

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4634
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIM ARLEN RABY,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas

(February 2, 1993)

Before POLITZ, Chief Judge, HIGGINBOTHAM and WIENER, Circuit
Judges.

POLITZ, Chief Judge:*

Jim Arlen Raby appeals his conviction by a jury on multiple
counts of Lacey Act¹ violations. Finding no error, we affirm.

*Local Rule 47.5 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should not be published.

¹ 16 U.S.C. § 3371 *et seq.*

Background

Larry Wiler, owner of a restaurant on the Texas side of Lake Texoma, approached authorities about illegal commercial fishing, which was adversely affecting the tourist trade on which his business depended. The United States Fish and Wildlife Service began an undercover investigation with Wiler's help. Raby was among those caught in the net.

Raby resided on the Oklahoma side of Lake Texoma. On August 3, 1991, after preliminary conversations in which Wiler expressed an interest in buying fish for his restaurant, Raby offered to sell Wiler 250 pounds of fish. Wiler agreed to the price and Raby delivered the fish to the restaurant approximately two hours later. Similar events transpired on August 15 -- Wiler telephoned Raby at home; Raby again offered to sell 250 pounds of fish. Wiler agreed and Raby delivered the fish to the restaurant within the hour. On August 23, Raby appeared at Wiler's restaurant without preliminary telephone arrangements with approximately 264 pounds of fish to sell. Wiler purchased them. Unbeknownst to Raby, Wiler tape-recorded their conversations, both those by telephone and those in person.

All three sales were of catfish which, under Oklahoma law, could neither be sold nor transported out of state.² Raby was indicted on six counts of violating the Lacey Act by transporting and selling the fish in interstate commerce in contravention of

² Okla. Stat. Ann., Title 29, §§ 7-503(A), 7-602(A).

Oklahoma law.³ A jury convicted him on all counts and the district court sentenced him to eight months imprisonment to be followed by three years of supervised release during which he is prohibited from fishing on Lake Texoma. Raby timely appealed.

Analysis

Raby's principal contention on appeal is that there was insufficient evidence that he transported the fish across the Oklahoma-Texas state line. Raby moved for a judgment of acquittal after the close of the government's case on this ground but did not renew his motion after the close of evidence. This results in a waiver of any objection to the denial of the motion and we review the sufficiency of the evidence only for a manifest miscarriage of justice.⁴

Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or . . . because the evidence on a key element of the offense was so tenuous that a conviction would be shocking. In making this determination, the evidence, as with the regular standard for review for insufficiency of evidence claims, must be considered in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices.⁵

Albeit circumstantial, we find ample evidence of interstate transport to satisfy this standard. Contrary to Raby's argument,

³ 16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B); 18 U.S.C. § 2.

⁴ **United States v. Ruiz**, 860 F.2d 615 (5th Cir. 1988).

⁵ **Id.**, 860 F.2d at 617 (internal quotations and citations omitted).

circumstantial evidence may suffice to support a conviction.⁶

The first two sales were precipitated by Wiler's telephone calls to Raby at his home in Oklahoma. Within hours, Raby delivered the fish to Wiler's restaurant in Texas. Raby told Wiler on the second trip that the fish were skinned on a skinning machine which he kept near his residence. In all three sales, the fish were dressed and packaged in a similar manner. The jury was entitled to infer from this evidence that Raby brought the fish from Oklahoma to Texas on each occasion.

But there was more. Raby exhibited familiarity with the Lacey Act, telling Wiler that crossing the state line with fish for sale entailed a fine and imprisonment. Raby stated: "That's how come I stay with . . . personal contacts," and on another occasion, "That's how come . . . I'm pretty careful about when I come over." The third sale occurred a few hours after a mock raid on Wiler's restaurant staged by authorities as they prepared to terminate the investigation. Learning of the raid upon his arrival at the restaurant Raby commented, "It's a good thing they came when they did," that is, before he had delivered the fish. In still other displays of guilty knowledge, Raby asked Wiler for assurance that there would be "no extra company" when he delivered the fish and told him "If you call, you don't have to talk fish. Ask me if I've got any spuds or anything like that." The jury was entitled to infer that Raby would not have had such concerns had he not been

⁶ **United States v. Acosta**, 972 F.2d 86 (5th Cir. 1992).

violating the Lacey Act. Viewed together, the circumstantial evidence is sufficient to support the convictions.

Raby also challenges the admission of a statement given by codefendant Hank Barker at the time of Barker's arrest. The statement, which implicated Raby, was admitted when Barker took the stand in his own defense. Raby maintains that the statement was obtained in violation of Barker's constitutional rights. Because Raby did not object on this ground at trial, we review for plain error only.⁷

A defendant lacks standing to assert in his own defense the constitutional rights of others.⁸ "[I]n some circumstances, [however, a defendant may] have standing to claim that his own due process right to a fundamentally fair trial was violated by the admission of statements [of others] derived through shocking and intentional police misconduct."⁹ Nothing approaching shocking misconduct occurred here. According to Barker, the arresting officers took his statement when he was hung over from the prior night's drinking, after only a few hours sleep. Because of his hangover, Barker had to excuse himself several times during the

⁷ **United States v. Heath**, 970 F.2d 1397 (5th Cir.), on denial of petition for rehearing, 978 F.2d 879 (1992).

⁸ **United States v. Fredericks**, 586 F.2d 470 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979).

⁹ **United States v. Fortna**, 796 F.2d 724, 732 n.8 (5th Cir.), cert. denied, 479 U.S. 950 (1986); **United States v. Merkt**, 764 F.2d 266 (5th Cir. 1985).

interview. At trial he disclaimed the language in the statement and testified that he did not remember being read his **Miranda** rights until after the statement was given. Barker, however, admitted that the statement was read to him before he signed it. This occurred after he was released on personal recognizance. Barker testified that he signed because he was anxious to leave. Accepting *arguendo* Barker's recollection of events, such circumstances do not rise to the level of coercive or inquisitional techniques that warrant exclusion as a prophylactic measure.¹⁰ Nor did the admission of Barker's statement, even if error, render Raby's trial fundamentally unfair in light of the other evidence of guilt.

Finally, Raby claims ineffective assistance from his appointed trial counsel. He did not raise this claim in the district court and the record is not adequately developed for us to review it now. Hence, we decline to address the matter on direct appeal, without prejudice to Raby's right to raise it in a proceeding under 28 U.S.C. § 2255.¹¹

AFFIRMED.

¹⁰ **Merkt; Fredericks.**

¹¹ **United States v. Higdon**, 832 F.2d 312 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).