

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93-7515  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JULIO JAVIER BARBOSA,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CR-L-93-040)

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(June 2, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:<sup>1</sup>

Barbosa appeals his conviction on drug trafficking charges. We find no error and affirm.

I.

Julio Javier Barbosa was charged in a two-count indictment with (1) conspiring with others to possess, with intent to distribute, more than 100 kilograms of marijuana and (2) possessing, with intent to distribute, more than 100 kilograms of

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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. A jury found him guilty of both counts. The district court sentenced him to seventy-two months on each count to be served concurrently. The court also imposed a supervised-release term of five years on each count to be served concurrently. Barbosa filed a timely appeal raising a number of issues which we discuss below.

## II.

### A.

Barbosa argues first that the government produced insufficient evidence to convict him. In reviewing the sufficiency of the evidence, this court must determine whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. **U.S. v. Martinez**, 975 F.2d 159, 160-61 (5th Cir. 1992), **cert. denied**, 113 S. Ct. 1346 (1993).

Barbosa was convicted under 21 U.S.C. §§ 841(a)(1) and 846. Section 846 requires the Government to prove (1) the existence of an agreement between two or more persons to violate federal drug laws; (2) that the defendant knew of the agreement; and (3) that the defendant voluntarily participated in the agreement. **See U.S. v. Gallo**, 927 F.2d 815, 820 (5th Cir. 1991). An agreement may be inferred from concert of action, and voluntary participation may be inferred from a "collocation of circumstances." **U.S. v. Espinoza-Seanez**, 862 F.2d 526, 537 (5th Cir. 1988) (citation and internal quotations omitted). Mere presence at the scene of the offense and close association with those involved are insufficient factors alone; nevertheless, they are relevant factors for the jury to

consider. **U.S. v. Simmons**, 918 F.2d 476, 484 (5th Cir. 1990).

Under 21 U.S.C. § 841(a)(1) and (b)(1)(B), the Government must prove (1) knowledge, (2) possession, and (3) intent to distribute drugs. **U.S. v. Garza**, 990 F.2d 171, 174 (5th Cir.), **cert. denied**, 114 S. Ct. 332 (1993). The general rule is that "knowledge can be inferred from control over the vehicle in which the drugs are hidden if there exists other circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge." **Id.** (internal quotations and citation omitted). Possession of the illicit drug may be actual or constructive. **U.S. v. Gardea Carrasco**, 830 F.2d 41, 45 (5th Cir. 1987). Constructive possession is the knowing exercise of, or the knowing power or right to exercise dominion and control over, the proscribed substance. **Id.** In addition, possession may be established by circumstantial evidence. **Id.** Intent to distribute, moreover, may be inferred from the possession of a large amount of the illicit substance. **U.S. v. Prieto-Tejas**, 779 F.2d 1098, 1101 (5th Cir. 1986).

The evidence reflects that since August 1991, Diana Hamblen and her brother, Fernando Rodriguez, have owned Fero International Commerce (Fero) in Laredo, Texas. The business specializes in forwarding freight, especially egg cartons, from the U.S. to Mexico. Barbosa is one of the persons Fero contracts with for driving. As part of the agreement between Fero and Barbosa, Fero allows Barbosa to maintain tractors at the warehouse yard.

Leonardo Perez, a narcotics investigator with the Texas Department of Public Safety, participated in a surveillance mission

on February 10, 1993, at the Fero warehouse. At 8:55 p.m., Agent Perez noticed a gold-colored Chevrolet pickup-truck arrive at the warehouse. The driver exited the vehicle, opened the gates, and proceeded to the back of the warehouse. Five minutes later, the maroon pickup-truck with a male driver arrived at the gate. A blue van, riding "extremely low" and also driven by a man, immediately followed the maroon pickup-truck. Both the maroon truck and the blue van proceeded to the rear of the warehouse.

At approximately 9:25 p.m., Agent Perez saw a white tractor-trailer and a semi-trailer leave the Fero warehouse. The tractor, with the inscription "J.B. Trucking" on the side, headed north. Five minutes later, the maroon pickup-truck left the warehouse with Barbosa driving alone.

