UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-8268

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALFREDO GUTIERREZ-HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(EP-91-CR-361-H)

(February 19, 1993)

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

PER CURIAM:*

Defendant, Alfredo Gutierrez-Hernandez, appeals his conviction for possession with intent to distribute marijuana, importation of marijuana, and conspiracy to commit both substantive crimes, in violation of 21 U.S.C. §§ 841(a)(1), 846, 952(a), 960(a)(1), 963 (1988). Gutierrez-Hernandez contends that the district court abused its discretion in denying his motions for mistrial and new trial, based upon alleged jury coercion. He also claims that the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court plainly erred in its supplemental instruction to the jury. We affirm.

I

A four-count indictment charged Gutierrez-Hernandez with possession with intent to distribute marijuana, with importation of marijuana, and with conspiracy to commit both substantive crimes.[1] After deliberation, the jury returned with a guilty verdict as to all four counts. The district court polled the jury upon defense counsel's request. As the polling reached the eleventh juror, the following ensued:

> THE CLERK: Angie Gonzalez, is this your verdict?
>
> MRS. GONZALEZ: Under certain circumstances, yes.
>
> THE COURT: Well, we can't have any circumstances. The jury may retire to deliberate again. Follow the bailiff please. We have to have a unanimous [sic] verdict or not at all.

Record on Appeal, vol. 4, at 394. The jury then retired for further deliberation.

Approximately twenty minutes later, the district court received Jury Note No. 3, which stated that "[o]ne juror [assumedly the eleventh juror] feels that Gutierrez, according to his statement to Agent Brazeil, was pressured to cross the marihuana. Can we convict under this circumstance?" *Id.* vol. 1, at 34. Gutierrez-Hernandez's counsel moved for a mistrial because of the

[1] The facts underlying the charged offenses are not relevant to the issues on appeal, and therefore will not be discussed.

alleged coercive pressure on the eleventh juror. The district court denied the motion.

In response to the jury's note, the district court wrote that, "[t]he defense of duress was not raised in this case. Of course, it is an element of each offense charged that the *defendant participated* in it *either knowingly or intentionally." Id.* at 33. No objection was made to this instruction.

The jury returned to the courtroom for the second time with a guilty verdict on all counts. The jury poll revealed a unanimous vote. After sentencing, Gutierrez-Hernandez made a motion for new trial, based upon alleged jury coercion. This motion was denied by the district court. Gutierrez-Hernandez appeals his conviction, contending that the district court: (a) abused its discretion in denying his motions for mistrial and new trial; and (b) erroneously instructed the jury.

II

A

Gutierrez-Hernandez argues that the district court abused its discretion in denying his motions for mistrial and new trial, based upon the district court's use of alleged coercive language in its supplemental instructions to the jury. *See* Brief for Gutierrez-Hernandez at 11. We review for abuse of discretion a denial of a motion for mistrial, *United States v. Baresh,* 790 F.2d 392, 402 (5th Cir. 1986), as well as a denial of a motion for new trial. *Bailey v. Daniel,* 967 F.2d 178, 179-80 (5th Cir. 1992).

In determining whether the jury was improperly coerced, we must examine the supplemental charges given by the district court "in its context and under all the circumstances." *Lowenfield v. Phelps,* 484 U.S. 235, 237, 108 S. Ct. 546, 550, 98 L. Ed. 2d 568 (1988) (quoting *Jenkins v. United States,* 380 U.S. 445, 446, 85 S. Ct. 1059, 1060, 13 L. Ed. 2d 957 (1965) (per curiam)); *see United States v. Cheramie,* 520 F.2d 325, 330 (5th Cir. 1975) ("[W]e look to the language employed and that language's impact, under the circumstances, on the finders of facts."). Citing *Jenkins v. United States,* Gutierrez-Hernandez claims that the district court's demand for a "unanimous verdict or not at all," Record on Appeal, vol. 4, at 394, improperly coerced the jury into arriving at a guilty verdict. We disagree.

After reviewing the language of the district court's supplemental instructions, in the context in which they were made, we cannot find any evidence of coercion. Gutierrez-Hernandez's reliance upon *Jenkins* is misplaced, as there the Supreme Court held that jury coercion occurred where the trial judge stated, "You have got to reach a decision in this case." *See id.* at 446, 85 S. Ct. at 1060. Here, the district court merely stated that the jury should deliberate further,[2] until reaching *either* a unanimous guilty verdict or none at all. *See* Record on Appeal, vol. 4, at

[2] Gutierrez-Hernandez concedes that the district court did not abuse its discretion in instructing the jury to deliberate further. *See* Brief for Gutierrez-Hernandez at 10; Fed. R. Crim. P. 31(d) ("If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.").

394. Moreover, the district court's supplemental instructions did not contain those elements))e.g., references to the expense of a second trial or the need for the minority to reconsider its votes, or the imposition of a coercive deadline))which we have previously found to be coercive, and therefore impermissible. *See United States v. Warren,* 594 F.2d 1046, 1050 (5th Cir. 1979) (finding no coercion where above elements absent from district court's supplemental instructions). Therefore, we conclude that the district court did not coerce the jury. Accordingly, the district court did not abuse its discretion in denying Gutierrez-Hernandez's motions for mistrial and new trial.

B

Gutierrez-Hernandez also contends that the district court's final supplemental instruction was improper. Because Gutierrez-Hernandez did not object to the instruction below, we "will reverse only if the instruction constituted plain error, i.e., if `considering the entire charge and evidence presented against the defendant, there is a likelihood of a grave miscarriage of justice.'" *United States v. Stone,* 960 F.2d 426, 434 (5th Cir. 1992) (quoting *United States v. Sellers,* 926 F.2d 410, 417 (5th Cir. 1991)).

In response to the jury's inquiry as to whether it could convict if it found that Gutierrez-Hernandez committed the offenses under duress, *see* Record on Appeal, vol. 1, at 34, the district court wrote that "[t]he defense of duress was not raised in this case. Of course, it is an element of each offense charged that the

defendant participated in it either knowingly or intentionally." Record on Appeal, vol. 1, at 33. Gutierrez-Hernandez claims that this instruction constituted plain error because it failed to state all the essential elements of the charged offenses. *See* Brief for Gutierrez-Hernandez at 16. We find this argument without merit.

Gutierrez-Hernandez does not dispute that the district court, in its original oral charge, *see* Record on Appeal, vol. 4, at 378-84, properly instructed the jury on all the elements of each offense. *See* Brief for Gutierrez-Hernandez at 19. "Where the district court initially charges the jury orally but later responds in writing to a request for supplemental instructions, there is no error unless, under the totality of the circumstances, the court's written response creates an unbalanced charge prejudicial to the defendant." *United States v. Ehrlich,* 902 F.2d 327, 330 (5th Cir. 1990). The court's written response did not create an unbalanced charge prejudicial to Gutierrez-Hernandez because it specifically addressed the jury's question, without going further. *See id.* ("In view of the entire charge, and in light of the jury's specific inquiry, it cannot be said that the supplemental instruction created a prejudicial imbalance in the charge as a whole."); *see also United States v. Acosta,* 763 F.2d 671, 677 (5th Cir.) ("As a general principle, it is proper for a trial judge to limit reinstruction to the specific request made by a jury."), *cert. denied,* 474 U.S. 863, 106 S. Ct. 179, 88 L. Ed. 2d 148 (1985). Therefore, the district court's final jury instruction did not constitute error, plain or otherwise.

III

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