IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20090

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LUIS MARTINEZ, ROBERTO LOPEZ,
and LIVIO GUERRERO,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93 211 7)

August 23, 1995

Before REAVLEY, KING and WIENER, Circuit Judges.

PER CURIAM:*

Luis Martinez ("Martinez"), Roberto Lopez ("Lopez") and Livio Guerrero ("Guerrero") were convicted for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1),(b)(1)(A), 846; and aiding and abetting the knowing possession with intent to

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2. Each defendant appeals his conviction and sentence. We affirm the district court's judgment of conviction and sentence.

I. BACKGROUND

A. Factual Background

On the morning of July 15, 1993, United States Customs agents and Houston police officers commenced surveillance of a two-story townhome at 13004 Wirevine in Houston. At 9:15 a.m., a white van pulled out of the garage behind the townhome. The agents and officers left the Wirevine townhome and followed the van to the parking lot of a closed Wendy's restaurant. An unidentified male exited the vehicle and was eventually picked up in a car. Approximately fifteen to twenty minutes later, Lopez and his cousin, Pedro Rivera, Jr. ("Rivera, Jr."), approached the parking lot on foot, entered the van, and drove it to a Days Inn three or four blocks away. The two men parked the van and entered the hotel. Some of the agents returned to the Wirevine townhome between noon and 12:30 to resume surveillance.

At approximately 10:15 a.m., Lopez paged Drug Enforcement Agency ("DEA") Special Agent Kelly Johnson, for whom Lopez had previously worked as a confidential informant. Lopez told Agent Johnson that he had traveled from Miami, Florida, to Houston to obtain a part for his truck and that someone named "Fito"[1] had

[1]The record also refers to "Fito" as "Vito" and "Feeto".

approached him about driving a van to the Days Inn on Highway 59 South. Lopez said that he had just dropped the van off at the hotel and that he had discovered four or five U-Haul cardboard boxes inside the van which he suspected contained cocaine because they smelled like medicine.

Agent Johnson asked Lopez to look inside the boxes but Lopez refused because he was afraid to approach the van due to the police surveillance. Lopez also told Agent Johnson that he had not contacted the agents with whom Lopez had previously worked in Florida. Johnson instructed Lopez not to take further action until Johnson determined who had the van under surveillance.

Agent Johnson then contacted U.S. Customs Special Agent John Wooley, the lead case agent, and related to Wooley what Lopez had told him. Shortly thereafter, Agent Johnson met with Agent Wooley to discuss the matter, including the fact that Wooley could arrest Lopez because Lopez was not working with the DEA. During this meeting, Lopez paged Agent Johnson to report that someone in Houston had instructed him to drive the van to Sharpstown Mall and another person in Miami had told him to contact the individual in Houston again. Agent Johnson and Agent Wooley then decided that Wooley and Houston police officer Joe Garcia, both fluent in Spanish, would meet with Lopez and Rivera, Jr. in the hotel room.

At approximately 11:30 a.m., Agent Wooley and Officer Garcia, dressed in plain clothes, went to the hotel room and knocked on the door. Lopez, who was in the room with Rivera,

Jr., answered the door and let them in the room. Agent Wooley, speaking Spanish, identified himself as a U.S. Customs Agent and advised Lopez that law enforcement officials were conducting an investigation, that Lopez had been observed driving the white van to the Days Inn, and that Agent Johnson had contacted Wooley outside of the hotel. When Agent Wooley asked Lopez about the van, Lopez reiterated what he had told Agent Johnson and also stated that he and Rivera, Jr. were DEA informants who had been instructed to find cocaine and contact the DEA.

Agent Wooley and Lopez then discussed Lopez' past experiences with the DEA. At that point, Agent Wooley challenged Lopez' story, whereupon Lopez admitted that he had arranged with someone in Miami to come to Houston to pick up 170 kilograms of cocaine. Lopez further admitted that Fito had delivered the white van to him and that he and Rivera, Jr. were supposed to unload the cocaine into another vehicle and leave the white van to be picked up so that more cocaine could be transported.

Lopez then agreed to make several phone calls for Agent Wooley to enable Wooley to identify who had dropped off the white van that morning. Agent Wooley recorded these phone conversations, which included veiled references to transporting cocaine. Agent Wooley also asked Lopez to set up a meeting with Fito at the hotel, but Fito never arrived.

At 2:00 p.m., Lopez had to check out of the Days Inn. Lopez drove the white van to a LaQuinta Inn, followed by Rivera, Jr. and the agents. While the van was parked at the LaQuinta Inn,

Lopez consented to a search of the vehicle, which revealed that the boxes contained cocaine. Agent Wooley testified that Lopez was detained at that point. At 3:30 p.m., Officer Garcia and Lopez drove the white van to a parking garage where Agent Wooley conducted another search. Agent Wooley noticed that the back seats of the van had been removed and that the boxes of cocaine had numbers written on them signifying the number of kilograms of cocaine in each box.

