IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2745
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FRANCISCO MENDEZ-VILLARREAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR H 92 0033 02

August 17, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Francisco Mendez-Villarreal ("Mendez") appeals his drug-related convictions on the grounds that the district court improperly struck one venireman and improperly charged the jury in several particulars. Finding no error, we affirm.

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Mendez was convicted by a jury of one count of possession, with intent to distribute, more than 100 kilograms of marihuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2, and one count of conspiracy to possess, with intent to distribute, more than 100 kilograms of marihuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2. While entertaining challenges for cause, the district court informed the attorneys as follows: "I don't know how you gentleman [sic] feel about this, but [venireman] Number 29, if her children have been taken away from her by the county I'm not sure I want her on my jury." Defense counsel initially responded, "Well, I didn't see any problem with it, I do on 30."

After a brief discussion concerning Number 30, the court reiterated that it was bothered by the fact that Number 29's children had been taken away by a government agency. The prosecutor then challenged her for cause on the ground that she might be prejudiced against the government. Defense counsel not only failed to object but added, "She might hold it against me." The district court then struck Number 29 without objection.

Mendez now argues that the district court erred in suggesting and granting the government's challenge for cause regarding Number 29. According to Mendez, his right to be tried before a fair and impartial jury was compromised because the district court allowed an improper challenge for cause. Mendez asserts that this challenge amounted to an improper, "bonus" peremptory strike for

the government.

Because Mendez failed to object at trial, we review only for plain error. See FED. R. CRIM. P. 52(b); United States v. Pofahl, 990 F.2d 1456, 1471 (5th Cir. 1993). Plain error is "error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of [the] judicial proceedings and would result in manifest injustice." Id. (brackets in original) (citation and internal quotation marks omitted).

Attempting to circumvent the plain error standard and the burden of demonstrating actual prejudice that it places on the defendant, Mendez argues that the improper removal of a potential juror is per se harmful, citing Davis v. Georgia, 429 U.S. 122 (1976). Davis was a death penalty case, however, and in capital cases, the improper removal of a venireman for cause is scrutinized more closely "where removal is based on that person's opposition to the death penalty." See United States v. Prati, 861 F.2d 82, 87 n.16 (5th Cir. 1988).

Mendez further relies upon United States v. Salamone, 800 F.2d 1216 (3d Cir. 1986), for the proposition that Davis extends to all criminal cases. In Salamone, a firearms case, the district court cursorily struck every potential juror who was affiliated with the National Rifle Association. Id. at 1226-27. Relying upon Davis's "instructive" example, the Third Circuit reversed Salamone's conviction:

> [W]ere we faced with the inadequate questioning of a single excluded juror we might apply a different standard for determining the prejudicial effect of the erroneous exclusion. However, where such a "manifest abuse of

> discretion" results in the wholesale exclusion of a particular group, we do not deem it necessary for the defendant to affirmatively demonstrate the existence of actual prejudice in the resulting jury panel. Under such circumstances, prejudice may be presumed.

Id. at 1227.

We find Salamone distinguishable on its face. Here, there was no "wholesale exclusion of a particular group"; the district court excluded one potential juror only, and the defense counsel concurred in that exclusion. This case far more resembles "the inadequate questioning of a single excluded juror" that the Salamone court itself recognized as calling for a stricter standard. We therefore decline counsel's invitation to adopt Salamone under the particular facts of this case.

Rather, we find the instant case governed by United States v. Prati, 861 F.2d 82, 87 (5th Cir. 1988), where, similarly (accepting for the moment Mendez's version of the event), "[t]he effect of the court's error was to provide the government with an extra peremptory challenge." Noting the Supreme Court's conclusion that the distribution of peremptory strikes does not rise to a constitutional level, see Ross v. Oklahoma, 487 U.S. 81, 88 (1988), we required some showing of prejudice to the defendant or partiality by the jury, even where the defendant had objected at trial to the government's challenge for cause of one prospective juror. Prati, 861 F.2d at 87.

Even were we to assume that the venireman's exclusion was error, Mendez has alleged no partiality by the jury that ultimately tried him. Nor can he assert prejudice convincingly, inasmuch as

the jury panel was composed of veniremen Nos. 2-26, with the last two)) Nos. 25 and 26)) seated as alternates. Even had the excluded juror not been struck, the jury would have been selected before she could have been reached.[1] In Prati, at least, "the improper removal of the venire member may have altered the ultimate composition of the panel," id., and yet we affirmed. Here, in contrast, the court's action had no such effect, and, therefore, cannot constitute plain error.

II.

A.

Mendez argues that the district court committed three distinct errors in instructing the jury. Again, he failed to object to the charge at trial, and accordingly, we review for plain error only. United States v. Stone, 960 F.2d 426, 434 (5th Cir. 1992).[2] In so doing, we must consider the charge as a whole and determine whether "it is so clearly erroneous that the result would be a grave miscarriage of justice or seriously affects the fairness, integrity, or public reputation of the judicial proceedings." United

[1] We note also that the government used only three of its allotted peremptory strikes in selecting the jury. The district court's action in effectively granting it a "bonus" strike, therefore, had no real effect on the selection process.

[2] We cannot agree with Mendez that the airing of his objections to the charge at his sentencing hearing should be considered timely. FED. R. CRIM. P. 30 is quite plain, and provides in part, "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict . . . ." (Emphasis added.) As the jury long since had retired, and had been discharged, by the time Mendez's sentencing hearing was held, we have no choice but to proceed under the plain error standard of review.

