UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-9102

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RAMON ZAMORA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-102-A-2)

(January 20, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The defendant, Ramon Zamora, was convicted by a jury of possessing over 100 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(vii) (1988) and 18 U.S.C. § 2 (1988), and of conspiring to do the same, in violation of 21 U.S.C. § 846 (1988). The district court sentenced Zamora to 115 months imprisonment for each of the two foregoing counts, the terms to run concurrently. Zamora

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals, contending that (a) there is insufficient evidence to support his conviction; (b) he received ineffective assistance of counsel at trial; (c) the district court violated his Fifth and Sixth Amendment right to present a defense; (d) he is entitled to a new trial on account of newly discovered evidence; and (e) the district court enhanced his offense level on the basis of an erroneous finding that he was a leader or organizer in the conspiracy. Finding no reversible error, we affirm.

I

Zamora contends that the evidence presented by the government is insufficient to support his conviction. "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 offense[] beyond a reasonable doubt."[1] *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." *Id.* "We accept all credibility choices that tend to

[1] This standard of review is applied here because Zamora properly preserved his sufficiency claim by moving for a judgment of acquittal at trial. A more stringent standard is applied where the defendant fails to preserve his sufficiency claim. *See United States v. Galvan,* 949 F.2d 777, 782-83 (5th Cir. 1991) (applying "manifest miscarriage of justice" standard because defendant failed to move for directed verdict or for judgment of acquittal).

support the jury's verdict." *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991).

The evidence presented at trial was sufficient to support Zamora's conviction for conspiracy and possession of marijuana with intent to distribute. Drug Enforcement Administration ("DEA") special agent John Lunt described how he posed as a drug dealer and negotiated with Zamora and George Munoz to sell them several hundred pounds of marijuana. Lunt's testimony supports Zamora's argument that Munoz did most of the talking during the negotiations. However, Lunt's testimony also completely refutes Zamora's specious argument that he was merely present during the negotiations and was not a coconspirator with Munoz. Lunt described how the negotiations got under way: "Either George [Munoz] or Carlos introduced me to Ramon Zamora briefly. And I then told them let's go take a look at the marijuana." The four men then drove to a car wash to inspect the contraband, and Lunt testified that the following occurred on the way: "En route over to the car wash, I told Munoz and Zamora that only one of them could look at it and inspect the marijuana. . . . And at that point Zamora said that Munoz would be the one who would look at it . . . ." After Munoz inspected the marijuana, as the men were driving back to the original meeting place, Lunt "asked Munoz if he was satisfied with the weed, with the marijuana, and he stated that he was." At that time "Zamora was seated right next to [Lunt] in the passenger seat." Lunt asked Munoz and Zamora "how long it was going to take them to turn over the marijuana, which means how long

would it take them after [Lunt] gave it to them to sell it and pay [Lunt] the balance that they owed [him]. . . . Zamora made the statement it wouldn't take them very long at all to turn over the marijuana."

Lunt also described the exchange of the marijuana, which occurred at a later date. Since Munoz did not have all of the cash required for the purchase, he offered as collateral the title to a tractor-trailer rig owned by Zamora.[2] Lunt arranged for the marijuana to be brought to the exchange site in a van, and after receiving the money and truck title, Lunt permitted Amado Luna))one of Munoz and Zamora's co-conspirators))to drive the van away with the marijuana still inside. Zamora brought Luna to the exchange site in his car.

In light of the foregoing evidence, the jury could reasonably have concluded that Zamora conspired with Munoz and the other co-conspirators to possess the marijuana with intent to distribute it. Furthermore, "when the evidence is sufficient to establish the defendant's participation in a conspiracy to possess illegal narcotics, the defendant will be deemed to possess narcotics through his co-conspirator's possession." *United States v. Gallo,* 927 F.2d 815, 822 (5th Cir. 1991) (quoting *United States v. Medina,*

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[2] Zamora contends that there was no evidence to show that he gave Munoz permission to offer the title to Lunt as collateral. However, Lunt described a phone conversation which he had with Zamora after the exchange took place, in which Zamora referred to the truck title and said that he "was just puttin[g] [it] up" as collateral. In light of that statement and the other evidence of Zamora's involvement in the conspiracy, the jury could reasonably have concluded that Zamora gave Munoz permission to offer the title to Lunt.