Later that afternoon, the same unidentified male who had driven the van from the Wirevine townhome to the Wendy's restaurant entered the van, drove it to a mall, and left it there. That evening, another unidentified male entered the van and drove it to an apartment complex. After a few minutes, the white van left the apartments accompanied by a brown van and the two vehicles traveled in tandem to the Interstate. Eventually both vans exited the Interstate, turned down a side street, and parked side-by-side while the drivers engaged in a short conversation. The vans then proceeded to another apartment complex where the drivers of both vans unloaded a cardboard box from one of the vehicles into an apartment. At this point, the vans left the apartment and went in different directions. The white van traveled to a residence at 634 Park Leaf Lane.

At 1:15 a.m. on July 16, 1993, a federal search warrant was executed at the Wirevine townhome. In executing the warrant, the officers announced in both English and Spanish that they were police officers and, upon receiving no response, kicked in the

front door, which apparently was either reinforced or being held from the other side. Once inside, the officers observed appellant Guerrero just inside the entry, facing the door and backing away from it. The officers tackled Guerrero to the floor and handcuffed him.

Meanwhile, Agent Wooley performed a security sweep of the townhome that lasted from one to two minutes. During the sweep, Agent Wooley observed two bucket seats near the front door, the fabric and size of which were consistent with the interior of the white van. He also observed that the townhome was sparsely furnished and that there was only one set of men's clothes, features that Agent Wooley testified were consistent with a "stash house" where drugs are stored. Finally, Agent Wooley noticed several U-Haul boxes stacked in a living room closet. Some boxes had been assembled and were empty while others were not assembled and in bundles, but they were all similar to the boxes that contained cocaine that were found in the white van.

After performing the security sweep, the agents brought Guerrero into the living room where Agent Wooley read him his rights in Spanish. Guerrero waived his rights and stated that he was a citizen of Panama. In fact, Guerrero is a Colombian citizen, but he testified at trial that he had claimed to be a Panamanian because he feared that the agents would "do something" to him if they learned that he was from Colombia. Agent Wooley testified that Guerrero told him that he lived at the Wirevine townhome with another man whose name he could not recall.

Guerrero, however, testified that he was questioned by someone other than Agent Wooley and that he had denied living at the townhome. It is undisputed that Guerrero denied any knowledge of the white van.

No narcotics were recovered from the townhome, but a canine trained to detect narcotics alerted to one of the U-Haul boxes found there. Another U-Haul box had been marked with the number "30" in a manner similar to the writing on the U-Haul boxes retrieved from the white van. A picture of Guerrero, his driver's license, and his identification card were seized from the townhome.

Later during the investigation, Guerrero's left palm print was discovered on one of the U-Haul boxes containing cocaine that the agents had retrieved from the white van. Also, the brown van that the agents had observed driving in tandem with the white van on the previous evening had been purchased in Guerrero's name six days earlier with $9,990 in cash.

Around mid-afternoon on July 16, 1993, a federal search warrant was executed at the Park Leaf Lane residence. After the officers kicked in the front door, two men, one of whom was a defendant in this action, jumped out of a bedroom window and were arrested at the scene. The white van was found parked in the garage at this residence. Among the items recovered during the search of this residence were a semi-automatic weapon, a large quantity of cocaine, empty boxes, and a piece of paper with the

name "Fito" written on it along with the same number that Lopez had given the agents earlier.

On Saturday, July 17, 1993, government informant Glen Spradlin was contacted by Pedro Rivera, Sr. (Lopez' uncle and Pedro Rivera, Jr.'s father), who told him that he had "a large concession of chickens," meaning cocaine, that he wanted Spradlin to move and that he needed to meet with Spradlin in Miami. Later that evening, Rivera, Sr. met with Spradlin and John Thomas, another confidential informant, and told them that he had 170 kilograms of cocaine in a motor home in a motel parking lot in the Houston area that needed to be picked up and moved. Rivera, Sr. explained that, while the first load had "gotten in," his son and nephew had been "busted" carrying the second load. Rivera, Sr. also stated that he wanted Thomas to travel to Texas with him to get the load so that he could sell it to obtain money for his son's and nephew's legal expenses.

Around 1:00 a.m., Spradlin and Thomas met with Rivera, Sr., who was accompanied by appellant Martinez. While Martinez remained in the car, the other three men agreed that Rivera, Sr. and Martinez would travel to Texas first and that Thomas would join them later. Rivera, Sr. made several telephone calls from Houston to Spradlin and Thomas over the next two days in which they discussed picking up the vehicle and moving it.

Thomas met with Rivera, Sr. and Martinez in Houston in a motel room at the Western Inn on the afternoon of July 20, 1993. Thomas initially met with Rivera, Sr. alone outside the room

where Thomas stated that he had to take "the stuff" back to Galveston. Once inside the room, and in Martinez' presence, Thomas asked if the "coke is real good," and Rivera, Sr. responded that it was "premium," "straight from Colombia," "not cut," and that it was "99 percent" cocaine. The two men also agreed that Martinez would drive Thomas to see the drugs. Thomas testified that during this part of the conversation, Martinez was either at the table or nearby. When Thomas told Martinez to drive him to the motor home, Martinez responded, "I'm not going to go into anything dangerous," which Thomas understood to mean that Martinez did not want to go close to the motor home.

