IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50457
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RUDOLFO DAVILA
and
ROMAN GONZALEZ LOPEZ,
a/k/a R.G. Lopez,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-215(4))

(May 2, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Rudolfo Davila and Roman Gonzalez appeal their convictions of, and sentences for, conspiracy to possess with intent to distribute heroin, possession with intent to distribute heroin (Lopez only), money laundering, and managing and controlling a drug establishment (Davila only), in violation of 18 U.S.C. § 1957 and 21 U.S.C.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

§§ 841, 846, and 856. We affirm the convictions and Davila's sentence and vacate and remand Lopez's sentence.

I.

Austin, Texas, police officer Stan Farris testified that he began an investigation into local heroin trafficking in 1990, focusing on Juan Vela, a/k/a Pelon, Marina Vela Jordan, and Sebastian Amador. Farris identified Davila's Bar (owned by Davila) as a meeting place for heroin traffickers. As his investigation progressed, Farris purchased heroin from Diane Guzman and Manuel Barbosa, who put him in contact with Amador. Farris purchased eight ounces of heroin from Amador between March and July 1991.

Barbosa had taken Farris to the bar on March 11, attempting to locate heroin for Farris to purchase. Barbosa directed Farris to remain in the car while he went inside, then emerged from the bar shortly thereafter and told Farris that the owner was not present and that there was no heroin available.

Farris testified that he could not conduct surveillance inside Davila's bar because the "vast majority" of the bar's clientele consisted of heroin dealers and users. According to Farris, the bar's customers would cause trouble for any person who entered without someone to vouch for him. Barbosa directed Farris not to visit the bar unless accompanied by Barbosa or Guzman. Farris saw Amador, Jordan, Epifanio Nieto, and Goyo Mendieta at Davila's.

Farris had purchased heroin from all of those individuals.[1]

Around September 1991, according to Farris, federal agents began working with an informant named Lupe Montanez, who was assigned to gather information about heroin trafficking at the bar where he was a regular customer. Montanez reported to Drug Enforcement Administration ("DEA") agent Delfino Sanchez and Alcohol, Tobacco, and Firearms ("ATF") agent Jose Viegra. Farris had no contact with Montanez.

In August 1992, according to Farris, authorities contacted a Chevrolet salesman about a vehicle that Amador and Davila had purchased with a large amount of cash. That salesman contacted Davila and told him that the Internal Revenue Service ("IRS") and possibly other authorities were investigating that transaction. According to Farris, "the word got out on the street, and everything tightened up." Farris was unable to purchase heroin and was unable to contact Amador. On October 3 and 4, 1992, police arrested Davila, Jordan, Amador, Nieto, and others.

In December 1992, Farris learned at a meeting that Montanez had provided information that R.G. Lopez had obtained nine ounces of heroin that he wished to sell. Police directed Montanez to meet with Lopez at Lopez's furniture store. Montanez was "wired" for the meeting.

Montanez purchased heroin from Lopez. Another purchase was planned for December 8; Farris listened and watched outside Lopez's

[1] Farris later testified that he had been unable to purchase heroin from Mendieta.

store on that date. Mike Barrios, whom Montanez had identified as Lopez's heroin courier, appeared at the store about fifteen minutes after Lopez had arrived. Farris observed Amador's car outside the store. Farris saw Lopez and Montanez disappear behind a pillar in front of the store and saw Barrios walk to his truck and retrieve something from behind the seat. Barrios walked to Lopez and Montanez, pulled a small object from his pocket, and went behind the pillar behind which Lopez and Montanez stood. Shortly thereafter, Farris learned over the radio that Montanez had made a purchase from Lopez and Barrios.

According to Farris, Montanez had told Lopez on December 8 that he would contact him about purchasing the remaining seven ounces of heroin in Lopez's possession. Police planned to purchase the remaining heroin before arresting Lopez and Barrios. Farris had learned that Lopez's heroin had been buried on land owned by Amador. The heroin had not been found when police searched Lopez's residence in October.

Montanez arranged to purchase the remaining heroin from Lopez on December 10. Police followed Montanez to the parking lot of Lopez's furniture store on the evening of December 10; Montanez was "wired" for the meeting. Lopez told Montanez that he anticipated receiving two pounds of relatively pure "tar" heroin within the next few days. According to Farris, police decided to delay Lopez's arrest if he would commit to sell the two pounds of heroin to Montanez.

Around 11:50 p.m., Montanez went back to the furniture store;

Mike Barrios had already arrived. Montanez spoke with Lopez briefly, then went outside to retrieve the "buy" money. He went back inside the store. Farris heard Lopez counting money. Montanez re-emerged from the store shortly thereafter. Because Lopez would not commit to selling Montanez the two pounds of "tar" heroin, police raided the furniture store and arrested Lopez and Barrios.

Lopez did not acknowledge his participation in drug trafficking in his initial interviews with the authorities. Lopez told Farris that he had been assisting DEA agent Jack Derington. Farris called Derington. Lopez ignored Derington when the agent arrived. Lopez said nothing else to Farris about Derington. After police told Lopez about some of the details of their investigation, he told Farris, "[y]ou've got me by the balls." Later, Lopez told authorities that he and Barrios had dug up the heroin on Amador's land.

Former police officer Jon Barron testified that he had recorded Montanez's conversation at the furniture store on December 4, 1992. Barron met with Montanez later that day. Barron understood that Montanez was to meet with somebody at Davila's bar. Barron followed Montanez there and remained in the area while Montanez was inside. Montanez purchased one-half ounce of heroin from Lopez.

Montanez was supposed to have received one ounce. He phoned Lopez at Davila's Club and arranged to return to retrieve the rest. Barron followed Montanez back to the bar. According to Barron,

Montanez retrieved the remaining one-half ounce at the bar. Barron also participated in the surveillance of the furniture store on December 8 and 10.

