UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8155

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RAUL LONG, JR., GILBERTO MENDEZ, JR., JOSEPH THOMAS PARKER and REYNALDO MENDEZ,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas (DR-92-CR-70)

(March 15, 1994)

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

BARKSDALE, Circuit Judge:[1]

Raul Long, Gilberto and Reynaldo Mendez, and Joseph Parker raise numerous challenges to their convictions and sentences stemming from conspiracy to possess with intent to distribute a ton of marijuana. For purposes of our review, it is well to remember that this court is not a "citadel[] of technicality." ***McDonough Power Equip., Inc. v. Greenwood***, 464 U.S. 548, 553 (1984) (internal quotations and citations omitted). Nor is it our function to try

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 Pursuant to that rule, the court has determined that this opinion should not be published.

to ensure a perfect trial; a criminal defendant is "`entitled to a fair trial but not a perfect one,' for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 231-32 (1973) (citations omitted). We **AFFIRM**.

I.

Gilberto Mendez sent Homero Flores (who testified as a government witness) to the border area near Del Rio, Texas, to find a source for marijuana. Gilberto Mendez was a friend of Flores' uncle, appellant Long. Flores reluctantly agreed to find a source, fearing what Gilberto Mendez might do to him if he refused. Flores contacted Sergeant Jimmy Granato, who, unknown to Flores, was working undercover, posing as a drug dealer. The two met; Flores explained that he represented four or five "investors" from Houston who were looking for either a metric ton of marijuana or 35 kilograms of cocaine. Granato informed Flores that he could provide only marijuana, and that he was just a transporter. But, Granato did offer to set up a meeting with his source.

Later that day, Granato introduced Flores to undercover officers posing as Granato's source and his source's accountant. Again, their undercover status was unknown to Flores. (The meeting took place in a car; as discussed *infra*, a videotape was made of it.) The undercover officers discussed prices for a large shipment of marijuana, but Flores stated that he was merely authorized to obtain information, and could not negotiate the price.

The next day, Flores met again with Granato. Granato was accompanied by the two undercover officers; Flores, by Gilberto

Mendez and Long. Long represented that he was a small "investor", while Gilberto Mendez was a major one. In the course of negotiations, Gilberto Mendez stated that he had killed two people in Houston who had tried to "rip him off". Although a final agreement was not reached at that meeting, one was ultimately reached under which Granato was responsible for the transportation of the marijuana.

A few days later, Granato met with Gilberto Mendez and Long. Appellant Reynaldo Mendez, Gilberto Mendez's brother, also attended. He was driven to the meeting by appellant Parker, and Kenneth and Rodolfo Cruz were also in the vehicle.[2] Granato testified that Gilberto Mendez told him that Reynaldo Mendez was an investor, and that the "Gringo", identified as the driver of the car in which Reynaldo Mendez arrived (Parker), was Reynaldo Mendez's partner. After additional negotiations,[3] Granato took Gilberto Mendez and Reynaldo Mendez to a ranch to see the marijuana.

At the ranch, the Mendez brothers helped Granato unload over 2200 pounds of marijuana from a horse trailer; it was weighed and placed in a motor home for transport. The agreed price was

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[2] The Mendezes later referred to "los chavalones" ("the kids"), in what may have been a reference to the Cruz brothers. According to Reynaldo Mendez, "los chavalones" were brought to help transport the marijuana. The district court granted the Cruzes' motion for acquittal, finding the evidence insufficient to show that they were knowing members of the conspiracy.

[3] During these negotiations, the parties moved to a different location, because Gilberto Mendez felt that they "had been there too long".

$1,438,950. Granato and the brothers then left to drive back to the motel, where Granato was to pick up Long, who was to help him move the marijuana. Granato fled from the vehicle when the Mendez brothers were arrested; both were carrying semi-automatic pistols. Parker and Long were arrested at a motel.[4]

Long, the Mendezes, and Parker were convicted by a jury for conspiracy to possess with intent to distribute more than 1,000 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846; the Mendezes, also for use of a firearm in relation to the commission of a drug trafficking felony, in violation of 18 U.S.C. § 924(c)(1).[5]

II.

A.

We first review an "outrageous conduct" claim against the government.[6] "Although many have asserted the defense [of outrageous conduct], a due process violation will be found only in the rarest and most outrageous circumstances." ***United States v. Arditti***, 955 F.2d 331, 343 (5th Cir.) (internal quotations and citation omitted), *cert. denied*, 113 S. Ct. 597 (1992).[7] To

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[4] The Cruz brothers were also present in the motel room.

