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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 14, 2023
Lyle W. Cayce
Clerk

No. 21-51125

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

FRANCISCO MORA-CARRILLO,

Defendant—Appellant,

CONSOLIDATED WITH

No. 21-51126

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GRACIANO MORAL-CARRILLO,

Defendant—Appellant.

No. 21-51125
c/w No. 21-51126

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 4:17-CR-282-1,
4:21-CR-237-1

Before JONES, STEWART, and DUNCAN, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

Francisco Mora-Carrillo was convicted of illegally reentering the country after a previous deportation, in violation of 8 U.S.C. § 1326(a) & (b)(2). He claims that the district court wrongly denied his request for a jury instruction about duress and inappropriately applied an enhancement to his sentence for obstruction of justice. Finding no such errors, we AFFIRM.

I. BACKGROUND

Mora is a Mexican national. Beginning in the early 1990s, Mora built a substantial criminal record in the United States, including convictions for burglary, assault, drug possession, and driving under the influence. In 1992, he was deported to Mexico for the first time. Yet he repeatedly returned to this country, as evidenced by his ever-growing criminal record. He was deported again in 1993, 1999, 2004, and 2007.

In 2007, only months after his last deportation, Mora was arrested in the United States and pled guilty to aiding and abetting possession with intent to distribute marijuana. He now claims that La Linea, a Mexican drug cartel, had threatened to kill him unless he smuggled the drugs into the United States. The district court sentenced him to 51 months in prison followed by three years of supervised release. After Mora's incarceration, he was deported to Mexico two more times—in 2012 and 2019.

On March 1, 2021, Mora was arrested for the instant offense. He was caught smuggling four other illegal aliens across the border. When arrested,

he gave the false name of Graciano Moral-Carrillo, and stated that he was not afraid to return to Mexico.

At trial, Mora pled not guilty. He sought to convince the jury that, while he was in Mexico in both 2017 and 2020, La Linea had kidnapped and beaten him for his cooperation with United States officials related to the 2007 drug trafficking conviction. In late February 2021, he testified, La Linea kidnapped him in Mexico again, took the deed to his house, and told him to smuggle people across the border if he "wanted everything to be all right." He understood this as a death threat. He also presented corroborating testimony from his sister that he had disappeared in 2017, later to be found in the United States, and from his employer that Mora had been kidnapped and beaten by La Linea in 2020, and then gone missing again "more or less in February" 2021. On the basis of this evidence, Mora requested that a duress instruction be given to the jury. The district court denied the request but allowed the evidence to be used to show a lack of intent.

The jury found Mora guilty. The district court applied U.S.S.G. § 3C1.1, a sentencing enhancement for obstruction of justice, on the premise that Mora lied to the court during his testimony. The court sentenced him to 105 months of imprisonment. The district court also revoked Mora's supervised release for a 2017 illegal reentry conviction and sentenced him to 18 months of imprisonment to be served concurrently with his conviction for the 2021 reentry.

Mora appeals the conviction and the revocation of his supervised release. However, he has not briefed any arguments specific to the revocation.

II. Discussion

Mora challenges (1) the district court's denial of his request for a jury instruction about duress; (2) the application of the obstruction-of-justice

enhancement; and (3) the constitutionality of 8 U.S.C. § 1326(b), his statute of conviction. None of the challenges succeeds.

A. The Duress Instruction

We review a district court's denial of a requested jury instruction for abuse of discretion. *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994). Reversible error only arises where "(1) the requested instruction is substantially correct; (2) the actual charge given to the jury did not substantially cover the content of the proposed instruction; and (3) the omission of the instruction would seriously impair the defendant's ability to present his defense." *Id.* In conducting this review, we take the evidence in the light most favorable to the defendant. *United States v. Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996).

Duress is an affirmative criminal defense that consists of four elements:

> *First*: That the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded fear of death or serious bodily injury to himself . . . ;
>
> *Second*: That the defendant had not recklessly or negligently placed himself . . . in a situation where he . . . would likely be forced to choose the criminal conduct;
>
> *Third*: That the defendant had no reasonable legal alternative to violating the law, that is a reasonable opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and

> *Fourth*: That a reasonable person would believe that by committing the criminal action, he . . . would directly avoid the threatened harm.

5th Cir. Pattern Jury Instructions (Criminal Cases) § 1.38 (2019).

The defendant must present proof of each element to receive a jury instruction on duress. *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998). This court's precedents "make it clear that the defense only arises if there is a real emergency leaving no time to pursue any legal alternative." *Id.* at 874. "Any rule less stringent than this would open the door to all sorts of fraud." *The Diana*, 74 U.S. 354, 361 (1868). The defendant must be in serious danger "at the moment" he commits the offense; fear of future harm is insufficient. *United States v. Harper*, 802 F.2d 115, 118 (5th Cir. 1986); *see also United States v. Ramirez-Chavez*, 596 F. App'x 290, 293 (5th Cir. 2015).

