UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1840
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SIME HICKSON, a/k/a Issac Pratt,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-054-G)

(August 23, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[1]

Sime Hickson challenges his conviction on multiple charges of carjacking, obstruction of commerce by robbery, and use of a firearm during a crime of violence. We affirm.

I.

Hickson was indicted for two counts of obstructing interstate commerce by robbery, four counts of carjacking, and six counts of using a firearm during a crime of violence. The trial testimony

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

revealed that about 7:00 p.m. on November 17, 1992, Larry Jones drove to a liquor store in Dallas, Texas, in his white 1987 Corvette. As he was leaving the store, Jones was approached by an individual he later identified as Hickson. Hickson pointed a "Uzi-type" weapon at Jones and said "give it up." Jones threw his car keys a short distance away and ran inside the store. Hickson drove off in the Corvette.

Thomas Jennings testified that later that same evening, he and his wife were returning from the grocery store in their car, a red Camaro RS. When they arrived at their apartment complex, a white Corvette pulled behind them. Two men holding Uzi-type weapons exited the Corvette and approached each side of the Camaro. One of the men drove off in the Camaro and the other drove off in the Corvette. Jennings identified Hickson as the man who had approached his side of the Camaro.

Stenton Maddox testified that that same evening, he was driving on Interstate 30 on his custom-painted, Kawasaki 750 Ninja motorcycle. A red Camaro pulled up in the other lane, swerved in front of the motorcycle, and came to a stop. Maddox hit the rear of the Camaro, and the driver of the Camaro jumped out. Maddox identified Hickson as the driver of the Camaro. The men exchanged blows. A white Corvette pulled up in front of the Camaro and a man with an Uzi-type weapon exited the car. The man raised the gun in Maddox's direction. Hickson jumped on the motorcycle and drove off; the other man drove off in the Corvette. Approximately one

month later, Maddox identified Hickson in a photographic lineup as the man who rode off on his motorcycle.

Cornell Jones testified that he was with Hickson on November 17, 1992. He testified that he saw Hickson point a loaded machine gun at the man outside the liquor store and then drive off in the man's Corvette. Jones testified that he saw Hickson and Jimmy Lee Cooper rob the Jenningses of their red Camaro. Jones also testified that he saw Hickson force the man on the motorcycle off the freeway, fight with him, and drive off on the motorcycle. Jones saw Hickson with the motorcycle the next day and noticed that it had been spray-painted black.

Jimmy Lee Cooper testified that on November 17, 1992, he, Cornell Jones, and Hickson "decided to go carjacking." Cooper testified that he saw Hickson leave the liquor store parking lot with the white Corvette. He also testified that he and Hickson robbed the Jenningses of the red Camaro, and that Hickson robbed Stenton Maddox of his motorcycle.

Terry Ting, a waitress at the Hunan Cafe, testified that, on November 17, 1992,[2] at approximately 9:15 p.m., she saw two black men wearing ski masks enter the restaurant. The shorter of the men pointed a gun at Ting and told her to open the register. Ting gave the men the cash from the register. The men put the cash in a trash bag and proceeded to rob the restaurant's customers of their

[2] This date is apparently in error. Subsequent trial testimony established that the robbery of the Hunan Cafe occurred on November 18, 1992.

money, wallets, and watches. Ting noticed that the shorter man was wearing a long, dark overcoat.

A customer at the restaurant described the robbers as a shorter one and a taller one, both wearing ski masks and dark clothes. The shorter man had on a long, dark overcoat. The customer testified that after the men left the restaurant, they drove away on a dark-colored motorcycle. A short time later, the customer saw a similar motorcycle, about 400 yards away, involved in a traffic accident.

Ed Speed, the owner of a gas station approximately one mile from the Hunan Cafe, testified that on November 18, 1992, at about 9:15 p.m., he saw two men wearing masks approach his station. The shorter of the men entered the station, pulled a gun, and demanded money. The men then left on a motorcycle. Speed pursued the men in a car and rammed the motorcycle. The motorcycle skidded to a stop and the robbers ran off. Several wallets, cash, a checkbook with a check made to the Hunan Cafe, and a ski mask were found at the scene.

