

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8286
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAVIER PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
DR 91 CR 37 4

(December 28, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Javier Perez, alleging improper cross-examination of his character witness and prosecutorial misconduct, appeals his conviction for conspiracy to possess drugs with the intent to distribute. We find no error and affirm.

Relying upon United States v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977), Appellant contends that a single guilt-assuming hypothetical question asked to one of his character

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

witnesses deprived him of a fair trial. We disagree. In Candelaria-Gonzalez we actually held that the hypothetical question which assumed guilt was only one of the reasons for reversal. Candelaria-Gonzalez, 547 F.2d at 295-98. Additionally, the hypothetical question in that case was different from the one asked in this case. There, each of the defendants' three character witnesses was asked how the defendant's reputation in the community would be affected if he were convicted of the alleged crime. Here, the prosecutor inquired of only one witness whether, in that witness's personal opinion, the Appellant would be a good role model for young children assuming his involvement in the crime. This question did not require the witness to speculate on the impact that this particular conviction would have on the defendant's reputation in the community. Finally, even if we assume that permitting the question was error, it was harmless. See United States v. Westmoreland, 841 F.2d 572, 580 (5th Cir.), cert. denied, 488 U.S. 820 (1988). The prosecution here adduced overwhelming evidence of appellant's guilt.

Appellant also contends the district court erred in allowing the prosecution to cross-examine another character witness about prior bad acts. He argues that the prosecution lacked the necessary good faith factual basis for referring to his alleged criminal record. The record, however, shows that the prosecution's questions did not make any reference to a specific act allegedly committed by Perez, nor did the prosecutor refer to an actual criminal record. The full context of the interchange between the

prosecutor and the witness shows that the question was merely attempting to define the basis for the witness's testimony that Appellant had had no problems with the law. Any possible prejudice was further substantially mitigated by the court's immediate cautionary instruction to the jury.

We review Appellant's claims of prosecutorial misconduct in the context of the prosecutor's closing argument to determine whether the remarks were improper and, if so, whether they affected the defendant's substantive rights and cast serious doubt on the jury's verdict. United States v. Lokey, 945 F.2d 825, 837-838 (1991). In performing this analysis we give considerable weight to the district court's assessment of the prejudicial effect, if any, of the comments. Id. The first statement is challenged as an effort by the prosecutor to place her credibility at issue and to use her position as Government counsel to assure the jury of the Defendant's guilt. We disagree. During closing argument, defense counsel attacked the integrity of the prosecution and its witnesses, implying the testimony had been altered in order to make the case. The prosecutor's statement is a direct response to this argument by defense counsel and is not improper. See United States v. Medrano, 836 F.2d 861, 865 (5th Cir.), cert. denied, 488 U.S. 818 (1988).

During rebuttal, the prosecutor characterized defense counsel's closing argument as one made by counsel who knows he has a losing case. Appellant argues that this was an improper statement concerning the exercise of his right to counsel. This

comment did not prejudicially affect Appellant's substantial rights. Lokey, 945 F.2d at 837. When viewed in the context of the entire trial, and when measured against the weight of the prosecution's evidence, the comment does not cast serious doubt upon the jury's verdict.

Finally, Appellant argues that the prosecutor improperly bolstered the agents' testimony by voicing her personal opinion about their testimony. The argument is unconvincing in light of defense counsel's assertions that the agents' testimony was inconsistent with their reports. The argument was simply a response to arguments advanced by defense counsel. United States v. Hernandez, 891 F.2d 521, 526 (5th Cir. 1989), cert. denied, 495 U.S. 909 (1990).

AFFIRMED.