UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7718
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ENRIQUE RUIZ-MENDOZA a/k/a Henry, and HECTOR FIDEL ENRIQUEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR 92-209-9)

October 26, 1995

Before DAVIS, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:[1]

Enrique Ruiz-Mendoza appeals the district court's denial of his motion for a new trial, and Hector Fidel Enriquez appeals his conviction of conspiracy to possess marijuana with intent to distribute. We **AFFIRM**.

I.

A jury found Ruiz-Mendoza and Enriquez guilty of conspiracy to possess 1000 kilograms of marijuana with intent to distribute, in

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

violation of 21 U.S.C. §§ 841(a)(1) and 846. Ruiz-Mendoza was also convicted of possession with intent to distribute at least 50 kilograms of marijuana.

After Ruiz-Mendoza appealed, he moved for a new trial while his appeal was pending. The motion was based on newly discovered evidence, a statement[2] in which a government witness, Guadalupe Garza-Rodriguez, recanted the testimony that he gave at Ruiz-Mendoza's trial. Ruiz-Mendoza moved also to depose Garza-Rodriguez, and for a conditional remand to allow the district court to consider his new trial motion; the motion was granted by this court. However, before this court conditionally remanded the case to the district court, it denied the motion for a new trial and the motion to depose Garza-Rodriguez.

II.

A.

Ruiz-Mendoza challenges the denial of his new trial motion, claiming that the government pressured Guadalupe Garza Rodriguez to give untruthful testimony against Ruiz-Mendoza at trial and failed to disclose an alleged plea agreement with Rodriguez at trial. Ruiz-Mendoza claims that the district court erroneously denied an evidentiary hearing and applied an improper standard for granting a new trial.[3] Motions for a new trial based on newly discovered

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[2] Garza-Rodriguez's statement does not qualify as an affidavit under 28 U.S.C. § 1746. Although Garza-Rodriguez signed the statement in the presence of two witnesses, he did not include the declaration required by 28 U.S.C. § 1746.

[3] The district court was within its power in denying the motion, even though it would not have had jurisdiction to grant the

evidence are generally disfavored and are viewed with caution. ***United States v. Pena***, 949 F.2d 751, 758 (5th Cir. 1991). This court will reverse a denial of a new trial only when there is an abuse of discretion. ***United States v. Sanchez-Sotelo***, 8 F.3d 202, 212 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1410 (1994).

To prevail on a new trial motion based on newly discovered evidence, a defendant must show that (1) the evidence is in fact newly discovered and was unknown to the defendant at the time of trial; (2) the failure to discover the evidence was not due to the defendant's lack of diligence; (3) the evidence is more than merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence introduced at a new trial would probably produce an acquittal. ***United States v. Jaramillo***, 42 F.3d 920, 924-25 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2014 (1995); ***United States v. Time***, 21 F.3d 635, 642-43 (5th Cir. 1994).

There is an exception to the above-stated test; however, if the government's case "included false testimony and the prosecution knew or should have known of the falsehood". ***United States v. Antone***, 603 F.2d 566, 569 (5th Cir. 1979). "[I]n that event a new

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motion when it ruled. *See* ***United States v. Burns***, 668 F.2d 855, 857-58 (5th Cir. 1982). Although Ruiz-Mendoza did not file a notice of appeal of the order denying a new trial or the order denying his motion for reconsideration, a second notice of appeal was not necessary to obtain review of the order denying his motion for a new trial. *See* ***id.*** at 857-58. Whether the motion for a new trial should have been denied is properly before this court.

trial must be held if there was any reasonable likelihood that the false testimony would have affected the judgment of the jury." ***Id***. Accordingly, to obtain a new trial on his claim, Ruiz-Mendoza had to prove that Rodriguez's statements were false, that the statements were material (a highly significant factor reasonably likely to affect the judgment of the jury), and that the prosecution knew they were false. ***Griffith v. United States***, 535 F.2d 320, 321 (5th Cir. 1976) (citations omitted).

Ruiz-Mendoza claims in his motion for a new trial that the government had an undisclosed plea agreement with Rodriguez and that "Rodriguez stated that two [f]ederal agents. . . told him that if he did not cooperate, and give incriminating testimony against Mr. Ruiz and others, that additional charges would be brought against Mr. Rodriguez, and that he would serve 10-15 more years." To the contrary, Rodriguez's statement says nothing about an alleged plea agreement. Rodriguez states that he was pressured by the DEA agents and "knew [Ruiz] was not involved in what [he] testified," but Rodriguez gives no details to substantiate this assertion. In light of the conclusory nature of Rodriguez's statement (which did not declare it was under penalty of perjury) and the contrary testimony of several other witnesses, Ruiz has not proven that Rodriguez's original testimony was false or that the government knew it was allegedly false. He also has not shown that the government entered into a plea bargain with Rodriguez, or that the government failed to disclose the alleged plea bargain.

