**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 94-50482
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS MEJIA,
and JOSE ANTONIO SORIA,

Defendants-Appellants.

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Appeal from the United States District Court
For the Western District of Texas
(SA-93-CR-331)

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(February 17, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:*

Defendants-Appellants Jose Luis Mejia and Jose Antonio Soria appeal their convictions following trial by jury on charges of conspiracy to possess marijuana with intent to distribute and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Among the alleged errors are insufficiency of the evidence, various evidentiary rulings, prosecutorial misconduct, and misapplication of provisions of the sentencing guidelines. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Mejia and Soria were convicted by a jury of conspiracy to possess marijuana with intent to distribute (Count One) and possession of marijuana with intent to distribute (Count Two). Mejia was sentenced to concurrent 108-month terms of imprisonment, a four-year period of supervised release, and a $100 special assessment. Soria was sentenced to concurrent 121-month terms of imprisonment, a four-year period of supervised release, and a $100 special assessment. Both appealed their convictions and sentences.

II

ANALYSIS

A. Sufficiency of the Evidence

Mejia and Soria contend that the evidence was insufficient to convict them on the conspiracy counts. Although each moved for a judgment of acquittal at the close of the government's case (which motions the court denied), neither renewed his motion at the close of all of the evidence. Our review is thus narrowed to a determination of whether there was a manifest miscarriage of justice.

To support a conviction for conspiracy to possess a controlled

substance with intent to distribute, the government must prove an agreement between two or more persons to violate the underlying narcotics laws, each person's knowledge of the conspiracy and intent to join it, and each person's voluntary participation in the conspiracy. United States v. Salazar, 958 F.2d 1285, 1291 (5th Cir.), cert. denied, 113 S. Ct. 185 (1992). A conviction for possession of drugs with intent to distribute, a violation of 21 U.S.C. § 841(a)(1), requires the government to prove that the defendant knowingly possessed the drugs with the intent to distribute. United States v. Shabazz, 993 F.2d 431, 441 (5th Cir. 1993). "Possession may be either actual or constructive and may be proven either by direct or circumstantial evidence." United States v. Gonzalez-Lira, 936 F.2d 184, 192 (5th Cir. 1991). "Constructive possession has been defined as ownership, dominion, or control over the contraband, or over the vehicle in which the contraband was concealed." Id.

Soria suggests that the only evidence supporting his involvement in the conspiracy is inadmissible hearsay, arguing that the government failed to establish his knowledge of or participation in the conspiracy or that he had "possession, dominion, or even knowledge of any controlled substance."

We have carefully reviewed the evidence presented at trial and, without regurgitating it in excruciating detail here, we conclude that the totality of the evidence against Soria is sufficient. The evidence reflects that Soria directed the negotiation and delivery of the 700 pounds of marijuana and that he

was the recipient of proceeds following the delivery of the marijuana. The evidence also suggests a pattern of dealing between the parties. Thus the evidence is sufficient to support the conclusion that Soria's conviction for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute did not result in a manifest miscarriage of justice. See Ruiz, 860 F.2d at 617.

Mejia argues that the evidence showed no more than his association with one member of the alleged conspiracy and some phone calls between the parties; that no testimony suggested his involvement in the drug conspiracy, other than the fact that the van containing the marijuana was located at his place of business at the time of the seizure of the marijuana. He notes that he is not a participant in any of the taped conversations admitted by the government at trial. Mejia insists that no evidence "unequivocally indicates that [he] knew of any illicit transactions that may have taken place in his place of business."

Again, we have carefully reviewed the record and find more than enough evidence to support this conviction. The evidence shows that Mejia's place of business had been used by the same parties in prior drug deals. Motor vehicle records showed that one of the two vehicles parked outside the business at or about the time of the commission of the offense was Mejia's. He was observed in the vicinity of his business at or about the time of the commission of the offense driving the truck. Further, the physical evidence, found in the vicinity of Mejia's business—including the

700 pounds of marijuana wrapped in gray duct tape and contained inside a van, a loaded semi-automatic pistol, a police scanner, gray duct tape and cellophane wrap used to package the marijuana—supports Mejia's conviction. The phone and hotel records also suggested an ongoing pattern of activity involving Mejia's business and a relationship among the phone numbers of Soria, Mejia, Saucedo, and Soto. Based on the evidence presented at trial, Mejia's conviction for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute did not result in a manifest miscarriage of justice. See Ruiz, 860 F.2d at 617.

