IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7667

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUBEN LONGORIA, a/k/a El Diablo,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR 92-00024-S30-01)

(April 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Ruben Longoria was convicted by a jury of conspiracy to possess with intent to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. He was sentenced to 114 months imprisonment and a four-year term of supervised release; he was also charged a special assessment of $50. Longoria now appeals his conviction and

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

sentence. Finding no error, we affirm the district court's judgment of conviction and sentence.

I.

In a series of face-to-face and telephonic meetings in early January 1992, confidential informant Sergio Delgado (Delgado) negotiated with Ruben Longoria (Longoria) to sell Longoria approximately 450 pounds of marijuana for $475 per pound. The sale was to be consummated at the HEB store in Weslaco, Texas, where a man wearing blue overalls would meet Delgado.

When Delgado and an undercover agent arrived at the HEB store, Delgado went inside the store and met a man in blue overalls. Both then left the store. The man in blue overalls proceeded to meet with another undercover agent, Rolando Cruz (Cruz), who had parked a van, which contained the marijuana, across the street. The man in blue overalls told Cruz he had been sent by "El Patron" or "the boss," also called "El Diablo," to pick up the vehicle. When asked who "El Diablo" was, the man in blue overalls told Cruz it was Longoria. After Cruz said that he would not release the vehicle until he had been paid, the man in blue overalls said that he had no money in his possession but that he would telephone Longoria. He then walked into the HEB store and was not seen again. Delgado contacted Longoria, who responded to Delgado's inquiry about the money saying that he knew nothing and hung up on Delgado.

A search warrant for Longoria's residence was executed on January 10, 1992, where a number of firearms and a shaving kit containing two photographs, an address book, and slips of paper constituting a drug ledger were found in Longoria's bedroom. Officers also discovered a financial statement for Longoria, prepared December 31, 1989, which reflected that Longoria was worth several hundred thousand dollars.

On February 3, 1992, Longoria was charged by indictment with various drug-trafficking offenses. This indictment was superseded by three other indictments, the last of which was handed down on June 23, 1992. This third superseding indictment charged Longoria with seven counts of various drug-trafficking offenses. This indictment added Maria Yolanda Barrera as a defendant to counts six and seven, which charged that Longoria and Barrera had traveled in interstate commerce conspiring to violate narcotics laws. Longoria moved to dismiss this indictment, alleging that it was vague and ambiguous and that thus it failed to apprise him adequately of the nature of the charges brought against him. The district court denied Longoria's motion.

Longoria was tried before a jury in July 1992. At the close of the government's case, the district court granted Longoria's motion for acquittal on six counts of the indictment. The jury convicted Longoria on the remaining count, conspiracy to possess marijuana with intent to distribute.

In the pre-sentence report, the probation officer recommended that Longoria's base offense level be increased under the United States Sentencing Guidelines (the Guidelines) by two levels because Longoria possessed a dangerous weapon during the commission of the offense and by another two levels because Longoria was an organizer or leader of the criminal activity with which he was charged. Longoria objected to both of these proposed adjustments, but the district court overruled his objections. The district court then sentenced Longoria to 114 months imprisonment and four years of supervised release and charged Longoria a special assessment of $50. Longoria now appeals the district court's judgment of conviction and sentence.

II.

Longoria first argues that the third superseding indictment did not fairly inform him of the charge against him. The language of the challenged indictment provides in pertinent part:

> On or about January 1, 1991, to on or about January 10, 1992, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant RUBEN LONGORIA did knowingly and intentionally conspire and agree together and with other persons known or unknown to the Grand Jurors to knowingly and intentionally possess with intent to distribute more than 100 kilograms of marijuana, a Schedule I controlled substance.

This court reviews the sufficiency of an indictment de novo. United States v. Nevers, 7 F.3d 59, 62 (5th Cir. 1993), cert. denied, 114 S. Ct. 1124 (1994). An indictment is constitutionally sufficient if it enumerates each prima facie element of the charged offense, notifies the defendant of the

charges against him, and provides the defendant with a double jeopardy defense against future prosecutions. Id.; see Hambling v. United States, 418 U.S. 87, 117 (1974).

An indictment that tracks the statutory language of the offense charged is sufficient to enumerate each prima facie element of that offense "as long as those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished." United States v. Arlen, 947 F.2d 139, 145 (5th Cir. 1991) (internal quotations and citation omitted), cert. denied, 112 S. Ct. 1480 (1992). The indictment of which Longoria complains tracks the appropriate statutory language, see 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846, and thus sufficiently enumerates each prima facie element of the charged offense.