Police officer Paul Brick testified that he conducted surveillance of the bar on December 4. He saw Lopez exit a car and enter the bar. Montanez, then Barrios, arrived shortly thereafter. Barrios came back out of the bar and retrieved something from his truck, then went back inside. Montanez left very shortly thereafter.

Guadalupe Montanez testified that he had met Amador and Rudolfo Davila at the Pasa Tiempo bar in early 1990. Davila told Montanez that he owned Pasa Tiempo. Amador told Montanez that he and Davila were co-owners of the bar. According to Montanez, Amador and Davila opened Davila's bar in early 1990. Both Amador and Davila told Montanez that they were partners in the bar, which Montanez patronized two or three times a week. Montanez noticed other customers exchanging money in the club and holding discussions out of the hearing of others. Based upon his own experience, Montanez believed the other customers were making deals.

Montanez singled out Goyo Mendieta and "Low" Nieto as individuals involved in dealmaking at the bar. Mendieta told Montanez that he was selling heroin that he had obtained from Amador. Nieto never discussed heroin sales with Montanez. Montanez had seen Nieto frequently giving money to Amador. According to Montanez, Davila was present during much of the activity he described.

Montanez testified that he accompanied Amador to an immigration hearing in San Antonio in March 1991. Davila and Nieto also attended the hearing, at which Montanez, Davila, and Nieto testified.

Montanez testified that he had met Derington in September 1991. He told Derington about the suspicious activity he had observed at Davila's bar. The DEA enlisted Montanez as a confidential informant. Montanez also worked with the IRS and the ATF.

Montanez continued to patronize the bar, now on a daily basis. Davila was present every time Montanez was there. Montanez witnessed frequent heroin deals at the bar. Mendieta and Nieto paid Amador four to five thousand dollars in small bills at least twice per week. Davila was present at the bar, but Montanez was unsure whether Davila witnessed the transactions.

At some point, Amador told Montanez that Ramon Martinez was his heroin supplier. Montanez spoke with Amador and Martinez about heroin deliveries. Montanez testified that Mendieta's and Nieto's heroin customers frequently visited the bar to purchase heroin.

According to Montanez, he received a telephone call from Davila in August 1992. Davila asked Montanez to come to Davila's bar; Montanez did so. Davila asked Montanez whether he had seen Amador lately. Davila told Montanez that some people from a Chevrolet dealership were looking for Amador because somebody from the IRS was asking questions about how Amador had paid for a new truck. Montanez believed that Davila looked worried. Montanez did not know Amador's whereabouts.

Montanez testified that in early October 1992 agents told him to stop patronizing the bar because the agents were planning to make some arrests. The agents directed Montanez to return to the bar in mid-October. Montanez met with Mendieta at the bar. Mendieta told Montanez that he was still selling heroin. Montanez observed Mendieta selling heroin in October and November 1992.

Montanez returned to the bar on December 1, at Mendieta's behest. Davila was present. Barrios, Lopez, and Mendieta later arrived separately. Lopez and Mendieta met for about thirty minutes. Mendieta told Montanez that Amador had secreted some drugs at his ranch and that Lopez and Barrios had retrieved those drugs. Lopez and Barrios wanted Mendieta to sell the drugs. Mendieta told Montanez that he wanted nothing to do with Lopez. Montanez told Mendieta not to trust Lopez, but also told Mendieta that he might be able to help Lopez sell the heroin.

Montanez testified that he and Mendieta went to Lopez's furniture store on December 4. Montanez, Mendieta, Lopez, and Barrios engaged in conversation. Montanez and Lopez discussed a heroin transaction. Lopez told Montanez that he had 9½ ounces of "cut" heroin and one ounce of pure heroin. Montanez told Lopez that he would like to purchase one ounce of heroin. Lopez suggested that he and Montanez meet later that day at the bar. Montanez understood that the transaction would take place that day.

Montanez went to the bar, where Davila was present. Lopez appeared and discussed the heroin transaction with Montanez. Montanez gave Lopez the agreed-upon sum. Lopez told Montanez to

wait for Barrios. Barrios arrived and spoke with Lopez, then went outside to his truck. Barrios re-entered the bar. Lopez directed Montanez to follow Barrios to the bathroom. Barrios gave Montanez a plastic bag containing brown powder that looked like heroin.

Montanez later discovered that Lopez had given him only one-half ounce of heroin. Montanez phoned Lopez, who directed him to return to the bar to obtain the remaining one-half ounce. Montanez returned to the bar, where Barrios again delivered heroin to him in the bathroom.

Montanez phoned Lopez at the bar on December 7 and told Lopez that he would like to pay him $600 he owed for the December 4 heroin purchase. The two men agreed to meet the next day. Montanez went to Lopez's store on December 8, paid Lopez, and arranged to purchase three or four ounces of heroin. Lopez told Montanez that he still had seven or eight ounces of heroin and that he had sold the ounce of pure heroin about which he had spoken earlier. Lopez, Montanez, and Barrios went to a building next to the furniture store. Barrios remained outside for a few minutes, then came into the building and walked to Montanez. Barrios gave Montanez two plastic bags, evidently containing heroin.

Montanez telephoned Lopez on December 9, telling Lopez he would like to purchase the remaining heroin. Lopez agreed to sell the heroin to Montanez.

On December 10, Montanez went to Lopez's store. Lopez told Montanez he was in the process of obtaining two pounds of pure heroin. Lopez told Montanez to return to the store later, because

Barrios was running an errand for Lopez.

Montanez returned to the store later that evening. Lopez and Barrios were present when he arrived. Lopez expressed uncertainty about whether he would obtain the two pounds of heroin; told Montanez he would have to talk to Amador about it. He pledged the two pounds of heroin to Montanez if he actually obtained it. Eventually, Montanez went to his truck and retrieved his money. Barrios delivered the agreed-upon amount of heroin to Montanez in the front of the store. Lopez was present.

