

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20501
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUSTAVO CAICEDO CASTRO,

Defendant-Appellant.

Appeal from the United States District Court
for the
Southern District of Texas
(CR H 93 0128 2)

(April 10, 1995)

Before JOHNSON, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Gustavo Caicedo Castro ("Castro") appeals the district court's denial of his motion for new trial following a jury conviction of possession with intent to distribute heroin. Castro claims that there was insufficient evidence to convict him of the crime, that the district court reversibly erred by admitting certain hearsay evidence, and that the district court reversibly erred by giving a

¹Local 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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

"deliberate ignorance" instruction to the jury when none was warranted. Because we do not find merit in any of these contentions, we affirm.

I. Facts and Procedural History

In the early afternoon of March 20, 1993, Castro's Co-Defendant Jesus Pedroza-Vivas (Pedroza") arrived at the Houston Intercontinental Airport on a flight from Honduras. Pedroza was carrying two suitcases, each of which held a leather jacket with heroin packets sewn into the linings. Customs officers found the heroin in a search conducted after a canine unit signalled that Pedroza had heroin.² After being warned of his *Miranda* rights, Pedroza agreed to cooperate by participating in a controlled delivery to the intended recipient of the contraband.

Pedroza initially attempted to meet his contact in the lobby of the airport. After forty-five minutes had passed without the contact taking place, the agents had Pedroza telephone his contact and arrange to deliver the contraband to 10300 Harwin, Apartment #407.³ Pedroza was transported to the apartment in a taxi driven by an undercover government agent. However, no one answered the apartment door when Pedroza knocked. Next, the government agent drove Pedroza across the street to a convenience store so that he

²The heroin was estimated to be valued at between \$60,000 and \$80,000. Castro stipulated that the 90% pure heroin weighed 518.4 grams and was individually separated in 8 to 10 gram packets. Thus, the amount and purity of the heroin was consistent with an intent to distribute on the part of its possessor.

³Pedroza carried the 10300 Harwin, Apartment 407 address with him and told officers that was his alternative rendezvous point if the contact did not transpire at the airport.

could make another call to his contact on a pay telephone. Pedroza returned to the taxi and waited forty-five minutes for his contact to arrive. When the contact still had not surfaced,⁴ Pedroza again telephoned his contact and then proceeded to wait another forty-five to sixty minutes for the contact's arrival.

Next, a black sedan pulled into the convenience store parking lot and parked directly next to Pedroza. The driver of the black sedan was later identified as Castro. Castro and Pedroza conversed with one another for a few minutes and then Castro instructed the taxi driver/undercover agent to follow Castro's black sedan. The taxicab followed Castro for about fifteen to twenty minutes until Castro stopped in the rear, dark area of a Pizza Hut parking lot next to a fence or wall. Pedroza then paid the undercover taxi driver. Suddenly, Castro began questioning the taxi driver extensively about the fare and the drive.⁵ The taxi driver then exited the vehicle, and the three men unloaded the luggage containing the heroin into the trunk of the black sedan driven by Castro.

After the heroin was placed into the trunk of Castro's car, the agents closed in and arrested Castro and Pedroza. Immediately upon arrest, Castro said to Pedroza in Spanish: "Did they catch you? Did they catch you at the airport?" Additionally, when

⁴Pedroza's understanding was that the contact would show-up at the convenience store driving a black sedan.

⁵Apparently, Castro was quizzing the driver to see how familiar the driver was with the area so as to evaluate whether or not the driver was a legitimate taxi driver.

agents asked Castro to identify himself, he gave them the false name of "Sammy Salazar." When the agents patted-down Castro incident to his arrest, they found a pair of keys, one of which fit the black sedan and the other of which fit the Harwin apartment. The agents also found a note in Castro's car containing the name of a woman and the address of the Harwin apartment.

The jury used this evidence to convict Castro of possession with intent to distribute heroin. Castro filed a motion for new trial which was denied by the district court. The district court sentenced Castro to a ninety-two month term of imprisonment, a five year term of supervised release, and a fifty dollar special assessment. Castro now appeals.

