UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8678
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TAMI RENEE WITTMAN,

Defendant-Appellant.

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

(EP-93-CR-146(1))

(May 19, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

On March 20, 1993, at approximately 1:40 p.m., Tami Renee Wittman, driving a small white pickup truck from Mexico, approached the U.S. port of entry at the Bridge of the Americas near El Paso, Texas. The vehicle had a temporary paper plate from Texas on the back. Wittman, polite, talkative, and friendly, declared that she

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was a U.S. citizen and that she was not bringing anything into the U.S. As the INS inspector's attention focused on Wittman's makeup case sitting in the truck bed, Wittman declared that she was bringing two cartons of cigarettes into the country.

The inspector noticed that the floor of the pickup bed appeared warped, and, upon tapping, that the floor sounded solid and not the usual hollow. The truck appeared freshly painted. Wittman told the inspector that the vehicle was not hers, but belonged to an unnamed friend. Wittman handed the inspector her California identification, which the inspector testified was a driver's license, although Wittman testified that she did not have a license. After the inspector entered the plate number in a computer, the computer responded with the instruction for the vehicle to be inspected as a random inspection; thus the truck was sent to secondary.

At secondary inspection, the customs inspector noticed that Wittman appeared wide-eyed and nervous, her hands tightly gripping the steering wheel. Wittman gave a negative declaration about having firearms or large amounts of cash, and she stated that she had gone to Mexico to purchase cigarettes, that the vehicle was owned by a "Rafael," and that she was traveling back to her El Paso home. Inspection of the truck bed indicated an unaccounted-for space, an indication confirmed by the alert for controlled substances by a canine inspection. Further inspection revealed approximately 214 pounds of packaged marijuana hidden under the false truck bed.

At some point during this inspection, Wittman was taken into the port-of-entry office and subsequently placed in a holding cell. A pat-down search of Wittman's person revealed California identification and over $200 in cash. During this search, Wittman told the inspector that she had been living with a cousin in the El Paso area for approximately three months, that she was looking for a playhouse for her niece, and that she intended on moving back to California.

At some point during her detention, she excitedly told authorities about other vehicles and persons involved in this episode. She described a small gray car, with one or two male passengers and a female driver with long dark hair, a blue pickup with maroon striping, and a man who entered the U.S. through the pedestrian lane. Acting upon her information, inspectors discovered a small gray vehicle parked by a bank of phones whose occupants, a woman with long dark hair (Rosalie Jimenez-Garza) in the driver's seat and a man (Rafael Flores-Servin) standing by the vehicle, were watching the white truck in secondary inspection. Wittman recognized the photo identification of Jimenez-Garza, and the inspectors found California license plates inside the gray car and a California vehicle registration on Flores-Servin's person. Both plates and registration were subsequently connected to the white pickup truck's vehicle identification number (VIN).

Customs Special Agent Mark Miller interviewed Wittman and took her statement. Wittman told Miller that she left California with the uncle of a neighbor to assist him, for $250, in driving a

truck, but that she could not remember the uncle's name. They picked up the truck in Juarez, Mexico, and this was the truck that she drove into the U.S. According to Miller, Wittman's story varied on the number of men traveling with her, whether she was the only driver of the truck, and the exact events leading up to her entry into the U.S. She told him that, as she approached the port of entry, she began to suspect that the vehicle might contain contraband or illegal drugs.

At Wittman's trial on the four-count drug indictment, Wittman testified that she was the unsuspecting pawn in the efforts of her neighbor's uncle to bring the marijuana into the country. Wittman's mother and neighbor also testified at trial.

The jury found Wittman guilty on all four counts. The district court's sentence included fifty-one months imprisonment.

OPINION

Issue 1. Sufficiency of the Evidence to Prove Knowledge

Wittman argues that the evidence was insufficient to prove that she knew that the truck contained marijuana; thus the Government failed to prove the knowledge element of all four counts. The attorney-written brief does not contest the sufficiency of the evidence as to the other required elements of the offenses. When the issue has been preserved for appeal, this Court "examine[s] the evidence, together with all credibility choices and reasonable inferences, in the light most favorable to the [G]overnment. The verdict must be upheld if the [C]ourt concludes that any reasonable trier of fact could have found that

the evidence established guilt beyond a reasonable doubt." United States v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993) (citation omitted), cert. denied, 114 S.Ct. 1096 (1994). Every reasonable hypothesis of Wittman's innocence need not be excluded in order for this Court to uphold her convictions. See id. Moreover, it is the jury's role, and not this Court's, to determine the credibility of the witnesses and the weight of the evidence. See United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989).

