12-3128

To Be Argued By:
MICHAEL E. RUNOWICZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3128

UNITED STATES OF AMERICA,
Appellee,

-vs-

RUFINO CANDELARIO,
Defendant-Appellant,

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants.

Table of Contents

Table of Authorities ii

Statement of Jurisdiction v

Statement of Issue Presented for Review vi

Preliminary Statement 1

Statement of the Case 2

Summary of Argument 9

Argument 10

I. The evidence at trial was sufficient to support a verdict of guilty 10

A. Relevant facts 10

B. Governing law and standard of review 10

1. Sufficiency of the evidence 10

2. Possession of narcotics 11

C. Discussion 12

Conclusion 17

Table of Authorities

Pursuant to "Blue Book" rule 10.7, the government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

Cases

United States v. Andrews,
442 F.3d 996 (7th Cir. 2006) 16

United States v. Florez,
447 F.3d 145 (2d Cir. 2006) 11

United States v. Forlorma,
94 F.3d 91 (2d Cir. 1996) 15

United States v. Gaviria,
740 F.2d 174 (2d Cir. 1984) 13

United States v. Hassan,
578 F.3d 108 (2d Cir. 2008) 11

United States v. Heras,
609 F.3d 101 (2d Cir. 2010) 11

United States v. Jackson,
335 F.3d 170 (2d Cir. 2003) 11

United States v. Maher,
108 F.3d 1513 (2d Cir. 1997) 10

United States v. Mariani,
725 F.2d 862 (2d Cir. 1984) 11

United States v. Morgan,
385 F.3d 196 (2d Cir. 2004) 16

United States v. Paulino,
445 F.3d 211 (2d Cir. 2006) 12

United States v. Payton,
159 F.3d 49 (2d Cir. 1998) 11, 12

United States v. Rodriguez,
392 F.3d 539 (2d Cir. 2004) 12

United States v. Snow,
462 F.3d 55 (2d Cir. 2006) 12

United States v. Tran,
519 F.3d 98 (2d Cir. 2008) 10, 15

Statutes

18 U.S.C. § 2 2

18 U.S.C. § 3231 v

21 U.S.C. § 841 2

28 U.S.C. § 1291 v

Rules

Fed. R. App. P. 4 v

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on July 30, 2012. Appellant's Appendix ("A") at 16. On August 3, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A16 & A412. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue Presented for Review

Did the district court err in denying the defendant's motion for a judgment of acquittal, where the evidence at trial established, *inter alia*, that four kilograms of cocaine were found in the defendant's Jeep, which was in a repair facility; that before the drugs were found, the defendant repeatedly asked if his wife could "take the car" away; and that after the drugs were found, the defendant stated that his wife did not know about the cocaine, but did not deny that the cocaine belonged to him?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3128

UNITED STATES OF AMERICA,

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RUFINO CANDELARIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Rufino Candelario was convicted after trial of possessing more than 500 grams of cocaine with intent to distribute. The evidence at trial established that Candelario and his Jeep were at a garage when law enforcement officers arrived to execute a search warrant; that Candelario was extremely nervous; that Candelario repeatedly asked one of the officers if his wife could "take the car" away; that four kilograms of cocaine were found in Candelario's Jeep; and that Can-

delario did not deny that the cocaine was his, but only stated that his wife did not know about it.

The defendant's claim that the evidence at trial was insufficient to sustain the jury's verdict is meritless, and the judgment below should be affirmed.

Statement of the Case

On February 24, 2011, appellant Rufino Candelario and twenty-five other defendants were charged in a superseding indictment with various drug trafficking offenses. Count Five specifically charged that, on or about December 18, 2010, Candelario and co-defendant Manuel Vizcarrando possessed over 500 grams of cocaine with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1) & (b)(1)(B)(ii)(II) and Title 18, United States Code, Section 2. *See* A29-30.

The trial of Candelario was conducted on March 19, 2012, and a general verdict of guilty was returned on March 20, 2012. *See* A14.

