IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5119

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FAXON MULHOLLAN and
DONALD MULHOLLAN,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(1:92-CR-28)

(December 16, 1993)

Before REYNALDO G. GARZA, KING and DeMOSS, Circuit Judges.

PER CURIAM:*

Donald and Faxon Mulhollan were tried by jury on a two-count indictment alleging violations of the federal narcotics laws. Donald Mulhollan was convicted of one count of attempting to import in excess of one hundred kilograms of marijuana into the United States in violation of 21 U.S.C. § 963. Faxon Mulhollan was convicted of a similar attempt count, as well as one count of

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

conspiring to import in excess of one hundred kilograms of marijuana into the United States in violation of 21 U.S.C. § 963. Both defendants now appeal.

I.

A. *Factual Background*

The instant case revolves around two conspiracies to import marijuana into the United States from Latin America. The following facts are derived from the evidence introduced at the Mulhollans' criminal trial in support of the verdicts, primarily the testimony of coconspirators Randy Fincher and Jim Bowen.

The criminal enterprises with which we are concerned had their genesis in a meeting between Randy Fincher and Kenny Andreas, at a time when both were in prison for other crimes. Andreas confided to Fincher that he was interested in smuggling illegal drugs into the United States from Belize by plane. The two stayed in touch after they were paroled in the mid-1980s, and Andreas told Fincher that he was still interested in smuggling drugs into the United States from Belize and that he had a pilot and a plane available for use in the smuggling operation. Andreas invited Fincher to be part of the "ground crew," to receive the drugs once the plane had returned from Belize with its illicit cargo.

The Mulhollans became involved in this plot when the pilot Andreas was relying on dropped out of the conspiracy. Fincher suggested that his friend Faxon Mulhollan ("Faxon") would agree

to pilot the plane, an Aztec Piper, and Faxon did so agree at a meeting with Fincher and Andreas. Donald Mulhollan ("Donald"), who is Faxon's brother, and another person named Chris Wideman were recruited by Fincher to be part of the ground crew. The conspirators carried out their plan in March 1987, arranging for the ground crew to rendezvous with the loaded Piper in the early morning hours in a rural area in south central Texas. The Piper, with Andreas and Faxon aboard, developed engine trouble as it approached the rendezvous point, and finally crash-landed near the waiting ground crew. Apparently Andreas and Faxon were not seriously injured, and the conspirators proceeded to transfer the marijuana from the wreckage to a truck. They then abandoned the wreckage. Fincher testified at trial that he heard Andreas say there was about 500 pounds of marijuana in the shipment. The proceeds from this endeavor amounted to only about $4000 for each conspirator.

Undaunted, Faxon and Fincher began to formulate a new plan to import marijuana by means of a Cessna Skymaster owned by the two men. To finance the repairs necessary to make the Cessna capable of flight they borrowed money from several other persons, including a man named Jim Bowen. As the repairs progressed, Fincher engaged in discussions with a marijuana wholesaler known to him only as "Terry" or "Bones," hoping that Bones could put him in touch with marijuana sellers in Mexico. Eventually Faxon and Fincher met with Bones and a person nicknamed "Mr. Cholesterol," who was to serve as the conspirators' connection in

Mexico. Mr. Cholesterol's role was to provide an airstrip in Mexico where the marijuana pick-up could take place. Faxon went to Mexico with Mr. Cholesterol to scout the airstrip, which was located outside of Taxco, Mexico, south of Mexico City. After his return he told Fincher that he thought the airstrip would be satisfactory for their purposes.

Although Andreas took no active part in the second conspiracy, he did put Fincher in touch with a man named David Ischy, who owned an airstrip in rural Texas somewhere near the town of Egypt, Texas. Faxon and Fincher inspected the airstrip and agreed to pay Ischy $5000 for letting them use it. Later, Ischy also agreed to serve as a lookout at the strip.