Further, an indictment notifies the defendant of the charges against him if the indictment describes the specific facts and circumstances surrounding the offense in such a manner as to inform the defendant of the particular offense charged. Nevers, 7 F.3d at 63. Although the indictment must concisely state the essential facts constituting the offense charged, it need not provide the defendant with the evidentiary details by which the government plans to establish guilt. United States v. Gordon, 780 F.2d 1165, 1172 (5th Cir. 1986). "The test for validity is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." Id. at 1169.

Longoria argues that the indictment is insufficient because it failed to identify any co-conspirator and to limit sufficiently the geographical location and the time frame of the alleged conspiracy. A defendant can be convicted of conspiracy without any of the co-conspirators being named in the indictment, see United States v. Landry, 903 F.2d 334, 338-39 (5th Cir. 1990), and thus it is not necessary to identify the co-conspirators in the indictment. This court has also approved a similar description of the geographical location in an indictment. See United States v. Giles, 756 F.2d 1085, 1087 (5th Cir. 1985). Further, Longoria has not demonstrated how the one-year time frame alleged in the indictment prejudiced his defense. This court will not reverse a conviction because of an error in the indictment unless the error misled the defendant to his prejudice. Nevers, 7 F.3d at 63.

Finally, to the extent that Longoria contends that the indictment fails to provide him with a double jeopardy defense, he has failed to present an argument in support of this position. Issues raised but not briefed on appeal are considered abandoned. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). We thus conclude that the indictment of which Longoria complains was constitutionally sufficient.

III.

Longoria also argues that there is insufficient evidence to support his conspiracy conviction. We disagree.

This court's review of a sufficiency-of-the-evidence claim is well settled: whether a "reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993). The evidence, as well as all reasonable inferences therefrom, is to be viewed in the light most favorable to the verdict. Id. The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except guilt. United States v. Restrepo, 994 F.3d 173, 182 (5th Cir. 1993). The jury is the final arbiter of the weight of the evidence and the credibility of the witnesses. Id.

To establish a conspiracy under § 846, the government must prove (1) that a conspiracy existed, (2) that the defendant knew of the conspiracy, and (3) that the defendant voluntarily participated in the conspiracy. United States v. Cardenas, 9 F.3d 1139, 1157 (5th Cir. 1993). The elements of conspiracy may be proved by circumstantial evidence alone, and concert of action can indicate agreement and voluntary participation in the conspiracy. Id.; United States v. Lopez, 979 F.2d 1024, 1029 (5th Cir. 1992), cert. denied, 113 S. Ct. 2349 (1993). Voluntary participation in the conspiracy may also be inferred from a "collection of circumstances." Cardenas, 9 F.3d at 1157. Further, a conspiracy conviction does not require identification of a co-conspirator. United States v. Winn, 948 F.2d 145, 157 (5th Cir. 1991), cert. denied, 112 S. Ct. 1599 (1992). The evidence is sufficient if it "supports the proposition that such

a co-conspirator did exist and that the defendant did conspire with him." Id. (internal quotations and citations omitted).

The following evidence was adduced at trial. Delgado contacted Longoria and offered to sell him marijuana. Delgado and Longoria then finalized an agreement for Longoria to purchase approximately 450 pounds of marijuana for $475 per pound. On the day the transaction was to be completed, Delgado went to Longoria's house to make the final preparations. After Delgado arrived, Delgado and Longoria drove to a gas station where Longoria made a telephone call from a public pay phone. When Longoria got back into the car, he stated that he had not found the "runner." After they began driving, Longoria saw a car going in the opposite direction, and they turned around to follow it. The two cars stopped, Longoria got out to talk to the driver, and when he got back into the car with Delgado said that the driver was his "runner." Longoria and Delgado then proceeded to an automobile repair shop where Longoria talked to a man in blue overalls. When Longoria got back into the car with Delgado this time, he informed Delgado that everything was ready.

Longoria and Delgado then returned to Longoria's house, where Longoria introduced Delgado to another man with whom Delgado was supposed to make plans for the actual transfer of the marijuana. This unidentified man and Delgado agreed to complete the transfer at the HEB store in Weslaco, where Delgado was to be met by a man in blue overalls.

Delgado and an undercover agent went to the HEB store where Delgado met a man in blue overalls. Cruz, another undercover agent who had a van with the marijuana parked across the street, met with the man in blue overalls, who told Cruz that he had been sent by "the boss," otherwise known as "El Diablo" or Longoria, to pick up the van. Cruz refused to give the man the van without receiving any money, and the man left. Delgado testified that he waited in the back seat of the car while Cruz and the man in blue overalls went to the van containing the marijuana. Cruz, however, testified that although another man was present with the man in blue overalls when they went to the van, Delgado was not.

