material, and its suppression does not entitle Lazara to a new trial. Because Fajardo's prior inconsistent statements did not concern factual issues directly relevant to Lazara's conviction, and because considerable evidence independent of Fajardo's testimony supports Lazara's conviction, there is no

[55] Because we reverse under *Brady,* we need not address Gilberto's and Campos' *Agurs* argument))that the government knew or should have known that its case included perjured testimony. Neither do we address their claims, premised on *Bruton,* that they were denied their Sixth Amendment right of cross-examination by the admission of extrajudicial statements of non-testifying co-defendants.

reasonable probability that the jury's verdict would have been different if the jury had considered Fajardo's prior inconsistent statements.

Unlike Gilberto and Campos, Lazara was not present during the meeting at the Iron Skillet, and what occurred there is not directly relevant to the issue of her guilt. Neither do any of Fajardo's other prior inconsistent statements bear heavily on the question whether Lazara participated in a conspiracy to import cocaine and possess cocaine with intent to distribute it. Thus Lazara could not have used Fajardo's prior inconsistent statements to demonstrate that any particular testimony vital to her conviction was false. Those prior inconsistent statements would have been useful only to show that Fajardo generally was not a credible witness, and other evidence before the jury tended to show that. Fajardo admitted that he had falsified a statement of his income on an application to lease an automobile. More importantly, Fajardo admitted on redirect examination that he had lied under oath during direct and cross examination. On direct and cross examination Fajardo stated that he had met Lazara at a child's birthday party and then had seen her at a neighborhood supermarket, but otherwise had not seen Lazara before he began cooperating with her to purchase cocaine from the confidential informant. On redirect Fajardo admitted that his earlier testimony under oath had

been false, and that he had known Lazara considerably longer and had been involved in drug trafficking with her.[56]

On several occasions we have found that impeachment evidence was not material under *Brady* where the witness in question had already been effectively impeached, and the impeachment evidence suppressed by the government therefore would not have changed the outcome of the trial. *See Edmond v. Collins,* 8 F.3d 290, 294 and n.9 (5th Cir. 1993); *Smith v. Black,* 904 F.2d 950, 967-68 (5th Cir. 1990), *vacated on other grounds,* ___ U.S. ___, 112 S. Ct. 1463, 117 L. Ed. 2d 609 (1992); *Weintraub,* 871 F.2d 1264; *United States v. Merida,* 765 F.2d 1205, 1216 (5th Cir. 1985). Similarly here, the evidence of Fajardo's prior inconsistent statements would have merely added incrementally to the impression that Fajardo generally was not a credible witness, an impression which was amply supported by other evidence before the jury.

Furthermore, considerable evidence independent of Fajardo's testimony supports Lazara's conviction. The confidential informant "Carlos" testified about Lazara's conduct at the Holiday Inn in Beaumont on the day of her arrest. When Carlos approached Fajardo's Toyota in the Holiday Inn parking lot, Lazara and Fajardo asked him for the cocaine and wanted to inspect it.[57] Carlos

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[56] Fajardo testified that he lied in order to avoid implicating other persons who were involved in the early drug deals with him and Lazara, and who knew the whereabouts of his family in Colombia.

[57] Carlos' testimony is as follows:

> Q After you walked over to the car and spoke with person named Ferdinand, what did you do next?

further testified that both Lazara and Fajardo decided that Lazara would remain with Carlos while Fajardo retrieved the money, to guarantee payment for the cocaine. Also, according to Carlos, when Fajardo returned in the Nissan Pathfinder Lazara offered him the bag of money and told him that it was complete))$32,000. Carlos testified that, after giving him the money, Lazara shook his hand and told him that they would meet again on the next voyage, and that the contact in Colombia had promised another delivery.

Were the jury to discredit Fajardo's testimony entirely, the foregoing testimony by the confidential informant would nevertheless provide ample proof that Lazara knowingly participated in the conspiracy to import cocaine and to possess cocaine with intent to distribute it. Because of the independent evidence supporting Lazara's conviction, as well as the limited and largely cumulative impeachment value of Fajardo's prior inconsistent

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> A They're asking cocaine.
>
> Q I'm sorry, could you repeat that?
>
> A They're asking me for the bag of cocaine.
>
> * * *
>
> A I walked up to the car and asked for Ferdinand [Fajardo] and he asked me for the cocaine and I tell them I give the payment for delivery until they get the cocaine.
>
> * * *
>
> A So I bring the cocaine and I give to Ferdinand [Fajardo] and they want to pick up the package to see it's cocaine, so I offer the bag and they pick it up.