In preparation for the flight, the conspirators modified the Cessna by removing the rear passenger seats and adding an auxiliary fuel system to increase the airplane's fuel storage capacity. Fincher recruited a ground crew consisting of himself, Donald, Wideman, Ischy, and someone else named Harry. The conspirators received word from Bones that everything was ready in Mexico in mid-December 1988, and Faxon and Bowen began their flight to Mexico on December 14 or 15 of that year. The ground crew was scheduled to meet the returning plane at the airstrip about half an hour before dark, but the airplane never returned. Bowen testified at trial that when Faxon landed in Mexico the landing gear was irreparably damaged, making take-off impossible. Mr. Cholesterol was waiting at the airstrip with the marijuana, and he and Faxon and Bowen fled from the airstrip. Faxon and

Bowen eventually made their way to Mexico City, where they took a bus to Matamoros. There they walked across the border back into the United States and returned to Houston.

B. *Procedural History*

Faxon and Donald Mulhollan were indicted by a federal grand jury on February 5, 1992, in a two-count indictment charging them as follows: (I) conspiracy to import over one hundred kilograms of marijuana into the United States from on or about October 1987 until on or about December 14, 1988, in violation of 21 U.S.C. § 963; and (II) attempted importation of over one hundred kilograms of marijuana into the United States on or about December 14, 1988, in violation of 21 U.S.C. § 963. Donald was arraigned on April 6, 1992, and pleaded not guilty to both counts; Faxon was arraigned on April 10, 1992, and pleaded not guilty to both counts. A joint jury trial was set for May 26, 1992. On Donald's motion, the court continued the trial until July 13, 1992.

The trial took place from August 6-17, 1992. The jury found Faxon guilty on both counts and Donald guilty on Count I alone. On October 28, 1992, Donald was sentenced to sixty months imprisonment, to be followed by a five-year term of supervised release, and ordered to pay a special assessment of $50. The same day, Faxon was sentenced to 115 months imprisonment for each count, to run concurrently, to be followed by two five-year terms of supervised release, also to run concurrently. He was also

ordered to pay a special assessment of $100. Each defendant timely filed a notice of appeal.

II.

Standard of Review

The following standards of review are applicable in the instant case. The denial of a motion for continuance will be reversed only if the appellant demonstrates an abuse of discretion resulting in serious prejudice. United States v. Webster, 734 F.2d 1048, 1056 (5th Cir.), cert. denied, 469 U.S. 1073 (1984). The appellants complain of a modified Allen[1] charge given by the district court. The standard of review for such challenges is abuse of discretion. United States v. Lindell, 881 F.2d 1313, 1320 (5th Cir. 1989), cert. denied, 493 U.S. 1087, and cert. denied, 496 U.S. 926 (1990). The district court's decision to admit extrinsic offense evidence, as it did in this case, also will not be disturbed absent a clear showing of abuse of discretion. United States v. Bruno, 809 F.2d 1097, 1106 (5th Cir.), cert. denied, 481 U.S. 1057 (1987).

Both defendants raise sufficiency of the evidence challenges. Our standard of review is to consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 111 S. Ct. 2064 (1991). The test is not whether the

[1] Allen v. United States, 164 U.S. 492 (1896).

evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence. Id. at 254.

Faxon also challenges the district court's application of the sentencing guidelines to him. The district court's sentence will be upheld so long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous. United States v. Rivera, 898 F.2d 442, 445 (5th Cir. 1990). The district court's interpretations of the guidelines, being conclusions of law, are reviewed de novo. United States v. Madison, 990 F.2d 178, 182 (5th Cir.), cert. dismissed, 114 S. Ct. 339 (1993). The factual findings made by a district court in its determination of a defendant's relevant conduct for sentencing purposes are subject to the "clearly erroneous" standard of review on appeal. United States v. Buckhalter, 986 F.2d 875, 879 (5th Cir.), cert. denied, 114 S. Ct. 203, and cert. denied, 114 S. Ct. 210 (1993); United States v. Lokey, 945 F.2d 825, 839 (5th Cir. 1991).

