

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7170
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAVIER ARTURO GARZA-VASQUEZ,

Defendant-Appellant.

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

(L-92-CR-242-1)

(January 27, 1994)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:*

Appellant Javier Arturo Garza-Vasquez (Garza) was convicted on various drug related charges. On appeal, Garza claims that there was insufficient evidence to support his convictions, that the prosecutor violated his Fifth Amendment privilege against self-incrimination by commenting on his silence in violation of **Doyle v.**

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and that the prosecutor violated Garza's right to due process through improper comments during trial. Finding no merit in these contentions, we affirm.

Facts and Prior Proceedings

Trial testimony established the following. Michael James Murie, an immigration inspector, stopped Garza on September 19, 1992, as Garza crossed the border in Laredo, Texas. Garza was driving a white truck, and his wife and two children were passengers. When the inspector asked Garza where he was coming from and where he was traveling to, Garza replied that he was coming from Nuevo Laredo and he was going to Laredo, Texas. Garza said that he had nothing to declare. As the inspector continued to interview him about possible declarations, Garza and his wife appeared unusually nervous. The inspector noted that no luggage was visible. Because Garza made a negative declaration, the inspector referred the vehicle to Customs.

Rudolph Bowles, a Customs Service Inspector, questioned Garza in the secondary inspection area. Garza told Bowles that he was coming from Sabinas and going to Corpus Christi. A canine search was implemented, and the canine alerted underneath the truck on the passenger side. After thorough inspection, the officers discovered a well hidden compartment within the gas tank containing several packages of marihuana. Between the packages were layers of baby powder and fabric softener sheets used to conceal the smell of

marihuana. It was ultimately determined that the truck contained 83 pounds of marihuana.

Special Agent Gerado Chavez advised Garza of his **Miranda** rights. Chavez attempted to interview Garza, but Garza said he wanted to wait and speak to his attorney. Prior to the end of the interview, however, Garza told Agent Chavez that he was going to Laredo, Texas and that he had traveled to Sabinas by bus. Garza could not produce the ticket stub for the bus at this time, nor did he remember how much he had paid for the tickets. He also told the agent that a friend or acquaintance owned the truck, but he could not remember the friend's name.

Garza testified on his own behalf at trial. He testified that he and his wife took a bus to Sabinas, Mexico, on September 17, 1992, and planned to return by bus. He and his wife each carried one piece of luggage. The next day, while at a bar, a friend offered to give him a ride back to Laredo in his truck so that Garza could stay a little longer and continue to drink. The following day, his friend changed his mind about going to Laredo but let Garza use the truck anyway. His friend was to pick up the truck the next day at Garza's home. Garza offered no explanation why his friend would set him up. He admitted he had no way of contacting his friend in the event he had car trouble, and he denied being nervous while talking with Customs officials. He also denied that he told anyone he was going to Corpus Christi.

Juan Ramon Buentello-Alaniz, a friend of Garza, testified that he had seen Garza and a guy named Javier drinking at a bar in

Sabinas the night before Garza's arrest. Buentello-Alaniz overheard a conversation between Javier and Garza regarding Garza getting a ride with Javier the next day.

Garza's wife testified that she and her husband and two children traveled from Nuevo Laredo to Sabinas by bus to pay bills for Garza's father who lived in Sabinas. She produced the bus tickets, and these were admitted into evidence. She further testified that she and Garza had luggage with them when they returned to Laredo. Garza's wife denied being nervous prior to being informed that the truck contained contraband.

The jury found Garza guilty of importing marihuana and of possessing marihuana with intent to distribute.¹ The court sentenced Garza to thirty-six months of imprisonment on each count, to run concurrently, with a three-year term of supervised release on each count, also to run concurrently. Garza timely appeals his conviction to this Court.

