UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20952

(Summary Calendar)

United States of America,

Plaintiff-Appellee,

versus

Enrique Rodriguez,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-94-0143-2)

September 19, 1995

Before HIGGINBOTHAM, DUHÉ and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant Enrique Rodriguez was convicted of 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) and 21 U.S.C. § 846. Rodriguez appeals his conviction, alleging that the evidence was insufficient to support the district court's verdict, and that the district court impermissibly relied on inadmissible evidence, rendering the trial fundamentally unfair. Finding no

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

error, we affirm.

I

The Guatemala Office of the Drug Enforcement Administration ("DEA") initiated an investigation after one of their agents was informed by a confidential informant ("CI-1") that he had been approached about transporting cocaine from Guatemala into the United States. Under DEA supervision, CI-1 eventually agreed to assist Victor Suarez (a/k/a Frank Suarez) ("Suarez") and his organization to transport the cocaine. Suarez informed CI-1 that he had approximately 300 kilograms of cocaine in Guatemala and agreed to pay CI-1 $2,000 per kilogram to transport the cocaine to Houston, Texas.

In May, CI-1 traveled to Guatemala City where he received approximately 165 kilograms of cocaine from a Suarez associate identified only as "El Gordo." Later that month, the two CIs flew to Houston where they met with Suarez and two of his associates, Beau Charles Martin and Antonio Borrego-Vidal (a/k/a Jose Rivera Santiago) ("Borrego"). At this meeting, they discussed the delivery of the cocaine to Houston and how the money would be exchanged. They agreed that half of the money would be transferred in Houston once the cocaine was delivered there, and the other half would be handed over in Chicago upon notification that the Houston delivery was completed.

At a meeting the next day, Suarez, Borrego and Martin supplied the CIs with a pager number that could be used to contact the drivers of the vehicles to be used to transfer the cocaine in

Houston. Telephone toll records reflect that a couple of days later, two calls were made from Rodriguez's home telephone to this contact number. The records also reflect that during the months preceding the final June 1st delivery in Houston, several telephone calls were made from Rodriguez's home telephone to cellular telephones used by Suarez in Miami, as well as telephone calls made by Suarez to Rodriguez's home and cellular telephone.

In the evening of June 1st, CI-1 met with Borrego and Martin at a Houston shopping center in order to receive half the money and turn over the cocaine hidden in the vehicles supplied by Suarez. CI-1 received over $232,000 wrapped in brown paper and marked with either "10KK" or "6K," depending on whether the bundle contained $10,000 or $6,000. The keys to the vehicles where not given to Borrego and Martin until word came from Chicago that another confidential informant ("CI-2") had received the second half of the payment for the cocaine. The telephone records reflect that during this time several telephone calls were placed to Borrego and Martin's pager and cellular telephone from Rodriguez's residence.

Suarez at this time was at Rodriguez's residence in Chicago and attempted to convince CI-2 to pick up the second half of the money at Rodriguez's. CI-2, however, managed to persuade Suarez to deliver the money to CI-2's room at the Marriott Residence Inn in suburban Chicago. Rodriguez eventually came on the phone and took down the directions to the Marriott. The Marriott room was equipped with video and audio equipment for law enforcement agents to monitor and record the money exchange.

Suarez and Rodriguez arrived at the Marriott room together. When Rodriguez entered the room, he was carrying a brown shoulder bag. Rodriguez opened the bag and, speaking to CI-2 in Spanish, mentioned an amount roughly approximating the amount expected by the undercover agents. The shoulder bag was later found to contain approximately $202,000 in packaged bundles marked "10k." During this time, Suarez was in communication over the phone with the people in Houston and eventually the vehicles containing the cocaine were released. In the hotel room, Rodriguez and Suarez engaged in a conversation with CI-2 in which they repeatedly stated how disgusted they were with how the transaction was going and intimated that they were unsure whether they would be doing business again in the future.

During the events in Chicago, Suarez stayed in a Quality Inn hotel room rented by Rodriguez in his own name for the period May 30 through June 5. When Borrego was arrested in Houston, he was found to be in possession of Rodriguez's business card, on the back of which was written the telephone number of his Chicago residence. Rodriguez's home telephone number was also stored in the memory of the pager seized from Borrego.

A federal grand jury indicted Rodriguez, Suarez, Borrego and Martin for conspiring to possess with the intent to distribute over five kilograms of cocaine and for aiding and abetting in possession with the intent to distribute the cocaine. The Government elected to proceed only on the conspiracy charge. After his codefendants pleaded guilty, Rodriguez waived his right to a jury trial.

