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United States Court of Appeals
Tenth Circuit

November 21, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEAN MILTON DORMER,

Defendant - Appellant.

No. 06-3310
D. Kan.
(D.C. No. 02-CR-40157-JAR)

ORDER AND JUDGMENT[*]

Before **MURPHY**, **O'BRIEN**, Circuit Judges and **KANE**, District Judge[**].

Dean Dormer was convicted after a jury trial of conspiracy to distribute marijuana and sentenced to 151 months imprisonment. Dormer appeals from his conviction and sentence. We affirm.

I. FACTUAL BACKGROUND

A. Troy Barker's Drug-Trafficking Operation

Troy Barker, a California resident, began selling cocaine and marijuana in 1994. He eventually sold only marijuana. He obtained the marijuana from Catalina Alcoverde in Tucson, Arizona, transferred it to California for packaging, and then transported it to Cleveland, Ohio, for sale. In the beginning, Barker

[*]This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[**] The Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

transported the marijuana to Cleveland in five to ten pound increments via Federal Express (Fed Ex) or United Parcel Service (UPS). Seeking to transport larger quantities, Barker began packaging the marijuana in crates and sending it to Cleveland via a commercial carrier. Ultimately, he chartered private airplanes to transport the marijuana. Barker's drug-trafficking operation was very successful, generating millions of dollars in profits.

Family members and friends assisted Barker in his drug-trafficking operation. Brian Diaz (a.k.a. Rocky), Barker's half-brother, ran errands for him, including picking up the marijuana in Arizona and transferring it to California. Occasionally, Barker gave Diaz money to pay Alcoverde. Clive Hamilton (Clive), another half-brother, protected the marijuana while it was in California. He also helped Barker's brothers "Papa" and "Tata" package the marijuana for transportation to Cleveland. (R. Vol. 2 at 418, 421.) Sean Gayle, Barker's friend, collected drug money for Barker in Cleveland.

Faeth Hamilton (Faeth), Barker's half-sister, owned a real estate business called Investor's Link Financial Services. She used this business to obtain fraudulent loan documentation for family members which allowed them to purchase houses and vehicles despite their having no legitimate sources of income. Faeth was assisted in this endeavor by Alex Onesiuwu, a friend of Dormer's. Sophia Barker Williams, Barker's half-sister, worked for Barker at Heartless Records, a recording studio he used to launder his drug proceeds. Clarence Aldophus, who Barker met through Faeth, also worked at Heartless Records and owned Smooth Air, a private airplane company Barker used to transport the marijuana to Cleveland.

Mitchell Hamilton (Mitchell, pronounced Michelle), Barker's half-sister, agreed to have her name placed on one of Heartless Records's business accounts and to monitor the financial transactions occurring there. Mitchell also worked for Faeth at Investor's Link as an office manager.[1] In her capacity as Faeth's sister and officer manager, Mitchell observed Faeth talking with Dormer, drove Faeth to Dormer's house on one occasion and answered a telephone call Dormer made to Faeth's telephone. Mitchell also overheard a conversation between Faeth and Dormer in which the word "Arizona" was mentioned. (R. Vol. 1 at 260.) The word "Arizona" was significant to her because "that's the source" of Barker's marijuana:

> Arizona is where my brother, Troy, would go to buy his marijuana. He had a connection there. And everyone--like, [Faeth] knows Arizona and myself know Arizona as marijuana. Like, if you ask about Arizona, you're talking about marijuana . . . . [W]hen they say Arizona, they're talking about marijuana because it's known for [its] good marijuana. [It has] good quality weed.

(*Id.* at 261-62.)

B. Barker's Arrest

On December 23, 2002, Barker and Ondreya Bruce were traveling to Cleveland on a private airplane with 564 pounds of marijuana. En route, the plane stopped for re-fueling at the airport in Salina, Kansas. Acting on a tip, police officers greeted the plane at the airport. A drug dog alerted to the presence of drugs on boxes and luggage inside the airplane. The boxes and luggage were opened revealing the marijuana. While the officers were searching the airplane but before their arrests, Barker and Bruce went to the restrooms. A later search

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[1] Clive, Faeth and Mitchell Hamilton are siblings. To prevent confusion, we refer to them by their first names. Diaz is their half-brother.

of the women's restroom revealed $2,000 hidden therein; Bruce admitted the money was hers. In the men's restroom, the officers discovered a small bag of marijuana, a broken cellular telephone and an address book.

After Barker's arrest, Faeth received a number of telephone calls from Alcoverde seeking the money Barker owed her for the 564 pounds of marijuana. Diaz, Gayle and Clive decided to fly to Cleveland to collect drug money owed to Barker to cover the Alcoverde debt and pay Barker's legal fees.[2] In the early morning hours of December 24, 2002, Diaz and Gayle traveled to the airport in Van Nuys, California, in a Cadillac Escalade, leased by Dormer in July 2001. Clive arrived in another vehicle. After parking their vehicles behind Raytheon, a charter airplane company, Diaz, Gayle and Clive flew to Cleveland, where they collected $852,405 in drug proceeds. They then returned to the airport to fly back to California.

