IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1610

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOE HOWARD JONES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-192-A)

(September 30, 1994)

Before POLITZ, Chief Judge, WISDOM and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

In June 1992, in Fort Worth, Texas, Joe Jones and Larry Enos robbed a Grandy's restaurant carrying a machine pistol that later was retrieved by police in the course of a traffic stop. On July 2, Jones robbed a Whataburger outlet in Fort Worth; again, he

---

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

carried a machine pistol. On July 14, Jones robbed a Whataburger in the same general area, brandishing a handgun. He was arrested one month later in Oklahoma City, when a drug-related tip led police to conduct a computer check of his car that revealed that Jones and the car had been involved in an unrelated robbery in Texas. Obtaining a search warrant for Jones's motel room, police found the bank bag used in the Grandy's robbery. They arrested Jones and impounded his car; three days later, they searched the car and found a handgun covered by a bandanna resembling that worn in one of the Whataburger robberies.

Jones was indicted on three counts of violating the Hobbs Act, 18 U.S.C. § 1951, and three counts of carrying a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1). A jury convicted him on all six counts.

II.

First, Jones argues that the district court erred in finding that the live lineup was not unduly suggestive and in refusing to suppress eyewitness identifications from it. Three eyewitnesses selected Jones from a six-person lineup.

Jones argues that the lineup was impermissibly suggestive because he was the only person without a mustache and with slicked-back hair and one of only three persons with brown eyes. The government contends that the lineup was fair because the participants shared Jones's general physical characteristics (height, weight, hair, and skin color), and there was no suggestiveness in

the presentation. In support of its position, the government recounts that one eyewitness, after identifying Jones from photographs, did not identify him in the lineup. Although Jones shaved off his mustache and slicked back his hair immediately before the lineup, the district court did not rely upon this evasive maneuver in ruling against him.[1]

We review the finding that the lineup was not impermissibly suggestive for clear error. United States v. Brown, 920 F.2d 1212, 1214 (5th Cir.), cert. denied, 500 U.S. 925 (1991). If the eyewitnesses saw an assailant with a moustache at the scene of the crime, the fact that Jones was the only person in the lineup without a moustache is the reverse of suggestive. One witness, after identifying Jones from photographs, did not pick him out of the lineup. On the facts of this case, there is no reason to allow Jones to benefit from his deliberate effort to sabotage the lineup.

Jones's moustache and slicked-back hair are not striking characteristics, particularly as Jones wore a bandanna in two robberies, a wig in one, and a cap in another. Nor did the other persons in the lineup possess "physical characteristics drastically dissimilar to those of appellant, thus clearly singling him out and suggesting him for identification to the government witnesses." United States v. Taylor, 530 F.2d 639, 641 (5th Cir.), cert. denied, 429 U.S. 845 (1976).

[1] Because the district court found that the line-up was not impermissibly suggestive, it did not reach the follow-up question of whether there was a substantial risk of misidentification.

III.

The district court accepted as true defense counsel's assertion that the jury saw Jones being handcuffed by a U.S. marshal during a recess. According to Jones, the marshal jingled his handcuffs as he stood behind him, escorted him out of the courtroom, and handcuffed him at the top of the stairs in the presence of jurors. Defense counsel asserts that when he pointed this out to the court, he was instructed to "shut up."

Counsel moved to recuse the judge; his request was denied. He then moved for a mistrial, asking to call witnesses. Again, his request was denied. The court, however, instructed the jury that it should not consider the handcuffs as an indication of guilt.

Jones argues that the handcuffs were unnecessary and that the court's failure to voir dire the jurors about the effect of the incident and its denial of his request to call witnesses prevented him from showing prejudice. We review the district court's refusal to grant a mistrial for abuse of discretion. United States v. Sanchez-Sotelo, 8 F.3d 202, 211 (5th Cir. 1993), cert. denied, 114 S.Ct. 1410 (1994).

"Defendants accused of crimes are, of course, entitled to physical indicia of innocence . . . . The Court has declared, however, that brief and inadvertent exposure to jurors of defendants in handcuffs is not so inherently prejudicial as to require a mistrial, and defendants bear the burden of affirmatively demonstrating prejudice." United States v. Diecidue, 603 F.2d 535, 549 (5th Cir. 1979), cert. denied, 445 U.S. 946 and 446 U.S. 912

(1980). The exposure herein was brief and apparently inadvertent, the restraint was routine, and the court gave a cautionary instruction. Although the trial court could have handled the situation in a more appropriate manner, the denial of a mistrial was not an abuse of discretion.

IV.

Jones offered the testimony of Dr. Robert Powitsky concerning the unreliability of eyewitness testimony. The district court excluded the testimony in a ruling that relied upon both a concern that Powitsky would be "parroting" someone else's study without having enough knowledge for effective cross-examination and upon FED R. EVID. 403 considerations.[2] Applying rule 403, the court concluded that the probative value of the testimony would be substantially outweighed by its prejudicial effect. The court also expressed skepticism about whether Powitsky qualified as an expert

---

[2] The court explained its reasoning about the exclusion as follows:

> "[M]y impression is that he is, for the most part, just parroting what another person has said and in its entirety is relying on studies of another person to reach the conclusion . . . . I think there are offsetting and competing considerations, and in this case I think they outweigh the gain from the testimony. I think that there would be a tendency the way this witness proposes to present it, as indicated by Mr. Fleury's questioning, for the jury to be over influenced in an improper and undue way by his testimony, particularly taking into account the questionable basis for this witness' ability to actually convey the testimony . . . . Even if it would be of marginal assistance to the trier of fact to hear from this witness . . . <u>the probative value of the testimony this witness would give is substantially outweighed by the danger of unfair prejudice, confusion of the issues and misunderstanding of the jury</u>."