III.

Donald Mulhollan challenges his conviction on four grounds.

A. *Denial of Motion for Continuance*

Donald's first argument concerns a forty-page report compiled by Mexican authorities regarding the crash of the Cessna airplane in December 1988. On May 11, 1992, Donald filed a motion requesting the court to appoint an expert to translate the document from Spanish into English. The court granted the motion. The court also granted Donald's May 14, 1992, motion for a continuance to allow time for Donald's counsel to review the documents. Donald argues, and the government concedes, that he did not receive a translation of the report until August 5, 1992, the day before the trial began. It appears that the translation was also not available to the government until August 5. Just before the trial began, Donald moved for another continuance to permit review of the translated report. The trial judge denied the motion.

Donald argues that the denial of his motion for a continuance was an abuse of discretion. When a claim of insufficient time to prepare is advanced, we examine the totality of the circumstances, including such factors as the time available for preparation, the complexity of the case, the availability of discovery from the prosecution, the adequacy of the defense actually provided at trial, and the services provided by counsel for codefendants, if any, that accrued to the defendant's benefit. Webster, 734 F.2d at 1056-57. In this case, it is appropriate to begin our inquiry by examining the report itself for evidence that its tardy production seriously prejudiced Donald's defense.

The report contains the opinion of a Mexican forensic chemist after analysis that a substance was marijuana. It also connects that marijuana with the discovery of an abandoned Cessna Skymaster airplane, with that airplane's serial and registration numbers being noted. A letter from the Office of Civil Aeronautics to the Office of the Attorney General discloses Faxon Mulhollan as the owner of the airplane. A report reflects that Mexican authorities discovered the abandoned Cessna with one package of marijuana inside and twenty-six other packages in the vicinity, and that the marijuana was identified as such by chemical analysis. The statement of a Mexican infantryman reflects that a total of some 330 kilograms of marijuana was found at the airstrip with the Cessna. The report also includes the statements of eyewitnesses to the Cessna's landing, reflecting that the airplane landed at about 9:30 a.m. on December 14, 1988, and that at least one of its occupants was an American armed with a pistol.

It is true that Donald had little time in which to review the translation of the Mexican report, which was admitted into evidence during trial. It is, however, also true that the information contained in the report merely confirmed the testimony given by Bowen as a government witness. Donald argues that he was given very little time to review the translated report to prepare for cross-examination of Bowen, but we find nothing in the report that would have enabled him to impeach Bowen or contradict his version of the attempted importation of

marijuana. Nor does Donald explain how the delay in receiving the report prejudiced his defense. We conclude that the delay in turning the translation over to Donald before trial had no serious prejudicial effect.

Donald also suggests that the government's tardiness in providing the translation may run afoul of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Brady establishes that due process is violated by the government's failure to disclose evidence favorable to an accused upon request if the evidence is relevant to either guilt or punishment. Brady, 373 U.S. at 87. Giglio establishes that due process is violated by the government's failure to disclose on request information that an accused might use to impeach government witnesses. Giglio, 405 U.S. at 153-55. These claims are without merit. We have already noted Donald's failure to explain how anything in the Mexican report could have had any value as impeachment evidence. Even if it had such value, any failure to disclose by the government would rise to the level of a constitutional violation only if it "undermines confidence in the outcome of the trial." United States v. Bagley, 473 U.S. 667, 678 (1985). Donald "has not adequately shown how the document[] [was] material to his defense, how the document['s] production would have changed the outcome of the case, or that the document['s] failure to be produced has undermined the confidence in the integrity of the outcome of his trial." United

States v. Masat, 948 F.2d 923, 932 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992).

The district court's denial of Donald's motion for a continuance was not reversible error.

