

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8232

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAFAEL DELGADO-MORALES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-90-CR-281(H))

(December 30, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Rafael Delgado-Morales (Delgado-Morales) was convicted for conspiring to import more than fifty kilograms of marijuana in violation of 21 U.S.C. §§ 952, 960, and 963, and for conspiring to possess with intent to distribute more than fifty kilograms of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

marijuana in violation of 21 U.S.C. §§ 841 and 846. Delgado-Morales appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On November 4, 1989, Susan Smith (Smith) attempted to enter the United States at the Ysleta Port of Entry at El Paso, Texas. Because it appeared that body work had been done to the Volkswagen van she was driving, she was referred to a secondary inspection station. At the secondary station, inspectors told Smith that they had a report of a stolen van and asked her to step into the headhouse while they verified her paperwork. During an inspection of the vehicle, the inspectors noticed that there were spot welds on the overhead liner. The inspectors opened the overhead liner and discovered that there was some packaging in it. They opened one of the packages and found a green leafy substance which tested positive for marijuana. The inspectors found a total of forty-nine packages of marijuana in the overhead liner, weighing 175.5 pounds.

Smith initially told inspectors that an individual named "Jesse" had recruited her to take the marijuana over the bridge. Customs officials later contacted Smith and asked her to cooperate with them in their investigation of the incident. Smith agreed to cooperate, and she told the customs officials that it was Delgado-Morales who had recruited her to drive the van. In return for her cooperation, all charges against Smith were dropped.

Susan Smith's testimony

At Delgado-Morales' trial, Smith testified that she originally met Delgado-Morales in California in December of 1988 and that they had dated for a few months. Because Smith needed some money for Christmas, Delgado-Morales gave her two one-pound packages of marijuana to sell. Smith paid Delgado-Morales for one of the packages, but before she could pay him for the second package, Delgado-Morales left for Mexico for a few months. When Delgado-Morales returned to California, Smith told him that she no longer had the money for the second package of marijuana. Delgado-Morales told her not to worry about it; she would just owe him a favor. At about this time, Smith discovered that Delgado-Morales was married, and she stopped seeing him.

About seven months later, Delgado-Morales called Smith and told her that he needed a favor and that she owed him one. Delgado-Morales told Smith to get on a Southwest Airlines flight for El Paso, Texas, and he would pick her up when she arrived in El Paso. He also told her that he would reimburse her for the cost of the flight. Delgado-Morales would not, however, tell Smith over the phone why he wanted her to fly to El Paso.¹

Smith flew to El Paso and was met at the airport by Delgado-Morales. They took a cab from the airport to the bridge at the border of Mexico and walked across the bridge. After crossing the bridge, they took another taxi and went to a restaurant to

¹ The government introduced into evidence a piece of paper which Smith identified as her notes that she had written down during her conversation with Delgado-Morales. The paper was found in her purse at the time she was arrested.

eat lunch. During lunch, Delgado-Morales informed Smith that he had a van that he wanted her to drive across the border.

After lunch, Smith and Delgado-Morales went to a motel to meet Delgado-Morales' friend, Guadalupe. Before Guadalupe arrived, Delgado-Morales told Smith that if Guadalupe asked her how much it would cost for her to take the van over the border, she should say fifty dollars a pound. Guadalupe arrived a short while later.

After Guadalupe and Delgado-Morales talked at the motel, the three of them took a cab to a small town in Mexico. At the town, they were met by three men driving the Volkswagen van. The three men left, and Smith, Guadalupe, and Delgado-Morales took the van to a gas station. At the gas station, Delgado-Morales touched the roof of the van and asked, "How does it look? Pretty good?" Delgado-Morales then told Smith to get in line to cross the border. Delgado-Morales told her that if the inspection officials asked her who owned the van she was driving, she should say it was hers and show them the paperwork in the glove compartment. He also instructed her that she should tell the inspectors she had been in Mexico for a few days. While Smith was waiting in line, Delgado-Morales and Guadalupe got out of the van and told her that they would meet her across the border near some phones or at a K-mart down the highway.

After the customs officials arrested Smith, Delgado-Morales sent an attorney to visit her in jail. She was released on bond, part of which was provided by Delgado-Morales, and returned to

California. Upon her arrival in California, Delgado-Morales went to Smith's house and asked her what she had told the police. Smith told him that she had not given the inspectors his name. Delgado-Morales said that if she went to jail, he would help take care of her son.