[5] The district court imposed, *inter alia*, the following prison sentences: Long, 151 months; Gilberto Mendez, 360 months; Reynaldo Mendez, 300 months; and Parker, 151 months.

[6] Gilberto Mendez makes this assertion. As discussed *infra*, Reynaldo Mendez, Long and Parker attempt to adopt it. (Reynaldo Mendez seeks to "join in all arguments of his co-defendants".)

[7] Gilberto Mendez does not cite any case in which this court has reversed a conviction because of outrageous conduct.

establish such a claim, "defendants must prove not only government overinvolvement in the charged crime, but also that they were *not* active participants in the criminal activity." ***United States v. Mora***, 994 F.2d 1129, 1138 n.9 (5th Cir.) (emphasis in original; citing ***Arditti***, 955 F.2d at 343), *cert. denied*, 114 S. Ct. 417 (1993).

Even assuming that the government was overinvolved,[8] Gilberto Mendez cannot seriously maintain that he was anything other than an active participant in the charged crime. After all, Gilberto Mendez sent Flores to find a source for a ton of marijuana. Gilberto Mendez was identified as one of the "investors" by co-conspirator Long; he participated in negotiations concerning the price of the ton of marijuana; he gave his beeper number to the undercover officers so that they might contact him; he went to the ranch where he participated in the unloading, weighing, and reloading of more than 2,200 pounds of marijuana; and he inquired,

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[8] Some of the assertions advanced by Gilberto Mendez to show government overinvolvement border on the absurd, *e.g.*:

> ... [T]he Government was more deeply involved in the marihuana dealing that were the defendants. At the first meeting with Flores, three government agents negotiated with one unindicted co-conspirator. At the restaurant meeting, the numbers were even: three government agents and three alleged coconspirators. At the Government's ranch, where the Government motor home waited to be loaded with a ton of the Government's marihuana, the defendants were outnumbered two to one: four Government agents helped two defendants load the Government's marihuana into the Government's motor home.

(Record citations omitted).

just before he was arrested and his semi-automatic handgun confiscated, whether Granato could supply him with up to 35 kilograms of cocaine per month. In short, Gilberto Mendez was an active participant in the charged crime.[9]

B.

Two challenges spring from a videotape found by the government two days before trial began:[10] that the district court erred in denying a motion for continuance to have the tape's audio enhanced and translated; and in denying a motion for mistrial pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963).[11]

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[9] Gilberto Mendez places great reliance on ***United States v. Tobias***, 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982), which purported to "set the outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit." ***Id.*** at 387. We have little difficulty in finding that his active participation kept the government well within that "limit". Borrowing ***Tobias***' language, he was not a "*predisposed inactive participant* in this scheme"; rather, he was "a *predisposed active participant*". ***Id.*** at 387 (emphasis in original).

Reynaldo Mendez's attempt to adopt his brother's contention on this point is ineffective. Gilberto Mendez's factual arguments regarding his own active participation status are, on their face, inapplicable to Reynaldo Mendez. (In any event, the evidence is sufficient to find that, like his brother, Reynaldo Mendez was an active participant in the charged crime.)

Likewise, Long and Parker cannot adopt fact-specific arguments relating to their conduct without separate briefing. *See infra*, note 22.

[10] The prosecutor stated at the suppression hearing, which immediately preceded the trial, that "[t]he videotape was just given to me two days ago."

[11] Reynaldo Mendez adopts Gilberto Mendez's contentions on this issue. In addition, he raises his own challenge to the denial of the continuance motion. Long and Parker adopt both Reynaldo Mendez's and Gilberto Mendez's treatment of the continuance issue. Gilberto Mendez adopts Reynaldo Mendez's argument on this issue as

At a suppression hearing immediately before jury selection, a law enforcement officer disclosed that the above described meeting in a car between Flores, Granato, and two undercover officers, on the day that Flores met Granato, had been videotaped by a surveillance team. He testified that, although the camera recorded sound, it was unlikely that the conversations were recorded because of the distance involved. The officer acknowledged that a listening device had been placed in the car in which the meeting took place, but stated that he did not know whether the videotape's audio track picked up the sounds relayed by the listening device; he later testified at trial that the listening device did not function properly, and that the conversations could not be heard.

Upon learning of the tape, the defendants moved unsuccessfully for a continuance to examine it. The government made it available that day, but no one associated with the defendants examined it until the following morning, when two members of the defense team viewed it.

At the outset of court on that day, the defendants again moved for a continuance. According to them, the tape did have an audio track, although it was essentially inaudible.[12] They wanted the continuance so that an audio expert could enhance the audio track, and then the conversation could be translated from Spanish to English. The district court denied the motion, stating:

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well.