1st Supp. Record on Appeal, vol. 4, at 146, 148. Fajardo used the name "Ferdinand" when dealing with the confidential informant.

statements, our confidence in the jury's verdict as to Lazara is not undermined by the prosecutors' failure to provide the defense with their notes from the pretrial interviews with Fajardo. Lazara's *Brady* claim therefore must be rejected.[58]

C

Lazara also argues that the district court erred by admitting, under Fed. R. Evid. 404(b), Fajardo's testimony regarding Lazara's involvement in prior unadjudicated drug transactions. Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fajardo testified that Lazara hired him as a cocaine dealer and instructed him to find buyers for the cocaine; that he sold cocaine, which he obtained from Lazara, to "a chicano woman" and

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[58] We also reject Lazara's claim under *Agurs,* that the government knew or should have known that its case included perjured testimony. Assuming *arguendo* that the inconsistencies between Fajardo's testimony and his prior statements prove that his testimony was perjurious, and that the government knew or should have known it was perjurious, Lazara has failed to show that there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*, 427 U.S. at 103, 96 S. Ct. at 2397 (citing *Giglio,* 405 U.S. at 154, 92 S. Ct. at 766). The allegedly false testimony upon which Lazara relies concerns matters which related only collaterally to the issue of Lazara's guilt, and in light of the other evidence supporting Lazara's conviction, there is no reasonable likelihood that the jury was affected by the testimony in question.

received a portion of the profits in return for his services; and that he attempted to sell several kilos of Lazara's cocaine to his friends, the Lasso brothers, and to Ferdinand, but they refused to buy the cocaine because it was too expensive. The district court held that Fajardo's testimony was admissible to prove Lazara's intent,[59] and instructed the jury to consider the evidence only for that purpose.[60] Lazara contends that the district court's ruling was erroneous.[61]

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[59] *See United States v. Roberts,* 619 F.2d 379, 383 (5th Cir. 1980) (holding that "[i]n every conspiracy case . . . a not guilty plea renders the defendant's intent a material issue").

[60] The district court instructed the jury:

> During this trial, you have heard evidence of acts of the defendant Lazara Dominguez which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant Lazara Dominguez, or any other defendant, committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.
>
> If you find beyond a reasonable doubt from other evidence in this case that the defendant Lazara Dominguez did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed by her on other occasions to determine whether the defendant Lazara Dominguez had the state of mind or intent necessary to commit the acts charged in the indictment, or whether the defendant Lazara Dominguez committed the acts for which she is on trial by accident or mistake.
>
> These are the limited purposes for which any evidence of other similar acts may be considered.

1st Supp. Record on Appeal, vol. 10, at 15-16.

[61] Lazara contends that the evidence should not have been admitted because (1) the government failed to notify the defense of their intent to prove prior acts; (2) the evidence was not relevant because the government failed to present credible evidence that Lazara actually committed the alleged prior acts; (3) the prejudicial effect of the extrinsic act evidence substantially outweighed any probative value it may have had; and (4) the

Whether extrinsic offense evidence is admissible under Rule 404(b) is governed by the application of a two-prong test set out in *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979). "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [Fed. R. Evid.] 403." *Id.* at 911. A district court's decision to admit evidence under Rule 404(b) is reviewed under a heightened abuse of discretion standard employed for criminal trials. *United States v. Carrillo*, 981 F.2d 772, 774 (5th Cir. 1993).

Here we need not decide whether the district court abused its discretion, because any error would have been harmless.[62] In cases where evidence of guilt was overwhelming, we have held that admission of extrinsic act evidence under Rule 404(b) was, at most, harmless error. *See United States v. Williams,* 957 F.2d 1238, 1244 (5th Cir. 1992); *United States v. Gordon,* 780 F.2d 1165, 1175 n.5 (5th Cir. 1986); *United States v. Mortazavi,* 702 F.2d 526, 528 (5th Cir. 1983). We have also held that "the improper admission of

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district court failed to make an explicit finding under Fed. R. Evid. 104(b) that Lazara committed the alleged prior acts.

[62] *See* Fed. R. Evid. 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."); *United States v. Williams,* 957 F.2d 1238, 1244 (5th Cir. 1992) (declining to decide whether district court abused its discretion by admitting evidence under Rule 404(b) "because any error that the district court may have committed in admitting the evidence was harmless").

. . . evidence [under Rule 404(b)] may be cured by appropriate limiting instructions." *Gordon,* 780 F.2d at 1174 and n.4 (where district court delivered limiting instruction similar to one given at Lazara's trial). Because of the overwhelming evidence of Lazara's guilt presented by the government, *see supra* part I, and the appropriate limiting instruction given by the district court, any error committed by the district court in admitting evidence of Lazara's prior unadjudicated offenses was harmless beyond a reasonable doubt.

