UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60286

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID GUTIERREZ-GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR L 93 212 1)

August 29, 1995

Before KING and JONES, Circuit Judges, and LAKE, District Judge[*]

By EDITH H. JONES, Circuit Judge:[**]

David Gutierrez-Garcia challenges as a matter of law the sufficiency of the evidence supporting his conviction for conspiracy to possess marijuana with intent to distribute. Although some triers-of-fact might have hesitated to convict appellant, we cannot conclude that a rational trier-of-fact could not have deduced that he was guilty beyond a reasonable doubt of

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[*] District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the drug conspiracy.[1] Because the circumstantial evidence did not merely "plac[e] the defendant in a climate of activity that reeks of something foul,"[2] but refuted or undermined the plausibility of any innocent explanation for Gutierrez's behavior, we affirm his conviction.

I.

On appeal Gutierrez's seeks refuge in this circuit's long line of cases holding that "mere presence at the scene of the crime or a close association with a co-conspirator alone cannot establish voluntary participation in a conspiracy." United States v. Cardenas, 9 F.3d 1139, 1157 (5th Cir. 1993) (citations omitted). Yet "[i]n most cases . . . the evidence establishes not mere presence but presence under a particular set of circumstances. In such a case, the task of determining the sufficiency of the evidence is not ordered by the ritualistic invocation of the 'mere presence' rubric." United States v. Medina, 887 F.2d 528, 531 (5th Cir. 1989) (citation omitted) (omission in original). Instead we scrutinize all of the evidence in the light most favorable to the government to insure that the defendant was not merely the unfortunate victim of time and circumstance. If, however, *any* rational trier-of-fact[3] could decide beyond a reasonable doubt that

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[1] Our "review concentrates on whether the trier-of-fact made a rational decision to convict or acquit, not whether the fact finder correctly determined the defendant's guilt or innocence." Jaramillo v. United States, 42 F.3d 920, 923 (5th Cir.).

[2] United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992) (internal 1994) quotation omitted)).

[3] See Jackson v. Virginia, 443 U.S. 307 (1979).

the defendant was in the "right" place at the "right" time the jury's verdict prevails.

Hence "presence . . . is a factor that, along with other evidence, may be relied upon to find conspiratorial activity by the defendant." United States v. Cardenas, 9 F.3d 1139, 1157 (5th Cir. 1993) (citations omitted). Here Gutierrez was found standing a few feet in front of a Chevy Blazer as at least nine individuals carrying bundles over their shoulders scurried back and forth. These spray-painted-black bundles contained more than 660 pounds of marijuana with a street value of at least $280,000 and were being transported along a trail, over a private fence, and at least 400 feet into the property of a private ranch ("Mendoza Ranch"). Moments before his arrest, Gutierrez was observed by two Border Patrol agents within a few feet of at least four of these individuals with the double-sided bundles dropped around their necks.[4] Moreover, when law enforcement personnel announced their presence, a single bundle was dropped directly in front of Gutierrez's confirmed locale in front of the Blazer.[5]

These events all transpired at approximately 9:00 p.m. the evening of November 21, 1993. Earlier, at about 7:30 p.m., two agents had observed this black Blazer approach the gate to the private ranch (the "Mendoza gate.") They heard someone step out of

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[4] A government exhibit placed three to four of these couriers within virtual arms-length of Gutierrez.

[5] The proximity of the dropped bundle to the defendant was apparent from a government photo capturing the bundle directly in front of the Chevy's front license plate.

the Blazer and open an unlocked gate. Next, they observed a second person get out of the vehicle, heard the gate being closed, and for three to four minutes listened to the clanking of a chain being wrapped around the gate and locked. This surprised the agent, who had never known the gate to be locked before, and noted that there was no lock for the gate. Later, Gutierrez would admit to entering the Mendoza gate in the Blazer.

Combining the testimony of Agents Campos and Simpson[6] with Gutierrez's own account[7] removes this case from the "mere presence" line of cases. In United States v. Medina, 887 F.2d 528, 533 (5th Cir. 1989), this court held that a defendant's "knowledge of the marijuana could easily be inferred from his entering a secluded area just after the van entered and remaining for 20 minutes, during which time 27 bundles of marijuana weighing in total 650 pounds were loaded into the van." Testimony at trial confirmed that this area was "generally isolated," fenced-off and locked to the outside world, during which time 22 bundles weighing 660 pounds were transported within feet of Gutierrez. Further, an immigration agent confirmed that a vehicle with the Blazer's license plates had crossed the bridge from Mexico at 7:19 p.m. that evening.

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[6] Their testimony must be credited in its entirety. United States v. Anderson, 933 F.2d 1261, 1274 (5th Cir. 1991) (this court "accept[s] all credibility choices that tend to support the jury's verdict"); United States v. Zuniga, 18 F.3d 1254, 1260 (5th Cir.), cert. denied, 115 S. Ct. (1994)) ("We will not second guess the jury in its choice of which witnesses to believe.")

