

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8449
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUSTAVO DURAN-LOYA,

Defendant-Appellant.

Appeal from the United States District Court for
the Western District of Texas
(EP-93-CR-114)

(January 27, 1994)

Before REAVLEY, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

Defendant Gustavo Duran-Loya ("Duran") was convicted for possessing and importing marijuana into the United States from Mexico. Duran argues on appeal that there was insufficient evidence to support the conviction and that the district court improperly charged the jury. We find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

On March 4, 1993, Duran attempted to enter El Paso, Texas through the United States - Mexico border in a black Toyota. A United States Customs Inspector questioned Duran about his citizenship and noticed that he appeared "extremely nervous." Duran told the inspector that he was going to Dallas and explained that the car was his. He did not know what kind of car it was, however, and upon further questioning he stated that the car belonged to a friend. Based on Duran's conflicting answers and his nervous demeanor, the inspector referred him to a secondary lane for further inspection.

Once in the secondary station, Duran was questioned by a Canine Enforcement Officer. The officer noticed that Duran was nervous: his hands were shaking and his eyes were "very wide open." Duran told the officer that he was coming from La Paz, Chihuahua, and later changed his story, stating that he was coming from Juarez and had not been to La paz since the previous December. Duran was asked to exit the car and a canine was brought out to inspect the car. Duran stared nervously at the canine during the inspection. The four-legged investigator soon alerted that there may be drugs within the framework of the vehicle by scratching and biting the fender area.

Duran was then taken into the office for a pat down while the vehicle was searched. The vehicle was dismantled after marijuana was found in the bumper and a total of 108 pounds of marijuana was subsequently discovered buried in various hidden

compartments. Duran claimed that he had no knowledge of the marijuana and that he had agreed to drive the car across the border for \$100. Duran admitted at trial that he lied to the inspectors regarding the ownership of the car and his potential destination. He also testified at trial that he was nervous during the inspection because he had been drinking and was fearful he would be arrested for driving while intoxicated. A jury found Duran guilty of possession and importation of the drugs. Duran appeals.

ANALYSIS

Duran first argues that the government presented insufficient evidence of his guilty knowledge to support the convictions. In evaluating a challenge to the sufficiency of evidence, "we must examine the evidence as a whole in the light most favorable to the verdict and must afford the government the benefit of all reasonable inferences and credibility choices drawn therefrom." United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989). The evidence is sufficient to uphold the verdict if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Id. The jury is solely responsible for determining issues of the weight and credibility of evidence presented. United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993).

In order to sustain Duran's conviction for possession of marijuana with intent to distribute under 21 U.S.C. § 841(a)(1), the government must prove three elements: (1) knowing (2)

possession of marijuana (3) with intent to distribute it. United States v. Diaz-Carreón, 915 F.2d 951, 953 (5th Cir. 1990). A conviction of importation requires proof that the defendant "knowingly" played a role in bringing marijuana into the U.S. from a foreign country. Id. Duran claims that there is insufficient evidence to support the "knowing" element on both the charged counts.

"Knowing" possession *and* importation of a controlled substance can be inferred from circumstantial evidence. See United States v. Ledezma-Hernandez, 729 F.2d 310, 314 (5th Cir. 1984). When drugs are hidden in compartments of a vehicle, however, control over the vehicle alone is not enough to prove knowledge. United States v. Garza, 990 F.2d 171, 174 (5th Cir.), cert denied, 114 S.Ct. 332 (1993). Knowledge can be inferred if there is other circumstantial evidence that is suspicious or demonstrates guilty knowledge. Id. This court has recognized that nervous behavior which (in light of other facts) suggests an underlying consciousness of criminal activity is persuasive evidence of guilty knowledge. See Diaz-Carreón, 915 F.2d at 954. Inconsistent statements to customs officials are also strong evidence of a criminal defendant's guilty knowledge. Id. at 954-55. Finally, a less than credible explanation for a defendant's actions can demonstrate guilty knowledge. Id. at 955. The jury is free to accept or reject these inferences. Id.

Here, Duran was unusually nervous at both the first and second inspection station. He also admitted at trial that he had

lied and made inconsistent statements to customs officials. Although Duran offered an explanation for his actions and claimed he was unaware of the drugs hidden in the vehicle, the jury was free to reject his story as less than credible. Considering all these circumstances, there was sufficient evidence for the jury to infer Duran's consciousness of guilt.

Duran next argues that the district court erred in failing to give requested jury instructions as to the knowledge element of the charged offenses. We review a court's refusal to give a requested instruction for an abuse of discretion. United States v. Sellers, 926 F.2d 410, 414 (5th Cir. 1991). As this court has previously stated, "[f]or a refusal to give a requested jury instruction to constitute reversible error, the instruction (1) must have been substantially correct, (2) must not have been substantially covered in the charge given to the jury, and (3) must have concerned an important issue so that the failure to give it seriously impaired the defendant's ability to present a given defense." United States v. Hernandez, 962 F.2d 1152, 1160 (5th Cir. 1992).

Duran requested three instructions defining the knowledge element which the district court refused because they were "more along the lines of commenting on evidence or a jury argument." The charge that was given explicitly required the jury to find that Duran "knowingly" and "intentionally" possessed and imported the marijuana. Duran's requested instructions were adequately incorporated into the charge as a whole and the failure to give

them did not seriously impair Duran's ability to present a defense. Duran argues that under United States v. Ojebode, 957 F.2d 1218 (5th Cir. 1992), cert. denied, 113 S.Ct. 1291 (1993), instructions must be given explaining the knowledge element, but that case cannot be interpreted so broadly. In Ojebode, the jury instructions omitted the *intent* element for a charged importation offense. Id. at 1227. No such error was made here.

AFFIRMED.