IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1512

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CYNTHIA MIZELL a/k/a
CYNTHIA L. WALKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92 CR 128A)

(October 13, 1994)

Before KING and BENAVIDES, Circuit Judges, and LEE[*], District Judge.

PER CURIAM:[**]

A jury found Cynthia Walker Mizell guilty of conspiracy to interfere with commerce by robbery and of interference with commerce by robbery, both in violation of 18 U.S.C. § 1951. The jury also found Mizell guilty of misprision of a felony in

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[*] District Judge of the Southern District of Mississippi, 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

violation of 18 U.S.C. § 4. Mizell appeals, contending that the district court committed reversible error by excluding the testimony of two witnesses, Dennis Spaulding and Dr. Richard Schmitt. Specifically, Mizell raises three points of error on appeal: (1) the district court violated her Fifth Amendment right to due process and her Sixth Amendment right to compulsory process by permitting Spaulding to invoke his Fifth Amendment privilege; (2) the district court abused its discretion by denying her motion to supplement an offer of proof regarding Spaulding's anticipated testimony; and (3) the district court abused its discretion in excluding the testimony of Dr. Schmitt pursuant to Rule 403. We now proceed to analyze each of these points of error. Because we agree that the district court abused its discretion in excluding the testimony of Dr. Schmitt, we reverse Mizell's conspiracy and robbery convictions. Her misprision conviction is affirmed.

I. BACKGROUND

A. Factual Background.

On November 7, 1990, an armored car owned by Armored Transport Company was robbed in Fort Worth, Texas. Mizell, her ex-husband John Walker and Walker's cousin, Kevin Turnage, were arrested for the offense.

Pursuant to a plea bargain, Turnage testified as the government's key witness against Mizell. He testified to the following facts. He met Mizell and Walker on several occasions prior to the robbery, and on the day of the robbery, he accompanied them to the crime scene in a car driven by Mizell.

Upon arrival at the crime scene, Walker exited the car, Turnage took over the driver's position and Mizell moved to the passenger seat. Following his successful robbery of the armored car, Walker returned to the car, got in, and Turnage drove the trio to the Walker-Mizell home in Irving, Texas.

Upon arrival at the home, Walker dumped the money and a gun out of a bag; he and Mizell then proceeded to count cash totaling over $400,000. Turnage received a total of $20,000 in return for his assistance with the robbery.

B. Alleged Trial Errors.

During trial, Mizell attempted to call two potentially exculpatory witnesses: (1) Dennis Spaulding, a friend of Turnage, who knew about the robbery; and (2) Dr. Richard Schmitt, a clinical psychologist who diagnosed Mizell as suffering from a disorder known as "Accommodation Syndrome." The district court excused Spaulding on grounds that he had validly invoked his Fifth Amendment privilege against self-incrimination. Dr. Schmitt's testimony was excluded pursuant to Rule 403 of the Federal Rules of Evidence, on grounds that its probative value was substantially outweighed by the danger of misleading the jury and because it was cumulative.

Mizell raises three points of error on appeal: (1) the district court violated her Fifth Amendment right to due process and her Sixth Amendment right to compulsory process by permitting Spaulding to invoke his Fifth Amendment privilege; (2) the

district court abused its discretion by denying her motion to supplement an offer of proof regarding Spaulding's anticipated testimony; and (3) the district court abused its discretion in excluding the testimony of Dr. Schmitt pursuant to Rule 403. We now proceed to analyze each of these points of error.

II. ANALYSIS

A. Spaulding's Invocation of the Fifth Amendment Privilege.

(1) Background.

Spaulding drove Turnage to the Walker-Mizell home so that Turnage could collect his remaining share of the robbery proceeds. Turnage testified that: (1) he told Spaulding about the robbery; (2) he showed Spaulding the gun used in the offense; and (3) he showed Spaulding the money Walker gave him for his assistance with the robbery. Turnage further testified that he did not recall whether he told Spaulding about Mizell's participation in the robbery.

