

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7743  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS ARTURO GUAJARDO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. CR-M92-079-02  
- - - - -

June 22, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Guajardo contends that he is entitled to a new trial because the Assistant United States Attorney ("AUSA") made the following remark during closing argument: "Both of these defendants took affirmative steps. Both of these defendants--you've seen them, they've been smiling and laughing here. They think it's a big joke because they think--"

A prosecutor's remark to the jury constitutes reversible error only when it is both inappropriate and harmful. United States v. Lowenberg, 853 F.2d 295, 301 (5th Cir. 1988) (internal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

quotations omitted), cert. denied, 489 U.S. 1032 (1989). To overturn a criminal conviction on the basis of a prosecutor's improper argument, a defendant must show that the prosecutor's statements affected his "substantial rights." Id. at 302. "In determining whether improper argument affects a defendant's substantial rights, the court should 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 of the defendant's guilt." Id. "The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." United States v. Sanchez, 961 F.2d 1169, 1176 (5th Cir.) (internal quotations omitted), cert. denied, 113 S.Ct. 330 (1992).

Assuming the argument was improper, it was isolated and relatively mild when compared to improper arguments at issue in other cases in which this Court has affirmed convictions notwithstanding the prosecutor's improper argument. See, e.g., Lowenberg, 853 F.2d at 301. Although the district court's admonition was somewhat perfunctory, the fact that the admonition was given without objection by Guajardo does not weigh in favor of reversal. See Sanchez, 961 F.2d at 1176. The evidence against Guajardo was considerable. In the context of the entire trial, the prosecutor's remark does not cast doubt on the correctness of the jury's verdict.

AFFIRMED.