The district court found that the Government proved beyond a reasonable doubt that Rodriguez was guilty of conspiring to possess with the intent to distribute over five kilograms of cocaine. Rodriguez was sentences to 292 months imprisonment, 10 years supervised release, a $25,000 fine and the $50 special assessment. Rodriguez challenges his conviction, contending that the evidence was insufficient to support the district court's finding, and that the court impermissibly relied on the notice to enhance his penalty filed by the Government and on his codefendants' guilty pleas.

II

Rodriguez asserts that the evidence was insufficient to support his conviction for conspiracy to possess with intent to distribute cocaine. He does not deny that a conspiracy existed. Instead, Rodriguez argues that the evidence did not establish beyond a reasonable doubt that he was a knowing participant in the conspiracy. In reviewing the ultimate finding of guilt by the district court, we apply a "substantial evidence test." *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993), *cert. denied*,__ U.S. __, 114 S. Ct. 2150, 128 L. Ed. 876 (1994). It is not this court's function "to make credibility choices or to pass upon the weight of the evidence. The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty. . . ." *Id.* (internal citations and quotations omitted). In applying this test, we view the evidence in the light most favorable to the government and defer to any reasonable inferences

of fact drawn by the district court. *Id.* Moreover, our review under the substantial evidence test makes no distinction between direct and circumstantial evidence. *Id.*

A conviction for conspiracy requires the Government to prove beyond a reasonable doubt: (1) that a conspiracy existed; (2) that Rodriguez knew of the conspiracy; and (3) that Rodriguez voluntarily participated in the conspiracy. *Id.* at 1157; *United States v. Rodriguez-Mireles*, 896 F.2d 890, 892 (5th Cir. 1990). Knowledge and voluntary participation may be inferred from a collection of circumstances. *Cardenas*, 9 F.3d at 1157; *United States v. Espinoza-Seanez*, 862 F.2d 526, 537 (5th Cir. 1988). While "mere presence at the scene of the crime or a close association with a co-conspirator alone cannot establish voluntary participation in a conspiracy," presence and association are both factors which may be relied upon to find that the defendant engaged in conspiratorial activity. *Cardenas*, 9 F.3d at 1157.

There is substantial evidence to support the district court's implicit finding that Rodriguez knowingly and voluntarily participated in the conspiracy. Suarez and Rodriguez were together at Rodriguez's residence when Suarez was negotiating the final money transfer with one of the confidential informants. Carrying the bag containing the money, Rodriguez accompanied Suarez to the Marriott Residence Inn in suburban Chicago where the undercover agents were waiting for them.

Once in the room at the Marriott, Rodriguez made a statement to the confidential informant as to the amount of money in the bag

corresponding roughly to the amount expected by the undercover agents. The should bag was found to contain packaged bundles marked "10K" which together amounted to approximately $202,000.[1] A conversation ensued between Suarez, Rodriguez and the confidential informant during which both Suarez and Rodriguez expressed their displeasure with the way the transaction was going.[2] This conversation and Rodriguez's handling of the money strongly suggests that he knew about the nature of the transaction and that he freely chose to take part in the conspiracy.

While Rodriguez's participation in the money transfer at the Marriott hotel may be the most important piece of evidence establishing his knowledge and voluntary participation in the conspiracy, it is not, as Rodriguez argues, the only evidence supporting his conspiracy conviction. The Quality Inn hotel room where Suarez stayed during his time in Chicago had been rented by Rodriguez and was registered in his name. When Borrego was

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Two Drug Enforcement Agents testified that, in their experienced opinion, individuals in the drug trade do not conduct their business around persons who are not trusted. Another agent opined that the main deal makers use trusted associates, who have knowledge of what is happening, to make travel arrangements, carry the drugs and money, and complete other small tasks. *See United States v. Gallo*, 927 F.2d 815, 821 (5th Cir. 1991) (jury could reasonably conclude from evidence that defendant knew he was transporting approximately $300,000 and therefore that he also knew the object of the conspiracy).

According to the testimony of one of the undercover agents present at the Marriott:

> [C]onversation was engaged in by [CI-2] and Mr. Rodriguez about how they were unhappy with the way the deal was going, that it was going drawn out way too long and that this was taking too much time for the transaction to take place in Houston while we were waiting for our money here, and that was just not a good way to do business. At that time, both Mr. Suarez and Rodriguez continued to reiterate their disgust with how the ultimate business transaction was going with the delivery of the cocaine in Houston.

