UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8200
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTONIO CARDENAS, and
JUAN GAYTAN-MEDINA,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(EP-91-CR-303-H(04))

(February 24, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Antonio Cardenas and Juan Gaytan-Medina appeal their convictions, and Cardenas his sentence, arising from a conspiracy to possess with intent to distribute 250 kilograms of cocaine; we **AFFIRM**.

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On October 8, 1991, drug enforcement agent Whipple and detective McBain met with cooperating witness Samaniego and Fernando Ferez-Arana. Whipple told Ferez that he was looking for someone who could supply 500 kilograms of cocaine per week. Ferez responded that his organization could, but that only 250 kilograms were available then. The price was set at $15,500 per kilogram. The agents met with Ferez and Samaniego later that evening to sample the cocaine.

The next day, the agents met with Ferez, who informed them that he could deliver only 80 kilograms and that the full 250 kilograms would not be available until the next day. Whipple refused the partial delivery; the parties agreed to meet the following day at the same location for the full delivery.

Whipple and McBain met Ferez the following day at a parking lot. On arriving, the agents observed Ferez conversing with appellant Gaytan-Medina. Ferez approached the agents and suggested that they follow him to a different location. McBain, Whipple and Ferez pulled out of the parking lot in separate vehicles, followed by Gaytan-Medina.

Gaytan-Medina arrived at a residence before the others and opened the garage door. Gaytan-Medina then positioned himself in the front yard with a rake in his hand, although the yard consisted only of rocks and dirt. Ferez instructed Gaytan-Medina to go the store and purchase some beer. After Gaytan-Medina returned from the store, he went back outside to the front yard.

Approximately twenty minutes later, Ferez opened the garage door, allowing an automobile driven by appellant Cardenas to enter. Once the garage door was shut, Cardenas opened the trunk; it was filled with kilo packages of cocaine. Cardenas, Ferez, and McBain loaded 71 kilos into McBain's vehicle. After Cardenas' vehicle unloaded, he left. Gaytan-Medina was still positioned in the front yard.

Several minutes later, Ferez received a telephone call and told Whipple that the supplier wanted payment for the 71 kilograms. Whipple refused. Shortly thereafter, Cardenas returned and also told Whipple that he had to first pay for the 71 kilos. Whipple offered to show the money to ensure the full delivery, and Cardenas left to relay the message to the suppliers. Ferez then received a telephone call advising him that the suppliers felt comfortable and would be completing the delivery. Meanwhile, Gaytan-Medina maintained his position in the front yard.

McBain then went to his vehicle and attempted to neatly pile the 71 kilos. Ferez offered to buy some trashbags to make unloading easier; he ordered Gaytan-Medina to buy trashbags and more beer. When Gaytan-Medina returned, he met Ferez and McBain in the garage, handed Ferez the trashbags, and remained in the garage while Ferez and McBain loaded the bags. Gaytan-Medina then resumed his position in the front yard. Several minutes later, Cardenas returned, appearing very nervous. Gaytan-Medina was with him. Cardenas announced that some of their vehicles were being followed and demanded payment for the 71 kilos. Whipple then asked Ferez

whether the place was safe and said to Gaytan-Medina, "You've been here all morning long. Have you seen anything?" Gaytan-Medina responded, "Look, I've been out here since 7:00 o'clock in the morning. I've been driving around and I haven't seen anybody. Everything is safe."

When the agents insisted on conducting the whole deal at once, Cardenas asked Gaytan-Medina to find a couple of blankets to help him unload the merchandise. Two minutes later, officers arrived to make the arrests. When they entered the front door, Gaytan-Medina was the first one out the side door.

Cardenas and Gaytan-Medina were indicted with others for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, in violation of 21 U.S.C. § 846 (count one). Cardenas was also charged with possession of more than five kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (count two). A jury convicted Cardenas on both counts and Gaytan-Medina on count one. The district court sentenced Cardenas to concurrent 235-month terms of imprisonment on each count, with five years of supervised release; Gaytan-Medina, to 151 months, with five years of supervised release.

II.

A.

Both appellants contest the sufficiency of the evidence to support their convictions. "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." ***United States v. Pruneda-Gonzalez***, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2952 (1992). It is within the sole province of the jury to determine the weight and credibility of the evidence. ***United States v. Pena***, 949 F.2d 751, 756 (5th Cir. 1991).

To establish the conspiracy, the government must prove (1) that an agreement with intent to distribute existed; (2) that each conspirator had knowledge of the agreement; and (3) that each voluntarily participated in the conspiracy. ***U.S. v. Sanchez***, 961 F.2d 1169, 1174 (5th Cir.) (citation omitted), *cert. denied*, ___ U.S. ___, 113 S. Ct. 330 (1992). Although the government must prove all three elements beyond a reasonable doubt, it need not do so by direct evidence. "An agreement may be inferred from concert of action, participation from a `collocation of circumstances,' and knowledge from surrounding circumstances." ***Id.*** (quoting ***United States v. Espinoza-Seanez***, 862 F.2d 526, 537 (5th Cir. 1988) (citations omitted). "Mere presence at the scene and close association with those involved are insufficient factors alone; nevertheless, they are *relevant* factors for the jury." ***Id.*** (emphasis in original).