To prove the knowledge element of possession with the intent to distribute, the Government must prove that Wittman knowingly possessed the controlled substance. To prove the knowledge element of the importation count, the Government must prove that Wittman "knowingly played a role in bringing marijuana from a foreign country into the United States." United States v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990). To prove the knowledge element of the conspiracy counts, the Government must prove that Wittman knew of the agreement to import the controlled substance and to possess with the intent to distribute the marijuana. See United States v. Rodriguez-Mireles, 896 F.2d 890, 892-93 (5th Cir. 1990). Wittman's attorney-written argument focuses on the lack of evidence indicating that she knew there was illegal drugs in the white pickup truck she drove into the United States. Therefore, if the evidence is sufficient to prove knowledge for the substantive counts, this Court need not address whether the evidence was sufficient to show her knowledge of the conspiratorial agreements because Wittman does not contest the issue.

> "Knowledge of the presence of contraband may ordinarily be inferred from the exercise of control over the vehicle in which it is concealed." . . . [I]f the illegal substance is contained in a hidden compartment in the vehicle, [this Court] may also require circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge.

United States v. Shabazz, 993 F.2d 431, 441 (5th Cir. 1993) (citation omitted). The evidence within the record supports the inference that Wittman knew there was a controlled substance within the white truck.

Wittman testified that, after being asked by a neighbor to accompany the neighbor's uncle, for money, to Texas in order to assist him in driving a truck back to California, Wittman traveled with this uncle, Francisco, and another man, Rick, on the interstate highway to Texas and into Juarez, Mexico, where they stayed the night in a motel room. At the time, Wittman did not know either man's name, and she had to communicate with Francisco through Rick because she could not speak Spanish and Francisco spoke "very little" English.[1] In answering the Government's questions, Wittman said that she was not concerned at the time about traveling out of state with these two men, about the change in travel destination from Texas to Mexico, and about staying in the same room with these men after one had propositioned her.

[1]Her testimony about Francisco's lack of English was undercut by her further testimony that, at the hotel room, Francisco propositioned her for money in English and that, as Francisco ordered Rick out of the white truck, he used English. See R. 3, 260-61, 271.

Wittman testified that, on the morning of the 20th, the three of them were driven by an unidentified Hispanic male to an undisclosed home where Wittman observed the white truck which the three had used to travel from California. When Wittman left the house, the gray car was parked behind the white pickup. Wittman testified that Francisco rode in the gray car which led the white pickup, driven by Rick with Wittman as passenger. There was also a blue pickup. About 100 yards from the border, Francisco exited the gray vehicle and instructed Rick to accompany him across the border and to allow Wittman to drive the white truck alone through the port of entry. Rick instructed Wittman to drive the truck home. Wittman assumed that the bridge into the United States was the same one they used the day before and that the interstate would be located next to the bridge; therefore, she was not concerned about getting to California without a map.

Wittman's sequence of events varied from the testimony of Jimenez-Garza, who testified that, once she drove her gray car to the Juarez house, she only observed Wittman in the white pickup and that only Wittman drove the truck.[2] The jury was entitled to believe Jimenez-Garza's testimony at the expense of Wittman's testimony. Further, the implausibility of Wittman's story of being the unknowing drug mule, based upon traveling out of state with two strange men, proceeding into Mexico with these men for the night,

[2]The testimony of the two women also differed from the other as to whether Wittman and Jimenez-Garza spoke to each other about Wittman's carton of cigarettes as they approached customs. See R. 2, 114; R. 3, 243, 270-71.

riding to undisclosed locations, driving the truck with the use of a lead car, and being left alone to drive the vehicle through customs, is some circumstantial evidence which lends support to the inference that Wittman knew the truck contained controlled substances. See Diaz-Carreon, 915 F.2d at 955; see also Ayala, 887 F.2d at 67 (observing that the finder of fact is entitled to use common sense in making logical inferences from the evidence).

