

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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7 August Term, 2007
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9 (Argued: June 16, 2008 Decided: July 18, 2008)

10 Docket Nos. 07-1435-cr(L), 07-1855-cr(CON)
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15 UNITED STATES OF AMERICA,
16

17 Appellee,
18

19 -v.-
20

21 ANDREA LORENZO and JULIO LORENZO,
22

23 Defendants-Appellants,
24

25 FRANCISCA LEERDAM,
26

27 Defendant.
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29 -----
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31 Before: JACOBS, Chief Judge, STRAUB, Circuit Judge, and JONES,
32 District Judge.*
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34 On appeal from judgments of conviction entered in the
35 Eastern District of New York (Walter, J.) following a jury trial,
36 in which both defendants-appellants were convicted of conspiracy to
37 import cocaine in violation of 21 U.S.C. §§ 960 and 963; and

*The Honorable Barbara S. Jones of the United States District Court for the Southern District of New York, sitting by designation.

1 conspiracy to distribute and possess with intent to distribute
2 cocaine in violation of 21 U.S.C. §§ 841 and 846. Defendant-
3 appellant Andrea Lorenzo was also convicted of importation of
4 cocaine in violation of 21 U.S.C. §§ 952 and 960.

5 Reversed and remanded for entry of judgments of
6 acquittal.

7
8 RAMON A. PAGAN, Bronx, New York, for
9 Defendant-Appellant Andrea Lorenzo.

10
11 JANEANNE MURRAY, New York, New York
12 (Robert A. Culp, Garrison, New York,
13 on the brief), for Defendant-
14 Appellant Julio Lorenzo.

15
16 BRIAN MEAGHER, Assistant United
17 States Attorney, Brooklyn, New York
18 (Benton J. Campbell, United States
19 Attorney for the Eastern District of
20 New York, Susan Corkery, Elizabeth
21 A. Geddes, Assistant United States
22 Attorneys, Brooklyn, New York, on
23 the brief), for Appellee.

24
25 JONES, District Judge:

26 Defendants-appellants Andrea and Julio Lorenzo, following
27 a four-day jury trial of a four-count superseding indictment before
28 Donald E. Walter, Visiting Judge,¹ in the United States District
29 Court for the Eastern District of New York, were convicted of
30 conspiracy to import cocaine in violation of 21 U.S.C. §§ 960 and
31 963 (Count 1); and conspiracy to distribute and possess with intent

¹ The Honorable Donald E. Walter of the United States District Court for the Western District of Louisiana.

1 to distribute cocaine in violation of 21 U.S.C. §§ 841 and 846
2 (Count 3). As to Count 2, importation of cocaine in violation of
3 21 U.S.C. §§ 952 and 960, Andrea Lorenzo was convicted, while Julio
4 Lorenzo was acquitted. Both Lorenzos were acquitted of Count 4,
5 attempted possession of cocaine with intent to distribute in
6 violation of 21 U.S.C. §§ 841 and 846. Andrea Lorenzo was
7 sentenced to a term of 60 months' imprisonment, to be followed by
8 a four-year term of supervised release, and a \$300 special
9 assessment. The district court sentenced Julio Lorenzo to 60
10 months' imprisonment, to be followed by a four-year term of
11 supervised release, and a \$200 special assessment. On appeal, the
12 Lorenzos contend that the evidence adduced at trial was
13 insufficient to sustain the judgments of conviction against them.
14 Julio Lorenzo also argues alternatively that he should be granted
15 a new trial in the interest of justice, and raises challenges to
16 his sentence. We agree that the evidence was insufficient to
17 support the judgments of conviction, and for the reasons that
18 follow, reverse the judgments of conviction against Andrea and
19 Julio Lorenzo and remand to the district court for entry of
20 judgments of acquittal.²

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² Following oral argument and upon due consideration of the record on appeal, we issued an Order filed June 17, 2008, reversing Andrea Lorenzo's judgment of conviction, issuing the mandate forthwith, and noting that an opinion would issue in due course.