Even taking the evidence in the light most favorable to Mora, he has not presented proof that he was in danger at the moment of his offense. He testified that he was abducted on February 24 or 25 and told to smuggle people across the border if he "wanted everything to be all right." He crossed the border on March 1, at least four days later. During his jury trial, Mora never presented evidence—even in his own testimony—of what happened in the meantime. Thus, there is no reason to believe that he was detained, followed, or surveilled in the interim between his abduction and the commission of the offense.[1] In other words, he presented no evidence that

[1] Mora argues in his reply brief (1) that he was never released after his abduction in late February and (2) that the migrants he was smuggling might have been monitoring him for the cartel. But he did not say any of this at trial, and his employer's statement that she stopped seeing him "more or less in February" is at best consistent with, but not evidence of, the first proposition. He also offers no reason to believe that the persons he was trafficking across the border would report back to the cartel. In any event, the legally

he was committing the crime because of "a real emergency leaving no time to pursue any legal alternative." *Posada-Rios*, 158 F.3d at 874. Because Mora was obliged to present evidence of each element of duress, yet failed as to the first element, we need go no further. The district court did not abuse its discretion.

B. The Obstruction of Justice Enhancement

"We review the district court's application or interpretation of the Sentencing Guidelines de novo and its factual findings, such as a finding of obstruction of justice, for clear error." *United States v. Smith*, 804 F.3d 724, 737 (5th Cir. 2015). The government argues that Mora did not adequately preserve this issue, in which case this court reviews for plain error; Mora disagrees. *See United States v. Rodriguez*, 602 F.3d 346, 351 (5th Cir. 2010). We assume without deciding that Mora is correct. Under his preferred standard, the court affirms the finding if it is "plausible in light of the record as a whole." *Smith*, 804 F.3d at 737. Where, as here, the finding hinges on the credibility of a witness, the district court's determination is given "particular deference." *Id.*

The obstruction of justice enhancement applies if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and . . . the obstructive conduct related to . . . the defendant's offense of conviction and any relevant conduct." U.S.S.G. § 3C1.1. Perjury warrants the enhancement. *Id.* § 3C1.1 cmt. n.4(B). For these purposes, "perjury" means willfully giving "false testimony concerning a material matter." *United States v. Dunnigan*,

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relevant question is whether he was under threat at the moment of the offense, not whether he ran a risk of future harm by not complying.

507 U.S. 87 (1993). While "it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding," we do not reverse so long as "the court makes a finding . . . that encompasses all of the factual predicates for a finding of perjury." *Id.*, 507 U.S. at 95.

Mora argues that the district court's finding did not address all the elements of perjury. The district court stated that "this Defendant lied under oath to that jury" and that "he obstructed justice." Mora posits that this does not address whether the lie was willful or material.

The argument fails. First, the district court adopted Mora's presentence report, which made a willfulness finding. Second, a "sentencing court need not expressly find that the false testimony concerned a material matter; it is enough that materiality is obvious." *United States v. Perez-Solis*, 709 F.3d 453, 470 (5th Cir. 2013) (quotation marks and brackets omitted). Here, the court disbelieved Mora's testimony that he was under duress during the 2007 drug-smuggling incident. This was a material fact because it supported Mora's argument that he was once again placed under duress in 2021. The transcript lacks clear grammar, but the district court's sentiments are clear:

> I also think that, frankly, the whatever threats and potential or possible duress that have been testified to about the 2007, *nor the Court to even believe those, the Court does not*—with the Court to even believe those, it wouldn't necessarily, and I think that's independent of this offense and don't believe that would necessarily be a linchpin to proving that whether there was duress involved here or not, present here or not.

Thus, we find that the district court's finding "encompasses all of the factual predicates for a finding of perjury." *Dunnigan*, 507 U.S. at 95.

Consequently, there was no clear error in the sentencing court's application of the enhancement.

C. Apprendi *Challenge*

Last, Mora challenges the constitutionality of 8 U.S.C. § 1326(b) in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As the defendant acknowledges, that argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

III. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GRACIANO MORAL-CARRILLO,

Defendant.

§
§
§ NO. P-21-CR-237
§
§ **INDICTMENT**
§
§ **[Vio: 8 U.S.C. § 1326(a) and (b)(2) Entry**
§ **after Deportation]**

THE GRAND JURY CHARGES:

COUNT ONE
[8 U.S.C. § 1326(a) and (b)(2)]

On or about March 1, 2021, in the Western District of Texas, Defendant,

GRACIANO MORAL-CARRILLO,

an alien, attempted to enter, entered, and was found in the United States having previously been denied admission, excluded, deported, and removed therefrom on or about June 21, 2019, and that the defendant had not received consent to reapply for admission to the United States from the U.S. Attorney General or the Secretary of the Department of Homeland Security, the successor for this function pursuant to Title 6, United States Code, Sections 202(3), 202(4), and 557.

A violation of Title 8, United States Code, Section 1326(a) and (b)(2).

Original signed by the
A TRUE BILL foreperson of the Grand Jury

FOREPERSON OF THE GRAND JURY

ASHLEY C. HOFF
UNITED STATES ATTORNEY

BY: _____
LANCE L. KENNEDY
Assistant U.S. Attorney

APPENDIX C

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Notes of Decisions (1512)