

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>JAVIER GARCIA ALVAREZ,</p> <p>Defendant.</p>	<p>No. 4:10-cr-0047-JAJ</p> <p>ORDER</p>
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This matter comes before the Court pursuant to Javier Garcia Alvarez's ("Alvarez") August 11, 2010 Motion for Judgment of Acquittal and New Trial [Dkt. No. 86.] The Court granted in part and denied in part Alvarez's motion for judgment of acquittal on August 30, 2010. [Dkt. No. 88.] For the reasons set forth below, the Court denies Alvarez's motion for new trial.

On April 28, 2010, the grand jury for the Southern District of Iowa returned a one count indictment against Alvarez. Count 1 charged that Alvarez transported aliens illegally in the United States, on or about February 26, 2010, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). Trial commenced July 27, 2010. On July 28, 2010, the jury returned a verdict finding Alvarez guilty of the transportation of aliens illegally in the United States, as charged in Count 1. Pursuant to a special interrogatory, the jury found that this offense resulted in the death of one person. In its August 30, 2010 order, the Court granted Alvarez's motion for judgment of acquittal only as to the "resulting in death" finding because the evidence did not support the conclusion that the offense "resulted in death."

Alvarez moves for a new trial. In support of the motion, Alvarez contends that the jury's verdict was against the weight of the evidence.

I. ANALYSIS

A. Motion for New Trial - Standard

A district court may grant a new trial if the interests of justice so requires. Fed. R. Crim. P. 33. The Rule 33 remedy should be used sparingly and with caution. United States v. Dodd, 391 F.3d 930, 934 (8th Cir. 2004). The trial court may exercise its broad discretion in considering the motion, and its decision is subject to reversal only for a clear abuse of discretion. United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996). The district court has broader discretion in granting a new trial than it does in granting a judgment of acquittal. United States v. Boesen, 473 F. Supp. 2d 932, 941 (S.D. Iowa 2007) (citing United States v. Campos, 306 F.3d 577, 579 (8th Cir. 2002)). See United States v. Starr, 533 F.3d 985, 999 (8th Cir. 2008). Unlike a motion for a judgment of acquittal, the district court need not examine the evidence in the light most favorable to the government. United States v. Gascon-Guerrero, 382 F. Supp. 2d 1097, 1102 (S.D. Iowa 2005). A court may weigh evidence and evaluate for itself the credibility of witnesses to determine if a miscarriage of justice may have occurred. Starr, 533 F.3d at 999; United States v. Davis, 103 F.3d 660, 668 (8th Cir. 1998); United States v. Rodriguez, 812 F.2d 414, 417 (8th Cir. 1987); United States v. Boesen, 473 F. Supp. 2d 932, 936 (S.D. Iowa 2007).

Motions for new trials based on the weight of evidence are generally discouraged, and the authority to grant such a motion should be exercised “sparingly” and “with caution. United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). The jury verdict is to be upheld, unless the court determines that a miscarriage of justice will occur. United States v. Johnson, 403 F. Supp. 2d 721, 766 (N.D. Iowa 2005) (quoting Campos, 306 F.3d at 579). Nonetheless, a new trial may be granted under several scenarios. First, a new trial may be granted “if the evidence weighs heavily enough against the verdict that a miscarriage of justice occurred.” Ortega v. United States, 270 F.3d 540, 547 (8th Cir.

2001) (quoting United States v. Lacey, 219 F.3d 779, 783 (8th Cir. 2000)). Second, even if there is sufficient evidence to sustain a verdict, but a preponderate of evidence weighs “sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, [the court] may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.” United States v. Walker, 393 F.3d 842, 847-48 (8th Cir. 2005). See also United States v. Lewis, 436 F.3d 939, 945 (8th Cir. 2006).

B. Sufficiency of Evidence

The government must demonstrate four elements to prove that Alvarez transported aliens illegally in the United States. First, the government must present evidence that at least one of the individuals in the van was an alien illegally in the United States. United States v. Hernandez, 913 F.2d 568, 569 (8th Cir. 1990) (per curiam) (listing elements for violation of § 1324(a)(1)(B), the predecessor statute to § 1324(a)(1)(A)(ii)); see also United States v. Cuevas-Reyes, 572 F.3d 119, 121–22 (3d Cir. 2009) (citing United States v. DeJesus-Batres, 410 F.3d 154, 160 (5th Cir. 2005)). Second, the government must show that the defendant knew or was in reckless disregard of the fact that the alien or aliens were in the United States in violation of the law. Hernandez, 913 F.2d at 569. Third, that the defendant knowingly transported or moved one or more of the aliens who were illegally in the United States. Id. Finally, that the defendant acted willfully in furtherance of the aliens’ violation of the law. See United States v. Velasquez-Cruz, 929 F.2d 420, 422 (8th Cir. 1991).

First, the government must demonstrate that at least one of the individuals in the van was an alien illegally in the United States. Hernandez, 913 F.2d at 569. Two passengers in the van, Edgar and Daniel Epifanio Alvarez, testified that they were illegally in the United States. They further testified that a van drove them from Phoenix, Arizona, to the accident scene in Iowa. The Court finds that there was sufficient evidence for the jury to

find that at least one individual in the van was an alien illegally in the United States. See Starr, 533 F.3d at 999.

Next, the Court considers whether Alvarez knew or was in reckless disregard of the fact that the aliens were in the United States illegally in violation of the law. Hernandez, 913 F.2d at 569. Testimony from Marshall County Deputies Corby Robbins and Tim Hungerford established that all of the passengers were thought to be Hispanic. Oscar Ibanez, an untrained interpreter for the hospital where the van occupants were taken, translated for interviews conducted by Deputy Hungerford and Iowa State Trooper Rod Larson. Iowa State Trooper Chris Starrett also interviewed the occupants of the van.

