

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20179

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAMON RAMIREZ a/k/a
Fabian Ignacio Guez
in Custody,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93 245 1)

(May 9, 1995)

Before KING, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:*

Ramon Ramirez appeals his conviction by a jury on one count of possession with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(ii) and one count of conspiracy to possess with

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii) and 846. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence, viewed in the light most favorable to the verdict, indicates the following. On August 19, 1993, federal and state officers assigned to the High Intensity Drug Task Force (HIDTA) conducted surveillance of apartment 4307 of the Willow Creek Apartments in Houston, Texas. The apartment was leased in defendant Ramirez's name. At approximately 12:30 p.m., agents observed four individuals, including Ramirez, enter a grey Oldsmobile and drive to a nearby Chinese restaurant. Three of the four individuals entered the Chinese restaurant but Ramirez remained in the car and drove to Hobby Airport. Ramirez entered the airport and met an individual-- later identified as Moses Williams-- who had arrived via Memphis on Northwest Airlines without any luggage. Ramirez and Williams then drove to the Chinese restaurant where the other three men were waiting. The group then returned to apartment 4307.

At approximately 3:40 p.m., agents saw Ramirez and Williams leave the apartment and get into a white Mitsubishi driven by Ramirez. While following the Mitsubishi, agents temporarily lost contact when Ramirez made a sudden U-turn and sped into a subdivision. Approximately ten to twenty minutes later, agents spotted the Mitsubishi parked in the driveway of 4914 Tenderwood, along with two Nissan station wagons.

Ramirez and Williams were observed exiting the Tenderwood house, with Ramirez entering the Mitsubishi and Williams entering one of the Nissan station wagons, which officers observed to be riding low in the rear. Williams then followed Ramirez to another residence at 9422 Waving Fields, where Ramirez's common law wife, Clemencia Angulo ("Angulo"), got into the Mitsubishi driven by Ramirez. Williams then followed Ramirez and Angulo northbound on Interstate 45. After approximately one hour, agents contacted officers of the Texas Department of Public Safety (DPS), who stopped Williams' Nissan station wagon when they noticed that it lacked a front license tag. Williams showed the state trooper a Tennessee driver's license and consented to a search of the station wagon. The search uncovered a registration receipt which indicated that the Nissan was owned by Julio Cesar Castillo of apartment 8717 of the Willow Creek Apartments, an apartment leased by Ramirez and Angulo. Williams was taken to jail for driving with a suspended license and for not having proof of liability insurance.

During the stop of the Nissan, agents observed Ramirez's Mitsubishi circling the area. After making several passes, Ramirez proceeded south on a state highway and was pulled over by Texas DPS officers when he made a lane change without signalling. Ramirez informed the state officers that he was travelling to Houston from Buffalo, Texas. The state officers took Ramirez's driver's license and asked him to voluntarily follow them to the DPS station. Upon arrival at the DPS station, officers learned

that a consent search of the Nissan station wagon had uncovered 75 kilograms of cocaine hidden beneath the rear seat. Ramirez was then formally arrested by a federal agent and taken into state custody at the Walker county jail.

A routine inventory search of the Mitsubishi driven by Ramirez revealed an unloaded .38 caliber pistol in the glove compartment, bullets in the ashtray, and a potato chip bag which contained an Arkansas license plate and registration certificate for the Nissan station wagon. A search warrant was obtained for the 4914 Tenderwood residence. The search uncovered 24 kilograms of cocaine in the attic, over \$1 million in small denominations, two guns, and a money counting machine.

Williams informed the authorities that he worked as a cocaine courier for Curtis McDonald and Alice Johnson in Memphis, Tennessee. Williams further stated that McDonald and Johnson offered him \$20,000 to fly to Houston in order to meet with Ramirez and transport cocaine from Houston to Memphis, with one-half of the money coming from McDonald and Johnson, and the other half coming from Ramirez. The police asked Williams to make a controlled delivery of the cocaine to his co-conspirators in Memphis, but Williams evaded the authorities en route and hid for one week before turning himself in. The Nissan station wagon was located and the cocaine was recovered.

