IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50550

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSE HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 93 CR 401 H)

April 14, 1995

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Jesse Hernandez appeals his conviction for conspiracy to possess with the intent to distribute cocaine, a Schedule II controlled substance, contrary to 21 U.S.C. § 841(a)(1) and in violation of 21 U.S.C. § 846. Hernandez was sentenced by the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

district court to a 97 month term of imprisonment, five years of supervised release and a $50 special assessment. We affirm.

In January 1993, Hernandez purchased a home from Louis Couder, a confidential informer for the Drug Enforcement Agency (DEA). Couder had been convicted for narcotics violations in 1980 and 1993. Couder began to suspect that Hernandez was involved in the narcotics trade.

In June 1993, Couder and Hernandez agreed that Couder would sell Hernandez five kilograms of cocaine. Hernandez told Couder that he intended to be a "broker" in the sale. Hernandez informed Couder that he had seen the buyers' money and that he needed a sample of the cocaine. Couder and two undercover law-enforcement officers showed Hernandez a kilogram of the cocaine, and Hernandez removed a sample to show "his people."

In July 1993, Couder, Hernandez, and an undercover officer met at a McDonald's to consummate the sale. The men discussed lowering the price of the cocaine. In September 1993, Couder and Hernandez had a recorded telephone conversation in which Hernandez told Couder that he wanted to buy 20 kilograms of the cocaine. Shortly thereafter, Hernandez arranged for Couder to meet him and the "people with the money" at the McDonald's; however, the people did not appear. While Hernandez and Couder were waiting, Hernandez told Couder about another narcotics transaction he was involved with in which 275 pounds of marijuana was seized.

In October 1993, Hernandez contacted Couder to begin purchasing the cocaine. They met at the Bowl El Paso so that Hernandez could show Couder the money for the cocaine. Hernandez was accompanied by his co-defendant Jorge Espinoza-Estrada. The three men went to Espinoza's car. Pursuant to Hernandez's instruction, Espinoza showed Couder $48,000. The men discussed a lower price, and Couder left, purportedly to retrieve the cocaine. Hernandez and Espinoza were then arrested.

Hernandez's defensive theory was that Couder had entrapped him so that Couder would receiver a lesser sentence on his 1993 drug conviction. He attempted to show that Couder had swindled him by selling the house Hernandez was attempting to purchase to another person and that he, Hernandez, became involved in the narcotics transaction only to recoup the $10,000 that he had paid to Couder for the house. Hernandez's wife testified that, after she and Hernandez began giving Couder money for the house, Couder sold the house to Maria Fontes and her husband. An attorney testified that Hernandez and his wife contacted him about Couder having sold the house to the Fonteses, and Maria Fontes testified that she and her husband gave Couder a down-payment on the house. Hernandez testified that Couder suggested that he get involved in Couder's drug-dealing so that Couder could make money and return to Hernandez the money he had paid for the house.

The jury disbelieved Hernandez's story and found him guilty of possession with intent to distribute cocaine, a violation of 21 U.S.C. §§ 841 & 846. Hernandez appeals, claiming first, that

the district court erred by submitting the issue of entrapment to the jury because he had established the defense as a matter of law, and second, that the evidence was insufficient to support his conviction.

Entrapment

On the submission of the entrapment issue to the jury, Hernandez argues that the testimony at trial established that, but for Couder's inducement, he would never have gotten involved in the drug transaction. He further argues that the Government failed to present evidence from which a reasonable jury could have found that he was predisposed to commit the crime. He argues that, because he was entrapped as a matter of law, the district court should have granted his motion for a judgment of acquittal.

To rely on the entrapment defense, the defendant must as a threshold matter present evidence that government conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it. United States v. Lui, 960 F.2d 449, 455 (5th Cir.), cert. denied, 113 S. Ct. 418 (1992). If the defendant meets this burden, he is entitled to a jury instruction on the issue and the Government has the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the offense. Id.; United States v. Menesses, 962 F.2d 420, 429 (5th Cir. 1992).

The jury in Hernandez's case was instructed on the issue of entrapment. Thus, the court impliedly found that Hernandez met

his initial burden of proving that Couder's conduct created a substantial risk that he was induced to commit the offense. See Lui, 960 F.2d at 455. Once the jury has been instructed on entrapment but has rejected the defense, the standard of review is whether, when viewing the evidence in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that "the defendant was disposed to commit the criminal act prior to first being approached by Government agents." United States v. Sandoval, 20 F.3d 134, 138 (5th Cir. 1994); United States v. Morris, 974 F.2d 587, 588)(5th Cir. 1992).

