UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-7195

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PEDRO OLIVARES CORRAL,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CR3 90 269 G)

(January 5, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Pedro Olivares Corral was convicted of one count of aiding and abetting in the transportation of stolen goods in foreign commerce, in violation of 18 U.S.C. § 2, 2314 (1988), and three counts of aiding and abetting in the theft of goods from interstate shipments, in violation of 18 U.S.C. § 2, 659 (1988). Corral appeals his convictions. Finding no reversible error, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

In April 1989, motorcycle tires and tubes were stolen from a truck parked in Irving, Texas. In February 1990, Corral offered to sell some of these motorcycle tires to Enrique Amor, a Mexican citizen who ran a retail store in Mexico. After Amor bought the tires from Corral, Corral offered to assist Amor in transporting the tires from Texas to Mexico.

In April 1990, a shipment of Honda automobile parts was stolen from a truck en route from California to Texas. That same month, a shipment of prefabricated kitchen cabinets was stolen from a truck en route from Texas to New Jersey. Two months later, a shipment of plastic goods was stolen from a truck en route from Texas to Illinois. Corral and Jesse Mojica, a co-defendant, offered to sell the Honda automobile parts, the kitchen cabinets, and some of the plastic goods to Amor.[1]

Corral was convicted of one count of aiding and abetting in the transportation of stolen goods, specifically motocycle tires, in foreign commerce and three counts of aiding and abetting in the theft of goods, specifically prefabricated kitchen cabinets, Honda auto parts, and plastic containers, from interstate shipments. He was sentenced to 21 months imprisonment on each count, such sentences to run concurrently, three years supervised release, $36,584.17 in restitution, and a $200 special assessment.

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[1] Mojica rented a warehouse in Dallas, where the goods were stored. *See* Record on Appeal, vol. 4, 105-06. Corral had his own key to the warehouse. *See* Record on Appeal, vol. 7, at 138.

Corral appeals his convictions, contending that:

(a) he was denied his right to a speedy trial;

(b) the district court abused its discretion in denying his motion to sever;

(c) the district court violated his rights to due process and right against self-incrimination, by improperly instructing the jury; and

(d) insufficient evidence supported his convictions.

II

A

Corral argues that the district court denied his constitutional and statutory rights to a speedy trial. To determine whether Corral was deprived of his sixth amendment right to a speedy trial, we must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the timeliness of Corral's assertion of the right to a speedy trial; and (4) the degree of prejudice to Corral as a result of the delay. *United States v. Juarez-Fierro,* 935 F.2d 672, 676 (5th Cir.) (citing *Barko v. Wingo,* 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972)), *cert. denied,* ___ U.S. ___, 112 S. Ct. 402, 116 L. Ed. 2d. 351 (1991). A review of these factors does not support Corral's claim, as the only factor supporting his argument is that he timely asserted his right to a speedy trial. *See* Record on Appeal, vol. 1, at 35-36, 109-11. Corral's initial appearance before a judicial officer was on April 3, 1991, and his trial began on July 9, 1991. *See* Record on Appeal, vol. 1, at 7; docket sheet at 6. A three-month delay is not presumptively prejudicial. *See Juarez-Fierro,*

935 F.2d at 676 (holding that a four-month delay was not presumptively prejudicial).

In addition, the delay was caused by Corral's pre-trial motions, *see* Record on Appeal, vol. 1, at 33-34, 109-11, the government's request for a continuance because it had difficulty locating a witness, *see id.* at 104-07, and Corral's co-defendants' pre-trial motions. *See id.* at 99-103. These delays do not suggest that government misconduct caused unwarranted delay. *See Juarez-Fierro,* 935 F.2d at 676 (weighing factor of reason for delay less-heavily against government, where defendant made no allegations of government misconduct or improper dilatory tactics).

Lastly, although Corral alleges that the delay prejudiced his case because he gave up his other pre-trial defenses to preserve his speedy trial, he does not indicate what other defenses he would have pursued, or point to any facts in support of those defenses. Corral's conclusionary allegations of prejudice cannot support his claim that he was deprived his right to a speedy trial under the sixth amendment. *See id.* (holding that conclusory statements about prejudice are insufficient to support a constitutional challenge). Therefore, the district court did not deny Corral's constitutional right to a speedy trial.