On September 27, 1993, a federal grand jury indicted Ramirez on one count of possession with intent to distribute more than five kilograms of cocaine and one count of conspiracy to possess

with intent to distribute more than five kilograms of cocaine. On November 23, 1993, a jury found Ramirez guilty on both counts. The district court sentenced Ramirez to 360 months in prison. Ramirez filed a timely appeal to this court, alleging seven points of error: (1) the district court erred in denying Ramirez's motion to dismiss the indictment on grounds that the Speedy Trial Act had been violated; (2) the warrantless search of Ramirez's Mitsubishi was unreasonable in violation of the Fourth Amendment; (3) the government's use of a peremptory challenge to exclude a prospective black juror violated the equal protection component of the Due Process Clause of the Fifth Amendment; (4) the district court erred in denying Ramirez's motion for a mistrial based upon the prosecution's failure to turn over a videotaped interview with Ramirez until after voir dire; (5) there is insufficient evidence to sustain the conviction of possession; (6) there is insufficient evidence to sustain the conviction of conspiracy; and (7) the district court erred in granting a two level upward adjustment in sentencing based upon possession of a dangerous weapon.

II. ANALYSIS

A. Speedy Trial Act Violation?

Ramirez contends that the district court should have dismissed his indictment due to a violation of the Speedy Trial Act. Specifically, Ramirez argues that because he was not indicted within thirty days of his arrest as required under 18

U.S.C. § 3161(b),¹ the charges against him should have been dropped pursuant to 18 U.S.C. § 3162(a)(1).²

After his arrest on August 19, 1993, Ramirez remained in the Walker County jail until he posted bail twelve days later, on August 31, 1993. That same day, a federal complaint was filed against Ramirez and on September 1, 1993, Ramirez was arrested again by federal authorities. On September 27, 1993-- thirty-nine days after his initial arrest and twenty-six days after his re-arrest-- a federal grand jury returned its two-count indictment against Ramirez.

The critical inquiry is to determine when Ramirez was "arrested" for purposes of triggering the thirty-day Speedy Trial Act clock. Ramirez contends that his arrest on August 19, 1993 triggered the Speedy Trial Act. The government, on the other

¹ 18 U.S.C. § 3161(b) provides in pertinent part:

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. . . .

18 U.S.C. § 3161(b).

² 18 U.S.C. § 3162(a)(1) provides in pertinent part:

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) . . . such charge against that individual shall be dismissed or otherwise dropped. . . .

18 U.S.C. § 3162(a)(1).

hand, contends (and the district court agreed) that the thirty-day clock was not triggered until September 1, 1993, the date Ramirez was re-arrested upon filed federal charges.

In this circuit, "an individual is not arrested under 3161(b) until he is taken into custody after a federal arrest for the purpose of responding to a federal charge." United States v. Johnson, 815 F.2d 309, 312 (5th Cir. 1987), cert. denied, 484 U.S. 1068 (1988); see also United States v. Charles, 883 F.2d 355, 356 (5th Cir. 1989) ("It is clear that this section is triggered only by federal action, by bringing federal charges."), cert. denied, 493 U.S. 1033 (1990). Thus, "[a]n arrest made by a state officer, even if state and federal officers are cooperating at the time, does not start the running of the thirty day time period." United States v. Taylor, 814 F.2d 172, 175 (5th Cir.), cert. denied, 484 U.S. 865 (1987).

Ramirez argues that the thirty-day Speedy Trial Act clock should have been triggered upon his initial arrest of August 19, 1993 because "[h]is incarceration and subsequent release on bond from the Walker County jail was a subterfuge agreed upon by Federal and State authorities acting in collusion with each other to further the federal drug investigation" In support of this proposition, Ramirez cites United States v. Sims, 779 F.2d 16, 17 (8th Cir. 1985), a case in which the Eighth Circuit noted that collusion between federal and state authorities can trigger the thirty day clock of the federal act, although no such collusion was found in that case. Likewise, the Ninth Circuit

has held that the Speedy Trial Act clock may be triggered by a state detention that is merely a ruse to detain the defendant solely for the purpose of bypassing the thirty-day time limit. United States v. Benitez, 34 F.3d 1489, 1494 (9th Cir. 1994), cert. denied, 115 S. Ct. 1268 (1995).