The evidence introduced by the government established that, in early 2010, the FBI "Safe Streets Task Force" was investigating drug traffickers in the New Haven area. *See* A260. During the investigation, one of the locations that came under surveillance was 150 Kendall Street in New Haven, a garage owned and operated by

Vizcarrando. *See* A260-61. Vizcarrando was described as a "kilo-level dealer" in cocaine. A317.

On December 18, 2010, the government obtained an arrest warrant for Vizcarrando and a search warrant for 150 Kendall Street. *See* A262-63. The warrants were executed that day, and two of the officers who participated in the execution of the warrants testified at trial.

Officer Karl Jacobson, a member of the New Haven Police Department, was assigned to the Safe Streets Task Force and was a co-case officer on the investigation. *See* A257-59. After arriving at 150 Kendall Street, Officer Jacobson saw that the entrance door to the facility was wide open. *See* A266-67. As Officer Jacobson approached the open door, he saw Candelario inside the garage, near a Jeep. *See* A290. Candelario was walking out of the garage, towards a pickup truck where his wife and other family members were waiting. *See* A268-69.

Officer Jacobson entered the garage and arrested Vizcarrando. *See* A269-70. After questioning Vizcarrando, Officer Jacobson found eighteen small bags of cocaine in the office and instructed another officer to arrest Candelario and bring him back into the garage. *See* A271-72. Candelario was searched, and three small bags of cocaine were found on his person. *See* A272.

Officer Jacobson then advised Candelario of his *Miranda* rights. *See* A273. Candelario re-

sponded that he understood his rights, and he "immediately asked" if his wife could take the car. *Id.* At the time, Officer Jacobson and Candelario were in the garage, in front of the Jeep. *See id.* Candelario also said that the Jeep was his. *See id.*

Officer Jacobson asked Candelario about the three bags of cocaine that had been found on his person. *See* A274. Candelario was "extremely nervous, sweating, very nervous." *Id.* Officer Jacobson attempted to calm Candelario down, explaining that the three bags were only a small amount of cocaine. *See id.* Candelario, however, would not calm down. *See* A275. "He was extremely nervous, continued to be extremely nervous, [and] asked . . . again could his wife take the car." *Id.* Candelario asked seven or eight times whether his wife could take the car. *See id.*

Officer Jacobson then stepped out of the garage to call the prosecutor. *See* A275. After speaking with the prosecutor, Officer Jacobson reentered the garage and saw that another officer, Officer Carlos Conceicao, was looking around the Jeep. *See id.* Officer Jacobson also saw that Candelario was watching Officer Conceicao and "getting more and more nervous," to the point where Officer Jacobson "sat him down" out of concern that Candelario "might fall down or pass out." A276. Candelario asked again whether his wife could take the car. *See id.*

Officer Conceicao then made an exclamation, having seen something in the back of the Jeep. *See* A277. Officer Jacobson looked in the Jeep, and he saw "four wrapped packages that appeared to be four kilograms of cocaine." A277. Officer Jacobson said to Candelario, "[Y]ou got some problems now," and Candelario "looked down[,] upset." Officer Jacobson testified: "I didn't have to tell him what was in there." A278. When Officer Jacobson tried to question Candelario about the cocaine in the Jeep, "all he would say . . . was his wife didn't know anything about it." A278.

Officer Jacobson testified that Candelario had called other subjects of the investigation, including Ceferino Quinones, Nicholas Casanova-DeJesus, and Vizcarrando. *See* A329. Candelario and Vizcarrando, in particular, spoke by phone "approximately 300 times." *Id.*

Officer Conceicao, a member of the New Haven Police Department, testified after Officer Jacobson. *See* A335. Officer Conceicao testified that he searched the Jeep and that, "[b]ased on the search warrant, [he] was looking for narcotics and weapons." A340. While outside the Jeep, Officer Conceicao saw a shopping bag through the rear window. *See* A341. The bag did not have a lid or zipper, and Officer Conceicao saw something with "Saran wrap" inside the bag. *See* A341-42. Officer Conceicao opened the door of the Jeep and emptied the contents of the bag on-

to the floor of the cargo area, revealing four "bricks" of cocaine. *See* A342-45.

