IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7790
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMMY JAMES GILLENTINE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi

(CR-1:92-085-B-D)

(August 31, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Tommy James Gillentine (Gillentine) was convicted by a jury for possession of an unregistered firearm in violation of 26 U.S.C. §§ 5861(d) and 5871. He appeals both his conviction and his sentence, alleging errors in his trial and in his sentencing. Concluding that both the guilt-innocence and sentencing phases of Gillentine's experience in the district court were free of reversible error, we affirm.

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[*]Local Rule 47.5 provides: "The publicat ion 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

FACTS AND PROCEEDINGS

Bobby Gillentine, uncle of Defendant-Appellant Gillentine, is the proprietor of the County Line Grocery and Bait Store (County Line) in Lee County, Mississippi. Bobby Gillentine (the Uncle) was at work at County Line at about 4:45 p.m. on January 31, 1992, when he received a telephone call from an individual whose voice he identified as Gillentine's. According to the Uncle, Gillentine said, "I'm going to kill you, you mother f_____," then hung up the telephone. The Uncle reported the incident by telephone to a deputy sheriff.

The Uncle was serving customers at around 8:00 p.m. that same evening when he heard what he described as a "crackling sound," then felt pain in his back and shoulders and noticed blood running down his side. A bullet had passed through his arm and back.

Peggy Young was at County Line during the shooting. She heard two "booming" sounds, then heard the Uncle say,"I'm hit." Young attempted to aid the Uncle.

At the time, Angie Guin was sitting in her car while using an outside telephone at County Line. She saw a black Chevrolet Camaro stop in front of the store and observed as the occupants of the Camaro turned on the interior light, then turned it off. Guin heard two shots, immediately after which the Camaro began to accelerate quickly. Guin heard another shot as the Camaro drove off.

Ricky Bishop lived in a trailer next to the County Line. He was at home at 8:00 p.m. when he heard shots. He told his children to get down, then he ran out the front door. He saw a dark sports car, which appeared to him to be either a Camaro or a Pontiac Trans-Am, going down the highway. Bishop heard another gunshot and saw a lightning-like flash come from the passenger side of the car. Norman John Shierling, driver of the Camaro, testified that Gillentine arrived at Shierling's residence between 5:00 and 5:30 p.m. on January 31; that Gillentine had in his possession a long, black gun and several loaded ammunition clips for the gun; and that Gillentine asked Shierling if he wanted to shoot the gun. Shierling responded affirmatively, so the two men left Shierling's

residence in his black 1983 Chevrolet Camaro, with the gun leaning against the passenger side of the car's center console. According to Shierling, Gillentine said that the two were going to, in Shierling's words, "[s]hoot the gun and scare somebody." Gillentine did not specify whom they were going to scare.

Shierling testified that he and Gillentine drove to a flea market in Monroe County, Mississippi, where Gillentine told Shierling to pull off the road. When Shierling complied, Gillentine opened the door, loaded the gun, then fired about twenty times, during which the gun misfired continuously. Gillentine told Shierling that the gun was fully automatic; however, according to Shierling, it fired only one round each time Gillentine pulled the trigger. The men remained at the flea market for about 15 or 20 minutes, then drove to a Texaco service station and purchased a six-pack of beer.

After drinking some beer, Shierling and Gillentine drove to a store, the name of which Shierling could not remember. Gillentine directed Shierling to pull off the road across from the store, and he again complied. According to Shierling, Gillentine exited the car; stood up; reached inside the car and grabbed the gun; and laid the gun across the roof of the car and fired, whereupon Shierling began to drive away. Gillentine jumped back into the car and directed Shierling to "[g]o, go, go." As they drove off, Gillentine fired into the air.

The two men drove south towards Amory, Mississippi. According to Shierling, Gillentine said words to the effect, "[h]e'll pay me now." Gillentine explained that the store at which he and Shierling had stopped was owned by the Uncle and that, in Shierling's words, "money was owed."