In the case at hand, Ramirez contends that collusion between federal and state authorities to subvert the federal act's thirty-day time limit is evidenced by the fact that federal authorities played an active, if not dominant, role in the investigation leading to Ramirez's arrest and the fact that no state complaint, information, or indictment was ever filed against Ramirez. Thus, according to Ramirez his detention under state control and in a state facility was "nothing more than a `ruse' to detain [Ramirez]" beyond the thirty day limit contained in the Speedy Trial Act. We disagree.

The district court held an evidentiary hearing on this issue and concluded that "[c]ertainly the facts of this case do not show any collusion by state or federal officials to avoid the effect of the Speedy Trial Act." As with all other findings of fact made by the district court, we may reverse only if it is proven to be clearly erroneous. See United States v. Harlan, 35 F.3d 176, 178 (5th Cir. 1994). As an initial matter, we note that mere cooperation by federal and state officials does not constitute collusion so as to characterize the arrest as federal and start the running of the Speedy Trial Act clock. Cf. United States v. Taylor, 814 F.2d 172, 175 (5th Cir. 1987), cert.

denied, 484 U.S. 865 (1987). Moreover, Ramirez has proffered no evidence to suggest that the state's failure to indict Ramirez was the result of a desire to subvert the time limits of the Speedy Trial Act. Indeed, in United States v. Charles, 883 F.2d 355 (5th Cir. 1989), cert. denied, 493 U.S. 1033 (1990), we faced a factual scenario arguably more suggestive of collusion than the present case yet held that there had been no violation of 3161(b). We stated:

The Collin County officials wrongfully held Charles for four months. Though they may have thought Charles was to be charged by federal authorities, and for that reason detained him, the fact remains that Charles was not under a federal detainer; he was not the subject of a federal complaint; there were no federal charges pending against him. The district court correctly described Charles' wrongful incarceration as "an unusual set of circumstances and an unfortunate set of circumstances." But Collin County's wrongful actions simply did not trigger the Speedy Trial Act, and we therefore affirm the district court's denial of Charles' motion to dismiss.

Id. at 356.

In short, Ramirez was arrested by a federal official on a state charge and immediately turned over to state custody. He was held in state custody until September 1, 1993, at which time he satisfied his state-imposed bond requirement and was released from the Walker County jail.³ After his release from jail, federal authorities followed Ramirez to Houston and arrested him

³ The fact that Ramirez was held in the Walker County jail pursuant to a state-imposed bond bolsters our conclusion that he was held in state, not federal, custody. It is also telling that in negotiating his bond amount, Ramirez's counsel dealt exclusively with the state district attorney, not federal authorities.

on federal charges. It was not until his arrest on federal charges that he was taken into federal custody and the Speedy Trial Act clock began ticking. Thus, because Ramirez was indicted twenty-six days after his arrest on federal charges, the thirty-day period provided in 18 U.S.C. § 3161(b) was not exceeded.

B. Fourth Amendment Violation?

Ramirez's next argument is that the warrantless search of his Mitsubishi automobile was "unreasonable" in violation of the Fourth Amendment. Specifically, Ramirez contends that the Texas DPS officer who stopped him had neither sufficient articulable facts upon which to justify an investigatory stop, see Terry v. Ohio, 392 U.S. 1, 21 (1968), nor probable cause to justify a full-fledged arrest. Thus, Ramirez argues, evidence discovered as a result of the inventory search of his vehicle were the fruit of an unconstitutional search and should have been suppressed. We find this argument to be without merit.

At the time Ramirez's vehicle was stopped, government agents surveilling his movements knew the following. Four confidential sources had informed HIDTA agents that Ramirez was involved in trafficking cocaine from Houston to Memphis. Specifically, they stated that couriers from Memphis would drive to Houston or fly into Hobby Airport via Northwest Airlines to meet with Ramirez and pick up cocaine. The cocaine would be loaded into one of four types of vehicles-- including Nissan station wagons-- and

driven back to Memphis, escorted by a member of Ramirez's organization.

