IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7524
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CASIMIRO NAJERA-BARRERA,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR-L-93-55)

(May 17, 1994)

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

PER CURIAM:[*]

Casimiro Najera-Barrera ("Barrera") was found guilty by a jury of conspiring to possess with the intent to distribute and possessing with the intent to distribute in excess of five kilograms of cocaine. He received two concurrent 121-month terms of incarceration, two concurrent five-year terms of supervised release, and a $100 special assessment. He appeals.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Barrera contends that the government failed to prove 1) that there was an agreement to violate a drug law; 2) that Barrera knew that the car he was driving contained cocaine; and 3) that there was no duress involved. He is mistaken.

I

At trial, Barrera testified to the following. He was forced to drive the vehicle in which the cocaine was secreted. Anonymous people called him on the telephone and threatened to kill his son and pregnant wife if he did not cooperate, beginning in October 1992. These anonymous individuals sent "two pink slips belonging to the car" (documents to effect title transfer and registration), and Barrera then had ownership of two vehicles placed in his name. He did not go to the police because the anonymous individuals threatened to harm his family and told him not to tell anyone. He also planned to find out who these people were so that he could turn them in, but never found out who they were. In February 1993, four months hence, the individuals called again and told him that a car was parked near his home, which he was to drive to Puebla, Mexico. He drove the car to Mexico, spent three days in transit, and remained in Puebla more than ten additional days prior to flying back to San Diego. He did not know how the anonymous individuals got his telephone number or how they picked him to do the job.

A reasonable trier of fact could have chosen to disbelieve Barrera's story regarding duress, especially in the light of the

fact that he did not call the police, did not pursue his alternatives within the five months, and did not demonstrate that those alternatives were foreclosed. His argument fails. See U.S. v. Gant, 691 F.2d 1159, 1163-64 (5th Cir. 1987).

II

Barrera's challenge to his possession conviction hinges on whether he knowingly possessed the cocaine found in his vehicle. He admits that he possessed the car and that the drugs were found in that car. He also testified that he thought he was transporting something illegal into Mexico, checked the car, but could not find anything. The mere fact that he checked the car indicates that his suspicions were aroused.

Furthermore, Barrera was extremely nervous when he arrived at the border checkpoint. As he handed his resident alien card to the Border Patrol officer, his hand was shaking visibly. He was also nervous during the search of the vehicle. Additionally, over ten kilograms of cocaine with the value in excess of $800,000 was found in the car, and the jury "was entitled to consider the unlikelihood that the owner of such a large quantity of narcotics would allow anyone unassociated" with the venture to transport and be responsible for them. See U.S. v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991) (addressing a defendant's presence during unloading). Also, an inspection of Barrera's vehicle at the checkpoint revealed fresh tool marks on some of the bolts to the car's firewall (behind which was found the secret compartment containing the contraband),

as well as some missing bolts. See U.S. v. Shabazz, 993 F.2d 431, 442 (5th Cir. 1993) (noting fresh nicks on screws holding down strips covering secret container).

Still further, Barrera's explanation of the events seems unlikely. He contends that individuals picked him at random, had him transfer the car title to his name, instructed him to drive to Mexico, leave the car, fly home, then fly back to Mexico, and then drive the car home, all over the span of approximately five months. A less-than-credible explanation can be part of the "overall circumstantial evidence from which knowledge may be inferred." U.S. v. Arozl-Amaya, 867 F.2d 1504, 1512 (5th Cir.), cert. denied, 493 U.S. 933 (1989). A reasonable jury could reject Barrera's explanation and accept the government's version of the facts. See Garza, 990 F.2d at 175.

III

Barrera next argues that the government failed to prove that an agreement to violate drug laws existed, that Barrera knew of the agreement, and that he joined the conspiracy voluntarily. However, Barrera admits driving to and from Mexico at the direction of other individuals, establishing an agreement. Having failed to prove that he acted under duress, his argument regarding the voluntariness of his participation fails. Based on the evidence of Barrera's participation in the telephone calls, and his conduct regarding the transportation of the drugs, a reasonable trier of fact could conclude that Barrera knew of the agreement. His

challenge to the sufficiency of the evidence regarding his conspiracy conviction fails.

IV

Finally, Barrera contends that the prosecution's comments during closing argument deprived him of a fair trial. His argument is unpersuasive. Barrera did not object during closing argument, and thus failed to preserve his claim for appeal. Therefore, it is reviewed for plain error. Plain error is error that is obvious and that affects the defendant's substantial rights. U.S. v. Olano, ___ U.S.___, 113 S.Ct. 1770, 1776-78, 123 L.Ed.2d 508 (1993). Whether the error should be reviewed is left to the appellate court's discretion. U.S. v. Rodriguez, 15 F.3d 408, 415-16 (5th Cir. 1994).

In his closing argument, the prosecutor stated that the defendant "actually left his pregnant wife . . . and this child who's under threat, and he went to go live with another woman, a girlfriend." Barrera argues that the comments are irrelevant and unfairly prejudicial. When asked whether he went to live with the other woman because individuals were threatening his son, he replied in the negative and stated that he "didn't want to be at the house so they wouldn't look for [him] there."

During closing argument, the prosecutor discounted Barrera's duress argument by pointing out that although Barrera testified that he had left his house so it would be safer for his wife, his wife did not testify, did not corroborate the duress defense, and

did not indicate that Barrera had told her of the threats. A prosecutor may comment on the evidence during closing argument and may suggest what conclusions the jury should draw regarding the issues properly presented to it. U.S. v. Phillips, 664 F.2d 971, 1030 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). The district court did not commit plain error by allowing the jury to consider the prosecutor's statements.

V

For the reasons set forth above, the judgment of the district court is

A F F I R M E D.