UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4646
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERIC MITCHELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CR 91 50077 02)

(March 12, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

Defendant Eric Mitchell has appealed his conviction on multiple counts of an indictment charging cocaine-related offenses: he contends that his trial should have been severed from that of co-defendant Michael West, and that a pretrial statement he made to the magistrate judge should have been suppressed. We find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In arguing that the district court's denial of his motion for severance, pursuant to Fed. R. Crim P. 14, was a manifest abuse of discretion, Mitchell contends that he and West had antagonistic defenses. It was assertedly to West's advantage at trial to point the finger at Mitchell as the man who actually conducted cocaine sales while West was not even present for those transactions. West's counsel made opening and closing arguments allegedly containing this assertion. Further, West's testimony allegedly implicates Mitchell while it exonerates West.

Even if Mitchell's characterization of the argument and evidence at trial were fully accurate -- a point we find highly dubious -- the United States Supreme Court has just refined our understanding of Rule 14 governing severances in such a way as to preclude Mitchell's argument. In Zafiro v. United States, 113 S. Ct. 933 (Jan. 25, 1993), the Court held not only that mutually antagonistic defenses are not prejudicial per se, but that Rule 14 does not require severance even if prejudice is shown. A severance should be granted only if there is "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Ordinarily, less dramatic measures, such as limiting instructions, will suffice to cure any risk of prejudice. 113 S. Ct. at 937. The defendants in Zafiro each proclaimed their innocence of drug possession and conspiracy charges on the basis that a co-defendant really owned the box or luggage in which cocaine was found and knew its contents were contraband. The defenses were much more antagonistic than those of

Mitchell and West, yet the Court held there was insufficient prejudice to require severance, and such prejudice as existed was adequately cured by appropriate jury instructions. So it is here. West's counsel conceded during his closing argument that statements made by counsel are not evidence at trial. The district court provided a limiting instruction to safeguard against possible spillover of evidence involving the other two defendants to the issue of Mitchell's guilt. Significantly, there was ample evidence from which the jury could find Mitchell guilty without West's hedging testimony. This case is not materially distinguishable from Zafiro, hence the denial of severance was not improper.

Mitchell also contends that the district court erred when it denied his motion to suppress an inculpatory statement he made during his initial appearance. He also argues that because the magistrate judge gave inadequate cautionary instructions, he did not knowingly and intelligently waive his fifth amendment rights. The district court found, however, that the government had borne the burden of proving that under the totality of the circumstances, Mitchell's statement was voluntarily made and there was no coercion or fault of anyone under the circumstances. United States v. Raymer, 876 F. 2d 383, 386-87 (5th Cir.), cert. denied, 493 U.S. 870 (1989). We agree with this assessment.

At his initial appearance, the magistrate judge stated:

> Let me start off by telling you that you're not required to make any statement at all about the charge that the Government has made against you. And if you do make a statement, it can be used against you.

The magistrate judge then reviewed the charges set forth in the indictment, asked the defendants whether they had copies of the indictments, reviewed the right to counsel, and discussed the issue of bail. Mr. Mitchell then blurted out without forewarning to the magistrate judge that he was to blame for what was found in the car wash. The tape recording of his inculpatory statement was played to the jury.

Mitchell concedes that the magistrate judge's initial warning complied with Fed. R. Crim. P. 5(c),[1] but he argues that something more was required to render his statement voluntary. The one case Mitchell cites in his behalf, United States v. Dohm, 618 F.2d 1169 (5th Cir. 1980), is not pertinent. In that case, the magistrate judge gave a misleading and confusing statement that really did not warn the defendant that his testimony could be used against him. The statement made in this case, quoted above, engendered no such confusion. Mitchell argues further that the magistrate judge should have cautioned Mitchell that any statement he made could be used against him "at trial." It is hardly sensible for him to complain, however, that the language used by the magistrate judge here was broader than what he now suggests proper; the magistrate's warning, if anything, should have put him even more on his guard.

By contrast, the district court emphasized that Mitchell made his statement independent of questioning or coercion from law enforcement personnel, employees of the court, or any other person.

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[1] Rule 5(c) requires the magistrate judge to inform the defendant that the defendant is not required to make a statement, and that any statement made by the defendant may be used against the defendant.

In such circumstances, the test for voluntariness found in Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 523 (1986), was satisfied.

Mitchell finally urges that the court should have excluded his tape-recorded statement under Fed. R. Evid. 403 as unduly prejudicial compared with its probative value. We find no abuse of discretion in the district court's decision to admit this statement. Likewise, we find no cumulative or synergistic error from combining the denial of severance with the admission of Mitchell's statement.

The judgment of the district court is AFFIRMED.