Montanez testified that Davila had complained to him that he was paying Amador's telephone bill, which sometimes reached $1,000 per month. According to Montanez, Amador had said that Amador owned some race horses. Davila told Montanez that the horses were in his name but did not say that he owned them. According to Montanez, Davila and Amador frequented the racetrack.

Agent Delfino Sanchez testified that he began to investigate Jordan and her drug-trafficking confederates around October 1990. Sanchez began watching Davila's bar in November 1990, as the members of Jordan's ring frequented the bar. Sanchez observed several controlled buys of heroin from Amador. Sanchez testified that Montanez became an informant in September 1991. According to Sanchez, Montanez always reported back to him when asked. Sanchez made notes from Montanez's reports. Montanez told Sanchez of drug-trading activity involving Amador, Mendieta, and Nieto at the bar. Montanez told Sanchez about specific deliveries of heroin to Amador. In March 1992, Montanez told Sanchez that Amador had

discussed a load of heroin while in Davila's truck, with Davila present. According to Sanchez, the agents decided to arrest the drug participants in October 1992 because Jordan had told Montanez that she believed she was being watched by federal agents.

Montanez gave Sanchez information about Mendieta's continuing drug-trafficking activities at the bar after the October arrests. Sanchez testified that Montanez told him about meetings with Lopez, Davila, and Barrios at the bar. Davila told Montanez that he could not talk to Amador. According to Sanchez, Montanez told him that Mendieta had told him that Lopez had visited Amador in jail and that Amador had told Lopez about heroin buried at his ranch. Sanchez also testified about the arrangements made for Montanez to purchase heroin from Lopez and about surveillance of those transactions.

Amador testified that he began selling heroin in 1988, as a protege of Jordan's and then as a partner with Jordan's brother, John Vela. He sold heroin until his arrest in 1992. He also sold cocaine until a month or two before his arrest.

Amador testified that he met Davila when he purchased the Pasa Tiempo from Lopez. Amador knew Lopez from his association with Vela. According to Amador, Lopez claimed to have transported money for Vela. Amador purchased the Pasa Tiempo because he believed it would be a good place to meet his fellow heroin traffickers. Davila purchased the taco stand next door to the bar at about the time Amador purchased the bar. Because he was on probation, Amador's liquor license was in another's name. Amador decided to

end his association with that person, so he arranged for Davila to put the license in Davila's name. Amador would pay Davila weekly, with the amount depending on revenues. Davila and Amador opened a bank account in Davila's name. Amador placed some of his heroin proceeds into the Pasa Tiempo.

Amador operated his heroin enterprise from the Pasa Tiempo. He did not believe that Davila ever saw any drug-trafficking activity at the bar. Davila and Amador eventually purchased another bar, which Davila named "Davila's Club." Amador and Davila put money into the bar, and Davila worked there. Amador and Davila closed the Pasa Tiempo shortly thereafter.

Amador testified that he began to operate his heroin enterprise from Davila's bar. Mendieta and Nieto were Amador's primary customers. According to Amador, Mendieta's and Nieto's customers visited them at the bar. Jordan visited there a few times.

Initially, according to Amador, he and Davila split the profits from the bar evenly. After a few months, Amador and Davila were making barely enough money from the bar to pay the rent. Amador did not pay the bar's bills but occasionally bought beer and paid his telephone bill once or twice. Amador agreed to allow Davila to keep all of the bar's profits if Davila would pay for his pagers and pay his cellular telephone bill.

Amador continued to sell drugs from the bar and other locations. He was paid for heroin inside the bar three to five times a week.

Amador testified that Martinez left messages for him with

either Davila or the bartender. Once, Davila told Amador that Martinez had said he was angry because he could not find Amador and had some "stuff" for Amador. Davila also received messages for Amador from other people related to heroin dealings, though the messages Amador recalled did not mention heroin specifically.

According to Amador, Davila once asked him which there was money to be made in the heroin business. Amador recalled that he told Davila, "'I don't think it's))you know, it's a business for you.'"

Amador testified that he owned between twelve and fourteen horses, some of which he had purchased with heroin proceeds. Because of a previous drug conviction, Amador could not hold a racing license, so Davila agreed to hold the license in his name. Additionally, Amador owned the horses in Davila's name. Amador paid the training fees, feed bills, and license fees, in cash. Davila paid no bills or fees related to the horses.

Amador once had five pagers. He first leased them under Tim Vela's name, later placing them under Davila's name. He also listed his cellular telephone in Davila's name. Amador wanted nothing in his name, as he was not working and knew that the authorities sometimes traced drug traffickers through pagers and cellular telephones. Amador used his pagers and cellular telephones for his drug-trafficking operations.

Amador testified that he and Davila discussed his purchase of a new pickup truck in 1991. Amador decided to trade Davila's 1984 pickup and $18,300 for the new truck and to give Davila his 1988

pickup. According to Amador, his 1988 pickup was nicer than Davila's older truck. Amador believed that Davila deserved the pickup because Davila "had helped me a lot."

According to Amador, Lopez visited the bar about once a week. Lopez arranged for him to hire attorney Robert Crider to represent Amador in his federal drug case. Lopez would accompany Crider to meet with Amador. On one of his visits to Amador in jail, Lopez told Amador that he knew Amador had buried some heroin. Amador acknowledged that he had done so. Lopez told Amador that the authorities would arrest Amador's wife if they found the heroin. Lopez asked Amador where the heroin was buried. Amador told Lopez, but no one else, the location.

A couple of days after the conversation about the buried heroin, Lopez told Amador that he had retrieved the heroin; Amador directed Lopez to dispose of it. Lopez responded that he knew "`how to handle it.'" A couple of days later, Lopez indicated that he was going to sell the heroin to Mendieta. Later, Lopez told Amador that he was going to sell the heroin to Montanez. Amador vouched for Montanez.