The Government argues that Hernandez's enthusiastic participation in the cocaine sale established that he was predisposed to commit the instant offense. "Although an eager acceptance of an opportunity to commit an illegal act may prove predisposition," such an inference must be rejected when "significant and persistent" government encouragement was required to induce the crime. Sandoval, 20 F.3d at 138 (footnote omitted).

Couder's encouragement was not as "significant and persistent" as that described in Sandoval, even by Hernandez's own telling. Further, although Couder made the initial contact, Hernandez actively pursued the cocaine sale. Couder testified that Hernandez called him to attempt to negotiate the sale, and that Hernandez directed how the sale would be accomplished. Hernandez's testimony was contradicted by Couder's; however, we

defer to the jury's resolution of the conflicting testimony. See United States v. Layne, 43 F.3d 127, 130 (5th Cir. 1995). Additional evidence of Hernandez's predisposition to commit the offense was his admission that he previously had possessed 275 pounds of marijuana and his business acumen in handling the sale, including his sampling of the cocaine and his attempt to lower the purchase price.

Viewing the evidence in the light most favorable to the Government, the jury could find, beyond a reasonable doubt, that Hernandez was predisposed to commit the offense before he was first approached by Couder. See Sandoval, 20 F.3d at 137. Because entrapment as a matter of law is established only when a reasonable jury could not find that the Government proved that the defendant was predisposed to commit the offense, id., the district court did not err by submitting the issue to the jury.

Sufficiency

By his second and third arguments, Hernandez challenges the sufficiency of the evidence supporting his conviction. In deciding the sufficiency of the evidence, this court determines whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt.[1] United States v. Charroux, 3 F.3d 827, 830-31 (5th Cir. 1993). The evidence need not

[1] Hernandez moved for a judgment of acquittal at the close of the Government's case in chief, and reargued his motion at the close of the case.

exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and this court will accept all credibility choices that tend to support the verdict. United States v. Pofahl, 990 F.2d 1456, 1467 (5th Cir.), cert. denied, 114 S. Ct. 266 and 114 S. Ct. 560 (1993).

To convict Hernandez of conspiring to possess cocaine with the intent to distribute, the Government must prove: (1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that Hernandez knew about the conspiracy, and (3) that Hernandez voluntarily participated in the conspiracy. United States v. Bermea, 30 F.3d 1539, 1551 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995).

Hernandez argues that his only alleged co-conspirators were government agents; therefore, the Government failed to prove that two or more persons were involved in the conspiracy. We agree with the Government that this argument borders on being frivolous. The trial testimony established that Hernandez conspired with at least one other person who was not a government agent, Jorge Espinoza, his co-defendant. Hernandez acknowledged that he spoke with Espinoza on the telephone twice before the meeting at the El Paso Bowl, and that he learned at the bowling alley that Espinoza had the money in his possession. In furtherance of the conspiracy, Couder, Hernandez, and Espinoza went to Espinoza's automobile to view the money. Thus, a rational jury could have found beyond a reasonable doubt that

Hernandez conspired with at least one other person who was not a government agent.

Hernandez also argues that the Government failed to prove the existence of an agreement because "[w]hatever communications took place between Espinoza and Hernandez were a secret." He argues that "[a]ll we know is that Espinoza was at the bowling alley with $48,000.00, that Hernandez and Couder appeared later and Espinoza showed the money to Couder." He also argues that the testimony showed only preliminary negotiations because the men did not agree on the purchase price of the cocaine.

Mere presence among or association with drug conspirators cannot suffice to establish that Hernandez voluntarily joined a conspiracy; however, a reasonable jury could have inferred that Hernandez and Espinoza were at the bowling alley pursuant to an agreement to possess cocaine. Bermea, 30 F.3d at 1552. Espinoza had $48,000 on his person, and Hernandez acknowledged that he knew that Espinoza had the money "right there and them." Contrary to Hernandez's assertion that the testimony showed only preliminary negotiations, Couder testified that there "[w]as an arrangement made for there to be an exchange that day of the $52,000 for the four kilos[.]" Hernandez tried to negotiate a lower price and Couder agreed on $12,000 per kilogram for the four kilograms. Espinoza then asked Couder if he could bring the cocaine as soon as possible. Couder told Espinoza that he would do his best and then got out of the car. Thus, a reasonable juror could infer that the agreement had been reached.

The judgment of the district court is AFFIRMED.