

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-60555  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PLUTARCO CRUZ-HERNANDEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Southern District of Texas

(94-CR-36-3)

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November 2, 1995

Before GARWOOD, WIENER, and PARKER, Circuit Judges.

PER CURIAM\*:

Appellant Plutarco Cruz-Hernandez ("Cruz") was convicted of conspiracy to possess with intent to distribute, possession with intent to distribute, conspiracy to import, and importation of more than 100 kilograms of marijuana. Although not challenging all of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his convictions on appeal, Cruz contends that there was insufficient evidence to support his convictions for conspiracy to import marijuana and importation of marijuana. Finding no error, we affirm.

#### FACTS

On February 3, 1994, buried sensors on an uninhabited peninsula area on the banks of the Rio Grande signaled the presence of persons traversing the location. The electronic sensors notified the sector headquarters of the United States Border Patrol. Border Patrol Agent Michael Hester ("Hester"), who was undercover at the time, responded to the information.

Upon arriving at the location, Hester observed a number of persons cultivating an onion field near the peninsula. He observed the presence of several vehicles that were parked in a manner that was consistent with a starting point for the workers to engage in their field duties. However, he also noticed a truck that was more isolated and parked in the brush along the riverbank, near a "tractor cut"<sup>1</sup>. It was Hester's experience as a Border Patrol agent that tractor cuts are commonly used as crossing points for contraband because they provide easy access to the areas above the river.

As Hester approached the truck parked near the river he observed several people entering the brush on the river's edge and returning to the truck. He estimated the distance from the parked

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<sup>1</sup>Agent Hester testified that a "tractor cut" is created to permit a tractor or other vehicle to back down to the river edge and to facilitate the pumping of water for irrigation.

truck to the river to be approximately twenty feet. As he got closer he could see that the individuals were retrieving bundles from the brush and tossing them into a crate that was placed in the back of the truck. When he reached a distance of approximately thirty-five yards from the truck, Hester counted five persons.

His approach caused two of the men to dive into the brush, and the other three boarded the truck and began to drive away. Hester followed the truck down the road and called other agents to intercept the truck. Shortly thereafter, Agents Pete Martinez ("Martinez") and Gilbert Rodriguez stopped the truck. Cruz was found seated inside the truck, between the other two occupants.

A search of the truck revealed approximately 890 pounds of marijuana inside the cab of the truck and inside the crate in the back. Cruz and the other occupants, Jesus Villarreal ("Villarreal") and Juan Carlos Vasquez ("Vasquez"), were arrested and transported to the Border Patrol station.

Subsequent to his arrest, Cruz was interviewed by the border patrol agents. During the interview Cruz admitted that he had entered the United States illegally from Mexico. However, Cruz told the agents that he was not involved in loading the truck, but that he had crossed the river and hitched a ride with Villarreal and Vasquez.

During the interview, the agents noticed that Cruz' pants and the shoulder, arm, and chest of his jacket were smeared with a blue detergent stain. A subsequent investigation revealed that the marijuana found in Cruz' possession was covered with blue detergent

powder, a masking agent used to conceal the odor of marijuana. The agents also observed that Cruz' shoulder was significantly wet, which, in their opinion, was consistent with an object that had been permitted to soak on the jacket in that location for a prolonged period of time. Cruz told the agents that the clothes he was wearing were not his. He claimed that his clothes had been stolen from him in Mexico before he crossed the Rio Grande. He said that the person who had stolen his clothes then gave him the clothes that he was currently wearing.

PROCEEDINGS BELOW

Cruz, Villarreal, and Vasquez were indicted on March 1, 1994, in the Southern District of Texas, Houston Division, and charged with conspiracy to import more than 100 kilograms of marijuana (count one),<sup>2</sup> knowingly and intentionally importing more than 100 kilograms of marijuana (count two),<sup>3</sup> conspiracy to possess with the intent to distribute more than 100 kilograms of marijuana (count three),<sup>4</sup> and knowingly and intentionally possessing with the intent to distribute more than 100 kilograms of marijuana (count four).<sup>5</sup> Following a two-day jury trial concluding on May 24, 1994, Cruz was convicted of all counts.

On July 29, 1994, Cruz was sentenced to concurrent 63-month

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<sup>2</sup>See 21 U.S.C. §§ 952(a), 960(b)(2) and 963.

<sup>3</sup>See 21 U.S.C. §§ 952(a), 960(b)(2) and 18 U.S.C. § 2.

<sup>4</sup>See 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846.

<sup>5</sup>See 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 18 U.S.C. § 2.

terms of imprisonment. He was ordered to serve concurrent four-year terms of supervised release under each count of conviction and ordered to pay \$200 in mandatory cost assessments. Cruz then perfected this appeal.

#### DISCUSSION

Cruz challenges the sufficiency of the evidence supporting his convictions for conspiracy to import marijuana and importation of marijuana.<sup>6</sup> In reviewing the sufficiency of the evidence, we view all evidence, and all inferences to be drawn from this evidence, in a light most favorable to the verdict. *United States v. Ornelas-Rodriguez*, 12 F.3d 1339, 1344 (5th Cir. 1994). The defendant's conviction should be affirmed "if the evidence so viewed would permit a rational jury to find all elements of the crime proven beyond a reasonable doubt." *Id.* (quoting *United States v. Roberson*, 6 F.3d 1088, 1093 (5th Cir. 1993)). This court will reverse a conviction, however, "if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." *Id.* (internal quotation marks and citations omitted).