A day or two after that meeting, Lopez returned and told Amador that Montanez had purchased some of the heroin. Amador gave Lopez no instructions about the heroin or the proceeds from its sale. Later, Lopez told Amador that Montanez had lowered the price he would pay for the remainder. Amador told Lopez he did not care what Lopez did with the drugs.

On cross-examination, Amador testified that Vela had taken him

to Lopez's bar in 1988. Vela and Amador were partners in heroin trafficking. Lopez did not participate in the 1988 heroin-trafficking venture. Amador recalled, however, that Lopez and Vela discussed Vela's earlier heroin venture and that Lopez indicated that he had carried money for Vela.

Cecilio Garza testified that he was the salesman who sold the pickup truck to Amador in 1991. Davila and Amador visited the dealership on successive days. The first day's negotiations were unavailing. Garza's supervisor insisted that Amador was unable to afford the pickup he wanted. Amador and Davila returned the next day. Amador sent Davila to the truck the men had driven to retrieve a ziplock bag filled with over $18,000 in twenties, fifties, and hundreds. Amador received a $4,400 trade-in allowance for Davila's truck. Garza had never seen such a transaction.

According to Garza, IRS agent Young visited the dealership and subpoenaed certain records. Young directed Garza not to tell anybody about the subpoena, as it was related to a criminal investigation. Garza phoned Davila and told him about the subpoena.

Young testified, inter alia, that Lopez, after his arrest, told agents that Hilda Garza, Amador's wife, had told him that she possessed some of Amador's cash. Garza told Lopez that she wished to turn that cash over to Lopez to pay attorney fees. Lopez took $12,000 from Garza. He paid $5,000 to an attorney, kept $1,500 for his own fee, paid $1,200 to repair Amador's Mustang for resale, and pocketed the remaining $3,300. According to Young, Lopez gave

varied and inconsistent accounts regarding the heroin buried at Amador's ranch.

Lopez testified that he is a private investigator and that Amador and Mendieta had been his clients. According to Lopez, Garza had told him about the cash and heroin at the ranch. Amador was surprised to hear that there was heroin there but directed Lopez to speak to Mendieta. Lopez believed that he was being set up, and he sent Barrios to watch Amador's ranch. Barrios surprised Lopez by appearing at the furniture store with the heroin. Lopez then negotiated to sell the heroin. He never called federal agents, because he feared a set-up.

II.

A.

Davila first contends that the district court erred by not allowing his attorney, Alden, to testify as a witness at trial. Davila's contention is unavailing.

"The trial judge has discretion to allow an attorney for a party to testify at trial . . . . Courts are reluctant to allow lawyers to testify in trials where they are advocates." United States v. Phillips, 519 F.2d 48, 50 (5th Cir. 1975), cert. denied, 423 U.S. 1059 (1976). The district court did not abuse its discretion.

Alden wished to testify about an affidavit he assisted attorney Crider in obtaining from Amador. Alden believed that his credibility had been drawn into question by Amador's testimony

regarding that affidavit. The court denied Alden permission to testify and would not relieve Alden from representing Davila so that he could testify.

Amador testified that portions of the affidavit regarding Davila were inaccurate and did not reflect what he had told the attorneys. According to Amador, he signed the affidavit only because Crider told him that nothing in the affidavit could harm him.

Alden cross-examined Amador about the circumstances under which the affidavit was obtained. Amador testified that Alden had not coerced him; that Alden took notes at the first meeting regarding the affidavit; that Alden gave him an opportunity to ask questions; and that he remembered telling Alden that he had never talked to Davila about the drug business.

The jury had before it Amador's affidavit, this testimony regarding alleged inaccuracies in the affidavit, and his testimony regarding the circumstances surrounding the signing of the affidavit. Amador's cross-examination testimony indicated that Alden had done nothing improper in his meetings with Amador, thus blunting the effect of his testimony on direct examination, which could be construed as calling Alden's ethics into question. Given the reluctance of courts to allow attorneys to testify, the court did not abuse its discretion.

B.

Davila next contends that the district court erred by not

allowing into evidence the testimony of potential witnesses Ortiz, Muhica, and Villareal about the general atmosphere at Davila's bar. The court excluded those witnesses because counsel had not mentioned their names to the jury panel during voir dire.

We review evidentiary rulings in criminal trials under a heightened abuse of discretion standard. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993). "[R]elevant evidence may be excluded if it is a needless presentation of cumulative evidence." United States v. Edwards, 702 F.2d 529, 530 (5th Cir. 1983).

Amador testified on cross-examination about lighting, music, and noise levels at the bar. Defense witness Joe Lozano testified that he had been to the bar on many occasions. According to Lozano, he and his wife believed the club was nice, and they appreciated the security provided there. Lozano and his wife would meet other couples at the club for beer. Prosecution witness Cecilio Garza testified on direct examination that he had been to the bar but felt uncomfortable there because he was dressed for business. He noticed people drinking but noticed little else about the atmosphere. He saw nothing illegal. Lopez testified that the bar was clean and cold; that Davila had an exceptional bartender; and that he liked the music.

Further testimony about the atmosphere at the bar would have been cumulative of the testimony of Lozano, Garza, Lopez, and Amador. Exclusion of that testimony thus was not an abuse of discretion.

C.

Davila contends that the district court erred by allowing various hearsay statements into evidence. Davila's contention is unavailing.

"`Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). The admission of hearsay is subject to harmless-error analysis. United States v. Evans, 950 F.2d 187, 190-91 (5th Cir. 1991).

Farris testified on redirect that he had information that the bar was a gathering place for drug dealers. Farris did not identify his sources. Davila objected to Farris's testimony as hearsay.