Martin Cuellar and Alfonso G. de la Garza, Jr., investigators with the Texas Department of Public Safety, were stationed near the intersection of Mines Road and the Milo Interchange. Sergeant Perez notified Cuellar that a white tractor with a white box-trailer had left Perez's location. Cuellar and de la Garza followed the tractor-trailer and a maroon pickup-truck to a farm road known as the Milo Interchange, which connects Mines Road with Interstate 35. The tractor-trailer, the lead vehicle, later stopped on the side of the road. The maroon pickup-truck stopped momentarily behind the tractor-trailer. From there, both vehicles proceeded east to Interstate 35, and then headed north on the interstate. The pickup-truck was approximately one to two miles behind. De la Garza and Cuellar followed the two vehicles all the

way to the checkpoint.

Curtis Bitz, the case agent, coordinated the efforts of the other agents. According to Bitz, the tractor-trailer arrived at the checkpoint slightly ahead of the pickup-truck. At trial, Bitz identified Barbosa as the driver of the maroon pickup-truck. Bitz also identified Teofilo Cavazos as the driver of the tractor-trailer. Jesus Valdez was identified as a passenger in the tractor-trailer.

Barbosa passed through the checkpoint without incident. However, when Teofilo Cavazos, the driver of the tractor-trailer, presented documents to the Border-Patrol agents, they directed the tractor-trailer to the secondary-inspection area. It was at this time that the maroon pickup-truck left the checkpoint. The maroon pickup-truck continued for about a mile and a half. It then went across the median and proceeded south on Interstate 35. The truck then stopped at a rest area adjacent to the Border-Patrol checkpoint. While the pickup-truck was parked at the rest area, Bitz observed Barbosa "watching the tractor-trailer and the events that were taking place there." When the Border-Patrol agents found marijuana in the tractor-trailer, Barbosa left the rest area.

The tractor-trailer was loaded almost three quarters of the way from the front to the back with egg cartons. The egg cartons surrounded a cavity in which boxes of marijuana were hidden. Approximately 391 pounds of marijuana were seized.

At around 10:00 p.m., Agents Perez, Cuellar, and de la Garza saw the maroon pickup-truck return to the warehouse with Barbosa

still driving. At the time, the truck's cab light was on. The truck entered the warehouse parking lot, made a u-turn, and exited the area. A few minutes later, Barbosa again returned to the warehouse. This time he stopped. It was about this time that a blue four-door Cadillac with a blondish woman approached the warehouse area. The Cadillac entered, and Barbosa and the woman met for several minutes in front of the Fero warehouse at around 10:30 p.m. They then left in separate vehicles.

Agent Cuellar later saw the maroon pickup-truck at around 1:00 a.m. at the Fero warehouse. At that time, the agents identified those present and took photographs. In the warehouse area was a blue van with a strong odor of marijuana.

The blue Cadillac returned at 1:30 a.m. Maria Lydia Saenz, a blondish woman was driving and Barbosa and Gustavo Cavazos, Teofilo's brother, were passengers. After being told that Teofilo Cavazos, the driver of the tractor-trailer, had been arrested for possession of marijuana earlier that evening, Barbosa denied knowing that Cavazos had been headed north that evening. Barbosa further asserted that he had been at the Crystal Palace with Saenz all evening.

Maria Lydia Saenz testified that she knew Barbosa and that on February 10, 1993, she had been with him. According to Saenz, she left her night-school class at about 8:20 p.m. on the evening in question; after stopping at her house, she proceeded to the Crystal Palace. When she arrived at the club, Barbosa and Tavo Cavazos were already there. She later gave them a ride to the warehouse.

As part of its business duties, Fero had a shipment of egg cartons that was supposed to have been destroyed. According to Hamblen, Barbosa was supposed to have taken the cartons to the city dump. Although Barbosa did not provide photographs showing that the cartons had been left at the dump, he verbally attested that they had been destroyed. According to Hamblen, neither Cavazos nor Barbosa was supposed to have been hauling anything for Fero on the night in question.

Jesus Valdez, Jr., testified that on February 10, 1993, Teofilo Cavazos picked him up at his home at 9:30 p.m., told him that he was going to Fort Worth, and took him to the yard at Fero International. They arrived in Cavazos's brown pickup-truck. At the yard, Valdez and Cavazos picked up a white trailer. Valdez did not see anyone load anything into the trailer at the yard. He also did not see a maroon pickup-truck, a blue van, or any people. From there, they went out on the road. Valdez, however, did not know where Cavazos was headed. According to Valdez, the trailer never stopped until the checkpoint. Valdez further testified that he knew Barbosa but that on the night in question, Valdez did not see Barbosa go through the checkpoint. Barbosa presented testimony from three men that he has a good reputation in the community.

