FILED
United States Court of Appeals
Tenth Circuit

December 14, 2020

Christopher M. Wolpert
Clerk of Court

<u>PUBLISH</u>

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANCISCO YBARRA CRUZ,

Defendant - Appellant.

No. 19-2132

Appeal from the United States District Court for the District of New Mexico (D.C. No. 2:18-CR-02041-KG-1)

Bernadette Sedillo, Assistant Federal Public Defender (Stephen P. McCue, Federal Public Defender with her on the brief), Las Cruces, New Mexico, for Defendant-Appellant.

Allison C. Jaros, Assistant United States Attorney (John C. Anderson, United States Attorney with her on the brief), Las Cruces, New Mexico for Plaintiff-Appellee.

Before **PHILLIPS**, **BALDOCK**, and **McHUGH**, Circuit Judges.

PHILLIPS, Circuit Judge.

In March 2018, Francisco Ybarra Cruz—by then a terminated confidential informant in federal drug investigations—was stopped for a New Mexico traffic violation. After obtaining consent to search, the officer found more than ten pounds of methamphetamine in Ybarra Cruz's truck. After being indicted, Ybarra Cruz

moved to suppress the methamphetamine evidence and his Mirandized statements and admissions. The district court denied this motion, and a jury later convicted him for possessing the methamphetamine with an intent to distribute it.

On appeal, Ybarra Cruz argues four points: (1) that the district court erred by not granting his motion to suppress, on grounds that the police officer lacked reasonable suspicion to initiate the traffic stop; (2) that the district court erred by not acquitting him based on his public-authority defense (that he reasonably believed he was acting with government authority in transporting the methamphetamine); (3) that the district court abused its discretion by not granting him a new trial on grounds that the jury might not have understood that crediting his public-authority defense would require acquittal on both counts; and (4) that the district court abused its discretion by not sua sponte instructing on the affirmative defense of duress. We reject each of these arguments and affirm.

I. BACKGROUND

A. The Drug Investigation

By 2016, Homeland Security Investigations (HSI) Special Agent Fernando Lozoya had begun a successful working relationship with a confidential informant (CS)[1] in drug investigations. Their work had led to multiple methamphetamine seizures, as well as several promised, but unrealized, deliveries. In 2018, the agent

[1] This unnamed individual is sometimes referred to as a confidential informant (CI) and at other times referred to as a confidential source (CS). For clarity, we use "CS" whenever referring to this informant throughout this opinion.

and CS worked together to arrange a large methamphetamine delivery from a Mexican drug organization. The CS acted in the role of a buyer located in Las Cruces, New Mexico. On March 24, 2018, the CS had good news for Agent Lozoya—a courier had called the CS to tell him that he had arrived in Las Cruces with the large load of methamphetamine.

Agent Lozoya began surveilling near the site that the CS had arranged with the courier for the methamphetamine delivery. Once there, Agent Lozoya focused on a man working on a truck with Arizona license plates. A woman and child soon joined this man after arriving in a black pickup truck with Kansas license plates. With help from the CS's updates, Agent Lozoya tracked the man to different locations. The man turned out to be Ybarra Cruz.

Once Agent Lozoya was satisfied that he had located the man transporting the methamphetamine, he called New Mexico State Police Officer Leonel Palomares (a Spanish-speaking officer with a drug dog), advised him of the drug investigation, directed him to Ybarra Cruz's route (after Ybarra Cruz headed north from Las Cruces after the CS requested a delay for the purchase), and asked him to make a traffic stop. Agent Lozoya provided the license-plate numbers of Ybarra Cruz's white pickup truck as well as of the black pickup truck, which Ybarra Cruz had begun towing. Soon afterward, Officer Palomares located the trucks traveling on the interstate highway.

B. The Stop and Search

While following the white truck, Officer Palomares saw, for a few seconds, its

right tires cross the line separating the right lane from an exit lane. Officer Palomares stopped the truck, relying on the driver's "failure to maintain the traffic lane." R. vol. 4 at 54. Officer Palomares had the driver, Ybarra Cruz, step out of the truck and stand in front of his police car, while he issued a written warning. After issuing the warning, Officer Palomares returned Ybarra Cruz's driving documents and told him that he was free to leave. But as Ybarra Cruz neared his truck, Officer Palomares asked him for permission to ask additional questions. Ybarra Cruz consented.

