IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60156

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FIDEL VALENCIA, TERRY WILLIAMSON, ALEJANDRO ALCALA, PEDRO ROSARIO, and JESUS VILLALOBOS,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas
(CR B 93 132 1, 04, 08, 13, 12)

August 7, 1995

Before REAVLEY, KING and WIENER, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Fidel Valencia, Terry Williamson, Alejandro Alcala, Jesus Villalobos and Pedro Rosario appeal their convictions and/or sentences for various offenses relating to a drug distribution operation centered in Brownsville, Texas. We reverse Valencia's continuing criminal enterprise ("CCE") conviction on count 1. We

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

remand to the district court for dismissal of Valencia's count 2 marijuana conspiracy conviction or count 4 marijuana conspiracy conviction and for resentencing of Valencia. We reverse the conviction of Valencia on the count 6 structuring charge. We affirm the remaining convictions.

BACKGROUND

Valencia was a supplier of narcotics based in Brownsville, Texas. Two Government informants, Lozano and his brother Galvan, infiltrated Valencia's narcotics distribution operation and arranged with Valencia to transport various loads of his marijuana to buyers in other areas of the country.

As a result of the operation, the Government brought this case. The Government sought to show at trial that, in 1992 and 1993, Valencia engaged in a continuing criminal enterprise. The Government alleged that the enterprise involved three marijuana distribution conspiracies and a cocaine conspiracy and that Williamson, Alcala, and Villalobos each participated in at least one of those conspiracies. The Government further sought to prove that Rosario and Valencia structured currency transactions to conceal the proceeds of Valencia's marijuana distribution activities.

Valencia, Williamson and Alcala were convicted on count 2 of the indictment, which charged conspiracy to possess marijuana with the intent to distribute, in violation of 21 U.S.C. § 846. The count 2 conspiracy involved 1542 pounds of marijuana for delivery to buyers in Boston between November, 1992 and February,

1993. Valencia alone was convicted on count 4, which also charged him with conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846. Count 4 related to a conspiracy involving 145 pounds of marijuana which Valencia gave to Lozano believing that it would serve as partial payment for Lozano's services in transporting the marijuana to Boston. The indictment alleged that this conspiracy took place on December 5 and 6, 1992.

Valencia and Villalobos were convicted on count 3 of the indictment, which charged conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846. The count 3 conspiracy involved 868 pounds of marijuana for delivery to buyers in Chicago between February, 1993 and March, 1993. Based on the three marijuana conspiracy convictions, Valencia was also convicted under 21 U.S.C. § 848(a), (c) for engaging in a continuing criminal enterprise.

Valencia and Rosario were also convicted of structuring a cash transaction to evade financial institution reporting requirements, in violation of 31 U.S.C. § 5324(a)(3). The conviction related to Rosario's purchase of cashier's checks on Valencia's behalf on August 10, 1993.

DISCUSSION

A. *Valencia's Conspiracy Convictions on Counts 2 and 4*

The Government has failed to show that the conspiracies charged in counts 2 and 4 of the indictment were multiple conspiracies rather than one single conspiracy. One of

Valencia's convictions on those two counts must therefore be reversed to avoid a violation of the Double Jeopardy Clause. See United States v. Goff, 847 F.2d 149, 172 (5th Cir.), cert. denied, 109 S.Ct. 324 (1988).

Count 2 alleged a conspiracy to transport marijuana from Brownsville to Boston for its sale. Valencia agreed to pay Lozano a negotiated amount to transport the marijuana to Boston. When the Boston buyers for the marijuana fell through, Valencia did not have cash to pay Lozano and his helpers. Valencia provided Lozano with 145 pounds of marijuana as a partial payment for the transportation to Boston. The delivery of this marijuana is the basis for count 4.

In determining whether a single conspiracy exists in a case such as this one, this court addresses five factors relating to the charged conspiracies: 1) time; 2) persons acting as conspirators; 3) the statutory offenses charged; 4) the activities related to the conspiracy as charged by the government and revealed at trial, and; 5) places where the events occurring during the conspiracy took place. United States v. DeShaw, 974 F.2d 667, 674 (5th Cir. 1992). Reviewing these factors, it becomes apparent that the delivery of marijuana to Lozano charged in count 4 was not a separate conspiracy but rather "a smaller part of the larger conspiracy" to deliver marijuana to Boston for its sale. Id.

The time frame of the Count 4 conspiracy falls within the time period in which the Government alleged that the count 2

conspiracy took place. The count 2 conspiracy occurred between November, 1992 and February, 1993 while the count 4 conspiracy took place in December, 1992.