The jury is the ultimate arbiter of the credibility of a witness. **Martinez**, 975 F.2d at 161. The jury, therefore, was entitled to believe the agents. In this case, Barbosa was seen at the Fero warehouse on a night in which no Fero shipments were scheduled; Barbosa was seen leading a blue van into the Fero yard.

The van was riding "extremely low" and later smelled of marijuana. Barbosa was seen by several agents following a tractor-trailer that left the Fero yard and waiting for the tractor-trailer to proceed through a Border-Patrol checkpoint; the tractor-trailer contained more than 300 pounds of marijuana; Barbosa denied knowing about the tractor-trailer's itinerary on the night in question; and Barbosa asserted that he had been at the Crystal Palace the entire evening in question. A reasonable jury could have found that Barbosa intentionally and knowingly participated in the conspiracy and that he aided and abetted the possession of marijuana. Barbosa's convictions, therefore, are supported by sufficient evidence.

B.

Barbosa next complains of certain comments made by the prosecutor. This court can reverse a conviction based on prosecutorial misconduct if the prosecutor's remarks were both inappropriate and harmful. **U.S. v. O'Banion**, 943 F.2d 1422, 1431 (5th Cir. 1991). This court must determine whether the remarks "`affected substantial rights of the accused.'" **Id.** (citation omitted). In other words, this court must decide "whether the misconduct casts serious doubt upon the correctness of the jury's verdict." **U.S. v. Kelley**, 981 F.2d 1464, 1473 (5th Cir.) (citation omitted), **cert. denied**, 113 S. Ct. 2427 (1993). This court, moreover, will not lightly overturn a criminal conviction based solely on the comments made by a prosecutor. **See O'Banion**, 943 F.2d at 1431.

Barbosa first contends that the following remarks amounted to



an impermissible comment on his failure to testify:

So you don't have to guess about any of that information. The question is, what does that information mean? And that's something that cannot proven [sic] by any kind of witness. Unless the defendants get up here and tell us by their own words, this is what we were doing, you're going to have to make that determination based on the actions that you see. All we can relate to you is what the officers have seen. You get to determine what that means.

Because Barbosa did not object to these comments, this court reviews for plain error only. **See U.S. v. Sanchez-Sotelo**, 8 F.3d 202, 211 (5th Cir. 1993), **cert. denied**, 1994 WL 69678 (U.S. Apr. 4, 1994) (No. 93-7959). Plain error amounts to error that is "clear" or "obvious" and that affects "substantial rights." **U.S. v. Olano**, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1770, 1777-78, 123 L. Ed. 2d 508 (1993).

"The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify in a criminal case." **U.S. v. Montoya-Ortiz**, 7 F.3d 1171, 1178 (5th Cir. 1993) (internal quotations and citations omitted). A violation occurs if either the prosecutor's "manifest intent" was to comment on the defendant's failure to testify or if a jury would "naturally and necessarily" interpret the remarks as a comment on the defendant's failure to testify. **U.S. v. Collins**, 972 F.2d 1385, 1406 (5th Cir. 1992) (internal quotations and citation omitted), **cert. denied**, 113 S. Ct. 1812, **and cert. denied**, 113 S. Ct. 1812 (1993). Regarding the first alternative, the prosecutor's intent is not "manifest" if some other equally plausible explanation exists for the remark. **Id.** As to the second alternative, the

question is not whether a jury possibly or probably would view the remark as a comment on the defendant's silence, but whether a jury "necessarily" would construe the remark in such a way. **Id.** In addition, the comments must be viewed in the context of the trial. **Montoya-Ortiz**, 7 F.3d at 1179.

Putting the comments in the context of the trial, they amount to nothing more than a rebuttal of defense counsel's closing argument. The prosecutor explained that the jury could consider only the evidence presented at trial and that it should not make unreasonable inferences about what might have occurred on the night in question. Although it is possible that the jury could have interpreted those remarks as indirect comments on Barbosa's failure to testify, it is not "necessarily" so. **See Collins**, 972 F.2d at 1406.