After the additional questioning, Officer Palomares asked Ybarra Cruz for permission to search the trucks. Again, Ybarra Cruz consented. Officer Palomares then deployed his drug dog, which alerted at the white truck. In the cab of the white truck, Officer Palomares found "a blue glass pipe with white crystal-like residue and small amounts of crystal-like substances." *Id*. at 63. In the bed of the truck, Officer Palomares found eleven "bundles of a crystal-like substance" in a bag inside a television. *Id*.

At this point, Officer Palomares called Agent Lozoya, who, upon arriving, read Ybarra Cruz his *Miranda* rights, and took over the investigation. In addition to asking some questions on the roadside, Agent Lozoya soon after interviewed Ybarra Cruz at the HSI office in Las Cruces, again obtaining from Ybarra Cruz a *Miranda* waiver. Among other things, Ybarra Cruz admitted that he had been transporting the methamphetamine for $10,000. In addition, Ybarra Cruz told him that he had "been working with agents in Phoenix." *Id*. at 37. Even so, he said that the HSI Phoenix agents were unaware of his methamphetamine trip.

C. The Suppression Hearing

Three months later, a federal grand jury indicted Ybarra Cruz on two charges: (1) conspiracy to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A); and (2) possession with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2. Disputing the legality of the traffic stop, Ybarra Cruz moved to suppress his Mirandized statements and the methamphetamine.

At the suppression hearing, the government called two witnesses, Agent Lozoya and Officer Palomares. It also admitted into evidence numerous photographs, as well as the Officer's dashcam-video footage. Ybarra Cruz presented no evidence. Afterward, the district court issued an Order denying Ybarra Cruz's Motion to Suppress the methamphetamine. For our purposes, the district court concluded that Officer Palomares reasonably suspected that Ybarra Cruz had violated a New Mexico traffic law. From this, applying the Fourth Amendment, the district court concluded that the traffic stop had been reasonable at its inception. The court denied the Motion to Suppress.

D. The Trial

At trial, Ybarra Cruz conceded having transported the methamphetamine, but

relied on the public-authority defense to excuse his conduct.[2] In her opening statement, Ybarra Cruz's counsel acknowledged that the government would introduce methamphetamine evidence from the stop, as well as "text messages of Mr. Cruz communicating with many different people about drugs." *Id.* at 273. But she attributed this anticipated evidence to Ybarra Cruz's working as "a documented informant." *Id.* On this point, she acknowledged that weeks before this stop in Las Cruces, federal agents had told Ybarra Cruz that they could not continue working with him, after learning of his recent Arizona arrest and charge for possession of methamphetamine.

The government called Agent Lozoya and Officer Palomares to establish the facts of the stop and the content of Ybarra Cruz's interview statements. In addition, the government called the two Phoenix HSI agents for whom Ybarra Cruz had worked as an informant—Agent Edward Arellano and Agent Manuel Ochoa. These two agents testified about their work with Ybarra Cruz and his deactivation as an informant weeks before his Las Cruces arrest, right after they had learned about his previous Arizona methamphetamine offense.

Agent Lozoya testified about some of Ybarra Cruz's Mirandized admissions that bore on his public-authority defense. In particular, he noted that Ybarra Cruz had

---

[2] In fact, Ybarra Cruz's closing argument focused almost exclusively on his public-authority defense. *See* R. vol. 4 at 816 ("Ladies and gentlemen, I told you at the beginning of this case that Mr. Cruz does not dispute that he transported methamphetamine on March the 24th. So the issue that you have to determine today is whether or not Mr. Cruz had a reasonable belief that he was acting as a Government agent at that time.").

admitted working with a man, El Viejo, to transport methamphetamine from Phoenix to Las Cruces for a fee of $500 per pound. Ybarra Cruz had told him that another man, Omar, delivered the methamphetamine to him in a black duffle bag. In addition, Ybarra Cruz told him that a third man, El Pariente, gave him the phone number of the methamphetamine buyer. After this "buyer" (really, the CS) delayed the purchase, Ybarra Cruz spoke with El Pariente, who "directed him to deliver the methamphetamine to Denver, Colorado, and he was going to get paid $10,000." *Id.* at 318. After this, Ybarra Cruz told Agent Lozoya that he was working for the government, but that the agency was unaware of his transporting the methamphetamine. Agent Lozoya doubted Ybarra Cruz's claimed status as an informant "[b]ecause an informant, if he's conducting any type of work or operations, the controlling agent would be aware of it." *Id.* at 324. In addition, Agent Lozoya noted that Ybarra Cruz had not provided contact information for the controlling agent.

