IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30435

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUILLERMO LEON-LEON, RAUL VINCENTE BAYLON PAREDES, WILLIAM TELLO VALERO and JORGE SALINAS-SILVESTRE,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana
(CR-94-003-M)

(June 15, 1995)

Before JOLLY and BENAVIDES, Circuit Judges, and FITZWATER[*], District Judge.

PER CURIAM:[**]

The defendants appeal their convictions and their offense levels, alleging several errors by the district court. Finding no reversible error, we affirm.

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[*] District Judge of the Northern District of Texas, sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

Codefendants William Tello-Valero (Tello), Jorge Salinas-Silvestre (Salinas), and Raul Vicente Baylon-Paredes (Baylon) were Peruvian Navy sailors, and Juan Carlos Martinez-Hidalgo (Martinez) and Guillermo Leon-Leon (Leon) were civilian citizens of Peru. While attempting to smuggle cocaine transported by a Peruvian naval ship docked in New Orleans, Louisiana, to sell to undercover customs agents, the defendants were arrested.

On January 6, 1994, a grand jury charged Leon, Salinas, Tello, Baylon, and Martinez each with one count of conspiring to possess with intent to distribute approximately 34 kilograms of cocaine hydrochloride in violation of 21 U.S.C. §§ 841(a)(1) and 846, and each with one count of possessing with the intent to distribute 34 kilograms of cocaine hydrochloride in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. § 2. Martinez pleaded guilty. A jury found the remaining defendants guilty of both charges. The district court sentenced the defendants to the following terms of imprisonment: 210 months (Leon); 180 months (Tello); and 151 months each (Salinas and Baylon).

They each appeal their convictions and/or the offense level of the sentence imposed. Leon argues that the district court erred in finding that he was a manager/supervisor pursuant to U.S.S.G. § 3B1.1, that the court erroneously refused his proposed instruction on the law of duress or coercion, and that the court's instructions regarding the juror's "common sense" lessened the government's

burden of proof. Salinas argues that the district court erred in refusing to sever his trial from that of codefendant Tello, that his confession was involuntary and should have been suppressed, and that his offense level should have been decreased for being a minimal or minor participant pursuant to U.S.S.G. § 3B1.2. Baylon, Salinas, Tello argue that the evidence was insufficient to convict them of these drug offenses. Baylon and Salinas, furthermore, contend that the district court impermissibly restricted the cross-examination of the government informant. Finally, Tello asserts that the district court erred in denying his motion to suppress the evidence seized in the warrantless search of his quarters on the Peruvian naval ship. We will deal with each issue in turn.

II

A

Leon contends that the district court erred in enhancing his base offense level by three levels for being a manager/supervisor pursuant to § 3B1.1. He asserts that there was insufficient evidence to support such a finding. We will not disturb a district court's factual finding that a defendant was a manager/supervisor pursuant to § 3B1.1 unless it is clearly erroneous. United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989).

We find that this argument is without merit. The record is replete with statements by witnesses indicating that Leon led the operation. Specifically, there was evidence to show that: his check backed the orchestrated bribery of the consulate for a visa;

he was the boss of Martinez; he was a boss in Peruvian organized crime; he asserted ownership of the cocaine; and he instructed the undercover agents to evade police. Id. These facts demonstrate that the district court did not clearly err in assessing the three-level increase in Leon's offense level for his leadership role.

B

Leon contends that the court erroneously refused an instruction on the law of duress or coercion.[1] We review jury instructions for an abuse of discretion. United States v. Tomblin, 46 F.3d 1369, 1378 (5th Cir. 1995). "`The refusal to give a jury instruction constitutes error only if the instruction (1) was substantially correct, (2) was not substantially covered in the charge delivered to the jury, and (3) concerned an important issue

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[1]Leon requested the following instruction:

> (1) One of the questions in this case is whether the defendant was coerced, or forced, to commit the crime.
>
> (2) Coercion can excuse a crime, but only if the defendant reasonably feared that he [or others] would immediately be killed or seriously hurt if he did not commit the crime, and there was no reasonable way for him [or the others] to escape.
>
> (3) The government has the burden of proving that the defendant was not coerced. For you to find the defendant guilty, the government must prove that his fear was unreasonable. In other words, the government must prove that it was not reasonable for him to think that committing the crime was the only way to save himself [or others] from death or serious bodily harm. Unless the government proves this beyond a reasonable doubt, you must find him not guilty.