B. *Modified Allen Charge*

Both defendants argue that the district judge abused his discretion in using a modified Allen charge. An Allen charge is a supplemental instruction that urges jurors to forego their differences and come to a unanimous decision. Lindell, 881 F.2d at 1320 n.11.

The jury began its deliberations the afternoon of August 13, 1992. Deliberations continued the next day. That afternoon the jury sent the court a note advising that no progress toward a decision was being made. The court then proposed to read to the jury a modified Allen charge to encourage a verdict. Both defendants objected, and the court overruled the objections and gave the modified Allen charge. At the end of the day the judge excused the jury for the weekend with the following additional comments:

> Ladies and gentlemen, I know that jury duty is often difficult. It requires conscientious effort on your part and it requires that you discuss your feelings with each other and air out your own opinions about the case. Maybe after a weekend of rest, you can get a different perspective on the case, re-examine your own positions. If you'd like to take home your copy of my instructions, you're welcome to do that, and we will keep the exhibits in the jury room for you on Monday morning.

On Monday, August 17, 1992, the jury returned its verdicts. Both Mulhollans argue on appeal that the district court committed

reversible error in overruling their objections to the modified Allen charge. In reviewing the district court's exercise of discretion in giving an Allen charge, we scrutinize the charge for compliance with two requirements: (1) any semantic deviations from approved Allen charges cannot be so prejudicial to the defendant as to require reversal, and (2) the circumstances surrounding the giving of an approved Allen charge must not be coercive. Lindell, 881 F.2d at 1321.

The first requirement is met in the instant case. The charge given by the district court was essentially identical to the one recommended in this circuit's pattern jury instructions for criminal cases, which is in turn based on the charge we approved in United States v. Kimmel, 777 F.2d 290, 294-95 & n.4 (5th Cir. 1985), cert. denied, 476 U.S. 1104 (1986). The charge did not violate the first Lindell requirement.

The Mulhollans contend that the charge, coupled with the additional comment to the jurors before the weekend recess, was coercive and prejudiced their right to a fair trial. Considering all the circumstances of the case, as we must, we hold that the Mulhollans' right to an impartial and conscientious jury deliberation was not violated. We see no evidence of a "coercive atmosphere sufficient to justify reversal." Id. at 295. The judge did encourage the jury to reach a unanimous verdict, but he also reminded the jurors that each should remain true to his own conscience. The charge was not threatening in any way. Nor do we agree with the suggestion that the judge's comment before

excusing the jury for the weekend was a "subtle but still coercive stimulus to acquiesce to the opinions of the other jurors." The total time spent in deliberations was not so lengthy as to be unreasonable. We note also that the jury's verdict was a discriminating one, that the judge did not inquire into the numerical division of the jury, and that the judge set no deadline for a jury verdict. These circumstances tend to show the absence of a coercive atmosphere. Lindell, 881 F.2d at 1321-22.

The district court did not abuse its discretion in using the modified Allen charge.

C. *Admission of Evidence of the 1987 Conspiracy*

Both defendants argue that the district court committed reversible error in admitting evidence regarding the uncharged conspiracy to import marijuana from Belize in 1987, which culminated in the crash of the Piper Aztec. Admission of such evidence is governed by Federal Rule of Evidence 404(b), which does not permit the admission of evidence of "other crimes, wrongs, or acts" in order to prove the character of a person in order to show that he acted in conformity with such character; evidence of other crimes is, however, admissible for such purposes as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). We review alleged violations of Rule 404(b) under the two-pronged test of United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440

U.S. 920 (1979). That test requires us to verify (1) that the evidence of extraneous conduct is relevant to an issue other than a defendant's character, and (2) that the evidence possesses probative value that is not substantially outweighed by its undue prejudice and is otherwise admissible under Rule 403. Id.