D

Lazara further argues that the district court erred by denying her request to discover the notes of David Koppa, the attorney for government witness Jesus Fajardo. Fajardo was originally a co-defendant in this case, and Koppa made notes during Fajardo's plea negotiations and other meetings with the government. Lazara requested disclosure of Koppa's notes, arguing that they would reveal inconsistencies between Fajardo's out-of-court statements and his testimony at trial, which could be used to impeach Fajardo. The district court ruled that Koppa's notes were privileged information under Fed. R. Crim. P. 16(b)(2), and therefore were not discoverable.[63] Lazara contends that the district court's ruling

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[63] Rule 16 governs pre-trial discovery in federal criminal cases, and subdivision (b) describes defense information which is discoverable by the government. Rule 16(b)(2) limits the category of information which the government is entitled to discover:

> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the

was erroneous because Rule 16(b)(2) applies only when the government seeks discovery.[64] Assuming *arguendo* that Rule 16(b)(2) is inapplicable here, any error was harmless because the work product doctrine, independent of Rule 16(b)(2), shielded Koppa's notes from disclosure.[65]

The United States Supreme Court has recognized "a qualified privilege for certain materials prepared by an attorney `acting for his client in anticipation of litigation.'" *United States v. Nobles,* 422 U.S. 225, 238, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975); *see also Hickman v. Taylor,* 329 U.S. 495, 510-11, 67 S.Ct. 385, 393-94 (1947); *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied,* 466 U.S. 944 (1984); *Kent Corp. v. N.L.R.B.*, 530 F.2d 612 (5th Cir. 1976), *cert. denied,* 429 U.S. 920

> defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

Fed. R. Crim. P. 16(b)(2).

[64] Lazara relies on the advisory committee's notes, which state that "[s]ubdivision (b) deals with *the government's* right to discovery of defense evidence . . . ." Fed. R. Crim. P. 16 advisory committee's note to 1974 amendment (emphasis added). Because Rule 16(b) deals with the government's right of discovery, and not that of the defense, Lazara suggests, any restrictions contained in subdivision (b)(2) are inapplicable here.

[65] Because the work product doctrine precluded discovery of Koppa's notes, we need not decide whether Lazara would have been entitled to such discovery in the absence of the work product doctrine. We note, however, that on its face Rule 16 only provides for discovery between the government and the defense.

(1976). This "work-product doctrine" applies to both civil and criminal litigation. *Nobles*, 422 U.S. at 236, 95 S.Ct. at 2169.

In *Hickman v. Taylor*, the Supreme Court explained the policy behind the doctrine:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 510-11, 67 S.Ct. at 393-94. The Supreme Court further stated in *United States v. Nobles* that "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Nobles*, 422 U.S. at 238, 95 S.Ct. at 2170.

We have recognized that the work product doctrine is not absolute, and "is waived when the attorney requests the witness to

disclose the information or when the attorney discloses the information to the court voluntarily or makes no objection when it is offered." *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989).

We have also distinguished the work product privilege from the attorney-client privilege:

> The attorney-client privilege exists to protect confidential communications and to protect the attorney-client relationship and is waived by disclosure of confidential communications to third parties. The work product privilege, however, does not exist to protect a confidential relationship but to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent. Therefore, the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege.

Id. (citation omitted).

In the instant case, Koppa's notes were made by counsel acting on behalf of his client, Fajardo, in anticipation of litigation.[66] As such, Koppa's notes depict the very essence of his mental impressions, conclusions, opinions, and legal theories enabling him to analyze and prepare his client's case. It is immaterial that these notes were made in the presence of government agents, since the work-product doctrine is not designed to protect confidentiality. Further, the privilege was not waived by Fajardo's presence and testimony on the witness stand. Fajardo was not called to testify or disclose information by his attorney. Rather, Fajardo was called to testify, as a government witness, by

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[66] Koppa stated that he made the notes in preparation of Fajardo's sentencing.

the government's attorney. Koppa's notes were therefore shielded from discovery by the work-product doctrine, and even if denial of Lazara's discovery request under Fed. R. Crim. P. 16(b)(2) were error, it would be harmless error.[67] *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").[68]

III

For the foregoing reasons, Lazara Dominguez's conviction is **AFFIRMED** in all respects. The convictions of Gilberto Dominguez and Joel Campos for conspiracy to import cocaine are **REVERSED** for lack of sufficient evidence, *see supra* part II.A.3., and we direct that judgments of acquittal be entered in favor of both defendants on the charges of conspiracy to import. Furthermore, we **REVERSE** the convictions of Gilberto Dominguez and Joel Campos on the remaining counts of conviction and **REMAND** for new trial, on account

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[67] Again, we do not decide whether in the absence of the work product doctrine Lazara would have been entitled to discover Koppa's notes.

[68] Lazara also contends that the district court committed reversible error by denying her request that the jury be instructed to disregard Fajardo's testimony because it was incredible as a matter of law. Lazara concedes that testimony is not incredible as a matter of law unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature. *See United State v. Lindell,* 881 F.2d 1313, 1322 (5th Cir. 1989), *cert. denied,* 496 U.S. 926, 110 S. Ct. 2621, 110 L. Ed. 2d 642 (1990); *United States v. Palacios,* 612 F.2d 972, 973 (5th Cir. 1980). Although Fajardo's credibility was seriously damaged at trial, we are satisfied after a thorough review of all the evidence that none of his testimony warranted the instruction which Lazara requested. This claim is patently without merit.

of the government's failure to comply with the disclosure requirements of *Brady v. Maryland*. *See supra* part II.B.3.