C. Dormer's Stolen Vehicle Report

On the afternoon of December 24, 2002, Dormer reported the Cadillac Escalade stolen. At approximately 7:00 PM on the same day, Los Angeles Police Officer Kenneth Boyles received a call that the Escalade had been located at the Van Nuys Airport. Boyles drove to the airport where he discovered the Escalade, along with another vehicle, parked behind Raytheon. A Raytheon employee

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[2] In 1997, Clive began his own marijuana-trafficking operation, transporting marijuana from California to Philadelphia, Pennsylvania. The government's theory at trial was that while Clive had withdrawn from Barker's drug-trafficking operation in 1997, he re-joined it when he agreed to travel to Cleveland on December 24, 2002, to collect Barker's drug proceeds. Although there was substantial evidence at trial concerning Clive's drug operation, it is irrelevant to this appeal as Dormer was charged and convicted of being a member of the Barker drug conspiracy.

informed him four individuals had arrived at the airport in the vehicles, chartered a flight to Cleveland, and Hamilton was listed as the driver of the stolen Escalade.

Finding the circumstances suspicious, Boyles called Dormer. Dormer said Cherise Walton (who he referred to as his wife) had parked the Escalade in Los Angeles earlier that day and left it running while she went inside to talk to a friend. When she returned a few minutes later, the vehicle was gone. Boyles told Dormer the vehicle had been found at the Van Nuys Airport, he was at the airport and he would call him when he could retrieve the vehicle. He also informed Dormer it was likely the police would apprehend the suspects as their plane was scheduled to arrive at the airport that night. Boyles then asked to speak with Walton, who was with Dormer. Walton's story mirrored Dormer's.

A few minutes later, Walton contacted Boyles through the Raytheon office. She informed Boyles that because it was Christmas Eve, she and Dormer were not interested in prosecuting the suspects and just wanted to pick up the vehicle. Boyles told her he had a duty to apprehend the suspects and would notify her when she could retrieve the vehicle. Shortly thereafter, Walton called Boyles again. This time she said she was having a business dispute with someone (although she would not identify with whom) and did not want to prosecute. Boyles warned her about the consequences of filing a false police report and reiterated he would notify her when she could retrieve the vehicle.

D. Diaz, Gayle and Clive's Arrests

Once the plane carrying Diaz, Gayle and Clive landed, Boyles, along with other officers, stationed themselves by the Escalade. As Diaz, Gayle and Clive approached the vehicle, the officers identified themselves and informed them the

Escalade had been reported stolen. Diaz claimed the vehicle and admitted Dormer's name was on the vehicle. However, he denied stealing the vehicle, stating he was making payments on the vehicle directly to the leasing company.

The officers eventually arrested and searched Diaz, Gayle and Clive. They discovered a loaded .40 caliber Glock and a loaded gun magazine in Diaz's waistband. In Diaz's wallet, they found a piece of paper with "Donovan" written on it. (R. Vol. 4 at 943.) Gayle had a loaded 9 mm Beretta and two loaded gun magazines hidden in his waistband. On Clive, they discovered a loaded Glock 21 semiautomatic .45 caliber pistol, three loaded gun magazines and approximately $1,900 in cash. The officers also discovered a stun gun, five cellular telephones and 13.79 grams of marijuana in Clive's shoulder bag. Inside a suitcase they found the $852,405.

E. Dormer's Arrest

Four months later, on April 24, 2003, the police in Charlotte, North Carolina, received information from a confidential informant concerning a UPS package to be delivered to a residence in Charlotte. Officers observed a white pickup truck driving past the residence several times and on one occasion observed the truck in the driveway. The truck eventually entered a parking lot, where the passenger left the vehicle and began talking to another individual. The officers moved in and detained the individuals. The truck's driver and passenger were identified as Donovan Walker and Dormer, respectively. The other individual was Sonny Lucas, who had a bag of marijuana. Inside Dormer's wallet was a piece of paper with "Faeth Hamilton" written on it, along with two telephone numbers. (R. Vol. 5 at 1252.) One of the numbers matched the

telephone number written beside the name “Faeth” in the address book found in the men’s restroom on the day of Barker’s arrest. A search of the truck revealed a number of Western Union receipts from a James Otis or Gary Walton in Charlotte to Cherise Walton in California. The receipts showed two payments of $999.99 and a $500 payment had been sent to Walton via Western Union within a half-hour of each other on April 18, 2003.

Because the UPS package was not in the truck, the officers performed a knock and talk at the residence. Jeffrey Lewis answered and consented to a search of the residence. The UPS package was found in a bedroom closet. The package had been sent from Yorba Linda, California. Inside the package was 9.63 pounds of marijuana. After his arrest, Dormer informed officers he was driving with friends looking for a guy named Jeff and was also planning on visiting a friend named Fox but he could not identify Fox’s address or telephone number. Further investigation revealed Dormer lied about his employment on the lease agreement for the Escalade and had no legitimate source of income but had purchased two homes for $180,500 and $115,000.

II. PROCEDURAL BACKGROUND

Dormer was indicted, along with Barker, Diaz, Gayle, Clive, Faeth, Mitchell and others, with conspiracy to distribute more than 1,000 kilograms of marijuana and more than five kilograms of cocaine between January 18, 1994, and November 5, 2003, in violation of 21 U.S.C. §§ 812, 841(a)(1), (b)(1)(A) and 846. Dormer and Clive proceeded to a jury trial and were found guilty. However, on special interrogatory, the jury expressly rejected the most serious option — that Dormer had conspired to distribute “1,000 kilograms or more” of marijuana—

instead finding he had conspired to distribute "100 kilograms or more but less than 1,000 kilograms" of marijuana. (R. Vol. 1 at 31.)