After Smith agreed to cooperate with the customs officials, she made several attempts to try to inculcate Delgado-Morales in the marijuana smuggling. She initially attempted to set up another marijuana transaction with Delgado-Morales, to no avail. Smith then attempted to get Delgado-Morales to admit his involvement in the November 4, attempted marijuana smuggling. Smith met Delgado-Morales in a restaurant and taped their conversation. In the taped conversation, Delgado-Morales states that since Smith was caught he had touched nothing because he was paranoid and that his prints were all over the van and that he was sure that the agents would catch him. The tape was played for the jury. Smith testified that although it was tough to get Delgado-Morales to talk in the restaurant, he relaxed when they went outside after he ran his hands up and down her back as if searching for a wire. Smith also taped a phone conversation she had with Delgado-Morales. In this taped conversation, which was also played for the jury, Smith attempted to obtain Delgado-Morales' help in paying for her attorney. During the conversation, Delgado-Morales acknowledged that he had called her and gotten her into this trouble.

James Aston's testimony

James Aston (Aston), Smith's live-in boyfriend, testified that he knew Delgado-Morales and that Delgado-Morales had called Smith on November 3. He also testified that Delgado-Morales called him on November 4 to verify which flight Smith was on and when she would arrive in El Paso. After Smith was arrested, Aston called Delgado-Morales to get some money and a lawyer for her. He further testified that he did not tell Delgado-Morales why Smith was in jail because Delgado-Morales already seemed to know. Delgado-Morales then gave Aston \$1,000 for Smith's bond.

Delgado-Morales' testimony

Delgado-Morales testified that he is a livestock trader and horse trainer and that he conducts business on his ranch in Corona, California. He testified that Smith had introduced him to a man she called Jesse but who introduced himself as Chuy. He further testified that he knew a man named Guadalupe, and he had seen Chuy and Guadalupe at several rodeo practices. Delgado-Morales further testified that Guadalupe and Chuy had been at his ranch several times to look at horses, and, in the summer of 1989, Guadalupe had bought a colt from him.

About a month after Guadalupe bought the colt, Guadalupe told Delgado-Morales that he was interested in buying two brood mares. Delgado-Morales told Guadalupe that he had some cheap brood mares at a ranch in Juarez, Mexico. In the last week of October, Guadalupe called Delgado-Morales and told him that he was going to be in Juarez in the first week of November and asked

him if he could show him the mares at that time. Guadalupe and Delgado-Morales met in El Paso on November 3, took a taxi across the border, and met Chuy at a motel in Mexico. Guadalupe and Delgado-Morales then borrowed Chuy's van to drive out to the ranch to see the mares. Guadalupe bought two mares, and they returned to the motel.

While they were sitting around drinking and talking, Chuy suggested that they call Smith and ask her to come to Mexico and party with them. Chuy invited Smith and told her how to arrange for her flight. When Delgado-Morales and Guadalupe returned from picking up the horses, they saw Smith at the motel with Chuy. They all went to a restaurant to eat, and at the restaurant Guadalupe and Chuy proposed a business proposition to him, in which he would drive marijuana across the border. He refused. However, because Smith needed the money, she agreed. Delgado-Morales testified that he left the others to go check on some things in the valley. Upon his return the next morning, Smith and Chuy had already left. He and Guadalupe then returned to California.

Delgado-Morales stated that when he got back to California, Aston called him and told him that Smith had been arrested for trying to import marijuana into the United States. Aston asked Delgado-Morales to help Smith, which he did out of friendship and sympathy. He called several attorneys, agreed to pay for a lawyer, and loaned her some money to pay for her bond.

During cross-examination of Delgado-Morales, the prosecutor asked Delgado-Morales questions concerning the financial affidavit that he had filled out in order to receive appointed counsel. The prosecutor asked Delgado-Morales why he had not listed his livestock on the affidavit as assets. The prosecutor further pointed out to Delgado-Morales that failure to list the assets constituted false swearing. The prosecutor then asked Delgado-Morales why he had not told this story to anyone else before. The prosecutor's cross-examination of Delgado-Morales concerning the financial affidavit is the only point of error that Delgado-Morales brings up on this appeal.

Course of Proceedings

On July 18, 1990, Delgado-Morales was indicted for conspiracy to import more than 50 kilograms of marijuana and for conspiracy to possess with intent to distribute more than 50 kilograms of marijuana. He was arrested on July 24, 1990, and on July 25, 1990, he was released on bond. He failed to appear for trial on March 4, 1991, and the court ordered that his bond be revoked and issued an arrest warrant.

Delgado-Morales was arrested on September 15, 1991, and he was tried on February 11-12, 1992. The jury found him guilty on both counts of the indictment, and he was sentenced to two concurrent terms of imprisonment of sixty-three months followed by five years of supervised release.