Corral also claims that the district court denied his right to a speedy trial under 18 U.S.C. § 3161 (1988). Under this statute, a trial must commence within 70 days of the public filing of the indictment or the defendant's initial court appearance, whichever is later. 18 U.S.C. § 3161(c)(1) (1988); *Juarez-Fierro,* 935 F.2d

at 676 (citing section 3161). Certain periods are excluded from the computation under the statute, including the delay resulting from the filing of pre-trial motions. 18 U.S.C. § 3161(h)(1)(F) (1988) (counting the time of delay from the filing of the motion through the disposition of the motion); *Juarez-Fierro,* 935 F.2d at 676 (citing subsection (h)(1)(f)).

Ninety-eight days elapsed between Corral's initial court appearance and the beginning of his trial. *See* Record on Appeal, vol. 1, at 7; docket sheet at 6. However, the 26-day period between the filing of Corral's motion to sever his trial on May 17 and the denial of that motion on June 12, and the 19-day period between the filing to dismiss the indictment on June 20 and the denial of that motion on July 9, are excludable under § 3161(h)(1)(F). *See* Record on Appeal, vol. 1, at 33-34, 49-50, 109-11, 151. Excluding these 45 days from the computation under § 3161(c)(1), Corral's trial began within 53 days from his initial court appearance. Therefore, the district court did not deny his statutory right to a speedy trial.

B

Corral argues next that the district court abused its discretion in denying his motion to sever his trial from his co-defendant Jesse Mojica.[2] We review the district court's denial of

[2] The government argues that Corral failed to preserve this issue for review because he failed to re-urge his motion to sever at the close of all the evidence. *See* Brief for Corral at 24. Corral filed a pre-trial motion to sever, and we do not require that a defendant re-raise the issue at trial. *See United States v. Means,* 695 F.2d 811, 818 (5th Cir. 1983) ("[T]his circuit does not recognize waiver of severance upon non-renewal of the motion at

a motion to sever for abuse of discretion. *United States v. Rocha,* 916 F.2d 219, 227 (5th Cir. 1990), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2057, 114 L. Ed. 2d 462 (1991). "To demonstrate an abuse of discretion, a defendant must show that he suffered specific and compelling prejudice against which the district court could not provide adequate protection, and that this prejudice resulted in an unfair trial." *Id.* Corral maintains that he suffered "specific and compelling prejudice" by the denial of his motion to sever, because: (1) he was deprived of a speedy trial; (2) evidence admissible only as to Mojica was offered at the joint trial; and (3) his only defense was atagonistic to Mojica's defenses.[3]

Corral received a speedy trial under both the sixth amendment and 18 U.S.C. § 3161 (1988), and therefore, the denial of his motion to sever did not prevent him from getting a speedy trial. Furthermore, severance is not required where the government introduces evidence admissible only against individual co-defendants. *Rocha,* 916 F.2d at 228. "[A]n appropriate limiting instruction is sufficient to prevent the threat of prejudice of evidence which is incriminating against one co-defendant but not another." *Id.* at 228-29. The district court instructed the jury to consider each offense and each defendant independently.[4] *See*

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trial . . . .").

[3] "Co-defendants are entitled to severance when they demonstrate antagonistic defenses." *Rocha,* 916 F.2d at 231.

[4] The district court instructed the jury, in relevant part:

> A separate crime is charged against one or both of the defendants in each count of the indictment. Each count,

Rocha, 916 F.2d at 229 ("The district court explicitly instructed the jury . . . to consider each offense separately and each defendant individually. This cautionary instruction sufficiently enabled the jury to compartmentalize such evidence and prevent any spillover from tainting another defendant's case."). Moreover, Corral does not specifically identify any evidence that would not have been admitted in a severed trial. Therefore, Corral has not demonstrated prejudice in the introduction of evidence.