A Presentence Report (PSR) attributed to Dormer the 564 pounds of marijuana seized at the time of Barker's arrest and the ten pounds of marijuana seized at the time of Dormer's April 2003 arrest. It also determined the offense involved the $852,405 in drug proceeds seized at the time of Diaz, Gayle and Clive's arrests which represented 2,435 pounds of marijuana.[3] However, the PSR recognized that part of the $852,405 could have been for payment of the 564 pounds of marijuana seized from Barker at his arrest. Therefore, to avoid double-counting, the PSR did not use the 564 pounds to determine drug quantity. Consequently, the PSR found the offense involved 2,445 pounds or 1,109 kilograms of marijuana, establishing a base offense level of 32. *See* USSG §2D1.1(a)(3) and (c)(4) (assigning a base offense level of 32 for "[a]t least 1,000 KG but less than 3,000 KG of Mari[j]uana . . . .").[4] It then applied a 2-level enhancement for possession of a firearm (USSG §2D1.1(b)(1)) based on the weapons seized at the time of Diaz, Gayle and Clive's arrests and a 2-level upward adjustment for obstruction of justice (USSG §3C1.1) based on a false statement Dormer made in a pro se pleading concerning the forfeiture of money seized in a 1997 incident involving Dormer. With a total offense level of 36 and a Criminal History Category I, the applicable guideline range was 188 to 235

[3] Evidence at trial showed Barker paid approximately $350 for each pound of marijuana. To determine the amount of marijuana represented by the $852,405, the PSR divided that amount by $350, resulting in 2,435 pounds.

[4] Dormer was sentenced pursuant to the 2005 edition of the United States Sentencing Commission Guidelines Manual. All citations to the guidelines in this opinion refer to the 2005 guidelines unless otherwise indicated.

months imprisonment.

Dormer filed a number of objections to the PSR. He objected to the drug quantity calculation, arguing there was no evidence linking Dormer's involvement in the conspiracy to the marijuana seized at the time of Barker's arrest or the drug money seized at the time of Diaz, Gayle and Clive's arrests. Dormer also objected to the firearm possession enhancement, alleging there was no evidence he knew or should have known about the guns possessed by his co-conspirators on the day of their arrests. He further objected to the obstruction of justice adjustment. Although he admitted his statement in the pro se pleading was false, he asserted that at the time he filed the pleading he reasonably believed his statement was true. In any event, he claimed the statement was not material. Finally, Dormer argued he was entitled to a 4-level downward adjustment to his base offense level for his minimal role in the offense and sought a downward variance from the guideline range under 18 U.S.C. § 3553(a) based on his minimal role, his lack of a criminal history, the fact he will be deported to Jamaica upon completion of his sentence and to avoid sentencing disparities between him and several of his co-defendants.

The district court sustained Dormer's objection to the obstruction of justice enhancement but overruled his objections to the drug quantity calculation and the gun possession enhancement. As to drug quantity, the court found Dormer's objection overlapped with his motion for judgment of acquittal based on insufficient evidence he was a member of the Barker conspiracy, a motion which the court had already rejected. With regard to the gun possession enhancement, the court concluded that although the evidence did not show Dormer knew Diaz,

Gayle and Clive would be in possession of weapons, this possession was reasonably foreseeable to him, especially in light of the fact that when Dormer himself was arrested in 1998 for distribution of marijuana, a search of his residence revealed a loaded Glock 9 millimeter semi-automatic pistol and a loaded gun magazine.

The court also determined Dormer was not entitled to a minimal role adjustment because, *inter alia*, his limited role was already accounted for in the fact he was not being held accountable for all of the drugs and money involved in the entire conspiracy. The court further denied his request for a downward variance under the § 3553(a) factors concluding a sentence below the advisory guideline range would not be sufficient to satisfy these factors. Based on a total offense level of 34 and a Criminal History Category I, the advisory guideline range was 151 to 188 months imprisonment. The court sentenced Dormer to 151 months imprisonment.

III. DISCUSSION

Dormer contests his conviction, alleging the district court erred in denying his motion to exclude evidence of his April 2003 arrest in North Carolina and his motion for judgment of acquittal. He also challenges his sentence, claiming the court erroneously calculated the advisory guideline range and constitutionally erred by increasing his sentence based on acquitted conduct.

A. Denial of Motion to Exclude Evidence of Dormer's April 2003 Arrest

The government sought to introduce evidence of Dormer's April 2003 arrest in North Carolina as an overt act in furtherance of the charged conspiracy.

Dormer moved to exclude the evidence, arguing it was irrelevant as the April 2003 incident had no connection to the charged Barker conspiracy and indeed there was no evidence Dormer was a member of that conspiracy. He also complained it constituted impermissible "other act" evidence under Rule 404(b) of the Federal Rules of Evidence. The district court overruled the motion, concluding:

> There's evidence that by 2003, even by late 2001, Mr. Dormer was a member of this conspiracy. That, coupled with all the other evidence offered by [Mitchell] concerning [Dormer's] connection with Faeth and [Onesiuwu] and discussions about Arizona, the North Carolina situation, is admissible as intrinsic overt acts of this conspiracy.
>
> And maybe it is a different conspiracy. But, again, that's something the jury can decide. But certainly on the showing I have there's sufficient evidence that it would survive the 403 analysis. It is probative. It's something the jury will have to decide. It, of course, is prejudicial as well. But based on the things that were seized from his person in the truck and the proffer offered by the government, the Court determines that it's more probative than prejudicial under Rule 403, and it will be admitted.[5]

(R. Vol. 4 at 999-1000.).