The persons charged in the count 4 conspiracy were a subset of the persons charged in the count 2 conspiracy. Valencia and one other person (Davila) were charged with the count 4 conspiracy. Valencia and Davila were charged in the count 2 conspiracy along with eight other persons.

As for the third factor, the statutory offenses charged in the two counts were identical. Counts 2 and 4 both charged violations of 21 U.S.C. § 846.

An analysis of the fourth factor shows that the activities forming the basis for the conspiracies charged in counts 2 and 4 are intertwined. The count 2 conspiracy charge involved the delivery of marijuana to Lozano and his associates and the transportation of that marijuana to Boston so that it could be sold to buyers there. The count 4 conspiracy count is based on a delivery of marijuana to Lozano in payment for the transport to Boston. The payment for transportation of the marijuana was "necessary or advantageous to the success" of the overall scheme to sell marijuana in Boston, indicating a single conspiracy. United States v. Maceo, 947 F.2d 1191, 1197 (5th Cir. 1991), cert. denied, 112 S.Ct. 1510 (1992).

Finally, the single location involved in the count 4 conspiracy is one of several locations involved in the count 2 conspiracy. The count 4 delivery of marijuana took place in the

Southern District of Texas. In the count 2 conspiracy, marijuana was transported to Boston from within the Southern District of Texas.

Our conclusion that the facts comprising counts 2 and 4 present only one conspiracy is not altered by the fact that Valencia had originally arranged to pay Lozano for the transportation of the marijuana in cash and only later decided to make a partial payment with marijuana. Conspiracy agreements are modified over time, and agreements within agreements are reached. Each revision in a plan for carrying out a conspiracy does not create a new and independent conspiracy. In this case, the Government has failed to show a "separate, corresponding agreement for each conspiracy conviction it seeks." Goff, 847 F.2d at 169.

B. *Valencia's Continuing Criminal Enterprise Conviction*

Valencia's CCE conviction must be reversed. To establish the continuing "series" of violations necessary to obtain a CCE conviction, the Government was required to prove that Valencia committed three predicate drug offenses. See United States v. Hicks, 945 F.2d 107, 108 (5th Cir. 1991). The Government indicated at trial that it would rely only on the drug conspiracies charged in counts 2 through 5 of the indictment to establish the requisite predicate drug offenses. Valencia was acquitted of participation in a cocaine conspiracy charged in count 5 of the indictment. So, the drug conspiracies charged in counts 2, 3 and 4 provided the only basis for Valencia's CCE

conviction. Because we hold that counts 2 and 4 constituted one single conspiracy and offense, we must also hold that only two predicate drug offenses were established.

C. *The Structuring Convictions*

1. Instructions to the Jury

The district court did not commit plain error in instructing the jury on the intent requirement of the count 6 structuring offense with which Valencia and Rosario were charged. To convict Valencia and Rosario of the crime of structuring financial transactions to avoid the reporting obligations of a financial institution, in violation of 31 U.S.C. § 5324(a)(3), the Government was required to prove that the defendants acted "willfully."[1] The willfulness requirement mandates a showing that Valencia and Rosario intended to circumvent a financial institution's reporting obligation and knew that their conduct in so doing was unlawful. Ratzlaf v. United States, 114 S.Ct. 655, 657 (1994).

In instructing the jury on count 6, the district court explained the intent requirement as: "[T]hey did it for the

---

[1] At the time when Valencia and Rosario were prosecuted, 31 U.S.C. § 5324 worked in tandem with 31 U.S.C. § 5322. Section 5324 made illegal the practice of structuring transactions. Section 5322, the blanket criminal enforcement provision for the currency reporting statutes, provided for the imposition of criminal penalties against a person "willfully violating," *inter alia*, the antistructuring provision of § 5324. Section 5322 has since been amended to exclude violations of § 5324 from its provision for criminal penalties. Section 5324 has been amended to include its own provision for the imposition of criminal penalties for structuring violations, which does not require a showing of willfulness. Pub. L. No. 103-325, § 411, 108 Stat. 2253 (1994). The amendments do not apply in this case.

purpose of evading statutory reporting requirements. Because remember, what you did you had to do knowingly and willfully." The instruction on count 6, if read alone, might have misled the jury into believing that it need only find that Valencia and Rosario intended to evade reporting requirements. Under Ratzlaf, more is needed. 114 S.Ct. at 657. But, the court also gave a general instruction which explained that, "Willfully means that you did the act . . . with the specific intent to do something the law forbids." In instructing on count 6, the court reminded the jury that willfulness was required and thus directed the jury to the correct general definition. Reading the instructions as a whole, the district court communicated adequately to the jury the correct intent requirement. See United States v. Eargle, 921 F.2d 56, 57 (5th Cir.) (analysis of jury instructions requires a determination "whether the instructions as a whole correctly state the rules of law applicable" to a case), cert. denied, 112 S.Ct. 52 (1991).