Though Ruiz-Mendoza claims that the proper legal standard for granting a new trial is whether there is any reasonable likelihood that the judgment of the jury was affected by false testimony, it is improper to apply this standard because Ruiz-Mendoza did not prove false testimony or knowledge of such by the government.

Furthermore, it was not necessary for the district court to hold an evidentiary hearing. Having had the opportunity to observe the direct and cross-examination of Rodriguez, the court could find that his recantation of his trial testimony was incredible and deny Ruiz-Mendoza's motion for a new trial without an evidentiary hearing. ***United States v. MMR Corp***, 954 F.2d 1040, 1046 (5th Cir. 1992).

The district court thus did not err in using the general standard of whether the allegedly new evidence would probably produce an acquittal. *See* ***Jaramillo***, 42 F.3d at 924; ***Time***, 21 F.3d at 642-43. Moreover, Ruiz-Mendoza failed to establish that the allegedly newly discovered evidence would probably have produced an acquittal. In addition to Garza-Rodriguez's testimony, several other co-conspirators testified regarding Ruiz-Mendoza's involvement in the conspiracy. Pursuant to the district court's ruling that the claimed new evidence probably would not have resulted in an acquittal, the denial of the new trial motion was not an abuse of discretion. *See* ***Time***, 21 F.3d at 642-43; *see* ***Jaramillo*** 2 F.3d at 924-25.

B.

Enriquez contends that the government did not present sufficient evidence to support his conviction for conspiracy to possess marijuana with intent to distribute. In reviewing challenges to the sufficiency of the evidence, we determine whether a rational trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. ***United States v. Ivey***, 949 F.2d 759, 766 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 64 (1992). In so doing, we view "all evidence and any inferences that may be drawn from it in the light most favorable to the government." ***Id***. The focus is not "whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit". ***Herrera v. Collins***, ___ U.S. ___, 113 S. Ct. 853, 861 (1993). The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except that of guilt, and this court will accept all credibility choices that tend to support the verdict. ***United States v. Pofahl***, 990 F.2d 1456, 1467 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 266 (1993) and ___ U.S. ___, 114 S. Ct. 560 (1993).

To prove the drug conspiracy charges, the Government was required to establish beyond a reasonable doubt (1) that a conspiracy existed, i.e., that two or more people agreed to violate the narcotics laws; (2) that the defendant knew of the conspiracy; and (3) that the defendant voluntarily participated in it. ***United States v. Cardenas***, 9 F.3d 1139, 1157 (5th Cir. 1993), *cert.*

denied, ___ U.S. ___, 114 S. Ct. 2150 (1994). The elements of the conspiracy need not be proved by direct evidence; instead, they may be inferred from circumstantial evidence. ***Id***.

Thus, agreement may be inferred from "concert of action", and voluntary participation inferred from a "collection of circumstances". ***Id***. Similarly, knowledge of the conspiracy may be inferred from a "collection of circumstances", including evidence of erratic and evasive behavior. ***Id***. "Although mere presence at the scene of the crime or a close association with a co-conspirator alone cannot establish voluntary participation in a conspiracy, presence or association is a factor that, along with other evidence, may be relied upon to find conspiratorial activity by the defendant." ***Id***. (internal citation omitted). Finally, as the Supreme Court recently made explicit, "to establish a violation of 21 U.S.C. § 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy". ***United States v. Shabani***, ___ U.S. ___, 115 S. Ct. 382, 385 (1994).

Enriquez failed to show that no reasonable jury could find him guilty of conspiracy beyond a reasonable doubt. The evidence presented at the trial established that he received money from Ruben through Diaz as a down-payment on a load of marijuana; that he transported the money which was subsequently seized by police; that he stored marijuana at a stash house; and that he had a key to that stash house.

In sum, the evidence supports the jury's finding that Enriquez agreed with at least one other person to violate the narcotics

laws, that Enriquez knew of the conspiracy, and that he voluntarily participated in the conspiracy. *See* ***Cardenas***, 9 F.3d 1139 at 1157.

III.

For the foregoing reasons, the judgments are

AFFIRMED.