Officer Palomares also testified about matters relevant to Ybarra Cruz's public-authority defense. He testified that during the consensual questioning, Ybarra Cruz had denied that he was transporting anything illegal, agreeing that he was "responsible for everything in the vehicles." *Id.* at 371. Yet before Officer Palomares found the methamphetamine, Ybarra Cruz told him that "if you go inside the television, you're going to find a black duffle bag. That's where it's located." *Id.* at 376.

Next, the government called HSI Agent Arellano, who testified that in March

2018, about three months after Ybarra Cruz's Arizona arrest, Ybarra Cruz finally told him about it. On then speaking to the officers involved in that arrest, Agent Arellano learned that Ybarra Cruz had possessed methamphetamine and a pipe on his person. The agent took this to mean that Ybarra Cruz had been "using narcotics as well as conducting illegal acts." *Id*. at 404.

Agent Arellano testified that on March 14, 2018, he, Agent Ochoa, and their supervisor met with Ybarra Cruz and deactivated him as an informant for HSI. He advised Ybarra Cruz that he needed to resolve his state charges before he could be eligible for any more informant work.

Agent Ochoa testified along the same lines, adding that he told Ybarra Cruz to stop working and to cut ties with all drug targets. He warned Ybarra Cruz that if he was caught "doing something illegal" he would be on his own. *Id*. at 502. Agent Ochoa testified that Ybarra Cruz was "obviously sad" and "nervous." *Id*.

HSI Agent, Joey Rodriguez, testified about two cell phones seized from Ybarra Cruz after the highway stop. Ybarra Cruz admitted owning the two phones. *See id.* at 528 ("He stated the one of 'em, being the iPhone was his personal phone, and he stated that the Motorola, the bronze Motorola was actually used for his narcotic-trafficking activities."). Ybarra Cruz consented to a search of both phones. Agent Rodriguez saw that between March 14, 2018 and March 28, 2018, Ybarra Cruz's phones registered hundreds of communications with several drug dealers but none with Agents Arellano or Ochoa.

In his case-in-chief, Ybarra Cruz testified in support of his public-authority

defense. He described the circumstances in which he first began acting as an informant for HSI. Despite testifying that he had not wanted to be an informant, Ybarra Cruz saw undercover work as an opportunity to pay a $10,000 bond. As an informant, he communicated with the two agents "[t]he whole time, with [his] phone via text or calls." *Id.* at 605. He testified that the agents routinely "searched [his] car and they searched [him]." *Id.* at 611. For his work with controlled buys, the officers counter-surveilled him, including with GPS devices, and they regularly monitored his cell phone. He understood the strict rules governing informant work and signed annual agreements to comply with those rules.

Ybarra Cruz also testified that after being deactivated on March 14, 2018, he never again communicated with Agent Arellano or Agent Ochoa. In fact, Ybarra Cruz testified that he instead traveled to Iowa to meet drug dealers. Those drug dealers provided Ybarra Cruz a new cell phone for drug communications. Ybarra Cruz also admitted that he never told the agents about his Las Cruces methamphetamine trip. Despite all this, Ybarra Cruz asserted that he had transported the methamphetamine while reasonably believing that he did so while still in his informant role with the Phoenix HSI.

After each side's case-in-chief, Ybarra Cruz moved for a judgment of acquittal under Fed. R. Crim. P. 29. He argued that the evidence showed that he had reasonably believed that he was working as an informant in transporting the pounds of methamphetamine. The court denied both motions. Even so, the court agreed to instruct the jury on Ybarra Cruz's public-authority defense.

In an instruction substantially identical to the one Ybarra Cruz proffered, the court advised the jury of these features of a public-authority defense: (1) that Ybarra Cruz had to "prove by a preponderance of the evidence that he had a reasonable belief that he was acting as an authorized Government agent to assist in law enforcement activity at the time of the . . . offense charged in the Indictment"; (2) that "Government authorization of the defendant's acts legally excuses the crime charged"; and (3) that "[i]f you find that the defendant has proved that he reasonably believed that he was acting as an authorized Government agent as provided in this instruction, you must find the defendant not guilty of the charges in Counts 1 and 2 of the Indictment." *Id.* at 798–99.

