UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7066
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BERTIS DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CA4-91-157-K (CR4-89-171-K))

(January 14, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Bertis Davis appeals his conviction for use of a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924 (c)(1). Finding no reversible error; we **AFFIRM**.

I.

In August 1989, Davis was arrested during the execution of a search warrant at a residence at 853 Erma in Fort Worth (Erma residence). Police officers seized, among other items, syringes, capsules containing heroin and cocaine, and a loaded .357 pistol that was found under the middle cushion of the couch where Davis had been sitting.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Davis was indicted for unlawfully carrying and using a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c). A jury found Davis guilty of the charge; the district court sentenced him to a five-year term of imprisonment, a three-year term of supervised release, and a special assessment of $50. Because of his appointed trial counsel's failure to perfect a timely appeal, the district court granted Davis an out-of-time appeal. This court ordered that Davis' trial counsel be relieved of further representation and new counsel be appointed to represent Davis on appeal.[2]

II.

Davis raises several issues, many of which are subject to the narrow plain error standard of review. Davis concedes that, in many instances, this standard is applicable.

A.

First, Davis objects to both the nondisclosure of the government's informant (CI) prior to trial and the district court's termination of Davis' cross-examination regarding the characteristics of the CI. The balancing test set forth in ***Roviaro v. United States***, 353 U.S. 53 (1957), governs the propriety of such nondisclosure. The district court did not apply this balancing test, nor must we do so here, because Davis did not request that the identity of the CI be disclosed.[3] The prosecution did not attempt to introduce hearsay by the CI on direct examination, and only did so in response to testimony elicited by Davis on cross-examination. Accordingly, we find no error concerning the non-disclosure.

Likewise, given the government's privilege of nondisclosure, the district court properly limited Davis' cross-examination. A defendant's right to cross-examine a witness is committed to the sound discretion of the trial court. ***United States v. Contreras***, 602 F.2d 1237, 1239 (5th Cir.), *cert. denied*, 444 U.S. 971 (1979). Defense counsel was allowed to effectively cross-examine officer Jay concerning whether the CI had a criminal record, whether the CI was a police officer, whether the CI was paid, whether the CI was a drug user, and whether the CI had children. The court limited

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[2] Appointed counsel filed a supplemental brief (Davis had filed one *pro se*) and a reply brief.

[3] Even at trial, Davis' counsel asserted that he was not seeking disclosure of the CI; he stated, "I really don't care about that."

counsel's questioning only when the elicited information threatened to expose the CI's confidentiality. Accordingly, Davis' contention is without merit.

B.

Davis contends that the introduction of hearsay was inadmissible and violated his right to confrontation; however, he failed to object to the admissibility of the contested evidence at trial; therefore, we review only for plain error. ***United States v. Lechuga***, 888 F.2d 1472, 1480 (5th Cir. 1989); Fed. R. Crim. P. 52(b). "`Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." ***United States v. Lopez***, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032 (1991). "It is a mistake so fundamental that it constitutes a `miscarriage of justice.'" ***Id.***

1.

First, Davis objects to the admission of out-of-court testimony from the CI elicited by defense counsel. In direct response to defense counsel's questions, officer Jay testified that the CI told her that she had purchased drugs at the Erma residence, approximately ten minutes prior to the execution of the warrant, from a black male known as "Little Buster". Officer Jay further testified that the CI identified Davis as "Little Buster". Because these out-of-court statements were purposefully elicited by defense counsel on cross-examination, the "invited error" doctrine precludes a finding of error, much less, plain error.[4] *See* ***United States v. Martinez***, 604 F.2d 361, 366 (5th Cir. 1979) ("[W]here the injection of allegedly inadmissible evidence is attributable to the action of the defense, its introduction does not constitute reversible error."), *cert. denied*, 444 U.S. 1034 (1980).[5]

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[4] Similarly, Davis cannot object to the district court's failure to give a cautionary instruction concerning the suspect credibility of a witness compensated on a contingent fee basis for his testimony, as discussed in ***United States v. Cervantes-Pacheco***, 826 F.2d 310, 316 (5th Cir. 1987), *cert. denied*, ***Nelson v. United States***, 484 U.S. 1026 (1988), where defense counsel elicited the out-of-court testimony. Moreover, it is not clear from the record that the CI was paid on such a basis.