The first prong of the Beechum test is met in the instant case. We have recognized that a not guilty plea in a conspiracy case always renders a defendant's intent a material issue and imposes a difficult burden on the government. United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980). Evidence that a defendant associated with conspirators, standing alone, does not show that he had the requisite intent to join the conspiracy--even if he knew that they intended to commit a crime. Id. Thus, evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he affirmatively acts to take the intent issue out of the case. Id. We have consistently followed Roberts in later cases. See, e.g., United States v. Parziale, 947 F.2d 123, 129 (5th Cir. 1991), cert. denied, 112 S. Ct. 1499 (1992); United States v. Henthorn, 815 F.2d 304, 308 (5th Cir. 1987). In the absence of any attempt by the Mulhollans to take the issue of intent out of the case by stipulation or otherwise, we hold that the first prong of the Beechum test is satisfied in the instant case.

The Mulhollans concentrate their attack on the district court's ruling that the probative value of the evidence regarding the 1987 conspiracy was not substantially outweighed by the

danger of unfair prejudice. This determination by the district court is made under Rule 403, Beechum, 582 F.2d at 914, and it is subject to our review for abuse of discretion, Parziale, 947 F.2d at 129. The Mulhollans' argument that the 1987 conspiracy was too remote in time and too dissimilar from the 1988 conspiracy to have any probative value is without merit. Many of the particulars of the two conspiracies are quite similar: both involved the importation of marijuana from Latin America, the modus operandi of the participants in the two conspiracies was quite similar, and several members of the first conspiracy also took part in the second. "[T]he probative value of the extrinsic offense correlates positively with its likeness to the offense charged." Beechum, 582 F.2d at 915. The time lapse between the two attempts was not so great as to destroy the probative value of the first conspiracy. See Roberts, 619 F.2d at 383-84 (holding that a four-year old conviction for a gambling offense was probative of defendant's intent to commit conspiracy to operate an illegal gambling business). We also disagree with the Mulhollans' argument that the danger of jury confusion was so great as to require exclusion of the first conspiracy, which was completely distinct from the second in chronological terms.

We next consider whether there was so much additional evidence of the Mulhollans' intent to conspire to import marijuana as to render the probative value of the extraneous conduct evidence nugatory. In Beechum we recognized that the probative value of evidence of extraneous conduct with respect to

the issue of intent is not absolute; its probative value declines in proportion to the extent that the requisite state of mind is established by other evidence. Beechum, 582 F.2d at 914. With respect to Donald, the probative value of the evidence of his involvement in the prior conspiracy was clearly not substantially outweighed by the danger of unfair prejudice. His role in the second conspiracy seems to have been minimal; without evidence of his participation in the first conspiracy, the government may have had no other way to demonstrate that he actually intended to join the second conspiracy, rather than merely associated with some of its members--one of whom was, after all, his brother. See Roberts, 619 F.2d at 383-84 (approving the use of a four-year old conviction to prove intent when "[t]here was little other independent evidence of intent").

The probative value of the extraneous conduct evidence with respect to Faxon's intent to join the second conspiracy, on the other hand, seems to us to have been minimal. There was ample testimonial evidence that Faxon was not only a member of the second conspiracy but also a leading organizer and participant. Faxon flew the Cessna to Mexico together with Bowen, and the two remained together throughout the course of their escape back to the United States. He was, in fact, a part owner of the Cessna, and his willingness to put his property at risk in the venture tends to demonstrate his intent to join the conspiracy. The government's need to prove Faxon's involvement in the first conspiracy in order to show his intent to join the second, it

seems to us, was not strong, and it may have been an abuse of discretion for the district court to admit the evidence as to him, despite the court's use of a proper limiting instruction.