1 BACKGROUND

2 The present prosecutions arose out of a controlled
3 delivery of narcotics initiated after officers with Customs and
4 Border Protection ("CBP") discovered over three kilograms of
5 cocaine hidden in defendant Francisca Leerdam's suitcases during a
6 routine customs examination at John F. Kennedy International
7 Airport ("JFK Airport") on October 13, 2005. The evidence at trial
8 consisted largely of, inter alia, Leerdam's testimony as to the
9 events surrounding the October 13, 2005 trip and a previous trip
10 she made to the United States a month earlier, and the testimony of
11 various agents involved in the customs search and controlled
12 delivery; the Lorenzos offered no evidence. The evidence is
13 summarized below in the light most favorable to the prosecution.

14 A. Leerdam's Entry into the Conspiracy

15 In July, 2005, Leerdam met a man known as Amauri (Andrea
16 Lorenzo's nephew) in a nightclub in Santo Domingo in the Dominican
17 Republic, who offered her a job smuggling drugs outside of the
18 Dominican Republic. (Trial Transcript ("Tr.") at 141-42.) The day
19 after their meeting at the nightclub, he asked Leerdam to meet him
20 at a house, where she found him cutting up carrots that she learned
21 were for her to swallow "to train [her], to see if [she] could
22 swallow drugs." (Id. at 143.) Leerdam was unable to swallow the
23 carrots easily, and thus planned to smuggle drugs outside of the
24 Dominican Republic in suitcases instead. (Id. at 144.)

1 Leerdam's first smuggling trips--three in all--were from
2 the Dominican Republic to the Netherlands; for each trip, she
3 received approximately \$3,000 from Amauri, (id. at 183). Amauri
4 then asked her to smuggle drugs into the United States. Leerdam
5 initially refused because of her view that there were "too many
6 police officers . . . in the U.S.," (id. at 145), but eventually
7 acceded to Amauri's request.

8 B. The September Trip

9 Prior to Leerdam's first trip to the U.S., Amauri told
10 her to pack her clothing into a suitcase and take a taxi to a
11 store. (Id. at 146.) Upon arrival, Leerdam met Amauri's
12 girlfriend, Camelina, with whom she went to a nearby hotel, where
13 Amauri arrived and instructed Leerdam to transfer her clothing from
14 her suitcase to one that he provided for her. (Id. at 147.) At
15 the hotel, he gave Leerdam an airplane ticket, her passport, \$100
16 in cash, and a piece of paper with an address on it, and instructed
17 her to buy a phone card upon her arrival in the U.S. in order to
18 call him for further instructions. (Id. at 147-48.)

19 On September 1, 2005, Leerdam departed from the Santo
20 Domingo Airport for JFK Airport. She passed through customs at JFK
21 Airport without incident, purchased a phone card, and called Amauri
22 for further instructions; he told her to take a taxi to Corona,
23 Queens. At the location in Corona to which her taxi was directed,
24 two men were waiting, and one greeted her and eventually introduced

1 himself as Ronnie. (Id. at 152-53.) Ronnie paid the taxi driver
2 and removed the suitcase from the cab. Leerdam entered a different
3 vehicle with Ronnie and the other individual, and they drove to
4 Ronnie's apartment in Pennsylvania. At Ronnie's apartment, Ronnie
5 took Leerdam's suitcase into a bedroom, from which he emerged with
6 a different suitcase. (Id. at 154.)

7 Eventually, Ronnie and the other individual drove Leerdam
8 back to Corona, Queens. In Corona, a white S.U.V. pulled up, and
9 Ronnie exited the car to speak with the driver of the S.U.V., Julio
10 Lorenzo. (Id. at 155.) Ronnie and Julio spoke for approximately
11 5 minutes; Leerdam was unable to hear the contents of their
12 conversation. (Id.) Ronnie then told Leerdam to go to the S.U.V.,
13 which Julio had exited in order to get the suitcase. (Id.) Upon
14 entering the S.U.V., Leerdam met Andrea Lorenzo for the first time;
15 Andrea asked Leerdam "how did it go for [you]," (id. at 157), and
16 noted that Amauri had called and asked the Lorenzos to take Leerdam
17 to a nearby hotel, (id. at 157-58). At the hotel, Andrea stayed in
18 the S.U.V., while Julio accompanied Leerdam to the reception desk
19 and paid for one night's stay. Julio then escorted Leerdam up to
20 the room, and told Leerdam to call him if she needed anything.
21 (Id. at 158-59.)