(Emphasis added.) These comments reveal an express reliance both upon the doctor's lack of personal knowledge about the study and upon the balancing test of rule 403.

in this particular field. We review the district court's exclusion of evidence under rule 403 under the abuse of discretion standard, United States v. Luben, 812 F.2d 179, 184 (5th Cir. 1987), and find that there was no error here.

Jones complains that the ruling is inconsistent with Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), in which the Court held that the Frye requirement of a generally accepted methodology was not codified in FED. R. EVID. 702. Daubert did not dispense with the district court's discretion to exclude expert testimony under rule 403, however; since the district court relied upon rule 403 in its ruling, Daubert does not require reversal. See Marcel v. Placid Oil Co., 11 F.3d 563, 567 (5th Cir. 1994) (stating that in addition to employing Daubert, district court can exclude evidence under rule 403).

V.

Jones argues that the government presented insufficient evidence to prove an interstate nexus with respect to the Hobbs Act charges. If his Hobbs Act convictions are reversed, he contends that his weapons convictions also must fall for lack of an underlying crime of violence.

Both chains robbed by Jones, Grandy's and Whataburger, sold food that was purchased from out-of-state vendors. Each store wired proceeds to headquarters in another state. The precedents of this circuit support finding an interstate nexus on these facts. In United States v. Martinez, 28 F.3d 444, 445 (5th Cir. 1994), we

found an interstate nexus to support Hobbs Act convictions where the defendant robbed three Diamond Shamrock convenience stores and two fried chicken outlets. The robberies interrupted commerce in stores dealing in out-of-state wares and resulted in the permanent closure of one. In United States v. Sander, 615 F.2d 215, 218 (5th Cir.), cert. denied, 449 U.S. 835 (1980), we held that doing business out-of-state and purchasing interstate goods is sufficient to provide an interstate nexus. The government presented sufficient evidence of an interstate nexus here.

VI.

Jones argues that the Double Jeopardy Clause bars convictions for violating the Hobbs Act and carrying a firearm during the same Hobbs Act violation, asking the court to hold that United States v. Dixon, 113 S. Ct. 2849 (1993), overrules caselaw allowing cumulative punishment for the same conduct in a single trial where authorized by Congress. Jones's argument is without merit. Dixon overruled Grady v. Corbin, 495 U.S. 508 (1990), making the Blockburger standard apply in all double jeopardy analyses, whether the convictions resulted from one trial or multiple trials. Dixon, 113 S. Ct. at 2860. Under Blockburger v. United States, 284 U.S. 299, 304 (1932), convictions for violations of two statutes flowing from the same course of conduct do not violate the Double Jeopardy Clause if each statute requires proof of an element that the other does not. In United States v. Martinez, 28 F.3d 444, 445 (5th Cir. 1994), this court held the Hobbs Act and use of a firearm during a

crime of violence to be different offenses under the Blockburger test. The Hobbs Act requires proof of an attempt or commission of robbery or extortion, or the threat or commission of physical violence. Section 924(c), on the other hand, requires the use or carrying of a firearm in the commission of any federal felony. Each offense contains a statutory element not present in the other.

VII.

Finally, Jones argues that the district court erred in refusing to suppress evidence gained from searches of his motel room and car. He contends that the warrant for the search of his motel room was not supported by probable cause. Because the data provided by the informant was corroborated, however, there was probable cause.

The informant advised the police that a man in Jones's motel room was selling heroin and that when he declined to purchase, the man threatened him with a gun. The warrant recites that when the police ran a computer check of Jones's license plate, they learned that he was wanted on a robbery charge and had been arrested under an alias on drug charges in the past. Based upon this information, the police arrested Jones when he and his girlfriend left the motel room; the woman was in possession of four used syringes that tested positive for cocaine and methamphetamine. At this point, they sought a warrant to search the motel room for drugs and drug paraphernalia. They found the Grandy's bank bag in plain view.

The Oklahoma City police impounded Jones's car upon his

arrest. Three days later they searched it and found a firearm wrapped in a bandanna. The government justifies the search under the automobile exception to the warrant requirement, contending that the police had probable cause to believe a handgun used in various robberies was in the car, since it was not found in the motel room.

The impoundment of the vehicle does not remove it from the ambit of the automobile exception, as "the justification to conduct [] a warrantless search does not vanish once the car has been immobilized." Michigan v. Thomas, 458 U.S. 259, 261 (1982). "[E]xigence is to be determined as of the time of seizure of an automobile, not as of the time of its search," and the fact that sufficient time to obtain a warrant has passed between the seizure and the search does not invalidate either. United States v. Mitchell, 538 F.2d 1230, 1232 (5th Cir. 1976) (en banc), cert. denied, 430 U.S. 945 (1977). See also United States v. McBee, 659 F.2d 1302, 1305 (5th Cir. Unit B Oct. 1981), cert. denied, 456 U.S. 949 (1982). Because the search was supported by probable cause and was within the automobile exception, the district court did not err in admitting the evidence.

AFFIRMED.