III. DISCUSSION

On appeal, Delgado-Morales argues that the prosecutor's cross-examination of him concerning the financial affidavit was improper impeachment because the prosecutor attempted to impeach him on the basis of his invocation of the right to remain silent. Delgado-Morales complains of the following questions:

A. It's a financial affidavit.

Q. And is that your signature?

A. Yes, sir.

Q. It says warning on this, "I certify thatSO" or above your signature it says, "I certify the above to be correct." And below that it says, "A false or dishonest answer to a question in this affidavit may be punishable by a fine or imprisonment or both."

Now, this affidavit calls for you to list all of your assets both real and personal, doesn't it, sir?

A. Yes, sir.

Q. And it was executed for you in order to see if you could qualify for a court-appointed attorney. Is that correct?

A. Yes.

Q. Now, you don't list anything about any livestock whether here or in Mexico on that, do you, sir?

A. No, I don't.

Q. But you told me a minute ago to response to my questions about your having livestock in Mexico on a continual basis that you have and still do to today, is that right?

A. Yes, sir.

. . . .

Q. So you had some stock or inventory in your business that was worth close to \$15,000, correct?

A. Yes.

Q. And in fact, this story that you're telling me about horses in Mexico and horses are going to sell, brood mares, that's the first time you've ever told that, that any Government person is going to hear that, isn't that correct, sir?

A. Yes, sir.

Q. You never came forward before and said to anybody this story, is that correct, sir?

MR. ABRAHAM: Your Honor, I object to that question. I don't know what you mean by come forward. He didn't have any obligation to say nothing to nobody. What are you talking about?

Q. (By Mr. Greenberg:) I'm saying to you on any statement that you made in an application for financial aid or anything at the court.

THE COURT: Have there been any other financial affidavits besides this one, Mr. Greenberg?

MR. GREENBERG: Not that I know of, but I want to make sure there aren't.

THE COURT: Do you know of any others?

THE WITNESS: No, I don't.

THE COURT: All right. The next question.

MR. GREENBERG: Pass the witness.

MR. ABRAHAM: Your Honor, if it please the Court, I object to the question that he asked of this witness and move for a mistrial.

THE COURT: Which one?

MR. ABRAHAM: The question that I objected to the first time whenever he's asking if he came forward.

THE COURT: I think I set him straight on that real plainly. Maybe the jury understood what I was saying. I think they probably did.

MR. ABRAHAM: Yes. Thank you. Thank you, Judge.

THE COURT: That was an improper question, and I'll sustain your objection to it.

MR. ABRAHAM: Thank you.

THE COURT: I'll instruct the jury to disregard that. Everybody in this room knows that somebody accused of a crime doesn't have to say anything to anybody unless he wants to. So it's not proper to ask him why he didn't. Go ahead.

In Doyle v. Ohio, 426 U.S. 610, 619 (1976), the Supreme Court established that questioning a defendant for purposes of impeachment about the defendant's silence after he had been arrested and received Miranda warnings violated the Due Process Clause of the Fourteenth Amendment. "A prosecutor's or witness's remarks constitute comment on a defendant's silence if the manifest intent was to comment on the defendant's silence, or if the character of the remark was such that the jury would naturally and necessarily so construe the remark." United States v. Carter, 953 F.2d 1449, 1464 (5th Cir.) (citing United States v. Shaw, 701 F.2d 367, 381 (5th Cir. 1983), cert. denied, 465 U.S. 1067 (1984)), cert. denied, 112 S. Ct. 2980 (1992). The intent and character of the remarks are determined by reviewing

the context in which they occur. United States v. Laury, 985 F.2d 1293, 1303 (5th Cir. 1993) (quoting United States v. Shaw, 701 F.2d 367, 381 (5th Cir. 1983), cert. denied, 465 U.S. 1067 (1984)).

In this case, the prosecutor's questions occurred during the prosecution's attempt to impeach Delgado-Morales concerning the financial affidavit. Even if the prosecutor's "manifest intent" was not to comment on the defendant's silence, we believe that the prosecutor's comment that "this story that you're telling me about horses in Mexico and horses are going to sell, brood mares, that's the first time you've ever told that, that any Government person is going to hear that, isn't that correct, sir," would "naturally and necessarily" be construed by a jury as referring to Delgado-Morales' post-arrest and post-Miranda warnings silence. The clear implication of the remark is that Delgado-Morales' alibi is a recent fabrication. See Laury, 985 F.2d at 1304 (holding that a Doyle violation occurs when the prosecution comments on the defendant's failure to give an alibi prior to trial but subsequent to the time of arrest). Indeed, the judge himself construed the remarks as an improper reference to Delgado-Morales' post-arrest and post-Miranda warnings silence.