FBI Special Agent Robert Bornstein provided expert testimony about the packaging of kilogram "bricks" of cocaine for distribution. *See* A354-55. Special Agent Bornstein testified that the cocaine seized in the case was of "extremely high purity" and "good quality." A359. Special Agent Bornstein also testified that the price of a kilogram of good quality cocaine was approximately $30,000 to $35,000, *see* A361, and that its value after being re-packaged for distribution was "well over 100,000 to almost $200,000 . . . ." A362.

The defense did not offer any evidence, *see* A376, and the jury returned a guilty verdict the following day, *see* A214.

On March 30, 2012, Candelario filed a timely motion under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. *See* A15. In his motion, Candelario made the same arguments* that he raises on appeal: that there was insufficient evidence for a jury to find that Candelario possessed the cocaine found in his Jeep, and also, that there was insufficient evidence for a jury to find that Candelario aided and abetted somebody else to possess the cocaine

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* Candelario also argued that there was insufficient evidence of his intent to distribute, but he does not press that argument on appeal.

in his Jeep. *See* Record on Appeal Doc. No. ("R. Doc.") 788.

The district court correctly denied the motion. *See* R. Doc. 998. Specifically, the court found that "Candelario was present at 150 Kendall Street under a set of circumstances from which the jury could reasonably conclude that he constructively possessed the four kilograms of cocaine found there." *Id.* at 5. As the court explained, Candelario's "extreme nervousness" and his "repeated requests that the officers let his wife 'take the car'" suggested that Candelario knew about the drugs in the Jeep. *Id.* Moreover, his statement after the drugs were found that "*his wife*" didn't know anything about the drugs "amounted to an implicit admission that *he* did know about the drugs." *Id.* at 6.

The district court also found that there was sufficient evidence for a jury to find that the cocaine was going to be transported by Candelario or was otherwise under his control. *See id.* at 6-7. The court cited evidence establishing that Candelario owned the Jeep and was standing next to it when the law enforcement officers arrived, *see id.*; that Candelario was linked to the drug-distribution activities at the garage through hundreds of telephone calls, *see id.* at 7; and that Candelario's repeated requests for his wife to "take the car" could reasonably be interpreted as attempts by Candelario to exercise dominion or control over the cocaine, *see id.*

Finally, the court rejected Candelario's argument that the Jeep might have been used by somebody other than Candelario as a hiding place for the cocaine. As the court explained, "the garage featured a number of storage areas that would have served as more effective places to conceal valuable drugs than the open rear cargo area of an SUV." *Id.* at 6 (internal quotation marks omitted).

On July 26, 2012, the defendant was sentenced principally to 60 months' imprisonment, followed by four years' of supervised release. *See* A16. Judgment entered on July 30, 2012, and the defendant filed a timely notice of appeal on August 3, 2012. *See id.*

The defendant is currently serving his sentence.

Summary of Argument

A defendant challenging the sufficiency of the evidence after a jury's guilty verdict bears a "heavy burden" and must show that no reasonable jury would have convicted him. *See* Point I.B. In this case, there was overwhelming evidence to support the jury's verdict, including Candelario's physical proximity to the cocaine, his admitted ownership of the Jeep in which the cocaine was found, his repeated attempts to remove the cocaine from the premises being searched, his failure to deny that the cocaine found in his car belonged to him, and his consciousness of guilt. *See* Point I.C., *infra*. Although Candelario argues that Vizcarrando had control over the cocaine, Candelario's argument fails because it was not necessary for the government to establish that Candelario had exclusive control over the cocaine. *See id.*

Argument

I. The evidence at trial was sufficient to support a verdict of guilty

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the Statement of the Case above.