During its deliberations, the jury sent the court a group of four written questions: (1) "Are the 2 counts tied together?" (2) "Can a person be not guilty of one and not guilty of another?" (3) "Is it contradictory to have a split decision?" and (4) "What is the legal definition of voluntarily?" R. vol. 1 at 187. But minutes later, the jury withdrew its four questions, so the court did not address them. Neither party objected to its not doing so. About thirty minutes after withdrawing its questions, the jury returned its verdict—acquitting Ybarra Cruz on the conspiracy charge (Count 1) but convicting him on the possession-with-intent-to-distribute charge (Count 2).

E. The Post-Trial Motion Under Rule 29(c)

After trial, Ybarra Cruz filed his third Motion for Judgment of Acquittal under Fed. R. Crim. P. 29(c). In support, he argued that he had proved by a preponderance of the evidence that he had reasonably believed that he was working as an informant

in transporting the charged methamphetamine on March 24, 2018.[3] Along this line, he claimed that he "was never given anything in writing stating clearly that he was no longer an authorized informant" and that when the agents told him that they and he were "going to stop working" together, he did not understand this "to mean that he was no longer working under government authority at all, only that he was supposed to get his arrest warrant in [Arizona] straightened out." *Id*. at 199. The district court denied the Motion.

F. The Post-Trial Motion Under Rule 33(a)

In addition, Ybarra Cruz filed a Motion for a New Trial under Fed. R. Crim. P. 33(a). There, Ybarra Cruz raised additional issues from those that he had raised at trial. Specifically, in requesting that the district court grant him a new trial in the "interests of justice," he stated that the court should focus on the "weight" rather than the "sufficiency" of the evidence. *Id*. at 201-02. Based on that distinction, he then argued two new points: (1) that the jury's first three written questions, addressing split verdicts, raised a possibility that the jurors may have misunderstood his public-authority defense, and (2) that the jury's fourth question, asking about the meaning of "voluntarily" required the district court to sua sponte instruct the jury on the

[3] Yet in the same filing, Ybarra Cruz departed from his trial position in which he had acknowledged that he bore the burden to establish his public-authority defense by a preponderance. In this regard, he offered a contradictory view, namely, that "[i]n a case involving a public authority defense, the jury's verdict should be upheld only 'if a rational juror could find beyond a reasonable doubt, that the defendant did not reasonably believe he was acting as an authorized agent of the Government.'" R. vol. 1 at 198 (citations omitted). On appeal, he has continued with the latter approach. We address it in Part II B.

affirmative defense of duress. *Id.* at 202–03. The district court denied Ybarra Cruz's Rule 33(a) Motion. Ybarra Cruz timely appealed. We exercise jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

On appeal, Ybarra Cruz raises four issues: (1) whether the district court erred in not suppressing evidence, alleging as grounds that the police officer lacked reasonable suspicion to support the traffic stop; (2) whether the district court erred by not acquitting him based on the evidence presented on his public-authority defense (that he reasonably believed he was acting with government authority in transporting the methamphetamine); (3) whether the district court abused its discretion by denying him a new trial, based on the jury's possibly misunderstanding that crediting his public-authority defense would require acquittal on both counts; and (4) whether the district court abused its discretion by not sua sponte instructing on the affirmative defense of duress. We address each of these in turn.

A. The Suppression Issue: Reasonableness of the Traffic Stop

Ybarra Cruz concedes that before his traffic stop on March 24, 2018, he crossed into an adjacent lane while driving on the interstate highway near Las Cruces. Yet, he argues that the traffic stop was unreasonable at its inception, contending that Officer Palomares lacked reasonable suspicion that Ybarra Cruz had committed a traffic violation.[4]

[4] Because we conclude that Ybarra Cruz's lane violation provided the necessary reasonable suspicion to sustain the traffic stop, we do not address the

Ordinarily, when reviewing the denial of a motion to suppress, we view the evidence in the government's favor and accept the court's factual findings unless clearly erroneous. *United States v. Smith*, 531 F.3d 1261, 1265 (10th Cir. 2008) (citation omitted). But here, the district court erred in a way that interferes with our appellate standard of review. The district court mistakenly viewed the evidence at the suppression hearing in the light most favorable to the government.[5] Fortunately, our disposition of this case involves no disputed facts or inferences from the suppression hearing. We resolve the reasonable suspicion question on the observed traffic violation and not on the suspected methamphetamine crime. After applying the undisputed facts and inferences, we review de novo the ultimate question of reasonableness under the Fourth Amendment. *United States v. Cortez*, 965 F.3d 827, 833 (10th Cir. 2020) (citation omitted).