[12] Certain words in Spanish allegedly were heard by defense counsel, such as "patron", or boss.

> We'll go ahead and continue, and if you want to find somebody that can do it, or [Kenneth Cruz's lawyer's] investigator maybe can try to put it all together. If he needs the assistance of the court interpreter, they can start looking at the video while we go on to trial. We'll do that, but continuance will be denied. Maybe they can, while we're here, decipher what's being said and put something together.

The defendants moved next for a mistrial on the basis that the government failed to produce ***Brady*** material timely. The court denied this as well.

1.

We first examine the contention that the court erred in refusing a continuance so that the tape's audio track could be enhanced.[13] Denial of a continuance is reviewed only for an abuse of discretion. ***United States v. Shaw***, 920 F.2d 1225, 1230 (5th Cir.), *cert. denied*, 111 S. Ct. 2038 (1991); ***United States v. Hopkins***, 916 F.2d 207, 217 (5th Cir. 1990); ***United States v. Mitchell***, 777 F.2d 248, 255 (5th Cir. 1985), *cert. denied*, 476 U.S. 1184 (1986). The precise question "is whether the district court ... unreasonably and arbitrarily insist[ed] on an expeditious trial." ***United States v. Jackson***, 978 F.2d 903, 912 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993). As usual, prejudice must be demonstrated. ***United States v. Peden***, 891 F.2d 514, 519 (5th Cir. 1989) (citing ***United States v. Houde***, 596 F.2d 696, 701 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979)); *see also* ***Jackson***, 978 F.2d at 912 ("Furthermore, the defendant has failed to show that he was materially prejudiced by lack of preparation time.").

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[13] This assignment of error is couched in due process terms.

And, that prejudice must be "serious". ***Mitchell***, 777 F.2d at 255; *see also* ***Shaw***, 920 F.2d at 1230 (requiring demonstration that denial of continuance "severely prejudiced" defendant).

Examining the totality of the circumstances, we do not find an abuse of discretion. *See generally* ***United States v. Uptain***, 531 F.2d 1281, 1285-86 (5th Cir. 1976) ("This issue must be decided on a case by case basis in light of the circumstances presented, particularly the reasons for continuance presented to the trial court...."). Admittedly, the tape did not come to light until immediately before jury selection. After two defense attorneys waited until the next day to view it, they represented to the court that the videotape *might* contain exculpatory statements, if only the audio track could be heard clearly. With the trial already under way, the district court made its interpreter available to the defense, and urged it to "decipher what's being said and put something together." Given the district court's belief that the trial would take "about a week",[14] we cannot say that it abused its discretion in proceeding with trial and urging defense counsel, with the assistance of the court's resources, to determine whether there was information on the tape that might be useful to the defense.

Appellants have failed to demonstrate severe prejudice. No record evidence supports the conjecture (by defense counsel) that audible phrases on the tape raise exculpatory inferences sufficient

[14] In fact, the trial began on Monday; the jury heard closing arguments that Thursday.

to cast doubt upon the jury's verdict.[15] Inasmuch as defense counsel did not have the videotape audio track enhanced, either during or after trial,[16] we are left with a routine surveillance tape that discloses nothing remarkable. Defendants cannot demonstrate material prejudice; in fact, they have made no real efforts toward that end.

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[15] Indeed, in an attempt to demonstrate prejudice, Gilberto Mendez states in his reply brief:

> Homero Flores and the undercover agents speak in Spanish, their voices are barely audible and difficult to understand. It is these voices, the barely audible Spanish-language voices of Flores and the agents, that appear to discuss role-playing and plans for the sting operation. As Gilberto Mendez's attorney pointed out at trial, the videotape of "the very first meeting between Homer Flores and three undercover agents ..." had "discussions pertaining to who would be responsible[,] who the patron would be ... and how the recordings would be made of when and where ..." These discussions contradicted Government witnesses' testimony that Homero Flores worked for Mendez and was not an undercover informant hired by the Government. Because the discussions were in Spanish and of poor sound quality, they could not be effectively used to impeach witnesses without sound enhancement and translation into English.

(Record citations omitted). Needless to say, this curious contention -- the sound quality precludes effective use of the videotape to impeach a witness, but this court should rely on the belief of defendant's trial counsel, who thought there might be exculpatory statements on the tape, and therefore reverse the district court -- strains credulity.

[16] Of course, defendants could have moved for a new trial if subsequent expert analysis discovered exculpatory evidence. *See* Fed. R. Crim. P. 33.

2.