2. Sufficiency of the Evidence

In addition, Rosario and Valencia challenge the sufficiency of the evidence on their count 6 structuring charge. When reviewing a conviction for the sufficiency of the evidence, we view the evidence in the light most favorable to the guilty verdict, drawing all reasonable inferences and resolving credibility choices in favor of the jury's verdict.[2] The

[2] Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Beverly, 921 F.2d 559, 561-62 (5th Cir.), cert. denied, 501 U.S. 1237, 111 S.Ct.

standard is whether any rational trier-of-fact could have found the essential elements of the crime beyond a reasonable doubt.[3] In Ratzlaf v. United States, the Supreme Court held that in order to convict a defendant of structuring,[4] it does not suffice for the government to prove that the defendant knew of the bank's reporting obligation and attempted to evade it.[5] The government must now also prove that a person, when structuring a currency transaction, knew that his conduct was unlawful.[6]

a. Circumstantial Evidence

As the First Circuit recognized in a recent post-Ratzlaf structuring case, "willfulness, as a state of mind, can rarely be proved by [direct evidence that the defendant knew of the illegality of structuring]; instead, it is usually established by drawing reasonable inferences from the available facts."[7] Thus in Marder, the court affirmed a conviction for structuring despite a lack of direct evidence that the defendant knew that

---

2869, 115 L.Ed.2d 1035 (1991).

[3] United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

[4] 31 U.S.C. §§ 5322 and 5324 (West 1983 & Supp. 1995).

[5] Ratzlaf, __ U.S. __, __, 114 S.Ct. 655, 657, 126 L.Ed.2d 615 (1994).

[6] Id.

[7] United States v. Marder, 48 F.3d 564, 574 (1st Cir.) (internal quotations and citations omitted), cert. denied, __ U.S. __, 115 S.Ct. 1441, 131 L.Ed. 320 (1995); see also Ratzlaf, __ U.S. at __ n.19, 114 S.Ct. at 663 n.19.

structuring was illegal.[8] The court reasoned that the jury could infer from the fact that the defendant had his wife make cash transactions at three separate banks that the defendant was trying to conceal his structuring, and from that inference could infer that the defendant knew that the structuring was unlawful. The First Circuit's approach is in accord with Ratzlaf, in which the Supreme Court noted that "[a] jury may . . . find the requisite knowledge [that the structuring was unlawful] on defendant's part by drawing reasonable inferences from the evidence of defendant's conduct . . . ."[9] Thus, in the instant case, the jury could consider circumstantial evidence and all reasonable inferences to be drawn from it in determining whether Rosario and Valencia knew that structuring was unlawful.

In the parallel context of convictions for willful failure to file federal income tax returns, we have held that evidence of the defendant's knowledge of his or her general obligation to file tax returns can support a jury's inference that the defendant knew that he or she violated the law by failing to file a tax return for which he or she is charged.[10] Relying on

---

[8] Id.; see also United States v. Tipton, __ F.3d __, __, 1995 WL 429098, at *3 (9th Cir. July 21, 1995)(affirming structuring conviction on circumstantial evidence alone).

[9] Ratzlaf, __ U.S. at __ n.19, 114 S. Ct. at 663 n.19.

[10] United States v. Kim, 884 F.2d 189,192 (5th Cir. 1989) ("Circumstantial evidence [which shows a voluntary, intentional violation of a known legal duty] may consist of 'any, conduct, the likely effect of which would be to mislead or conceal.'"(citing Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418 (1943)); United States v. Schaefer, 580 F.2d 774, 781 n.8 (5th Cir.)("[W]e would think affirmative

similar tax evasion cases, the Ninth Circuit concluded in Tipton, a post-Ratzlaf structuring case, that evidence of attempts to conceal actions can be treated as circumstantial evidence that the defendant knew he or she was violating the law.[11] We agree with the Ninth Circuit: a reasonable jury could conclude that a defendant willfully violated the law from circumstantial evidence, such as the use of multiple transactions to mislead or conceal.

b. Circumstantial Evidence: Rosario's Conduct

The evidence showed that Rosario was a federal agent "gone bad." Having worked the Rio Grande for several years, Rosario was a veteran federal Border Patrol Agent. As a Border Patrol Agent, Rosario was experienced in both the detection of and the means by which to evade detection in typical border crimes such as illegal immigration and drug trafficking. Despite his sworn duty to uphold federal law, Rosario lived with and ran errands (such as conducting the subject $20,000 cash transaction) for Valencia, a known drug dealer. In addition, Valencia's drug trafficking was known to Rosario: Witnesses testified that Rosario consoled Valencia after the loss of a large drug transaction.