A traffic stop is a seizure under the Fourth Amendment and is subject to its reasonableness requirement. *Id*. To be reasonable, a traffic stop must be "justified at its inception." *United States v. Mayville*, 955 F.3d 825, 829 (10th Cir. 2020), *cert. denied*, No. 20-5967, 2020 WL 6551895 (Nov. 9, 2020) (citation omitted). A traffic stop is justified at its inception if "the specific and articulable facts and rational inferences drawn from those facts give rise to a reasonable suspicion a person has or

---

district court's additional ground for sustaining the traffic stop—reasonable suspicion that Ybarra Cruz was trafficking methamphetamine.

[5] Unfortunately, this mistake keeps recurring. In *United States v. Cortez*, 965 F.3d 827, 833 n.4 (10th Cir. 2020), we pointed this out in hopes that courts would apply the proper standard in the future.

is committing a crime." *United States v. Whitley*, 680 F.3d 1227, 1232 (10th Cir. 2012) (citation omitted). We look at the totality of the circumstances to determine whether reasonable suspicion exists. *Id.* (citation omitted).

Under New Mexico law, when a "roadway has been divided into two or more clearly marked lanes for traffic . . . a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." N.M. Stat. Ann. § 66-7-317(A). The New Mexico Court of Appeals has held that a driver sometimes "may momentarily leave his or her lane of travel without violating the statute." *State v. Siqueiros-Valenzuela*, 404 P.3d 782, 787 (N.M. Ct. App. 2017).

To assess whether a lane deviation is a traffic violation, the New Mexico Court of Appeals has cited our decisions in *United States v. Alvarado*, 430 F.3d 1305 (10th Cir. 2005) and *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996), which interpreted identical language in Utah's traffic code. Under the fact-specific analysis used in those cases, and adopted by the New Mexico Court of Appeals, the court looks at "the particular circumstances present during the incident in question to determine whether the driver could reasonably be expected to maintain a straight course at that time in that vehicle on that roadway." *Siqueiros-Valenzuela*, 404 P.3d at 787 (quoting *Alvarado*, 430 F.3d at 1309). Relevant factors include these: weather conditions, traffic, road features, vehicle type, and need for the driver to deviate lanes. *See Alvarado*, 430 F.3d at 1309 (finding reasonable cause for traffic stop where "there were no adverse weather or road conditions that might have made it

impractical for Alvarado to prevent his vehicle from drifting out of the righthand lane and over the fog line"); *Gregory*, 79 F.3d. at 978 (finding lane deviation excusable where the defendant was driving a U-Haul and the "road was winding, the terrain mountainous and the weather condition was windy").

We conclude that Officer Palomares had reasonable suspicion that Ybarra Cruz had violated New Mexico law by failing to drive "as nearly as practicable" within his lane. Officer Palomares testified that Ybarra Cruz crossed into the exit lane for four to five seconds. And Officer Palomares testified that no construction, roadway debris, or other visible condition justified Ybarra Cruz's deviation.

Ybarra Cruz concedes those facts. After all, Officer Palomares's video footage shows Ybarra Cruz's truck traveling on a nearly empty highway in clear weather conditions, crossing into the exit lane. Ybarra Cruz contends that he crossed into the adjacent lane because the two lanes on the highway split into three lanes near the exit. He also mentions that he was "towing another vehicle." Appellant's Opening Br. at 17. But he does not explain how those circumstances would justify the lane deviation. Even so, Ybarra Cruz disputes that he violated § 66-7-317(A).

We conclude that Ybarra Cruz's justifications are not the sort that § 66-7-317(A) might excuse. The video shows that his situation differs from that described in *Siqueiros-Valenzuela*, in which the defendant was trying to safely pass two semi-trucks on an interstate highway, resulting in her tires touching, but not crossing, the yellow shoulder line. 404 P.3d at 788. It also differs from the situation in *Gregory*, which involved a winding and mountainous road on a windy day.