Even if the admission of the extrinsic offense evidence was erroneous as to Faxon, however, it would not be reversible error under the harmless error rule. Fed. R. Crim. P. 52(b); United States v. Mortazavi, 702 F.2d 526, 528 (5th Cir. 1983). There was ample testimonial evidence from Faxon's alleged coconspirators Bowen, Wideman, Ischy, and Fincher connecting him with the second conspiracy, and in light of Faxon's conviction we must accept all the jury's credibility choices that tend to support the verdict. Mortazavi, 702 F.2d at 528. The investigation by Mexican authorities connected Faxon with the Cessna airplane found abandoned at a remote airstrip with packages of marijuana in and near the airplane. Faxon testified on his own behalf that he had never seen Ischy or Wideman before the day of the trial and that he was not the pilot of the airplane in either conspiracy. The jury was entitled to determine that his testimony was not credible. The district court's admission of Faxon's extraneous conduct, if erroneous, was harmless error as to Faxon.

D. *Sufficiency of the Evidence*

Donald argues that the evidence was insufficient to support the jury's verdict of guilty with respect to the charge of attempted importation of marijuana. Viewing the evidence in the

light most favorable to the jury verdict, as we must, we reach the opposite conclusion.

In order to prove an attempt crime, the government must prove (1) an action involving the kind of culpability otherwise required for the commission of the crime upon which the charge of attempt is based, and (2) conduct constituting a substantial step toward commission of a crime. United States v. Salazar, 958 F.2d 1285, 1296 (5th Cir.), cert. denied, 113 S. Ct. 185 (1992). The underlying crime in this case, the importation of marijuana, requires the prosecution to prove merely that the defendant played a role in bringing marijuana into the United States from a foreign country. United States v. Martinez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989). The mental state required for proof of punishable importation of narcotics is either knowledge or intent. United States v. Londono-Villa, 930 F.2d 994, 997 (2d Cir. 1991) (citing 21 U.S.C. §§ 952(a), 960(a), 960(b)). Thus, the government was required to prove that Donald took a substantial step toward commission of the crime of importation of marijuana and that Donald intended to play a part in or knew he was playing a part in bringing marijuana into this country.

The key evidence connecting Donald to the attempted importation of marijuana in December 1988 was the testimony of Randy Fincher. He testified that he asked Donald to be in the ground crew at the airstrip to receive the marijuana when Faxon and Bowen returned from Mexico with it, and that he told Donald that he would be paid about $10,000 for his help. He also

testified that Donald went with him and the other conspirators to a restaurant in Wharton, Texas, and then proceeded to the airstrip provided by Ischy to await Faxon and Bowen's return. When the airplane did not appear, Fincher testified, he left Donald at the airstrip and drove to Wharton to call Bones to see if he knew what had happened. Fincher returned to the airstrip where he waited with Donald and the others until just before daybreak.

Other witnesses corroborated Fincher's testimony. David Ischy testified that Donald was among those who met at the restaurant at Wharton before proceeding to the airstrip. Chris Wideman testified that Donald was present at the airstrip "in a security capacity," and he added that he believed Donald was going to drive the marijuana back to Houston. Donald testified at trial and denied any involvement in the attempted importation of marijuana in December 1988.

Donald's sufficiency of the evidence challenge is based primarily on the theory that Fincher was an unreliable witness because Fincher admitted on cross-examination that he had used drugs such as cocaine and marijuana and because Fincher had earlier received leniency in sentencing for an unrelated crime in exchange for his testimony in the Mulhollan case. Donald makes similar arguments with respect to Ischy, but he makes no such complaint about Wideman, who apparently had no criminal record at the time of the trial and was not promised any sort of leniency for his testimony.

We hold that the evidence introduced at trial against Donald was sufficient to support his conviction. It is well-settled that "[t]he jury is the final arbiter of the weight of the evidence, and of the credibility of witnesses." United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993); see also United States v. Hoskins, 628 F.2d 295, 297 (5th Cir.) ("[F]or testimony to be held incredible as a matter of law it must relate to facts that the witness could not possibly have observed, or events which could not have occurred under the laws of nature."), cert. denied, 449 U.S. 987 (1980). Unless it is facially insubstantial or incredible, uncorroborated testimony of a coconspirator may be constitutionally sufficient evidence to convict, even if the coconspirator has chosen to cooperate with the government in exchange for immunity or leniency. United States v. Greenwood, 974 F.2d 1449, 1457 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). The coconspirator testimony in this case was neither facially insubstantial nor incredible. We therefore hold that Donald Mulhollan's conviction was based on sufficient evidence.

