IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8365
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MONTOYA, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(EP-92-CR-69)

(January 28, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I

Juan Montoya, Jr., drove a Volkswagen van across the United States-Mexico border from Juarez, Mexico, to El Paso, Texas, and arrived at a U.S. Border Inspection Station. A U.S. Customs Inspector stopped a line of vehicles in conjunction with "Special Operation Trunk."

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The inspector directed Montoya to a secondary search area when he made the following observations: (1) a temporary registration slip appeared in the van's rear window; (2) Montoya avoided eye contact with the inspector; (3) when showing his Mexican I.D. card, his hands were trembling; (4) Montoya was gripping the steering wheel tightly with the engine turned off; and (5) Montoya seemed reluctant when asked to open the rear of the van. Another agent testified that temporary registration slips were often used by vehicles smuggling contraband in order to insulate the smuggling organization from quick identification. The inspector did not detect any odor of marijuana when he opened the rear of the van.

In the secondary search area, two other inspectors became involved, and the van was searched again. Attempting to light a cigarette, Montoya's hands shook so violently that the match extinguished before he could light it. A narcotics-detection dog showed interest in the rear of the van. A search of that area resulted in the discovery of about 22 bundles of marijuana weighing 78 pounds and worth $40,000 stored in the van's modified gas tank. The bundles were wrapped with silver duct tape, a partial roll of which was found under the driver's seat of the van.

Montoya indicated that he had the van for several days and that because he was buying the vehicle, he had made a down payment. Montoya reported that his mother-in-law died the day before and that he was traveling to Las Cruces, New Mexico, where he resided,

to shower and change, and then would return to Juarez, Mexico, to attend a rosary.

Later in the day, Montoya was approached by two U.S. Customs Agents who questioned him further. Montoya denied ownership of the van and reported that (1) the van belonged to an unknown friend of his brother-in-law in Juarez; (2) he had picked up the van at his mother-in-law's home in Juarez the day before; (3) he was traveling to Las Cruces to procure bedding for family members attending the funeral in Juarez; and (4) he was test-driving the van because he was thinking about buying it for $4200.

Although admitting at trial that the gas gauge registered empty when he began his trip, Montoya testified that the man who provided the van told him that the van had plenty of gas to make the 50-mile trip to Las Cruces. He also testified that the same person satisfied him further by telling him that he had placed registration papers on the rear of the van with his name on it. Montoya added that he did not question that peculiarity because he was in a hurry and was "going against the clock." He also indicated that he had no idea how his address appeared on the temporary registration slip but that the information was at his mother-in-law's house on a calendar.

At trial, Montoya was questioned on direct examination whether he ever smoked marijuana. He denied ever having used marijuana and explained that, just by smelling it, he would get hungry, sleepy, and would eat. Montoya responded again to the same question: "No.

I've seen it by, just like I say, just by taking a hit or whatever. Just by smelling it, it just knocks me, you know, it snuckles me. I don't do that."

Montoya gave a puzzling account of how he purchased liquor and gas before crossing the border. He first testified that he went to the liquor store and then used the change to buy gas at the gas station. Montoya then stated that at the gas station, "the gas station told me about where the liquor store [was]," suggesting chronologically inapposite versions of the sequence of events. Montoya testified further that he had initially claimed the vehicle was his so he could get to Las Cruces and back more rapidly. He testified that he shook because it was cold and he had been drinking the day before and that he had since "drank a couple of beers" and another drink before crossing the bridge. Montoya testified that he removed his jacket and put it on the seat of the van even though the van had no heater. He later added that it was so cold that he had to wear the jacket outside. Montoya also disputed in vague terms that he had possessed the van for several days before its seizure and, after the district court pressed for a direct answer, denied telling anyone otherwise. Montoya also denied telling anyone that he had made a down payment on the van. He denied any knowledge that marijuana was in the van and testified that although "it was a little unpleasant" to discover that marijuana was hidden in the van, when marijuana was discovered, he told the agent, "Well, do your job." He testified that, although

he did not recall the agent reporting that marijuana was found, he did not say more because he was completely caught off guard. He explained further: "You see, now that everything has come out, I find out that it's serious."

The title of the van was traced to Joe Chrisman, who, when questioned by a Government agent, denied ever seeing Montoya or the van and quipped that the "Henry's Auto Sales" plate on the van could have been printed in Mexico. Chrisman later testified on Montoya's behalf and admitted at trial that he had advertised the van and sold it to another man, Luis Zarate, for $800. The government agent testified, however, that Chrisman had indicated that he sold the van for $1500. The agent noted that the title did not indicate a purchaser.