Discussion

A. Sufficiency of the Evidence

Garza argues that the evidence was insufficient to support his conviction because the Government failed to prove that he knew the marihuana was in the truck. In deciding the sufficiency of the evidence, this Court determines whether, viewing the evidence and the inferences that may be drawn from it in the light most

¹ Garza was also charged with conspiracy to import marihuana, and conspiracy to possess marihuana with intent to distribute, however, the court granted his motion for acquittal on these counts.

favorable to the verdict, a rational jury could have found the essential elements of the offense beyond a reasonable doubt. **United States v. Martinez**, 975 F.2d 159, 160-61 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1346 (1993); **United States v. Pruneda-Gonzalez**, 953 F.2d 190, 193 (5th Cir.), **cert. denied**, 112 S.Ct. 2952 (1992). Reasonable inferences are construed in accordance with the jury's verdict. **Id.** at 161. The jury, moreover, is solely responsible for determining the weight and credibility of the evidence. **Id.** This Court will not substitute its own determination of credibility for that of the jury. **Id.**

To prove the knowledge element of possession with intent to distribute, the Government must prove that a defendant knowingly possessed a controlled substance. **See United States v. Ojebode**, 957 F.2d 1218, 1223 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1291 (1993). To prove the knowledge element of importation, the Government must prove that the defendant knew the substance he was bringing into the United States was a controlled substance. **See id.** Circumstantial evidence that is "suspicious in nature or demonstrates guilty knowledge" must exist in order to find the knowledge element if no direct evidence of knowledge exists. **United States v. Garza**, 990 F.2d 171, 174 (5th Cir.), **cert. denied**, 114 S.Ct. 332 (1993) (internal quotation and citation omitted). Nervousness and inconsistent statements to federal officials can constitute persuasive evidence of a defendant's guilty knowledge. **United States v. Diaz-Carreon**, 915 F.2d 951, 954-55 (5th Cir. 1990). A detailed summary of the testimony and evidence at trial

is discussed above. Viewing it in the light most favorable to the verdict, we firmly believe that a rational jury could have found the knowledge element for both possession with intent to distribute and importation of marihuana, beyond a reasonable doubt.

B. Doyle Violation

Garza contends that his due process rights were violated when Agent Chavez commented on Garza's post-arrest, post-**Miranda** silence. Garza argues that it was constitutionally impermissible for the prosecution witness to reveal to the jury that Garza had exercised his right to terminate the agent's questioning. Garza maintains that the agent's testimony caused the jury to infer that he was guilty of the charged offenses because he refused to answer the agent's questions. Garza contends that this tactic is condemned by **Doyle v. Ohio**, 426 U.S. 610 (1976). Garza also urges that this conclusion is especially warranted in light of the weak evidence adduced against him at trial.

Specifically, Garza complains of the following testimony from Agent Chavez:

Government: And what did you do upon arriving at the location you were summoned to?

Chavez: ...Once I arrived at the bridge, I basically conducted a brief debriefing of the inspectors involved and then I proceeded to advise Mr. Garza...of his rights as per Miranda. I read him his rights and I attempted to interview Mr. Garza, which lasted approximately two or three minutes. I asked him maybe two or three questions, at which time he said he'd rather wait and speak to his attorney. So I stopped my interview and left the holding cell.

Immediately after this testimony, Garza moved for a mistrial. After a discussion at the bench, the trial court gave a lengthy cautionary instruction to the jury. The trial court sternly warned the jury that they were not to make any inferences based on the agent's testimony regarding Garza's silence.

The Government contends that the agent's statement should not be characterized as a **Doyle** violation, but merely viewed in context as a recitation of events, a mere narrative. The Government points out that the prosecutor did not deliberately elicit the forbidden comment and never attempted to tie the fact of the defendant's silence to any exculpatory story. There simply was no further mention of Garza's silence during the remainder of the trial.