Longoria now argues that Delgado's and Cruz's uncorroborated testimony regarding the man in the blue overalls is insufficient to establish a conspiracy because their testimony is inconsistent. Although Delgado's and Cruz's testimony has a minor inconsistency, their testimonies are not mutually exclusive. Both testified that a man in blue overalls sent by Longoria arrived to collect the marijuana but indicated that Longoria had not given him the money to complete the transfer. Such evidence was enough for a jury to infer that Longoria conspired with the man in the blue overalls to possess marijuana with intent to distribute. Longoria's challenge actually goes to the weight and credibility of the evidence, which are within the exclusive province of the jury, rather than to the sufficiency of the evidence. See United States v. Ruiz, 987 F.2d 243, 250 (5th Cir.), cert. denied, 114 S. Ct. 163 (1993). When viewed in the

light most favorable to the jury's verdict, the evidence was sufficient to support Longoria's conspiracy conviction.

IV.

Longoria further challenges a number of the district court's evidentiary rulings. We review the district court's admission of evidence for an abuse of discretion. United States v. Sparks, 2 F.3d 574, 582 (5th Cir. 1993), cert. denied, 114 S. Ct. 720, and cert. denied, 114 S. Ct. 899 (1994). If an abuse of discretion is found, the error is then reviewed under the harmless error doctrine. United States v. Liu, 960 F.2d 449, 452 (5th Cir.), cert. denied, 113 S. Ct. 418 (1992). The test for harmless error is "whether the trier of fact would have found the defendant guilty beyond a reasonable doubt with the additional evidence [excluded]." United States v. Gomez, 900 F.2d 43, 45 (5th Cir. 1990), cert. denied, 112 S. Ct. 1504 (1992); see FED. R. CRIM. P. 52(a).

A. Weapons

Longoria first complains that five firearms which were observed and identified during a search of his home were improperly admitted into evidence. Longoria contends that the district court abused its discretion by admitting these firearms into evidence because the government failed to demonstrate any chain of custody for the firearms.

If a defendant questions whether the evidence offered is the same as items actually seized, the role of the district court is

to determine whether the government has made a prima facie showing of authenticity. Sparks, 2 F.3d at 582. If the government meets its burden, the evidence should be admitted, and the jury has the ultimate responsibility for deciding the authenticity issue. Id.

During a valid search of Longoria's home, officers discovered five weapons in Longoria's bedroom. These weapons were not seized at that time, but agent Paul Craine wrote down the serial numbers of the weapons to run a computer check on them. Approximately one month later, the weapons were seized from Longoria's attorney, who had been given the weapons by Longoria's wife. Craine testified that the serial numbers on the seized weapons matched the serial numbers he had written down at the time of the search, but that he had lost the paper with the serial numbers by the time of the trial. Kevin Savage, another government agent, testified that he had shown a photographic line-up of the weapons to Delgado and that from this photograph Delgado had identified one of the weapons as the weapon used by Longoria to threaten him.

The government thus made a prima facie showing of the authenticity of the weapons, and the district court did not abuse its discretion by admitting them into evidence.

B. Prior Stop in Michigan

Longoria also challenges the admission of testimony regarding his drug interdiction stop in the Detroit, Michigan, airport in January 1991 because such testimony was drug-courier

profile evidence used as substantive evidence of his guilt of the conspiracy offense of which he was convicted. Longoria makes this challenge for the first time on appeal. Hence, because there was no contemporaneous objection to the testimony of which Longoria now complains, we review the admission of this testimony for plain error. FED. R. CRIM. P. 52(b); United States v. Garcia, 995 F.2d 556, 561 (5th Cir. 1993). In order to constitute plain error, the error must have been so fundamental as to have resulted in a miscarriage of justice. Id.

Several Michigan law enforcement officers testified that Longoria and two companions were stopped and questioned at the Detroit airport in January 1991. These officers testified that approximately $20,000 was seized from the three after a dog alerted to the presence of a controlled substance on the money.

The testimony which Longoria now challenges was intrinsic to the offenses alleged in counts six and seven of the indictment. See United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979). Further, the district court granted Longoria's motion for acquittal at the close of the government's case with respect to counts six and seven, and the evidence of which Longoria now complains was not alluded to by the government during closing argument. The admission of this evidence was therefore not plain error.

C. Drug Ledger

Longoria also contends that the district court abused its discretion by admitting several slips of paper and permitting an

expert witness to testify that these slips constituted a drug ledger. He argues that the government failed to establish that these slips of paper belonged to him and therefore were not properly authenticated and that the alleged ledger was inadmissible hearsay.