Amory Police Lieutenant Weldon Wiggins testified that the police department received a call around 8:30 p.m. on January 31, advising that there had been a shooting at County Line and to be on the lookout for a black Camaro with two occupants, so Wiggins positioned himself to intercept the car. After about five minutes, a black Camaro with two occupants drove past. Wiggins followed the car into Amory, stopped it, and asked the driver for his driver's license. Shierling responded to Wiggins that he knew that Shierling had no license. The passenger exited the car, walked around it,

and identified himself to Wiggins as Tommy Gillentine. Wiggins directed Gillentine and Shierling to move to the rear of the car, after which Wiggins looked inside the car and saw a gun, which he identified as an "AR-15 type weapon," lying on the floorboard behind the driver's seat. Shierling testified that when he and Gillentine noticed the police cruiser following them Gillentine had reached into the back seat, lifted the gun, and shoved it rearward.

An agent of the Bureau of Alcohol, Tobacco and Firearms (BATF) testified that the gun seized from Shierling's car was not registered in the National Firearms Registration and Transfer Record. Another BATF agent testified that the gun was a .223 caliber, AR-15-like weapon, manufactured by the Cendra Corporation; and that the weapon had been modified to fire on full automatic, employing the type parts found in M-16 machine guns.

Gillentine was convicted by a jury of possession of an unregistered firearm, and the district court sentenced Gillentine to 63 months of imprisonment, to be followed by three years of supervised release. Gillentine timely appealed.

II

ANALYSIS

A. Pre-Trial Publicity

Gillentine first contends that the district court erred by failing to question the jury venire regarding publicity about him. Yet Gillentine failed to raise this contention before the trial court.

Gillentine's trial was held on September 9, 1992. His counsel has submitted, in the record excerpts filed in this court, two articles from an unidentified newspaper. The first of those articles, dated July 11, 1992, reported that Gillentine was arrested in July 1992 for the murder of the son of a United States District Judge of the Northern Judicial District of Mississippi. The second article, dated November 9, 1992, reported that Gillentine was to be tried on state charges of aggravated assault, and that he had been accused of murdering the judge's son. There is no indication that the newspaper articles or any other potential evidence of pre-trial publicity was submitted to the district court. The Chief Judge of this court appointed a district judge from the Eastern District of Louisiana

to preside over Gillentine's trial. Additionally, Gillentine's trial was held in the Western Division of the Northern Judicial District of Mississippi, rather than the Eastern Division, where it ordinarily would have been held but for the fact that the father of the man whom Gillentine was accused of killing sits in the Eastern Division.

Defense counsel contends that we "may take judicial notice that a case such as this . . . generates extensive media coverage," and that "the `murder' . . . was probably the only type of similar kind having occurred anywhere in the United States of America." Under the circumstances, he insists, the district court should have questioned the jury venire about its knowledge of the allegation that Gillentine had murdered a judge's son.

We will not consider issues for the first time on appeal unless they are purely legal issues and failure to consider them would result in "manifest injustice." United States v. Pigno, 922 F.2d 1162, 1166 (5th Cir. 1991). Resolution of Gillentine's contention that adverse publicity warranted questioning the venire about that publicity would require factual determinations by this court. Moreover, counsel has not presented potential evidence to us reflecting publicity so prejudicial that it would have warranted consideration during jury selection. See United States v. Gerald, 624 F.2d 1291, 1297-98 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981). The one newspaper article published before trial and submitted by counsel to this court does not indicate that Gillentine's trial took place in a "media circus" or otherwise highly charged atmosphere. Additionally, assigning an out-of-state judge to conduct the trial and moving the trial to another judicial division reduced the likelihood that such an atmosphere necessarily existed. To the contrary, those actions indicate that the federal judiciary was sensitive to the situation and acted to avoid any possibility of actual or perceived prejudice toward Gillentine from the judiciary itself.

B. Extraneous Evidence

Gillentine next contends that the district court should have excluded all testimony about the shooting of the Uncle. Gillentine argues that the challenged testimony was unduly prejudicial and that its prejudicial effect substantially outweighed its probative value. We disagree.