States v. Winn, 948 F.2d 145, 159-60 (5th Cir. 1991), cert. denied, 112 S. Ct. 1599 (1992). We also have stated that, in the context of jury instructions, plain error exists only if it "could have meant the difference between acquittal and conviction." United States v. Contreras, 950 F.2d 232, 240 (5th Cir. 1991), cert. denied, 112 S. Ct. 2276 (1992).

Mendez first argues that the district court erred in formulating his charge to the jury respecting the reasonable doubt standard: "Proof beyond a reasonable doubt is proof that is so convincing that you would be willing to have other people rely and act upon it without hesitation in the most important of your own affairs." (Emphasis added.) Mendez asserts that the court's instruction diverges crucially from the pattern jury instruction in that the latter requires "proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs." (Emphasis added.) FIFTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS 17 (1990 ed.).

We begin with the premise that district courts possess substantial latitude in formulating jury instructions. United States v. Carr, 979 F.2d 51, 53-54 n.5 (5th Cir. 1992). Moreover, a challenged reasonable doubt instruction must be viewed in the particular context in which it is given. Baker v. United States, 412 F.2d 1069, 1073 (5th Cir. 1969), cert. denied, 396 U.S. 1018 (1970). So long as the definition correctly conveys the concept of reasonable doubt, the charge will not be considered sufficiently prejudicial to warrant reversal. Holland v. United States, 348

U.S. 121, 140 (1954).

During the sentencing phase, the district court explained that, in its view, the variation from the pattern instruction served to raise the standard of proof)) not lower it, as Mendez contends. We need not delve into the more metaphysical aspects of the criminal law, however, because we find not only that the altered instruction adequately conveyed the concept of reasonable doubt, but also that the district court amply cautioned the jury elsewhere in its charge. See United States v. Moss, 756 F.2d 329, 334 (4th Cir. 1985).[3]

B.

Mendez also failed to object at trial but asserts as error on appeal that the district court's charge relieved the government of proving his culpable mental state. Item 19-D of the court's instructions to the jury provides, "A defendant must be found to have acted knowingly and willfully." According to Mendez, "there was a substantial risk that it could have been taken as a judicial command to find against the appellant on the mens rea element."

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[3] Immediately after the challenged reasonable doubt instruction, for example, the court reminded the jury that "the defendant is innocent and he remains innocent unless the Government proves its charges." Later, the court reiterated,

> The defendant is presumed innocent. If a reasonable doubt remains in your minds after a fair consideration of all of the evidence, you must acquit the defendant, finding him not guilty. The Government has the duty to prove his guilt beyond a reasonable doubt, and if the Government fails you must acquit him.

Such cautions to the jury are, according to the Fourth Circuit, "precisely the type of ameliorating instructions that render harmless any confusion engendered by an unsuccessful attempt to define reasonable doubt." Moss, 756 F.2d at 334.

A verdict cannot stand if the instructions do not require the jury to find each element of the crime under the proper standard of proof. United States v. Ojebode, 957 F.2d 1218, 1227 (5th Cir. 1992), cert. denied, 113 S. Ct. 1291 (1993). We previously have noted that "[a]ny one instruction, however, does not have meaning in isolation from the instructions that went before and came after it." United States v. Jokel, 969 F.2d 132, 136 (5th Cir. 1992).

In this case, the jury was instructed on many occasions that the government was required to prove all elements beyond a reasonable doubt and that Mendez was presumed innocent until the government met its burden of proof. See, e.g., note 3, supra. Moreover, the court separately defined both "knowingly" and "willfully" and gave a deliberate ignorance instruction prior to the challenged charge.[4] Lastly, in its explanation of the government's burden under count one, the court instructed the jury that "the Government must prove beyond a reasonable doubt that the defendant knowingly and willfully possessed" the marihuana; as to count two, the court stated that "the Government must prove . . . the defendant willfully became a member of that conspiracy . . . ."

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[4] The full text of the court's charge regarding the requirement of knowing and willing conduct is as follows:

> "Knowingly" means an act was done voluntarily and not because of mistake or accident.
>
> "Willfully" means an act was done with a conscious purpose to violate the law.
>
> A defendant can still be found to have acted knowingly or willfully if he closed his eyes on purpose to avoid learning all of the facts or the law.
>
> A defendant must be found to have acted knowingly and willfully.

Viewed in this context, the challenged instruction could not have meant the difference between acquittal and conviction, and therefore, we find no plain error.

C.

Finally, Mendez argues that the district court erred in instructing the jury that "your only interest is to seek the truth from the evidence," following the FIFTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS 39. As in United States v. Winn, 948 F.2d at 159-60, however, the district court not only instructed the jury to "seek the truth," but also properly instructed the jury as to the burden of proof. We agree with the Winn court that, "in the face of the reiteration of the burden of proof (i.e. beyond a reasonable doubt) . . . one instruction to "seek the truth from the evidence" in no way rises to the level of a miscarriage of justice." Id. at 160. As we previously have stated, we find nothing contradictory between the notions of truth-seeking and the duty to find guilt beyond a reasonable doubt. See United States v. Cordova-Larios, 907 F.2d 40, 42 (5th Cir. 1990).

AFFIRMED.