UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2226
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JUAN RIVERA MARTINEZ, a/k/a GERARDO ROSAS ALVARDO, and FIDENCIO PEREZ-GARCIA,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR H 92 0133 01)

(May 16, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Juan Rivera Martinez and Fidencio Perez Garcia appeal their convictions for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine.[2] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

[2] Martinez timely appealed. Garcia filed a motion for his counsel to withdraw and requesting appointment of counsel on appeal approximately five days after judgment was entered, but did not file his notice of appeal until more than 40 days after judgment. The district court lacked jurisdiction to grant Garcia's motion to file an out-of-time appeal, but Garcia's motions are treated as an effective notice of appeal. ***United***

I.

In April 1992, undercover agent Snyder contacted Manuel Patino in Miami regarding the transportation of cocaine that had been confiscated by the government in Guatemala. Patino, who used the name Don Francisco, offered to pay Snyder between $150,000 and $200,000 as a partial down payment for Snyder's transportation services. Because Patino was having difficulty arranging for the money, Snyder agreed to accept deeds to property as payment for the services. Snyder gave Patino his beeper number so that Patino's people could contact him, and left Miami.

While Snyder returned to Houston, a man named Mario paged him[3] and said that Patino had contacted him, that they had the deeds and were ready to accept the cocaine. Snyder set up a meeting at which Mario would turn over the deeds to another undercover agent, Villafranca, who in turn would give them to Snyder to inspect before the cocaine was delivered. Also, Snyder told Mario that he would have to supply two vehicles to transport the cocaine.

Villafranca was paged by "Juan", who identified himself as one of Mario's workers. At trial, Villafranca testified that Juan was defendant Martinez. Juan/Martinez informed Villafranca that he was ready to deliver two vehicles -- a white van and a reddish van-type vehicle. Villafranca asked Martinez if he would also have the

States v. Sacerio, 952 F.2d 860, n. 1 (5th Cir. 1992).

[3] Snyder had previously made arrangements to meet with Mario regarding the transaction, but Mario did not appear for the meeting.

papers,[4] and Martinez replied that he would bring them to the parking lot of Doneraki's restaurant at 2:30 that afternoon.

Villafranca, accompanied by two other agents, went to Doneraki's restaurant to accept delivery of the vehicles and papers. A reddish Plymouth Vista arrived first, driven by a man whom Villafranca identified as defendant Garcia. When Garcia arrived, he went directly to Villafranca in the parking lot, introduced himself, and handed the keys to Villafranca. Martinez then walked up and apologized for being late. Soon thereafter, the white van, driven by a third person, arrived. Martinez handed Villafranca an envelope addressed to "Carlos" (the name used by Snyder), and said that they were the papers. Martinez wrote down the number where he could be reached once the vans were loaded, and included a code for Villafranca to use when calling. Villafranca asked all three men if they "knew what this was about", and they nodded and said that they did. Villfranca checked the vehicles and expressed concern that the Vista was not reliable, but Martinez assured him that they had tested it. Villafranca and the other agents drove off in the vehicles.

Before the agents reached their office, one of the vehicles overheated, so Snyder called Mario and told him to provide a replacement vehicle. The agents then loaded the operative vehicle with 134 kilograms of cocaine.

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[4] Villafranca testified that he did not have to explain to Juan/Martinez what he was talking about when he referred to the papers.

Villafranca and the others met Garcia and Martinez at Doneraki's the next day, and Garcia and Martinez brought a replacement vehicle. Villafranca told them that the white van was loaded "with 200" and that they were going to keep 50 until they verified the papers. According to Villafranca, there was no indication that Garcia and Martinez did not understand what he was talking about and had no questions.[5] Villafranca then handed the keys to the white van to Martinez who gave them to Garcia. The defendants were arrested as Garcia was getting into the vehicle loaded with cocaine.

The agent who arrested Martinez found a .22 caliber revolver in his right rear pocket and a business card with Snyder's pager number written on the back. The agent who arrested Garcia found a beeper.