Christopher Hosek testified that on November 18, 1992, at about 9:30 p.m., he was doing laundry at his apartment approximately one-quarter of a mile from the scene of the accident. A man with a long, dark overcoat approached him with a pistol, put the pistol to his ribs, and demanded his car keys. Hosek identified the man as Hickson. Hosek saw the man and another taller man drive off in his car.

A jury found Hickson guilty of two counts of robbery affecting interstate commerce, two of the four carjacking counts (not-guilty findings corresponded to the Corvette and Camaro carjackings), and four of the six counts of using a firearm during a crime of violence (not-guilty findings corresponded to the Corvette and Camaro carjackings). The district court sentenced Hickson to a total of 990 months in prison.

II.

A.

On appeal, Hickson argues that his convictions for carjacking and use of a firearm during a crime of violence, and his convictions for obstructing commerce by robbery and use of a firearm during a crime of violence, violate double jeopardy. Hickson failed to raise these issues in the district court.

When a defendant in a criminal case has forfeited an error by failing to object, we may remedy the error only in the most exceptional case. **See United States v. Rodriguez**, 15 F.3d 408, 414 (5th Cir. 1994). In determining whether a case is exceptional, we use a two-part analysis. First, the appellant must show that there is actually an error, that is plain and that affects substantial rights. **See United States v. Olano**, 113 S. Ct. 1770, 1777-79 (1993). Second, as the Supreme Court pointed out, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." **Id**. at 1779.

Prior to **Olano**, we held that multiple sentences in violation of double jeopardy constitute plain error. **See United States v. Pineda-Ortuno**, 952 F.2d 98, 105 (5th Cir.), **cert. denied**, 112 S. Ct. 1990 (1992). It is not clear whether that holding survives **Olano**. For purposes of this opinion, however, we assume that **Pineda-Ortuno** is still good law and proceed to consider whether Hickson's sentence violates double jeopardy.

In **United States v. Singleton**, 16 F.3d 1419 (5th Cir. 1994), we expressly rejected the argument that convictions under 18 U.S.C. § 2119 and 18 U.S.C. § 924(c) violate the Double Jeopardy Clause: "Although we agree with the district court that the firearms offense is not factually distinct from the carjacking offense, we hold that Congress has clearly indicated its intention to impose cumulative punishments." **Id**. at 1420; **see also United States v. Harris**, 25 F.3d 1275 (5th Cir. 1994).[3] Thus, Hickson's double jeopardy argument with respect to his sentences under these two statutes must fail.

In connection with the robberies of the Hunan Cafe and the gas station, Hickson was convicted of two counts of obstructing commerce by robbery in violation of 18 U.S.C. § 1951. In addition, based on the facts surrounding these same robberies, Hickson was convicted of two counts of using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). Hickson

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[3] Hickson argues that **Singleton** is not binding precedent because we did not consider the Supreme Court's recent decision in **United States v. Dixon**, 113 S.Ct. 2849 (1993). This assertion is erroneous. **See Singleton**, 16 F.3d at 1422 n.10.

argues that his convictions and sentences under these statutes violate double jeopardy. However, in **United States v. Martinez**, ___ F.3d ___, 1994 WL 392671 (5th Cir.), we expressly held that convictions and sentences under § 1951 and § 924(c)(1) do not violate double jeopardy. Thus, this part of Hickson's double jeopardy argument must also fail.

B.

Hickson argues next that the carjacking statute, 18 U.S.C. § 2119, lacks a rational nexus to interstate commerce. Hickson's argument, however, is foreclosed by our decision in **United States v. Harris**, 25 F.3d 1275 (5th Cir. 1994), in which we held that "the carjacking statute is a valid exercise of Congress's Commerce Clause powers."

C.