Martinez drove Thomas to the motor home, which was parked at the Days Inn on Hooton Street, the same hotel where Agent Wooley had originally contacted Lopez. En route to the Days Inn, Martinez and Thomas discussed transacting a future marijuana deal. During the conversation, Thomas asked Martinez if he had seen "this stuff," meaning the cocaine, and Martinez answered, "yeah," stating that "they just brought it from South America," that it was "not old," and that "it is sealed."

When they reached the motor home, Martinez let Thomas out of the car next to the parking lot and quickly drove away. Thomas and another agent entered the motor home and found five boxes containing approximately 168 kilograms of cocaine. A subsequent search revealed that four of the boxes were marked with numbers signifying the number of kilograms of cocaine contained in each box. The motor home also contained a rental receipt and lease

agreement in the name of Roberto Lopez, another receipt in Lopez' name, and a cellular phone. Agents arrested Rivera, Sr. and Martinez at the Western Inn later that evening.

Subsequent investigation revealed that Lopez had rented the motor home on July 13, 1993, in Houston. Lopez had paid $1,435 in cash for the rental and the vehicle was due to be returned on July 20. The motor home rental contract contained Rivera, Jr.'s fingerprints.

B. Procedural History

Martinez, Lopez, and Guerrero were charged by indictment with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846 (Count One). They were also charged with aiding and abetting the knowing possession with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2 (Count Two charged Lopez and Guerrero, while Count Four charged Martinez).

The defendants were tried before a jury and were convicted on all counts. Martinez was sentenced to concurrent terms of 235 months of imprisonment, to be followed by five years of supervised release, and assessed $50. Lopez was sentenced to concurrent terms of 235 months of imprisonment, to be followed by five years of supervised release, fined $25,000, and assessed $50. Guerrero was sentenced to concurrent terms of 188 months of

imprisonment, to be followed by five years of supervised release, and assessed $50. All three timely appealed.

II. DISCUSSION

A. Motions to Suppress

Lopez argues on appeal that the district court erred in denying his motion to suppress statements he made to law enforcement officials after Agent Wooley and Officer Garcia met him at the Days Inn. Guerrero appeals the district court's denial of his motion to suppress statements he made after his arrest at the Wirevine townhome.

In an appeal from a district court's ruling on a motion to suppress, we review factual findings in support of the ruling under the clearly erroneous standard and legal conclusions de novo. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir.), cert. denied, 114 S. Ct. 155 (1993). Furthermore, we view the evidence in the light most favorable to the party who prevailed in the district court. United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993), cert. denied, 114 S. Ct. 2150 (1994). We view not only the evidence taken at the suppression hearing, but also the evidence taken at trial. Id.

1. Lopez

Lopez contends that the district court erred in refusing to suppress the statements he made at the Days Inn and the LaQuinta Inn because he made those statements while he was in custody and

before the agents had advised him of his constitutional rights.[2] Specifically, Lopez argues that the period of time he spent with Agent Wooley and Officer Garcia amounted to custody because it was lengthy, private, and "police-dominated." In support of this contention, Lopez points out that he was with the agents for two and one-half hours before he was formally detained. He also maintains that, because the agents had probable cause to arrest him during this period, he reasonably believed that he was not free to leave. Moreover, he notes that most of this time was spent behind closed doors inside a hotel room. Finally, he argues that the agents and officers dominated the situation by confronting him in his room, challenging his answers, instructing him to make phone calls, and following him from one hotel to another.

The government counters that Lopez was not in custody because he initiated the contact with the agents and cooperated with them in order to get "a better deal." First, the government points out that it was Lopez' calls to Agent Johnson that prompted Agent Wooley and Officer Garcia to contact Lopez at the Days Inn. In addition, the government would characterize the situation as cooperation rather than custody because Lopez permitted the agents to enter the hotel room and voluntarily

[2]The district court granted Lopez' motion as to statements he made after the agents actually viewed the cocaine in the white van, ruling that Lopez' interrogation had ripened into an arrest at that point.

answered their questions and complied with their requests to make phone calls in an attempt to avoid his own arrest.

We have held that a suspect is in custody for Miranda purposes when he has been placed under formal arrest or "when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." United States v. Bengivenga, 845 F.2d 593, 596 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988). Because Lopez' appeal concerns statements made before his formal arrest, only the "reasonable person" part of the test is relevant to our review. This reasonable person standard contemplates an individual who is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." Id.

In applying the reasonable person test, our inquiry has necessarily centered upon the particular facts and circumstances of each case. Accordingly, we are wary of drawing comparisons to other cases to achieve the correct result. Nevertheless, previous applications of this test are helpful in ascertaining some general factors that are germane to the custody analysis.