Chrisman testified at trial that he never saw Montoya before and that he delivered the paperwork and title to Zarate. Chrisman explained, when confronted with the discrepancy on price, that it was a mistake, and that he gave title to the van when Zarate tendered $800 in cash. Chrisman admitted that the title to the van did not indicate the name of the purchaser and address and acknowledged that, by so doing, Zarate could have disassociated himself from the chain of title by putting anyone's name in that space.

Montoya's common-law wife gave conflicting testimony as to when she had been in Juarez visiting her mother when her mother died. His wife, when shown a picture of the van, denied ever

seeing the van. When later viewing the same photographs, his wife identified the van as the one Montoya borrowed when their own car was not running well. She denied knowledge that Montoya had ever dealt in marijuana or any other drugs. His wife worked part-time in a minimum-wage position at a motel doing laundry. When asked if she knew where Montoya worked, she responded, "I don't know where he is. I'm not taking care of him." When asked by defense counsel whether she would tell lies to help her husband or lie to the jury under oath for her husband, she replied each time, "I don't know."

Montoya pleaded not guilty to charges that he had imported marijuana into the United States in violation of 21 U.S.C. § 952(a) and § 960, and possessed marijuana with intent to distribute in violation of § 841(a)(1). Montoya was tried by a jury and convicted of those charges. He was sentenced to 33 months incarceration.

II

Montoya argues that the evidence was insufficient to show that he knew the van contained marijuana. This argument lacks merit.

The essential elements of a violation of § 841(a)(1) require that, in order to possess marijuana with intent to distribute, the defendant must (1) knowingly (2) possess marijuana; (3) with intent to distribute it. See U.S. v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990). "A conviction for the crime of importation of marijuana requires proof that the defendant knowingly played a role in bringing marijuana from a foreign country into the United

States." Id. Thus, both offenses require proof of the defendant's "guilty knowledge." Id.

Montoya correctly argues that in hidden-compartment cases, more than possession or ownership must be established to prove a violation of this nature. See U.S. v. McDonald, 905 F.2d 871, 874 (5th Cir.), cert. denied, 111 S.Ct. 566 (1990). However, Montoya's argument that the Government failed to establish more than control or possession lacks merit.

"[I]n hidden compartment cases, this Court has repeatedly required additional evidence indicating knowledge--circumstances evidencing a *consciousness of guilt* on the part of the defendant." Diaz-Carreon, 915 F.2d at 954 (citations omitted). Such "additional" evidence includes (1) nervousness at an inspection station, (2) inconsistent or conflicting statements to customs officials, and (3) an implausible story. Id. at 954-55. Such evidence is not exclusive, because "[a] jury is free to choose among reasonable constructions of the evidence." Id. at 954 (citation omitted).

"The test is not whether the evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." Salazar, 958 F.2d at 1294. This Court will thus look to the record as a whole when reviewing evidence from which a jury infers guilty knowledge. U.S. v. Farias-Farias, 925

F.2d 805, 812 (5th Cir. 1991). A jury may consider both *behavioral* (shaking, sweating, pulsating veins), *physical* (license plates and contents of vehicle), and *testimonial* evidence. See id.

To the extent that Montoya denied his knowledge or involvement, the jury was free to reject that testimony as self-serving. See U.S. v. O'Banion, 943 F.2d 1422, 1427 (5th Cir. 1991). Even if Montoya did not know to a certainty whether the van contained marijuana, his act of borrowing a stranger's van in a pinch under "overwhelmingly suspicious" circumstances, including the allegedly gratuitous addition of his name to the registration papers, may establish "purposeful contrivance to avoid guilty knowledge." U.S. v. Lara-Velasquez, 919 F.2d 946, 952 (5th Cir. 1990). A "charade of ignorance" may itself be circumstantial proof of guilty knowledge. Id. at 951.

In the instant case, the record reveals Montoya's evasiveness and his shaking and trembling demeanor, which together established his extreme nervousness at the inspection station. Montoya's explanation about his drinking and the cold weather as a basis for his shaking was not necessarily credible. His testimony that he never smoked marijuana was less than convincing and supported an inference that Montoya would lie to buttress the credibility of his other statements. Even if the jury could have inferred that Montoya's nervousness related to his intoxication or another offense such as car theft, the evidence need not rule out every reasonable hypothesis of innocence. See Salazar, 958 F.2d at 1294.