In **Doyle**, the Court held that the due process clause of the Fourteenth Amendment prohibits impeachment of a defendant's exculpatory story by using the defendant's immediate post-arrest, post-**Miranda** silence. **Id.** at 619. For several years after the **Doyle** decision, this Circuit found that "...virtually any description of a defendant's silence following arrest and a **Miranda** warning will constitute a **Doyle** violation." **United States v. Shaw**, 701 F.2d 367, 382 (5th Cir. 1983), **cert. denied**, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984)). However, the Supreme Court has since held, under facts very similar to the case before us, that where no use of information pertaining to the defendant's silence is permitted by the court, no **Doyle** violation occurs. **Greer v. Miller**, 107 S.Ct. 3102, 97 L.Ed. 2d 618 (1987); see also **Franklin v. Lynaugh**, 823 F.2d 98 (5th Cir. 1987) (sustained objection;

issuance of cautionary instruction; and no use of petitioner's silence allowed amounts to no violation). In **Greer**, the trial court sustained an objection to the only question that touched upon the defendant's post-arrest silence; allowed no further questioning or argument on the subject of the defendant's silence; and specifically advised the jury to disregard any improper questions to which an objection was sustained. **Id.** at 3108. "Unlike the prosecutor in **Doyle**, the prosecutor in this case was not allowed to undertake impeachment on or permitted to call attention to, [the defendant's] silence." **Id.** (internal quotations and citations omitted). The essence of **Doyle** is that due process bars "the use for impeachment purposes" of a defendant's post-arrest silence. **Greer**, 107 S.Ct. 3108 (citing **Doyle**, 426 U.S. at 619) (emphasis added)).

The case before us is all to similar to both **Greer** and **Franklin** cited above. The trial court did not allow further questioning or argument concerning Garza's post-arrest silence. The trial court issued a strong specific instruction to disregard any information concerning Garza's post-arrest silence. The prosecution never commented on Garza's silence nor attempted to link his post-arrest silence to his exculpatory story. We therefore find no **Doyle** violation.

C. Improper Comments

Finally, Garza contends that the prosecution made improper argument by implying that he was a professional drug smuggler. Garza, however, does not point to any specific examples of improper

argument. Rather, Garza merely contends that improper argument occurred in the opening statement, in the trial itself, and in the closing argument. We have combed the record to find any such improper statements by the prosecutor, and are unpersuaded that any comments by the prosecutor so infected the trial as to be a violation of Garza's right to due process.

This Court's task in reviewing a claim of improper prosecutorial comments is to decide whether the comments substantially affected the defendant's right to a fair trial. **United States v. Diaz-Carreon**, 915 F.2d 951, 956 (5th Cir. 1990) (citations omitted). If the comments cast serious doubt upon the correctness of the jury's verdict, then reversal is required. **United States v. Goff**, 847 F.2d, 149, 165 (5th Cir.), **cert. denied sub nom. Kuntze v. United States**, 488 U.S. 932, 109 S.Ct. 324, 102 L.Ed.2d 341 (1988).

Garza first complains that in the prosecutor's opening statement, the prosecutor described the attempt to cover the scent of the marihuana by using layers of baby powder and fabric softener sheets as "...professional, not an amateur job." Shortly thereafter, the prosecutor described the hidden compartments in the gas tank of the truck and then told the jury that the Government's witnesses would testify that professional drug importers often use this method to transport drugs across the border. Garza did not lodge an objection. We have reviewed the prosecutor's statements in context, and find that the prosecutor was merely presenting what the evidence would show. This is the purpose of an opening

statement. We find no error that would cast a serious doubt on the verdict. **Goff**, 847 F.2d at 165.

Next, during direct examination by the prosecution of Inspector Zapata, Zapata was asked if he considered this a professional job. Garza objected, and the objection was sustained. Zapata never responded. However, we note that throughout the presentation of evidence in the case, the prosecution appeared to infer that it was not Garza that they suspected of being a professional smuggler, but that the persons for whom Garza was transporting the marihuana had gone to a lot of trouble to modify the gas tank and place the marihuana inside, making it likely that the persons would then not entrust the marihuana to someone who knew nothing about its existence. This posture of the case was used to counter Garza's defense that he had no knowledge that the marihuana was in the truck as he crossed the border. We find no error.

Finally, Garza complains about the prosecutor's closing statement. During closing argument, the prosecutor summarized the testimony of several of the Government witnesses that described the gas tank's false compartments as a professional job. Garza objected once. The objection was overruled because the trial court believed it was a fair comment on the evidence. We agree.

Conclusion

Based on the foregoing, we affirm Garza's conviction.

AFFIRMED.