Agents corroborated this confidential information by following Ramirez to Hobby Airport on August 19, 1993, where he met Moses Williams, a passenger who had arrived from Memphis on Northwest Airlines without any luggage. Agents watched the two men leave the airport, go to apartment 4307, and then on to 4914 Tenderwood. En route to the Tenderwood residence, officers observed the Mitsubishi driven by Ramirez made a sudden U-turn and increase its speed, in an apparent attempt to evade surveillance. The Mitsubishi was relocated by agents in the driveway of the Tenderwood residence, where agents watched the two men exit the residence and enter separate vehicles. Williams got into his Mitsubishi and was followed by Williams, who drove a Nissan station wagon which appeared to have a low riding rear end. After picking up Ramirez's common-law wife, the two vehicles proceeded in tandem, northbound on Interstate 45, in the direction of Memphis.

After DPS troopers pulled over the Nissan station wagon driven by Williams, agents observed Ramirez circle the area several times, slowing down as he neared the scene. When Ramirez began to leave the area on another road, agents stopped him when he failed to signal a lane change. Ramirez told the officer that he was coming from Buffalo, Texas, a statement known by the officer to be false.

The district court found that the DPS officers had reasonable suspicion to make a Terry investigatory stop under the totality of the circumstances. The district court also concluded that "when the defendant lied to the DPS officers and said that he was coming from Buffalo, that at that point they had probable cause to arrest him." Despite this finding of probable cause, however, the district court went on to conclude that Ramirez was not actually arrested until later that evening, when agents discovered cocaine hidden inside the Nissan station wagon.

Ramirez argues that he was actually arrested when the officers requested that he follow them to the police station. He argues further that this arrest was not supported by probable cause because the cocaine had not yet been discovered in the Nissan. Assuming arguendo that Ramirez was indeed arrested at the point when the officers asked him to follow them to the police station, we agree with the district court that the officers had probable cause to arrest him at that point.

Whether reasonable suspicion or probable cause exists are legal determinations which we review de novo. United States v. Harlan, 35 F.2d 176, 178 (5th Cir. 1994); United States v. Tellez, 11 F.3d 530, 532 (5th Cir. 1993), cert. denied, 114 S. Ct. 1630 (1994). Probable cause may be based upon facts and circumstances within the agents' collective knowledge so long as it is based on reasonably trustworthy information that warrants a belief that the defendant had committed or was committing a crime. Charles v. Smith, 894 F.2d 718, 723 (5th Cir.), cert.

denied, 498 U.S. 957 (1990). "A succession of otherwise `innocent' circumstances or events . . . may constitute probable cause when viewed as a whole." United States v. Muniz-Melchor, 894 F.2d 1430, 1438 (5th Cir.), cert. denied, 495 U.S. 923 (1990). The agents who directed that Ramirez be stopped had detailed information from four confidential informants which had been significantly corroborated by surveillance. In addition, Ramirez's behavior following the stop of the Nissan station wagon and his provision of false information regarding his origin of travel bolsters this conclusion. In short, Ramirez's behavior, in light of the information obtained from four confidential informants which had been substantially corroborated, warranted the conclusion that Ramirez was engaged in illegal drug trafficking. Accordingly, the arrest of Ramirez and the subsequent inventory search of his vehicle was supported by probable cause and was therefore reasonable within the meaning of the Fourth Amendment.

C. Batson Violation?

Ramirez's third point of error is that the government's use of a peremptory challenge to exclude a prospective black juror violated equal protection under the rule of Batson v. Kentucky, 476 U.S. 79 (1986) and United States v. Leslie, 813 F.2d 658, 659 (5th Cir. 1987) (extending the Batson rule to federal prosecutions under the Fifth Amendment's Due Process Clause).