First, our cases have examined the duration of the restraint in evaluating whether it rose to the degree of a formal arrest. In Bengivenga, we held that a citizenship check at the border did not involve a degree of restraint associated with formal arrest in part because the checkpoint stop was a "brief detention," whereas an arrest is "more enduring." Bengivenga, 845 F.2d at

598. Similarly, we have held that a customs inspection at an airport was so temporary and brief as to fall short of a restraint that would trigger Miranda. United States v. Berisha, 925 F.2d 791, 797 (5th Cir. 1991).

On the other hand, we have expressly declined to establish any time limits beyond which a detention will ripen into custody per se. United States v. Harrell, 894 F.2d 120, 124 (5th Cir.), cert. denied, 498 U.S. 834 (1990). In Harrell, we held that the defendant's detention by immigration officials was not custodial, despite the fact that it lasted 60-75 minutes. The defendant urged a rule that any detention over one hour requires Miranda warnings as a matter of law. In rejecting this proposition, we noted that:

> We agree with the defendant that a detention of approximately an hour raises considerable suspicion. We note, however, that neither the agents nor the detainee accurately knows in advance his expected delay. Overreliance upon the length of the delay thus injects a measure of hindsight into the analysis which we wish to avoid.

Harrell, 894 F.2d at 124 n.1. We also rejected any per se rule because other factors must be considered in the custody analysis, implying that even a lengthy detention can be noncustodial under certain circumstances. Id. at 124.

Another factor we have considered is whether the restraint is "police dominated." Bengivenga, 845 F.2d at 598. "Police domination" in turn depends upon the public nature of a detention and the number of officers involved. Id. For example, a traffic stop is less police-dominated than a stationhouse detention

because it is subject to public scrutiny and usually only one or two officers participate. Id. We note, however, that even some private detentions, wholly removed from public view, do not rise to the level of custody. See, e.g., Harrell, 894 F.2d at 125 (finding that a home interrogation was noncustodial because a reasonable person, questioned at home, would not suffer a restraint that met the Bengivenga test).

We have also looked at whether the detainee had any advance notice of the restraint that would mitigate "the `subjective' fear a reasonable person might otherwise experience" when detained. Id. at 599. This factor is present in citizenship and immigration checkpoints, which travelers may learn of in advance and not be surprised when they are stopped. Harrell, 894 F.2d at 124; Bengivenga, 845 F.2d at 599. In this regard, we noted that the law enforcement presence at such checkpoints "actually assuages the reasonable person's perception of restraint." Bengivenga, 845 F.2d at 599.

Applying the reasonable person test to the instant case, we believe the facts do not support Lopez' contention that he was in custody between the time the officers first contacted him at the Days Inn and the point when the officers first observed the cocaine at the LaQuinta Inn. While it is true that the period Lopez spent with the officers was lengthy and generally not subject to public scrutiny, other factors depict a scenario that a reasonable person would not have understood to be a restraint on par with formal arrest.

At the outset, we find it particularly significant that Lopez initiated his contact with law enforcement by telephoning Agent Johnson from the hotel room. Although agents already had Lopez under surveillance, it was the phone call to Johnson that prompted the visit from Agent Wooley and Officer Garcia and the subsequent questioning. Furthermore, Lopez permitted the officers to enter into his hotel room and voluntarily cooperated with their investigation by answering their questions, making phone calls, and driving the van to another location. These facts undermine Lopez' argument that, because the agents had probable cause to arrest him, a reasonable person would not think he was free to leave. Regardless of whether the agents had probable cause,[3] a reasonable person in the context of having initiated the contact with law enforcement officials would not perceive that the questioning was custodial.

Second, while Lopez' contact with officers largely took place out of the public eye, it was in his own hotel room, as opposed to a stationhouse or other location controlled by the police. Just as we held in Harrell that an interrogation in the suspect's home was not custodial, the fact that the contact here occurred in a place where Lopez was lodged, albeit temporarily, contributed to the noncustodial nature of the questioning. In addition, only two officers were in the hotel room with Lopez and

[3]Agent Wooley testified that the agents did not have probable cause to arrest Lopez until they verified that the white van contained cocaine.

Rivera, Jr. Given these factors, we cannot agree with Lopez' contention that the questioning was "police-dominated."

Finally, we note that, although Lopez did not have advance notice of Agent Wooley and Officer Garcia's visit, he could hardly have been surprised that he was contacted by law enforcement officials after informing Agent Johnson that he had just driven to the hotel in a van that he suspected contained cocaine. The fact that Lopez initiated the contact substantially mitigated the "subjective fear" that a reasonable person in Lopez' situation would have experienced. Because these factors lead us to conclude that Lopez was not in custody before the agents observed the cocaine in the white van, we hold that the district court properly refused to suppress the statements Lopez made during that period.