79 F.3d. at 978. Instead, Ybarra Cruz's situation aligns with that in *Alvarado*, in which the driver crossed a highway line by a foot for a few seconds. 430 F.3d at 1306. Therefore, we conclude that the traffic stop was reasonable.

B. The Denial of the Post-Trial Rule 29(c) Motion: Acquittal Under the Public-Authority Defense

Ybarra Cruz next argues that the district court erred by not granting his post-trial Motion for Acquittal under Fed. R. Crim. P. 29(c). Here, taking a contrary position to his own proffered jury instruction, he argues that "no reasonable jury could find, beyond a reasonable doubt, that [he] did not reasonably believe he was an authorized government agent." Appellant's Opening Br. at 18. And he adds that "[t]he government failed to prove beyond a reasonable doubt that Mr. Cruz did not reasonably believe[] he was acting as a government agent. . . ." *Id*. at 37.

But we have ruled that "[t]he public authority defense requires *a defendant* to show that he was engaged by a government official to participate in a covert activity." *United States v. Apperson*, 441 F.3d 1162, 1204 (10th Cir. 2006) (emphasis added) (quoting *United States v. Parker*, 267 F.3d 839, 843 (8th Cir. 2001)). In *Apperson*, while concluding that the district court had not erred by refusing to instruct the jury on this defense, we also noted the district court's conclusion that the defendant's "own testimony was insufficient to establish the public authority defense[.]" *Id*. at 1206 n.15. By speaking to what it takes to establish the defense, this language strongly suggests that even defendants who have been allowed a public-authority-defense instruction still will need to establish their entitlement to acquittal

on the defense. Consistently, we now hold that a defendant carries the burden to prove the public-authority defense to the jury by a preponderance of the evidence.

In so holding, we acknowledge that Ybarra Cruz has cited a passage suggesting otherwise from an unpublished case decided after *Apperson*. As he points out, the panel in *United States v. Ortega*, 210 F. App'x 784 (10th Cir. 2006) (unpublished), commented that "[i]n a case involving a public authority defense, we will uphold the jury verdict if a rational juror could find, beyond a reasonable doubt, that the defendant did not reasonably believe he was acting as an authorized agent of the Government." *Id.* at 786 (citing *Apperson*, 441 F.3d at 1205).

But the problem is that nothing in *Apperson* aligns with the proposition *Ortega* apparently gleaned from it. Nowhere does *Apperson* impose a burden on the government to disprove the public-authority defense, let alone beyond a reasonable doubt. We note that the Supreme Court has told us how to assign the burden of proof between the government and a criminal defendant regarding excuse-related defenses—those that do not negate an element of the crime. For such defenses, the Court requires the defendant to prove by a preponderance any such defense. *Dixon v. United States*, 548 U.S. 1, 4–8, 13–14, 17 (2006) (affirming the district court's use of a jury instruction requiring defendant to prove the affirmative defense of duress by a preponderance); *see also United States v. Jumah*, 493 F.3d 868, 875 (7th Cir. 2007) ("Because the public authority defense is an affirmative defense based on excuse, we must conclude that Congress intended the burden to rest on the defendant to prove the defense by a preponderance of the evidence."); *United States v. Al-Rekabi*, 454

F.3d 1113, 1121–22 (10th Cir. 2006) (relying on *Dixon* to require the defendant to prove the excuse-related affirmative defense of necessity by a preponderance).

Further, the government offered solid evidence against Ybarra Cruz's public-authority defense. We agree with the district court that a reasonable jury could find "that Defendant did not reasonably believe he was acting as a CI on March 24, 2018." R. vol. 1 at 221. For instance, as detailed above, the government established that the HSI agents with whom Ybarra Cruz had previously worked had deactivated Ybarra Cruz as an informant ten days before his Las Cruces stop, immediately after learning about his methamphetamine charges in Arizona; that Ybarra Cruz never communicated with the agents again; that Ybarra Cruz was to be paid thousands of dollars for delivering the methamphetamine; that Ybarra Cruz named the men with whom he communicated about the methamphetamine delivery; and that Ybarra Cruz's telephones amply showed that he was by then neck-deep in the drug world. On appeal, Ybarra Cruz simply credits his own testimony and ignores or slights the overwhelming evidence discrediting his account.