B. Governing law and standard of review

1. Sufficiency of the evidence

The appellant purports to raise two issues on appeal, but the issues reduce to one in this case: if there was sufficient evidence to support a guilty verdict, then the appellant's motion for a judgment of acquittal was properly denied. *See generally United States v. Maher*, 108 F.3d 1513, 1530 (2d Cir. 1997) (noting that "same standard" applies whether court is reviewing sufficiency of the evidence or motion for judgment of acquittal).

An appellant challenging the sufficiency of the evidence "faces a heavy burden, because [the Court] must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor." *United States v. Tran*, 519 F.3d 98, 105 (2d Cir. 2008). "Reversal is warranted only if no rational factfinder could have found the crimes charged proved be-

yond a reasonable doubt." *Id.* "The ultimate question is not whether [the Court] believe[s] the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

The standard is "exceedingly deferential" to the jury's role as the fact finder. *United States v. Hassan,* 578 F.3d 108, 126 (2d Cir. 2008). The Court "may not usurp the role of the jury by substituting its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010). The evidence is to be viewed not in isolation, but as a whole. *See United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984). Indeed, "the jury's verdict may rest entirely on circumstantial evidence." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003).

The Court reviews *de novo* the denial of a motion for a judgment of acquittal, applying the same stringent standard as the district court. *See United States v. Florez*, 447 F.3d 145, 154 (2d Cir. 2006).

2. Possession of narcotics

Possession with intent to distribute narcotics may be established by proof of "actual or constructive possession of the narcotics." *United*

States v. Snow, 462 F.3d 55, 69 (2d Cir. 2006). "Constructive possession exists when a person knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *United States v. Paulino*, 445 F.3d 211, 222 (2d Cir. 2006). Constructive possession may be shown by direct or circumstantial evidence. *See Payton*, 159 F.3d at 56.

A defendant's dominion and control "need not be *exclusive*." *Snow*, 462 F.3d at 69. In particular, the government is not required to disprove that the object was subject to the dominion and control of others. *See Payton*, 159 F.3d at 56. However, mere proximity or presence is not sufficient to prove constructive possession. *See United States v. Rodriguez*, 392 F.3d 539, 548 (2d Cir. 2004).

C. Discussion

The evidence at trial overwhelmingly supported the jury's verdict in this case. The evidence included:

- *Candelario's knowledge of the cocaine.* Candelario properly concedes that a jury could reasonably have inferred that "he knew the cocaine was inside the Jeep . . . ." *See* Appellant's Brief and Special Appendix ("Br.") at 11.

- *Candelario's physical proximity to the cocaine.* Candelario was standing near the Jeep, and thus near the four kilograms of cocaine in the Jeep, when the law enforcement officers arrived at the scene. *See* A290. Candelario's proximity to the cocaine, though insufficient standing alone to establish guilt, could properly have been given some weight by the jury in concluding that Candelario had the power to exercise control over the cocaine.
- *Candelario's ownership of the Jeep.* When he was questioned, Candelario immediately claimed ownership of the Jeep. *See* A273. Candelario's claim of ownership, combined with the reasonable inference that he knew about the cocaine in the Jeep, was tantamount to a claim by Candelario that the cocaine also was his. *See, e.g.*, *United States v. Gaviria*, 740 F.2d 174, 185 (2d Cir. 1984) (rejecting insufficiency claim where, *inter alia*, apartment where drugs were found had been leased in defendant's name).
- *Candelario's attempts to secure the cocaine.* Before the cocaine was found, Candelario repeatedly asked if his wife could "take the car." A273 & A275. Candelario's attempts to remove the Jeep from the scene of the search, with the cocaine inside, easily supports a reasonable jury's conclusion that

Candelario was responsible for the cocaine and intended to exercise dominion and control over it.