Leon's Record Excerpts (case cites omitted) (brackets in original).

so that the failure to give it seriously impaired the defendant's ability to present a given defense.'" Id. at 1378-79 (quoting United States v. Pennington, 20 F.3d 593, 600 (5th Cir. 1994)) (other citations omitted). The government does not assert that the instruction was substantially covered in the charge submitted to the jury, and, thus, we need only to look to the first and third requirements.

The government argues that Leon failed to make the requisite factual showing to warrant the instruction and that his requested instruction was erroneous as a matter of law. Assuming, without deciding, that Leon's testimony warranted the instruction, the charge Leon proposed does not comport with the requirements set forth in United States v. Liu, 960 F.2d 449, 454 (5th Cir.), cert. denied, 113 S.Ct. 418 (1992). The rejected charge does not inform that jury that he must not have "recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct." Liu, 960 F.2d at 454. Also, the proposed charge provides that coercion can excuse a crime if a defendant reasonably feared that he or others would immediately be killed or seriously hurt. The caselaw provides that "the defense is available if the defendant proves that he, or a member of his family, was under a present, imminent, or impending threat of death or serious bodily injury." Id. Accordingly, because the proposed instruction was not substantially correct,

Leon has not shown that the district court abused its discretion in denying it.

C

Relying on Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990), Leon contends that the court's charge lessened the government's burden of proof (beyond a reasonable doubt) by indicating to the jurors that they should use their common sense in determining whether or not the defendant was guilty. In the case at bar, the district court's charge tracked § 1.06 of the Fifth Circuit Pattern Jury Instructions regarding burden of proof and reasonable doubt. Leon concedes that "the court gave the time[-]honored definition of reasonable doubt indicating that the doubt is to be found after reason and common sense," but he nevertheless asserts that, "the court went further in using the terms common sense."

Viewing the charge as a whole, it does not seem that reasonable jurors would interpret it to allow them to convict on a lesser standard than beyond a reasonable doubt. Thus, Leon has not shown that his due process rights were violated by the court's charge.

III

A

Salinas argues that the district court erred in refusing to sever his trial from that of codefendant Tello pursuant to Rule 14 of the Federal Rules of Criminal Procedure. He argues, without

giving specifics, that the testimony of Tello vitiated his "mere presence" defense.

The initial joinder of Salinas and Tello for trial was legitimate because they were charged with having conspired with each other. United States v. Elam, 678 F.2d 1234, 1250 (5th Cir. 1982). The district court's decision whether to grant a severance under Rule 14 because of prejudice is reviewable only for an abuse of discretion. United States v. Stotts, 792 F.2d 1318, 1321 (5th Cir. 1986); see also United States v. Salomon, 609 F.2d 1172, 1175 (5th Cir. 1980) (to establish an abuse of discretion by the district court, a defendant must show that he received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection). An appellant must demonstrate something more than the fact that a separate trial might offer him a better chance of acquittal. United States v. Berkowitz, 662 F.2d 1127, 1132 (5th Cir. 1981).

We hold that the district court did not abuse its discretion in refusing to sever his trial. The thrust of Tello's testimony was that neither he nor his fellow seaman knew that the suitcases on the ship contained cocaine. This testimony does not vitiate his "mere presence" defense, and, thus, we affirm the district court on this issue.

B

Salinas further argues that his confession was involuntary and therefore should have been suppressed. The ultimate issue of the

voluntariness of a defendant's confession is determined de novo. United States v. Andrews, 22 F.3d 1328, 1340 (5th Cir.), cert. denied, 115 S.Ct. 346 (1994). The government, however, carries the burden of showing that, under the totality of the circumstances, Salinas's confession was voluntary. United States v. Restrepo, 994 F.2d 173, 185 (5th Cir. 1993).