B. Admission of Evidence - Confidential Informant

Soria urges that the district court erred in admitting into evidence the hearsay statements of confidential informant Gutierrez. He argues that Gutierrez was not a co-conspirator and that the testimony was not admissible under Fed. R. Evid. 801(d)(2)(E), contending that, even if Gutierrez was a co-conspirator, the statements were not made to advance the ultimate objectives of the conspiracy. Soria insists that the following testimony given by Gutierrez was improperly admitted:

> Q. When [Saucedo] would talk to you about these drug deals this month before June 5, would he talk about where he was getting his marijuana from?
>
> A. Yes, sir.
>
> Q. What would he tell you?
>
> A. He told me -- He told me -- He told me -- Especially when I questioned him, because I was holding the money for him. Because one time it was a large sum of money, a greater amount than I would ever -- I would ever hold

in my safe. And at that time he told me that it was money that belonged to his uncle that he owed his uncle and he had to send it [to] Laredo.

Q. Did he tell you his uncle's name?

A. No, not at that time, sir. He always just referred to him as "tio," which means his uncle.

Q. Did the figure 700 ever come into this -- these discussions?

A. Yes, sir. In the process while we were trying to put this deal together, evidently I understood from Mr. Saucedo that his uncle told him that he could have --

[o]bjection by Soria, hearsay upon hearsay; AUSA responds, "These are coconspirator statements;" trial court judge overruled the objection.]

A. That we could take the whole shipment and we would sell 300 pounds first and then sell the remainder later. And the amount that was given to us at the time was 700 pounds, which was what we were going to receive.

Q. Is that consistent with what Mr. Saucedo was telling you that he was making calls to Mr. Soria to set up this transaction?

A. Yes, sir, it is. And most of those calls -- I can't say that all of them, but most of those calls were made in my presence, also.

We review the evidentiary rulings of district courts in criminal trials under a heightened abuse of discretion standard. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993), cert. denied, 115 S. Ct. 261 (1994). Statements made by a co-conspirator of a party during the course of and in furtherance of the conspiracy are not hearsay. Fed. R. Evid. 801(d)(2)(E); United States v. McConnell, 988 F.2d 530, 533 (5th Cir. 1993). Assuming Soria's arguments were preserved by his one objection, his arguments are still meritless. Even if Gutierrez is not a co-conspirator, the out-of-court statements were made by Saucedo, the

"declarant" for purposes of Fed. R. Evid. 801, or Soria himself; Soria does not contend that Saucedo was not a co-conspirator for purposes of Rule 801. Also, the statements were made in furtherance of the ultimate objectives of the conspiracy. "A statement is made in furtherance of the conspiracy if it advances the ultimate objectives of the conspiracy." United States v. Snyder, 930 F.2d 1090, 1095 (5th Cir.), cert. denied, 112 S. Ct. 380 (1991). The district court did not abuse its discretion in admitting the testimony.

C. Sixth Amendment Rights: Confrontation

Soria argues that the trial court violated his Sixth Amendment right to confront the witnesses against him by allowing Gutierrez to testify as to the out-of-court statements made by co-defendant Saucedo even though Saucedo was available to testify. Soria notes that Saucedo pleaded guilty prior to the trial, but fails to identify specific portions of Gutierrez's testimony which allegedly violate Soria's Sixth Amendment right of witness confrontation. We assume that he must be referring to the same portions of Gutierrez's testimony that he contends, by separate point of error, contain inadmissible hearsay.

In any event, statements made in furtherance of a conspiracy by a co-conspirator and admissible under Rule 801(d)(2)(E) are not limited by the Confrontation Clause. Bourjaily v. United States, 483 U.S. 171, 181-84 (1987). Thus, Soria's arguments lack merit.