Appellants also contend that the court erred in not granting a mistrial because of the late production of the tape, citing ***Brady*** as authority. We review the denial only for an abuse of discretion, ***United States v. Baresh***, 790 F.2d 392, 402 (5th Cir. 1986); ***United States v. Merida***, 765 F.2d 1205, 1220 (5th Cir. 1985), and find none.

Brady requires disclosure to the defendant of evidence that is both favorable to the defense and material either to guilt or punishment (a reasonable probability that the outcome would be different). ***United States v. Villarreal***, 963 F.2d 725, 730 (5th Cir.) (citing and quoting ***United States v. Bagley***, 473 U.S. 667, 674 (1985)), *cert. denied*, 113 S. Ct. 353 (1992). As discussed *supra*, we cannot discern the contents of the audio track with sufficient clarity to find that it satisfies both criteria. Needless to say, speculation and conjecture about the tape does not yield such a probability.

C.

Gilberto Mendez also challenges the district court permitting in evidence his earlier described statement, made during the negotiations for the marijuana, that he had killed two people in Houston. The first witness to testify about the statement was Granato. According to him, Mendez stated "[t]hat he had been forced to kill two people in Houston who had tried to rip him off."

[17] Later, the undercover officer who posed as Granato's source testified that Mendez stated that "he didn't want any problems, because he already killed two other people".[18] Gilberto Mendez now asserts that the admission of such evidence contravened Fed. R. Evid. 404(b) (generally excluding, without more, evidence of other crimes, wrongs, or acts) and 403 (requiring that relevant evidence be excluded if its probative value is substantially outweighed by prejudice, confusion, etc.).

Even assuming error in admitting the statements, it was harmless. *See* Fed. R. Crim. P. 52(a) ("Any error ... which does not affect substantial rights shall be disregarded."); Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling ... unless a substantial right of the party is affected"). As shown in the earlier discussion of the outrageous conduct claim, the evidence of Gilberto Mendez's active participation in the drug conspiracy is overwhelming. Even had the district court excluded the challenged testimony, the jury would have returned a guilty verdict.[19]

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[17] No objection was lodged then to Granato's testimony; after six additional questions, Gilberto Mendez objected and moved to strike "any testimony relating allegedly statements by Gilberto Mendez regarding past actions."

[18] Gilberto Mendez did timely object to this questioning.

[19] Pursuant to his blanket adoption, Reynaldo Mendez purports to adopt his brother's contentions on this issue. Even assuming that Reynaldo Mendez was somehow prejudiced by these statements, that prejudice obviously cannot be more harmful than that to Gilberto Mendez.

D.

Gilberto Mendez asserts that a mistrial should have been declared because of closing argument comments by the prosecutor:

> [Entrapment] is just a red herring that the defense counsel is trying to throw your way, to try to distract you and to try to take your mind off the evidence in this case. The evidence that these four defendants entered into an agreement to buy some marijuana -- a ton -- a metric ton of marijuana. It's not an amount that they're going to sit and smoke in one day. That's an amount that they're going to go back to Houston, and they're going to peddle that poison on the streets of Houston, or possibly some other community around here.

The immediate objection was sustained; the jury was instructed to disregard the comments; but, a mistrial was denied.

In the specific context of a charge of prosecutorial misconduct, for our abuse of discretion review, we determine whether the "remarks were improper and whether they prejudicially affected substantial rights of the defendants." ***United States v. Castro***, 874 F.2d 230, 232 (5th Cir.) (internal quotations and citation omitted), *cert. denied*, 493 U.S. 845 (1989); *see also* ***United States v. Parker***, 877 F.2d 327, 332 (5th Cir.), *cert. denied*, 493 U.S. 871 (1989); ***United States v. Hutson***, 821 F.2d 1015, 1021 (5th Cir. 1987). "[A] criminal defendant bears a substantial burden when attempting to demonstrate that improper prosecutorial comments constitute reversible error." ***United States v. Diaz-Carreon***, 915 F.2d 951, 956 (5th Cir. 1990); *see also* ***United States v. Young***, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone".)

Accordingly, "if we determine that the prosecutor's remarks did not prejudicially affect a defendant's substantial rights, such remarks do not constitute reversible error and it is not necessary to reach the question of their propriety." ***Castro***, 874 F.2d at 233 (citations omitted); ***Hutson***, 821 F.2d at 1021 ("In other words, a harmless error analysis applies."); ***United States v. Carter***, 953 F.2d 1449, 1457 (5th Cir.) (court must decide "whether the misconduct casts serious doubt upon the correctness of the jury's verdict") (citations omitted), *cert. denied*, 112 S. Ct. 2980 (1992). We consider three factors in so deciding: (1) the magnitude of the prejudicial effect; (2) the efficacy of cautionary instructions; and (3) the strength of the evidence of the defendant's guilt. ***United States v. Lowenberg***, 853 F.2d 295, 302 (5th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); ***United States v. Goff***, 847 F.2d 149, 165 (5th Cir.), *cert. denied*, 488 U.S. 932 (1988).