The customs inspector in secondary testified that Wittman appeared nervous, wide-eyed, and white-knuckled. See Diaz-Carreon, 915 F.2d at 954 ("Nervous behavior at an inspection station frequently constitutes persuasive evidence of guilty knowledge."). Wittman admitted that she lied to the various inspectors concerning where she lived and where she was going. She testified that she told these lies because Francisco and the men in Mexico instructed Rick to say he was from Texas or because Rick told her that he was going to tell customs that he was from Texas. She continued with these lies even after admitting that she was from California. Diaz-Carreon, 915 F.2d at 954-55 (discussing inconsistent statements to officials as some evidence of consciousness of guilt).

Other indications of Wittman's guilty knowledge were the statements she gave to Miller. Although Wittman explained to the jury that her statements about her suspicions concerning illegal substances came right as she entered the bridge area, or that her conclusions about illegal contraband surfaced when Miller informed her what was found, Miller testified that Wittman said that she

began to be suspicious as she approached the port of entry, but that she could not pinpoint when these thoughts actually began.

Although each circumstance by itself may be insufficient to find, beyond a reasonable doubt, that Wittman had the requisite guilty knowledge, the combined circumstances are sufficient to support the jury's verdict. See Diaz-Carreon, 915 F.2d at 955.

Issue 2. Deliberate Ignorance Instruction

Wittman argues that the district court, over her objection, erred by giving an instruction on deliberate ignorance.[3] For review, this Court determines "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." United States v. August, 835 F.2d 76, 77 (5th Cir. 1987). In making this determination, this Court "view[s] the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Government." United States v. Lara-Velasquez, 919 F.2d 946, 950 (5th Cir. 1990).

> The circumstances which will support the deliberate ignorance instruction are rare. The evidence at trial must raise two inferences:

[3]"You may find that a [D]efendant had knowledge of a fact if you find that the [D]efendant deliberately closed her eyes to what would otherwise have been obvious to her. While knowledge on the part of the Defendant cannot be established merely by demonstrating that the [D]efendant was negligent, careless or foolish, knowledge can be inferred if the [D]efendant deliberately blinded herself to the existence of a fact."

> (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and
> (2) the defendant purposely contrived to avoid learning of the illegal conduct.

Id. at 951. "[T]he same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct." Id. at 952. As explained in discussing the sufficiency of the evidence to prove the knowledge elements of the convictions, Wittman's control over the vehicle, her nervousness, her false statements to the inspectors, her implausible story supporting her ignorance of the criminal activity, and her admission of suspecting criminal activity as she approached the bridge area, all raise the inference that she was subjectively aware of a high probability of the existence of illegal conduct. See United States v. Stouffer, 986 F.2d 916, 925 (5th Cir.) (relying on previous analysis showing sufficient proof of intent), cert denied, 114 S.Ct. 115, 314 (1993).

The second prong, personal contrivance to avoid learning of the illegal conduct, "may be established by direct or circumstantial evidence." Lara-Velasquez, 919 F.2d at 952. "Courts . . . have determined that the circumstances of the defendant's involvement in the criminal offense may have been so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful

contrivance to avoid guilty knowledge." Id. Wittman's answers, especially on cross-examination, are replete with her assertions of lack of worry or concern at key points in her version of events and of her failure to ask key questions of Francisco and Rick. These include her $250 agreement to accompany a man, whom she barely knew and whom she could not communicate with, to an undisclosed place in Texas in order to drive another vehicle back to California, the appearance of the barely-known Rick on the trip to Texas, the unplanned travel to Mexico, the convoy of vehicles back to the border, the instructions given Rick to lie that he was from Texas, and the end result that Wittman was left in the white truck to drive unassisted through the port of entry and back to California without a map.

Based upon this evidence, the district court did not err in giving the deliberate-ignorance instruction. See Lara-Velasquez, 919 F.2d at 953.

Judgment of the district court is AFFIRMED.