22 The next day, September 4, 2005, Julio returned to the
23 hotel with a brown bag containing \$14,000 that he told Leerdam was
24 for Amauri, and wrapped the cash inside clothing in her suitcase.

1 (Id. at 161.) Julio took Leerdam to JFK Airport and accompanied
2 her to the terminal from which her return flight was departing and
3 stayed with her until she checked her luggage. (Id. at 161-63.)
4 When Leerdam arrived in Santo Domingo, she retrieved her suitcase
5 and received a phone call from Camelina, who picked Leerdam up and
6 took her to a nearby hotel. (Id. at 164.) At the hotel, Camelina
7 counted the money in Leerdam's suitcase; Amauri called Camelina "to
8 see if everything was complete," (id. at 165), which Camelina
9 confirmed. Camelina then gave Leerdam \$3,000. (Id.) At trial,
10 Leerdam admitted that she had never seen the contents of the
11 suitcase during this trip, (id. at 191), though she simply assumed
12 that there were drugs therein because Amauri told her so, (id. at
13 187-88).

14 C. The October Trip

15 Shortly after the September Trip, Amauri asked Leerdam to
16 take another trip to the U.S., and Leerdam agreed. (Id. at 165-
17 66.) On October 13, 2005, Leerdam boarded a flight from Santo
18 Domingo to JFK Airport, this time with two suitcases provided by
19 Amauri. (Id. at 166.) Upon arrival at JFK Airport, Leerdam
20 underwent a routine customs examination, during which agents from
21 CBP discovered what was later determined to be 3.25 kilograms of
22 cocaine. (Id. at 44-45, 269.) A special agent with Immigration
23 and Customs Enforcement ("ICE") testified at trial that the
24 wholesale value of this cocaine was approximately \$67,000, and that

1 the street value was approximately \$260,000. (Id. at 271-72.) At
2 trial, Leerdam testified that until confronted by CBP agents, she
3 did not know the type or amount of drugs in her suitcases. (Id. at
4 182.) Leerdam was arrested by CBP officers at approximately 11 p.m.
5 on October 13, (id. at 295-96), and she agreed to cooperate with
6 law enforcement by permitting certain phone calls to be monitored
7 and recorded, and participating in a controlled delivery of the
8 cocaine, (id. at 60-61, 169-70).

9 The first call Leerdam made was to Amauri in the
10 Dominican Republic; he directed her to find a taxi driver,
11 preferably one who had a cellular phone, and to take the taxi to
12 103rd Street and Corona Avenue in Queens. (Government Exhibit
13 ("GX") 10-A (Translated English Transcription of Telephone
14 Conversation between Leerdam and Amauri on October 13, 2005).) An
15 agent from ICE, Jason Hurwitz, posed as a taxi driver and took
16 Leerdam in an undercover taxi to 103rd Street and Corona Avenue in
17 Queens. At approximately 12:45 a.m. on October 14, Leerdam placed
18 another call to Amauri in the Dominican Republic. (Tr. 62.)
19 During that call, Amauri asked to speak with the taxi driver and
20 told Hurwitz to take Leerdam to a nearby hotel. (Id.; GX 3500FL4
21 at 3-4 (Translated English Transcriptions of Recorded Telephone and
22 Monitoring Device Conversations).) After briefly conversing with
23 Hurwitz, Amauri asked him to put Leerdam back on the line, and
24 altered course, giving Leerdam a local Queens number to call, with

1 instructions to ask for Julio. (Tr. 63; GX 3500FL4 at 4-7.)