Lastly, "[t]he test for antagonistic defenses requires that the defenses be irreconcilable or mutually exclusive." *Rocha,* 916 F.2d at 231. Corral did not allege before the district court, nor does he specifically identify in his brief, which defenses were "irreconcilable or mutually exclusive." Corral alleges generally that his right to a speedy trial was "antagonistic to any defense of Mojica's," apparently because Mojica did not contest his right to a speedy trial. *See* Brief for Corral at 28-29. Mojica's defenses, however, do not impinge on Corral's right to a speedy trial and correspondingly his right to severance on the basis of atagonistic defenses. *See id.* ("[T]he core of one defendant's defense must be contradicted by a co-defendant's defense.").

> and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence of each defendant.

Record on Appeal, vol. 2, at 252.

Accordingly, the district did not abuse its discretion in denying Corral's motion to sever.

C

The district court instructed the jury that if it found Corral acutally or contructively[5] possessed recently stolen property without a satisfactory explanation, then it could infer that Corral knew the property was stolen, and that he participated in the theft of the property. *See* Record on Appeal, vol. 2, at 259. These factors are elements of Corral's charged offenses. *See* 18 U.S.C. §§ 2, 659, 2314 (1988). Corral argues that this instruction denied him due process and violated his right against self-incrimination.

Corral argues that the jury instruction denied him due process because it permitted the jury to convict him without having to find all the elements of the charged offenses beyond a reasonable doubt. In a case involving the same offenses, we upheld a similar inference instruction against a due process challenge. *See United States v. Ferro,* 709 F.2d 294, 297 (5th Cir. 1983) ("[T]his circuit has `held in numerous cases that unexplained possession of stolen property may be shown to permit an inference by the finder of fact that the possessor participated in [and therefore knew of] the theft of the property.'" (quoting *United States v. Marchbanks,* 469 F.2d 72, 74 (5th Cir. 1972)). We added that an inference instruction does not violate due process where the district court

[5] Constructive possession includes those situations where a person, although not in direct physical control of property, nevertheless exercises dominion over property. *See* Record on Appeal, vol. 2, at 261.

instructs the jury that they *may,* rather than *shall* draw the inference, and that the jury must acquit the accused if any juror entertained a reasonable doubt of guilt. *Id.* Here, the district court instructed the jury that: (a) the inference was permissive; (b) the jury had "exclusive province" to determine whether the inference was warranted; and (c) the jury had to acquit if it entertained a reasonable doubt about guilt. *See* Record on Appeal, vol. 2, at 260-61. Therefore, the jury instruction did not deny Corral due process.[6]

Corral further claims that the instruction violated his right against self-incrimination because it allowed the jury to infer guilt from Corral's failure to explain his possession of recently stolen property. Corral therefore argues that the instruction impermissibly commented on his failure to testify.

An inference instruction does not offend the right against self-incrimination where "the trial court specifically instruct[s] the jury that [a defendant has] a constitutional right not to take the witness stand and that possession c[an] be satisfactorily explained by evidence independent of [a defendant's] testimony." *Barnes v. United States,* 412 U.S. 837, 846-47, 93 S. Ct. 2357, 2363, 37 L. Ed. 2d 380 (1973). Here, the district court instructed the jury that "[i]n considering whether possession of recently stolen property has been satisfactorily explained, you are reminded

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[6] The instruction was proper whether the possession was actual or constructive. *See United States v. Allen,* 497 F.2d 160, 164 (5th Cir.), *cert. denied,* 419 U.S. 1035, 95 S. Ct. 520, 42 L. Ed. 2d 311 (1974) (upholding an inference instruction based upon constructive possession).

that . . . a defendant need not take the witness stand and testify. There may be opportunities to explain possession by showing other facts . . . independent of the testimony of a defendant." *See* Record on Appeal, vol. 2, at 260. Therefore, the instruction did not violate Corral's right against self-incrimination.

