

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7600

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDENIN HURTADO-OLIVERO,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR-G-91-15)

(May 23, 1994)

Before REAVLEY and JOLLY, Circuit Judges, PARKER, District Judge.*

PER CURIAM:**

Defendant-appellant Edenin Hurtado Olivero was convicted of possession of cocaine with intent to distribute, and conspiracy to possess cocaine with intent to distribute. He appeals. We find no reversible error and affirm.

I

*Chief Judge of the United States District Court for the Eastern District of Texas, 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

In late November 1991, the United States Customs Service received information that a crew member of the MOTOR VESSEL PRINCESA, a vessel en route to Galveston, Texas, from Columbia, was in possession of cocaine. According to this tip, the crew member would throw the cocaine overboard to a person waiting on the dock. On November 26, 1991, at approximately 11:00 p.m., customs agents began monitoring the M/V PRINCESA and the surrounding docks. Approximately two hours later, at about 1:00 a.m., the agents observed two people on the dock--who were later identified as Juan Ramon Cruz-Montano and Jose Gonzalez Cabrera--signaling with a flashlight someone onboard the ship. After signaling the ship, the men climbed from the dock onto pilings near the ship, and Cabrera disappeared from the customs agents' view. Meanwhile, Marine Enforcement Officers John Davis and Timothy Unger, who were observing the ship from the dock, observed a crewman at the stern of the M/V PRINCESA wearing a distinctive baseball cap with the word `SECURITY' written across the front in gold lettering. This crewman paced back and forth repeatedly, and eventually kicked a duffle bag through a scupper of the ship towards the general area where Cabrera was last observed.

Almost immediately after the bag dropped through the scupper, customs agents observed Cabrera with the bag in his hands. Cabrera then joined Montano, who was waiting on a nearby piling. As the two men climbed onto the dock and began walking away with the duffle bag, customs agents arrested them and found 3,553 grams of

cocaine in the duffle bag. Immediately after Cabrera and Montano were arrested, customs agents boarded the M/V PRINCESA and arrested defendant-appellant Edenin Hurtado Olivero, a security guard standing near the gangway who was wearing the distinctive 'SECURITY' baseball cap. According to Agent Unger, Olivero was the crewman who kicked the bag of cocaine off the stern of the ship.

II

All three defendants were charged with possession of cocaine with intent to distribute, a violation of 21 U.S.C. § 841(a)(1), and with conspiracy to possess cocaine with intent to distribute, a violation of 21 U.S.C. § 846. On the day of trial, Montano pleaded guilty, but Olivero and Cabrera continued to claim innocence and they were tried before a jury. After the joint trial concluded, the jury convicted both defendants on all counts. Olivero was sentenced to serve two concurrent terms of 126 months in custody, two concurrent terms of five years of supervised release, and he was required to pay a \$100 cost assessment. He now appeals his conviction.¹

¹Cabrera's appeal had initially been joined with Olivero's appeal. Cabrera's attorney, however, filed an Anders brief, noting that the evidence was sufficient to support the jury's verdict, that he was competent to stand trial, and that his sentence was within the range prescribed by the applicable sentencing guidelines. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Pursuant to the Anders brief, this court dismissed Cabrera's appeal.

III

Olivero presents three issues for our consideration. First, Olivero contends that the evidence is insufficient to support his conviction. Second, Olivero argues that the district court abused its discretion in denying his request that the court sever his trial from that of codefendant Cabrera. Finally, Olivero contends that he is entitled to a new trial because arguments made during the prosecution's closing arguments were improper and amounted to prosecutorial misconduct. We will, in turn, discuss each contention.

