IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
DES MOINES, IOWA
02 FEB 12 AM 8:3
SOUTHERN DISTRICT OF

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 01-151
	)	
vs.	)	
	)	
MATIAS LEANOS-MARQUEZ,	)	
JAVIER EDUARDO MIRANDA,	)	
NICHOLAS M. BARRIOS, and	)	
ANNA MARIA MARTINEZ,	)	
	)	
Defendants.	)	

Now before the Court is defendant Anna Maria Martinez's ("Martinez") January 7, 2002 motion for acquittal or for a new trial. The motion was joined by Matias Leanos-Marquez ("Leanos-Marquez"), co-defendant, on January 24, 2002. The government filed a resistance on January 25, 2002. The motions are now fully submitted.

On August 15, 2001 a grand jury indictment was filed in this case. A superseding indictment was filed on September 11, 2001. The indictment contained 11 counts against 8 defendants. In the indictment, Martinez was charged under counts 1, 2, 5, 6, 7, 10 and 11. Leanos-Marquez was charged under counts 1, 2, 8, and 9.[1] A trial of four defendants, those

[1] Count 1 alleged the existence of a conspiracy to intentionally distribute various controlled substances in violation of 21 U.S.C. sections 841(b)(1)(A)(viii), 841(b)(1)(B)(ii), 841(b)(1)(B)(vii) and 846. Count 2 alleged the named defendants knowingly and intentionally possessed firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. section 924(c)(1)(A). Count 5 alleged Martinez and another defendant knowingly and intentionally possessed with intent to distribute methamphetamine in excess of 500 grams in violation of 21 U.S.C. section 841(b)(1)(A)(vii). Count 6 alleged Martinez and another defendant knowingly and intentionally possessed marijuana with intent to distribute, in excess of 100 kilograms, in violation of 21 U.S.C. section 841(b)(1)(B). Count 7 alleged Martinez and another defendant

151.

named in the caption of this Order, began on December 10, 2001. The jury returned its verdicts on December 14, 2002. Martinez was found not guilty on counts 1, 2, 5, 7, and 10. The jury determined she was guilty of the charges alleged in counts 6 and 11. Leanos-Marquez was found not guilty of count 2, but was found guilty of the other charges brought against him.

I. STANDARDS OF REVIEW

Under Rule 29 of the Federal Rules of Criminal Procedure, this Court may grant a defendant " a judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." FED. R. CRIM. P. 29(a). "In ruling on a motion for judgment of acquittal, the role of the district court is not to weigh evidence or consider the credibility of the witnesses, but rather to determine whether the Government has presented evidence on each element sufficient to support a jury verdict." *United States v. Chavez*, 230 F.3d 1089, 1091 (8th Cir. 2000) (citing *Burks v. United States*, 437 U.S. 1, 98 (1978)) (other citation omitted). The jury's verdict "should not be overturned lightly," *United States v. Burks*, 934 F.2d 148, 151 (8th Cir. 1991), the evidence must be viewed in a light most favorable to the verdict, and the Court must accept as established all reasonable inferences supporting the verdict.

---

knowingly and intentionally possessed a firearm, a .45 caliber semi-automatic pistol, in furtherance of a drug crime in violation of 18 U.S.C. section 924(c). Count 8 alleged Leanos-Marquez and another defendant knowingly and intentionally distributed in excess of 50 grams of a mixture or substance containing methamphetamine in violation fo 21 U.S.C. section 841(b)(1)(B). Count 9 alleged Leanos-Marquez and another defendant knowingly and intentionally distributed in excess of 50 grams of a mixture or substance containing methamphetamine in violation of 21 U.S.C. section 859. Count 10 alleged Martinez and another defendant knowingly and intentionally possessed with intent to distribute cocaine in violation of 21 U.S.C. section 841(b)(1)(C). Count 11 alleged Martinez and another defendant knowingly and intentionally possessed firearms, an AK-47 assault rifle and a sawed-off shotgun, in furtherance of the drug trafficking crime charged in Count 10. *See* 18 U.S.C. § 924(c).

See United States v. Oberhauser, 142 F. Supp. 2d 1118, 1126 (D. Minn. 2001) (citation omitted).

If the Court grants a judgment of acquittal to either defendant, it must still make a conditional ruling on the defendants' alternative motions for a new trial. *See* FED. R. CRIM. P. 29(d) (stating the district court should determine whether a new trial should be granted "if the judgment of acquittal is thereafter vacated or reversed"); *see also Oberhauser*, 142 F.Supp. 2d at 1130. If the Court does not grant a judgment of acquittal, it will then proceed to rule on the motions for a new trial pursuant to Federal Rule of Criminal Procedure 33.