2. Guerrero

Guerrero argues that the district court erred in refusing to suppress his statements because they were obtained as a result of an invalid warrantless arrest. Specifically, Guerrero contends that the agents did not have probable cause to arrest him at the Wirevine townhome. The government counters that the information it learned from its surveillance of the Wirevine townhome and the protective sweep of the premises provided sufficient basis for Guerrero's arrest.

Probable cause to arrest exists "when facts and circumstances within the knowledge of the arresting officer would

be sufficient to cause an officer of reasonable caution to believe that an offense has been or is being committed." United States v. Carrillo-Morales, 27 F.3d 1054, 1062 (5th Cir. 1994) (citing United States v. De Los Santos, 810 F.2d 1326, 1336 (5th Cir.), cert. denied, 484 U.S. 978 (1987)), cert. denied sub nom. Austin v. United States, 115 S. Ct. 1163 (1995). While this is an objective test, it does take into account the police officer's experience and expertise. United States v. Raborn, 872 F.2d 589, 593 (5th Cir. 1989). The quantum of evidence required for probable cause is "less . . . than would be required for conviction -- that is, less than proof beyond a reasonable doubt -- but more than a `bare suspicion.'" Id. (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). Accordingly, we must evaluate the information known to Agent Wooley at the time he read Guerrero his rights to determine whether he acted with probable cause.[4]

---

[4]The parties' briefs appear to indicate some disagreement over when Guerrero was actually placed under arrest. Guerrero's brief states that he was under full arrest when the officers first subdued and handcuffed him, yet in evaluating probable cause, includes the information Agent Wooley learned during the protective sweep that occurred after Guerrero was handcuffed but before he was read his rights. The government contends in its brief that this represents a change in Guerrero's position on appeal, and that therefore his claim must be reviewed for plain error. Guerrero's reply brief counters that it is the government who has changed its position because its response to Guerrero's motion to suppress states that Guerrero was arrested after struggling with one of the police officers who tackled him. At the same time, the reply brief places the arrest at a point after Guerrero was removed to the living room and read his rights. This confusion was apparently resolved at oral argument when counsel for Guerrero stated that she did not dispute that Guerrero was merely detained while the officers performed the protective sweep and that he was not under full arrest until

Agent Wooley was aware that the white van had left the Wirevine townhome that morning and that it contained approximately 170 kilograms of cocaine. At the time, Agent Wooley believed that the townhome had been under continuous surveillance since the van left, although there apparently was a break in surveillance between 9:15 a.m., when the van left, and noon or 12:30 p.m. When the agents executed the search warrant at the townhome, they received no response upon knocking and announcing their presence. Further, they had trouble breaking through the door because it was either reinforced or being held from the other side. When they finally made it through the door, they observed Guerrero facing the door and backing away from it.

While Guerrero was detained, Agent Wooley performed a protective sweep of the premises. He observed the two seats that apparently had been removed from the van. He also noticed several U-Haul boxes similar to those containing cocaine that he had discovered in the white van. Agent Wooley found Guerrero's photograph in the upstairs bedroom. Finally, he concluded from the townhome's sparse furnishings and the single set of men's clothes that the townhome was probably a "stash house" where drugs are stored. Because Guerrero was the only person on the premises, his picture was found in the upstairs bedroom, and

---

Agent Wooley read him his rights. Therefore, for purposes of our analysis, we accept as undisputed that Guerrero was permissibly detained while the agents performed their sweep, see Michigan v. Summers, 452 U.S. 692, 705 (1981), and that he was under full arrest at the time Agent Wooley read his Miranda warnings to him.

there was only one set of men's clothes, Agent Wooley linked Guerrero to the townhome and the criminal activity he believed had occurred there. Given this set of circumstances, we hold that Agent Wooley acted with probable cause in arresting Guerrero, and therefore, the district court did not err in denying Guerrero's motion to suppress statements he made after his arrest.

B. Sufficiency of the Evidence

Martinez and Guerrero both challenge the sufficiency of the evidence supporting their convictions.[5] The scope of our review of the sufficiency of the evidence after conviction by a jury is narrow. We must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994). We must consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied sub nom. Allen v. United States, 500 U.S. 936

[5]Lopez did not brief this issue nor did he adopt his co-appellants' issues on appeal. Nevertheless, the government treated Lopez as having briefed the issue because Lopez argues that, absent the statements he sought to suppress, there is no evidence linking him to the cocaine. In fact, Lopez made this argument to show that, if we ruled that his statements should have been suppressed, it was not harmless error for the district court to have admitted them. Because we hold that the district court properly denied Lopez' motion to suppress, we do not address his argument concerning harmless error.

(1991). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. Id. at 254. On the other hand, if the evidence, viewed in the light most favorable to the prosecution, gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, we must reverse the conviction. United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir.), cert. denied, 113 S. Ct. 330 (1992).