A

Olivero first contends that the evidence introduced at trial is insufficient to support his conviction. Specifically, he argues that the government failed to prove beyond a reasonable doubt that he was the crewman who kicked the duffle bag of cocaine through the scupper. When reviewing the sufficiency of the evidence, we apply a highly deferential standard of review. We will affirm a jury verdict if, after viewing the evidence in the light most favorable to the verdict and construing all reasonable inferences in favor of the verdict, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1346, 122 L.Ed.2d 722 (1993). In this case, there is sufficient evidence that Olivero

was the crewman who kicked the duffle bag through the scupper. Customs agent Timothy Unger, who observed the "transaction" from approximately 300 feet through binoculars, testified at trial that he could see the crewman clearly enough to make out his facial features. Within minutes after the "transaction" occurred, Unger and another Customs agent boarded the M/V PRINCESA and arrested Olivero. In open court, Unger identified Olivero as the crewman he observed on the stern of the ship. Although Olivero vigorously contested Unger's ability to identify Olivero because of distance and weather conditions, Unger's testimony provides an ample foundation to support the guilty verdict, especially, as we discuss later in this opinion, when the process of elimination of the possibilities of misidentification confirms Unger's testimony.

B

Next, Olivero contends that the district court abused its discretion by refusing to sever his trial from that of codefendant Cabrera. According to Olivero, Cabrera's "dumbfoundingly incredible" testimony concerning the events surrounding Cabrera's arrest prejudiced Olivero in the eyes of the jury. Where two or more defendants have been indicted together, there is a preference for a joint trial. Zafiro v. United States, ___ U.S. ___, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993). However, if it appears that one defendant will be prejudiced by a joint trial, the court may, in its discretion, grant a severance. United States v. Restrepo, 994 F.2d 173, 186 (5th Cir. 1993). The decision to grant

or deny a motion for severance cannot be disturbed absent an abuse of that discretion. Id. To demonstrate an abuse of discretion, an appellant must show that he received an unfair trial that exposed him to compelling prejudice against which the district court was unable to protect. Id.

In this case, Olivero failed to demonstrate that the district court abused its discretion. Because Olivero has not demonstrated that the joinder prejudiced his right to a fair trial, we hold that the district court did not abuse its discretion.

C

Finally, Olivero contends that the prosecutor made improper and prejudicial closing arguments that require a new trial. A criminal conviction should "not to be lightly overturned on the basis of a prosecutor's arguments standing alone." United States v. O'Banion, 943 F.2d 1422, 1431 (5th Cir. 1991). Improper arguments by a prosecutor require a new trial only if the arguments substantially affect a defendant's right to a fair trial. United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985). A defendant's right to a fair trial has been substantially affected if the arguments in question are both inappropriate and harmful. United States v. O'Banion, 943 F.2d at 1431.

Olivero complains of two separate arguments made by the prosecutor. The first argument concerns what might be characterized as a "plea to act as the conscience of the

community." United States v. Sanchez-Sotelo, 8 F.3d 202, 211 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1410 (1994). A prosecutor may appeal to the jury to act as the conscience of the community, however, those arguments at some point become improper if they are calculated to inflame the jury, or to appeal to passion or prejudice. United States v. Brown, 887 F.2d 537, 542 (5th Cir. 1989). If the defendant objects to the prosecutor's argument, we review the district court's refusal to grant a mistrial for abuse of discretion. United States v. Sanchez-Sotelo, 8 F.3d at 211.

In this case, the prosecutor made the following statement during closing arguments:

It's said that criminals do what they do because they don't think that they'll get caught and if they do get caught, that they won't get convicted and if they are convicted, they won't get punished and that we, the noncriminals, contribute to that way of thinking. I ask you not to contribute to that way of thinking anymore. Do not let these people believe --

Olivero's attorney objected, arguing that the statement was "manifestly improper," and required a mistrial. The court denied the motion, adding that "I think at this juncture a limiting instruction would cause more harm than benefit. Let's move on." Although at some point, a plea to act as the conscience of the community becomes so inflammatory that the argument is improper, this argument does not rise to that level--and we are referred to no cases that would support reversing Olivero's conviction for these remarks. We therefore hold that the district court did not abuse its discretion in refusing to grant a mistrial.

The next improper prosecutorial argument is more serious. It concerns the credibility of the government's witnesses. The prosecutor stated during his rebuttal argument about codefendant Cabrera that:

In order to find this man not guilty, you would have to come back into this courtroom with your verdict and tell the officers and agents that they lied. That's what you would be saying by anything other than a guilty verdict against Defendant Cabrera. You would be telling the agents and officers, you lied. After listening to his story from that witness stand, that's the only way you could come back with anything but a guilty verdict on him.

The prosecutor then linked the two defendants by arguing that both defendants were relying on identical defenses:

The defense attorney told you -- his defense attorney told you in his opening statement that his client was going to testify even though he didn't have to. And I want you to keep this in mind in regard to both of the defendants' stories that you heard. And both of their stories came down to it must have been another person. That was the gist of both of their stories.

Clearly and without question, the prosecutor's argument was an inaccurate definition of the burden of proof. The prosecutor's definition fails to recognize that the jury could properly acquit Olivero without concluding that the government agents lied by finding that the government failed to prove the defendant's guilt beyond a reasonable doubt. See United States v. Vargas, 583 F.2d 380, 387 (7th Cir. 1978)(holding that the prosecutor's argument that a "not guilty" verdict said to each government agent that he was a liar was error); United States v. Diaz-Carreon, 915 F.2d 951, 956 n.8 (5th Cir. 1990)(holding that prosecutor's argument was not

error, but distinguishing the case from United States v. Vargas); United States v. Cantu, 876 F.2d 1134, 1138 (5th Cir. 1989)(citing United States v. Vargas and holding that similar statements were "inappropriate").

Having established that the argument was improper, we next evaluate the effect of the argument, considering the following three factors: 1) the magnitude of the prejudicial effect of the remarks; 2) the efficacy of any cautionary instruction; and 3) the strength of the evidence of the defendant's guilt. United States v. Sanchez-Sotelo, 8 F.3d at 211; United States v. Rocha, 916 F.2d 219, 234-35 (5th Cir. 1990), cert. denied, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991). Because Olivero failed to object to this argument, we must determine whether the improper arguments amount to "plain error." United States v. Sanchez-Sotelo, 8 F.3d at 211. "Plain error" is error that is "obvious, substantial, and so basic and prejudicial that the trial lacks the fundamental elements of justice." United States v. Simpson, 901 F.2d 1223, 1227 (5th Cir. 1990).

After considering the improper argument in the light of the three factors, we conclude that it does not amount to plain error. First, we are conscious that the prejudicial effect of the improper argument was fairly strong--after all, the prosecutor misstated the very standard against which Olivero's guilt or innocence should be judged. We also recognize that this prejudicial effect was unmitigated by any curative instruction because Olivero failed to

object to the improper argument. Nevertheless, the strong evidence of Olivero's guilt outweighs the other factors. As the record demonstrates, Agent Unger and Agent Davis testified that from their vantage point on the dock, they observed a crewman dressed in a security guard's uniform pacing between the stern of the ship and the ship's gangway. After this crewman kicked the duffle bag overboard, he walked to the gangway, where he remained all the while in view of Agent Unger. Agent Unger testified that he observed this crewman continuously except for a fifteen to twenty second interval when he was assisting other agents in the arrest of Montano and Cabrera. It might have been possible that during this short period of time Olivero could have replaced Sixto Iturralde, the uniformed security guard on duty before Olivero, except for Olivero's own testimony. Olivero testified that at the time the customs agents boarded the ship, Iturralde was standing near the dining room dressed in light colored pants and a white shirt drinking a beer. Thus, although it might have been possible that Olivero replaced Iturralde on deck as security guard just before the agents boarded the ship, the twenty second span of time in which the security guard was out of sight of Agent Unger and Agent Davis would not have provided sufficient time to allow a uniformed Iturralde to completely change clothes and reappear near the dining room with a beer. Thus, Olivero's contention that Iturralde was the security guard observed pacing the stern of the ship does not stand up. Given the strength of the government witnesses'

testimony, and the elimination of possible misidentification, the evidence supporting Olivero's conviction is strong enough to outweigh the other factors. Consequently, we hold that the prosecutors arguments, although improper, do not amount to plain error.

IV

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.