887 F.2d 528, 532 (5th Cir. 1989)). The evidence was therefore sufficient to support Zamora's convictions for conspiracy and possession with intent to distribute marijuana.

II

Zamora also contends that he was denied effective assistance of counsel at trial, in violation of the Sixth Amendment, because his attorney failed to submit a list of witnesses and exhibits to the district court in a timely manner. As a result of this alleged error, counsel was not permitted to offer any evidence in Zamora's defense. In order to prevail on his claim of ineffective assistance of counsel, Zamora must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To demonstrate prejudice, Zamora must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. Zamora fails to meet the prejudice requirement, because there is no reason to believe that the jury's verdict would have been different if counsel had been permitted to introduce the excluded evidence. According to Zamora, that evidence would have shown only that he was a responsible, honest family man and business owner. Zamora does not contend that the evidence would have refuted the ample evidence of his guilt presented by the government. *See supra* part I. Therefore

counsel's alleged error did not change the outcome of the trial, and Zamora's ineffective assistance claim fails.

III

Zamora also contends that the district court violated his right to present witnesses in his defense, in violation of the Fifth and Sixth Amendments, when the district court refused to permit the introduction of evidence which was not timely disclosed before trial. *See supra* part II. Assuming *arguendo* that the district court erred by excluding the evidence, we hold nevertheless that Zamora is not entitled to relief because any error would have been harmless.

Claims of this kind are subject to harmless error review. *See United States v. Alexander,* 869 F.2d 808, 812 (5th Cir. 1989) (declining to decide whether district court erred by excluding evidence which was not timely disclosed, since any error would have been harmless), *cert. denied,* 493 U.S. 1069, 110 S. Ct. 1110, 107 L. Ed. 2d 1018 (1990); *United States v. Davis,* 639 F.2d 239, 245 (5th Cir. 1981) (performing harmless error analysis where district court erroneously excluded criminal defense witnesses not timely disclosed during discovery). "To determine whether an error in a criminal case is harmless, we must examine `whether there is a reasonable possibility that the [error] might have contributed to the conviction.'" *United States v. Lay,* 644 F.2d 1087, 1090 (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86-87, 84 S. Ct. 229, 230, 11 L. Ed. 2d 171 (1963)), *cert. denied,* 454 U.S. 869, 102 S. Ct. 336, 70 L. Ed. 2d 172 (1981). We may affirm on the grounds

that any error was harmless only if it was harmless beyond a reasonable doubt. *See Davis,* 639 F.2d at 245 ("[W]e can allow the conviction to stand only if we find the error to be harmless beyond a reasonable doubt." (citing *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967))).

As we already observed, *see supra* part II, Zamora does not contend that the evidence excluded by the district court would have refuted the ample evidence of his guilt. Consequently, there is no reasonable possibility that the district court's alleged error contributed to Zamora's conviction, and any error was harmless beyond a reasonable doubt. Zamora's claim is therefore without merit. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.").[3]

IV

Zamora also contends his conviction must be reversed and remanded to the district court for a new trial in light of newly discovered evidence.[4] The newly discovered evidence is

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[3] In *Braswell v. Wainwright,* 463 F.2d 1148 (5th Cir. 1972), upon which Zamora relies, we held that the state trial court violated the Sixth Amendment by excluding a defense witness on procedural grounds. *See id.* at 1157. *Braswell* is distinguishable because the excluded witness in that case was the only witness available to corroborate the defendant's case of self-defense. *See id.* The excluded witness in *Braswell* therefore was vital to the defense, unlike the witnesses and exhibits excluded at Zamora's trial.

[4] Zamora moved for new trial before the district court, but he did not raise newly discovered evidence as a ground for his motion, apparently because the evidence was not yet known to Zamora on the date of the motion.

coconspirator George Munoz's anticipated testimony that Zamora was not present at the negotiation with undercover agent Lunt, and that Munoz took Zamora's truck title and gave it to Lunt without Zamora's knowledge or consent. Because Zamora raises this issue for the first time on appeal, we will not consider it unless it is a purely legal issue and our failure to consider it would result in manifest injustice. *See United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990) ("[I]ssues raised for the first time on appeal `are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice.'"). The issue raised by Zamora is not a purely legal one. Zamora argues that he is entitled to a new trial if he shows that (1) the evidence is in fact newly discovered; (2) the evidence is material; (3) the evidence would probably produce a different result at a new trial; and (4) Zamora's failure to discover the evidence earlier was not due to his lack of diligence. *See United States v. Alvarado,* 898 F.2d 987, 994 (5th Cir. 1990). Several of the foregoing requirements raise factual issues. As a result, the issue which Zamora raises is not purely legal, and we will not consider it for the first time on appeal.

