

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-5639

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN ERNEST BISHOP, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(SA 91-CR 471-03)

(March 4, 1993)

Before POLITZ, Chief Judge, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

John Bishop was convicted of conspiracy to distribute LSD and distributing LSD, in violation of 21 U.S.C. § 841(a)(1), 846 (1988). Bishop appeals his conviction on two grounds. First, he contends that he was denied effective assistance of counsel due to his attorney's alleged conflict of interest. Second, Bishop argues that the district court abused its discretion by denying his motion

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

for mistrial. We affirm.

I

Bishop was convicted in part upon the testimony of Chris Kasper, who testified that Bishop was his source for LSD.¹ After Bishop's attorney, Timothy Hootman, had finished presenting the evidence for Bishop's defense, the following ensued:

HOOTMAN: I want to request that I be allowed to take the stand. Chris Kasper came to my office before all this started, and was considering hiring me, and he told me that John [Bishop] didn't have anything to do with it.

[PROSECUTOR] MCCRUM: Judge, we're getting into the fact of representation of counsel, for building a -- for the defense. I don't think that's --

HOOTMAN: Basically it, attorney/client privilege is to encourage discussions between attorney and the client. This Mr. Kasper has already pled guilty.

MCCRUM: If he was a witness in this case, it should have come out long before this trial so that he could have gotten other counsel to do this. This is highly improper. After the trial's over, after jeopardy is already attached and this man now comes forward saying he's some kind of witness.

COURT: I'm going to sustain the Government's objection, Mr. Hootman. My concern is, he went to see you with regard to hiring you, whether there was attorney-client privilege where he -- he's waiving that privilege and also you being a witness in this case, and possibly knowing that you might be a witness in this case, and have gone throughout the trial, and we get to this stage and then you think you might be a witness, I think causes some problems. So, I'm going to sustain the Government's objection to you testifying with

¹ The facts underlying Bishop's offenses of conviction are not relevant to the issues raised on appeal, and therefore will not be discussed.

regard to any discussions you might have had with Mr. Kasper.

HOOTMAN: Okay. That's where we rest our case.

Video Tape ("V.T.") 104, 05-21-92, 11:53:15. On appeal, Bishop argues that this discussion revealed a conflict of interest for Hootman (between Bishop and Kasper) that denied Bishop the effective assistance of counsel.

In addition, Bishop contends that the prosecution introduced prejudicial evidence of his involvement with marijuana. During the prosecution's direct examination of Steven Griebbe, Kasper's former roommate, the following occurred:

MCCRUM: All right. Did you [Griebbe] ever return to [Bishop's] apartment?

GRIEBBE: I think one more time.

MCCRUM: Okay. Who and what were the circumstances in which you returned to that apartment?

GRIEBBE: I went to the apartment another time and it was for a large amount of marijuana.

MCCRUM: Okay. Was John Bishop there?

GRIEBBE: Yes, he was.

MCCRUM: All right. Did you---

HOOTMAN: May we approach, your honor? I would object to any reference to marijuana or any other types of drugs except for LSD.

MCCRUM: All right. It was a surprise to me, Judge. I guess an instruction to the jury might be appropriate at this time. . . . It's my understanding his only visits to the apartment were for the purpose of LSD.

Id., 05/21/92, 08:58:48. The district court denied Bishop's motion for mistrial, and instructed the jury as follows:

Members of the jury, I'm going to ask you to disregard the response that was just given by the witness. This case deals with allegations against Mr. Bishop involving LSD and you should not consider any other drugs. There's no other allegations, no other evidence in this case regarding any other drugs involving Mr. Bishop; only the allegations that he was involved in the distribution of LSD. So please disregard what the witness just said . .

. .

Id., 05/21/92, 09:00:43.

Bishop was subsequently convicted of conspiring to distribute LSD, and distributing LSD, in violation of 21 U.S.C. § 841(a)(1), 846. He was sentenced to 121 months imprisonment and five years supervised release. Bishop appeals his conviction, arguing that: (1) he was denied effective assistance of counsel due to Hootman's alleged conflict of interest; and (2) the district court abused its discretion in denying his motion for mistrial based upon Griebe's testimony that Bishop was also involved with marijuana.