D. Prosecutorial Misconduct

Mejia posits that portions of the prosecutor's closing

argument constituted personal opinions that were "clear attacks on the merits of the case and the credibility of the witnesses." He insists that the remarks directly attacked his alibi defense, i.e., that he was involved in baptismal activities at the time of the commission of the offense, and misstated the fact.

We will not reverse a conviction based on an improper argument by the prosecutor unless it is shown that "the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." United States v. Iredia, 866 F.2d 114, 117 (5th Cir.), cert. denied, 492 U.S. 921 (1989). We look to see whether the challenged remarks were both inappropriate and harmful. Id. Pertinent factors include: (1) the "magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instruction; and (3) the strength of the evidence of the defendant's guilt." Id. (internal quotations and citation omitted). A conviction should not be "lightly overturned" solely on the basis of improper prosecutorial remarks. United States v. Neal, 27 F.3d 1035, 1051 (5th Cir.), cert. denied, 115 S. Ct. 530 (1994).

Mejia did not object to the prosecutor's statements at trial. When a defendant in a criminal case has forfeited an error by failing to object in the district court, we may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993).

First, an appellant 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 ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). We lack the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, even when the appellant carries this burden, "Rule 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 Supreme Court stated in Olano:

> the 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] (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, our discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Mejia argues that these portions of the prosecutor's closing argument were improper:

> The Defendant Mejia, he wasn't in Laredo June 5th, 1993. He didn't go to that baptism class. He was letting his shop being (sic) used as a warehouse for this business.
>
> The identification of Mr. Mejia . . . You know, this paper that Mr. Mejia brought into evidence. . . the baptismal certificate, . . . after that testimony was presented yesterday morning, I had the opportunity then to then make some calls and figure out what this is all about. And we were able to bring the employee, the

> church secretary of San Luis Rey Church. That paper doesn't mean Mr. Mejia was there.
>
> And then another interesting fact is that they say, "We go to class one day. We go get the dress that night and we have the baptism the next day, June 6th." Why would they say that? Why would they say the baptism was the next day, June 6th, when their own certificate says June 27th?

These comments are reasonable inferences from the evidence presented and do not constitute improper closing argument. United States v. Enstam, 622 F.2d 857, 869 (5th Cir. 1980), cert. denied, 450 U.S. 912 (1981). Any error does not rise to the level of plain error.

E. Sentencing: Leadership Role

Soria claims that the district court erred in enhancing his base offense level four points for his leadership role in the offense pursuant to U.S.S.G. § 3B1.1(a).

The Guidelines provide that if the defendant was an organizer or leader of any criminal activity that involved five or more participants or was otherwise extensive, the offense level should be increased by four levels. § 3B1.1(a). Factors which should be considered in making a leadership finding include: (1) the exercise of decision-making authority; (2) the nature of participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5) the degree of participation in planning and organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others. § 3B1.1, comment. (n.3). A district court's finding

that a defendant was an organizer or leader is reviewed for clear error. United States v. Puig-Infante, 19 F.3d 929, 944 (5th Cir.), cert. denied, 115 S.Ct. 180 (1994). The district court need only determine factual findings at sentencing by a preponderance of the evidence. Id.

The PSR recommended a four-level increase in Soria's base offense level for his role in the offense as an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive. § 3B1.1(b). Soria contested this recommendation by written objection and re-argued this objection at sentencing. There, the court overruled Soria's objection, adopting the PSR's recommendation and concluding that Soria's total offense level was 32 and his criminal history category I.

The PSR stated that at least five participants (other than DEA agents or confidential informants) were involved in the offense: Soria, Mejia, Saucedo, Benigno Soto, Jr., and others who assisted "inside the business concerning the storage of this marijuana in the van." Further, the PSR reflected that because of previous drug transactions the organization was "otherwise extensive" for purposes of § 3B1.1. "The PSR is considered reliable and may be considered as evidence by the trial judge in making factual sentencing determinations." United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992).

