UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-2265

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WINSTON ALEXANDER COLLINS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-260)

(January 10, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

The defendant, Winston Alexander Collins, was convicted by a jury of being an illegal alien in possession of a firearm in violation of 18 U.S.C. § 922(g)(5) (1988).[1] Collins appeals his conviction, arguing that (1) there is insufficient evidence to show

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] "It shall be unlawful for any person who, being an alien, is illegally or unlawfully in the United States[,] to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(5).

that he was in the United States illegally; and (2) the district court abused its discretion by admitting a post-arrest photograph of Collins which was excludable under Fed. R. Evid. 401 and 403. We affirm.

I

Collins argues that the evidence is insufficient to support his conviction, as the government failed to prove that he was in the United States illegally. "In deciding the sufficiency of the evidence, we determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offense[] beyond a reasonable doubt."[2] *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2952, 119 L. Ed. 2d 575 (1992). "It is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *Id.* "We accept all credibility choices that tend to support the jury's verdict." *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991).

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[2] This standard of review is applied here because Collins properly preserved his sufficiency claim by moving for a judgment of acquittal at trial. A more stringent standard is applied where the defendant fails to preserve his sufficiency claim. *See United States v. Galvan,* 949 F.2d 777, 782-83 (5th Cir. 1991) (applying "manifest miscarriage of justice" standard because defendant failed to move for directed verdict or for judgment of acquittal).

For the purposes of 18 U.S.C. § 922(g)(5), an alien who is in the United States without authorization is in the country illegally.[3] Based on the evidence presented by the government, the jury could reasonably have concluded that Collins was in the United States without authorization. According to an Immigration and Naturalization Service ("INS") agent who testified at trial, INS records did not contain any authorization for Collins to remain in the United States. The agent testified that the INS records pertaining to Collins would have been "voluminous" if Collins had applied for immigrant status in order to remain in the United States legally.[4]

At the time of his arrest, Collins told an INS agent that his wife had filed a petition on his behalf to allow him to remain in the United States. Collins then recanted, however,[5] admitting that (1) no petition had been filed; (2) he had the partially completed

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[3] *United States v. Bazargan,* 992 F.2d 844, 848 (8th Cir. 1993); *United States v. Hernandez,* 913 F.2d 1506, 1513 (10th Cir. 1990) (citing *United States v. Igbatayo,* 764 F.2d 1039, 1040 (5th Cir.), *cert. denied,* 474 U.S. 862, 106 S. Ct. 177, 88 L. Ed. 2d 147 (1985)), *cert. denied,* 499 U.S. 908, 111 S. Ct. 1111, 113 L. Ed. 2d 220 (1991).

[4] Collins places great weight on the fact that the INS records failed to show that he once received authorization to remain briefly in the United States while in transit to another country. Collins does not argue that that temporary authorization was still in effect at any time pertinent to this case. He merely suggests that the error in the INS records impugns their credibility. Because "credibility assessments lie within the exclusive province of the jury," *United States v. Chappell,* 6 F.3d 1095, 1098 (5th Cir. 1993), Collins' argument is to no avail in the context of his sufficiency claim.

[5] It was within the province of the jury to measure the credibility of Collins' two inconsistent statements. *See id.*

petition in his possession; and (3) he had no documents authorizing him to remain in the United States. A search revealed that Collins did in fact have a partially completed, unfiled petition under the rug in his apartment.

Collins makes much of the fact that a postal money order in the amount of $60 was sent to the INS as payment of a filing fee for his INS petition.[6] Collins suggests that this proves a petition was filed. We disagree. At most, the money order receipt indicates that a money order was sent, probably accompanied by a petition, to the INS. That does not mean, however, that the petition was filed, or that Collins was authorized to remain in the country after submitting the filing fee. At trial an INS agent testified that, according to INS records, Collins' filing fee was never accepted by the INS. According to the agent, that "means [that] even though it was submitted to the immigration service, it was not accepted . . . because there was apparently some sort of error in the petition or it was not complete." The INS agent also testified that Collins said "his forms were returned so that he could get photographs and take them to the Houston office [of the INS]." From all the foregoing evidence the jury could reasonably have concluded that the petition, although mailed to the INS along with the filing fee, was never filed because it was incomplete.

Furthermore, neither the record nor any authority cited by Collins suggests that he was authorized to remain in the United

[6] A receipt for the money order, showing the INS as payee, was introduced into evidence at trial.