Record on Appeal, vol. 1, at 142-43.

arrested he was found to be in possession of Rodriguez's home phone number. During the time period in which the transaction was being negotiated, several telephone calls were placed to and from Rodriguez's home and Suarez's cellular telephone. The evidence also reflects that several calls were placed from Rodriguez's residence to the contact numbers provided by the undercover agents. All of this evidence further supports the inference that Rodriguez knew about the cocaine transaction being negotiated.

We conclude that the evidence at trial, when viewed in the light most favorable to the government, is substantial enough to support the district courts finding that Rodriguez knowingly and voluntarily participated in the conspiracy to possess with an intent to distribute cocaine.

III

Rodriguez also presents a somewhat confused argument that the district court impermissibly considered (1) a prior conviction contained in Rodriguez's penalty enhancement notice, and (2) the guilty pleas of his codefendants, and that the combination of these factors denied his right to a fair trial.

While organizing themselves for opening statement, but before beginning his opening statement, the Assistant U.S. Attorney ("AUSA") clarified for the record that the Government had filed a notice of intent, upon Rodriguez's conviction, to seek enhancement of Rodriguez conviction, as required under 21 U.S.C. § 851.[3]

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[3] Section 851 states in relevant part:

No person who stands convicted of an offense under this part shall

Rodriguez's counsel moved for mistrial, contending that the Government improperly mentioned the filing of this enhanced penalty notice and suggested that it "may carry with it some inherent prejudice which the defendant should not suffer from at this point in time."[4]

Rodriguez also argues, on the basis of a comment made by the district court during opening statements, that the court impermissibly relied upon the factual bases of his codefendant's guilty pleas to find Rodriguez guilty. As the AUSA began his opening statement, the district court interrupted him and informed him that it was unnecessary to reiterate all of the facts already recited at the arraignment and directed the AUSA instead to focus his attention of the facts as they related specifically to Rodriguez.[5] Finally, Rodriguez argues that the combination of

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be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States Attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon . . . .
21 U.S.C. § 851.

Rodriguez argues on appeal that Rule 49 may establish the error in the Government's action. Rule 49(e) states:

> A filing with the court pursuant to 18 U.S.C. § 3575(a) or 21 U.S.C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge or United States magistrate judge in the district, except that in a district having a single judge and no United States magistrate judge, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

Fed. R. Crim. Proc. 49(e). Because we hold that the error, if any, was harmless, we do not need to decide whether this provision is applicable.

The district court stated:

> Let me say, Mr. [AUSA], excuse me for interrupting you, if what you are suggesting is you expect to prove the matters that have been generally

these factors denied him a fundamentally fair trial.

The denial of a motion for mistrial is reviewed for abuse of discretion. *United States v. Coveny*, 995 F.2d 578, 584 (5th Cir. 1993). In moving for a mistrial, Rodriguez raised the propriety of the Government calling the court's attention to the filing of the notice of enhancement and the alleged inherent prejudice from doing so. This court presumes that a judge, sitting as the trier of fact, disregards inadmissible evidence and relies only upon admissible evidence in making the determination of guilt. *Cardenas*, 9 F.3d at 1156. "Any error the judge makes in admitting evidence is thus harmless if there exists other admissible evidence sufficient to support the conviction." *Id.* Thus, even if we assume that there was error here, it was harmless in light of the substantial evidence sufficient to support the conviction. Therefore, there was no abuse of discretion.

There is no evidence in the record that the district court in fact considered either the penalty enhancement notice or the codefendant's guilty pleas in finding Rodriguez guilty. Other than these two statements, Rodriguez has pointed to nothing in the record that even suggests that the district court impermissibly considered either of these factors. Rodriguez attempts to rely on vague inferences that the district court may have considered this evidence. We presume the contrary and therefore hold that there is

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recited already in the rearraignments that have taken place, then I won't trouble you to reiterate that. I thought that if you wanted to focus upon the evidence that would pertain particularly with respect to this defendant and how that ties in to the conspiracy, then that would be more helpful, I should think.
Record on Appeal, vol. 4, at 13.

no evidence to support Rodriguez's claim that he was denied a fair trial.

IV

For the forgoing reasons, we AFFIRM Rodriguez's conviction.