As discussed, the evidence of Gilberto Mendez's guilt was overwhelming; on this basis alone, we could conclude that any prejudice flowing from the comments was harmless. In addition, the jury was promptly instructed to disregard them. Also, it was instructed a short while later that "arguments made by the

attorneys [are] not evidence in the case".[20] Gilberto Mendez has failed to demonstrate that his substantial rights were affected.[21]

E.

In addition to adopted issues, Parker challenges the sufficiency of the evidence.[22] Under the more than well established

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[20] Similar, but more egregious comments, have been deemed harmless. *See* ***Castro***, 874 F.2d at 232-33, where the prosecutor stated:

> "Let's focus in on the families of the people in this district, the families who are going to have almost 950 to 1000 pounds of dope distributed in the streets."
>
> "He took a shot for greed like all these dope dealers do, both of them, and they lost, and it is time for you, I suggest, to send the message that we're not going to put up with it."
>
> "Whether it be Vacherie, Chalmette, or New Orleans, we don't want 950 to a thousand pounds of dope coming into this district. We are not going to put up with it."

Castro, 874 F.2d at 232. The district court overruled objections to these comments (thus, no cautionary instruction). ***Id.*** at 233 & n.8. Nevertheless, they were deemed harmless. ***Id.*** at 233.

[21] Reynaldo Mendez adopts this contention. Our review of the record discloses no basis for finding that the assumed error affected his substantial rights.

Also, Gilberto Mendez alleges that the cumulative effect of the murder statement ruling and the prosecutor's comments justify a new trial. Their cumulative effect was no more harmful than our separate consideration of them. Again, Gilberto Mendez was an active participant in the drug conspiracy; there was overwhelming evidence of his guilt.

[22] Of course, Reynaldo Mendez purports to adopt this argument. This adoption is ineffective; he cannot simply "adopt" Parker's sufficiency challenge; in many respects, the facts as to each differ greatly. Without separate briefing of the issue, we will not consider it to have been raised by Reynaldo Mendez. *See* ***Atwood v. Union Carbide Corp.***, 847 F.2d 278, 280-81, *reh'g in part*, 850 F.2d 1093 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989).

standard, the evidence is sufficient if, "[v]iewing [it] ... and the inferences that may be drawn from it in the light most favorable to the government", a reasonable jury could find guilt beyond a reasonable doubt. *See* ***United States v. Bell***, 678 F.2d 547, 549 (5th Cir. 1982) (en banc) (citation omitted), *aff'd*, 462 U.S. 356 (1983); *see also* ***United States v. Graham***, 858 F.2d 986, 990-91 (5th Cir. 1988) (applying standard), *cert. denied*, 489 U.S. 1020 (1989). Applying this most familiar standard to the drug conspiracy charge,

> ... the government must establish beyond a reasonable doubt that a conspiracy to violate the law existed, that [Parker] knew of the conspiracy, and that he intentionally joined and participated in it. The jury may infer a conspiracy agreement from circumstantial evidence, *and may rely upon presence and association, along with other evidence*, in finding that a conspiracy existed.

Id. at 991-92 (citations omitted; emphasis added); *accord* ***United States v. Pofahl***, 990 F.2d 1456, 1467 (5th Cir.) (contemplating sufficiency of evidence challenges to convictions obtained under 21 U.S.C. §§ 841(a)(1), 846), *cert. denied*, 114 S. Ct. 266 (1993). Of course, "[n]o evidence of overt conduct is required", and "[a] conspiracy agreement may be tacit"; the jury may infer the existence of such a tacit agreement from circumstantial evidence. ***Pofahl***, 990 F.2d at 1468 (internal quotation and citation omitted).

The jury could have reasonably concluded that Parker entered such an agreement. He drove the car in which Reynaldo Mendez arrived for a meeting with undercover agents. In addition, he paid for the rooms at a motel where he, Long, and the Cruzes were apprehended.

