

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-2530  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAIRO H. CASTANO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CR-H-93-39)

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(July 15, 1994)

Before POLITZ, Chief Judge, KING and WIENER, Circuit Judges.

POLITZ, Chief Judge:\*

Jairo H. Castano, convicted by a jury of conspiring to possess with intent to distribute cocaine and aiding and abetting possession with intent to distribute cocaine, appeals his conviction and sentence. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## Background

On a tip received during an undercover cocaine-trafficking investigation, special agents Charlie Boyce and John Sanchez of the Drug Enforcement Administration arranged to meet with Raul Avendano on October 8, 1992 at his machine shop in Houston, Texas. Avendano agreed to sell Boyce one kilo of cocaine to be followed by ten kilos. When Boyce returned to the machine shop on December 17, 1992, Avendano introduced Castano as his cousin and in Castano's presence told Boyce that his cocaine supply was low. Over the next few days, however, Avendano spoke with Boyce several times, advising that he had purchased a large quantity of cocaine and would be prepared to sell him ten kilos a week. Avendano also told Boyce that his cousin "Luis"<sup>1</sup> was the machine shop supervisor and that if Avendano was ever absent, Luis would discuss drug-related matters in his behalf.

On January 13, 1993, Avendano's machine shop was placed under surveillance by DEA agents. In the early afternoon the surveillance team saw Castano as he arrived in a gray Buick and entered the shop. A red BMW with two occupants immediately followed. The occupants entered the shop, stayed a few minutes, and then departed. Later a red Mitsubishi drove up; Castano met the driver at the door and led him inside. Shortly thereafter the Mitsubishi left, followed by Avendano and Castano in the gray Buick which returned about 40 minutes later. Avendano moved a truck

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<sup>1</sup>Avendano explained to Boyce that the individual wearing glasses that he had previously met was the one he called Luis. That person was the defendant Castano.

parked in front of the garage door and Castano left in the Buick, returning very quickly with an empty box. Shortly thereafter a gray Honda arrived driven by the driver of the Mitsubishi, accompanied by one of the BMW occupants. The Honda was backed into the garage and the doors were closed. The doors reopened a few minutes later and the Honda exited and began slowly circling the streets and parking lots around the shop. At this time Avendano paged Agent Boyce informing him that he had ten kilos of cocaine available for immediate purchase. Castano walked into the adjacent parking lot, looking and waiting.

Shortly thereafter Agents Boyce and Sanchez arrived and were greeted by Avendano and Castano. Avendano patted down Boyce and, discovering a pistol, told Boyce that he too had a firearm inside to protect his merchandise. Once inside the garage Avendano directed Boyce to a box containing block-shaped packages of cocaine which Boyce opened with a razor Castano supplied. Speaking in Spanish, Castano assured Boyce that he was going to like the cocaine because it was good merchandise. Boyce agreed to purchase the cocaine and left the garage purportedly to collect the purchase money. On Boyce's signal, the surveillance team moved in and arrested Avendano and Castano. In addition to the ten kilos of cocaine the agents found the 12-gauge shotgun which Avendano had mentioned.

At trial prosecution witnesses testified that Castano had twice sold cocaine to an undercover officer and had been convicted in 1986 of cocaine possession and possession with intent to

distribute cocaine. Additionally, against the advice of defense counsel, Castano insisted that Avendano testify. Avendano, having previously pled guilty to the crimes at issue, testified that Castano knew about Avendano's drug trafficking, that he had aided him during the transaction by bringing him a box and some tape, and by providing the razor to Boyce. More importantly, he also testified that Castano knew he would be paid for his help.

The jury found Castano guilty on both counts. The probation officer recommended and the district court granted an upward adjustment to the offense level for possession of a dangerous weapon, the shotgun, during a drug offense. Castano was sentenced to concurrent terms of 293 months imprisonment and timely appealed.

#### Analysis

Castano first complains of the district court's decision to admit evidence of his prior convictions. He points to Fed.R.Evid. 404(b) which generally bars admission of evidence of prior bad acts. Castano's argument fails to persuade. To establish conspiracy, the government had to prove Castano's knowledge of the drug transaction and his voluntary participation therein. Castano contended that he was "merely present" and not an active participant in the transaction. The evidence of prior convictions became relevant to negate the suggestion that Castano was ignorant of the transaction that was occurring. Additionally, Castano "put his intent at issue when he entered his plea of not guilty to the conspiracy charge. . . . A prior conviction for possession of cocaine is probative of a defendant's intent when the

charge is conspiracy to distribute."<sup>2</sup>

Castano argues, in the alternative, that the prejudicial effect of the 404(b) evidence vastly outweighed its probative value.<sup>3</sup> The court's cautionary instruction to the jury before admitting the evidence attenuated the prejudicial effect.<sup>4</sup> Comparing the claimed prejudice with the evidence's relevance to scienter, we are not persuaded that the district court abused its discretion in determining that the risk of prejudice did not substantially outweigh the probative value of the evidence.

Castano next contends that the government adduced insufficient evidence. We may reverse for insufficient evidence only where, considering all of the evidence and inferences therefrom in the light most favorable to the conviction, we must conclude that no rational jury could have found Castano guilty beyond a reasonable doubt.<sup>5</sup> Castano actively participated in the suspicious activities at the machine shop on the date of his arrest, he retrieved tape and a box for Avendano, he provided Boyce with a razor to open the cocaine, he told Boyce the packages contained good merchandise that he would like, and Avendano said that Castano was an active participant in the operation who could discuss with Boyce any drug business in Avendano's absence. The record contains ample evidence

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<sup>2</sup>**United States v. Gadison**, 8 F.3d 186, 192 (5th Cir. 1993) (citations omitted).

<sup>3</sup>Fed.R.Evid. 403.

<sup>4</sup>**United States v. Elwood**, 999 F.2d 814 (5th Cir. 1993).

<sup>5</sup>**United States v. Sandoval**, 20 F.3d 134 (5th Cir. 1994).

for a rational jury to find that Castano conspired to distribute cocaine and that he aided Avendano in doing so.

Finally, Castano contends that the district judge erred by adjusting his offense level upward for possession of a dangerous weapon during the drug transaction.<sup>6</sup> The upward adjustment will be granted "when another individual involved in the commission of an offense possessed the weapon [if] the government . . . show[s] that the defendant could have reasonably foreseen that possession. . . . The sentencing court may infer foreseeability from the coparticipant's knowing possession of the weapon."<sup>7</sup> Avendano's statement to Boyce that he kept the shotgun to protect his merchandise sufficiently supports the finding that he knowingly possessed a weapon connected to the crime. Under our precedents, the district court could impute a reasonable foreseeability to Castano.

AFFIRMED.

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<sup>6</sup>U.S.S.G. § 2D1.1(b)(1) (two-level upward adjustment warranted unless it is clearly improbable that the weapon was connected with the offense).

<sup>7</sup>**United States v. Hooten**, 942 F.2d 878, 882 (5th Cir. 1991) (citations omitted).