II

A

Bishop first argues that he was denied the effective assistance of counsel because a conflict of interest existed between his counsel and Kasper, the prosecution's principal witness. Bishop did not raise this claim before the district court. Generally, "a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court." *United States v. Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), *cert. denied*, 490 U.S. 1097, 109 S. Ct. 2447, 104 L. Ed. 2d 102 (1989). However, because the record here is "sufficiently complete to enable us to fairly evaluate the

merits of the claim," *id.*, we determine the merits of Bishop's claim on this appeal. *See, e.g., United States v. Phillips*, 664 F.2d 971, 1040 (5th Cir. 1981) (deciding ineffective assistance of counsel claim on direct appeal where record sufficiently developed on claim), *cert. denied*, 457 U.S. 1136, 102 S. Ct. 2965, 73 L. Ed. 2d 1354 (1982); *United States v. Brown*, 591 F.2d 307, 310 (5th Cir.) (same), *cert. denied*, 442 U.S. 913, 99 S. Ct. 2831, 61 L. Ed. 2d 280 (1979).

We examine claims of ineffective assistance of counsel to determine whether counsel's performance was both objectively deficient and prejudicial to the petitioner. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). Where an ineffective assistance claim is based upon conflicts of interest, "prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* at 692, 104 S. Ct. at 2067 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333). Bishop does not dispute that he has failed to show prejudice. *See* Brief for Bishop at 10-19. Rather, he contends that prejudice should be presumed in his case because Hootman actively represented conflicting interests and such conflict adversely affected his performance. We disagree.

The record indicates that Hootman never represented Kasper, as Hootman was only consulted (not retained) by Kasper before Bishop's trial. *See* V.T. 104, 05/21/92, 11:53:15. Even if Hootman did

represent Kasper at some point, such representation ended before Bishop's trial began. Thus, Bishop has not shown that Hootman actively represented conflicting interests. See *United States v. Olivares*, 786 F.2d 659, 663 (5th Cir. 1986) (holding that defendant did not demonstrate that his attorney actively represented conflicting interests where attorney's representation of co-defendant terminated long before trial).

Moreover, even if Hootman was operating under an actual conflict of interest when he cross-examined Kasper, the record indicates that this assumed conflict did not adversely affect Hootman's performance. Hootman vigorously cross-examined Kasper, and established that Kasper was a biased witness, see V.T. 102, 05/20/92, 02:14:22, and a liar. See, e.g., *id.*, 05/20/92, 02:25:16; 05/20/92, 02:16:32. Therefore, Bishop has not shown how any actual conflict of interest adversely affected Hootman's performance.² See *Olivares*, 786 F.2d at 663 (holding that defendant did not demonstrate that his attorney's performance was adversely affected, where attorney "thoroughly cross-examined [his former client and co-defendant] and exposed him as a liar"). Because prejudice cannot be presumed in this case, and Bishop has not shown how he has been prejudiced, his ineffective assistance of

² While it may be argued that Hootman's failure to point out Kasper's exculpatory statement during cross-examination indicates that Hootman's performance was adversely affected, we conclude otherwise. Hootman had the option of either impeaching Kasper, whose testimony concerning Bishop's involvement was certainly damaging, or building up Kasper's credibility in anticipation of bringing out his exculpatory statement concerning Bishop. Because Hootman made the strategic decision to impeach Kasper (which he did effectively) we cannot conclude that Hootman's performance was adversely affected in any way.

counsel claim is without merit.

B

Bishop also contends that the district court abused its discretion by denying his motion for mistrial based upon Griebe's prejudicial testimony that Bishop was also involved with marijuana. We review for abuse of discretion a denial of a motion for mistrial. *United States v. Baresh*, 790 F.2d 392, 402 (5th Cir. 1986).

In the case of erroneously elicited testimony, striking the testimony "and admonishing the jury to disregard it normally serves to cure the error." *United States v. Escamilla*, 666 F.2d 126, 128 (5th Cir. 1982); see also *Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 3109 n.8, 97 L. Ed. 2d 618 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." (citations omitted)). Bishop has not shown any reason why the jury may have been unable to follow the court's curative instruction. The testimony concerning Bishop's involvement with marijuana was only an isolated occurrence in a trial which was replete with admissible evidence concerning LSD transactions. Because of the curative instruction and the strength of the prosecution's case,³

³ See *United States v. Rodriguez-Arevalo*, 734 F.2d 612, 615 (5th Cir. 1984) ("Prejudicial testimony will not mandate a mistrial when there is other significant evidence of guilt which

we cannot conclude that the district court abused its discretion in denying Bishop's motion for mistrial. See *United States v. Rodriguez-Arevalo*, 734 F.2d 612, 616 (5th Cir. 1984) (finding no abuse of discretion in denying motion for mistrial, based upon the strength of the evidence, coupled with a curative instruction).

III

For the foregoing reasons, we **AFFIRM**.

reduces the likelihood that the otherwise improper testimony had a substantial impact upon the verdict of the jury.").