Of course, this alone would not be sufficient; "mere presence at the scene of the offense and his apparent association with the other conspirators is alone insufficient to sustain his conspiracy conviction". *See* ***United States v. Lechuga***, 888 F.2d 1472, 1477 (5th Cir. 1989). On the other hand, presence and association is evidence "that the jury may properly consider, along with other evidence, in finding him guilty of conspiracy." ***Id.*** (citation omitted).[23]

There was an abundance of additional evidence. First, at the meeting at which Reynaldo Mendez first appeared (in a car driven by Parker, who remained in it; the meeting was in a parking lot), Gilberto Mendez identified Reynaldo Mendez as an "investor", and stated that the "Gringo", identified as the driver of the car (i.e., Parker),[24] was Reynaldo Mendez's "partner". At that meeting, Reynaldo Mendez became upset about delays; he then walked away to talk to Parker. As he spoke to Parker, Parker was seen shaking his head from side-to-side in a "negative way".[25] Reynaldo Mendez returned, and told Granato that he and his "partner" wanted to see the marijuana before paying for it.

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[23] The jury was given two "mere presence" instructions. Obviously, it concluded that Parker was more than merely present at drug negotiations; it inferred reasonably that he was involved in the conspiracy.

[24] Granato testified that "el Gringo had already been to me identified as the driver".

[25] The Cruz brothers were "draped" over the back seat, "listening to the conversation" between Parker and Reynaldo Mendez.

After Granato told Reynaldo Mendez that they could probably travel to a ranch some 45 minutes away and see the marijuana, Reynaldo Mendez became upset again, and told Granato that the "Gringo" would not like that, and might leave. Reynaldo Mendez then stated that he needed to discuss developments with the "Gringo", whereupon he walked back towards Parker. After changing locations (from one parking lot to another), Reynaldo Mendez's discussions with the undercover agents continued. After more discussions concerning travel plans to the ranch, Reynaldo Mendez stated that he needed to talk to his "partner"; once again, he went and talked to Parker. The Mendezes then travelled to the ranch with Granato.

Similar behavior has been found to be sufficient to sustain a conspiracy conviction. *See* ***United States v. Mergerson***, 4 F.3d 337, 342 (5th Cir. 1993) ("only after [appellant] ... nodded at [a co-defendant] did [the co-defendant] consummate the heroin sale"), *petition for cert. filed*, (U.S. Dec. 21, 1993)(No. 93-7246); *see also* ***United States v. Blessing***, 727 F.2d 353, 356-57 (5th Cir. 1984) (affirming conspiracy conviction of a defendant when a co-defendant went to defendant's house after telling undercover agent he had to talk to his "money people", left, and then called agent to approve drug deal), *cert. denied*, 469 U.S. 1105 (1985).

In addition, during the period leading up to the transaction, Granato telephoned Gilberto Mendez at Room 236 of a "Motel 6". (Parker had rented a "U-Haul" truck that same day; a receipt from "U-Haul" bears the notation "BREAKDOWN AT MOTEL 6".) During the

telephone conversation, Gilberto Mendez told Granato that there were four investors; he would gather them together and travel to meet with Granato concerning the transaction. One day later, Granato spoke with Gilberto Mendez, who explained that he and his investors were late because of vehicle breakdowns.

Needless to say, viewing the evidence in a light most favorable to the government, a jury could reasonably infer that Parker conspired with the Mendezes and Long to distribute a ton of cocaine; in other words, that Parker was the fourth investor to whom Gilberto Mendez referred in his conversation with Granato.[26] (As discussed *supra*, note 2, the Cruzes' role, if any, was only to help transport the marijuana.)

F.

Long contends that the district court erred in granting, over his objection, an upward adjustment in computing his sentence, pursuant to U.S.S.G. § 2D1.1(b)(1).[27] The adjustment follows when a weapon is present, "unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. 2D1.1 comment. (n.3); *see also* ***United States v. Aguilera-Zapata***, 901 F.2d 1209, 1212-15 (5th Cir. 1990) (discussing enhancement).

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[26] Our disposition of Parker's claim disposes of one of Gilberto Mendez's sentencing claims. He contends that, if Parker's conviction is reversed, his "sentence should be reconsidered", because he would no longer be eligible for an upward adjustment for a "leadership role" under § U.S.S.G. § 3B1.1(a).

[27] Section 2D1.1(b) provides that "[i]f a dangerous weapon (including a firearm) was possessed, increase by **2** levels."