Mizell called Spaulding to the witness stand in the hopes of eliciting testimony that, despite several conversations with Turnage about the robbery, Turnage had never mentioned Mizell's involvement. Such testimony is exculpatory because it tends to impeach Turnage's testimony that Mizell was a participant in the robbery.[1] Mizell asserts that if Turnage really believed Mizell

[1] Spaulding's anticipated testimony regarding his conversations with Turnage, although admittedly hearsay, were offered by Mizell for the non-hearsay purpose of impeaching a witness; thus Spaulding's testimony, if not privileged under the Fifth Amendment, would have been admissible. See FED. R. EVID.

was an active participant in the robbery, he likely would have mentioned her involvement to his friend Spaulding.

When Mizell attempted to call Spaulding as a witness, the district court, fearing that Spaulding could be prosecuted for misprision of a felony,[2] *sua sponte* asked Mizell's counsel to apprise Spaulding of his Fifth Amendment privilege against self-incrimination. Dissatisfied with the generality of the warning, the district court provided an additional, more specific warning to Spaulding:

> [if you] had that knowledge [of the robbery] and did not disclose it to the proper authorities, there would be some possibility that you could be convicted of the very same crime that Mr. Turnage has been convicted of. . . . Nobody has indicated to me that the government has made any commitment not to prosecute you, if you implicate yourself in a crime in the sense of knowing about it and not disclosing it. Therefore, it would appear to me that you're definitely at risk that that could occur.

Spaulding then invoked his Fifth Amendment privilege and declined to testify. Mizell unsuccessfully objected to invocation of the privilege on grounds that there was no evidence that Spaulding would incriminate himself. Specifically, Mizell contended that a mere failure to report a crime is not in itself a criminal act; hence, absent evidence that Spaulding took affirmative action to conceal his knowledge of the robbery,

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801(c) (defining hearsay as an out-of-court statement made to prove the truth of the matter asserted).

[2] The crime of misprision of a felony consists of three elements: (1) knowledge of a felony; (2) failure to notify the authorities of such felony; and (3) an affirmative step to conceal the felony. United States v. Davila, 698 F.2d 715, 717 (5th Cir. 1983).

Spaulding's testimony presented no risk of prosecution for misprision. Thus, Mizell argues, the excusal of Spaulding violated her Fifth Amendment right of due process and her Sixth Amendment right to compulsory process.

(2) Fifth Amendment Due Process Claim.

Mizell's due process argument is without merit. The record discloses that Spaulding was adequately informed that the offense of misprision of a felony requires proof of an affirmative act of concealment. Mizell specifically brought this issue to the trial court's attention in the presence of Spaulding and Spaulding continued to assert his privilege after being so informed.

Even assuming, arguendo, that Spaulding was not fully apprised of the intricacies of misprision, his invocation of the privilege was nevertheless valid. This court will reverse a trial court's decision to permit invocation of the Fifth Amendment privilege only for an abuse of discretion. United States v. Follin, 979 F.2d 369, 374 (5th Cir. 1992), cert. denied, 113 S. Ct. 3004 (1993); United States v. Metz, 608 F.2d 147, 156 (5th Cir. 1979), cert. denied, 449 U.S. 821 (1980).

In United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976), we specified that a trial judge's obligation under such circumstances is to question the witness "only far enough to determine whether there is *reasonable ground to apprehend danger to the witness from his being compelled to answer. If the danger might exist, the court must uphold the privilege*." Id. at 1046 (emphasis added). Later, in United States v. Goodwin, 625 F.2d

693 (5th Cir. 1980), we reiterated that "the privilege must be sustained if it is not perfectly clear . . . that the witness is mistaken, and that the answers *cannot possibly have such tendency to incriminate*." Id. at 701 (emphasis added).

In Goodwin, we held that the trial judge abused his discretion by merely accepting, at face value, generalized assertions by counsel that testimony of an unspecified content could implicate the witness in unspecified crimes. Id. at 700-02. The Goodwin decision set forth the following guidelines for permitting invocation of the privilege:

> [the witness] must describe in general terms the basis of the liability actually feared. He must give a description at least adequate to allow the trial judge to determine whether the fear of incrimination is reasonable and, if reasonable, how far the valid privilege extends.