In order to establish an equal protection violation under Batson, a defendant must establish a prima facie case of purposeful discrimination. Batson, 476 U.S. at 96. If this showing is made, the prosecutor must then establish that there was a legitimate, race-neutral reason for striking the prospective juror. Id. at 97-98. Once the prosecutor articulates a race-neutral reason for the peremptory challenge, the district judge must evaluate the prosecutor's explanation and determine if it is pretextual. United States v. Clemons, 941 F.2d 321, 323 (5th Cir. 1991). The defendant bears the burden of convincing the district court that the prosecutor's proffered reason is pretextual. United States v. Guerra-Marez, 928 F.2d 665, 673 n.9 (5th Cir.), cert. denied, 502 U.S. 917 (1991).

In the case at bar, the prosecutor used a peremptory challenge to strike Barbara Fuller, a twenty-four year old African-American bank clerk. When Ramirez objected to the strike of Ms. Fuller, the government responded "[w]e agreed to strike all people on the jury panel that were under the age of, well, twenty-five years and under before the panel even walked in and I had any idea as to race or color or anything" The district court explicitly found that Ramirez had failed to establish a prima facie case of discrimination and alternatively, even if such a prima facie showing had been made, the government had sufficiently articulated a race-neutral explanation for striking Ms. Fuller. We agree.

This court has acknowledged that age is a legitimate, racially-neutral basis for exercising a peremptory strike against a prospective juror. See, e.g., United States v. Bentley-Smith, 2 F.3d 1368, 1374 n.6 (5th Cir. 1993); United States v. De La Rosa, 911 F.2d 985, 991 (5th Cir. 1990) (listing age as a "valid reason" for excluding a prospective juror), cert. denied, 500 U.S. 959 (1991). Furthermore, Ramirez has not proffered any evidence to establish that the government's proffered race-neutral explanation was pretextual. Accordingly, Ramirez has not borne his burden of proving that the district court's finding was clearly erroneous and his claim must fail. See Clemons, 941 F.2d at 325 (noting that appellate court must review district court's credibility findings with regard to Batson challenges under clearly erroneous standard).

D. Withholding of Videotape.

Ramirez contends that the district court erred in denying his motion for a mistrial based upon the government's failure to deliver a videotape to defense counsel prior to voir dire. The videotape, which was made shortly after the arrest, contains incriminating statements made by Ramirez. When the jury was brought in for voir dire, defense counsel prepared the venire for the possibility that the videotape would be introduced into

evidence by informing them as to the law, admissibility, and effect of a statement of the accused.⁴

Sometime after voir dire but before opening arguments, the videotape was turned over for defense inspection and the defense discovered that the prosecution did not intend to use the videotape during trial. Ramirez contends that

[t]he net effect [of the late disclosure of the videotape] was prejudice and harm to the Appellant which resulted in the denial of due process. If the videotape had been timely produced, counsel would have known prior to jury selection that no purported statements of Appellant would be offered at trial. Instead, by qualifying a jury it was made readily apparent to the venire that there would be evidence involving incriminating statements of Appellant.

The district court denied Ramirez's motion for a mistrial based upon this delayed disclosure, stating that

⁴ Specifically, Ramirez's counsel informed the venire as follows:

In some cases, and I think in this case, law enforcement officers are going to say that Mr. Ramirez made a statement. Now, you might want to consider-- would be [sic] there be things that you might want to consider and think to yourself, would it be appropriate to consider such things as whether or not someone witnessed that statement, whether or not it was written down, whether or not it was recorded? Wouldn't the best way to show a jury what a person said be to record it so they could hear it and hear the circumstances under which it was taken?

You may be called upon to decide whether or not you think, one, a statement was given voluntarily, or two, whether a statement was given at all. Okay? So there [are] things that you may have to think about.

Is there anyone here that has a problem with the idea that they may introduce a statement of the person who is accused? Any feelings about that one way or the other? Okay. All right.

I don't find that there is any prejudice on the part, that there is any prejudice involved here in the late receipt of that August 19th tape that would justify a mistrial. If there is prejudice, given the totality of the facts, it's not sufficient to warrant a mistrial, and I don't find any bad faith on the part of the government here.