In order to prove conspiracy to possess narcotics with intent to distribute the government must prove beyond a reasonable doubt that (1) a conspiracy to possess narcotics with intent to distribute existed, (2) the defendant knew of the conspiracy and intended to join it, and (3) the defendant participated in the conspiracy. United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992). No proof of overt conduct is required. United States v. Hernandez-Palacios, 838 F.2d 1346, 1348 (5th Cir. 1988). Any of these elements, including knowledge, may be inferred from circumstantial evidence. United States v. Espinoza-Seanez, 862 F.2d 526, 537 (5th Cir. 1988).

To prove possession with intent to distribute narcotics, the government must prove beyond a reasonable doubt that (1) the defendant possessed the narcotics (2) knowingly and (3) with the intent to distribute. Pigrum, 922 F.2d at 255. "Possession of a controlled substance with intent to distribute can be actual or

constructive, and may be proved by circumstantial evidence." Id. In order to prove that a defendant has aided and abetted a crime under 18 U.S.C. § 2, the government must prove (1) the defendant associated with the criminal venture, (2) the defendant participated in the venture, and (3) the defendant sought by action to make the venture successful. United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991). We have recognized that, "[t]ypically, the same evidence will support both a conspiracy and an aiding and abetting conviction." United States v. Singh, 922 F.2d 1169, 1173 (5th Cir.), cert. denied, 500 U.S. 938 (1991).

1. Martinez

Martinez contends that there is insufficient evidence to support his convictions because there is no evidence that he ever entered the motor home, that he saw or touched the cocaine therein, or that he received any money or cocaine in any of these transactions. The government counters that Martinez' association with Rivera, Sr., his presence when statements were made by others about the quality of the cocaine, and his own statements about the cocaine that he made while transporting Thomas to the motor home are sufficient to sustain his convictions.

The record in this case contains ample evidence for a reasonable trier of fact to find that Martinez was guilty of the aiding and abetting and conspiracy charges beyond a reasonable doubt. Martinez was present when Rivera, Sr. and Thomas agreed

that Martinez would drive Thomas to the motor home, which contained approximately 168 kilograms of cocaine. Also, Martinez clearly knew that the motor home contained cocaine, stated that he had seen the cocaine, and attested to its quality. Finally, Martinez drove Thomas to the motor home. These facts provide sufficient basis for the aiding and abetting conviction. The existence of a conspiracy is supported by Lopez' connection to both the white van and the motor home, the fact that both vehicles were parked at the same hotel during the alleged conspiracy, and the similarity of the markings on the boxes found in the two vehicles and in the townhome. A reasonable juror could infer from Martinez' presence during some of the conspirators' conversations and his statements to Thomas about the cocaine that he knew of the conspiracy. That Martinez traveled with Rivera, Sr. to Houston, checked into the Western Inn with Rivera Sr.'s money, and drove Thomas to the cocaine support the inference that Martinez intended to join the conspiracy and participated in it. Given this evidence, we believe that a reasonable trier of fact could find Martinez guilty beyond a reasonable doubt of the conspiracy and aiding and abetting charges.

2. Guerrero

Guerrero argues that the evidence is insufficient to support his convictions because the government failed to show that he knew of the conspiracy or that he participated in the venture in

any way. The government counters that the evidence supports the inference that the Wirevine townhome was a stash house and that Guerrero was in charge of it. The government further contends that Guerrero's false testimony at trial bolstered its case against him.

While the evidence against Guerrero is almost entirely circumstantial, we believe that a reasonable trier of fact could find him guilty of the aiding and abetting and conspiracy charges. Guerrero's brief analogizes his situation to other cases where we have found insufficient evidence to support conspiracy and aiding and abetting convictions. As with the issue of custody, however, the fact-intensive nature of our review on a sufficiency appeal inevitably undermines somewhat the value of such comparisons. Accordingly, our discussion must focus on the record in this case.

The agents arrested Guerrero at the Wirevine townhome from which the white van containing cocaine had left that morning. Although mere presence at a crime scene is itself insufficient to sustain a conviction, we consider presence along with all other circumstances in determining whether a reasonable jury could make the inferences to support the defendant's convictions. United States v. Rosalez-Orozco, 8 F.3d 198, 201 (5th Cir. 1993). In this case, the agents testified that they believed Guerrero had been holding the door when they tried to enter the townhome. Inside the townhome, the agents found seats consistent with those that had been removed from the white van and U-Haul boxes similar

to those used to transport the cocaine in the van. One of the boxes was marked with the number "30" in a manner similar to those retrieved from the white van. A narcotics canine alerted to another box inside the townhome. Agent Wooley testified that the seats, the boxes, the sparse furnishings, the single set of men's clothing, and the fact that there were few cooking utensils or linens and no phone service indicated to him that the townhome was a "stash house" and not a residence as Guerrero had claimed.