Id. at 702.

In the present case, the district court complied with the purpose and spirit of Melchor Moreno and Goodwin. The district court recognized, on its own motion, that Spaulding's testimony posed a reasonable danger of misprision liability. Spaulding knew about the robbery. He failed to report it. He also drove Turnage to the Walker-Mizell home in order to help facilitate Turnage's receipt of a remaining share of the ill-gotten gains. Thus, there was a reasonable danger that all elements of misprision were present. The question is not whether a *certain* danger of self-incrimination existed, but merely whether a *reasonable* danger existed. Under these circumstances, the trial

court did not abuse its discretion in concluding that Spaulding's testimony posed a reasonable danger of self-incrimination.

Mizell further argues that the district court failed to comply with Goodwin by inadequately assessing the scope of Spaulding's privilege and granting a blanket excusal. We disagree. The record indicates that the district court appropriately assessed the scope of Spaulding's privilege by inquiring of Mizell's counsel, "Are you wanting to ask [Spaulding] questions that would not be of an incriminating character?" to which Mizell's counsel replied, "no." Thus, no question expected to be posed to Spaulding would have elicited an unprivileged response. In light of this admission, the district court did not abuse its discretion by granting Spaulding a blanket excusal from testifying.

(3) Sixth Amendment Compulsory Process Claim.

We are also unpersuaded by Mizell's Sixth Amendment claim. We need only reiterate our longstanding position that "an accused's right to compulsory process must give way to the witness' Fifth Amendment privilege not to give testimony that would tend to incriminate him." United States v. Boyett, 923 F.2d 378, 379 (5th Cir.), cert. denied, 112 S. Ct. 53 (1991) (citing United States v. Khan, 728 F.2d 676, 678 (5th Cir. 1984) and United States v. Chagra, 669 F.2d 241, 260 (5th Cir.), cert. denied, 459 U.S. 846 (1982)). Having concluded that there were reasonable grounds to believe that Spaulding's testimony would tend to incriminate, Spaulding's invocation of his Fifth

Amendment privilege must trump Mizell's Sixth Amendment compulsory process claim.

B. Denial of Mizell's Supplemental Offer of Proof.

Mizell next argues that the district court abused its discretion by rejecting her written motion to supplement an earlier oral offer of proof regarding Spaulding's anticipated testimony.[3] The district court denied this motion on grounds that Mizell had failed to comply with its instruction to file the supplement prior to the close of evidence. Thus, because Mizell did not file her supplement until after the close of evidence, the district court considered it untimely and concluded that Mizell had voluntarily waived her right to supplement.

The district court's decision to disallow supplementation of Mizell's offer of proof is analogous to a decision to exclude evidence and is therefore reviewable only for an abuse of discretion. United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993); United States v. Eakes, 783 F.2d 499, 506-07 (5th Cir.),

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[3] Although Mizell technically avers a Fifth Amendment due process violation, she offers no substantive argument regarding due process and we are not obliged to address an argument which has not been properly presented. See United States v. Ballard, 779 F.2d 287, 295 (5th Cir.) (holding that a party who offers only a "bare listing" of alleged errors "without citing supporting authorities or references to the record" abandons those claims on appeal), cert. denied, 475 U.S. 1109 (1986); see also Cinel v. Connick, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its initial brief on appeal."). The gravamen of her complaint is one of an abuse of discretion and we shall proceed to analyze this issue accordingly.

cert. denied, 477 U.S. 906 (1986). We conclude that the district court did not abuse its discretion under these circumstances.

First, and perhaps most importantly, the district court informed Mizell that she could supplement her offer of proof until the close of evidence. This time limit was a reasonable measure to ensure full functioning of the adversarial process. Permitting supplementation of an offer of proof after the close of evidence would deny the opposing party an opportunity to voice its objections or present counter-evidence. Accepting a supplemental offer of proof that was not subjected to the adversarial process would unfairly distort appellate review and impermissibly tilt the scales of justice.