Dormer challenges this ruling. He asserts there was no evidence the North Carolina incident was an intrinsic overt act in furtherance of the Barker conspiracy. Specifically, he alleges the April 2003 attempted drug deal does not "fit" the Barker conspiracy as it occurred four months after Barker's arrest and

[5] The government also sought to introduce two other incidents involving Dormer: (1) an April 1997 traffic stop in which Dormer and Fabian Cook were found with $148,120 in cash and (2) a July 1998 incident in which Dormer was identified as the source of seven pounds of marijuana seized from Regina Kidd as she was attempting to transport the marijuana to Atlanta, Georgia. The court excluded these two incidents, concluding there was insufficient evidence showing they were intrinsic overt acts of the Barker conspiracy and they did not meet the criteria for admission under Rule 404(b) of the Federal Rules of Evidence.

involved a different location, a different method of sale and different people. (Appellant's Opening Br. at 27.) Because the April 2003 incident was not part of the Barker conspiracy, Dormer maintains it was impermissible extrinsic "other act" evidence under Rule 404(b). Alternatively, Dormer asserts evidence of the April 2003 incident should have been excluded under Rule 403 of the Federal Rules of Evidence because its probative value, if any, was outweighed by its unfairly prejudicial effect.

We review a district court's admission of evidence for abuse of discretion. *United States v. Portillo-Quezada*, 469 F.3d 1345, 1353 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 3066 (2007). Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Rule 404(b) only applies to evidence of acts extrinsic to the crime charged; it does not apply to direct or intrinsic evidence. *United States v. Green*, 175 F.3d 822, 831 (10th Cir. 1999). Therefore, whether Rule 404(b) applies here depends on whether the April 2003 attempted drug deal is extrinsic or intrinsic to the Barker conspiracy.

"Other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir. 1993) (quotations omitted). "In a conspiracy prosecution, uncharged acts committed in furtherance of the charged conspiracy are themselves part of the act charged" and

therefore evidence of such acts is "intrinsic to the crime and simply does not implicate the requirements of 404(b)." *Portillo-Quezada*, 469 F.3d at 1353 (quotations omitted). "In sum, conduct which occurs during the life of a conspiracy and is a part of the same is direct evidence of the conspiracy and therefore not subject to Rule 404(b)." *Id*.

Although we have yet to address the issue, it appears Rule 104(b) of the Federal Rules of Evidence applies when deciding whether an uncharged crime is admissible as an intrinsic overt act of a charged conspiracy. That rule states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." "In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." *Huddleston v. United States*, 485 U.S. 681, 690 (1988) (concluding Rule 104(b) applies to "other act" evidence under Rule 404(b)). Under this standard, the district court did not err in determining there was sufficient evidence for a jury to reasonably conclude by a preponderance of the evidence that the April 2003 attempted drug deal was an intrinsic overt act of the Barker conspiracy.[6]

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[6] Rule 104(a) of the Federal Rules of Evidence states: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the
(continued...)

First, the attempted drug deal occurred within the time frame of the charged conspiracy (January 18, 1994, to November 5, 2003). Second, Mitchell, who the district court expressly found to be "quite convincing and credible," testified Faeth knew Alcoverde, and in fact, after Barker's arrest, Alcoverde called Faeth. (R. Vol. 6 at 1345.) Mitchell also observed Faeth talking with Dormer, drove Faeth to Dormer's house on one occasion and answered a telephone call Dormer made to Faeth's telephone. Mitchell further stated she overheard a conversation between Faeth and Dormer in which the word "Arizona" was mentioned. Members of the Barker conspiracy referred to the marijuana and its source as "Arizona."[7] While Mitchell did not indicate when she overheard this conversation, a reasonable inference from the evidence was it occurred sometime in 2002 or before the April 2003 incident. Therefore, before the April 2003 incident, Dormer was conversing with Faeth about Barker's source and marijuana. The illegal substance involved in the April 2003 incident was marijuana.

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[6](...continued)
court, subject to the provisions of subdivision (b)." When these preliminary factual questions are in dispute, the party seeking to admit the evidence must prove them by a preponderance of the evidence. *Bourjaily v. United States,* 483 U.S. 171, 175-76 (1987). In *Bourjaily*, the Supreme Court determined that in deciding whether a coconspirator's statement is admissible under Rule 801(d)(2)(E), a court must decide under Rule 104(a) whether the offering party has shown by a preponderance of the evidence the statement satisfies the conditions for admissibility under that rule, *i.e.*, (1) the existence of a conspiracy involving the defendant and declarant and (2) the statement was made during and in furtherance of the conspiracy. *Id.* While we believe Rule 104(b) is the appropriate rule, even assuming Rule 104(a) applies, it is satisfied here.

[7] Dormer asserts Barker's exclusive marijuana source was Aldophus, who worked at Heartless Records and owned Smooth Air. He is mistaken. Barker admitted during cross-examination his marijuana source was Alcoverde in Tucson, Arizona. He also admitted members of his drug operation referred to marijuana as "Arizona" or "Zona." (R. Vol. 6 at 1380-81.)

Third, the evidence demonstrated Barker began his marijuana-trafficking operation by transporting marijuana from California in five to ten pound increments via Fed Ex or UPS. While the evidence showed Barker mainly transported the marijuana to Cleveland, Ohio, for sale, Mitchell testified other destinations were North Carolina, South Carolina and New York. Barker himself testified that before he began his own marijuana-trafficking operation, he helped ship drugs across the country, including to North Carolina. Therefore, not only did the April 2003 incident involve the same drug, it involved one of the destination states and methods of transportation (UPS) used by the Barker conspiracy.

