

MAR 08 2013

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NOT FOR PUBLICATION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.

ANTONIO LOPEZ-VALLE,

Defendant - Appellant.

No. 12-50253

D.C. No. 3:11-cr-04832-AJB-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Anthony J. Battaglia, District Judge, Presiding

Submitted March 6, 2013**
Pasadena, California

Before: THOMAS and HURWITZ, Circuit Judges, and BEISTLINE, Chief
District Judge.***

* 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).

*** The Honorable Ralph R. Beistline, Chief District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

Antonio Lopez-Valle appeals his conviction of attempted entry after deportation in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

Lopez argues that the district court erred in denying his motion to dismiss the indictment, which collaterally attacked the deportation order. “To succeed in such a challenge . . . an alien must demonstrate 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.’” *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1042-43 (9th Cir. 2012) (quoting 8 U.S.C. § 1326(d)).

Even assuming *arguendo* that Lopez could satisfy the first two requirements, he cannot meet the third. To show fundamental unfairness, Lopez must establish prejudice. *United States v. Bustos-Ochoa*, ___ F.3d ___, 2012 WL 6579556, at * 2 (9th Cir. Dec. 18, 2012). Because he has been convicted of an aggravated felony he cannot do so. *Id.* at *2-3.

AFFIRMED.