Garcia and Martinez were indicted for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine. Following their trial, the jury returned a guilty verdict as to both defendants. Martinez was sentenced to a term of imprisonment of 360 months, a five-year term of supervised release, and a special assessment of $50. Garcia received a sentence of 262 months in prison, a five-year term of supervised release, and a special assessment of $50.

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[5] Villafranca again asked if they knew what this was about and the defendants again nodded their heads up and down.

II.

A.

The defendants assert first that the evidence was insufficient to support their convictions. In evaluating the sufficiency of the evidence, it

> is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided 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.

United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), ***aff'd***, 462 U.S. 356 (1983) (footnote omitted).

In viewing the evidence in the light most favorable to the verdict, this Court affords the government the benefit of all reasonable inferences and credibility choices. ***United States v. Nixon***, 816 F.2d 1022, 1029 (5th Cir. 1987).

To support a conviction in a drug conspiracy prosecution, "the government must prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that the defendant knew of the agreement, and (3) that he voluntarily participated in the agreement." ***United States v. Maltos***, 985 F.2d 743, 746 (5th Cir. 1992). "The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances." ***Id.*** (internal quotations and citations omitted). "Although presence at the scene and close association with those involved in a conspiracy are

insufficient factors alone, they are nevertheless relevant factors for the jury." ***United States v. Leed***, 981 F.2d 202, 205 (5th Cir. 1993).

The defendants contend that the evidence showed only their mere presence at the scene, and was insufficient to support their conviction, relying on ***United States v. Maltos***, 985 F.2d 743 (5th Cir. 1992), in which a conspiracy conviction was reversed. In ***Maltos***, this Court stated:

> Our cases seem to call for something more than what the evidence showed in this case, namely, Maltos's association with individuals engaged in the transport of cocaine and his presence during the transport of two shipments of such contraband. Although damning when viewed cumulatively, this is a classic example of the type of evidence upon which we have prohibited the basing of conspiracy convictions.
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> Other than evidence of Maltos's association with the conspirators, and his presence at the time of the transactions, the government presented no proof establishing his knowledge of, or participation in, the conspiracy.... [N]o evidence established that Maltos knew the content of the myriad phone calls his codefendants placed from public phones or that his own conversations, whether by phone or during meals with his codefendants, concerned the drug transactions ... [N]o evidence -- direct or circumstantial -- demonstrated that he knew the contents of the cars he was transporting, or even that they contained contraband at the time he was transporting them.

Id. at 747-48.

The evidence presented by the government in this case, however, goes far beyond mere presence. Garcia and Martinez were clearly present for the transaction, and that proof can be considered along with other evidence in finding conspiratorial

activity. ***United States v. Chavez***, 947 F.2d 742, 745 (5th Cir. 1991). Mere presence, however, was not the only proof.

The proof showed that Garcia arrived before Martinez at the first meeting and began introductions; Martinez arrived with the documents Patino had promised to Snyder; Martinez and Garcia delivered the vehicles to be loaded with cocaine and received the vehicle that was loaded with a portion of the cocaine; Martinez had Snyder's pager number, which he had to get from Patino through Mario, and used it to contact Villafranca; Martinez and Garcia indicated that they understood the nature of the transaction; Martinez was carrying a gun, which the jury could have inferred was for the purpose of protecting the cocaine; and Garcia was wearing a beeper, which is commonly used the drug trade.

Martinez's access to Snyder's pager number indicates that he was involved with Mario and Patino in the conspiracy. Garcia never indicated by his actions or otherwise that he was present only to drive the vehicle; instead, he arrived before Martinez and greeted Villafranca. When Villafranca gave the keys to Martinez, Martinez handed them to Garcia who began to leave. Martinez participated in communications about the cocaine. Further the jury was entitled to consider that Martinez and Garcia were part of the conspiracy because it was unlikely that the financiers of such a large quantity of drugs would have entrusted them with the task of transporting the cocaine unaccompanied and in two separate vehicles. ***See Chavez***, 947 F.2d at 745. Accordingly, a reasonable

trier of fact could have found that the evidence established the defendants' guilt beyond a reasonable doubt.[6]

B.