Fourth, the evidence showed that at the time of his arrest, Dormer had two telephone numbers for Faeth in his wallet. One telephone number matched the number corresponding to Faeth's name in the address book found at the time of Barker's arrest. Barker admitted at trial the address book belonged to him. Dormer was arrested in April 2003 with Donovan Walker. At the time of Diaz's arrest, a piece of paper with "Donovan" written on it was found in his wallet. While Diaz testified he had no recollection of the paper, did not know a Donovan, and it was not his hand-writing, he conceded it could have been a message left at the record store where he worked indicating Donovan was trying to reach him. Therefore, the April 2003 incident was linked to two members of the Barker conspiracy.

Finally, at the time of Dormer's arrest in April 2003, a number of Western Union receipts were found in the pickup truck. The receipts showed two payments of $999.99 and a $500 payment sent to Cherise Walton in California

from two different Western Union locations within a half-hour of each other on April 18, 2003. Officer Daniel Phillips from the Charlotte-Mecklenburg Police Department testified that in his experience drug-traffickers frequently use Western Union to transfer their drug proceeds in increments just below $1,000 and will often do so from different locations within minutes of each other. Consequently, five days before the April 2003 incident, cash, which in all likelihood was drug proceeds, was sent to Walton in California, the hub of the Barker conspiracy.[8]

Because there was sufficient evidence for a jury to reasonably conclude by a preponderance of the evidence that the April 2003 attempted drug deal in North Carolina was an intrinsic overt act of the Barker conspiracy, Rule 404(b) does not apply.

Nor does Rule 403 call for exclusion of the April 2003 attempted drug deal. *See Lambert*, 995 F.2d at 1007-08 ("[I]ntrinsic 'other act' evidence, although not excluded by 404(b), is still subject to the requirement of Fed. R. Evid. 403 that its probative value is not substantially outweighed by the danger of unfair prejudice."). Evidence of this drug deal was particularly probative as an intrinsic

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[8] We recognize Barker may have been in jail at the time of the April 2003 incident. However, Diaz, Gayle and Clive were out on bail and Faeth and Alcoverde were not arrested. There is no indication that Alcoverde, who Faeth and Diaz knew, ceased providing marijuana to members of the Barker conspiracy or that these members stopped selling marijuana (even if on a smaller scale) after Barker's arrest. *See United States v. Record*, 873 F.2d 1363, 1368 (10th Cir. 1989) (finding sufficient evidence of a single conspiracy rather than multiple ones even though a member had been excluded; except for the exclusion of that member, the purpose and method of the conspiracy's operation remained the same and three of its original members continued to participate); *United States v. Brewer*, 630 F.2d 795, 800 (10th Cir. 1980) ("A conspiracy is not terminated simply by a turnover in personnel.").

overt act by Dormer in furtherance of the Barker conspiracy. While the evidence was also prejudicial, it was not unfairly so and did not outweigh its probative value.

The court did not abuse its discretion in admitting evidence of Dormer's April 2003 arrest.

B. Denial of Motion for Judgment of Acquittal

At the close of the government's evidence, Dormer orally requested a motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. He claimed the government had only shown "mere association or unwitting assistance to a conspiracy [which] is not sufficient to show [he] was a member of a conspiracy." (R. Vol. 6 at 1337.) Dormer renewed the motion at the close of the evidence. The district court denied the motion. Dormer argues the court erred because the evidence was insufficient to support his conviction for conspiracy to distribute marijuana.

We review de novo the denial of a motion for judgment of acquittal based on insufficient evidence. *United States v. McKissick*, 204 F.3d 1282, 1290 (10th Cir. 2000). "[W]e ask only whether taking the evidence--both direct and circumstantial, together with the reasonable inferences to be drawn therefrom--in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *Id.* at 1289 (quotations omitted.) In doing so, we will not weigh conflicting evidence or consider witness credibility. *Id.* "Instead, we must simply determine whether the evidence, if believed, would establish each element of the crime." *United States v. Delgado-Uribe*, 363 F.3d

1077, 1081 (10th Cir. 2004) (quotations omitted). "[R]eversal is only appropriate if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Austin*, 231 F.3d 1278, 1283 (10th Cir. 2000) (quotations omitted).

To establish a conspiracy, the government must show: (1) two or more persons agreed to violate the law, (2) the defendant knew at least the essential objectives of the conspiracy, (3) the defendant knowingly and voluntarily became a part of the conspiracy, and (4) the alleged coconspirators were interdependent. *United States v. Sells*, 477 F.3d 1226, 1235 (10th Cir. 2007). "Secrecy and concealment are often necessary to a successful conspiracy, and, as a result, direct evidence of the crime is frequently difficult to obtain. Therefore, conspiracy convictions may be based on circumstantial evidence, and the jury may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action." *United States v. Weidner*, 437 F.3d 1023, 1033 (10th Cir. 2006) (citation and quotations omitted). However, "we cannot sustain a conspiracy conviction if the evidence does no more than create a suspicion of guilt or amounts to a conviction resulting from piling inference on top of inference." *United States v. Hernandez*, 509 F.3d 1290, 1295 (10th Cir. 2007) (quotations omitted).