States simply by virtue of having submitted an incomplete petition and filing fee. The INS agent testified that mailing))but not filing))an incomplete petition would not have permitted Collins to remain in the United States legally. Neither does Collins offer any authority to the contrary. In *United States v. Brissett,* 720 F. Supp. 90 (S.D. Tex. 1989), upon which Collins relies, the district court held that the defendant was not guilty of violating 18 U.S.C. § 922(g) "because the defendant had an application for adjustment of status to permanent resident *pending* at the time he obtained the firearm . . . ." *Id.* (emphasis added). In *United States v. Hernandez,* 913 F.2d 1506 (10th Cir. 1990), upon which Collins also relies, the Tenth Circuit held that "to be prosecuted under § 922(g)(5), an alien seeking amnesty . . . must either receive a firearm before *filing* an amnesty application or after such application is denied." *Id.* at 1513 (emphasis added). Collins' petition was neither filed nor pending))it was under the rug in his apartment.[7] Therefore, the foregoing cases are distinguishable, and Collins' reliance on them is misplaced. In light of all of the foregoing, the jury could reasonably have concluded that Collins was in the United States without authorization. Collins' sufficiency claim is, therefore, without merit.

II

[7] We disagree with Collins' assertion that the INS agent "admitted that [Collins'] petition was lost by the government." The agent merely testified that Collins' petition "appear[ed] to be a missing record," and later went on to explain that the petition apparently had been rejected as incomplete.

Collins also contends that the district court erroneously admitted into evidence a photograph of him at the scene of the arrest, standing near a bed in his boxer shorts and undershirt, with a pistol lying on the bed.[8] Collins claims that admission of the photograph was improper because it was irrelevant,[9] and because the danger of unfair prejudice from the photograph substantially outweighed its probative value.[10] We review the district court's decision to admit the photograph for abuse of discretion.[11]

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[8] Counsel for Collins objected at trial to the admission of the photograph:

> Your honor, we'd object to No. 18. It's a picture of my client handcuffed. He's in shorts in some kind of Bob Marley outfit, who is a reggae singer, and some of the armed A.T.F. agents in some kind of bulletproof uniform.
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> I think it's inflammatory. There's no question about my client's identity this morning. He does not show the gun or anything like that. It adds nothing to the government's case other than it's inflammatory.

Record on Appeal, vol. 2, at 95.

[9] "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "`Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

[10] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

[11] *See United States v. Weeks,* 919 F.2d 248, 253 (5th Cir. 1990) (reviewing admission of evidence under Fed. R. Evid. 403 for abuse of discretion), *cert. denied,* ___ U.S. ___, 111 S. Ct. 1430, 113 L. Ed. 2d 481 (1991); *United States v. Hays,* 872 F.2d 582, 587 (5th Cir. 1989) ("[D]istrict courts have wide discretion in determining relevancy under Rule 401. The district court's decision will not be disturbed absent a substantial abuse of discretion.").

We disagree with Collins' argument that the photograph was irrelevant. The picture showed Collins' proximity to the gun at the time of his arrest and its location on his bed. The photo therefore tended to make Collins' possession of the weapon more probable than it would have been without the photograph. *See* Fed. R. Evid. 401. Collins suggests that the photograph was irrelevant because several other photographs admitted into evidence demonstrated the location of the gun in Collins' bedroom. We disagree. Evidence is not irrelevant, and therefore inadmissible under Fed. R. Evid. 401, simply because it is cumulative of other evidence.[12]

We also disagree with Collins' argument that the district court violated Fed. R. Evid. 403 because the photograph "unfairly prejudiced [him] by presenting him in a humiliating and dehumanizing way" and made "the jury feel comfortable in convicting [him] because he looked like a bad person." The photograph merely depicts Collins in his underwear, which hardly makes him "look[] like a bad person." Furthermore, although Collins appears to be handcuffed in the photograph, and although a heavily armed federal agent appears in the foreground of the picture, these photographic images are merely duplicative of what the testimony revealed at

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[12] *See Melton v. Deere & Co.,* 887 F.2d 1241, 1245 (5th Cir. 1989) (holding that evidence was both relevant, as defined in Fed. R. Evid. 401, and cumulative; *Lubbock Feed Lots, Inc. v. Iowa Beef Processors,* 630 F.2d 250, 267 (5th Cir. 1980) (explaining that evidence which is relevant may nonetheless be excluded where its admission would result in needless presentation of cumulative evidence (citing Fed. R. Evid. 403)); *United States v. Madera,* 574 F.2d 1320, 1322-23 (5th Cir. 1978) (explaining that evidence was both cumulative and relevant).

trial))that Collins was arrested and handcuffed during a raid by armed federal agents. *See United States v. Madera,* 574 F.2d 1320, 1323 (5th Cir. 1978) (holding that evidence was not excludable under Fed. R. Evid. 403 where it "only established . . . a fact already established" by other evidence). The danger of unfair prejudice from the photograph did not substantially outweigh its probative value, *see* Fed. R. Evid. 403, and the district court did not abuse its discretion by admitting the photograph.

III

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