We must now consider whether the Doyle violation is harmless error under the standards set forth in Chapman v. United States, 547 F.2d 1240, 1249-50 (5th Cir.), cert. denied, 431 U.S. 908

(1977).² In Chapman, we described three general types of Doyle violations:

When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous.

When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, *i.e.*, when the prosecutor elicits that fact on direct examination and refrains from commenting on it or adverting to it again, and the jury is never told that such silence can be used for

² The government has urged this court that United States v. Laury and United States v. Carter mandate that we apply the plain-error standard in resolving the issue before us. In Carter, the court determined that three considerations compelled the court to apply the plain-error rule in the context of a Doyle violation. The three considerations were: (1) the Doyle violation was not a classic Doyle violation, in that the prosecutor's comments were not directed at the defendant's silence immediately following his arrest and the reading of the Miranda warnings to him, (2) the story being impeached in the case was essentially peripheral to the defendant's defense, and (3) the defendant objected to the prosecutor's question and received all the relief that he requested. Carter, 953 F.2d at 1465. Two of the three considerations involved in Carter are not present in this case. First, the defendant's story was not "essentially peripheral" to his case. Second, the defendant did not receive all the relief that he requested. Unlike Carter, the defendant in this case also asked for a mistrial, which was not granted. Therefore, Carter does not compel us to apply the plain-error standard.

In United States v. Laury, this court, in a footnote, opined that non-classic Doyle violations are reviewed for plain-error. 985 F.2d at 1304 n.11 (5th Cir. 1993). The court purported to rely on Carter for its assertion. However, the court did not mention the other considerations that Carter utilized in making its determination that the plain-error standard applied to the case before it. Furthermore, while the court in Laury applied the plain-error standard to the case before it, the defendant in that case had not objected to the prosecutor's comments, which by itself would compel the application of the plain-error standard. Id. at 1304. Because we conclude that the error in this case was harmless beyond a reasonable doubt, we need not decide whether Laury actually extends Carter to cases involving only the consideration of a non-classic Doyle violation.

impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming.

When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.

547 F.2d at 1249-50 (citations and footnote omitted). We have recognized, however, in subsequent cases, that "'many cases lie somewhere in between the categories discussed in Chapman.'" Alderman v. Austin, 695 F.2d 124, 125 (5th Cir. Unit B 1983) (en banc) (quoting United States v. Shavers, 615 F.2d 266, 270 (5th Cir. 1980)). Because the evidence of Delgado-Morales' guilt was substantial and the defendant's story is not "totally implausible," the present case is in between the categories that Chapman described. Id. at 126 (holding that when there is substantial evidence of a defendant's guilt the Chapman rules do not dispose of the case); United States v. Dixon, 593 F.2d 626, 629 (5th Cir.) (holding that when the defendant's story is not "totally implausible" and the indicia of his guilt are substantial the Chapman categories do not apply), cert. denied, 444 U.S. 861 (1979). When a case cannot be resolved solely by reference to the Chapman categories, we apply a case-by-case analysis. Carter, 953 F.2d at 1465. Our case-by-case analysis requires "an examination of the facts, the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of the defendant's guilt." Shaw, 701 F.2d at 383; see also United States v. Meneses-Davila, 580

F.2d 888, 891 (5th Cir. 1978); United States v. Davis, 546 F.2d 583, 595 (5th Cir.), cert. denied, 431 U.S. 906 (1977).

We believe that the Doyle violation in this case was harmless error beyond a reasonable doubt. First, the court sustained the defendant's objection to the question and instructed the jury to disregard the question. See Greer v. Miller, 483 U.S. 756, 764 (1987) (holding that an objection which was raised before an improper question about post-arrest silence could be answered, and which was followed by an instruction to the jury to ignore the question, sufficed to prevent a Doyle violation from even occurring); Carter, 953 F.2d at 1466 (noting that curative instructions are at least effective to prevent a Doyle violation from rendering a trial fundamentally unfair); Dixon, 593 F.2d at 629 (noting that this court has embraced the propriety of cautionary instructions in Doyle situations). Second, Delgado-Morales does not argue that the prosecutor made any other references concerning his post-arrest and post-Miranda silence, either in cross-examination or in closing argument. Third, the evidence against Delgado-Morales was overwhelming. It was not circumstantial evidence; it was direct evidence of Delgado-Morales' participation in the conspiracy through the testimony of a co-conspirator. The jury obviously credited Smith's testimony over that of Delgado-Morales. Additionally, the government introduced taped conversations between Delgado-Morales and Smith which clearly indicated that he was involved in

the incident for which Smith was arrested. Therefore, we conclude that the error was harmless beyond a reasonable doubt.

IV.

For the foregoing reasons, we AFFIRM Delgado-Morales' conviction.