This Court "may grant a new trial . . . if the interests of justice so require." FED. R. CRIM. P. 33. Unlike the standard under Rule 29, in a motion for a new trial the district court may weigh the evidence and evaluate the credibility of the witnesses "'to determine if a miscarriage of justice may have occurred.'" *United States v. Saborit*, 967 F. Supp. 1136, 1145 (N.D. Iowa 1997) (citations omitted). Like the standard under Rule 29, however, the power to grant new trials should be used sparingly and with caution. *Id.* (citation omitted).

II. MARTINEZ: COUNT 6

The indictment charged Martinez and another defendant who did not go to trial, Rogelio Reynosa Ornelas ("Reynosa"), in count 6 with possessing more than 100 kilograms of marijuana with intent to distribute. The jury found Martinez guilty of possessing marijuana with intent to distribute, as charged by this count of the indictment. However, the jury found beyond a reasonable doubt that the quantity of marijuana she possessed with such intent to distribute was not more than 50 kilograms.

The record of the grand jury hearing clearly indicates that it returned an indictment against Martinez and Reynosa on count 6 because a large amount of marijuana was

found at a house located at 1672 Northwest 84th Street in Des Moines, Iowa. At the trial, Reynosa was a witness for the government. Reynosa testified that he came to Iowa from California in the middle of July 2001, and lived at the house at 1672 Northwest 84th Street until his arrest at the house on July 27, 2001. The transcript of the grand jury hearing discloses that the government urged the grand jury to indict Martinez because her name was on the lease of the house at 84th Street as the tenant. At trial, however, the rental agent for the house testified that Martinez was not the one who signed the lease, and that someone else used Martinez's identity to rent the house. There was no evidence presented at trial that Martinez ever gave anyone permission or allowed anyone to use her identity. The government stipulated at trial that defendant Anna Martinez was not the person who leased the house on 84th Street.

At trial, Reynosa testified about his contacts with Martinez and his knowledge of her involvement with marijuana. This was the only evidence presented at trial relevant to count 6 against Martinez.

Gov't:[2]	Did you meet a person called Anna Martinez?
Reynosa:	That's right.
Gov't:	And who introduced you to Anna Martinez?
Reynosa:	The girl, Jenny.[3]
. . .	
Gov't:	How many times did you meet her?
Reynosa:	I met her – I saw her, like, around five or six times.
. . .	
Gov't:	Did you ever see Anna Martinez at the 84th Street house?
Reynosa:	That's right.
Gov't:	How many times did you see her there?
Reynosa:	Maybe two or three times only.

[2] The abbreviation "Gov't" as used here identifies the questions posed at trial by the attorney for the government.

[3] The witness is referencing Jenny Barrios, who though indicted, was not on trial with the named defendants in the caption of this Order.

Gov't:	And did you ever sell her any marijuana?
Reynosa:	No, not to her.
Gov't:	Did you know to whom she was married?
Reynosa:	She's married to one of Mr. Nicholas' sons.
Gov't:	And do you know his name?
Reynosa:	Yes. He introduced himself with the name of Jose.
Gov't:	And did you sell marijuana, then, to Jose?
Reynosa:	That's right.
Gov't:	And how much marijuana did you sell to Jose?
Reynosa:	I didn't sell her – sell him the drugs. We can say that I just fronted the marijuana to him, and it was, like, 25 or 26 pounds.
. . .	
Gov't:	Now, was Anna involved in that transaction?
. . .	
Reynosa:	Yes.
Gov't:	In what way?
Reynosa:	She and the girl named – called Jenny, they went to pick it up at the house where the marijuana was.
Gov't:	And were you there when they picked it up?
Reynosa:	That's right.
. . .	
Gov't:	Were you present when the marijuana was picked up?
Reynosa:	That's right.
Gov't:	And where did the marijuana pick up occur?
Reynosa:	There at the house that is mentioned when I was arrested.
Gov't:	Did you have any discussion with Anna about the marijuana?
Reynosa:	Not with her.
. . .	
Gov't:	I want to ask you, is that transaction of 25 pounds reflected in the notes that you kept in Government's Exhibit 5?
Reynosa:	That's right.
Gov't:	And could you look through the Government's Exhibit 5 and direct us to that transaction?
Reynosa:	Yes. It's right here. It was not 26, there were 30.
Gov't:	So it had been 30 pounds of marijuana?
Reynosa:	That's right.
. . .	
Gov't:	With regard to the writing on that page [showing the witness the page of Government's Exhibit 5], who wrote the notes on that page?
Reynosa:	I did.
Gov't:	And which set of numbers are you talking about, the whole page, that represent the transaction?
Reynosa:	No. I wrote it in that part where I crossed it.
Gov't:	Okay. And you have some notations there on that transaction that look

	like A-N-A; is that correct?
Reynosa:	Yes. That's right.
Gov't:	And why did you make that notation on that?
Reynosa:	Because Jenny had made that transaction with – I'm sorry, Your Honor, I will clarify – that agreement with his brother. And since Jenny was the one that had made the agreement with her and with me, and since Anna had come to pick it up with her, that's the reason why I wrote it that way.