[7] We also discuss his account in greater detail.

Accordingly, Gutierrez is tied to a vehicle that crossed from Mexico, headed straight to a remote area,[8] stopped to "[ab]normally lock" the gate, patiently waited at night for a group of walkers to arrive with heavy bundles obviously spray-painted black, in a private ranch with no residence in the vicinity. This inference of knowledge and participation is compounded by appellant's physical and temporal proximity to these core illegal activities. Innocent outsiders presumably are not welcome to observe drug conspirators demonstrate their capacities for mass movements. See United States v. Pruneda-Gonzalez, 953 F.2d 190, 196-97 (5th Cir. 1992) ("We think it a reasonable reference . . . that the [other] defendants would not have permitted [Gutierrez] to accompany them in performing tasks total to the success of the crimes -- undertaken within so close a time frame as to indicate knowledge of, and intentional participation in, crimes in progress -- had [he] not knowingly and intentionally joined the venture.")[9]

Significantly, the jury could be quite confident -- and not merely speculate -- about the drug conspirators' aversion to uninvited company. A few moments earlier, agent Campos -- posing as an illegal alien -- was asked to leave despite the fact that he answered in Spanish -- apparently convincingly -- that he was an illegal looking for a job in the North.

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[8] Testimony at trial suggested that the trip from the Columbia Bridge to the ranch would take nine minutes if the speed limit were observed. The agents placed the Blazer at the Mendoza gate at about 7:30 p.m. in their reports prior to any knowledge of a computer check revealing the 7:19 p.m. time of crossing.

[9] This argument did not surface post-hoc; the district court advised counsel that the jury would be allowed to deduce this, but that the agent couldn't directly testify to this.

Nor, of course, may this court neglect the ludicrous account of the evening proffered by Gutierrez. "An implausible account of the events provides persuasive circumstantial evidence of the defendant's consciousness of guilt." United States v. Rodriguez, 993 F.2d 1170, 1176 (5th Cir. 1993). Allegedly, Gutierrez crossed the border not in the Blazer travelling across a bridge but by swimming the Rio Grande River. At that point, he stated that he changed at a house near the river, then was picked up by the driver of the Blazer, who had been hired to smuggle him to San Antonio. (The agents contrasted his "very clean[ly] dressed" look, neat and dry appearance, and a smell of cologne with the look of all others at the scene which were "scrappy," "sweaty", and "sticky" as well as wearing tennis shoes.[10]) His story about changing and cleaning up in the house is dubious in light of timing established by law enforcement testimony; although no residential house is located in the vicinity of the Mendoza property, the Blazer crossed the bridge at 7:19 p.m. and was spotted at the gate by 7:30 p.m. Because the direct trip itself takes nine minutes, little-if-any time was possible for a detour to an unspecified locale.[11]

Moreover, a paper bus ticket found in Gutierrez's pocket upon arrest and introduced into evidence was completely undamaged

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[10] Agent Campos observed that "aliens . . . when they cross they small like river water and they're all sweaty because they have to walk a long ways."

[11] Indeed, testimony viewed in the light most favorable to the government, Gutierrez claimed to have crossed the river at a location 24 miles -- and about a 43 minute drive -- from the Mendoza gate.

and showed no signs of water affecting its print or texture. Further, the conspicuous gold chain around Gutierrez's neck hardly comports with an unemployed worker smuggling himself to San Antonio.

Taken cumulatively, the evidence supports a verdict inferring that Gutierrez acted in concert with the other smugglers. Each little piece may not have devastated the defense but often "[c]ircumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." United States v. Roberts, 913 F.2d 211, 218 (5th Cir. 1990), cert. denied, 111 S. Ct. 2264 (1991).

No doubt exists that here *some* drug conspiracy operated. Once evidence of an illegal conspiracy is established, "only slight evidence" is needed to connect an individual to that conspiracy. United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir. 1994). "Among the factors that may be considered by the factfinder in determining whether a defendant is guilty of committing a drug conspiracy crime are 'concert of action,' presence among or association with drug conspirators, and 'evasive and erratic behavior'." Id. at 1552 (citation omitted). The government adduced evidence on all these counts, and more.[12]

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[12] Mr. Gutierrez exhibited further bizarre behavior that the jury was entitled to consider:

a. Upon arrest, his demeanor was characterized as "unusual[ly]" "bold and cocky;"

b. He yelled three or four times at the arresting agent to "Search me. Search me;" and

c. He likely made these comments in English; but during the booking process back at the office claimed to speak only in Spanish.

For the foregoing reasons, Mr. Gutierrez's conviction is **AFFIRMED**.