"[G]uilt is individual and personal, even as regards conspiracies, and is not a matter of mass application." *United States v. Espinosa*, 771 F.2d 1382, 1392 (10th Cir. 1985) (quotations omitted). Therefore, a defendant "may not be convicted of a conspiracy charge without proof that [he] had knowledge of and participated in the conspiracy." *Id.* at 1391. A "jury may presume that a

defendant is a knowing participant in the conspiracy when he acts in furtherance of the objective of the conspiracy." *United States v. Johnston*, 146 F.3d 785, 789 (10th Cir. 1998) (quotations omitted). "The defendant's participation in or connection to the conspiracy need only be slight, so long as sufficient evidence exists to establish the defendant's participation beyond a reasonable doubt." *Id.*

"Interdependence is shown if the defendant's conduct facilitated the endeavors of other coconspirators or the venture as a whole." *United States v. Chatman*, 994 F.2d 1510, 1515 (10th Cir. 1993). However, "[o]ne does not become a participant in a conspiracy merely by associating with conspirators known to be involved in crime." *Id.* Nor does mere presence at the crime scene warrant conviction. *United States v. Mendoza-Salgado*, 964 F.2d 993, 1005 (10th Cir. 1992). "However, a jury need not ignore presence . . . and association when presented in conjunction with other evidence of guilt." *United States v. Richard*, 969 F.2d 849, 856 (10th Cir. 1992).

Dormer does not assert, and rightly so, that no conspiracy existed. The evidence overwhelmingly established the existence of a conspiracy to distribute marijuana by Barker and others, including Aldophus, Diaz, Gayle, Faeth and Mitchell. Rather, Dormer claims the government "failed to demonstrate [he] entered into . . . the Barker conspiracy and engaged in conduct that was interdependent upon other conduct furthering the conspiracy." (Appellant's Op. Br. at 37.) He alleges the evidence only demonstrated he was acquainted with members of the conspiracy, attempted his own, separate drug deal in April 2003, had no lawful employment, and made the mistake of leasing his vehicle to a member of the conspiracy — all of which is insufficient to connect him to the

conspiracy.

The evidence and reasonable inferences to be drawn therefrom, taken in the light most favorable to the government, showed the following:

Dormer knew Faeth. Faeth had been to Dormer's house and Dormer had attempted to call Faeth. Faeth was a member of the Barker conspiracy who knew Alcoverde and enabled other members of the conspiracy to obtain fraudulent loans to purchase homes and vehicles. Onesiuwu helped Faeth obtain these fraudulent loans. Dormer introduced Onesiuwu to Faeth and Dormer was seen with Faeth at Onesiuwu's office. A reasonable inference from this evidence is Dormer was involved with Faeth on the financial side, *i.e.*, the money-laundering side, of the Barker conspiracy.

In July 2001, Dormer leased a Cadillac Escalade. Later, Faeth arranged for Diaz to take over the lease payments while the vehicle remained in Dormer's name. The evidence showed members of the Barker conspiracy placed their vehicles and homes under different names in order to protect them from government forfeiture as instruments involved in drug-trafficking and/or purchased with drug proceeds. Melanie Adauto, Clive's common-law wife, also testified Clive told her "[Dormer's] name was on [Diaz's] car" and "[h]e's the one who bought [Diaz]'s car for him." (R. Vol. 2 at 514; Vol. 3 at 668.) A reasonable inference from this evidence is Dormer agreed to lease a vehicle for Diaz under the belief it would prevent its forfeiture.

While Diaz and Gayle were using the Escalade to collect Barker's drug proceeds, Dormer reported it stolen. Although this evidence could lead a jury to reasonably infer Dormer did not know what members of the conspiracy were

doing, an equally reasonable inference is Dormer did know what other members of the conspiracy were doing, just not on that particular day. His and Walton's conduct after learning the Escalade was recovered at the Van Nuys Airport, *i.e.*, attempting to call off the police, is particularly damning. It demonstrates Dormer was familiar with the workings of the Barker conspiracy, in particular, that it transported its marijuana in airplanes. This inference is supported by Adauto's testimony that no one knew why Dormer filed the stolen vehicle report "being that [Dormer] knows what everybody's doing . . . . I mean, he knew who he leased the car to. I mean, that was kind of silly on his behalf." (R. Vol. 3 at 673-74.) She later reiterated that based on her conversations with Clive, she understood "[Dormer] knew what Rocky was doing. What everybody was doing." (*Id.* at 705.)

While working as Faeth's office manager, Mitchell overheard a conversation between Dormer and Faeth in which the word "Arizona" was mentioned. As discussed above, "Arizona" was Aesopian code; members of the Barker conspiracy referred to Barker's marijuana source and the marijuana itself as "Arizona." Other than having friends who lived in Arizona, Faeth had no other business connections to Arizona. A jury could reasonably infer Faeth and Dormer were talking about marijuana, or more specifically, Barker's marijuana source in Arizona.

Sometime after this conversation, Dormer was arrested with Donovan Walker in a pickup truck in North Carolina in connection with a UPS package sent from California containing approximately ten pounds of marijuana. As

explained previously, a jury could reasonably conclude this attempted drug deal was an intrinsic overt act in furtherance of the Barker conspiracy.

Further evidence showed Dormer had no legitimate source of income yet purchased two homes. While this evidence is not conclusive, it is yet further corroboration of Dormer's involvement in illegal activities.

Based on the above evidence, a jury could reasonably infer not only that Dormer associated with members of the Barker conspiracy but also that he actively participated in it.