We find that the government has carried its burden here. Although Salinas does not speak English, his Miranda warnings were read to him in Spanish. Salinas, thirty-six, was a nineteen-year veteran of the Peruvian navy who was familiar with foreign settings and authority figures in the light of his extensive travel experience. Furthermore, he has introduced no evidence of coercive police activity. Thus, we hold that his confession was properly admitted.

C

Salinas next argues that, pursuant to U.S.S.G. § 3B1.2, the district court should have granted him a four-level decrease in his offense level because he was a minimal participant; alternatively, he argues that he should have been granted a two-level decrease because he was a minor participant. The commentary explains that the Sentencing Commission intended the minimal participants to be "defendants who are plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, comment (n.1). A "minor participant" is defined as one who is "less culpable than most other participants, but whose role could not be

described as minimal." Id. (n.3). A district court's finding on this sentencing factor is reviewed under the clearly erroneous standard. United States v. Mitchell, 31 F.3d 271, 278 (5th Cir.), cert. denied, 115 S.Ct. 455 (1994).

Although Salinas describes his role in the offense as being "nothing more than a mule," the record belies this contention. The court's refusal to find that he was a minimal or minor participant was not clearly erroneous in the light of Salinas's confession that months earlier he had loaded the cocaine onto the vessel, and evidence that he had prepared the package for delivery and was waiting to complete the transaction.

IV

Baylon, Salinas, and Tello contend that the evidence was insufficient to convict them of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. When reviewing the sufficiency of the evidence, we view all evidence, whether circumstantial or direct, in the light most favorable to the government with all reasonable inferences and credibility choices to be made in support of the jury's verdict. United States v. Salazar, 958 F.2d 1285, 1290-91 (5th Cir.), cert. denied, 113 S.Ct. 185 (1992). The evidence is sufficient to support a conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id.

Our examination of the record easily convinces us that the evidence, viewed in the light most favorable to the government, is such that a reasonable trier of fact could find the evidence established guilt beyond a reasonable doubt. Indeed, this claim is virtually frivolous.

V

Baylon contends that the district court impermissibly restricted the cross-examination of the government informant because it did not require him to disclose his full name. Salinas adopts these arguments pursuant to Fed. R. App. P. 28(i). The government argues that Baylon waived his claim because on cross-examination, his attorney said that he did not want to know the informant's name. We agree, and find that Baylon has waived this argument. Addressing Salinas's argument, we hold that he was given sufficient opportunity to "place" the witness in his proper setting, and, thus, his right to effective cross-examination was not infringed. See United States v. Alston, 460 F.2d 48, 51 (5th Cir.), cert. denied, 409 U.S. 871 (1972).

VI

Tello contends that the district court erred in denying his motion to suppress the evidence seized in the warrantless search of his private quarters on the Peruvian naval ship. The government responds that his claim fails for the following three reasons: (1) Tello provides no authority for the proposition that a member of the armed forces has standing to object to the search of a naval

vessel; (2) the captain of the vessel consented to the search and the U.S. Customs has explicit statutory authority to make such entries into U.S. ports (19 U.S.C. section 1581(a)[2]; and (3) any error is harmless because the agent's testimony was largely cumulative or tangential.

When reviewing a district court's ruling on a motion to suppress, we accept the district court's factual findings unless they are clearly erroneous. United States v. Andrews, 22 F.3d 1328, 1333 (5th Cir.), cert. denied, 115 S.Ct. 346 (1994). The ultimate determination of reasonableness of the search is a conclusion of law reviewed de novo. Id. Further, the evidence is viewed in the light most favorable to the prevailing party. Id.

Section 1581 gave the Customs officer the statutory authority to search Tello's quarters. Moreover, because Tello and his codefendants had been observed carrying over 30 kilograms of cocaine from the ship into this country the day before, there was reasonable suspicion to search the ship. Cf. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (en banc) (coast guard has statutory authority to seize a foreign vessel in international

[2]Section 1581(a) provides that "[a]ny officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

waters if it has a reasonable suspicion that those aboard the vessel are engaged in a conspiracy to smuggle contraband into the U.S.). Tello has not demonstrated that the search was unreasonable, thus, the district court did not err in admitting the evidence.

VII

For the foregoing reasons, the judgment of the district court finding the defendants guilty is

A F F I R M E D.