Guerrero lied to the agents by claiming he was from Panama rather than Colombia because, according to his testimony, he did not want the agents to associate him with Colombia. Also, Agent Wooley testified that Guerrero stated he lived at the townhome with a man whose name he could not recall, although Guerrero denied speaking to Wooley or saying that the townhome was his residence. The jury was entitled to credit Agent Wooley's testimony in this regard. United States v. Gadison, 8 F.3d 186, 190 (5th Cir. 1993) (noting that the jury is the final arbiter of credibility). Guerrero's lie about his citizenship and explanation that he could not remember his roommate's name are part of the overall circumstantial evidence from which a reasonable trier of fact could infer guilt. Rosalez-Orozco, 8 F.3d at 201 n.1 (concluding that the defendant's "implausible explanation" contributed to an inference of guilt). Agents later discovered Guerrero's palm print on one of the boxes of cocaine they found in the white van. Also, title to the brown van that the agents had observed driving in tandem with the white van was

in Guerrero's name. Finally, Guerrero was present when the van was purchased in his name with $9,990 in cash. In sum, we find that this evidence provides sufficient basis for a reasonable trier of fact to infer that Guerrero knowingly and intentionally joined the conspiracy and participated in it. This same evidence is also sufficient to support Guerrero's aiding and abetting conviction.

C. Evidentiary Rulings

Guerrero's final argument on appeal is that the district court erred in admitting the opinion testimony of narcotics officers about the operating procedures of drug traffickers. Martinez adopts this argument and also contends that the district court erred in admitting evidence of the offenses of his co-defendants because its probative value was substantially outweighed by its prejudicial effect.

We review the district court's rulings on the admissibility of evidence for abuse of discretion. United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993); United States v. Jardina, 747 F.2d 945, 950 (5th Cir. 1984), cert. denied, 470 U.S. 1058 (1985). If we find an abuse of discretion, the next step in our inquiry is to determine whether the erroneous admission of evidence was harmless. In making such a determination, we must decide whether the inadmissible evidence actually contributed to the jury's verdict; we will not reverse unless the evidence had a

substantial impact on the verdict. United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993).

1. Opinion Testimony Regarding Drug Trafficking Operations

Guerrero and Martinez argue that the district court abused its discretion in permitting Agents Johnson and Wooley to testify, based on their training and experience, about the operating procedures of drug traffickers and the Wirevine townhome's resemblance to a "stash house." They contend that this evidence was irrelevant, speculative, not helpful to the jury, and so potentially prejudicial as to require reversal. The government counters that the operations of narcotics dealers is a permissible subject of expert testimony under Federal Rule of Evidence 702 and that the agents' testimony in this case assisted the trier of fact.

We have held that "an experienced narcotics agent may testify about the significance of certain conduct or methods of operation unique to the drug distribution business, as such testimony often is helpful in assisting the trier of fact understand the evidence." United States v. Washington, 44 F.3d 1271, 1283 (5th Cir.), cert. denied, 115 S. Ct. 2011 (1995). In Washington we cited United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992), as authority for this rule. The officer in Boney matched the defendants and their actions with paradigm roles in a drug operation, testimony which the court held not to amount to an impermissible opinion on the defendants' guilt. Id. at 631.

Agents Johnson and Wooley offered similar testimony in this case. They described how drug trafficking operations are organized and opined that the state of the Wirevine townhome suggested that it was a "stash house." It was permissible for the agents to analyze the evidence in this manner, based on their training and experience, in order to aid the jury's understanding without offering a direct opinion on the defendants' guilt. The district court did not abuse its discretion in admitting this evidence.[6]

2. Extrinsic Offense Evidence

Martinez also argues that "[t]he district court erred by admitting the commission of extrinsic offenses by co-defendants in controvention [sic] of Federal Rules of Evidence 403." Specifically, Martinez contends that it was error to admit certain "overwhelming extraneous evidence concerning errant drug informants, street values of cocaine and . . . covert activities of alleged [C]olumbian drug organizations" because its probative value was substantially outweighed by its prejudicial effect. Martinez' brief, however, offers no specific examples of evidence admitted at trial to support his contention, nor does it include

[6]The parties dispute the proper standard of review to be applied on this issue. The government contends that the appellants failed to make specific objections at trial to some of the testimony that they claim is inadmissible, and therefore, admission of that testimony must be reviewed for plain error. Appellants argue that they were not required to make those objections because they had already objected to similar testimony. Because we find that the trial court did not commit an abuse of discretion in admitting any of the testimony in question, we need not consider whether the stricter standard of plain error review should be applied.

any citations to the record. It is clear from the government's brief that this omission has prevented the government from responding to Martinez' argument.

The appellant's brief must contain the "contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Fed. R. App. P. 28(a)(4) (emphasis added). Because Martinez failed to do this, we do not consider the issue as properly before this Court. United States v. Abroms, 947 F.2d 1241, 1250 (5th Cir. 1991), cert. denied, 112 S. Ct. 2992 (1992).

