

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION**

UNITED STATES OF AMERICA

vs.

CASE NO. 5:09-cr-30-8/RS

AMY COOPER

ORDER

Before me is Defendant's Post-verdict Motion for Judgment of Acquittal (Doc. 356).

I. Background

Defendant was indicted in July 2009, for the offense of using a telephone in committing or facilitating the distribution of, or possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(b). The indictment stemmed from events that occurred in May 2009, when Defendant used a telephone to coordinate the delivery of a kilogram of cocaine for her boyfriend, co-defendant Michael Reed. Defendant was tried by jury on December 7-8, 2009. On December 8, 2009, the jury found Defendant guilty of using a telephone to facilitate the distribution of cocaine. The government's evidence consisted of intercepted telephone calls between several co-defendants, the testimony of co-defendant Hector Melara who delivered the kilogram of cocaine, and several law enforcement witnesses. At trial,

the evidence established that Reed had agreed to purchase a kilogram of cocaine from Melara for \$30,000, that Melara would deliver the cocaine to Reed at his residence where he lived with Defendant Cooper, that Reed had to leave his residence for work on the day of the delivery and asked Cooper to receive the drugs and pay Melara for them, that Cooper agreed to coordinate the drug drop, that Cooper made two telephone calls to Melara – one saying that she needed ten minutes because she had house guests and one saying that the guests had departed, and that, after the second phone call, Melara did deliver the kilogram of cocaine as agreed.

II. Standard

In considering a motion for the entry of judgment of acquittal under Federal Rule of Criminal Procedure 29(c), a district court should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction. *See United States v. Sellers*, 871 F.2d 1019, 1020 (11th Cir. 1989). “In considering a motion for the entry of a judgment of acquittal, a district court ‘must view the evidence in the light most favorable to the government, and determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt.’” *United States v. Molina*, 443 F.3d 824, 828 (11th Cir. 2006) (quoting *United States v. Miranda*, 425 F.3d 953, 959 (11th Cir. 2005)). “The prosecution need not rebut all reasonable hypotheses other than guilt. The jury is free to choose between

or among the reasonable conclusions to be drawn from the evidence presented at trial, and the court must accept all reasonable inferences and credibility determinations made by the jury.” *Sellers*, 871 F.2d at 1021 (internal quotations and citations omitted). The court must ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *See Sellers*, 871 F.2d at 1021 (citing *United States v. O’Keefe*, 825 F.2d 314, 319 (11th Cir. 1987)). A jury is free to choose among reasonable constructions of the evidence. *See Sellers*, 871 F.2d at 1021. The court must accept all of the jury’s “reasonable inferences and credibility determinations.” *See id.* (citing *United States v. Sanchez*, 722 F.2d 1501, 1505 (11th Cir. 1984)).

III. Sufficiency of Evidence under *Abuelhawa*

In her motion, Defendant relies on the recent Supreme Court decision of *Abuelhawa v. United States*, 129 S. Ct. 2101 (2009), and asserts that *Abuelhawa* requires that she be acquitted. Defendant’s reliance on *Abuelhawa* is misplaced. The question addressed by the *Abuelhawa* Court was “whether someone violates § 843(b) in making a misdemeanor drug purchase” over the telephone. *Abuelhawa*, 129 S. Ct. at 2104. For Defendant to be entitled to any relief under *Abuelhawa* she must have been a principal to the drug transaction with Melara and the transaction must have involved only a misdemeanor quantity of cocaine. Defendant fails to meet either criteria.

Unlike the defendant in *Abuelhawa*, Cooper was not the cocaine buyer. The evidence presented at trial clearly established through the intercepted phone calls and Melara's testimony that the buyer of the kilogram of cocaine was co-defendant Reed and that Cooper was a third party to the transaction whose job was to assist Melara in distributing the cocaine to Reed by ensuring that the coast was clear for the drug drop. The evidence showed that when Reed was unable to complete the drug transaction on his own, he enlisted the help of Defendant to ensure the drugs were safely delivered for him. Since Defendant was not a principal to the drug transaction, *Abuelhawa* is inapplicable.

Defendant further argues that *Abuelhawa* protects her from conviction by attempting to portray the cocaine purchase as a purchase for personal use. The evidence presented at trial clearly contradicts this portrayal. The evidence established both that a kilogram of cocaine is a distribution quantity of drugs and that the drugs purchased by Reed were intended to be distributed back to Melara in smaller quantities suitable for individual sale. Because the kilogram of cocaine was shown to be a felony distribution quantity and not a misdemeanor amount intended for personal use, *Abuelhawa* again is inapplicable.

IV. Sufficiency of Evidence for Facilitation

Defendant argues that the evidence presented at trial is "insufficient to sustain a conviction because Defendant's two phone calls did not, as a matter of

law, facilitate the crime of distribution.” (Doc. 356 at 6). In support of her contention, Defendant relies on *United States v. Rivera*, 775 F.2d 1559 (11th Cir. 1985). In *Rivera*, the defendant was charged under 21 U.S.C. § 843(b) for making telephone calls to a co-defendant to check on the status of the co-defendant’s drug sales and proceeds. *Id.* at 1562. The Eleventh Circuit held that the calls in question simply checked the status of sales and did not facilitate or assist the sales in violation of § 843(b). *Id.* at 1563.

The calls in *Rivera* are distinguishable from Defendant’s calls to Melara, because Defendant’s calls were made to coordinate the drug delivery, not merely to check on the status of a sale. Defendant’s calls not only confirmed that she would be available to receive the drug shipment, but also confirmed to Melara that the coast was clear for the delivery. Melara testified that Defendant’s statement to him that she had guests was significant to him because he would not deliver the drugs with bystanders present for fear of being caught. Defendant’s call also made clear to Melara that, for whatever reason, she needed at least ten minutes before she would be ready to receive the drugs, thereby assisting Melara in gauging when was the most opportune time to deliver the cocaine. By bringing back a guilty verdict, the jury found that Melara’s testimony about the effect of the phone calls was credible. Because such testimony is not incredible as a matter of law, the court must accept the determination of the jury. *United States v. Calderon*, 127 F.3d

1314, 1325 (11th Cir. 1997) (“For testimony of a government witness to be incredible as a matter of law, it must be ‘unbelievable on its face.’”) (quoting *Rivera*, 775 F.2d at 1561). Defendant places emphasis on the fact that Melara did not have to alter his plans on account of Defendant’s phone calls because he was too far from the drop site to have arrived while Defendant’s house guests were present. Such emphasis is misplaced, however. Even though Melara did not alter his delivery, a jury could find from the evidence presented that Defendant’s phone calls to Melara assisted him in assessing whether it was safe to deliver the drugs and whether Cooper was ready to receive them on Reed’s behalf. By believing Melara’s testimony, the jury determined that Defendant’s phone calls to Melara made the drug drop easier. Such communications are sufficient to uphold a conviction under § 843(b). See *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136, 102 S. Ct. 2965 (1982) (“In order to establish the facilitation element, the Government must show that the telephone call comes within the common meaning of facilitate – ‘to make easier’ or less difficult, or to assist or aid.”) (citing *United States v. Watson*, 594 F.2d 1330, 1343 (10th Cir. 1979)).

V. Conclusion

Based on my analysis of the law and the evidence presented at trial, I conclude that a reasonable jury could have found the defendant guilty beyond a

reasonable doubt of violating 21 U.S.C. § 843(b). Consequently, Defendant's Motion for Judgment of Acquittal (Doc. 356) is **DENIED**.

ORDERED on January 7, 2010.

/S/ Richard Smoak

RICHARD SMOAK

UNITED STATES DISTRICT JUDGE