V

Lastly, Zamora contends that the district court enhanced his sentence under U.S.S.G. § 3B1.1(a) based on an erroneous finding that he was a leader or organizer of a conspiracy involving five or

more participants.[5] The district court's finding to that effect is reviewed for clear error. *See United States v. Barbontin,* 907 F.2d 1494, 1498 (5th Cir. 1990). We will not find a district court's ruling to be clearly erroneous unless we are left with the definite and firm conviction that a mistake has been committed. *United States v. Mitchell,* 964 F.2d 454, 457-58 (5th Cir. 1992). The district court's finding is not clearly erroneous.

Zamora first contends that the district court erred by finding that five or more participants were involved in the conspiracy. Zamora concedes that he, George Munoz, Amado Luna, and a hispanic male in a maroon truck (who delivered the cash and truck titles to Munoz before the exchange) were involved))four participants in all. Zamora also concedes that evidence revealed the presence of a fifth individual in Zamora's car along with Zamora and Luna when Zamora dropped Luna off at the exchange site. Zamora contends that "[t]here was no evidence . . . that the other passenger in [Zamora's car] had anything to do with the transaction." We disagree. For the purposes of § 3B1.1, "the number of transactional participants . . . can be inferentially calculated." *Barbontin,* 907 F.2d 1498. The district court reasonably inferred that Zamora and Luna did not bring an uninvolved person to the transaction with them.[6] Furthermore, the district court found that

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[5] *See* United States Sentencing Commission, *Guidelines Manual,* § 3B1.1(a) (Nov. 1989) ("If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.").

[6] As the district court stated at sentencing, "Obviously, they wouldn't be hauling around a stranger to the transaction just

individuals referred to by Zamora in a telephone conversation with Lunt were participants as well. Lunt testified that, according to Zamora, certain people who supplied money for the drug purchase were upset and wanted to hit Munoz in the head with a pipe. The district court found that the people who wanted to hit Munoz were participants, and Zamora does not argue that that finding was clearly erroneous. Therefore, even excluding the unidentified individual in Zamora's car, the district court's finding of five participants does not leave us with the definite and firm conviction that an error has been committed.

Furthermore, we disagree with Zamora's argument that "there was no evidence to show that [he] was a leader or organizer." Zamora's presentence investigation report ("PSR") stated that, according to the investigating agent, "Zamora brought the people together for the buy, brought the driver [Luna] to the scene and later complained that `he' [Zamora] lost $75,000 on the deal." An addendum to the PSR states that Zamora told special agent Lunt, in a telephone conversation, that "his [Zamora's] people . . . had to pay $11,000 to get his [Zamora's] guy [Luna] out of jail."[7] The record also supports the conclusion that Zamora provided his truck

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to have him see what happens. So he had to be a participant . . . ."

[7] Zamora objected to the PSR's recommendation that he receive an enhancement under U.S.S.G. § 3B1.1, but he did not offer any evidence to rebut the factual assertions contained in the PSR. "When a defendant objects to his PSR but offers no rebuttal evidence to refute the facts, the district court is free to adopt the facts in the PSR without further inquiry." *United States v. Sherbak,* 950 F.2d 1095, 1099-1100 (5th Cir. 1992) (citing *United States v. Mir,* 919 F.2d 940, 943 (5th Cir. 1990)).

title as collateral for the drug purchase. Furthermore, during the negotiation, when special agent Lunt told Zamora and Munoz that only one of them would be permitted to examine the marijuana, it was Zamora who stated that Munoz would be the one to examine it. In light of these facts, the district court's finding that Zamora was a leader or organizer is not clearly erroneous.

VI

For the foregoing reasons, we **AFFIRM**.