We affirm Donald's conviction.

IV.

Faxon Mulhollan challenges his conviction on three grounds and his sentence on one ground. We have already addressed his challenges based on the modified Allen charge and the admission

of the extrinsic offense evidence, and we now turn to his remaining arguments.

A. *Sufficiency of the Evidence*

Like his brother, Faxon challenges his convictions on the ground that the evidence introduced against him at trial was insufficient to support the jury verdicts. We have already recited the elements of the attempt crime, see supra part III.D. In order to prove the crime of conspiracy to import marijuana, the government must prove: (1) a conspiracy existed; (2) the defendant knew of the conspiracy; and (3) the defendant voluntarily participated in it. United States v. Maceo, 947 F.2d 1191, 1197 (5th Cir. 1991), cert. denied, 112 S. Ct. 1510 (1992). Proof of an overt act is not necessary to prove the crime of conspiracy to import a controlled substance. United States v. Anderson, 651 F.2d 375, 379 (5th Cir. Unit A July 1981).

The evidence was sufficient to support Faxon's convictions. There was ample testimony at trial concerning Faxon's role in the attempt to import marijuana in December 1988. Bowen testified that Faxon flew the Cessna airplane to Mexico for the purpose of picking up marijuana to bring back to the United States, certainly a substantial step toward the commission of the crime of importation of marijuana. Fincher testified that he and Faxon met with several other coconspirators, including Bowen, Bones, and Mr. Cholesterol in Houston to arrange the pick-up in Mexico and that Faxon actually went to Mexico with Mr. Cholesterol to inspect the proposed landing site. Fincher also testified that

Faxon was part of the group that inspected the airstrip that Ischy provided. Additionally, the Cessna airplane discovered at the secret airstrip in Mexico with marijuana inside and nearby was registered with Faxon as its owner. Giving the required deference to the jury's credibility determinations, see, e.g., Greenwood, 974 F.2d at 1457, we hold that there was sufficient evidence to support Faxon's conviction for attempted importation of marijuana. The same evidence supports the jury's verdict with respect to Faxon's conspiracy conviction, amply demonstrating the existence of an agreement between several persons to import marijuana into the United States and Faxon's knowledge of and voluntary participation in that conspiracy.

We affirm Faxon's convictions.

B. *Application of the Sentencing Guidelines*

Faxon argues that the district court incorrectly applied the sentencing guidelines in determining his sentence. We note as a threshold matter that the presentence investigation report prepared for Faxon states that the 1988 edition of the sentencing guidelines manual was used to calculate Faxon's recommended sentence. The probation officer that prepared the report erred in using that edition; a sentencing court must apply the version of the guidelines effective at the time of sentencing. United States v. Gross, 979 F.2d 1048, 1050 (5th Cir. 1992). The district judge, however, noticed the error at sentencing, and our review of the record reveals that he took care to review the correct version of the guidelines before applying them to the

defendants. In any event, the relevant guidelines were not substantively amended between 1988 and the date of sentencing in the instant case.

In determining Faxon's base offense level, the district court ruled that the first conspiracy was relevant conduct within the meaning of the sentencing guidelines and that the amount of marijuana imported in March 1987 should therefore be added to the amount of marijuana Faxon attempted to import in December 1988 to determine Faxon's base offense level from the guidelines' Drug Quantity Table. United States Sentencing Commission, Guidelines Manual, § 2D1.1(c) (Nov. 1991).[2] This had the effect of increasing Faxon's base offense level from twenty-six to twenty-eight. The court also added three levels for Faxon's role as a manager or supervisor of the conspiracy. Faxon argues that the district court erred in holding that the 1987 conspiracy could be "relevant conduct" within the meaning of that term as used in the sentencing guidelines.