C. Denial of the Rule 33(a) Motion for a New Trial

After his conviction, Ybarra Cruz moved for a new trial under Rule 33(a), which allows a court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). In this Motion, Ybarra Cruz raised new issues unraised during trial.

1. The Jury's Alleged Possible Misunderstanding of Ybarra Cruz's Public-Authority Defense

Ybarra Cruz claims that the interests of justice necessitated granting a new trial. As support, he relies on the first three of four written jury questions asked during deliberations to show that it was possibly confused about whether a successful public-authority defense would defeat both charges. These jury questions read as follows: (1) "Are the 2 counts tied together?" (2) "Can a person be not guilty of one and not guilty of another?" and (3) "Is it contradictory to have a split decision?" R. vol. 1 at 187.

The district court rejected this argument in Ybarra Cruz's Rule 33(a) Motion, relying on Jury Instruction No. 11:

> If you find that the Defendant has proved that he reasonably believed that he was acting as an authorized government agent as provided in this instruction, you must find the Defendant not guilty of the charges in Counts 1 and 2 of the Indictment.

Id. at 222 (quoting Jury Instructions, R. vol. 1 at 164).

We conclude that the district court did not err in denying Ybarra Cruz a new trial under Rule 33(a). The district court gave Ybarra Cruz's requested instruction on the public-authority defense. And, as seen, this instruction unambiguously directed that the jury must acquit on both counts if it found that the public-authority defense applied. As we have explained, "[t]he jury is presumed to follow its instructions." *Bland v. Sirmons*, 459 F.3d 999, 1015 (10th Cir. 2006).[6]

---

[6] For this argument, Ybarra Cruz invites us to reverse his conviction based on the "weight" of the evidence. Appellant's Opening Br. at 39–41 (citing *Tibbs v.*

2. Duress

Ybarra Cruz next argues that the district court abused its discretion by not sua sponte instructing on duress. In support, he relies on the jury's fourth withdrawn question asking what "voluntarily" means. He surmises that this indicated that the jurors thought Ybarra Cruz may have acted under duress. After his trial, Ybarra Cruz argued that he had presented sufficient evidence to prove the duress defense by a preponderance, a showing that, he asserted, required the district court to sua sponte instruct on that defense.

The district court denied Ybarra Cruz's motion for a new trial on this ground too. In doing so, it noted (1) that Ybarra Cruz had "failed to provide evidence from which a reasonable jury could find by a preponderance of the evidence that he was entitled to a duress defense," and (2) that defense counsel had not raised duress until her closing argument and thus did not "alert the Court that she was pursuing that defense." R. vol. 1 at 224. The district court then concluded that it "was not required to *sua sponte* instruct the jury on a duress defense." *Id*.

We agree with the district court that Ybarra Cruz did not adduce sufficient evidence to prove each element of duress by a preponderance of the evidence. Ybarra Cruz's evidence of a "generalized fear" was not enough for him to prove by a

---

Florida, 457 U.S. 31, 37 (1982)). In suggesting that "the evidence preponderated sufficiently against the verdict that a miscarriage of justice may have occurred," *id.* at 39, Ybarra Cruz in effect asks that we credit his testimony and discredit the government's. Like the district court, we see no reason to do so—in fact, just the opposite.

preponderance that he had “an unlawful and present, imminent and impending fear of death or serious bodily injury.” *Id*. at 222–23 (citing Tenth Cir. Crim. Pattern Jury Instruction No. 1.36). And Ybarra Cruz did not show that “other alternatives [to violating the law] were unavailable to him.” *Id*. at 224. After all, he never even bothered to tell his former controlling HSI agents that he was being paid thousands of dollars to transport and deliver ten pounds of methamphetamine from Phoenix to Las Cruces, and later to Denver.

Further, Ybarra Cruz never sought the instruction. The district court wisely did not inject itself into Ybarra Cruz’s trial strategy. *See United States v. Tyson*, 653 F.3d 192, 212 (3d Cir. 2011) (“A defendant’s strategy is his own. It is not for the district court to *sua sponte* determine which defenses are appropriate under the circumstances.”); *United States v. Gutierrez*, 745 F.3d 463, 472 (11th Cir. 2014) (“The District Court is not required *sua sponte* to instruct the jury on an affirmative defense that has not been requested by the defendant.”) (citation omitted).

III. CONCLUSION

For the reasons stated above, we affirm.