1.

Gaytan-Medina contends that the evidence failed to establish that he knew about a conspiracy to sell cocaine. We disagree.

As discussed, Gaytan-Medina was present at critical junctures of the transaction. He was with Ferez when he met the agents at the parking lot; he opened the garage to let McBain in so that McBain could have his van loaded with cocaine; he stood in front of the house, raking dirt, during the delivery of the cocaine; and he was present when McBain and Ferez transferred 71 kilos of cocaine to trashbags, albeit in small covered packages[2], when Whipple discussed the delivery of cocaine, and when Cardenas announced that he thought they were being watched. Gaytan-Medina confirmed his role as a lookout when he responded to Whipple's inquiry about surveillance. Additionally, when agents entered to make the arrests, Gaytan-Medina was the first to depart.

2.

Cardenas contends that the evidence was insufficient to convict him on either count. The elements for conspiracy are stated *supra*. To prove possession of a controlled substance with intent to distribute, the Government must prove beyond a reasonable doubt Cardenas's possession of the illegal substance, knowledge, and intent to distribute. ***United States v. Prieto-Tejas***, 779 F.2d 1098, 1101 (5th Cir. 1986) (citation omitted). The necessary knowledge and intent can be proved by circumstantial evidence. ***Id.*** Additionally, "[i]ntent to distribute a controlled substance may generally be inferred solely from possession of a large amount of the substance." ***Id.***

---

[2] The jury was entitled to reject Gaytan-Mendina's contention that he did not know that the covered packages contained cocaine.

The evidence was sufficient. The Government proved that Cardenas arrived at the scene of the arrest driving a car loaded with cocaine, that Cardenas helped unload the cocaine into the undercover vehicle, that Cardenas left the scene to pick up and deliver the remaining 179 kilograms of cocaine, and that he returned to demand payment for the first 71 kilos before delivering the remainder.

B.

Gaytan-Medina contends that a supplemental instruction improperly confused the jury and had the effect of coercing a guilty verdict. During its deliberations, the jury presented a note to the court, stating:

> We have a verdict on two counts for Ferez and two counts for Cardenas, but are undecided on the one count for Medina. Will this jeopardize the whole trial?

After reading the jury's partial verdict, the court informed it that it had a supplemental charge that might assist in their arriving at a unanimous verdict "on that phase of the case". Because it was late in the day, however, the court recessed. The next day, over Gaytan-Mendina's objections, the court issued an *Allen* charge, *see* ***Allen v. United States***, 164 U.S. 492 (1896). The jury returned a guilty verdict.

"We review *Allen* charges for compliance with two requirements: `(1) the semantic deviation from approved *Allen* charges cannot be so prejudicial as to require reversal, and (2) the circumstances surrounding the giving of an approved *Allen* charge must not be coercive.'" ***United States v. Heath***, 970 F.2d 1397, 1406 (5th Cir.

1992) (internal citations omitted). "The district court is given broad discretion to determine whether an *Allen* charge might coerce a jury." ***Id.*** (citation omitted).

Gaytan-Medina does not contest the language of the supplemental charge, but contends that because the charge failed to specify that it was directed at the jury's deliberations as to Gaytan-Medina only, it was coercive. We disagree. The court rendered partial verdicts in front of the jury, stating "those verdicts will be accepted and the court at the proper time will enter judgment based on the verdicts of the jury in that phase of the case"; accordingly, we conclude that the court's failure to specify Gaytan-Mendina in its supplemental charge was not misleading and therefore did not result in coercion.

C.

Cardenas maintains that he was deprived of due process because the government elicited testimony referring to his silence, except to state a need for a lawyer, after he was arrested and given a *Miranda* warning. Because Cardenas failed to object to the testimony at trial, we review only for "plain error," that is, the error must be "so great as to result in the likelihood of a grave miscarriage of justice". ***U.S. v. Carter***, 953 F.2d 1449, 1463 (5th Cir.) (quotation and citations omitted), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2980 (1992).

The due process clause forbids use of a defendant's post-arrest silence for the purpose of impeaching an exculpatory story offered at trial, ***Doyle v. Ohio***, 426 U.S. 610, 617-18 (1976), or

for its substantive value. ***Carter***, 953 F.2d at 1463 n.6. Here, the officer's testimony made a single reference to Cardenas's silence.[3] Cardenas did not testify at trial and offered no exculpatory story; and, as discussed *supra* and *infra*, evidence of his guilt is overwhelming. Therefore, affirming the conviction will not result in a grave miscarriage of justice. *See* ***Carter***, 955 F.2d at 1463 (holding that where defendant had not offered exculpatory story, isolated comment on post-arrest silence did not constitute plain error).