The government introduced evidence of a statement Alvarez made in an interview conducted by ICE Agent John Barfels and Trooper Starrett on March 4, 2010. ICE Agent John Haase translated for this interview. The officers testified that Alvarez said he was paid \$800 by Noe Ugalde to drive “aliens” for three or four days on a cross-country trip. Alvarez told the officers that a van, filled with other passengers, picked him up in Dallas, Texas. The van also picked up two more aliens on the trip and that the van stopped at a Wal-Mart in Colorado for Ugalde to “pick up money.” Alvarez told officers that he was in the United States illegally. When food was purchased, only one person left the van to get food for all other occupants.

The Court finds that there was sufficient evidence for a jury to find that Alvarez knew or was in reckless disregard of the fact that the passengers in the van were illegal aliens. Hernandez, 913 F.2d at 569. The Court instructed the jury to find that reckless disregard means “deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States illegally.” See United States v. Uresti-Hernandez, 968 F.2d 1042, 1046 (10th Cir. 1992). Alvarez was picked up by a van in Dallas, paid \$800 to drive the van cross-country, the van was full of Hispanic and Spanish-speaking

persons, and the van stopped only for food and gas breaks.¹ These facts are sufficient for a jury to find that Alvarez knew or was in reckless disregard of the fact that the aliens were in the United States illegally. See United States v. Powell, 771 F.2d 1173, 1176 (8th Cir. 1985) (evidence that defendants transported agricultural workers from Texas to Arkansas under circumstances which strongly inferred that defendants knew they were illegal aliens was sufficient).

Next, the Court considers whether Alvarez knowingly transported or moved one or more of the aliens who were illegally in the United States. Hernandez, 913 F.2d at 569. Testimony from Deputy Robbins established that Alvarez was still seatbelted in the driver's seat when she arrived upon the accident scene. Daniel and Edgar Epifanio Alvarez also testified, when shown a picture of an individual in the driver's seat wearing a neck brace, that the individual in the picture was the driver of the van. The individual pictured was Alvarez.

Alvarez argues that the Court should accord less weight to any statements he made to law enforcement immediately following the accident because he was "incoherent." But the effect of Alvarez's assertion is diminished greatly by the fact that he was examined and quickly released from the hospital. The Court finds that there is sufficient evidence for a jury to find that Alvarez knowingly transported the aliens who were illegally in the United States.

Finally, the Court considers whether Alvarez acted willfully in furtherance of the aliens' violation of the law. Velasquez-Cruz, 929 F.2d at 422. The government must prove that Alvarez "knowingly transported the aliens in order to help them remain in the United States illegally." See United States v. Angwin, 271 F.3d 786, 805 (9th Cir. 2001). The government can use circumstantial evidence to prove a defendant's intent to further the presence of an illegal alien. See United States v. De Jesus-Batres, 410 F.3d 154, 161

¹According to the testimony of Edgar and Daniel Epifanio Alvarez.

(5th Cir. 2005). But the government must also establish “a direct or substantial relationship between that transportation and its furtherance of the alien’s presence in the United States.” United States v. Moreno, 561 F.2d 1321, 1323 (9th Cir. 1977); see also United States v. Velasquez-Cruz, 929 F.2d 420, (8th Cir. 1991) (adopting Moreno test, such that there must be more than an “incidental connection” to the transportation).

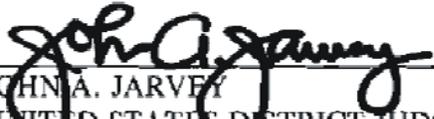
Here, there was sufficient evidence for a jury to find that Alvarez acted willfully in furtherance of the aliens’ violation of the law. Velasquez-Cruz, 929 F.2d at 422. Alvarez made a statement to officers on March 4, 2010, that he was paid \$800 by Ugalde for his help in transporting the van occupants. See United States v. Mejia-Luna, 562 F.3d 1215, 1220 (9th Cir. 2009) (“government need not prove actual payment or an agreement to pay the defendant directly in order to show that [defendant] committed the transporting offense for the purpose of . . . private financial gain.”); United States v. Romero-Cruz, 201 F.3d 374, 378 (5th Cir. 2000) (monetary gain is not an element of the crime of illegal transporting aliens). The van originated in Dallas, drove through Colorado, and the accident occurred in Iowa. See, e.g., United States v. Duarte-Acuna, 67 Fed. Appx. 412, 412 (9th Cir. 2003) (transportation of illegal aliens from a field near the border into a town was sufficient to establish a direct and substantial relationship between transportation and the furtherance of the aliens’ presence in the United States). This corroborates Alvarez’s statement that he acted willfully in furtherance of the aliens’ violation of the law because the aliens were transported across multiple states. The Court finds that there is sufficient evidence to suggest that Alvarez willfully transported the aliens.

In sum, Alvarez has not demonstrated that a manifest miscarriage of justice has occurred or that the record is so devoid of evidence that Alvarez recklessly disregarded the passengers’ status as to make his conviction shocking. See Walker, 393 F.3d at 847-48. There is sufficient evidence in the record to allow a jury to conclude that Alvarez transported aliens illegally within the United States.

Upon the foregoing,

IT IS ORDERED that Defendant Alvarez's Motion for New Trial [Dkt. No. 86] is DENIED.

DATED this 6th day of December, 2010.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA