UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7559

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONNIE HOWARD McPHAIL, JR., a/k/a Speedy, SARAH TRIBLY McPHAIL, and LOU CAROLYN McPHAIL,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR3-92-044-D-D)

(March 22, 1994)

Before POLITZ, Chief Judge, JONES, Circuit Judge and FULLAM*, District Judge.

PER CURIAM:**

Aided in part by informants and marijuana detection flyovers conducted by the Air National Guard, authorities in Mississippi uncovered over 14,000 marijuana plants, 100 pounds of processed and packaged marijuana, and numerous firearms on 900 acres of farmland operated by Donnie Howard "Speedy" McPhail and

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* District Judge of the Eastern District of Pennsylvania, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his sisters Lou Carolyn and Sara Trilby McPhail. The three McPhails were charged with drug trafficking violations as well as aiding and abetting the use of firearms during the drug trafficking violations.[1] The McPhails maintained at trial that Sheriff Leslie Pollan "forced" them to grow the marijuana; in fact, their *sole* defense consisted of entrapment and duress. The jury thought otherwise and convicted the McPhails on all counts.

On appeal, the McPhails challenge their convictions on three grounds. First, appellants contend that the trial court abused its discretion in excluding the testimony of two witnesses crucial to the appellants' entrapment and duress defense. Second, appellants maintain that a reference to Joseph Goebbels in the prosecutor's closing argument was so prejudicial as to constitute plain error. Third, in the event that this court does not find plain error or abuse of discretion, the McPhails claim ineffective assistance of counsel in that their trial counsel failed to call certain witnesses critical to their entrapment and duress defense and did not object to improper remarks by the prosecutor. We have carefully reviewed the judgment of the district court and AFFIRM.

I.

As a first level of attack on their convictions, the McPhails contend that the district court abused its discretion by excluding the testimony of two witnesses -- J.W. Walker and Dr. Beadle -- critical to their defense of entrapment and duress.

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[1] The drug trafficking violations included conspiracy to manufacture and possess marijuana with intent to distribute, as well as the underlying manufacturing and possession offenses.

Based on the record, however, it appears that the district court acted within its discretion in excluding this testimony.

Defense counsel advised the court that J.W. Walker would testify that Sheriff Pollan was involved in various illegal activities and had actually "framed" him.[2] Noting that Walker is serving a 25-year state sentence for drug offenses, the district court characterized Walker's proffered testimony as "in essence a collateral attack on Mr. Walker's conviction in [state court]" by virtue of a "sweeping indictment or allegation against many, many public officials." In part because of the potential for juror confusion in "retry[ing] the J.W. Walker case" and the absence of any testimony bearing on the facts of the McPhail case, the district court refused to admit Walker's testimony under Fed. R. Evid. 403.

Rule 403 provides the district court with "broad discretion to exclude evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, or misleading of the jury." United States v. Edelman, 873 F.2d 791, 795 (5th Cir. 1989). The district court did not err in deciding that the potential for juror confusion here was great, while the probative value of Walker's testimony was scant. Where entrapment is a defense the real focus should be on the defendant's predisposition as opposed to the conduct of the government. See United States v. Stowell, 947 F.2d 1251, 1256-57

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[2] How exactly Sheriff Pollan allegedly "framed" Walker is difficult to ascertain from defense counsel's interview notes which served as the basis for the proffer.

(5th Cir. 1991), cert. denied, 112 S.Ct. 1269 (1992). Walker's proffered testimony speaks solely to the latter. Similarly, the testimony has no probative value on the issue of duress as there is no suggestion that the McPhails knew of Walker's allegedly being "framed." In short, the district court operated well within its discretion.

The McPhails also complain that they were improperly denied the opportunity to present testimony from Dr. Beadle. Once the defense had rested, the prosecution called Sheriff Pollan as a rebuttal witness. After the sheriff was cross-examined, defense counsel asked the district court -- without an offer of proof to make known the substance of the evidence -- whether he could call surrebuttal witnesses to impeach Sheriff Pollan.[3] The district court denied this request, implying that surrebuttal evidence is not allowed.

If the court meant that surrebuttal evidence is never permissible, it was incorrect. Surrebuttal is merited where (1) the government's rebuttal testimony raises a new issue, which broadens the scope of the government's case, and (2) the defense's proffered surrebuttal testimony is not tangential, but discredits the essence of the government's rebuttal testimony. See United States v. Moody, 903 F.2d 321, 330, 331 (5th Cir. 1990). Regardless whether the court misconstrued the availability of surrebuttal evidence, however, exclusion of Dr. Beadle's testimony

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[3] Although it is not clear at all from the trial transcript, the McPhails maintain and the government does not dispute that Dr. Beadle was the intended surrebuttal witness.

was harmless error. Because the defendant-appellants concede that the "[g]overnment did not in a strict sense raise a new issue" through Sheriff Pollan's rebuttal testimony, the first of the Moody considerations is not met. Moreover, no proffer of Dr. Beadle's testimony was made to the district court, so neither it nor we can speculate on the probativeness of the hoped-for testimony.[4] Thus, any error with respect to Dr. Beadle's testimony was harmless.

II.

Although no objection was made at trial, the McPhails now complain that the prosecutor improperly compared the defendants to Joseph Goebbels. Specifically, during closing argument, the prosecutor described the defense strategy as follows:

> The idea is that, if you tell the big lie and you tell it often enough, that maybe somebody will believe it. That comes right out of Joseph Goebbels, Second World Minister of Information from Adolph Hitler. Tell the big lie long enough and maybe somebody will believe it. Every officer in this case has been attacked, vilified, and smeared, all in an effort for these people here to avoid their personal responsibility, to avoid their guilt.