Requiring a complete offer of proof before the close of evidence serves a prudential function as well: it gives the court a chance to change its mind and let evidence in without having to reopen the entire case. In this case, for example, if the district court had accepted Mizell's supplemental offer of proof and decided that it should permit Spaulding to be questioned, the evidence would effectively have to be "reopened" after closing arguments had been made. Thus, the district court's time limitation served the laudatory goals of organizing the evidence in an orderly fashion and enhancing overall judicial economy.

In short, we believe the imposition of a reasonable time limitation for submitting supplemental offers of proof is not an abuse of discretion, much less an error of constitutional

magnitude. Mizell's voluntary failure to heed such time limit constituted a voluntary waiver and she is now precluded from complaining on appeal.[4] Cf. United States v. Harrelson, 754 F.2d 1153, 1179 (5th Cir. 1985) (holding that failure to make timely offer of proof regarding admissibility of testimony waived issue on appeal), cert. denied, 474 U.S. 922 (1985); Mills v. Levy, 537 F.2d 1331 (5th Cir. 1976) (same).

C. Exclusion of Dr. Schmitt's Testimony Under Rule 403.

Mizell's final point of error is that the district court erred in excluding the testimony of clinical psychologist Dr. Schmitt pursuant to Rule 403 of the Federal Rules of Evidence.[5] The district court specifically concluded that the probative value of Dr. Schmitt's testimony was substantially outweighed by the danger of misleading the jury and further, that it was cumulative.

This court has held that reversal of the district court's ruling under Rule 403 will be granted only for a clear abuse of discretion. United States v. Frick, 588 F.2d 531, 537 (5th

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[4] We also note that despite Mizell's assertion that the supplementary information is material to her defense, she has made no effort to back up this assertion by, for example, requesting this court to permit supplementation of the record.

[5] Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

Cir.), cert. denied, 441 U.S. 913 (1979). Because the balance of Rule 403 tilts in favor of admitting, rather than excluding, relevant evidence, this court has determined that in reviewing a trial court's exercise of Rule 403 discretion, we "must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect." United States v. Soudan, 812 F.2d 920, 930 (5th Cir. 1986), cert. denied, 481 U.S. 1052 (1987).

Thus, our first task is to determine the maximum probative value of Dr. Schmitt's testimony. According to Rule 401 of the Federal Rules of Evidence, relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." On voir dire, Dr. Schmitt testified that he believed that Mizell suffered from a condition known as "Accommodation Syndrome," a dependent personality disorder marked by excessive dependence upon and submissiveness to a controlling personality. Dr. Schmitt's testimony clearly had a "tendency to make the existence of any fact that is of consequence . . . more probable or less probable;" namely, whether the Accommodation Syndrome rendered Mizell's participation in the robbery unknowing or involuntary.

Balanced against this relevance is the perceived danger of cumulativeness or of misleading the jury. The district court's decision to exclude was based upon a determination that two other witnesses, Mizell and her stepfather, had adequately informed the

jury of Walker's dominance over Mizell. Thus, in the eyes of the district court, Dr. Schmitt's testimony would merely be placing "fancy names or fancy labels on some of the things that the ordinary person would already understand," and would therefore mislead the jury by unduly emphasizing such facts.

Mizell made a considerable effort to establish her passive role before and during the robbery. The district court was therefore correct in its belief that substantially all of the facts upon which Dr. Schmitt based his diagnosis had already been presented to the jury. Mizell testified that Walker, a bouncer by profession, was trained in the martial arts and had a history of violence. She recounted that Walker had boasted about killing a man, had previously placed her in painful karate holds, and had threatened to kill any participants in the robbery if necessary. Mizell's stepfather corroborated these allegations and further testified that Mizell was uncharacteristically submissive around Walker.

Although considerable evidence of Walker's aggression and Mizell's passivity was before the jury, the evidence came from potentially biased sources: Mizell and her stepfather. The jury may well have concluded that the testimony of Mizell and her stepfather, standing alone, was too biased to provide credible proof of a dependent-submissive relationship which would negate the actus reus or mens rea elements of Mizell's conspiracy charge. The testimony of an objective psychologist such as Dr. Schmitt possessed additional exculpatory value beyond that

provided by the potentially biased assertions of Mizell and her stepfather.