Informing the jurors with regard to the admissibility and effect of incriminating statements was a reasonable tactical decision by defense counsel to identify and prevent potential juror prejudice. See Lawrence v. Lensing, 42 F.3d 255, 258 (5th Cir. 1994). The risk that the prosecution would forgo use of certain evidence is a risk inherent in the trial process of which the defendant and his counsel should be fully aware. The prosecution's failure to inform Ramirez, prior to voir dire, that the videotape would not be introduced at trial did not render the trial fundamentally unfair so as to offend due process. Accordingly, the district court did not err in denying Ramirez's motion for a mistrial.

E. Sufficiency of the Evidence.

Ramirez argues that the evidence is insufficient to prove beyond a reasonable doubt that he possessed cocaine with an intent to distribute, or that he conspired to so possess. Specifically, he contends that the possession conviction cannot stand because he never actually or constructively possessed the cocaine found in the Nissan station wagon or the Tenderwood residence. He contends that the conspiracy conviction cannot stand because there was no evidence that he had a common unlawful

agreement with any other individual to violate the federal narcotics laws. With regard to both the possession and the conspiracy counts, Ramirez's bases his argument upon the line of cases which hold that mere association with a guilty party is insufficient to sustain a conviction for either possession or conspiracy. See United States v. Espinoza-Seanez, 862 F.2d 526, 536 (5th Cir. 1988) ("mere knowing presence" is insufficient to sustain conviction for conspiracy); United States v. Gardea Carrasco, 830 F.2d 41, 45 (5th Cir. 1987) (mere association with individual who controls drugs is insufficient to sustain conviction for possession).

In assessing a sufficiency of the evidence challenge, our review 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. McCord, 33 F.3d 1434, 1439 (5th Cir. 1994), petition for cert. filed, Feb. 21, 1995; United States v. Townsend, 31 F.3d 262, 266 (5th Cir. 1994), cert. denied, 115 S. Ct. 773 (1995). We must consider the evidence in the light most favorable to the verdict, including all inferences that can be drawn from the evidence. McCord, 33 F.3d at 1439; Townsend, 31 F.3d at 266. 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. McCord, 33 F.3d at 1439.

The elements of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) are (1) knowing, (2) possession, (3) with intent to distribute. United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992); United States v. Anchondo-Sandoval, 910 F.2d 1234, 1236 (5th Cir. 1990). Possession, which may be actual or constructive, exists when the defendant exercises, or has the right to exercise, dominion and control over the contraband itself or the premises where the contraband is found. United States v. Lopez, 979 F.2d 1024, 1031 (5th Cir. 1992), cert. denied, 113 S. Ct. 2349 (1993); United States v. Pigrum, 922 F.2d 249, 255 (5th Cir.), cert. denied, 500 U.S. 936 (1991).

In order to be convicted of conspiracy to possess narcotics with an intent to distribute, the government must prove, beyond a reasonable doubt, that (1) a conspiracy to possess narcotics with an intent to distribute existed; (2) the defendant knew of the conspiracy; and (3) the defendant voluntarily joined the conspiracy. United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994); United States v. Greenwood, 974 F.2d 1449, 1456-57 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). The agreement among conspirators need not be express; a tacit agreement will suffice. Greenwood, 974 F.2d at 1457. The uncorroborated testimony of a co-conspirator may be enough to prove, beyond a reasonable doubt, that the defendant knowingly participated in the conspiracy. United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir. 1994),

cert. denied, 115 S. Ct. 1113 (1995); Greenwood, 974 F.2d at 1457; United States v. Hernandez, 962 F.2d 1152, 1157 (5th Cir. 1992).

The prosecution proved more than "mere association" with Williams. The cocaine-loaden Nissan station wagon was picked up at Ramirez's Tenderwood residence and was registered at an address leased by Ramirez. A search of Ramirez's Mitsubishi revealed an Arkansas plate and registration for the Nissan station wagon. Williams testified that the Arkansas plate and registration was intended to be used in Arkansas while en route to Memphis in order to lessen the chances of being stopped by Arkansas police. Williams further testified that he was to be paid \$20,000 to transport cocaine from Houston to Memphis and that half of this fee was to come from Ramirez. According to Williams, Ramirez picked him up at the airport, led him to the location of the drugs, and agreed to accompany him as far as Dallas. Moreover, Williams testified that Ramirez asked Williams if he would be willing to carry twenty additional kilograms of cocaine in the Nissan station wagon-- a request which Williams declined. Williams testimony clearly indicates that Ramirez knew about the cocaine and exercised control over it. It also clearly indicates that Ramirez intended to pursue a common unlawful objective-- cocaine trafficking-- with Williams and others in Memphis. The jury in this case found the testimony of Williams to be credible; in the absence of clear error, we will not disturb this credibility assessment. United States v. Restrepo,