D. Material Variance

Martinez' final argument on appeal is that: "The district court erred by admitting evidence consistent with a single conspiracy, to which the appellant Luis Martinez was not a party." Notwithstanding this caption, Martinez' briefing of the issue does not concern the erroneous admission of evidence; rather, Martinez contends that the government proved two separate conspiracies at trial. Because the indictment charged only one conspiracy, we thus construe Martinez' argument to be that there was a material variance between the government's proof and the indictment.[7]

A material variance occurs when there is a variance between the proof adduced at trial and the indictment, but the variance

[7]The government briefed the issue as if it were a material variance claim.

does not modify any of the essential elements of the crime charged in the indictment. United States v. Puig-Infante, 19 F.3d 929, 935 (5th Cir.), cert. denied, 115 S. Ct. 180 (1994). "We will not reverse a conviction for such a variance in the evidence unless 1) the defendant establishes that the evidence the government offered at trial varied from what the government alleged in the indictment, and 2) the variance prejudiced the defendant's substantial rights." Id. at 935-36 (quoting United States v. Jackson, 978 F.2d 903, 911 (5th Cir. 1992), cert. denied, 113 S Ct. 2429 (1993)).

The indictment charged a single conspiracy to possess with intent to distribute in excess of five kilograms of cocaine from on or about July 15, through on or about July 20, 1993. With respect to the proof, "[w]e must affirm the jury's finding that the government proved a single conspiracy unless the evidence and all reasonable inferences, examined in the light most favorable to the government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt." United States v. DeVarona, 872 F.2d 114, 118 (5th Cir. 1989). In making this determination, we examine (1) whether there was a common goal, (2) the nature of the scheme, and (3) whether the participants in the various transactions overlapped. Puig-Infante, 19 F.3d at 936 (5th Cir. 1994).

The government produced ample evidence that the cocaine loads seized from the white van, the motor home, and the Park Leaf Lane residence were related. The boxes of cocaine retrieved

from the van and the motor home bore similar markings indicating the number of kilograms in each. Agents followed the white van from the Wirevine townhome to the Days Inn hotel where the motor home was later found, and eventually to the Park Leaf Lane residence, where it was parked when they discovered cocaine on the premises. While no cocaine was found at the Wirevine townhome, it contained boxes similar to those found in the van and the motor home. A narcotics dog alerted to one of these boxes. Furthermore, Guerrero was arrested at the townhome and his palm print was found on one of the boxes taken from the white van. Lopez had rented the motor home on July 13 and was driving the white van two days later when agents discovered the cocaine in that vehicle. Rivera, Jr. accompanied Lopez in the white van and his fingerprints were found on the motor home rental receipt. Rivera, Sr. referred to the cocaine in the motor home and that in the white van as the "first load" and the "second load." Martinez traveled with Rivera, Sr. to Texas and was present when Rivera, Sr. and Thomas discussed their cocaine transaction. Martinez himself drove Thomas to the motor home and discussed the origin and the quality of the cocaine en route. This evidence provides sufficient basis from which a reasonable trier of fact could infer that a single conspiracy to distribute the three loads of cocaine existed. Accordingly, we hold that there was no

fatal variance between the indictment and the government's proof at trial.[8]

Even if Martinez could establish that some of the proof offered at trial varied from the allegations of the indictment, he must still prove that the variance prejudiced his substantial rights. In addressing this issue, we have noted that the indictment must provide the defendant with adequate notice to allow him to prepare his defense and must not leave him open to later prosecutions because the offense was not defined with particularity. Puig-Infante, 19 F.3d at 936 (citing United States v. Hernandez, 962 F.2d 1152, 1159 (5th Cir. 1992)). Where the alleged variance has been one between an indictment charging a single conspiracy and proof establishing multiple conspiracies, our concern has focused on "the danger of transference of guilt, i.e., the danger that despite demonstrating his lack of involvement in the conspiracy described in the indictment, a defendant may be convicted because of his association with, or conspiracy for other unrelated purposes, codefendants who were members of the charged conspiracy." Id. (quoting United States v. Hernandez, 962 F.2d 1152, 1159 (5th Cir. 1992)).

[8]Martinez contends that the government proved two conspiracies because it took the position in its trial memorandum that Rivera, Sr. and Martinez conspired with other defendants to steal the cocaine in the motor home from its owners. While it is true that the government alluded to this theory in a footnote, it maintained that one conspiracy to distribute the cocaine existed. Because the government's proof at trial supports an inference that there was a single conspiracy, we find Martinez' argument to be without merit.

In the present case, the district court instructed the jury that the indictment charged one conspiracy, and that the jury had to acquit any defendant it found not to be a member of the charged conspiracy, even though that defendant may have been a member of another conspiracy. The court also cautioned the jury to consider each defendant and each count separately and individually. We have held that such instructions provide adequate protection from the danger of transference of guilt where a single conspiracy is charged but the defendant is a member of an uncharged conspiracy. Id.; United States v. Guerra-Marez, 928 F.2d 665, 672 (5th Cir.), cert. denied, 502 U.S. 917 (1991). Therefore, we find that any variance between the proof at trial and the indictment did not affect the defendant's substantial rights.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence as to each of Martinez, Lopez, and Guerrero.