- *Candelario's reaction to the cocaine*. When the cocaine was found, Candelario did not react with shock or surprise that four kilograms of cocaine had been found in his Jeep. *See* A278. To the contrary, upon questioning, Candelario only said that his wife did not know about it. *See id.* Candelario's statement was an implicit admission that he (unlike his wife) knew about the cocaine, and it strongly supported the jury's verdict because the jury could reasonably have expected that Candelario would have reacted differently if the cocaine did not belong to him.

- *Candelario's ties to drug traffickers*. Although mere association is not alone sufficient to establish guilt, a reasonable jury could properly give some weight to Candelario's association with drug traffickers in concluding that Candelario was himself involved in drug trafficking. In particular, Candelario had spoken by phone approximately 300 times with Vizcarrando, identified as "a kilo-level dealer in cocaine." A317 & A329. From this, a reasonable jury could conclude that Candelario had a relationship with Vizcarrando, and from the four kilograms of cocaine found in Cande-

lario's Jeep, a reasonable jury could conclude that the relationship involved drug trafficking. At a minimum, the jury knew that the relationship was not innocent, based on the three baggies of cocaine that Candelario obtained from Vizcarrando. *See* A315.

- *Candelario's consciousness of guilt.* Finally, Candelario's extreme nervousness provided evidence of his consciousness of guilt, which a reasonable jury could have weighed in concluding that Candelario knew that the cocaine belonged to him. *See, e.g.*, *Tran*, 519 F.3d at 104-05; *United States v. Forlorma*, 94 F.3d 91, 93 (2d Cir. 1996).

In sum, there was overwhelming evidence in support of the jury's verdict. Although Candelario suggests alternative inferences that might have been drawn, taking some of the evidence in isolation, any reasonable jury would have had reached, as this jury did, a verdict of guilty after considering the evidence as a whole.

Candelario argues, however, that "the Jeep was under the control of Vizcarrando . . . ." *See* Br. at 16. Candelario relies in part on a finding by the district court, made while denying Candelario's motion to suppress, that Vizcarrando exercised sufficient dominion over the Jeep for the Jeep to be covered by the government's search warrant. *See* Br. at 12-13 (citing R. Doc. 736).

Candelario's argument fails, because the government was not required to prove that Candelario had exclusive possession of the cocaine in order to establish guilt. *See, e.g.*, *United States v. Morgan*, 385 F.3d 196, 207 (2d Cir. 2004) ("It is not necessary for a defendant to touch or exercise *exclusive* control over contraband to possess it . . . . What is required is sufficient indicia of dominion and control." (alteration in original)). Even if Vizcarrando exercised some degree of dominion and control over the Jeep, the evidence provided sufficient indicia that Candelario also exercised dominion and control over the Jeep and the cocaine contained therein to support the jury's verdict.

Finally, Candelario argues that there was also insufficient evidence to support an alternative theory of criminal liability, *i.e.*, that Candelario aided and abetted Vizcarrando in the possession of cocaine with intent to distribute. Obviously, the Court does not need to reach this alternative theory of liability if the Court concludes, as it should, that there was sufficient evidence for a jury to find that Candelario possessed the cocaine himself.

Otherwise, based on the evidence adduced above, the government contends that a reasonable jury could have returned a guilty verdict on the ground that Candelario provided his Jeep to Vizcarrando, knowing that the Jeep would be used to transport cocaine. *See, e.g.*, *United States*

v. Andrews, 442 F.3d 996, 1002-03 (7th Cir. 2006) (rejecting challenge to sufficiency of the evidence under aiding-and-abetting theory where defendant merely provided car to be used during bank robbery).

Conclusion

For the forgoing reasons, the judgment of the district court should be affirmed.

Dated: January 10, 2014

Respectfully submitted,

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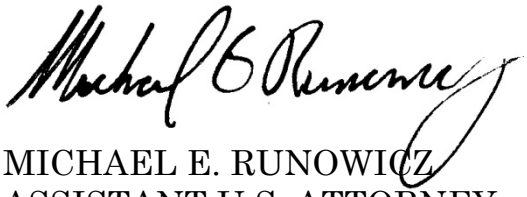

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