2 Leerdam called the Queens number shortly thereafter,
3 which was answered by Andrea. (Tr. 63.) Leerdam asked for Julio,
4 and when told that he was sleeping, responded that Amauri told her
5 to ask for him. (GX 3500FL4 at 11.) Andrea responded that Amauri
6 had just called, and that she should come to the Lorenzo residence
7 to wait for a taxi to "take [her] to, to where . . . uh, Julito
8 took [her]," (id. at 13), and that Amauri would be calling Andrea
9 back. Leerdam arrived at the Lorenzo residence at approximately 1
10 a.m. and found Andrea in her nightgown waiting on the porch. (Tr.
11 63-64.) Hurwitz pulled the taxi in front of the house and helped
12 Leerdam remove the suitcases from the trunk of the taxi; Andrea
13 took one suitcase and Leerdam took the other as they proceeded
14 towards the house. (Id. at 66.) Upon reaching the porch, Andrea
15 placed the suitcase she was carrying inside the house. (Id. at
16 180.) During the course of Leerdam's egress from the taxi and
17 their approach towards the house, the following exchange occurred:

18 LEERDAM: Is that you, ma'[a]m?
19
20 ANDREA: How are you, [unintelligible ("[U/I]")]? Damn
21 it, so much work, huh?
22
23 LEERDAM: Yes.
24
25 ANDREA: [U/I].
26
27 [Pause]
28
29 ANDREA: Oh, my God, honey! Yes, he called me, me and
30 told me to call a taxi from the corner that I
31 know to take you to the, the hotel.

1 LEERDAM: Right.

2
3 ANDREA: So you can spend the night right there.
4 Because [U/I] I'm sleeping in a room a lot
5 smaller tha[n] this one. Otherwise, we could
6 both be together. [U/I] a small bed.

7
8 LEERDAM: And the suit-?

9
10 (GX 3500FL4 at 24.) As Leerdam was asking Andrea about the
11 suitcases, she was interrupted by agents who told Leerdam and
12 Andrea not to move and proceeded to arrest them. (Id.)

13 Agents entered the Lorenzo home and came upon Julio
14 Lorenzo Jr., and arrested him. (Tr. 71.) Leerdam later told
15 agents that Julio Jr. was not the person whom she had dealt with
16 previously, and agents then returned to the home where they
17 returned Julio Jr. and arrested the senior Julio Lorenzo. (Id.)
18 Inside the home, agents recovered an address book which listed
19 several of Amauri's phone numbers repeatedly. (Id. at 67-68.)

20 Upon her arrest, Andrea was advised of and waived her
21 Miranda rights, and indicated her willingness to speak to law
22 enforcement. (Id. at 210-11.) During an interview conducted
23 shortly thereafter, Andrea disclaimed knowing Leerdam and said that
24 she had never seen her before. (Id. at 211-12.) She stated that
25 she was doing a favor for her nephew by helping to get Leerdam
26 situated in a hotel, and that she had no intention of bringing
27 Leerdam into her house. (Id. at 212.) Andrea also noted that she
28 did not know what was in the suitcases and that it was a mistake to
29 do this favor for her nephew. (Id.) At a subsequent interview in

1 the early morning at the ICE office at JFK Airport, Andrea was
2 again advised of and waived her Miranda rights, and noted that she
3 had in fact met Leerdam approximately two months prior, but that
4 she didn't know her name. (Id. at 282.) Julio was also advised of
5 and waived his Miranda rights during an interview at the ICE
6 office, and he stated that he had done a favor for his nephew by
7 picking Leerdam up, taking her to a hotel, and dropping her off at
8 JFK Airport. (Id. at 284-85.) He denied giving Leerdam any money.
9 (Id. at 285, 313.)

10 The trial commenced on December 4, 2006, and the jury
11 returned its verdict on December 7, 2006. Andrea Lorenzo's
12 judgment of conviction was entered on April 4, 2007; Julio
13 Lorenzo's was entered on May 1, 2007. Both defendants-appellants
14 filed timely notices of appeal, and these appeals followed.

16 DISCUSSION

17 On appeal, the Lorenzos contend that there was
18 insufficient evidence adduced at trial to demonstrate that they
19 knowingly entered into the conspiracy with the specific intent to
20 commit the offenses that were the objects of the conspiracy.
21 Andrea Lorenzo also argues that the evidence was insufficient to
22 prove that she knowingly and intentionally imported cocaine. We
23 agree.

