IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7530
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN PEREZ-PALACIOS,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
CR C 92 98 01

(March 22, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Martin Perez-Palacios (Perez) was convicted by a jury of possession with intent to distribute approximately 251 kilograms of marijuana. The district court sentenced Perez to a term of imprisonment of 70 months, a four-year supervised release term, a fine of $1000, and a $50 special assessment.

---

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

Perez argues that the government failed to prove that he had knowledge that marijuana was located in the trailer, which he was hauling to Mississippi. Perez contends that the government could not rely solely on the fact that he was driving the rig and the government failed to offer additional evidence to support the essential element of knowledge.

Perez moved for a judgment of acquittal at the close of the government's case, but failed, however, to renew his motion at the close of the evidence. "This failure constitutes a waiver of any objection to the motion's denial, restricting review to whether there has been a manifest miscarriage of justice." U.S. v. Knezek, 964 F.2d 394, 399-400 (5th Cir. 1992) (citation omitted).

> 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 . . . must be considered in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices.

Id. at 400, n.14. (internal quotation and citation omitted).

"To prove possession of a controlled substance with intent to distribute, the government must show beyond reasonable doubt that [the] defendant (1) possessed the illegal substance (2) knowingly (3) with intent to distribute." U.S. v. Ramirez, 963 F.2d 693, 701 (5th Cir.), cert. denied, 113 S.Ct. 388 (1992) (citation omitted).

"Knowledge of the presence of a controlled substance often may be inferred from the exercise of control over a vehicle in which the illegal substance is concealed." U.S. Diaz-Carreon, 915 F.2d 951, 954 (5th Cir. 1990) (citation omitted). If the controlled substance is "clearly visible or readily accessible to the defendant," control alone will support the inference of guilty knowledge. Id. However, although not required to do so, the government produced additional evidence demonstrating a "consciousness of guilt" on the part of Perez.

Perez was employed as a truck driver for Valley Trucking, an interstate hauling company located in Brownsville, Texas. Perez was assigned to pick up a load of raw materials in Mississippi during the late morning of February 19, 1992. Perez obtained tractor No. 615 and hooked it to his trailer. An inspection was made of trailer 615 on the morning of February 19 and it was empty at that time. Perez was stopped at a Border Patrol checkpoint at approximately 7:15 p.m., and agents discovered eighteen bundles of marijuana, weighing 582 pounds, in the trailer.

"A less-than-credible explanation for a defendant's actions is part of the overall circumstantial evidence from which possession and knowledge may be inferred." Diaz-Carreon, 915 F.2d at 955 (internal quotations and citation omitted). Perez contended that he did not inspect the trailer prior to leaving the yard because it was listed as empty on the inspection list. The dispatchers testified that the truckers are instructed to inspect the trailers

before taking them on the road to insure that they are empty. The drivers are not to rely on the inspection list, but are required to physically inspect the trailers.

Perez also asserted that he locked the trailer in conformity with company rules. The dispatcher testified that he instructs the drivers not to lock the empty trailers while they are on the road to avoid break-in damage. Perez's explanation for his actions was discredited by the government's evidence.

The testimony of the government witnesses also contradicts the defendant's estimate as to the time that he left the company yard and reflects that Perez had the opportunity to load the drugs into the trailer. Perez testified that he left the yard around 4:00 p.m., went home for a shower and clean clothes, and left for Mississippi between 4:30 and 5:00 p.m. A Valley yard mechanic's assistant testified that he was positive that Perez left the yard with the tractor-trailer rig between 1:00 p.m. and 3:00 p.m. A Valley trucker testified that he was traveling west in his rig on February 19 between 2:30 and 3:00 p.m. and saw Perez travelling east. The Sarita Border Patrol checkpoint is only an hour-and-a-half drive from Brownsville, and there was at least a four-hour period between Perez's departure and his arrival at the checkpoint. The defendant's version of the incident is less than credible and allowed the jury to infer guilty knowledge.

"Nervous behavior at an inspection station frequently constitutes persuasive evidence of guilty knowledge." Diaz-

Carreon, 915 F.2d at 954 (citation omitted). Brian Johnson, the Border Patrol agent assigned to the Sarita checkpoint, testified that Perez appeared anxious to leave the checkpoint and did not look at Johnson. Johnson testified that because of Perez's demeanor, he asked Perez if he would consent to a search of the trailer. Johnson testified that Perez moved the rig, but that he "overshot" the lighted canopy so that he was parked in a dark area. Johnson related that Perez reluctantly came to the back of the trailer and unlocked it.

Johnson testified that Perez told him three times outside and once inside the Border Patrol office that he had just picked up the rig. Perez's repeated false assertions that he had obtained the trailer just prior to the inspection also indicate his guilty knowledge. Diaz-Carreon, 915 F.2d at 954.

Reviewing the evidence presented in the light most favorable to the government, there was substantial evidence presented to support a finding of guilty knowledge. There is no basis for a determination that a manifest miscarriage of justice occurred.

II

Perez argues that the prosecutor attempted to shift the burden of proof to the defendant by making improper remarks concerning the credibility of the witnesses. "Improper prosecutorial comments require reversal only if the comments substantially affect the defendant's right to a fair trial." Diaz-Carreon, 915 F.2d at 956 (citations omitted). Three factors are considered in determining

whether the prosecutor's remarks substantially affected the fairness of the trial: the magnitude of the prejudicial effect of the remarks, the efficacy of any cautionary instruction, and the strength of the evidence of the defendant's guilt. Id. Perez did not object to the remarks during trial and, therefore, this court must review for plain error. U.S. v. Simpson, 901 F.2d 1223, 1227 (5th Cir. 1990).