In addition to bolstering the credibility of Mizell and her stepfather, Dr. Schmitt's testimony was probative of the issue of whether Mizell possessed the requisite actus reus or mens rea to be convicted of the robbery and conspiracy charges. The jury might have been persuaded that an individual suffering from Accommodation Syndrome either acted involuntarily or lacked the requisite mental state to rob or to conspire to rob. Viewed as potentially negating either mens rea or actus reus, Dr. Schmitt's testimony was highly probative and an important cornerstone of Mizell's defense.

An analogous case from the Eleventh Circuit, United States v. Roark, 753 F.2d 991 (11th Cir. 1985), held that the trial court's Rule 403 exclusion of expert psychiatric testimony regarding the effect of "compulsive compliance syndrome" upon the defendant's confession was error, stating:

> Dr. Carrera-Mendez's testimony was to be directed toward a fact at issue: whether [defendant] voluntarily inculpated herself in the robbery. As a medical doctor specializing in psychiatry, he was presumably qualified in assisting the jury in reaching a factual conclusion. His testimony was designed to help the trier of fact determine whether it was more or less probable that [the defendant] was somehow psychologically coerced into making the inculpatory statements. . . . Whether Dr. Cabrera-Mendez's testimony will be persuasive is for the jury . . . .

Id. at 994.

Similarly, in the present case, Dr. Schmitt's testimony concerned a material fact at issue: the voluntariness of

Mizell's participation in the robbery conspiracy. At a minimum, Dr. Schmitt's testimony would have aided the jury in determining what weight to give the potentially biased testimony of Mizell and her stepfather. In addition, if we maximize the probative value of Dr. Schmitt's testimony, as required by the rule of Soudan, supra, it had the additional value of informing the jury that Mizell suffered from a recognized psychological disorder with certain known clinical characterizations.

Whether Dr. Schmitt's testimony would be persuasive was for the jury to decide. If we are to have faith in the intelligence and good sense of the jury, we must be willing to let them separate the wheat from the chaff. Undoubtedly, the government would have rigorously cross-examined Dr. Schmitt if he had been allowed to testify and may even have called its own expert to challenge Dr. Schmitt's diagnosis or conclusions. In the end, the jury might have decided to reject Dr. Schmitt's testimony as little more than common sense wrapped up in fancy words or labels. But as the trier of fact, the jury has the right to make this decision.

Because the substance of Dr. Schmitt's anticipated testimony went well beyond other testimony placed before the jury, we cannot reasonably say that its probative value was substantially outweighed by the danger of cumulativeness or misleading the jury. We conclude, therefore, that the district court abused its discretion in excluding his testimony under Rule 403.

Finding an abuse of discretion, however, does not end our inquiry; we must also consider whether the exclusion of Dr. Schmitt's testimony was harmless error. FED. R. CRIM. P. 52(a); 28 U.S.C. § 2111. When the alleged error is one of excluding evidence, our task is to determine whether the trier of fact would have found the defendant guilty beyond a reasonable doubt had the additional evidence been presented. United States v. Roberts, 887 F.2d 534, 536 (5th Cir. 1989); United States v. Lay, 644 F.2d 1087, 1091 (5th Cir.), cert. denied, 454 U.S. 869 (1981).

The jury in this case might have believed Dr. Schmitt's testimony and concluded that Mizell's psychological disorder negated her voluntary participation in the robbery. We can, of course, only speculate on the weight that the jury might have placed on this testimony. We can say with confidence, however, that expert testimony is important to establishing a defense based upon involuntary participation. We believe that the exclusion of Dr. Schmitt's testimony may have produced a different verdict was therefore not harmless error.

III. CONCLUSION

For the foregoing reasons, Mizell's convictions for conspiracy to interfere with commerce by robbery and for interference with commerce by robbery are REVERSED. Her conviction for misprision is AFFIRMED.