The record also reveals (1) the discovery of silver duct tape under the driver's seat used to wrap the marijuana bundle and Montoya's rather weak attempt to convince the jury that he was surprised upon the marijuana's discovery, (2) Montoya's inconsistent statements to customs officials and faulty attempts to deny ownership of the van, (3) his suspicious testimony that the temporary registration papers were not genuine, and (4) Montoya's conflicting testimony explaining events underlying his trip across the border.

The evidence, taken from the record as a whole, is sufficient to meet the "additional-evidence" requirement for hidden-compartment cases as set forth by Diaz-Carreon and Farias-Farias. A rational jury could thus infer that Montoya was lying and that his behavior was a natural response to the imminent discovery of the marijuana he sought to import for distribution.

III

Montoya argues that the district court committed reversible error when it failed to give requested jury instructions designed to instruct the jury regarding the knowledge element of the offenses. Montoya also argues that the district court's instructions did not define or explain the knowledge element of the offenses. These arguments lack merit.

"A district court's refusal to deliver a requested instruction constitutes reversible error only if three conditions exist: [1] the requested instruction is substantively correct; [2] the

requested instruction is not substantially covered in the charge actually given to the jury; and [3] the requested instruction concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present a given defense effectively." U.S. v. Masat, 948 F.2d 923, 928 (5th Cir. 1991), cert. denied, 113 S.Ct. 108 (1992).

"When a charge is challenged on appeal, we evaluate it in its entirety, looking to see whether the charge *as a whole* was correct." U.S. v. Hagmann, 950 F.2d 175, 180 (5th Cir.), cert. denied, 113 S.Ct. 108 (1992).

Montoya requested an instruction that defined guilty knowledge as an act committed "voluntarily and intentionally and not because of mistake or accident or other innocent reason." He also requested an instruction designed to show how knowledge is proved that included the following:

> Knowledge and intent exist in the mind. It is obviously impossible to prove directly the operations of an accused's mind because you cannot look into a person's mind and see what his intentions are or were, but the proof of the circumstances surrounding the accused's activities may well supply an adequate understanding of the accused's actions.

Montoya also requested instructions explaining that the following would not, alone, be a basis for finding guilty knowledge: (1) possession or control of a vehicle; (2) nervousness; (3) a less-than-credible explanation by one merely in proximity to contraband; and (4) an awareness that he was committing "some kind of wrong or ... crime."

"A trial court need not define statutory terms unless they are outside the common understanding of a juror or are so technical or specific as to require a definition." U.S. v. Chenault, 844 F.2d 1124, 1131 (5th Cir. 1988). Where a defendant's sole defense is based on guilty knowledge, "[t]he recitation of only statutory language is not an adequate charge to the jury." U.S. v. Ojebode, 957 F.2d 1218, 1228 (5th Cir.), petition for cert. filed, (Oct. 28, 1992) (No. 92-6472). However, errors that do not affect substantial rights will be disregarded pursuant to Fed. R. Crim. P. 52(a).

The instructions given by the district court established the statutory elements of the offenses, which included the requirements of knowing and intentional importation and possession of a controlled substance. Marijuana was defined as a controlled substance. Aside from the statutory phrase "knowingly and intentionally," the district court set forth the knowledge element for each offense as follows:

> First, that the defendant imported a quantity of marijuana as charged.
> And second, that the defendant knew he was importing a controlled substance.
> . . .
> First, that the defendant knowingly possessed a quantity of marijuana as charged;
> Second, that the [d]efendant knew he was in possession of a controlled substance ...

Id. at 286.

According to our holding in Ojebode, a failure to, at least, give instructions further explaining the knowledge element appears

to be arguable error. However, the facts in Ojebode were inapposite, because in that case (1) the prosecutor made erroneous remarks that might have confused the jury, and (2) two jury instructions for an importation offense *omitted* the intent requirement. Ojebode, 957 F.2d at 1226. Such errors were not made by the district court in this case, nor did the Government mislead the jury. Thus, even if more was needed, the district court was not required to charge the jury on every nuance of relevant law on guilty knowledge. See id. at 1227-28. Nor does any Fifth Circuit case require a full recitation of the instructions requested by Montoya.

At any rate, even if the district court did commit an error in its instructions, in the light of the ample evidence from which Montoya's guilty knowledge could be inferred, the error certainly was harmless under Rule 52(a). See, e.g., U.S. v. Chen, 913 F.2d 183, 188 & n.6 (5th Cir. 1990). Accordingly, Montoya cannot, and does not, show that he was deprived of substantial rights when the district court gave its limited instructions that went little beyond a recitation of the statutory language.

IV

For the reasons we have set out in this opinion, the conviction of Juan Montoya, Jr., is

A F F I R M E D.