We recognize there is evidence which, at least at first glance, tends to exculpate Dormer. For instance, Adauto testified she did not know Dormer until after Clive's arrest, when Clive told her Dormer was the one who reported the Escalade stolen. Adauto, however, would not necessarily have known Dormer prior to that time because she was associated with Clive. Clive separated from the Barker conspiracy in 1997 and did not rejoin it until December 2002, when he agreed to help Diaz and Gayle collect Barker's drug money. Barker testified he did not know Dormer until they met in prison in November 2003. However, a reasonable jury could find he did not know Dormer because Dormer was involved with Faeth, who handled the financial transactions for the conspiracy. The evidence showed the Barker conspiracy was compartmentalized and members of the conspiracy did not necessarily know each other. For instance, Diaz testified he would pick up the marijuana in Arizona and drive it to California. Once he arrived in California, he would park the vehicle carrying the marijuana and another member of the conspiracy would pick up the vehicle and transport it to a house where the marijuana would be packaged. After individuals packaged the

marijuana, another individual would arrange for it to be transported to Cleveland and yet another individual would sell it in Cleveland. Therefore, it was quite possible for some members of the Barker conspiracy to not know other members. *See United States v. Caro*, 965 F.2d 1548, 1556 (10th Cir. 1992) ("[A] defendant need not know all the details or all the members of a conspiracy.")

Dormer argues there are reasonable innocent inferences that can be derived from the evidence. However, "[t]he evidence necessary to support a verdict need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt. Instead, the evidence only has to reasonably support the jury's finding of guilt beyond a reasonable doubt." *United States v. Isaac-Sigala*, 448 F.3d 1206, 1210 (10th Cir. 2006) (quotations omitted); *see also United States v. Scull*, 321 F.3d 1270, 1282 (10th Cir. 2003)("[W]hile the evidence supporting the conviction must be substantial and do more than raise a mere suspicion of guilt, it need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities except guilt.") (quotations omitted)*; United States v. Johnson*, 57 F.3d 968, 972 (10th Cir. 1995) ("The fact that the evidence may also be consistent with a hypothesis of innocence, however, does not require reversal where there is sufficient evidence to support a guilty inference as well."). Dormer is simply concocting inferences from the evidence supporting his innocence. He fails to refute the reasonable inferences of guilt arising from that same evidence.

The evidence and the reasonable inferences to be drawn therefrom were sufficient to support Dormer's conviction.

C. Calculation of Advisory Guideline Range

Dormer argues the district court erred in calculating his advisory guideline range by enhancing his sentence based on the drugs (in the form of $852,405 in cash) and firearms seized at the time of Diaz, Gayle and Clive's arrests.[9] He also alleges he was entitled to a 4-level downward adjustment for his minimal role.

We review sentences for reasonableness, *see United States v. Booker*, 543 U.S. 220, 261 (2005), which the Supreme Court recently explained is equivalent to an abuse of discretion standard. *Gall v. United States*, --U.S.--,128 S.Ct. 586, 594 (2007); *see also Rita v. United States*, --U.S.--, 127 S.Ct. 2456, 2465 (2007). Under this standard, we "must first ensure that the district court committed no significant procedural error, such as . . . improperly calculating[] the Guidelines range . . . . Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 128 S.Ct. at 597. Dormer does not challenge the substantive reasonableness of his sentence. His only complaint is the court procedurally erred in calculating the advisory guideline range. In determining whether the district court correctly calculated that range, we review its legal conclusions de novo and its factual findings for clear error. *United States v. Todd*, 515 F.3d 1128, 1135 (10th Cir. 2008).

1. Drug Quantity and Gun Possession

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[9] Dormer also argues the district court erred in holding him responsible for the 564 pounds of marijuana seized at the time of Barker's arrest. However, to alleviate the potential for double-counting, this amount was not considered in calculating his sentence. Therefore, we will not address this argument.

USSG §2D1.1(a)(3) provides for a base offense level based on drug quantity. USSG §2D1.1(b)(1) provides for a 2-level enhancement to the base offense level "[i]f a dangerous weapon (including a firearm) was possessed . . . ." This 2-level enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." USSG §2D1.1, comment. (n.3).

Section 1B1.1(b) requires a sentencing court to "[d]etermine the base offense level and apply any appropriate specific offense characteristics . . . contained in the particular guideline . . . ." Application Note 1(H) to USSG §1B1.1 defines "offense" as "the offense of conviction and all relevant conduct under [USSG] § 1B1.3 " Section 1B1.3(a)(1)(B) states relevant conduct includes "in the case of jointly undertaken criminal activity . . ., all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." *See United States v. Sells*, 541 F.3d 1227, 1235 (10th Cir. 2008) ("Section 1B1.3(a)(1)(B) makes clear that in calculating a defendant's offense level under the Guidelines, a defendant must be held accountable for the conduct of his co-conspirators, including conduct in which the defendant did not personally participate, as long as the conduct was within the scope of the jointly undertaken criminal activity and was reasonably foreseeable to the defendant."); *see also United States v. Patron-Montano*, 223 F.3d 1184, 1190 (10th Cir. 2000) ("Relevant conduct includes the reasonably foreseeable acts committed by co-conspirators in furtherance of the conspiracy."). Therefore, a defendant's relevant conduct includes the weapons and drugs possessed by a coconspirator if that possession was known or reasonably foreseeable to the defendant and it was

within the scope of or in furtherance of the conspiracy. *See Hernandez*, 509 F.3d at 1298 (stating a defendant "may be sentenced on the basis of [drugs] possessed by another coconspirator, so long as the amount is within the scope of the conspiracy and foreseeable by [the defendant]"); *United States v. McFarlane*, 933 F.2d 898, 899 (10th Cir. 1991) (concluding sentencing courts may "attribute to a defendant weapons possessed by his codefendants if the possession of weapons was known to the defendant or reasonably foreseeable by him").