II. Discussion

Because Castro makes three separate and distinct attacks on the validity of his conviction, this Court will examine each basis individually.

A. Sufficiency of Evidence

In evaluating Castro's claim that the evidence was insufficient for his conviction, this Court must determine whether, after viewing the evidence presented and inferences reasonably drawn therefrom in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Fierro*, 38 F.3d 761, 768 (5th Cir. 1994), *cert. denied*, 1995 WL 79138 (Mar. 20, 1995). A conviction for possession of heroin with intent to

distribute requires that the Government prove three elements: (1) knowledge of the heroin, (2) possession of the heroin, and (3) the intent to distribute the heroin. *United States v. Cardenas*, 9 F.3d 1139, 1158 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2150 (1994). Knowledge can rarely be established by direct evidence. *United States v. Garza*, 990 F.2d 171, 174 (5th Cir.), *cert. denied*, 114 S. Ct. 332 (1993).

While a defendant's mere presence around drugs or contraband is insufficient to establish guilty knowledge of the drugs or contraband, such knowledge may be inferred from circumstantial evidence of a defendant's suspicious actions indicating his knowing receipt of and control over packages containing drugs or contraband. *See United States v. Gallo*, 927 F.2d 815, 820-21 (5th Cir. 1991) (finding that a defendant's exchange of a box full of drugs for a box with a large quantity of money established the defendant's guilty knowledge that drugs were in the original box); *United States v. Lewis*, 902 F.2d 1176, 1180-81 (5th Cir. 1990) (finding defendant knowingly received a package of cocaine due to the circumstances of a controlled mail delivery). Guilty knowledge may also be inferred from the circumstantial evidence of a defendant's presence and involvement during a drug transaction. *United States v. Lechuga*, 888 F.2d 1472 (5th Cir. 1989) (finding guilty knowledge when defendant was present during a drug transaction occurring in a car registered to the defendant and when the defendant possessed paper with the name and number of co-conspirators who had been contacted by an undercover agent); *United*

States v. Sandoval, 847 F.2d 179 (5th Cir. 1988) (finding guilty knowledge where defendant drove co-defendant with a suitcase containing drugs to a hotel and then made comments to undercover agents regarding drug sales). Lying to officers is also evidence of subjective knowledge of wrongdoing. *United States v. Farias-Farias*, 925 F.2d 805, 810 (5th Cir. 1991) (finding guilty knowledge to be evidenced by the defendant's lying about drugs found in the vehicle); *United States v. Ayala*, 887 F.2d 62, 68 (5th Cir. 1989) (finding evidence of guilty knowledge when defendant picked up a suitcase containing drugs, drove to the train station with a co-defendant, acted nervous, and lied to officers about association with co-defendant). Intent to distribute may be inferred from knowing possession of a large quantity of marijuana. *United States v. White*, 972 F.2d 590, 597 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1651 (1993).

In the present case, there was sufficient circumstantial evidence for a rational jury to find beyond a reasonable doubt that Castro knowingly possessed the heroin with the intent to distribute. Castro met Pedroza at the controlled delivery site and instructed the undercover taxi driver to follow him. Castro engaged in reconnaissance-like conduct by driving around for fifteen minutes before pulling into a dark parking lot and then questioning the undercover cab driver extensively. Castro took the luggage from Pedroza and placed it into the trunk of his car. Officers found a set of keys when Castro was patted-down, one of which fit the Harwin apartment, Pedroza's alternate point of delivery.

Officers also found the address for the Harwin apartment inside of Castro's car. Castro gave a false name to the officers when they asked him to identify himself. Most significantly, immediately after arrest, Castro asked Pedroza in Spanish whether or not they had caught Pedroza at the airport. This statement indicates that Castro knew that Pedroza had just arrived at the airport and was, in fact, transporting contraband. Castro's intent to distribute the heroin can be gleaned from the large amount of the heroin. Because a rational jury could have found that Castro knowingly possessed the heroin with the intent to distribute, the evidence was sufficient to sustain the guilty verdict.