---

willful attempt may be inferred from conduct such as . . . handling one's affairs to avoid making the records usual in transactions of that kind, and any conduct, the likely effect of which would be to mislead or to conceal"), cert. denied, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978).

[11] See Tipton, 1995 WL 429098, at *3-*4.

The evidence was susceptible of a reasonable inference that Rosario concealed his efforts to convert into several negotiable instruments the $20,000 in cash that Valencia gave him. Given Rosario's relationship to Valencia and intimate familiarity with Valencia's business, a jury could reasonably infer Rosario's knowledge that the $20,000 in small, used bills was proceeds of the illicit drug trade.

Valencia gave Rosario the $20,000 with which to obtain the guaranteed funds required to purchase fighting cocks from Billy Ray Morris. It is unclear whether Morris requested payment in a cashier's check (singular) or cashier's checks (plural), as both of these terms are used indiscriminately throughout the record. What is clear beyond question, however, is that Rosario could have purchased one $20,000 cashier's check (singular) from any bank in South Texas. And nowhere in the record is there evidence that Morris would not accept such a singular instrument. Instead, however, Rosario's money order buying tactics suggest a deliberate attempt both to conceal his banking activity and to avoid federal reporting requirements by purchasing multiple instruments below the reporting threshold.

For example, when he entered the Federal Credit Union in Brownsville, Rosario attempted to purchase a $10,000 cashier's check. So, the first instrument sought was for less than the entire $20,000. After the teller informed him that she would have to file a CTR on the transaction, Rosario was no longer interested in a $10,000 money order, but asked if there would be

a "problem" with the purchase of a $9,000 cashier's check. Translating the term "problem" to mean "file a CTR," the teller responded that a CTR would not be required for a $9,000 cashier's check; whereupon, Rosario purchased a $9,000 cashier's check. He still needed to acquire $11,000 more in the form of guaranteed fund instruments to attain the full purchase price for the roosters. Travelling back and forth among three different Valley Check Cashiers locations in Brownsville, Rosario used $20 bills to purchase a total of $11,000 worth of money orders, each for $500. Thus, the question that we must decide is whether, based on this circumstantial evidence (federal border patrol agent "gone bad," concealment of banking activities involving illicit funds, and avoidance of federal reporting requirements) and reasonable inferences therefrom, a reasonable jury could have concluded that Rosario willfully violated the law against structuring. A federal jury in South Texas concluded that he did, and we find that conclusion reasonable and decline to disturb the result. Accordingly, we affirm Rosario's conviction on the count 6 structuring charge.[12]

c. Circumstantial Evidence: Valencia's Conduct

The same cannot, however, be said of Valencia's structuring conviction. Although Valencia supplied the $20,000 in cash for

[12] This writing and affirmation of the conviction of Rosario is by Judges King and Wiener. Judge Reavley would reverse the conviction of Rosario for insufficiency of evidence on the ground that evidence that Rosario did not want the cash transaction reported and that he was a federal agent "gone bad" does not prove that he knew that structuring was a crime.

the purchase of the roosters, the government failed to adduce a scintilla of evidence suggesting that Valencia willfully attempted to violate federal anti-structuring laws. In fact, after reviewing the entire record, the only evidence linking Valencia to the structuring is the fact that he supplied the cash for the transaction and was aware that the seller of the roosters required guaranteed funds.

As before, we must decide whether, based on this evidence (Valencia gave Rosario $20,000 in cash to purchase fighting cocks) and reasonable inferences therefrom, a reasonable juror could have concluded that Valencia willfully violated federal anti-structuring laws. Although the same South Texas jury concluded that he did, we find that conclusion unreasonable. We find this evidence insufficient to allow a reasonable jury to conclude Valencia even knew about the federal reporting requirements, much less that he willfully violated them. Accordingly, we reverse Valencia's conviction on the count 6 structuring charge.