Hickson argues next that there was insufficient evidence to convict him of the robberies of the Hunan Cafe and the gas station. He argues that the only evidence linking him to the crimes was circumstantial and that the identification testimony was not sufficient to prove that he was the perpetrator.

In addressing the sufficiency of the evidence, we must determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. **See United States v. Charroux**, 3 F.3d 827, 830-31 (5th Cir. 1993). In this case, Hickson attempts to isolate the evidence supporting his robbery convictions.

However, each piece of evidence need not be viewed in isolation and may be viewed for its cumulative effect. **See United States v. Sanchez-Sotelo**, 8 F.3d 202, 209 (5th Cir. 1993), **cert. denied**, 114 S. Ct. 1410 (1994).

The customer at the Hunan Cafe testified that the men who robbed the restaurant fled on a dark-colored motorcycle. The customer also testified that he saw a similar motorcycle, a few blocks away, involved in a traffic accident. The owner of the gas station testified that he followed, and then collided with the men who had robbed him. The men were on a dark-colored motorcycle. Wallets, cash, a checkbook with a check made to the Hunan Cafe, and a ski mask were found at the scene. The police traced the wrecked motorcycle as being stolen the day before. Hickson's accomplices testified that Hickson stole, and then spray-painted the motorcycle. Thus, the motorcycle tied Hickson to the crimes.

Common sense and reason support the inference that Hickson, who stole the motorcycle with which the robberies were committed and who was positively identified as having committed a carjacking near the scene of the motorcycle collision, committed the robberies at the Hunan Cafe and the gas station. Thus, a rational jury could have found that Hickson was guilty of those offenses beyond a reasonable doubt.

D.

Finally, Hickson argues that the district court erred in failing to exclude the in-court identification of him by Stenton Maddox and Christopher Hosek. He argues that the photographic

lineup used prior to trial was impermissibly suggestive and that it tainted the witnesses' in-court identifications.

Although Hickson requested that the in-court identification by the owner of the Corvette be suppressed based on allegedly suggestive pre-trial identification procedures, Hickson did not object to the identification testimony of Maddox and Hosek. We therefore review this challenge for plain error. **See United States v. Sanchez**, 988 F.2d 1384, 1389 (5th Cir.), **cert. denied**, 114 S. Ct. 217 (1993). Accordingly, we may correct the alleged error only if Hickson shows that it was a clear or obvious error that affected his substantial rights. **See Rodriguez**, 15 F.3d at 415-16.

In determining whether a pre-trial identification procedure violates a defendant's due process rights, we examine "the totality of the circumstances." **Herrera v. Collins**, 904 F.2d 944, 947 (5th Cir.), **cert. denied**, 498 U.S. 925 (1990). We first examine whether the procedure was unduly suggestive, and then determine whether the procedure created a substantial likelihood of misidentification. **See United States v. Shaw**, 894 F.2d 689, 692-93 (5th Cir.), **cert. denied**, 498 U.S. 828 (1990).

Hickson argues that the identification procedure was unduly suggestive because (1) Hickson was the only individual in the photo spread in a bright orange prison uniform, (2) Hickson was the only individual in the photo spread whose hair was closely shaven, and (3) Hickson was one of only two individuals in the spread who did not have facial hair.

Even assuming that the procedures were impermissibly suggestive, Hickson's rights were not violated "so long as the identification possesses sufficient aspects of reliability." **Herrera**, 904 F.2d at 947. Factors supporting the reliability of the identifications in this case include the following: (1) both Maddox and Hosek had opportunities to view Hickson, without a mask, at close range; (2) as witnesses involved in direct, violent confrontations with Hickson, both witnesses probably had a high degree of attention; (3) both witnesses accurately described Hickson prior to the lineup; (4) both witnesses were certain of their identification of Hickson; and (5) both photographic identifications were made within weeks of the crime. Because the totality of the circumstances indicate a high degree of reliability, the district court's failure to suppress the in-court identifications of Hickson by Maddox and Hosek was not error.

III.

For the reasons stated above, we affirm the district court's judgment of conviction.

AFFIRMED.