994 F.2d 173, 182 (5th Cir. 1993); United States v. Hoskins, 628 F.2d 295, 297 (5th Cir.), cert. denied, 449 U.S. 987 (1980).

Viewed in its totality and in the light most favorable to the verdict, the testimony adduced at trial was sufficient to permit a reasonable jury to conclude that Ramirez knew about the cocaine, exercised dominion or control over it, and intended to assist Williams and others in its distribution in Memphis. Accordingly, Ramirez's sufficiency of the evidence claims must fail.

F. Dangerous Weapon Enhancement.

Ramirez's final contention is that the district court erred in permitting a two-level upward adjustment in sentencing for possessing a dangerous weapon pursuant to U.S.S.G. § 2D1.1(b)(1). He argues that there was insufficient evidence that he possessed the .38 caliber gun found in his Mitsubishi because his common-law wife testified that the gun belonged to her. She also testified that, contrary to the testimony of Officer Waldrip who searched the vehicle, the gun was located in her purse, not the Mitsubishi's glove box. With regard to the two weapons (a .357 magnum and a .38 caliber pistol) found in the Tenderwood residence, Ramirez argues that there is no evidence that he was aware of their presence or that they were used in connection with the charged offenses. We are unpersuaded.

We review the district court's decision to apply the § 2D1.1(b)(1) enhancement only for clear error. United States v.

Vaquero, 997 F.2d 78, 84 (5th Cir.), cert. denied, 114 S. Ct. 614 (1993); United States v. Webster, 960 F.2d 1301, 1310 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992). The district court specifically found Officer Waldrip's testimony to be credible and determined that the two-level upward adjustment could be supported solely by the gun found in the Mitsubishi. Alternatively, the district court found that it was not clearly improbable that the two weapons found in the Tenderwood residence were connected to the charged offenses and determined that the two-level upward adjustment could be supported by these weapons as well.

The application notes to U.S.S.G. § 2D1.1 state that

[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

U.S.S.G. § 2D1.1, applic. n.3; see also United States v. Ortiz-Granados, 12 F.3d 39, 41 (5th Cir. 1994) (applying the "clearly improbable" standard of application note 3 to subsection (b)(1) of § 2D1.1). The crucial issue for purposes of the § 2D1.1(b)(1) enhancement is "the placement of the weapons and their ready accessibility." United States v. Villarreal, 920 F.2d 1218, 1222 (5th Cir. 1991). Moreover, despite Ramirez's contention that the gun was owned by his common-law wife, we have held that "[w]hat matters is not ownership, but access." United States v. Menesses, 962 F.2d 420, 429 (5th Cir. 1992).

In this case, the .38 caliber weapon was found inside the Mitsubishi driven by Ramirez. The district court explicitly credited the testimony of Officer Waldrip that the gun was found in the glovebox and the bullets were found in the ashtray. Williams testified that Ramirez agreed to escort him as far as Dallas for protection. It is clear that Ramirez had ready access to the gun during the commission of the offense and it is not clearly improbable that the gun was in the vehicle for purposes of protecting Williams and the cocaine. In short, the government proved that there was a temporal and spatial relationship between the weapon, the drug trafficking activity, and the defendant. See Mergerson, 4 F.3d at 350. Thus, the district court did not clearly err in granting an upward adjustment pursuant to U.S.S.G. § 2D1.1(b)(1).⁵

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

⁵ Because the two-level upward adjustment is independently justified by the .38 caliber weapon found in the Mitsubishi, we need not address the propriety of the adjustment with regard to the two additional weapons found at the Tenderwood residence.