Farris testified on direct that the bar was the focal point of his investigation, as it was a location used by dealers to sell drugs. Davila did not object. He also testified about having seen known drug dealers at the bar. Davila did not raise a hearsay objection. Any error in admitting Farris's testimony on redirect was harmless, as Farris had provided identical information on direct.

Sanchez testified about the reports he had received from Montanez, the cooperating individual. Sanchez stated that Montanez reported to him about activities at the bar, usually shortly after any specific incidents. According to Sanchez, Montanez had not lied to the agents. Sanchez also testified regarding specific

incidents about which Montanez had told him. The district court denied Davila's continuing hearsay objection. The government stated that it was offering Sanchez's testimony to bolster Montanez's earlier testimony.

A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination about the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" FED. R. EVID. 801(d)(1)(B). See, e.g., United States v. Henderson, 19 F.3d 917, 924 (5th Cir.), cert. denied, 115 S. Ct. 207 (1994).

Montanez testified on direct examination about drug activities at the bar. He also testified that he had reported to agents following his visits. Alden cross-examined Montanez extensively regarding the notes Montanez had prepared for the agents, noting few references to Davila. Alden also asked Montanez whether he was willing to lie for money. Sanchez's testimony was consistent with Montanez's testimony and supported that testimony against Alden's implicit allegation of fabrication.

Young testified that Sanchez had notified him that Montanez had called and told him that Davila had asked him to come to the bar. There, Davila told Montanez that he had received a call from a Chevrolet salesman warning him about an IRS investigation. The district court overruled Davila's hearsay objection.

Montanez testified on direct examination about his conversation with Davila. Young's testimony tends to support Montanez's

testimony against Alden's implicit allegation of fabrication. See FED. R. EVID. 801(d)(1)(B). Even if Young's testimony was not admissible under rule 801(d)(1)(B), its admission was harmless error, as Montanez offered identical information on direct examination.

Young also testified that Jordan told Montanez that she thought she was under investigation by law enforcement authorities. The district court overruled Davila's hearsay objection. On direct examination, Montanez did not testify about any such meeting with Jordan. Young's testimony appears to be hearsay, but its admission, if error, was harmless error. Young did not implicate Davila by testifying that Jordan met Montanez and expressed concern over an investigation.

Davila contends that the district court improperly admitted the transcript of Amador's proceedings before the Immigration and Naturalization Service ("INS"). Specifically, Davila contends that Epifanio Nieto's testimony at that proceeding did not concern events that happened during the course and scope of the drug conspiracy and that the government did not show that any of the witnesses at the proceeding were unavailable to testify at trial.

Davila did not object to the INS transcript at trial on the basis that the government failed to show that any of the witnesses were unavailable. Under FED. R. CRIM. P. 52(b), this court may correct forfeited errors only when the appellant shows the following factors: (1) There is an error (2) that is clear or obvious and (3) that affects his substantial rights. United States

v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)), cert. denied, 63 U.S.L.W. 3643 (1995). If these factors are established, the decision to correct the forfeited error is within our sound discretion, and we will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this court may remedy the error only in the most exceptional case. Calverley, 37 F.3d at 162.

The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. Olano, 113 S. Ct. at 1777-79. First, a defendant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain, and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); FED. R. CRIM. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. This court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "[r]ule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting FED. R. CRIM. P. 52(b)). As the Court stated in Olano:

> [T]he standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this court's discretion to correct an error pursuant to rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Davila does not indicate how his substantial rights were violated by introduction of the transcript. Davila's own testimony at that hearing was admissible as the statement of a party-opponent. FED. R. EVID. 801(d)(2). Amador's testimony at the INS hearing tended to corroborate his trial testimony but was not otherwise prejudicial to Davila. Other than Nieto, the other witnesses at the INS hearing played no role in the facts underlying Davila's conviction. We will not exercise our discretion to consider Davila's contention regarding the availability of witnesses.

At the INS hearing on March 20, 1991, Nieto testified that Amador frequently tended bar at Davila's bar; that he had met Amador through Davila; that Amador and Davila loaned him money to

pay his bar tab; and that he did not know about Amador's previous drug conviction. Montanez testified on direct examination that he had seen Nieto exchange money with Amador after he began frequenting the bar in 1990, and that Amador had requested Montanez and Nieto to testify at the immigration hearing. It is uncertain how Nieto's testimony at the immigration proceeding was designed to further the drug conspiracy, other than perhaps to assist Amador to retain his immigration status. Even if the testimony was not made in furtherance of the conspiracy, its admission was at most harmless error. It did not implicate Davila beyond implying that he knew Amador well, a fact established by Amador's and Montanez's testimony.

Young testified regarding a statement by Amador regarding Davila's knowledge of the IRS contact with the Chevrolet dealer that:

> In the statement, he says that he hadn't talked to Mr. Amador about it. But we know from what I've heard here this week that he certainly had had contact with Cecilio Garza. And he certainly had had contact with Lupe Montanez. And those contacts were made for the sole purpose of finding Mr. Amador.
>
> He certainly was searching for Mr. Amador, and the fact the investigation seemed to be compromised at that point and Marina Vela Jordan's later statement during an undercover purchase of heroin that the IRS was looking at her certainly))

The district court overruled Davila's hearsay objection, evidently on the basis that the statements involved co-conspirators. Young then testified that Jordan had stated that the IRS was investigating her.

Young's source for the information about Davila looking for

Amador and Jordan's statement is not evident. Assuming that Young's testimony constitutes inadmissible hearsay or multiple hearsay, see United States v. Dotson, 821 F.2d 1034, 1035 (5th Cir. 1987), any error in admitting it was harmless. Montanez testified on direct examination that Davila had contacted him seeking to meet with Amador. Young's testimony that Jordan feared that she was under investigation implicates Jordan and not Davila.