See Partial Trial Transcript, Testimony of Rogelio Reynosa-Ornelas at 47-51 (filed January 17, 2002).

Martinez argues that this testimony cannot serve as the factual basis to support the crime charged in the indictment. Martinez argues the indictment charges her with possession of the marijuana found in the house on 84th Street because her name appeared on the lease of that home. Testimony from one individual that she picked up marijuana one time from that home cannot support the crime charged in count 6. The issues raised by Martinez with respect to count 6 are: whether through the evidence and testimony presented at trial, the indictment in this case was constructively amended so as to permit the jury to convict her of a different crime than that charged; or, whether there was a fatal variance between the indictment and the proof presented at trial. *See United States v. Griffin*, 215 F.3d 866 (8th Cir. 2000). These issues address important protections provided to individuals in the Fifth and Sixth Amendments of the United States Constitution – addressing the right that some charges have to be made by a grand jury, and that a defendant has a right to know the nature and cause of accusations brought against her. *See generally United States v. Marshall*, 53 F.3d 1500, 1512 n.4 (10th Cir. 1995).

"An indictment is sufficient 'if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges

sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution.'" *United States v. Summers*, 137 F.3d 597, 601 (8th Cir. 1997) (citation omitted). The indictment in this case charged Martinez with possession of marijuana with intent to distribute it in violation of 21 U.S.C. section 841(b)(1)(B). The elements of the offense – that Martinez was in possession of marijuana, that she knew she was in possession of it, and that she intended to distribute some or all of the marijuana to another person – were clear from the indictment and known to Martinez . The indictment was not constructively amended.

"A fatal variance 'occurs when the essential elements of the offense set forth in the indictment are left unaltered but the evidence offered at trial proves facts materially different from those alleged in the indictment.'" *United States v. Emery*, 186 F.3d 921, 927 (8th Cir. 1999) (quotation omitted). "Reversal is not required if the variance is harmless, that is, if 'the indictment fully and fairly apprised the defendant of the charges he or she must meet at trial.'" *Id.* (quotation omitted). In this case, the indictment informed Martinez that she was charged with possessing marijuana with the intent to distribute it. The grand jury testimony shows the reason the grand jury indicted her under this charge likely was the fact that her name appeared on the lease of the house on 84th Street. The indictment itself, however, does not reference this fact and does not limit this charge against Martinez to her involvement as lessor of the 84th Street property.[4] Thus, the Court finds there was not a fatal variance, and even if there were a variance, it was harmless as Martinez was adequately apprised of the charge against her.

The Court recognizes that the evidence against Martinez regarding count 6 was limited

---

[4] The standard is not whether the evidence offered at trial materially differs from the evidence presented to the grand jury; rather, it is whether the evidence at trial materially differs from the allegations in the indictment. This is a real distinction which this Court is bound to honor.

to the previously stated testimony of Reynosa. While the evidence of Martinez's guilt on this count was marginal, giving the government all reasonable inferences as the applicable standard requires, the evidence is sufficient. Furthermore, the Court finds under the guidelines for assessing the interests of justice under Rule 33, a new trial for Martinez is not required on count 6. This finding of the jury will stand.

III. MARTINEZ: COUNT 11

The jury also determined Martinez was guilty of count 11. In this count of the indictment, the government charged Martinez and Nicholas Barrios with knowingly and intentionally possessing firearms, an AK-47 assault rifle and a sawed-off shotgun, in furtherance of the drug trafficking crime charged in count 10. *See* 18 U.S.C. § 924(c). The jury found Martinez was not guilty of count 10 of the indictment, knowingly and intentionally possessing with intent to distribute cocaine in violation of 21 U.S.C. section 841(b)(1)(C). Regardless of the fact that the jury found Martinez not guilty of count 10, the predicate offense, it is still possible for her conviction under count 11 of the indictment to be upheld despite the inconsistent verdicts. *See United States v. Powell*, 469 U.S. 57, 65-66 (1984).[5] Nicholas Barrios was found guilty of a lesser included offense in Count 10, possession of cocaine, but was found not guilty of count 11.

The guns at issue in count 11, the AK-47 and a sawed-off shotgun, were actually discovered by government agents in the ventilation ducts of the furnace in the basement of Nicholas Barrios's home. The cocaine at issue was found in the bedroom of co-defendant David

---

[5] The reason underlying this rule allowing a defendant to be convicted of a second charge despite being found not guilty of the underlying offense appears to be that while the jury has not followed the court's instructions, "it is unclear whose ox has been gored" by the jury's action. *Powell*, 469 U.S. at 65-66.