A reviewing court will reverse a district court's determination on the admissibility of evidence only on finding an abuse of discretion. United States v. Eakes, 783 F.2d 499, 506-07 (5th Cir.), cert. denied, 477 U.S. 906 (1986). "Evidence that is `inextricably intertwined' with the evidence used to prove a crime charged is not `extrinsic' evidence under [Fed. R. Evid.] 404(b). Such evidence is considered `intrinsic' and is admissible `so that the jury may evaluate all the circumstances under which the defendant acted.'" United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992) (citations omitted), cert. denied, 113 S.Ct. 1258 (1993). "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion under [Fed. R. Evid.] 403." United States v. McRae, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862 (1979).

The evidence adduced at trial indicates that Gillentine shot the Uncle with the unregistered weapon that gave rise to his conviction. That evidence is relevant to show that Gillentine actually possessed the gun and, as intrinsic evidence, is information the jury was entitled to know. Its relevance is not substantially outweighed by its prejudicial effect.

Moreover, the district court limited testimony about the shooting of the Uncle to the fact of the shooting itself. The court also instructed the jury that it was entitled to know the basic, factual circumstances of Gillentine's offense, directed the jury to focus on the particular charge against Gillentine, and admonished the government to avoid eliciting "exquisite details." The government complied with the court's limitation by not eliciting "exquisite details" about the Uncle's injury. And the witnesses to the shooting provided brief, non-inflammatory accounts of their observations.

C. Ineffective Assistance of Counsel

Gillentine next contends that he received ineffective assistance of counsel at trial.

> The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations. [We have] undertaken to resolve claims of inadequate representation on direct appeal only in rare cases where the record allowed [us] to evaluate fairly the merits of the claim.

United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987) (citations omitted), cert. denied, 484 U.S. 1075 (1988). As all of counsel's challenged acts occurred during voir dire or at trial and thus involve proceedings included in the record on appeal, this is one of those "rare cases." We may, therefore, evaluate the merits of Gillentine's allegations.

To prevail on a claim of ineffective assistance of counsel, a defendant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to prove either prong of the Strickland test is fatal. To prove deficient performance, i.e., "cause," the defendant must show that counsel's actions "fell below an objective standard of reasonableness." Id. at 688. To prove prejudice, the defendant must show that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). To prove unreliability or unfairness, the defendant must show the deprivation of a "substantive or procedural right to which the law entitles him." Id.

1. Questioning the Venire

Gillentine contends that counsel was ineffective because he failed to ask the jury venire about the adverse publicity surrounding Gillentine. As discussed above, Gillentine has failed to show that such questioning was warranted. Moreover, as a matter of trial tactics, counsel may have wished to avoid raising the subject of extraneous allegations against Gillentine.

2. Evidence of the Shooting

Gillentine next contends that counsel was ineffective because he failed to move before trial, rather than at trial, to exclude the testimony about the Uncle's shooting. But, as we find that admission of that testimony was not error, Gillentine can show neither deficient performance nor prejudice.

3. Waiver of Opening Argument

Gillentine contends further that counsel was ineffective because he waived the opportunity

to make his opening argument before the government presented its case, and made only a brief argument before resting Gillentine's case. Gillentine has failed to show either deficient performance or prejudice in this regard. First, the decision when or whether to present an opening argument is squarely in the realm of trial strategy. Second, Gillentine presented no evidence before resting his case, so no lengthy opening argument was necessary. Finally, counsel delivered a closing argument in which he questioned whether the rifle was fully automatic; pointed out inconsistencies and weaknesses in witness testimony; and suggested that Shierling had lied. Gillentine's contention is meritless.

4. Shierling's Post-Arrest Statement

Finally, regarding ineffectiveness of counsel, Gillentine contends that counsel was ineffective because he failed to move during trial for disclosure of Shierling's post-arrest statement to police. Gillentine argues that counsel's failure to move for disclosure "impaired [counsel's] ability to thoroughly impeach the government's main witness[.]" "Pure speculation that crucial cross-examination material might have been discovered is insufficient to raise a constitutional claim of ineffective assistance." Duff-Smith v. Collins, 973 F.2d 1175, 1183 (5th Cir. 1992), cert. denied, 113 S.Ct. 1958 (1993).