Over Davila's hearsay objection, Young summarized a portion of Barrios's written factual basis for a guilty plea:

> He said that he had been instructed by R.G. Lopez to go out to Mr. Amador's ranch and dig up the quantity of heroin, deliver it back to Mr. Lopez.
>
> Mr. Lopez then instructed him on four different occasions to disperse that heroin in quantities we have heard testimony about here this week to Guadalupe Montanez. And all of this activity was done at his direction.

As Barrios made his statement in conjunction with pleading guilty, it does not appear that he made the statement in furtherance of the drug conspiracy. See FED. R. EVID. 801(d)(2)(E). Admission of Young's testimony is at most harmless error regarding Davila, as it implicates Lopez and not Davila.

D.

Davila next contends that the district court erred by allowing into evidence testimony based upon speculation. "Under the Federal Rules of Evidence, speculative opinion testimony by lay witnesses)) i.e., testimony not based upon the witness's perception)) is generally considered inadmissible." Washington v. Dep't of

Transportation, 8 F.3d 296, 298 (5th Cir. 1993) (footnote omitted).

Farris testified that the clientele of Davila's bar consisted largely of drug dealers who would let strangers in the club only if they were with others who would vouch for them. Davila objected to Farris's testimony as speculative. Farris additionally testified that Barbosa had taken him to the bar and told him to wait in the car. According to Farris, Barbosa had told him not to go to the bar unless he was accompanied by Barbosa or another individual. Farris observed Nieto, Mendieta, Jordan, and other known, unnamed drug dealers at the bar. Farris's testimony was based upon his observations, not speculation.

Amador testified that Davila knew that Amador's income came from selling heroin. Davila objected to Amador's testimony as speculative. Amador also testified that he had no doubt that Davila knew what Amador was doing. Davila objected to Amador's testimony as speculative. Amador testified without objection that Davila knew what Amador was doing and that Davila relayed messages from would-be heroin purchasers to Amador. Amador's testimony was based upon his perceptions and was not speculative.

Young testified that he had reviewed various documents from the Texas Alcoholic Beverage Commission ("TABC"). He testified that records of the Pasa Tiempo bar indicated that Estrella Galvan had applied for the initial liquor license. Six months later, Galvan and Davila were cited by TABC because Galvan had obtained the license for Davila. Young testified that the records reflected that Davila knew he could not use another person to obtain a

license without disclosing his partners.

The district court overruled Davila's objection that Young's testimony regarding Davila's knowledge was speculative. Young's testimony was based upon inferences he drew from his reading of the TABC documents. Admission of Young's testimony was not an abuse of discretion.

E.

Davila contends that the prosecutor misstated the legal elements of conspiracy. Specifically, the prosecutor argued:

> And you know what? Cecilio Garza, a man who testified on the stand right there and who was certainly no friend of the government, sat there and testified that, yeah, he did, he messed up, and he told Rudolfo Davila that there was an investigation of his financial transaction.
>
> That's what happened in this case. And what did he do? He told everybody what was going on. Was he part of the conspiracy? Yes. That fact alone, that fact alone makes him guilty of this particular conspiracy. And that fact is unrebutted.

Davila objected on the ground that the prosecutor's argument misstated the law.

The question

> in reviewing a claim of prosecutorial misconduct is to decide whether the misconduct casts serious doubt upon the correctness of the jury's verdict. In making that determination, the Court is to consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of the appellants' guilt.

United States v. Carter, 953 F.2d 1449, 1457 (5th Cir.) (citations omitted), cert. denied, 112 S. Ct. 2980 (1992). "[T]he test for

determining whether a conviction should be overturned is whether the prosecutor's remarks were both inappropriate and harmful." United States v. Rocha, 916 F.2d 219, 234 (5th Cir. 1990), cert. denied, 500 U.S. 934 (1991).

The fact that Davila notified the members of the Amador drug operation of the IRS investigation does not by itself establish that he was a member of the conspiracy. Montanez's and Amador's testimony, corroborated by the testimony of the agents, however, indicates that Davila was a conspirator. The evidence indicates that Davila knowingly provided Amador with a location from which to conduct his heroin transactions and further assisted Amador by giving him messages and by placing Amador's telephones, beepers, horses, and liquor license in his own name. The evidence of Davila's guilt, though not overwhelming, is sufficiently strong to overcome any prejudice created by the government's argument.

F.

Davila contends that the district court incorrectly based his offense level upon 520 ounces of heroin. He also alleges that the 520-ounce amount was based upon an unsubstantiated estimate; that there was no evidence offered to support the calculation; and that the calculation conflicted with the 208.42 ounces of heroin upon which Lopez's offense level was based.

The district court heard Davila's arguments on Davila's objection to the presentence report ("PSR") and overruled that objection. A district court may make implicit factual findings by

adopting a PSR, so long as the PSR is sufficiently clear "that the reviewing court is not left to `second-guess' the basis for the sentencing decision." United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994). By overruling Davila's objections to the PSR, the district court implicitly adopted it. The implicit findings leave nothing for this court to second-guess. Those implicit findings are satisfactory for us to review Davila's contentions.

The sentencing guidelines provide for a sentence to be calculated upon the basis of, inter alia, the acts of co-conspirators that were "reasonably foreseeable" to the defendant; were done in furtherance of the conspiracy; and were temporally related to the offense. U.S.S.G. § 1B1.3(a)(1)(B).

> The sentencing court may make an approximation of the amount of [drugs] reasonably foreseeable to each defendant, and an individual dealing in large quantities of controlled substances is presumed to recognize that the drug organization with which he deals extends beyond his "universe of involvement." When calculating the amount foreseeable to a defendant, a court may consider the defendant's relationship with co-conspirators and his role in the conspiracy.

United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir.)(internal citations omitted), cert. denied, 115 S. Ct. 180 (1994).