Soria argues that the evidence admitted at trial suggesting that he played a leadership role consisted of inadmissible hearsay. Even assuming the evidence was hearsay, a sentencing court may

consider hearsay evidence at sentencing, if the evidence has a "sufficient indicia of reliability to support its probable accuracy." United States v. Cuellar-Flores, 891 F.2d 92, 93 (5th Cir. 1989) (internal quotation and citation omitted). The district court did not clearly err in enhancing Soria's base offense for his leadership role in the offense.

F. Sentencing: Firearm Enhancement

U.S.S.G. § 2D1.1(b) (1) provides for a two-level increase in a defendant's offense level "[i]f a dangerous weapon (including a firearm) was possessed." "Possession need only be established by a preponderance of the evidence." United States v. Webster, 960 F.2d 1301, 1310 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992). If "it is established that a firearm was present during the offense, the district court should apply the enhancement unless it is clearly improbable that the weapon was connected with the offense." Id. (citing § 2D1.1, comment. (n.3)). We "review[s] the district court's factfinding, connecting the weapon to a drug-related offense, only for clear error." Id.

The PSR recommended an increase in Mejia's base offense pursuant to § 2D1.1(b)(1). Mejia filed a written objection to that recommendation which objection was re-argued at sentencing. The district court overruled the objection at sentencing and determined that Mejia's base offense level was 30 and his criminal history category II.

"Generally, the government must provide evidence that the weapon was found in the same location where drugs or drug

paraphernalia are stored or where part of the transaction occurred." United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). However, "[i]t is not necessary for possession of the weapon to play an integral role in the offense or to be sufficiently connected with the crime to warrant prosecution as an independent firearm offense." United States v. Villarreal, 920 F.2d 1218, 1221 (5th Cir. 1991). It is sufficient to show "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." Hooten, 942 F.2d at 882. The PSR provided that

> [t]he 700 pounds of marijuana were found inside the van, which was parked inside [Mejia's] business. A loaded .380 caliber gun was found in a middle desk drawer in the bay area of the business. The desk was located in the same bay area where the marijuana was loaded inside the business. The gun was immediately accessible by pulling the drawer open, and access was not obstructed by any paper or other object.

The evidence supports the upward adjustment of Mejia's offense level.

G. Sentencing: Quantity of Drugs

Soria and Mejia each attack the quantity of marijuana on which they were sentenced (1000 pounds). Soria insists that he should not have been sentenced for more than the 700 pounds of marijuana seized. He argues that, as the only evidence supporting his being sentenced on the basis of 1000 pounds is inadmissible hearsay evidence of Gutierrez, and as he was in Laredo, Texas, during the date of the commission of the offense, he should not have been sentenced on the basis of any amount of marijuana. In the

alternative, he argues that the drug quantity for sentencing purposes should have been limited to the 700 pounds seized because his relevant conduct did not encompass the additional 300 pounds.

The offense level of a defendant convicted of a drug-trafficking offense is determined, in part, by the quantity of drugs involved in the offense. United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994); U.S.S.G. § 2D1.1(a)(3). This quantity includes both drugs with which the defendant was directly involved, and drugs that can be attributed to the defendant in a conspiracy as part of his "relevant conduct." Carreon, 11 F.3d at 1230. Relevant conduct for conspiratorial activity is defined as "`all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.'" Id. (quoting § 1B1.3(a)(1)(B)). The district court's findings relative to the quantity of drugs on which a sentence should be based are reviewed for clear error. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992).

Soria and Mejia objected to the PSRs' recommendation that they should be sentenced for more than 700 pounds of marijuana. Soria re-argued his objection at sentencing but the district court overruled his objection, sentencing him on the basis of 1000 pounds of marijuana. At Mejia's sentencing, the court overruled Mejia's objection to drug quantity, adopting the drug quantity findings that were made at Soria's sentencing.

The PSRs reflected that Soria and Mejia were participants in the drug transaction of June 5, 1993, in which 700 pounds of

marijuana were seized by the DEA. The PSRs also reflected that Mejia and Soria were co-conspirators involved in prior drug transactions involving the same participants as were involved in the June 5, 1993, transaction and that the transactions involved a total of approximately 300 pounds of marijuana. Based on this evidence, the district court did not clearly err in sentencing Soria and Mejia on the basis of 1000 pounds of marijuana.

AFFIRMED.