[5] Davis cites ***United States v. Taylor***, 508 F.2d 761, 764 (5th Cir. 1975), and contends that because defense counsel's inquiry was inadvertent, the "invited error" rule does not apply. We reject this contention because we do not view the inquiry as inadvertent. Defense counsel deliberately

2.

Davis' contention that the court erred in allowing officer Jay to testify on redirect as to hearsay statements from the affidavit used to obtain the search warrant is equally unavailing. The contested testimony regarding the CI's physical description of the two individuals she had encountered at the Erma residence was first raised during defense counsel's cross-examination. Where an issue is raised on cross-examination of a government witness by defense counsel, the government may respond by eliciting explanatory rebuttal testimony. *See* ***United States v. Smith***, 930 F.2d 1081, 1088 (5th Cir. 1991); ***United States v. Delk***, 586 F.2d 513, 516 (5th Cir. 1978). The redirect was therefore properly admitted. Needless to say, there was no plain error.

3.

Davis also maintains that Officer Camp's testimony posed hearsay and best evidence problems in suggesting that Camp had been told by officer Jay that the CI had used a pre-recorded twenty dollar bill to purchase drugs at the Erma residence. We do not find reversible error because, even if Camp's testimony or the bill itself were improperly admitted, its admission did not result in a "miscarriage of justice".

C.

Citing Fed. R. Evid. 608(b), Davis contends that the district court erred in allowing the prosecutor, over objection, to introduce evidence of Davis' prior arrests. We review rulings on the admissibility of evidence for abuse of discretion. ***United States v. Anderson***, 933 F.2d 1261, 1267-1268 (5th Cir. 1991); Fed. R. Evid. 103; Fed. R. Crim. P. 52(a).

Davis' testimony on direct that he had not had any other experience with the law other than one conviction and a number of gambling citations effectively opened the door for the government's rebuttal evidence. *See* ***United States v. Wylie***, 919 F.2d 969, 977 (5th Cir. 1990) (citing ***United***

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elicited testimony regarding identification of Davis by asking -- "But from the information that you have received up to this date you have not received any information other than what she [CI] told you that someone in that house told her that they were Little Buster, you haven't received any information that his name is Little Buster; isn't that correct?" That the officer's response was prejudicial to Davis does not change the purposeful nature of the inquiry.

States v. Caron, 474 F.2d 506, 509 (5th Cir. 1973)) ("[W]hen a witness denies on direct examination his involvement with certain persons or criminal undertakings, he effectively `opens the door' to questions and evidence that the prosecutor can put to him to prove his connection with the person or activity."). Thus, the district court properly exercised its discretion. There was no error.

D.

We do not reach the merits of Davis' contention that he should receive a new trial because of ineffective assistance of counsel. As Davis concedes, such claims presented for the first time on appeal will only be reviewed in rare cases where the record is sufficiently developed to allow for fair evaluation of the merits of the claim. *E.g.*, ***United States v. Higdon***, 832 F.2d 312, 314 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988). Because Davis' appointed trial counsel has not had an opportunity to explain the reasoning for his pretrial and trial actions, we cannot fully evaluate Davis' contentions on appeal. Of course, our ruling is without prejudice to Davis raising this issue in a 28 U.S.C. § 2255 proceeding. *See, e.g.*, ***United States v. Rinard***, 956 F.2d 85, 87 (5th Cir. 1992).

E.

Davis next raises several instances of alleged prosecutorial misconduct. Because he did not object at trial to the challenged statements, we again review only for plain error. Accordingly, we will reverse if the prosecutor's comments, viewed in the context of the entire trial, "seriously affected the fairness or integrity of the proceedings and resulted in a miscarriage of justice". ***United States v. Hatch***, 926 F.2d 387, 394 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2239 (1991).

1.

First, Davis asserts that the prosecutor expressly indicated at trial that Davis posed a threat to the physical well-being of the CI and the CI's family by stating, "counsel says on the one hand he's not trying to find out the identity but I'm not concerned about what he knows, it's the man at the table". Even if the prosecutor made an improper suggestion, this brief statement does not rise to the level of plain error.

2.

Davis also objects to the following portions of the prosecutor's closing argument: (1) references to obtaining a search warrant and affidavit; (2) references to Davis' prior arrests and misrepresentation of Davis' felony conviction; (3) reference to the efforts and expense incurred in the raid on the residence; (4) expressions of gratification that § 924(c) does not require the use of a firearm on a police officer; (5) expressions of personal frustration over Davis' testimony, possibly revealing his own views of Davis' credibility; and (6) reference to Davis as a "dope dealer". Davis asserts that these statements destroyed his credibility and thus constitute plain error.