"The amount of drugs for which an individual shall be held accountable at sentencing represents a factual finding, and will be upheld unless clearly erroneous. A factual finding is not clearly erroneous as long as it is plausible in light of the record of the case as a whole." United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993)(internal and concluding citations omitted), cert. denied, 114 S. Ct. 1096, and cert. denied, 114 S. Ct. 1552, and

cert. denied, 115 S. Ct. 282 (1994). A district court may consider a PSR when making factual findings. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992).

The probation officer based his calculation of Davila's base offense level upon Amador's estimate that he had distributed at least ten ounces of heroin per week from October 1991 through September 1992 and upon Amador's distribution of ten kilograms of cocaine. The probation officer determined that Davila's bar was operated as a location from which Amador could sell drugs and that Amador kept the club open by investing drug proceeds into it.

The attribution of 520 ounces of heroin and ten kilograms of cocaine to Davila is not clearly erroneous. Amador used the bar for an extended period as a drug marketplace. The testimony at trial indicates that Davila knew of Amador's drug-marketing activity and assisted Amador by relaying messages and warning him about the IRS investigation. The evidence also indicates that Davila assisted Amador by placing Amador's liquor license, cellular telephones, beepers, and race-horses in his names, thus helping Amador avoid detection.

G.

Davila finally contends that the district court erred by denying him a downward adjustment for being a minor or minimal participant in Amador's drug-trafficking ring. "[T]he party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment." United States v.

Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). A district court's determination whether a defendant is a minor or minimal participant is subject to reversal only if clearly erroneous. United States v. Giraldo-Lara, 919 F.2d 19, 22 (5th Cir. 1990). The adjustment for minimal participation

> is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.

U.S.S.G. § 3B1.2, comment. (n.1). Additionally, "a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." § 3B1.2, comment. (n.3).

The district court's finding that Davila was not a minor or minimal participant is not clearly erroneous. The evidence indicates that Davila provided Amador and his confederates with a location from which they could sell drugs; that Davila knew of the drug-trafficking activity; and that he assisted the activity by relaying messages to Amador.

III.

A.

Lopez first contends that the district court erred by denying his motion for new trial based upon letters from Amador to his wife that the defense discovered after trial. Lopez argues that the letters would have impeached Amador by demonstrating that he hated Lopez.

Lopez and Davila's trial lasted from April 4 to April 13, 1994. Lopez filed his new trial motion on June 23, 1994. A motion for new trial on the ground of newly-discovered evidence must be filed within two years after final judgment. A motion on any other ground must be filed within seven days of the verdict or finding of guilty. FED. R. CRIM. P. 33. Lopez's motion therefore was timely only if it was based upon newly-discovered evidence. "A motion for a new trial based upon newly discovered evidence is addressed to the sound discretion of the trial court." United States v. Miliet, 804 F.2d 853, 859 (5th Cir. 1986). The defendant must show, inter alia, that the evidence was discovered after trial. Id.

A copy of an affidavit introduced by the defense at the hearing on the new trial motion indicates that Amador's wife, Hilda Garza, gave Ruth Lopez copies of her letters to Amador on April 18, 1994. At the hearing, Lopez testified that Garza had corrected the affidavit to reflect that the letters had been turned over on April 18 rather than April 10. Agent Young testified that the government's copy of the affidavit was dated April 10, 1994. On June 27, 1994, attorney Jamie Balagia, who represented Lopez, swore to an affidavit in which he averred that Lopez had appeared at his office on June 15 and persuaded his secretary to change the date on the affidavit from April 10 to April 18 without Balagia's knowledge. Balagia's secretary swore to a similar affidavit.

Lopez does not controvert the affidavits of Balagia and his secretary. Those affidavits indicate that Lopez was in possession of the letters on April 10, during the trial. The evidence thus

was not discovered after trial. It could not serve as the basis for a new trial on the ground asserted by Lopez. See Miliet, 804 F.2d at 859.

B.

Lopez contends that the district court erred by admitting statements he had made during plea negotiations. Lopez argues that his right against use of such statements, protected by FED. R. CRIM. P. 11(e)(6), is not waivable as a matter of law. Lopez objected to the testimony at trial.

Before trial, the government filed notice of its intention to use statements Lopez made in conjunction with his plea negotiations. According to the government, Lopez had agreed to plead guilty but had failed to do so. Lopez's plea agreement contained the following provision:

> Statements of ROMAN GONZALEZ LOPEZ and evidence derived therefrom may, however, be used in cross-examination or rebuttal in any proceeding should Defendant testify, and may be used against ROMAN GONZALEZ LOPEZ in a prosecution for any offense if he violates any provisions of this agreement.

Id. at 527-28.

"[A]bsent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable." United States v. Mezzanatto, 115 S. Ct. 797, 806 (1995). Additionally, "if a defendant materially breaches his commitments under a plea agreement, the government is released from its obligations under that compact . . . regardless of what it may

have promised earlier." United States v. Ballis, 28 F.3d 1399, 1409 (5th Cir. 1994).

Lopez does not contend that his waiver was involuntary. Nor does he allege that he did not breach the plea agreement. The plea agreement did not limit the government's ability to use Lopez's statements if he breached the agreement. The government did no more than the agreement allowed it to do.

C.

Lopez contends that the evidence was insufficient to support his conviction of conspiracy with intent to distribute heroin during "the two-year, four-party conspiracy alleged in the indictment." His contention is unconvincing.

A reviewing court will affirm a jury verdict so long as there is evidence sufficient to allow a reasonable jury to find a defendant guilty beyond a reasonable doubt. The reviewing court will view the evidence and all inferences from it in the light most favorable to the verdict. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983).