D. *Williamson's Count 2 Conspiracy Conviction*

The evidence at trial was sufficient to allow a rational jury to find that Williamson agreed to participate in the count 2 conspiracy and to support Williamson's conviction on count 2. The evidence at trial supported a finding that Williamson was a middleman who agreed to find buyers in Boston for Valencia's marijuana. At a videotaped meeting on December 5, 1991, Valencia

told the informants of his intention to meet with Williamson to discuss the aborted delivery of the Boston marijuana load. Testimony at trial indicated that Valencia and Galvan later visited Williamson to discuss the Boston load. Then, in another videotaped meeting on December 8, 1992, Williamson himself told Valencia and the informants of his efforts to sell all or part of the Boston marijuana load to prospective buyers in Boston or Cincinnati. Williamson spoke on the tape about arrangements for the transfer of the marijuana to buyers.

Williamson argues that he negotiated possible participation in the conspiracy but that he never agreed to participate. On the tapes, Williamson explains why the deal with the buyers in Boston fell through and generally expresses uncertainty about finding a buyer. In the end, Williamson never consummated a transaction in Boston, and the marijuana transported to Boston was never actually delivered to a buyer.

However, Williamson's agreement to join the conspiracy was not based on an agreement to purchase marijuana but rather to serve as a middleman and find a buyer for the marijuana. The tapes show that he agreed to engage in that activity. The fact that a purchase in Boston never occurred does not affect the existence of Williamson's agreement to participate in the conspiracy in his role as middleman. In a similar case, the Fifth Circuit found sufficient evidence of participation in a drug conspiracy where the evidence showed that a middleman knew of a drug delivery and had agreed to call a potential purchaser

even though he never successfully contacted the purchaser to arrange the sale. United States v. Rena, 981 F.2d 765, 771 (5th Cir. 1993). The evidence against Williamson is at least as strong as the evidence supporting the conviction in that case.

E. *Villalobos' Count 3 Conspiracy Conviction*

Sufficient evidence also supports Villalobos' conviction of conspiracy on count 3. Villalobos contends that the Government failed to show that he knew of the conspiracy and intended to join it or that he voluntarily participated in the conspiracy. See United States v. Crain, 33 F.3d 480, 485 (5th Cir. 1994) (elements of conspiracy), cert. denied, 115 S.Ct. 1142 (1995).

The Government presented evidence at trial that Villalobos lived with Valencia and performed odd tasks for him. When Galvan went to pick up part of the Chicago load on February 17, 1993, Villalobos drove Valencia's car with Valencia as a passenger and guided Galvan to a ranch near Pharr, Texas. One of Valencia's associates took Galvan's van to load it with marijuana, and Villalobos remained at the ranch with Galvan. Galvan testified at trial that Villalobos discussed with him the quality of the marijuana he was about to receive. The Government also introduced evidence showing that Villalobos used substantial sums of money while reporting very minimal income on his tax returns.

A defendant's association with conspirators does not constitute sufficient evidence that the defendant is a conspirator, and presence at a crime scene alone does not prove conspiracy. United States v. Menesses, 962 F.2d 420, 427 (5th

Cir. 1992); United States v. Espinoza-Seanez, 862 F.2d 526, 537 (5th Cir. 1988). This court has also found insufficient evidence of involvement in a conspiracy where the evidence showed, without more, that a defendant drove a vehicle to a drug transaction under suspicious circumstances. See Menesses, 962 F.2d at 426-27; Espinoza-Seanez, 862 F.2d at 537-38. However, the evidence in this case shows more than Villalobos' mere association with Valencia, presence at the transfer of the Chicago marijuana load and activity as a driver to the scene of the marijuana transfer. The undisputed evidence that Villalobos vouched for the marijuana to Galvan and that he also lived far beyond his reported means supports a finding that Villalobos was actively involved in activities of the drug conspiracy.

F. *Remaining Arguments*

Alcala argues that the district court erred when it admitted his statement confessing to participation in the conspiracy charged in count 2. We disagree. Alcala received his Miranda warnings, and the Government adequately showed that "under the totality of the circumstances" Alcala's statement was voluntarily made. United States v. Restrepo, 994 F.2d 173, 185 (5th Cir. 1993).

Valencia and Williamson contend that their convictions should be reversed because of prosecutorial misconduct. That argument has no merit.

CONCLUSION

We reverse Valencia's CCE conviction on count 1. We remand to the district court for dismissal of either Valencia's count 2 or count 4 conviction. Because Valencia's sentence was largely dictated by his CCE conviction, the district court must also resentence Valencia on remand. We also reverse Valencia's conviction on the count 6 structuring charge. We affirm the remaining convictions.

AFFIRMED in part, REVERSED in part, REMANDED for further proceedings.