24 "A defendant bears a heavy burden in seeking to overturn

1 a conviction on grounds that the evidence was insufficient.”
2 United States v. Cruz, 363 F.3d 187, 197 (2d Cir. 2004). “The
3 ‘relevant question’ in this inquiry is ‘whether, after viewing the
4 evidence in the light most favorable to the [government], any
5 rational trier of fact could have found the essential elements of
6 the crime beyond a reasonable doubt.’” United States v. Rodriguez,
7 392 F.3d 539, 544 (2d Cir. 2004) (quoting Jackson v. Virginia, 443
8 U.S. 307, 319 (1979)) (emphasis in Jackson). Direct evidence is
9 not required; “[i]n fact, the government is entitled to prove its
10 case solely through circumstantial evidence, provided, of course,
11 that the government still demonstrates each element of the charged
12 offense beyond a reasonable doubt.” Id. “Our evaluation looks at
13 ‘the evidence in its totality,’ and the Government ‘need not negate
14 every theory of innocence.’” United States v. Glenn, 312 F.3d 58,
15 63 (2d Cir. 2002) (quoting United States v. Autuori, 212 F.3d 105,
16 114 (2d Cir. 2000)). “While we defer to a jury’s assessments with
17 respect to credibility, conflicting testimony, and the jury’s
18 choice of the competing inferences that can be drawn from the
19 evidence, specious inferences are not indulged,” United States v.
20 Jones, 393 F.3d 107, 111 (2d Cir. 2004) (internal quotation marks
21 and citation omitted), because “[it] would not satisfy the
22 [Constitution] to have a jury determine that the defendant is
23 probably guilty.” Rodriguez, 392 F.3d at 544 (quoting Sullivan v.
24 Louisiana, 508 U.S. 275, 278 (1993)) (emphasis in Sullivan;

1 alterations in Rodriguez). “[I]f the evidence viewed in the light
2 most favorable to the prosecution gives equal or nearly equal
3 circumstantial support to a theory of guilt and a theory of
4 innocence, then a reasonable jury must necessarily entertain a
5 reasonable doubt.” Glenn, 312 F.3d at 70 (internal quotation marks
6 omitted).

7 “To sustain a conspiracy conviction, the government must
8 present some evidence from which it can reasonably be inferred that
9 the person charged with conspiracy knew of the existence of the
10 scheme alleged in the indictment and knowingly joined and
11 participated in it.” Rodriguez, 392 F.3d at 545 (internal
12 quotations omitted). “[W]here the crime charged is conspiracy, a
13 conviction cannot be sustained unless the Government establishes
14 beyond a reasonable doubt that the defendant had the specific
15 intent to violate the substantive statute[s].” United States v.
16 Gaviria, 740 F.2d 174, 183 (2d Cir. 1984) (internal quotation marks
17 omitted). “To convict a defendant as a member of a conspiracy, the
18 government must prove that the defendant agree[d] on the essential
19 nature of the plan,” United States v. Salameh, 152 F.3d 88, 151 (2d
20 Cir. 1998) (internal quotation marks omitted), and that there was
21 a “conspiracy to commit a particular offense and not merely a vague
22 agreement to do something wrong,” United States v. Provenzano, 615
23 F.2d 37, 44 (2d Cir. 1980) (internal quotation marks omitted).

24 “[O]nce a conspiracy is shown to exist, the evidence

1 sufficient to link another defendant to it need not be
2 overwhelming." United States v. Nusraty, 867 F.2d 759, 762 (2d
3 Cir. 1989) (internal quotation marks omitted). But "[s]uspicious
4 circumstances . . . are not enough to sustain a conviction for
5 conspiracy," id. at 763, and "mere association with those
6 implicated in an unlawful undertaking is not enough to prove
7 knowing involvement," id. at 764; likewise, "a defendant's mere
8 presence at the scene of a criminal act or association with
9 conspirators does not constitute intentional participation in the
10 conspiracy, even if the defendant has knowledge of the conspiracy,"
11 United States v. Samaria, 239 F.3d 228, 235 (2d Cir. 2001).