Cruz contends that the Government failed to establish that the marijuana was imported from Mexico or that he helped with the alleged importation. He maintains that the marijuana bundles were never observed in Mexico, that the packaging of the bundles did not indicate a Mexican origin, and that the evidence adduced only that

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<sup>6</sup>Cruz does not challenge his convictions for conspiracy to possess with intent to distribute, or possession with intent to distribute marijuana. See blue brief, 10 n.5; R. 1., 81-82.

his codefendant, Vasquez, agreed to meet on the river's edge to load the marijuana. He maintains that the Government asked the jury to infer importation only from the marijuana's proximity to the Mexican border.

A conviction for importation of marijuana must be supported by evidence, direct or circumstantial, that the defendant played a role in bringing the marijuana from a foreign country. *See United States v. Rojas-Martinez*, 968 F.2d 415, 420-21 (5th Cir. 1992). In this case, Cruz's codefendant, Vasquez, testified that Cruz was present when he and codefendant Villarreal arrived at the scene and that Cruz helped load the truck. Vasquez also testified that he had never seen Cruz before that day. Cruz was travelling in the truck with the marijuana when the agents stopped it. Cruz had detergent stains corresponding to the detergent found on the marijuana on the shoulder of his jacket. Cruz admitted to illegally crossing the border. His pants were wet at the time he was arrested. The truck was parked on the edge of the brush near a tractor cut. Agent Hester testified that tractor cuts are typically used to move contraband from Mexico into the United States. The men were seen retrieving bundles from the brush near the river and loading them into the truck. Viewing the evidence and the inferences that could have been drawn from it in the light most favorable to the verdict, we hold that a rational jury could have found that Cruz imported marijuana into the United States.<sup>7</sup>

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<sup>7</sup>The following cases provide guidance for determining whether the evidence in the instant case is sufficient to support Cruz' convictions. *United States v. Rojas-Martinez*, 968 F.2d 415 (5th

In order to establish that a conspiracy to import marijuana existed the Government had to prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator participated in the conspiracy. *United States v. Puig-Infante*, 19 F.3d 929, 936 (5th Cir.), *cert. denied*, 115 S. Ct. 180 (1994). 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. (1994). "An agreement may be inferred from concert of action, participation from a collocation of circumstances, and knowledge from surrounding circumstances." *United States v. Sanchez*, 961 F.2d 1169, 1174 (5th Cir.), *cert. denied*, 113 S. Ct. 330 (1992) (internal quotation and citation omitted).

Agent Hester testified he observed five men loading bundles into a truck on the edge of the Rio Grande River. Hester saw three individuals board the truck and begin to drive away. Cruz was arrested in the same truck along with 890 pounds of marijuana. Furthermore, Vasquez testified at trial, pursuant to a plea agreement, and identified Cruz as one of the men who helped load the truck.

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Cir.), *cert. denied*, 113 S. Ct. 828 (1992), and *cert. denied* 113 S. Ct. 995 (1993), *United States v. Rosalez-Orozco*, 8 F.3d 198 (5th Cir. 1993), *United States v. Cardenas Alvarado*, 806 F.2d 566 (5th Cir. 1986).

"The uncorroborated testimony of an accomplice or co-conspirator will support a conviction . . . [as long as the] testimony is not incredible or otherwise insubstantial on its face." *United States v. Singer*, 970 F.2d 1414, 1419 (5th Cir. 1992). The rule applies even if the accomplice or coconspirator testified pursuant to a plea agreement with the Government. *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991). "[T]estimony generally should not be declared incredible as a matter of law unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature." *Id.* Vasquez's testimony was not incredible as a matter of law.

Once the Government has produced evidence of a conspiracy, only "slight" evidence is needed to connect an individual to that conspiracy. *United States v. Duncan*, 919 F.2d 981, 991 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2036 (1991). Although "[m]ere presence at the crime scene is insufficient to support an inference of participation in the conspiracy . . . the jury may consider presence and association, along with other evidence, in finding conspiratorial activity by the defendant." *United States v. Chavez*, 947 F.2d 742, 745 (5th Cir. 1991). The jury was free to reject Cruz's explanation that he was just hitching a ride and accept the Government's explanation of why Cruz was in the truck. *See United States v. Garza*, 990 F.2d 171, 175 (5th Cir.), *cert. denied*, 114 S. Ct. 332 (1993) (jury is free to reject defendant's explanation and to accept the government's version). "[A] less



than credible explanation' is part of the overall circumstantial evidence from which knowledge may be inferred." *United States v. Arzola-Amaya*, 867 F.2d 1504, 1512 (5th Cir.) (citation omitted), *cert. denied*, 110 S. Ct. 322 (1989).

Viewing the evidence in a light most favorable to the verdict, we find that the jury could reasonably infer that Cruz not only had imported marijuana, but that he had conspired with Villareal and Vasquez to accomplish this goal.

#### CONCLUSION

For the foregoing reasons, Cruz' convictions for conspiracy to import and importation of marijuana are AFFIRMED.