To convict a defendant of a drug conspiracy, a jury must find beyond a reasonable doubt an agreement that entails violation of federal narcotics laws, the defendant's knowledge of the agreement, and his voluntary participation in it. There is no overt-act requirement. United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989); see also United States v. Shabani, 115 S. Ct. 382, 383 (1994). The jury may rely upon circumstantial evidence, including

evidence of presence and association, Ayala, 887 F.2d at 67, though those factors alone are insufficient to prove conspiracy. United States v. Lechuga, 888 F.2d 1472, 1477 (5th Cir. 1989).

> "[W]hen the indictment alleges . . . a single conspiracy, but the `government proves multiple conspiracies and a defendant's involvement in at least one of them, then there is no variance affecting the defendant's substantial rights.'" This holding is subject to the caveat that substantial rights are affected when the defendant is subjected to transference of guilt, that is, the danger that the defendant may be convicted because of his association with, or conspiracy for unrelated purposes with, codefendants who were members of the charged conspiracy.

Carreon, 11 F.3d at 1239 (footnotes omitted).

Montanez's testimony indicates that Lopez, Barrios, and Amador had agreed to dispose of the heroin buried at Amador's ranch. Amador's testimony indicates that he directed Lopez to the location of the heroin and later told Lopez to dispose of it, though he gave Lopez no explicit directions and did not receive any of the proceeds from the sale of the heroin. Amador approved of Lopez's choice of Montanez as a customer. Young's testimony indicates that Lopez took $12,000 in cash from Amador's wife. Additionally, Montanez's and Amador's testimony established that there was a heroin-distribution conspiracy orchestrated by Amador and centered at Davila's bar. Montanez's and Amador's testimony was corroborated by the observations of the police witnesses.

The evidence shows an agreement to sell heroin, Lopez's knowledge of that agreement, and his voluntary participation in that agreement. Because the evidence against Lopez regarding the December transactions is strong, there was little danger that the

jury might have convicted him based upon evidence of Amador's previous drug dealing.

D.

Lopez next contends that the superseding indictment led him to believe that he would be tried as a member of the large-scale Amador drug-distribution conspiracy. According to Lopez, the evidence at trial indicated that he was part of a smaller conspiracy with Barrios to distribute nine ounces of heroin. Lopez contends that the variance between the indictment and the proof at trial is fatal. Lopez did not raise his variance contention in the district court.

This court need not exercise its discretion to review Lopez's contention pursuant to the plain error doctrine. See Rodriguez, 15 F.3d at 416-17. As is discussed above, the evidence was sufficient to support Lopez's conviction of conspiring with Amador and Barrios regarding the sale of the heroin retrieved from Amador's yard. See Carreon, 11 F.3d at 1239 (standards for variance).

E.

Finally, Lopez contends that the district court incorrectly attributed to him the equivalent of 2,208.42 kilograms of marihuana, based upon drug distributions by Amador between February 1990 and September 1992. Lopez argues that the 1991 and 1992 heroin sales occurred prior to any agreement between him and Amador

to sell drugs.

"`[R]elevant conduct' as defined in § 1B1.3(a)(1)(B) is prospective only, and consequently cannot include conduct occurring before a defendant joins a conspiracy." Carreon, 11 F.3d at 1235-36. The amount of drugs reasonably foreseeable to Lopez depends upon when Lopez joined the Amador conspiracy.

As is discussed above, the trial testimony was sufficient to support Lopez's conviction based upon his actions in November and December 1992. Before that time, the only links between Lopez and the Amador conspiracy proved by the trial testimony were that Lopez had sold Amador the Pasa Tiempo; had mentioned to Amador that he had carried money for Vela; and had visited Davila's bar on a regular basis. Amador testified on cross-examination that Lopez had not participated in his own heroin-trafficking venture with Vela.

The probation officer attributed 208.42 grams of heroin to Lopez based upon Farris's heroin transactions with the Amador organization between February 20 and July 16, 1991. The probation officer also attributed ten kilograms of cocaine that Amador had received from Martinez before his arrest in October 1992. The drug-equivalency tables indicate that those drug amounts equal 2,208.42 kilograms of marihuana.

The probation officer noted that the police investigation had revealed that Lopez had acted as Vela's bodyguard during the late 1980's and had revealed extensive knowledge about Vela's and Jordan's drug-trafficking activities in a January 1993 briefing.

The probation officer also noted that Lopez had sold Amador the Pasa Tiempo and that he had revealed knowledge in a January 1993 briefing that Davila operated the Pasa Tiempo and Davila's bar with Amador's drug proceeds. Additionally, according to the probation officer, law-enforcement personnel observed Lopez to be a frequent visitor to the bar. The probation officer concluded that the Farris transactions were foreseeable to Lopez "through his intimate knowledge of heroin trafficking activities in the Austin area including those of Sebastian Amador." He concluded that the cocaine transactions were attributable to Lopez because Lopez was a coconspirator at the time of those transactions. The district court overruled Lopez's objections to the PSR calculations.

Vela and Jordan were not indicted as members of the Amador conspiracy. Additionally, the conspiracy alleged in the indictment lasted from October 1990 until December 1992. Lopez's participation in Vela's operations is irrelevant to his participation in the Amador conspiracy. Lopez's sale of the Pasa Tiempo to Amador and his frequent visits to Davila's bar do not link him to Amador's drug activities. Nor does his knowledge regarding the ownership of the Amador/Davila bars. Additionally, Lopez's January 13, 1993, debriefing indicates that he knew of drug-trafficking activities before late 1992 but it does not indicate that he participated in those activities.

The evidence does not indicate that Lopez joined the Amador drug conspiracy until November 1992. The district court's attribution of the equivalent of 2,208.42 kilograms of marihuana

based upon the transactions that occurred before that date therefore is clearly erroneous. Accordingly, Lopez must be resentenced.

The convictions are AFFIRMED. Lopez's sentence is VACATED and REMANDED for resentencing.