12 A. Julio Lorenzo

13 The government contends that there was "ample evidence
14 adduced at trial" to demonstrate that Julio knew that the object of
15 the conspiracy was cocaine smuggling and distribution, and points
16 principally to the following evidence as indicia of his knowledge:
17 (1) Julio's encounter and conversation with Ronnie in September
18 2005 followed by his stewardship of Leerdam until her flight back
19 to the Dominican Republic; (2) Julio's transfer of the \$14,000 in
20 cash to Leerdam to deliver to Amauri; (3) Amauri's instruction to
21 Leerdam during the October 2005 trip that she call the Lorenzo
22 residence and ask for Julio; and (4) Julio's false exculpatory
23 statement upon questioning that he had never given Leerdam any
24 money.

1 It is clear, viewing the evidence in the light most
2 favorable to the government, that a reasonable jury could find that
3 a drug-smuggling conspiracy existed and that Leerdam and Amauri
4 knowingly participated in it. The government's argument focuses on
5 various events that purportedly link Julio to this conspiracy.
6 However, the evidence highlighted by the government, when
7 considered in the aggregate, still lacks a critical element--any
8 indication from which a jury could reasonably infer that Julio knew
9 of the nature and specific object of the conspiracy.

10 First, although there is ample evidence demonstrating
11 the existence of the conspiracy, and that Julio was present at and
12 participated in events that furthered the conspiracy, there is
13 insufficient evidence to show that he did so knowingly and with the
14 specific intent to further a cocaine smuggling and distribution
15 conspiracy. With respect to the September trip, there is no
16 evidence in the record as to the contents of either the
17 conversation between Julio and Ronnie or the suitcase that Leerdam
18 was carrying. The government contends that the \$14,000 that Julio
19 gave to Leerdam for delivery to the Dominican Republic was
20 "proceeds of the conspiracy," supporting an inference that Julio
21 knew of the aims of the conspiracy. However, in light of the
22 absence of any evidence indicating Julio's knowledge of the
23 contents of Leerdam's suitcase, or prior participation in this
24 conspiracy, and his complete lack of participation in the events

1 surrounding the October trip (where it is clear that cocaine was
2 actually smuggled into the country), we cannot say that there are
3 "facts sufficient to draw a 'logical and convincing connection'
4 between circumstantial evidence of an agreement, and the inference
5 that an agreement was in fact made," Jones, 393 F.3d at 111.

6 No doubt the transfer of \$14,000 from Julio to Leerdam is
7 suspicious and, viewed in the light most favorable to the
8 government, indicative of participation in illegal behavior. But
9 such a transfer is consistent with participation in a wide variety
10 of offenses, and in light of the other evidence, is insufficient to
11 prove Julio's intent to participate in the conspiracy charged in
12 the indictment. See Samaria, 239 F.3d at 237 (holding that there
13 was insufficient evidence of defendant's intent to engage in a
14 conspiracy to receive or possess stolen goods despite his presence
15 in a car with boxes containing the goods because "the exterior
16 appearance of the boxes was equally consistent with any number of
17 different criminal offenses including the receipt and possession of
18 drugs, illegal weapons, counterfeit currency, or the receipt of
19 legal goods such as drug paraphernalia that would later be employed
20 in a criminal endeavor").

21 The government also asks us to view Amauri's instruction
22 that Leerdam call Julio during the October trip as supporting an
23 inference that "Amauri would not have entrusted Julio with the
24 suitcases concealing the narcotics, worth over \$250,000, unless

1 Julio had known what was concealed within them and that it was
2 reasonably foreseeable to him that the smuggled narcotic from the
3 Dominican Republic was cocaine." This unfulfilled request for
4 Julio cannot support such a speculative and attenuated inference;
5 Julio's continued dormancy despite Leerdam's request severely
6 undermines the notion that it was critical that Julio specifically
7 be entrusted with such valuable narcotics.