Barbosa further complains that the prosecutor improperly informed the jury during opening arguments that an alleged coconspirator, the driver of the truck carrying the marijuana, had already pleaded guilty. Barbosa, however, did not object. Nevertheless, a prosecutor's reference to a coconspirator's guilty plea can amount to plain error unless the record indicates that defense counsel's failure to object to an improper comment was part of his defense strategy. **U.S. v. Leach**, 918 F.2d 464, 467 (5th Cir. 1990), **cert. denied**, 111 S. Ct. 2802 (1991). In this case, the record indicates that Barbosa did not object because the statement was consistent with his defense: the driver of the truck committed an offense, but Barbosa was not involved. In his opening

argument, for example, defense counsel asserted that he expect[ed] that at the end, nearing the end of the trial, at the proper time, the court will also instruct you that mere presence at the place where a crime is being committed is not evidence of guilt and that you cannot conclude that my client is present [sic] simply because he happened to be at the same yard or at the same place where the other individual Cavazos was committing the offense.

Defense counsel further explained the role the driver played in the offense. In addition, during preliminary jury instructions, the trial court explained that what the lawyers said during opening arguments did not amount to evidence. The comment regarding Cavazos's guilty plea, therefore, did not amount to reversible error.

Barbosa further argues that the prosecutor improperly alluded to the fact that Barbosa, a married man, went out with a woman not his wife on the night in question. During the cross-examination of one of Barbosa's character witnesses, the prosecutor asked the witness whether he knew if Barbosa was married, had siblings, or had living parents. The purpose of this questioning was to ascertain how well the witness knew Barbosa. In closing arguments, moreover, the prosecutor mentioned that although Barbosa has a wife, children, and a living father, he chose to present character testimony from witnesses who do not know him very well. That the jury may have inferred that Barbosa did not have a good reputation because he, a married man, was socializing with a woman not his wife, was not improper. In light of the manner in which these comments arose, no error took place.

Barbosa also asserts that the prosecutor improperly elicited testimony from Agent Perez that Perez received a call about a

defendant in this case and that Perez had a photograph of Barbosa when he went to investigate. At trial, Barbosa made a general objection to this testimony. On appeal, however, Barbosa specifically asserts that the testimony was inadmissible under FED. R. EVID. 403 and the Sixth Amendment.

Agent Perez's testimony was not unfairly prejudicial because it showed that the investigation was not a random investigation and that the agents could positively identify Barbosa because they had a photograph of him. The mere fact that they had a photograph of Barbosa is not unfairly prejudicial. To the extent that Barbosa now argues that the evidence violated his Sixth Amendment right to confrontation, that objection is raised for the first time on appeal, and Barbosa has failed to show plain error. **See U.S. v. Wake**, 948 F.2d 1422, 1435 (5th Cir. 1991), **cert. denied**, 112 S. Ct. 2944 (1992).

Barbosa next argues that the use of "we know" during closing arguments amounted to an expression of the prosecutor's personal opinion. Barbosa especially complains of the prosecutor's assertion that the egg cartons found in the tractor-trailer on the night in question were the same egg cartons that were supposed to have been destroyed. Barbosa, however, did not object to these remarks. For the most part, the prosecutor's use of "we know" was simply to emphasize what had been shown at trial. With regard to the arguments about the egg cartons, the prosecutor submitted that the egg cartons that should have been destroyed were not destroyed. Although the evidence at trial did not conclusively establish that

assertion, any impropriety caused by such a remark did not seriously affect Barbosa's substantial rights.

Barbosa also suggests that the prosecutor implied that there was further evidence of guilt that the Government could not present. The only statement he points to in support of this allegation is one taken out of context:

I know that the testimony is sometimes hard to follow because it comes so scattered and in pieces. It's basically like taking a jig saw [sic] puzzle and then having to put them all together to get a picture of it, and, unfortunately, because witnesses can only testify to what they personally did or said or asked or whatever, that's the only way that you can get the testimony in court cases.

Barbosa did not object to these remarks. In any case, no error occurred because the prosecutor merely explained how important it is that witnesses have personal knowledge of the facts they present at trial. This comment does not amount to error, plain or otherwise.

To the extent that Barbosa asserts that the court had ruled the "egg carton evidence" inadmissible, this assertion is incorrect. The court simply ruled that any documentation regarding the egg cartons was unnecessary and would be kept out. The jury, however, was free to draw reasonable inferences from the admitted testimony about the egg cartons.

Barbosa has failed to show reversible error regarding the prosecutor's comments. We therefore affirm Barbosa's conviction.

AFFIRMED.