Perez objects to the following statement by the prosecutor:

> Ladies and gentlemen, you have to decide who to believe. Why would the United -- the witnesses brought before you by the United States have a reason to lie? Why would they? None of them have a reason to lie. They're just employees of Valley Trucking Company doing their job. The only person in this courtroom that has a reason to lie is Martin Perez, the defendant, ladies and gentlemen, `cause he stands, he stands to lose a lot. He stands to go to jail. But if he'd been successful getting through the checkpoint, ladies and gentlemen, he would have stood to gain $27,000, and he was, at minimum, and he was willing to take that risk.
>
> Now, ladies and gentlemen, in order to believe him, you have to disbelieve every single witness the United States put on the stand, every single witness.

R. 6, 52.

Similar remarks were made by the prosecutor in the Diaz-Carreon case. 915 F.2d at 956. We determined that, although the remarks may have raised an incorrect implication as to the burden of proof, the argument had only limited prejudicial effect when considered in the context of the case. Id. As in Diaz-Carreon, the prosecutor made the remarks during rebuttal following defense

counsel's argument in which he disputed the credibility of the government's witnesses and justified the inconsistent statements of Perez.

Perez argues this court reversed a conviction on the basis of similar remarks made by the prosecutor in U.S. v. Cantu, 876 F.2d 1134, 1138 (5th Cir. 1989). In Cantu, the prosecutor expressed his personal opinion as to the witnesses' credibility and instructed the jury that in order to find the defendant guilty, it must find that a defense witness lied. Id. The prosecutor did not engage in such tactics in this case. Perez was not denied his right to a fair trial as a result of the prosecutor's statements. The argument did not result in the occurrence of plain error requiring reversal of the conviction.

III

Perez contends that the district court erred in giving the jury a modified Allen charge because it stated that another trial would serve to increase the cost to both sides. Perez acknowledges that he did not object to the charge and that it must be reviewed for plain error.

The use of the Allen charge is reviewed for an abuse of discretion. U.S. v. Lindell, 881 F.2d 1313, 1320 (5th Cir. 1980), cert. denied, 493 U.S. 1087 (1990).[1] "This Court must scrutinize

[1]"The term "Allen charge" is used in reference to supplemental instructions urging a jury to forego their differences and come to a unanimous decision." Lindell, 881 F.2d 1320, n.11.

the Allen charge for compliance with two requirements: (1) the semantic deviation from approved `Allen' charges cannot be so prejudicial to the defendant as to require reversal, and (2) the circumstances surrounding the giving of an approved `Allen' charge must not be coercive." Id. at 1321 (citations omitted). Because Perez did not object to the charge at trial, this court may reverse the conviction only "if the charge constitutes plain error, that is, only where the error complained of seriously affects the fairness or integrity of the trial and the appellate court must take notice of it to avoid a clear miscarriage of justice." U.S. v. Taylor, 530 F.2d 49, 51 (5th Cir. 1976).

The Allen charge given by the district judge is taken from the Fifth Circuit Pattern Jury Instructions, Criminal Cases (1990). This charge has been approved by this court on several occasions and thus meets the first criteria. Lindell, 881 F.2d at 1321; U.S. v. Kelly, 783 F.2d 575, 576-77 (5th Cir.), cert. denied, 479 U.S. 889 (1986).

In evaluating the totality of the circumstances surrounding the use of the charge, this court proceeds on a case-by-case basis. Lindell, 881 F.2d at 1321. The Perez jury retired to deliberate at 11:53 a.m., and sent a note to the court requesting a copy of the charge at 2:49 p.m. The court refused to provide the jury with the entire charge, but advised the jury that it could request specific portions of the charge. The jury sent a second note at 3:16 p.m., stating that it was "at a dead lock" and requested further

instruction on the meaning of "reasonable doubt." The court provided the jury with the portion of the charge defining reasonable doubt. The jury sent a third note at 5:06 p.m., advising the court that the panel was unable to reach a consensus. The district court instructed the jury to return the next morning. The jury sent a note the following morning at 9:00 a.m. requesting further instruction on "reasonable doubt" and the district court gave further instructions. The jury sent a note at 10:33 a.m. stating that the panel was "at a stand off" and required advice. The district court advised counsel that he thought it would be appropriate to give the Allen charge and defense counsel did not object. The charge was given at 10:54 a.m. and the jury rendered a verdict at 4:10 p.m.

In support of his argument, Perez relies on Taylor, 530 F.2d 49 (5th Cir. 1976), in which this court found the Allen charge to be unduly coercive and reversed the conviction. In Taylor, the district judge told the jury an anecdote that might have lead the jury to believe that the defendant was clearly guilty, and that the jury would not be released until it reached a verdict. Taylor, 530 F.2d at 51. The district court emphasized that another trial would involve enormous expense and inconvenience. Id.

The district court in Perez's case did not indicate that the case should be decided in a certain way and did not give the jury a deadline by which the case must be decided. The district court noted that a deadlock would involve another trial at additional

expense and inconvenience, but did not dwell on that factor, and cautioned the jurors not to yield their conscientious convictions. The jury deliberated for several hours after receiving the charge, indicating that the jury was not coerced into rendering an indiscriminate verdict. The charge did not constitute plain error.

IV

For the reasons we have set out in this opinion, the conviction and sentence of Martin Perez-Palacios is

A F F I R M E D.