8 Finally, the government relies on the false exculpatory
9 statement made by Julio after his arrest. We have observed that

10 [w]hile false exculpatory statements made to law
11 enforcement officials are circumstantial
12 evidence of a consciousness of guilt and have
13 independent probative force, . . . falsehoods
14 told by a defendant in the hope of extricating
15 himself from suspicious circumstances are
16 insufficient proof on which to convict where
17 other evidence of guilt is weak and the evidence
18 before the court is as hospitable to an
19 interpretation consistent with the defendant's
20 innocence as it is to the Government's theory of
21 guilt.

22
23 United States v. Johnson, 513 F.2d 819, 824 (2d Cir. 1975). We
24 find that Julio's statement, while indicative of consciousness of
25 guilt, is insufficient in light of the rest of the evidence against
26 him.

27 It bears emphasis that we recognize that "a defendant's
28 knowing agreement to join a conspiracy must, more often than not,
29 be proven through circumstantial evidence," Nusraty, 867 F.2d at
30 764. We have seen cases where the circumstantial evidence
31 considered in the aggregate demonstrates a pattern of behavior from

1 which a rational jury could infer knowing participation. See,
2 e.g., United States v. Martino, 759 F.2d 998, 1003-04 (2d Cir.
3 1985) (holding that defendant's arrival at a time and place where
4 a heroin transaction was scheduled to occur, where he witnessed an
5 exchange of money for packages of a substance made to resemble
6 heroin, coupled with statements indirectly indicating that he was
7 the intended eventual purchaser of a portion of the heroin,
8 coincidental coming and going with participants in the conspiracy,
9 and a false exculpatory statement upon his arrest at the scene, was
10 sufficient circumstantial evidence to show knowing participation in
11 a conspiracy to distribute and possess with intent to distribute
12 heroin). This is not such a case.

13 B. Andrea Lorenzo

14 1. The Conspiracy Counts

15 The evidence as to Andrea's knowing participation in the
16 conspiracy is even more sparse and requires little discussion. The
17 government contends that it was permissible for the jury to infer
18 that Andrea knowingly participated in the conspiracy with the
19 specific intent to import and distribute cocaine from: (1) the
20 record of conversations between Amauri and Andrea on the evening of
21 October 13, 2005; (2) Andrea's instruction to Leerdam that evening
22 that she come to the Lorenzo residence to take a different taxi to
23 a hotel; (3) her greeting of Leerdam as she arrived; (4) her
24 transfer of one of Leerdam's suitcases from the taxi into her

1 house; (5) Andrea's presence in the S.U.V. during Leerdam's
2 September visit; and (6) Andrea's false exculpatory statement
3 following her arrest that she had never seen Leerdam before and did
4 not know her. This evidence, considered in the aggregate and
5 viewed in the light most favorable to the government, supports at
6 most an inference that Andrea knew that she was assisting
7 suspicious behavior; viewed in this light, it is also, as Andrea
8 contends, consistent with providing hospitality to her nephew's
9 girlfriend and regretting providing such assistance. See Glenn,
10 312 F.3d at 70 ("[I]f the evidence viewed in the light most
11 favorable to the prosecution gives equal or nearly equal
12 circumstantial support to a theory of guilt and a theory of
13 innocence, then a reasonable jury must necessarily entertain a
14 reasonable doubt." (internal quotation marks omitted)).

15 2. The Substantive Importation Count

16 Because the government proceeded on an aiding and
17 abetting theory with respect to the substantive importation count,
18 the government was required "to prove, beyond a reasonable doubt,
19 that the defendant knew the specific nature of the . . . underlying
20 crime," United States v. Friedman, 300 F.3d 111, 124 (2d Cir.
21 2002). For the reasons discussed with respect to the conspiracy
22 counts against Andrea, the evidence was also insufficient to
23 support a conviction on this count.

1 C. Julio Lorenzo's Other Contentions

2 Because we reverse Julio's judgment of conviction in its
3 entirety on sufficiency grounds, we need not address his other
4 arguments.

5
6 CONCLUSION

7 For the foregoing reasons, defendants-appellants'
8 judgments of conviction are reversed in their entirety, and
9 remanded to the district court for entry of judgments of acquittal
10 on each count. The mandate as to Julio Lorenzo (docket number 07-
11 1855) shall issue forthwith.