The McPhails maintain that this reference amounted to plain error, but we are unimpressed by this assertion.

Criminal convictions are not to be lightly overturned on the basis of a prosecutor's comments standing alone; those comments must be viewed in context. See United States v. Young, 470 U.S. 1, 11 (1985). In determining whether the prosecutor's remarks

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[4] Immediately before voir dire, the district court clearly instructed defense counsel that a proffer of Dr. Beadle's testimony would be necessary at trial. No such proffer was ever made. At one point, in fact, defense counsel informed the court that they did not intend to put Dr. Beadle on the stand.

amounted to plain error, see id. at 14-15, we consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instruction; and (3) the strength of the evidence regarding the defendants' guilt. See United States v. Lowenberg, 853 F.2d 295, 301 (5th Cir. 1988), cert. denied, 489 U.S. 1032 (1989).

The prosecutor's reference to Goebbels was neither pronounced nor persistent. Further, the district court instructed the jury on at least two occasions before closing arguments that statements by attorneys should not be considered evidence. Last, as even counsel for the appellants concedes, the evidence regarding the guilt of the McPhails, if the jury disregarded the duress/entrapment defense, was considerable. In the overall context, the inflammatory reference made by the prosecutor in closing argument does not amount to plain error.

III.

As an alternative, final argument, the McPhails assert that the failure of their counsel to proffer Dr. Beadle's testimony prior to surrebuttal and to object to the prosecutor's remarks during closing argument amounted to ineffective assistance of counsel. This court is not inclined to review claims of constitutionally ineffective counsel on direct appeal if the record is insufficient to evaluate them. The particular claims raised here are not by themselves compelling, but the record raises suspicions that counsel may not have been effective in other ways.

In order not to prejudice appellants, we shall not consider ineffectiveness of counsel claims on this appeal.

IV.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FULLAM, J. Concurring in the result.

I agree that, on this record, no issue requiring reversal of the appellants' convictions has been adequately preserved for review. I therefore concur in affirmance of the conviction. I write separately, however, to emphasize that we have not considered any issues concerning the adequacy of appellants' trial representation -- issues which can, and in my view should, be asserted pursuant to 28 U.S.C. § 2255.

My reading of the trial record is that the defendants were flatly precluded from presenting any surrebuttal testimony, because the trial judge was of the view that surrebuttal is never permissible in a criminal case. As the majority notes, that view was incorrect; there is no question but that the appellants should have been permitted to impeach Sheriff Pollan's testimony through the testimony of Dr. Beadle -- if, as appellants now assert, Dr. Beadle would indeed have contradicted Sheriff Pollan on a material part of his testimony. But, unfortunately for appellants, the trial record also shows that the trial judge was never informed of the precise nature of the proposed testimony from Dr. Beadle,

notwithstanding his earlier advice that a proffer would be necessary; and appellants' trial counsel seems to have agreed that the evidence was properly excluded. At least, he elected not to pursue the matter. On this record, it is impossible to conclude that "plain error" has been shown.

There are other aspects of this case which should be mentioned. All three appellants, Donnie Howard McPhail, Jr. and his two sisters, were represented at trial by the same lawyer. Although the attorney was paid a very handsome fee, he abandoned his clients shortly after the trial, and has since been disbarred. Since there was joint representation at trial, it is understandable that this court earlier appointed one lawyer to represent all three appellants in this appeal. These circumstances combine, however, to preclude assertion of any issue not equally applicable to all three appellants.

The joint representation of the three defendants at trial may well have prevented the two McPhail ladies from negotiating potentially favorable plea agreements, or presenting defenses related to possible domination and coercion by their brother. In short, it seems self-evident that trial counsel was operating under an actual conflict of interests between his clients. Although all three appellants executed a written waiver, and consented to joint representation by a single lawyer, the record does not reflect any colloquy with the trial court on the subject. Thus, there remains a serious question whether each of the three appellants made an adequately informed decision to waive the apparent conflict.

A further source of concern arises from the highly unusual facts asserted at trial. According to appellants, Sheriff Pollan provided the marijuana seeds; ordered them to grow the marijuana; ordered Mr. McPhail to become a candidate for sheriff, in opposition to Sheriff Pollan and others; instigated (shortly before the election) the prosecution of appellants; and either had a hand in, or helped cover up, the deaths of two witnesses to his perfidy. After his arrest and incarceration, Mr. McPhail asserted, in a televised interview from his prison cell, that the voters should not lose faith, because he was working undercover for the federal authorities in order to expose the criminality of his opponent and others. His defense at trial was that he was coerced into criminal activity by Sheriff Pollan, and feared for his life.

Merely to state these contentions is to reveal their seeming improbability. But if, as the jury has found, appellants' implausible assertions are without basis in fact, it would seem that there are serious questions concerning appellants' mental capacity. Given the admitted facts -- a respectable farmer and his two sisters, none of whom had ever been in trouble with the law, undertake a large-scale marijuana-farming project, apparently with the full knowledge of many of their neighbors; and, when arrested, advance grandiose and farfetched explanations -- the circumstances of this case seem strongly to resemble other cases in which courts have been faced with assertions of a bi-polar disorder (manic-depressive syndrome) or paranoid schizophrenia. So far as the

record discloses, however, neither trial counsel nor anyone else has explored these questions.

Our rejection of the present appeal should not be viewed as expressing any definitive views on these issues, and is without prejudice to future collateral proceedings, if appropriate.