IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50644
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS MANUEL AGUIRRE-MIRAMONTES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(3:94-CR-14-2)

(June 14, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

In this direct criminal appeal from a jury conviction on various drug charges implicating violations of 21 U.S.C. §§ 841, 846, 952, 960 and 963, Defendant-Appellant Jesus Manuel Aguirre-

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Miramontes seeks reversal on grounds (1) that the district court erred in denying motions for judgment of acquittal, and (2) insufficiency of the evidence. For the reasons set forth below, we affirm.

I

FACTS AND PROCEEDINGS

A four-count indictment charged Aguirre-Miramontes with conspiracy to import marijuana (Count One), importation of marijuana (Count Two), conspiracy to possess with intent to distribute marijuana (Count Three), and possession with intent to distribute marijuana (Count Four). A jury trial ensued. At the close of the government's case and again at the close of all the evidence, Aguirre-Miramontes moved for a judgment of acquittal on all counts, urging that the evidence was insufficient to establish his knowledge of the conspiracies and of the marijuana in the car in which he was a passenger when arrested. The district court denied the motions in both instances.

A unanimous jury found Aguirre-Miramontes guilty as charged on each count. Following his conviction, Aguirre-Miramontes filed a written motion for judgment of acquittal on all counts, which motion the court denied.

At trial, a U.S. Customs Inspector, Juan Aguilar, testified that at 7:15 a.m. on December 7, 1993, co-defendant Chaparro drove a cream-colored Audi, in which Aguirre-Miramontes was a passenger, across the border from Mexico into the United States. Aguilar noticed that Chaparro appeared very nervous, kept looking at

Aguirre-Miramontes, and visibly trembled during routine questioning. In response to Aguilar's questions, Chaparro stated that the car belonged to him and that he and Aguirre-Miramontes had come from Juarez, where they had spent the night. When Aguilar asked Chaparro to open the trunk of the car, however, neither he nor Aguirre-Miramontes was able to locate the trunk release, and Chaparro mistakenly opened the hood of the car. Aguilar then asked Chaparro to exit the car and open the trunk with the key. Chaparro's hands shook so that he was unable at first to insert the key into the lock. He then used both hands in an effort to insert the key but, despite several attempts, was never able to open the trunk. Chaparro then stepped away from the trunk and said, "It's not my car."

By that time, Aguirre-Miramontes had exited the car and, despite being ordered to remain in the car, proceeded to the back of the car in an attempt to open the trunk. He, too, was unable to open it. When Aguilar ordered Aguirre-Miramontes to get back into the car and Aguirre-Miramontes moved toward the inside of the vehicle, he paused and looked at Chaparro who had retrieved the key from the trunk area and was also heading back towards the inside of the car. At that point, Aguilar grabbed Chaparro and took the key. Aguilar then called the canine enforcement agents for assistance and had the co-defendants and the car moved to the secondary inspection area.

Before the car was searched, Irma Rayas, a customs inspector, asked Chaparro who owned the car. Instead of responding, Chaparro

hesitated and looked to Aguirre-Miramontes who then answered that the car belonged to one Francisco Ortiz. Shortly thereafter a dog alerted, indicating that narcotics might be located in the area of the rear seat of the car. A search and field test revealed that the car contained approximately 204 pounds of marijuana in a hidden compartment.

While Chaparro and Aguirre-Miramontes were being interviewed they continuously avoided eye contact. Aguirre-Miramontes "appeared scared but cooperative." After he was advised of his constitutional rights, he indicated that he wished to make a statement. He explained that the car belonged to a Mexican drug dealer named either Salvador or Ortiz, but he denied any knowledge that the car presently contained drugs. He also offered to provide information regarding other drugs scheduled to come into the United States in exchange for his immediate release. When asked his purpose in entering the United States, Aguirre-Miramontes replied that he came to purchase a pair of pants. He first stated that he had met Chaparro that morning, but at another time during the interrogation indicated that he and Chaparro were staying at the El Galista Hotel in Juarez. Aguirre-Miramontes also admitted having seen Ortiz the day before at the Galista Hotel.

II

ANALYSIS

Aguirre-Miramontes contends that the government failed to prove that he had knowledge of the conspiracy or that he knowingly participated in the substantive offenses of importation and

possession with intent to distribute marijuana. He argues that the circumstantial evidence offered by the government as proof of "suspicious circumstances" was insufficient to show that he exercised dominion and control over the drugs or that he played a role in bringing the marijuana from a foreign country. He reasons that only by piling inference upon inference could the jury reach such an unreasonable decision.

The standard of review for a challenge to the denial of a motion for judgment of acquittal is the same as that for sufficiency of the evidence: whether a reasonable trier of fact could have found that the evidence established the defendant's guilt beyond a reasonable doubt. United States v. Stephens, 964 F.2d 424, 427 n.8 (5th Cir. 1992). When the sufficiency of the evidence is challenged, we review the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). The jury is in a unique position to determine the credibility of witnesses, so we defer to the jury's resolutions of conflicts in the evidence. United States v. Layne, 43 F.3d 127, 130 (5th Cir.), cert. denied, 115 S. Ct. 1722 (1995).

Possession with Intent to Distribute and Importation

A conviction for possession of drugs with intent to distribute requires proof that the defendant knowingly possessed contraband with the intent to distribute it. United States v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990) (citations omitted). A

conviction for importation requires proof of similar elements. United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 113 S. Ct. 1291 (1993). In addition, importation requires proof that the defendant played a role in bringing the controlled substance from a foreign country into the United States. Id.