The presentence report (PSR) based its recommendation on the presence of a firearm and other weapons (a dagger and "throwing stars") in the motel room in which Long was arrested (along with Parker and the Cruzes). The district court adopted the PSR's findings, and also noted that the Mendezes possessed weapons at the time of their arrests.[28]

We review sentencing factual findings only for clear error. 18 U.S.C. § 3742(e); *see also* ***United States v. Ortega-Mena***, 949 F.2d 156, 160 (5th Cir. 1991). We are not left with "the definite and firm conviction" that the district court was mistaken in finding that Gilberto Mendez's possession of a weapon was foreseeable to Long. *See* ***Pofahl***, 990 F.2d at 1480 ("We will not deem the district court's finding to be clearly erroneous unless we are left with the definite and firm conviction that a mistake has been committed.") (citation omitted); *see also* ***Aguilera-Zapata***, 901 F.2d at 1215 ("sentencing courts may hold a defendant accountable for a co-defendant's reasonably foreseeable possession of a firearm during the commission of a narcotics trafficking offense"). Nor can we say that the court erred in finding that the weapons in the motel room should be considered under §2D1.1(b)(1); it was not

[28] Presumably, Gilberto Mendez was armed when Long drove him to the meeting from which he (Gilberto Mendez) departed with Granato. The Mendezes went to the ranch with Granato, weighed and moved the marijuana, and then, while returning from the ranch with Granato, were arrested.

"clearly improbable" that they were connected to the conspiracy. *See* U.S.S.G. §2D1.1 comment. (n.3).[29]

G.

Reynaldo Mendez asserts that he was a "minor participant", rather than a "supervisor", in the drug conspiracy; therefore, he contends that the district court erred by authorizing, over his objection, an increase under U.S.S.G. § 3B1.1(c),[30] instead of a reduction under § 3B1.2(b).[31] We review only for clear error. ***United State v. Hewin***, 877 F.2d 3, 4 (5th Cir. 1989) ("The determination of participant status is a complex fact question .... The district court's findings on this issue will be upheld unless clearly erroneous.") (citations omitted).

There was none. Reynaldo Mendez was identified by his brother as an "investor", an identification consistent with a major role. He inspected the marijuana to be purchased; indeed, he was to be responsible personally for distributing 1,300 pounds of it. Also, upon examining the marijuana with Gilberto Mendez, he insisted upon having "first choice" as to his share, because some of it was of "poor quality". In addition, he had made arrangements to transport the 1,300 pounds (although he negotiated later with Granato a price

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[29] As usual, Reynaldo Mendez adopts this argument. But, § 2D1.1(b)(1) was not applied to him.

[30] Section 3B1.1(c) provides that "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity [that involved five or more participants or was otherwise extensive], increase by **2** levels."

[31] Section 3B1.2(b) provides that "[i]f the defendant was a minor participant in any criminal activity, decrease by **2** levels."

that included Granato transporting it). Moreover, he negotiated with Granato concerning the transaction to purchase a ton of marijuana.

H.

Finally, Gilberto Mendez contends that the district court violated Fed. R. Crim. P. 32(c)(3)(D)[32] by failing to rule on his PSR objection to the amount of marijuana used in determining his base offense level.[33] According to the responding PSR addendum, the objection was supported by Gilberto Mendez's claiming that "there was no testimony regarding the weight of the marijuana, exclusive of the containers."[34] And, much of the discussion at the sentencing hearing focused on whether the actual weight was correct.

In the course of urging his objection at sentencing, and after discussing the weight of the marijuana in the absence of the containers, Gilberto Mendez stated:

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[32] Rule 32(c)(3)(D) provides, in part:

> If the comments of the defendant and the defendant's counsel ... allege any factual inaccuracy in the presentence investigation report ... the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

[33] Of course, Reynaldo Mendez purports to adopt this argument.

[34] Although the addendum does not discuss an objection by Gilberto Mendez as to his intent and ability to purchase the marijuana, he asserts that his written objections raised the issue. The written objections are not included in the record; but, in any event, it discloses that Gilberto Mendez raised the issue orally.

> In addition, we would rely on Section 2(d)1.4 in the application note one, which states in substance that if a defendant was not capable of producing, was not reasonably capable of producing any alleged, quantity, the court should exclude from the guideline calculation that amount which the court finds the defendant is not reasonably capable of producing.
>
> ....
>
> The court will remember ... -- in conjunction with our ... objection as far as the quantity -- this man is an indigent person. There was never any money that was found.

After hearing other objections from various defendants, the district court stated:

> With regard to the objections that have been raised, both written *and orally*, the court, *having heard the evidence presented before the jury* finds that the calculations with regard to the amount of drugs involved is accurate ....
>
> ....
>
> The court will overrule the objections with regard to the amount of drugs.

(Emphasis added).

