

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4635
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL LEGETTE,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
1:92CR24 2

(April 27, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The question in this case is whether the trial judge improperly commented on the credibility of a witness.

I

On September 26, 1991, Lieutenant George Miller of the Jefferson County, Texas Sheriff's Department videotaped two men delivering cocaine to undercover narcotics investigator Paul

*Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Simpson in exchange for food stamps. Simpson worked for the Sheriff's Department, representing himself in drug deals as either a purchaser or seller of illegal drugs. Simpson and Miller did not know the men's identities at the time of the transaction. Orange, Texas police officers later identified appellant Michael Legette as one of the men from a description that Simpson had given them.

On February 11, 1992, Legette and Joseph Vital were arrested as the two men who sold the drugs to Simpson. Legette and Vital were each indicted on one count of possession with intent to distribute cocaine and one count of unlawfully acquiring food stamps. A jury found Legette guilty, and he was sentenced to serve two concurrent 24-month prison terms and two concurrent three-year terms of supervised release.

Legette's counsel filed in this court a motion to withdraw, accompanied by a brief identifying three issues that might arguably support an appeal. See Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Judge Jones denied the motion and, referring to page 63 of the trial transcript, directed counsel to "file a brief addressing whether the district court's comment on the credibility of a witness is plain error." U.S. v. Legette, No. 92-4635 (5th Cir. Nov. 3, 1992) (order of Jones, J.) (unpublished; copy enclosed).

II

Counsel argues that, as reflected on page 63 of the trial transcript, the court improperly commented on Lt. Miller's

credibility. Because Legette did not object to the comment, this court's review is limited to the plain error standard of Fed. R. Crim. P. 52(b). U.S. v. Wicker, 933 F.2d 284, 291 (5th Cir.), cert. denied, 112 S.Ct. 419 (1991). Plain error is error so great that it is incurable. This error must be obvious, substantial, and so basic and prejudicial as to render the trial fundamentally unjust. U.S. v. Hernandez, 891 F.2d 521, 527 (5th Cir. 1989), cert. denied, 495 U.S. 909 (1990).

The challenged remark came after the jury had heard much about Legette. Simpson had testified that he had no doubt that Legette was one of the men who sold him drugs. Miller had also stated that he was certain that Legette was one of the men. The jury saw the videotape of the transaction.

Then, on cross-examination, counsel asked Miller to describe the substance of a discussion that Miller had with the U.S. Attorney about Legette's case. The AUSA objected. The court told counsel that Miller did not have to answer the question. Counsel protested.

Immediately following counsel's protest, the court stated:

I understand what you're doing. You're just trying to muddle up the situation to try to discredit the witness; but he's credible insofar as the Court has been able to determine. You haven't succeeded.

Counsel did not object to the court's remark. No specific curative instruction was given at the time or when the court charged the jury, though the court did tell the jurors that they were the sole

judges of credibility. The issue on appeal is whether the judge's remark--as quoted above--requires reversal.

III

A judge may not infringe on the province of the jury by unduly commenting on the credibility of a witness. U.S. v. Onori, 535 F.2d 938, 944 (5th Cir. 1976). To require reversal, the remark must have been both substantial and prejudicial. This court reviews the remark in the context of the trial as a whole. U.S. v. Lance, 853 F.2d 1177, 1182 (5th Cir. 1988).

The remark, although it was made in the context of limiting the cross-examination of Miller, indicated that the judge found Miller believable. Legette later testified that neither man depicted on the videotape was he, which contradicted Miller's testimony. Although the judge's comment, standing alone, may appear to be prejudicial to Legette, we must look to the trial as a whole.

Simpson and Miller, who were present at the drug deal, identified Legette as one of the perpetrators. Based on prior experience with Legette, Orange Police Department Detective Sergeant Sarah Jefferson identified Legette as one of the men on the tape. All three officers were unshakable in their identifications of Legette. The jury itself had its own opportunity to view the tape and make its own decision about whether Legette was one of the men depicted. Thus in the light of the evidence as a whole, we are unconvinced that the judge's one

isolated comment, made in the context of an evidentiary ruling, was substantial and prejudicial.

Counsel further argues that the judge's comment undercut counsel's integrity in the eyes of the jury. To determine whether any reversible error occurred, we again must consider the remark in the light of the record as a whole. U.S. v. Westbo, 746 F.2d 1022, 1027 (5th Cir. 1984). This comment is the only comment challenged on the ground that it was directed at the integrity of counsel. Furthermore, when a comment is made in the context of an evidentiary ruling and is aimed at moving the trial along, no reversible error occurs. See id. That is what happened in the instant case. The comment is not plain error. The judgment of the district court is therefore

A F F I R M E D.