Diaz, Gayle and Clive were in possession of drugs (in the form of $852,405 in cash) and firearms at the time of their December 2002 arrests for drug-trafficking activities, facts Dormer does not contest. Instead, he argues their possession of drugs and firearms should not be attributed to him because the evidence failed to show he knew about their trip to Cleveland. Indeed, he claims that had he known about the trip, he would not have called the police and reported the Escalade stolen. Dormer again contends the evidence only demonstrated he was friends with Faeth and had a contractual arrangement with Diaz, not that he was a member of the conspiracy who engaged in conduct which facilitated the endeavors of other conspirators or the conspiracy as a whole.

The district court did not err in attributing to Dormer the drugs (in the form of $852,405 in cash) and the firearms seized from Diaz, Gayle and Clive at the time of their arrests. As to the drug money, it is clear Diaz, Gayle and Clive's possession of that money was within the scope of the Barker conspiracy as it was collected to pay Barker's marijuana source and legal fees. Their possession of the money was also reasonably foreseeable to Dormer. We have already concluded the evidence was sufficient to demonstrate Dormer was a member of the Barker

conspiracy. Dormer and Walton's actions after learning the Escalade was recovered at the Van Nuys Airport demonstrate Dormer was aware the Barker conspiracy used airplanes to engage in drug-trafficking activities. The evidence also showed Dormer was involved with Faeth in the financial activities of the Barker conspiracy. Therefore, Dormer knew or should have known the Barker conspiracy was a large-scale drug operation which generated millions of dollars in profits and members of the conspiracy would likely be in possession of large quantities of drugs and/or drug proceeds.

With regard to the firearms, it is clear Diaz, Gayle and Clive possessed the firearms in furtherance of the Barker conspiracy when they brought them on their trip to Cleveland. In fact, Diaz testified he brought a gun "in case somebody tried to do something to [him] when [he got to Cleveland]." (R. Vol. 5 at 1106.) While there was no evidence Dormer had actual knowledge Diaz, Gayle and Clive would be carrying weapons at the time of their arrests, it was reasonably foreseeable. In addition to the firearms found on Diaz, Gayle and Clive, other firearms were found in the Clive and Barker homes. Guns were an integral part of the Barker conspiracy and foreseeably so given its large scale drug-trafficking activities. We have long recognized firearms are "tools of the trade" for drug traffickers. *See United States v. Martinez*, 938 F.2d 1078, 1083 (10th Cir. 1991) (quotations omitted). Indeed, when Dormer himself was arrested in July 1998 for distributing marijuana, a loaded firearm and magazine were found in his home. Even though the district court found the July 1998 incident was not an overt act of the Barker conspiracy, Dormer's possession of a gun while engaged in drug-

trafficking suggests he could reasonably foresee other members of the conspiracy, *e.g.,* Diaz, Gayle and Clive, doing the same.

2. Minimal Role

In his objections to the PSR, Dormer alleged he was entitled to a 4-level reduction for his minimal role in the offense under USSG §3B1.2. The district court overruled this objection, concluding, *inter alia*:

> This defendant is not attributed with the full scope of this conspiracy . . . . [T]his adjustment for role in the offense is intended to apply to someone when they are stuck with the conduct of others in the jointly undertaken criminal activity, but they were a minor or minimal participant. This defendant's limited role has already been recognized through not attributing more drugs or money to him than was otherwise attributed . . . .

(R. Vol. 6 at 1511-12.) Dormer complains the court erred in denying him an adjustment for his role in the offense.

USSG §3B1.2 "provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." USSG §3B1.2, comment. (n.3(A)). However, Application Note 3(B) to USSG §3B1.2 provides:

> If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.

In *United States v. James*, we concluded Application Note 3(B) to USSG §3B1.2 precluded the defendant's claim he was entitled to a minor role reduction. 157 F.3d 1218, 1219-20 (10th Cir. 1998). There, James' sentence was based only on the amount of drugs he personally distributed as opposed to the amount of

drugs distributed by the conspiracy as a whole. We concluded that although James was not convicted of a less serious offense, the reasoning of Application Note 3(B) applied:

> James' sentence was based not on the collective amount of drugs distributed by all members of the conspiracy, but only on the amount of drugs distributed by James himself . . . . Thus, the district court necessarily took into account James' minor role in the drug trafficking enterprise. To provide a further reduction for his role in the enterprise would amount to finding James a minor participant in his own conduct, a finding that would make no sense . . . . Therefore, we . . . hold that when the relevant conduct of the larger conspiracy is not taken into account in establishing a defendant's base offense level, a reduction pursuant to U.S.S.G. § 3B1.2 is not warranted.

Id. at 1220 (quotations omitted).

In this case, Dormer's base offense level was calculated only on the amount of drugs associated with his conduct, not the collective amount of drugs distributed in the overall conspiracy. He was not entitled to a further reduction under USSG §3B1.2.

D. Acquitted Conduct

Dormer argues the jury specifically found he was only responsible for 100 kilograms or more but less than 1,000 kilograms of marijuana and specifically rejected holding him responsible for 1,000 kilograms or more of marijuana. Nevertheless, the district court sentenced him based on a finding he was responsible for 1,109 kilograms of marijuana. Dormer claims the court violated the Fifth and Sixth Amendments by punishing him based upon acquitted conduct.

As Dormer conceded at oral argument, the issue has been resolved contrary to his position. *See United States v. Magallanez*, 408 F.3d 672, 685 (10th Cir. 2005) ("[W]e conclude that when a district court makes a determination of

sentencing facts by a preponderance test under the now-advisory Guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard."); *see also United States v. Hall*, 473 F.3d 1295, 1311-12 (10th Cir. 2007) (same).

AFFIRMED.

ENTERED FOR THE COURT

Terrence L. O'Brien
Circuit Judge