Gilberto Mendez contends that this finding went only to the marijuana weight, and did not address whether he had the intent and capability to purchase it, within the meaning of U.S.S.G. § 2D1.1 comment. (n.12).[35] From this contention, he asserts that the

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[35] Although the oral objection at the sentencing hearing invoked § 2D1.4 comment. (n.1), that application note was moved, unchanged, to §2D1.1 comment. (n.12), prior to the sentencing hearing (February 1, 1993). We will refer to the language as § 2D1.1 comment. (n.12), which provides in pertinent part:

> In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where

district court failed to abide by Fed. R. Crim. P. 32(c)(3)(D) by failing to state its explicit resolution of contested facts relevant to sentencing.

Obviously, when a district court overrules a defendant's PSR objections, and adopts the PSR findings, it has, "at least implicitly, weighed the positions of the probation department and the defense and credited the probation department's facts. Rule 32 does not require a catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference." ***United States v. Sherbak***, 950 F.2d 1095, 1099 (5th Cir. 1992); *see also* ***United States v. Ramirez***, 963 F.2d 693, 706-07 (5th Cir.), *cert. denied*, 113 S. Ct. 388 (1992). Moreover, a district court may rely on facts adduced at trial in choosing to accept a PSR's findings. *See* ***United States v. Charroux***, 3 F.3d 827, 835-36 (5th Cir. 1993).

Given that both the PSR's factual resume and the trial yielded an abundance of evidence that Gilberto Mendez intended to possess a ton of marijuana, we find that the adoption of the PSR and reference to trial testimony implicitly resolved whether Gilberto Mendez had the requisite intent to purchase the amount of marijuana utilized in the PSR.

> the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

U.S.S.G. § 2D1.1 comment. (n.12).

And, the district court, having satisfied itself that Gilberto Mendez intended to possess that amount of marijuana, did not need to make specific factual findings that he possessed the financial wherewithal to do so. This court recently stated (while addressing a contention arising under the same guidelines application note):

> The defendants rely on the fact that they did not have sufficient capital to consummate the transaction. ... As a result, they argue that because they possessed only $5,000 at the time of the deal that they were incapable of possessing 750 pounds of marijuana.
>
> Applying the facts of the case, it seems clear that the defendants were involved in repeated negotiations aimed at securing possession of a large quantity of marijuana. During the course of the negotiations they were told that they would receive 750 pounds. The defendants were not perplexed, swayed, or hindered by that knowledge. ... Surely, they intended to possess the marijuana -- if they could get their hands on it.

United States v. Brown, 985 F.2d 766, 768-69 (5th Cir. 1993).

In the instant case, the facts were very similar. Repeated negotiations were made to purchase a ton of marijuana; Gilberto Mendez and his brother traveled to a ranch where they unloaded, weighed, and prepared it for transport. And, when Gilberto Mendez and his brother were made aware that the quantity exceeded a metric ton by 83 pounds, "they quickly offered to buy the additional eighty-three pounds". This hardly demonstrates concern regarding the amount of marijuana they intended to purchase.

In sum, the district court possessed ample evidence in the PSR and trial testimony to determine that the PSR utilized the

appropriate amount of marijuana. Accordingly, Rule 32 was satisfied.[36]

III.

For the foregoing reasons, the convictions and sentences are

AFFIRMED.

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[36] In any event, even if we were to find otherwise, we would find that Gilberto Mendez's substantial rights were not affected. *See* Fed. R. Crim. P. 52(a); *see also* ***United States v. Sparks***, 2 F.3d 574, 588-89 (5th Cir. 1993) (employing harmless error analysis to reject an appellant's allegation of Rule 32 error relating to the amount of drugs reasonably foreseeable to him), *cert. denied*, 114 S. Ct. 899 (No. 93-7055), *and cert. denied*, 114 S. Ct. 720 (1994) (No. 93-6720), *petition for cert. filed*, (U.S. Dec. 13, 1993) (No. 93-7084). The appropriate amount of marijuana was used; namely, the amount Gilberto Mendez intended to purchase. *See* ***Brown***, 985 F.2d at 768-69. As this court recently stated:

> Although here the district court neither cited [Rule 32] nor expressed its determination in the precise language of the rule, we decline to engage in a game of "Simon sez" with our overburdened, able and diligent district courts. To vacate and remand this case for resentencing would be to engage in a hollow act and to waste judicial resources which are sorely needed to deal with the ever increasing burden of matters of substance. Given the facts and circumstances of this case we decline to vacate [appellant's] sentence and remand for resentencing in more strict but no more effectual compliance with Rule 32(c)(3)(D).

United States v. Piazza, 959 F.2d 33, 37 (5th Cir. 1992).