

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-7639  
Summary Calendar

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United States of America,

Plaintiff-Appellee,

VERSUS

Billy Kesel,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas

(CR 92 1)

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August 11, 1993

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Before THORNBERRY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge\*:

Billy Kesel appeals his conviction for filing a false claim against the Government. Finding no merit in his contentions, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

### **Facts and Prior Proceedings**

Billy Kesel was convicted of making a false claim against the United States in violation of 18 U.S.C. § 287 when he filed a fraudulent claim for damaged fishing equipment and related economic losses with the Fisherman Contingency Fund. The Fund was established by Congress to reimburse commercial fishermen for losses that are caused by the oil and gas industry. Kesel claimed that he sustained losses when he hung his fishing nets on a piece of cable out in the Gulf of Mexico. Kesel's defense at trial was that his sister filled out the claim forms and substantiated the claim with improper documentation, therefore he did not possess the requisite intent to violate the statute. After a jury trial, Kesel was found guilty of presenting a false claim to an agency of the United States government. He was sentenced to three years supervised probation and ordered to pay \$11,334.05 in restitution and a \$50 special assessment. Kesel timely appeals to this Court.

### **Discussion**

Kesel makes three arguments pertaining to the jury instructions given by the district court at his trial.

First of all, without offering authority for support, Kesel argues that the district court erred by not including his requested instruction that he, "claimed money to which he was not entitled," as opposed to the instruction that Kesel made a "false claim." Kesel contends that he made a legitimate claim for damages to his fishing boat and equipment, therefore he did not make a "false

claim" under 18 U.S.C. § 287. Rather, Kesel argues, that based on the receipts used to support his claim, he "claimed money to which he was not entitled." There is no merit in Kesel's argument.

A trial judge's refusal to give a proffered jury instruction constitutes reversible error only if: (1) the requested instruction is substantially correct; (2) it was not substantially covered in the charge to the jury; and (3) the failure to give the charge seriously impaired the defendant's ability to present an effective defense. **United States v. Liu**, 960 F.2d 449, 453 (5th Cir.), **cert. denied**, 113 S.Ct. 418 (1992).

Title 18 U.S.C. § 287 describes the claims that come within the scope of the statute as any claims that are "false, fictitious or fraudulent."<sup>1</sup> The district court defined those terms as follows: "A claim is `false' or `fraudulent' if it is untrue at the time it was made." Jury instructions must track accurately the language of the statute, and in this instance the district court fashioned an instruction that tracked the plain clear language of § 287. **United States v. Luffred**, 911 F.2d 1011, 1016 (5th Cir.

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<sup>1</sup>The statute reads:

**Whoever makes or presents** to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, **any claim** upon or **against the United States**, or any department or agency thereof, **knowing such claim to be false, fictitious, or fraudulent**, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287 (emphasis added).

1990); **cf. United States v. Chen**, 913 F.2d 183, 189 (5th Cir. 1990) ("`words will be interpreted as taking their ordinary, contemporary, common meaning'"), quoting **Perrin v. United States**, 100 S.Ct. 311 (1979). Since Kesel's requested instruction does not track the language of § 287, the district court did not err in refusing the instruction. **Liu**, 960 F.2d at 453.

Kesel next argues that the district court erred in failing to instruct the jury that 18 U.S.C. § 287 requires "willfulness" or "intent to defraud." Kesel is incorrect. Willfulness or intent to defraud are not essential elements of the offense of knowingly making false claims against the United States. **United States v. Cook**, 586 F.2d 572, 575 (5th Cir. 1978), **cert. denied**, 442 U.S. 909 (1979); **see also John L. Cheek v. United States**, 111 S.Ct. 604, 607 (1991). Since a jury instruction that required "willfulness" or "intent to defraud" would have been an incorrect statement of the law, the district court did not err by refusing the requested instruction.

Finally, Kesel argues that the district court erred by instructing the jury that it could find a "knowing" violation of § 287 if it found that Kesel "deliberately closed his eyes" to the

false claim.<sup>2</sup> A "deliberate ignorance" instruction allows the jury to infer the "knowledge" element of § 287 as long as the instruction has a basis in the evidence presented at trial.

The standard of review of a claim that a jury instruction was inappropriate is "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors to the principles of law applicable to the factual issues confronting them." **United States v. Lara-Velasquez**, 919 F.2d 946, 950 (5th Cir. 1990) (citations omitted).

The purpose of the "deliberate ignorance" instruction is to inform the jury that it may consider evidence of the defendant's

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<sup>2</sup> The district court gave the following instruction:

For you to find Defendant Kesel guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

First: That the Defendant **knowingly** presented to an agency of the United States a false or fraudulent claim against the United States; and

Second: That the Defendant **knew** the claim was false or fraudulent.

The word "**knowingly**", as that term is used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

You may find that Defendant Kesel had knowledge of a fact if you find that the Defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the Defendant cannot be established merely by demonstrating that the Defendant was **negligent, careless, or foolish, knowledge can be inferred if the Defendant deliberately blinded himself to the existence of a fact.**

(emphasis added).

charade of ignorance as circumstantial proof of guilty knowledge. "[T]he instruction is nothing more than a refined circumstantial evidence instruction properly tailored to the facts of a case...." **Lara-Velasquez**, 919 F.2d at 951 (citation omitted). This Court will uphold a "deliberate ignorance" instruction as long as sufficient evidence supports the charge. **Id.** at 951.

This Court applies a two-part test in deciding whether the "deliberate ignorance" instruction was properly given. **Lara-Velasquez**, 919 F.2d 951-954. First, the defendant must claim a lack of guilty knowledge, and the evidence adduced at trial, viewed in a light most favorable to the Government, must show that the defendant had a subjective awareness of a high probability of the existence of the illegal conduct in question. **Id.** Second, the evidence must show that the defendant purposely contrived to avoid learning about the illegal conduct in question. **Id.** A defendant's contrivance to avoid guilty knowledge may be established by direct or circumstantial evidence, including when a defendant fails to question circumstances which are overwhelmingly suspicious. **Id.** at 952.

In the present case, the facts are sufficient to conclude that Kesel had a subjective awareness that he was involved in illegal activity. The district court noted that the "deliberate ignorance" instruction speaks to the issues raised by the alleged false documentation supporting Kesel's application for reimbursement to the Department of Commerce. Additionally, there was forceful evidence that Kesel provided misinformation about the number of

nets he lost and whether or not he actually carried stainless steel shark gear on the boat. Further, two retailers testified that the invoices used to support his losses appeared to be falsified. This misinformation may show subjective knowledge that the claim was false. **See United States v. Farfan-Carreon**, 935 F.2d 678, 681 (5th Cir. 1991) (lying to officers is evidence of subjective knowledge of illegal activity). Therefore, the first prong of the test has been met.

The second prong of the test, whether there was a purposeful contrivance to avoid learning of the illegal conduct, is also met in this case. Kesel attempted to remove himself from the impropriety involved in filing the claim by having Miss Jimmi Ann White handle the paperwork because he was bad at keeping records. As the district court observed, "The defense appears to be that...Ms. White prepared these documents, [attempting] some implicit representation that if she made mistakes or did these hastily or not in a format that's appropriate or logical, that he [Kesel] should not be branded with that." This evidence was sufficient for the jury to infer a deliberate contrivance to avoid guilty knowledge. **See Lara-Velasquez**, 919 F.2d at 952.

In light of the supporting evidence, we are unable to conclude that the district court's charge to the jury constituted reversible error.

#### **Conclusion**

Based on the foregoing, we affirm.