D. Calculation of Sentence

Moving from his trial to his sentence, Gillentine insists that the probation officer and the district court erred in calculating his sentence under U.S.S.G. § 2A2.2, which governs aggravated assault, rather than under § 2K2.1, which governs most firearm offenses. Gillentine's contention is unavailing.

Section 2K2.1 includes a cross-reference to § 2X1.1, which governs inchoate offenses when "the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense[,]" and the resulting offense level is higher than that otherwise obtained by application of § 2K2.1. See § 2K2.1(c)(1)(A.) Section 2X1.1 directs sentencing courts to use "[t]he base offense level from the guideline for the substantive offense, plus

any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." § 2X1.1(a). The probation officer determined that the substantive offense for which Gillentine used the automatic rifle was aggravated assault.

The aggravated assault guideline defines that offense as, inter alia, "a felonious assault that involved . . . serious bodily injury[.]" § 2A2.2, comment. (n.1). For purposes of the Sentencing Guidelines, "`[s]erious bodily injury' means injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." § 1B1.1(j). The base offense level for aggravated assault is 15. A sentencing court should add five levels if a firearm was discharged and four levels if the victim sustained a serious bodily injury. § 2A2.2(a), (b)(2)(A), (b)(3)(B).

In her Presentence Investigation Report (PSR) the probation officer found that the Uncle had sustained a serious bodily injury. She calculated Gillentine's offense level as 24, and the district court accepted the PSR.

The probation officer correctly calculated Gillentine's offense level by reference to the aggravated-assault guideline and its specific offense characteristics. Gillentine discharged his gun in front of County Line. The Uncle was hospitalized for his gunshot wound and thus suffered a "serious bodily injury." The resulting offense level of 24 was greater than the offense level of 22, which would have resulted from application of § 2K2.1 had the probation officer not followed that section's cross-reference to the inchoate-offense guideline. See § 2K2.1(a)(5), (b)(5), (c)(1)(A).

E. Criminal History

Gillentine next posits that the district court's counting of three drunken-driving convictions when calculating his criminal history score was improper, given the absence of any indication that Gillentine was represented by counsel when he was convicted on those charges. Sentencing courts may count uncounseled misdemeanor convictions for which no term of imprisonment was imposed. United States v. Haymer, 995 F.2d 550, slip p. 5339 (5th Cir Jun. 30, 1993, No. 92-7585). Drunken driving generally is a misdemeanor in Mississippi; only when a defendant is convicted three or more

times within five years does the offense carry a prison term of more than one year. See Wetz v. State, 503 So.2d 803, 811 (Miss. 1987); Miss. Code Ann. § 63-11-30(2)(a), (b), (c) (Supp. 1992). The PSR reflects that Gillentine was convicted of drunken driving three times in a six-year period and was not sentenced to any terms of imprisonment. His convictions thus reflect the type of conviction (misdemeanor for which no prison term is assessed) that the district court is entitled to consider despite the defendant's not having been represented by counsel.

In the same vein, Gillentine urges that the district court improperly counted as prior convictions his state-court convictions for possession of a derringer and public drunkenness. He insists that those incidents arose from the same episode as did his federal firearm conviction. Like the rest of Gillentine's contentions, this one too is without merit.

"The term `prior sentence' means any sentence previously imposed upon adjudication of guilt . . . for conduct not part of the instant offense." § 4A1.2(a)(1). "[T]he critical inquiry is whether the prior conduct constitutes a `severable, distinct offense' from the offense of conviction." United State v. Thomas, 973 F.2d 1152, 1158 (5th Cir. 1992). The state offenses of possession of a derringer and public drunkenness are severable and distinct from the federal offense of possession of an unregistered machine gun. The district court therefore properly considered Gillentine's state convictions.

Finding no reversible error in any of the assertions made by Gillentine on appeal, his conviction and his sentence are

AFFIRMED.