We disagree. Although portions of the prosecutor's closing argument, including misstatement of Davis' prior felony conviction,[6] expressions of personal frustration over Davis' testimony,[7] references to risks incurred by drug enforcement agents,[8] and reference to Davis as a "dope dealer, the man with the gun",[9] may have exceeded the legitimate bounds of advocacy, the inclusion of these statements, in the context of the trial as a whole, did not result in a miscarriage of justice. Thus, taken in context and in their entirety, the prosecutor's comments do not constitute plain error.

F.

Finally, Davis challenges his conviction on the basis of insufficiency of the evidence.[10] Specifically, he asserts that the government failed to prove that he knowingly possessed the firearm.

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[6] The prosecutor erred in stating that the conviction was for "possession of dope with attempt to distribute" when he was actually convicted only for possession. With respect to Davis's prior arrests, as stated *supra*, the prosecutor was entitled to argue that Davis had not testified truthfully when Davis stated that he had not had any "experience" with the law other than the one conviction and the gambling citations.

[7] "A prosecutor may not give a personal opinion about the veracity of a witness." ***United States v. Murrah***, 888 F.2d 24, 26 (5th Cir. 1989).

[8] Generally, "bolstering" is not permitted unless it was part of the prosecutor's response to the defendant's attempt to discredit the same witness. ***United States v. Hernandez***, 891 F.2d 521, 526 (5th Cir. 1989), *cert. denied*, 495 U.S. 909 (1990).

[9] *See* ***Hernandez***, 891 F.2d at 521, 525 (stating that it was improper for prosecutor to refer to Hernandez as an "armed drug dealer").

[10] Although Davis is not entitled to hybrid-representation, we conclude that the failure by appointed counsel to include this contention in his supplemental brief did not render it waived, because that brief explicitly incorporated the arguments presented in Davis's *pro se* brief.

Davis' trial counsel failed to renew his motion for judgment of acquittal at the close of all the evidence; accordingly, he waived any objection to the denial of his motion. ***United States v. Daniel***, 957 F.2d 162, 164 (5th Cir. 1992); Fed. R. Crim. P. 29. Given this waiver, we will reverse only if the record is "devoid of evidence pointing to guilt" or "because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." ***United States v. Ruiz***, 860 F.2d 615, 617 (5th Cir. 1988) (internal quotation omitted). In making this determination, the evidence must be considered in the light most favorable to the government, giving the government the benefit of all reasonable credibility choices and inferences. ***Id.***

To find Davis guilty under § 924(c)(1), the jury was required to find that he used the pistol in connection with a drug trafficking crime. *See* ***United States v. Blankenship***, 923 F.2d 1110, 1114 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2262 (1991). "`Use' does not mean discharging or brandishing the weapon; it simply means that the weapon facilitated, or could have facilitated, the drug trafficking charges." ***Id.*** Accordingly, this court has held that the presence of loaded firearms at the residence of the defendant where drugs, money and ammunition were also found is sufficient to establish "use." *See* ***United States v. Robinson***, 857 F.2d 1006, 1010 (5th Cir. 1988).

In the instant case, police found, among other things, syringes, capsules containing heroin and cocaine, and a loaded weapon under the middle cushion of the couch where Davis had been sitting. And, officer Camp testified that the weapon was positioned to be readily accessible to a person seated on the couch. The government also presented testimony that Davis had been living at the Erma residence for about a month. Although Davis contends that he had no knowledge of the gun, a jury could reasonably conclude that given the location of the gun, and his statement to the officer concerning the length of time he had resided at the Erma residence, he had knowledge of the existence of the gun. There was no miscarriage of justice.[11]

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[11] **In his reply brief, Davis raises for the first time the issue of whether the government "introduced competent evidence to substantiate its claim that the capsules introduced into evidence contained heroin and cocaine". This court does not consider issues raised for the first time in a reply brief.** ***United States v. Prince***, 868 F.2d 1379, 1386 (5th Cir.), *cert. denied*, 493 U.S. 932 (1989).

III.

For the foregoing reasons, the judgment is

AFFIRMED.