The government may authenticate a document with circumstantial evidence, including the document's distinctive characteristics and the circumstances surrounding its discovery. United States v. Arce, 997 F.2d 1123, 1128 (5th Cir. 1993); see FED. R. EVID. 901(a). The only evidence which the government introduced to establish that the slips of paper were Longoria's was testimony that these slips were found in a shaving kit in the master bedroom of Longoria's home.

Assuming that this testimony was insufficient to authenticate the slips of paper, any error was harmless. Independent evidence established that Longoria negotiated the purchase of 450 pounds of marijuana from Delgado and that he arranged for a man in blue overalls to complete the transaction.

Longoria also argues, however, that these slips of paper constitute inadmissible hearsay. At trial, the district court permitted the introduction of these slips of paper for the limited purpose of showing that the house was used for drug trafficking and not for the truth of the matters asserted therein. Such evidence is not hearsay. See United States v. Jaramillo-Suarez, 950 F.2d 1378, 1382-83 (9th Cir. 1991). Further, the district court gave a limiting instruction at the

time the evidence was admitted and again at the close of all of the evidence to guard against unfair prejudice. The district court, therefore, did not err in admitting this evidence.

D. Other Evidentiary Challenges

Finally, Longoria challenges the admission of a 1989 net worth statement, the photographs of the layout and structure of his house, and references to his nickname, "El Diablo." Assuming that the admission of this evidence was an abuse of discretion, any error was harmless. As discussed above, there was sufficient evidence to establish that Longoria conspired with others to possess marijuana with the intent to distribute.

V.

Longoria also challenges the district court's application of § 2D1.1(b)(1) of the Guidelines on the ground that there was insufficient evidence to support a finding that he possessed a firearm during the commission of the offense.

Section 2D1.1(b)(1) provides for a two-level upward adjustment if "a dangerous weapon (including a firearm) was possessed during [the] commission of the [narcotics] offense." Because the issue of the possession of a firearm during a drug-trafficking offense is fact specific, the district court's decision to apply § 2D1.1(b)(1) is reviewed for clear error. United States v. Eastland, 989 F.2d 760, 769 (5th Cir.), cert. denied, 114 S. Ct. 143, and cert. denied, 114 S. Ct. 246 (1993).

The two-level enhancement under § 2D1.1(b)(1) should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment. (n.3). To establish weapon possession, the government must prove by a preponderance of the evidence "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." Eastland, 989 F.2d at 770 (internal quotations and citation omitted). The government must show that the weapon was found with the drugs or drug paraphernalia or where part of the transaction occurred. Id.

Delgado testified that Longoria threatened him with a gun the first time he went to Longoria's house to discuss the transaction. Delgado also testified that an armed guard was stationed on the roof of Longoria's house. Further, Savage testified that from a photographic lineup Delgado had identified the gun that was used by Longoria to threaten him. He also testified that Delgado had identified a seized rifle as the one carried by Longoria's guard. Therefore, the district court did not clearly err in finding that Longoria possessed a firearm in the commission of the offense.

VI.

Longoria finally argues that he held no managerial role in the offense and that the district court erred in so finding. He asserts that the government did not identify any of the

participants in the offense and failed to demonstrate that "they were involved in the precise transaction underlying the conviction."

Whether a defendant was an organizer, leader, manager, or supervisor of the charged criminal activity is a question of fact reviewable under the clearly erroneous standard. United States v. Pofahl, 990 F.2d 1456, 1480 (5th Cir.), cert. denied, 114 S. Ct. 266, and cert. denied, 114 S. Ct. 560 (1993); United States v. Alvarado, 898 F.2d 987, 993 (5th Cir. 1990). Reversal of such a finding is warranted only on condition that the appellate court "is left with the definite and firm conviction that a mistake has been committed." Pofahl, 990 F.2d at 1480.

The terms "organizer," "leader," "manager," and "supervisor" are not defined by the Guidelines. See U.S.S.G. § 3B1.1 However, this court has interpreted these terms to imply the recruitment of participants in the offense, the exercise of control over others, and the exercise of decision-making authority. Pofahl, 990 F.2d at 1480-81.

The evidence established that Longoria negotiated the transaction and then recruited others, e.g., the man in the blue overalls, to assist in the actual transfer of the marijuana. The evidence also showed that Longoria controlled the money for the transaction and exercised decision-making authority regarding the transaction because the man in the blue overalls indicated to Delgado and Cruz that Longoria had sent him to pick up the van, which contained the marijuana, but had not provided him with the

money to complete the transfer. Further, Delgado identified several "runners" and other helpers known as "primos" that Longoria directed in this operation. Therefore, the district court's finding that Longoria directed more than two persons in the commission of the offense charged was not clearly erroneous.

VII.

For the foregoing reasons, we AFFIRM the judgment of the district court.