D

Lastly, Corral argues that insufficient evidence supported his convictions. In reviewing challenges based upon the sufficiency of the evidence, we must determine "whether a reasonable jury could find that the evidence establishes guilt beyond a reasonable doubt." *United States v. Salazar,* 958 F.2d 1285, 1291 (5th Cir.), *cert. denied,* ___ U.S. ___, 113 S. Ct. 185, 61 U.S.L.W. 3060 (1992); *see United States v. Parziale,* 947 F.2d 123, 127 (5th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 1499, 117 L. Ed. 2d 638 (1992). "[We] view the evidence, whether direct or circumstantial, and all the inferences reasonably drawn from it, in the light most favorable to the verdict." *Salazar,* 958 F.2d at 1291; *see Parziale,* 947 F.2d at 127.

Corral was convicted of one count of aiding and abetting in the transportation of stolen goods in foreign commerce, in violation of 18 U.S.C. §§ 2, 2314 (1988). To convict Corral of this offense, the government had to establish that Corral aided in "(1) the interstate transportation of (2) goods valued at $5,000 or more (3) with the knowledge that such goods have been stolen, converted, or taken by fraud." *United States v. Vontsteen,* 872

F.2d 626, 630 (5th Cir. 1989); *see* 18 U.S.C. § 2314 (1988). The government had to show only that Corral knew the goods were stolen and that the goods were transported in foreign commerce; the government did not have to prove that Corral actually participated in transporting the goods. *United States v. Franklin,* 586 U.S. 560, 564 (5th Cir. 1978), *cert. denied,* 440 U.S. 972, 99 S. Ct. 1536, 59 L. Ed. 2d 789 (1979).

The evidence at trial established that a load of motorcycle tires worth more than $5,000 were stolen in April 1989, *see* Record on Appeal, vol. 4, at 44, 46, 54, 57; that Corral sold the stolen tires to Amor for $15,000-20,000, *see* Record on Appeal, vol. 5, at 184-85; that with Corral's knowledge, Amor brought the tires to Mexico to sell them, *see id.* at 190-91, 193; and that a false bill of sale for the tires was found in Corral's desk. *See* Record on Appeal, vol. 9, at 91. From this evidence, the jury reasonably could have inferred that tires worth more than $5,000 were transported in interstate commerce, and that Corral knew the tires were stolen. Accordingly, sufficient evidence supported Corral's conviction under §§ 2, 2314.

Corral was also convicted of three counts of aiding and abetting in the theft of goods from interstate shipments, in violation of 18 U.S.C. §§ 2, 659 (1988). To convict Corral of this offense, the government needed to establish that: (1) Corral stole goods, or aided in their theft; (2) the goods had a value greater than $100; and (3) the goods were part of an interstate shipment. *See* 18 U.S.C. § 659 (1988). Corral does not challenge that the

goods were stolen from an interstate shipment or that they had a value greater than $100. *See* Brief for Corral at 24-25.

The evidence at trial established that stolen goods, including the prefabricated kitchen cabinets, Honda auto parts, and plastic container, were stored in a warehouse rented by Mojica, *see* Record on Appeal, vol. 4, at 105-06; vol. 5, at 203-05; that Corral gave Alberto Jimenez, an individual who worked for Corral, a key to the warehouse, *see* Record on Appeal, vol. 7, at 138; that Jiminez went to the warehouse only at Corral's instruction, *see id.* at 153; that Corral told his own employee to take some of the auto parts from the warehouse, *see id.* at 151; that Corral was upset about a possible break-in at the warehouse and told Jiminez that someone had "ripped him off" of some auto parts, *see id.* at 153; and that some of the goods in the warehouse belonged to Corral. *See* Record on Appeal, vol. 8, at 98. From this evidence, the jury reasonably could have found that Corral either acutally or constructively possessed the stolen goods, by exercising dominion over the goods. Because Corral did not offer an adequate explanation for his possession of recently stolen property, the jury could have inferred that Corral aided in the theft of the goods. *See Ferro,* 709 F.2d at 297. Accordingly, sufficient evidence supported Corral's convictions under §§ 2, 659.

III

For the foregoing reasons, we **AFFIRM.**