D.

Cardenas contends on two bases that the district court erred in fixing his base offense level.

1.

First, Cardenas maintains that the district court erred in basing his sentence on 250, rather than 71, kilos of cocaine. We

---

[3] After the arresting officer testified regarding Cardenas's arrest and the issuance of the *Miranda* warning, the government proceeded as follows:

> Q. All right. After you advised him of his rights, did he indicate that he understood his rights?
>
> A. Yes, he did.
>
> Q. And did you ask him if he wished to be questioned or interviewed about his arrest?
>
> A. Yes, I did.
>
> Q. And how did he respond?
>
> A. He said, no, he needed a lawyer.

No further questions were asked regarding the arrest.

review for clear error the sentencing court's factual findings on the quantity of drugs implicated in a given offense. *See e.g.* ***United States v. Robins***, 978 F.2d 881, 889 (5th Cir. 1992).

Pursuant to the Sentencing Guidelines, "[i]f a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed." U.S.S.G. § 2D1.4(a). Commentary to § 2D1.4 cross-references to § 1B1.3, which provides that where Chapter Two makes such a cross-reference, the base offense level shall be determined based on "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, ..." U.S.S.G. § 1B1.3(a)(1) (emphasis supplied). Commentary to § 1B1.3 explains that conduct for which the defendant "would be otherwise accountable" includes conduct of others that was "reasonably foreseeable by the defendant." § 1B1.3(a)(1) comment. (n.1).

The presentence report (PSR) concluded that Cardenas was responsible for 250 kilos. In support, it contained a statement by Cardenas reflecting full knowledge of the amount under negotiation. According to the PSR, Cardenas stated "that payment for the 71 kilograms must be made and the remaining 179 kilograms would be delivered in three days". Cardenas did not specifically object to this statement, but made the more general objection that "at no time did defendant Antonio Cardenas negociate [sic] or take

responsibility for 250 kilos of cocaine". The district court impliedly rejected his unsworn assertion, and held him responsible for 250 kilos; in so doing, it did not clearly err.[4]

Both the PSR and the evidence adduced at trial establish that Cardenas had an agreement with Ferez and others to provide 250 kilos of cocaine; and that Cardenas had knowledge that the conspirators were reasonably capable of producing that amount. As stated *supra*, the PSR reports a statement by Cardenas indicating that he was aware of the full extent of the negotiations. "[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial court in making the factual determinations." ***Robins***, 978 F.2d at 889.

In addition, and as discussed, trial testimony established that after delivering the initial load of 71 kilos of cocaine, Cardenas returned to the residence and demanded payment for 71 kilos before the delivery of the remaining 179 kilos. Agent Whipple expressed doubt to Cardenas whether he could deliver 250 kilograms of cocaine. Cardenas replied that "we need the money for the first 71 before we bring the rest to you". Whipple then set forth a plan, stating, "when you deliver the other 179 kilos then I'll hand you the keys to the Cadillac and he can take that money wherever he wants to take it to". Cardenas replied, "I need to go

---

[4] The district court was not required to make explicit findings, pursuant to Fed. R. Crim. P. 32(c)(3)(D), because Cardenas's objections consisted of unsworn assertions and therefore did not create a viable issue. *See* ***United States v. Whitlow***, 979 F.2d 1008, ____ (5th Cir. 1992) (stating that objections in the form of unsworn assertions do not create a viable issue).

talk to them and see what they say about this". Cardenas left and returned to say that the "heat" was there and that the deal would have to completed at a later date. Cardenas indicated that they would load the 71 kilos of cocaine and attempt to complete the transaction three days later. In view of the evidence, the district court did not clearly err in holding Cardenas responsible for 250 kilograms of cocaine.

2.

Second, Cardenas cites ***United States v. Puma***, 937 F.2d 151, 159-60 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1165 (1992), and contends that the district court reversibly erred by failing to make a finding as to the quantity of cocaine Cardenas ought reasonably to have foreseen was involved in the conspiracy. This contention is without merit. In ***Puma***, this court concluded that the Guidelines required the district court to make a specific finding as to knowledge or foreseeability because the entire amount of contraband involved in the conspiracy was not automatically attributable to the defendant; here, there was more than ample evidence indicating that Cardenas was personally involved in the distribution of 250 kilos of cocaine. Accordingly, in calculating the base offense level pursuant to U.S.S.G. § 1B1.3(a)(1), the court was not required to make a specific finding of knowledge or foreseeability.

III.

For the foregoing reasons, the judgments are

AFFIRMED.