Barrios, who also lived in Nicholas Barrios's home during government agents' search of that home. Testimony was presented at trial that David Barrios sold cocaine, and Nicholas Barrios was found guilty of possession of cocaine under Count 10. Testimony at trial showed that Martinez stayed in the home of Nicholas Barrios, but there was not testimony or evidence to show she knew of the cocaine and the only testimony regarding her knowledge of a weapon was from Reynosa. In his testimony, Reynosa stated that, for a period of time, an AK-47 assault rifle was kept in the house on 84th Street.

Gov't:	[D]id you see any other weapons that you associated with any of the people that you were dealing with?
. . .	
Reynosa:	[In] that house, the house where I was arrested, first we had an AK-47.
. . .	
Gov't:	And do you know who took [the AK-47] from the house?
Reynosa:	Yes.
Gov't:	Who took it from the house?
Reynosa:	Ms. Anna took it and Jenny.
Gov't:	Do you know what they did with it?
Reynosa:	No. After they left the house, I don't know where they went to with it.

See Partial Trial Transcript, Testimony of Rogelio Reynosa-Ornelas at 74 (filed January 17, 2002).

This Court fully recognizes that a jury may convict a defendant for possession of a weapon in furtherance of a drug trafficking crime under section 924(c) even if the jury acquits the defendant of the underlying drug trafficking crime itself. *See, e.g., United States v. Frayer*, 9 F.3d 1367, 1372 (8th Cir. 1993) (citations omitted). In *Frayer*, officers had an undercover operation investigating Frayer and others on drug trafficking and other charges. After monitoring Frayer's activities and witnessing incriminating conversations, law enforcement officers arrested Frayer and found a loaded .22 caliber handgun in his jacket pocket. *Id.* at 1370.

The jury acquitted Frayer of a charge that alleged he was part of a conspiracy to distribute cocaine, but the jury convicted him under section 924(c) for possession of a firearm in connection with the cocaine conspiracy count. *Id.* at 1371. The Court upheld the conviction despite the acquittal on the underlying offense. *Id.* at 1372.

The case now before this Court is different. No testimony or evidence at trial linked Martinez at all to cocaine. No testimony or evidence was presented at trial that showed she had knowledge of the firearms or the guns' whereabouts in Nicholas Barrios's home. There was scant testimony indicating that at one time she may have had joint possession of one of the weapons at issue, but nothing in that testimony indicated it was in relation to the possession and/or distribution of cocaine or another illegal substance. The guns at issue were found in a place that was not easily accessible, and the cocaine found at the house was hidden in the bedroom of defendant David Barrios. This is not a case where the weapon was found on defendant's person, or in her room or car. Tied to the paucity of evidence relating to the possession of a weapon is the lack of evidence connecting Martinez to cocaine or other drug trafficking at the home of Nicholas Barrios.

This Court finds there is not sufficient evidence to uphold the jury's verdict of guilty on count 11 against Martinez. In the alternative, if this judgment should be overturned, the Court finds that Martinez should be given a new trial on this count. The weight of the evidence that she actually or constructively possessed a weapon in furtherance of a drug trafficking crime is so tenuous that this Court finds a miscarriage of justice may have occurred and "in the interests of justice" a new trial would be appropriate if this Court's acquittal of Martinez on Count 11 is reversed.

IV. LEANOS-MARQUEZ

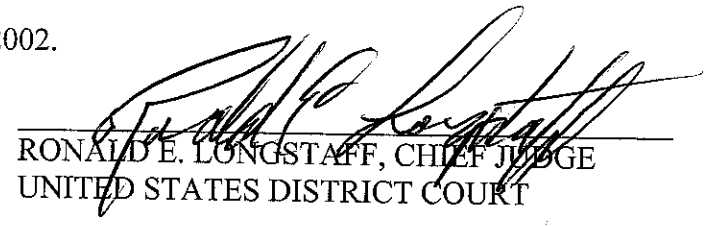
The motions of defendant Leanos-Marquez are denied. There was sufficient evidence of his involvement in the drug trafficking and conspiracies shown at trial to uphold his convictions, and a new trial is not warranted in the interests of justice.

V. CONCLUSION

For the above stated reasons, the Court now denies Martinez's motion for acquittal or for a new trial on count 6, but grants her motion for acquittal on count 11. Pursuant to Federal Rule of Criminal Procedure 29(d), the Court also conditionally grants Martinez's motion for a new trial under Rule 33 as the interests of justice would be met in conducting a new trial on count 11 if the Court's judgement of acquittal is reversed. The Court denies Leanos-Marquez's motions.

IT IS SO ORDEREED.

Dated this 12th day of February, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT