

APR 19 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANCISCO DE LA CONCHA-
OCAMPO,

Defendant - Appellant.

No. 09-50382

D.C. No. 3:08-cr-00711-JLS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

Francisco De La Concha-Ocampo appeals from the 42-month sentence imposed following his guilty-plea conviction for attempted entry after deportation, in violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

§ 1291, and we affirm.

De La Concha contends that the district court erred by declining to give a theory of defense jury instruction. This contention lacks merit. The instruction given by the district court covered De La Concha's theory of defense because it instructed the jury that he must have intended to cross the border to be free to go at large within the United States. Thus, the district court's failure to give De La Concha's requested instruction also did not impair his ability to present a defense. *See United States v. White*, 974 F.2d 1135, 1139 (9th Cir. 1992); *see also United States v. Lombera-Valdovinos*, 429 F.3d 927, 928-29 (9th Cir. 2005).

AFFIRMED.