Garcia maintains next that the district court erred in its instructions to the jury, asserting that the jury should have been instructed that it must determine whether the defendant "knowingly" rather than "willfully" became a member of the conspiracy. Garcia, however, did not object before the district court to this portion of the charge. This Court's power to address a forfeited error is limited to those that are plain and affect the defendant's substantial rights. ***United States v. Olano***, ___ U.S. ___, 113 S.Ct. 1770, 1776 (1993). Whether the error should be reviewed is left to the appellate court's discretion. ***Id.***; ***United States v. Rodriguez***, 15 F.3d 408, 415-16 (5th Cir. 1994). The Court should not exercise that discretion unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" ***Olano***, 113 S.Ct. at 1776 (quoting ***United States v. Young***, 470 U.S. 1, 15 (1985)).

In its jury instructions, the district court did, on one occasion, state that the jury must determine "whether or not either or both of the Defendants under consideration willfully became a

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6 Garcia also makes the frivolous contention that the agents did not properly investigate or document the case, asserting that "[t]he government had some dope and they were trying to make criminals out of someone," and that the Government's closing argument concerning the evidence required to show conspiracy "tortures logic". And, he challenges the credibility of the Government's evidence, a determination that is for the jury. ***United States v. Greenwood***, 974 F.2d 1449, 1458 (5th Cir. 1992).

member of the conspiracy." In that same discussion (on the immediately preceding page of the record transcript), the court used the word "knowingly." The court further instructed that, if the defendants were merely present and lacked knowledge of a conspiracy, they were not conspirators, and made it clear that a finding of guilty would require knowledge of the conspiracy when it stated that "a person who has no knowledge of a conspiracy ... does not thereby become a conspirator."[7] The district court's instructions were, therefore, adequate to inform the jury to consider whether the defendants had the specific intent to join the conspiracy and conspired to commit the substantive offense.[8] ***See United States v. Burroughs***, 876 F.2d 366, 369 (5th Cir. 1989). Because Garcia has not demonstrated the existence of any "plain error," we decline to exercise our discretion to review his challenge to this instruction. ***See United States v. Rodriguez***, 15 F.3d 408, 415 (5th Cir. 1994).

C.

Garcia contends finally that the district court erred in denying his motion to sever, asserting that he suffered prejudice

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7 In summarizing the elements of the offense, the district court again instructed that the government was required to prove that the defendants "knowingly" and unlawfully conspired.

8 The jury sent a note requesting a definition of "knowingly" and the district court responded by providing a form definition of that term. Garcia, however, never objected to this response and, in his brief on appeal, makes only the conclusory assertion that the definition was inadequate.

because the jury "attached particular importance" to Martinez's gun and the delivery of documents by Martinez.[9]

We will not disturb a district court's decision whether to grant a severance unless there is an abuse of discretion. ***United States v. Restrepo***, 994 F.2d 173, 186 (5th Cir. 1993). "To demonstrate that the district court abused its discretion, an appellant must show that he received an unfair trial, which exposed [him] to compelling prejudice against which the district court was unable to afford protection." ***Id.***

The district court instructed the jury that the evidence pertaining to each defendant should be considered separately and the fact that the defendants were charged together did not mean that the jury must find them both guilty or not guilty. Garcia has not demonstrated how any these instructions failed to provide adequate protection; and he, therefore, has not demonstrated that the district court abused its discretion in denying the motion to sever.

III.

For the foregoing reasons, the judgments are

AFFIRMED.

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[9] According to Garcia, this evidence could not have been used against him at a separate trial, and the district court's instruction to the jury not to use that evidence against him was inadequate.