B. Admission of Hearsay Evidence

Castro contends that the district court reversibly erred in admitting hearsay evidence concerning the key found when the officers conducted a pat-down search at the time of arrest. This Court reviews a district court's admission of hearsay evidence under the heightened abuse of discretion standard. *United States v. Triplett*, 922 F.2d 1174, 1180 (5th Cir.), *cert. denied*, 500 U.S. 945 (1991). Hearsay testimony erroneously admitted which is simply cumulative of other evidence admitted at trial is harmless error. *See United States v. Pineda-Ortuno*, 952 F.2d 98, 106 (5th Cir.), *cert. denied*, 112 S. Ct. 1990 (1992).

The district court erroneously admitted Agent Moran's testimony that Agent Gessner told him that the key found in the pat-down of Castro opened the door of the Harwin apartment. However, Agent Williams had previously testified that he personally

observed Agent Gessner open the locked door to the Harwin apartment with the key seized from Castro. Due to the fact that Agent Moran's hearsay testimony was simply cumulative of Agent Williams' proper testimony, any error in its admission was harmless.

C. "Deliberate Ignorance" Jury Instruction

Castro's final contention is that the district court should not have given a "deliberate ignorance" instruction to the jury.⁶ Castro claims that the instruction was prejudicial in view of the lack of any evidence that Castro knew that the luggage contained heroin. The Government admits that the trial court erred in giving the "deliberate ignorance" jury instruction, but maintains that the error did not rise to the level of plain error.

Castro did not object to the district court's "deliberate ignorance" instruction to the jury. Thus, the plain error standard of review applies. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1266 (1995). Under FED. R. CRIM. P. 52(b) this Court may correct forfeited errors only when the appellant shows the following facts are present: (1) there is an error, (2) the error is clear or obvious, and (3) the error affects the substantial rights of the defendant. *Id.* If these factors are established, the decision to correct the

⁶The "deliberate ignorance" instruction given by the trial court was as follows:

"Knowingly" means that an act was done voluntarily and not because of mistake or accident. "Willfully" means an act was done with a conscious purpose to violate the law. *A defendant can still be found to have acted knowingly or wilfully if he closed his eyes on purpose to avoid learning all of the facts.*
Record at 164 (emphasis added).

forfeited error is within the sound discretion of the Court, and the Court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993).

This Court allows the "deliberate ignorance" instruction so long as sufficient evidence supports its insertion into the charge. *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). The instruction is properly given when the facts support an inference that: (1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct. *Id.* at 951. However, where there is no evidence of conscious ignorance, the jury will not attribute negligence to the defendant. *United States v. Cartwright*, 6 F.3d 294, 301 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 671 (1994). In such circumstances, the deliberate indifference instruction is mere surplusage and, thus, does not create a risk of prejudice. *Id.* Additionally, error in giving the deliberate ignorance instruction is also harmless where there is substantial evidence of actual knowledge. *Id.*

In the case at bar, the giving of the "deliberate ignorance" instruction did not amount to plain error. There was sufficient evidence to indicate that Castro had a subjective awareness that he was involved in illegal activity. Such subjective awareness can be gleaned from: Castro's statements to Pedroza immediately following

his arrest; his reconnaissance activities in orchestrating the drug rendezvous; his use of a false name to authorities; his possession of the key to the Harwin apartment; and his implausible explanation of his actions. Additionally, no evidence was present from which the jury could have found negligence or "deliberate indifference" alone to be the basis for Castro's conviction. While the giving of the "deliberate ignorance" jury instruction may have been error, Castro has not met his stringent burden of showing that there has been such a grave miscarriage of justice as to rise to the level of plain error.

III. Conclusion

There was more than sufficient evidence from which the jury could have convicted Castro of possession with intent to distribute heroin. Additionally, any hearsay erroneously admitted by the trial court was cumulative of other testimony; therefore, its admission constituted harmless error. Finally, the giving of the "deliberate ignorance" instruction by the trial judge to the jury does not rise to the level of plain error so as to constitute a reversal ground. Therefore, the decision of the district court is affirmed in full.

AFFIRMED.