The prosecution may prove actual or constructive possession by direct or circumstantial evidence. United States v. Quiroz-Hernandez, 48 F.3d 858, 865 (5th Cir. 1995). To show constructive possession, mere proximity to the drugs is not enough; the government must show that the defendant controlled or had the power to control, the vehicle or the drugs. Id. "Knowledge of the presence of contraband may ordinarily be inferred from the exercise of control over the vehicle in which it is concealed." United States v. Garcia, 917 F.2d 1370, 1376-77 (5th Cir. 1990). When the drugs are contained in a hidden compartment, however, we require "additional evidence indicating knowledge--circumstances evidencing a consciousness of guilt on the part of the defendant." Diaz-Carreon, 915 F.2d at 954 (citations omitted). Circumstances such as nervousness, conflicting statements to inspection officials, and an implausible story may adequately establish consciousness of guilt. Id.

Here, the government had to prove "some nexus between [Aguirre-Miramontes] and the prohibited substance." United States v. Gordon, 700 F.2d 215, 217 (5th Cir. 1983). Although the car was equipped with a hidden compartment containing 204 pounds of

marijuana, Aguirre-Miramontes was not the driver. On the other hand, the driver, Chaparro, repeatedly glanced at Aguirre-Miramontes as though seeking consent or instructions; and Aguirre-Miramontes got out of the car, took the keys from Chaparro, and attempted to open the trunk. A reasonable inference is that Aguirre-Miramontes was actually the one in control even though he was being "chauffeured" by Chaparro.

The evidence presented by the government in this case is susceptible of the suggestion that Aguirre-Miramontes had knowledge of the presence of drugs in the car. As noted, Aguirre-Miramontes was traveling in a car that he knew was owned by a Mexican drug dealer. At first, he identified the owner as Ortiz, and later he identified the owner as either Salvador or Ortiz. Aguirre-Miramontes admitted that he had seen Ortiz at the hotel where he and Chaparro were staying, and offered information about other drugs scheduled to come into the United States. Chaparro looked to Aguirre-Miramontes when asked for information, and on at least one occasion Aguirre-Miramontes answered for Chaparro. Aguirre-Miramontes voluntarily exited the car in an attempt to open the trunk despite the inspector's instructions to remain inside.

Nervous behavior, inconsistent statements, and less than plausible explanation may constitute persuasive evidence of guilty knowledge. Diaz-Carreon, 915 F.2d at 954-55. Absent other facts suggesting that such conduct derives from a conscious awareness of criminal behavior, however, evidence of this type of behavior is not enough to establish guilty knowledge. Id.

The government contends that Aguirre-Miramontes acted nervously when he answered questions posed to Chaparro, exited the car to open the trunk despite being told to remain inside, and offered to provide information about other drug shipments to the United States in exchange for his release. Also, inspection officials testified that Aguirre-Miramontes avoided eye contact and appeared "scared." And the government notes that Aguirre-Miramontes provided inconsistent statements and an implausible story, and that taken as a whole, the facts support the jury's verdict.

Aguirre-Miramontes did provide conflicting information, first stating that he had met Chaparro on the morning of their arrest, but admitting later that they were staying at the same hotel in Juarez. Similarly, Aguirre-Miramontes first stated that the car belonged to Francisco Ortiz and later said that the car belonged to a Mexican drug dealer named either Salvador or Ortiz. Aguirre-Miramontes knew that Chaparro did not own the car; yet, he remained silent when Chaparro lied.

The above facts are capable of demonstrating suspicious knowledge or guilt. Whether, when combined with presence as a passenger in the car, they provide sufficient indicia of guilt for the jury to convict Aguirre-Miramontes of possession is admittedly a fairly close question. Given the deferential standard of review applicable to jury findings, however, we are not prepared to say that the evidence is insufficient to support the verdict in this case.

Conspiracy

The government had to "demonstrate that a conspiracy existed and that [Aguirre-Miramontes] knew of and voluntarily participated in the conspiracy." United States v. Chavez, 947 F.2d 742, 744-45 (5th Cir. 1991). Direct evidence of a conspiracy is unnecessary; each element may be inferred from circumstantial evidence. United States v. Cardenas, 9 F.3d 1139, 1157 (5th Cir. 1993), cert. denied, 114 S. Ct. 2150 (1994). An agreement may be inferred from a "concert of action." Id.; United States v. Natel, 812 F.2d 937, 940 (5th Cir. 1987). Knowledge of a conspiracy and voluntary participation in a conspiracy may be inferred from a "collocation of circumstances." United States v. Espinoza-Seanez, 862 F.2d 526, 537 (5th Cir. 1988).

Aguirre-Miramontes was in the car with the marijuana; Chaparro looked to Aguirre-Miramontes for answers and Aguirre-Miramontes interjected himself by answering questions posed to Chaparro by the agents. Aguirre-Miramontes stated that the car was owned by a Mexican drug dealer and he knew of other drug shipments to the United States. Aguirre-Miramontes admitted staying at the same hotel with Chaparro and having met the drug dealer, Ortiz, there. Having concluded that the jury verdict convicting Aguirre-Miramontes of possession and importation charges must stand, there can be no question of an overt act in furtherance of the activity of the conspiracy.

Although presence at the crime scene alone is insufficient to support an inference of participation in a conspiracy, "the jury

may consider presence and association, along with other evidence, in finding conspiratorial activity by the defendant." Chavez, 947 F.2d at 745. Again, the question whether the government presented sufficient "other evidence" to enable a reasonable jury to convict Aguirre-Miramontes on the conspiracy charges is close, but is one that is nevertheless supportable by the evidence presented to the jury, and the reasonable inferences to be drawn therefrom.

We conclude, therefore, that Aguirre-Miramontes' conviction by the jury on all counts, and the district court's judgment and sentence based thereon, are sustainable and, in all respects, are AFFIRMED.