The procedure to be used in determining the sentence of a drug offender is deceptively straightforward on the surface. For virtually all drug offenses, including those related to the importation of drugs, the base offense level is determined by the application of the Drug Quantity Table to the amount of drugs involved. Practice Under The New Federal Sentencing Guidelines 13 (Phylis S. Bamberger & David J. Gottlieb, eds., 2d ed. 1992

[2] All citations to the sentencing guidelines are to the version effective November 1, 1991, unless otherwise specified.

Supp.). The difficult issue is deciding the quantity of drugs that should be attributed to a particular offender. This determination is guided by § 1B1.3 of the guidelines, which defines the "relevant conduct" that should be considered by the sentencing court when the offense is one for which the guidelines prescribe several different base offense levels. Faxon was held responsible for the marijuana involved in the 1987 conspiracy under § 1B1.3(a)(2), which directs the sentencing court to consider as relevant conduct the offender's "acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." This guideline, however, applies "solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." U.S.S.G. § 1B1.3(a)(2).

Faxon's argument is a subtle one. He does not attack the district court's conclusion that the first conspiracy was part of the "same course of conduct or common scheme or plan" as the second conspiracy. He instead argues that, as a prerequisite to grouping the 1987 conspiracy with the 1988 conspiracy, it must have been possible for the two conspiracies to be charged and joined in a single indictment. He next argues that Federal Rule of Criminal Procedure 8(b) would control the joinder issue and that Rule 8(b) would not permit joinder of the two conspiracies. He thus concludes that the 1987 conspiracy should not have been attributed to him as relevant conduct under § 1B1.3(a)(2).

We find Faxon's argument to be without merit. His brief cites absolutely no authority for the proposition that, "in order for the alleged 1987 incident to be grouped with the 1988 offense under U.S.S.G. [§] 3D1.2(d), it must be possible for those two offenses to be charged and joined in one indictment." Section 3D1.2 provides, in pertinent part, as follows:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
>
> . . .
>
> (d) When the offense level is determined largely on the basis of . . . the quantity of a substance involved . . . or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. § 3D1.2. Nothing in the plain language of this section or its accompanying commentary suggests the requirement of the possibility of joinder that Faxon now urges. Indeed, the commentary suggests the opposite: "A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d)." § 3D1.2 cmt. n.6. No other limitation on the grouping of counts appears in the commentary.

The commentary to § 1B1.3 is also contrary to Faxon's position. Application Note 2 includes the following passage:

> [§ 1B1.3(a)(2)] applies to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine . . . on one occasion and, as part of the same

> course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine . . . on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine) . . . are of a character for which § 3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

U.S.S.G. § 1B1.3 cmt. n.2. Nothing in § 1B1.3 or its commentary suggests the joinder requirement urged by Faxon, and the passage quoted strongly suggests only two requirements for the consideration of the first conspiracy as relevant conduct--that it be of a character such that § 3D1.2(d) would require grouping and that it be part of the same course of conduct or common scheme or plan as the second conspiracy for which Faxon was actually convicted. We note also that § 1B1.3(a)(2) "does not require the defendant, in fact, to have been convicted of multiple counts." U.S.S.G. § 1B1.3 cmt. n.2. This also suggests that there is no requirement that all relevant conduct must be able to be joined in one indictment under the rules of criminal procedure.

We hold that the district court did not err in considering the 1987 conspiracy as relevant conduct against Faxon under §§ 1B1.3(a)(2) and 3D1.2(d) of the sentencing guidelines. We express no opinion as to the validity of Faxon's claim that the two conspiracies would not have been chargeable in a single indictment.

Faxon's sentence is affirmed.

V.

For the foregoing reasons, we AFFIRM Donald Mulhollan's conviction and Faxon Mulhollan's convictions and sentence.