IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2416
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOMINGO GUZMAN and
PEDRO ANTONIO GUZMAN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93 004)

(October 12, 1994)

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:[*]

A jury convicted defendants Pedro and Domingo Guzman ("Pedro" and "Domingo") of conspiracy to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841 (a)(1) and (b)(1)(A), as well as aiding and abetting the distribution, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and U.S.C. § 2. The district court sentenced Pedro and

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Domingo to prison terms followed by supervised release. Both Pedro and Domingo appeal. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Because Pedro and Domingo do not challenge the sufficiency of the evidence, we will only briefly discuss the general facts of this case.

Billy Davis, a sergeant with the Texas Department of Public Safety assigned to the High Intensity Drug Trafficking Area Task Force (HIDTA), received information from a confidential informant concerning Tiberio Mejia's ("Mejia")[1] cocaine-trafficking activities. As a result of a conversation with Mejia, Davis and Oscar Burnias, a Houston police officer working undercover with HIDTA, contacted Pedro and Domingo in order to arrange the pickup of seven kilograms of cocaine. Burnias was to deliver the cocaine loaded in a black Chevrolet Camaro to one of Mejia's couriers.

Burnias drove the load vehicle, the black Camaro, to the location specified by Pedro. Pedro then instructed Domingo to use the Camaro to "go get the seven," referring to the seven kilograms of cocaine. HIDTA officers followed Domingo, who was alone in the Camaro, to a residence at Bayou Place Court, where Domingo backed the Camaro into the garage and closed the door. A few minutes later, Domingo exited the garage and drove back to the original location to deliver the Camaro to Burnias. Burnias then drove the car to a Drug Enforcement Agency Field Office

[1] Mejia was a co-defendant in this case.

where he and other agents opened the trunk and found a sports bag containing seven bricks of cocaine wrapped in plastic and soaked in fuel.

Pedro and Domingo were eventually charged with conspiracy to distribute five kilograms or more of cocaine (count one) and aiding and abetting the distribution (count two). The jury returned verdicts of guilty on both counts for both defendants. The district court sentenced Pedro to concurrent terms of imprisonment of 151 months, concurrent five-year terms of supervised release, and a special assessment of $100. Domingo received concurrent terms of imprisonment of 135 months, concurrent five-year terms of supervised release, and a special assessment of $100.

Both Pedro and Domingo appeal. Pedro advances two issues on appeal. First, Pedro argues that the district court erred in allowing Special Agent Mike Lewis to give his opinion on the significance of a card found in Mejia's possession. Second, Pedro contends that the prosecutor's closing remark concerning Pedro's inability to speak English was improper and prejudicial. Domingo asserts that the prosecutor's alleged comment on Domingo's failure to produce evidence and testify improperly shifted the burden of proof to him.

II. STANDARD OF REVIEW

As will be more fully explained below, we will evaluate each of the issues on appeal for plain error only.

To preserve an error for appellate review, the aggrieved party must make a timely and specific objection. See FED. R. EVID. 103 (a)(1) (stating that the record must reflect "the specific ground of objection"); United States v. Martinez, 962 F.2d 1161, 1166 (5th Cir. 1992) (finding failure to preserve error because appellant did not "expressly articulate the asserted grounds for inadmissibility"). If a party does not preserve error through timely and specific objections, we may review only for plain error. FED. R. CRIM. P. 52(b); United States v. Olano, 113 S. Ct. 1770, 1776 (1993); United States v. Rodriguez, 15 F.3d 408, 415 (5th Cir. 1994).

The Supreme Court has recently clarified the requirements of Rule 52(b) and an appellate court's "limited power to correct errors that were forfeited because not timely raised in the District Court." Olano, 113 S. Ct. at 1776 (emphasis added). Four elements are necessary.

First, the appellant must show an "error." Id. at 1777. "Deviation from a legal rule is `error' unless the rule has been waived." Id. Second, the error must be "plain." Id. "`Plain' is synonymous with `clear' or, equivalently, `obvious.'" Id. (citations omitted). Third, the error must "`affec[t] substantial rights.'" Id. "[I]n most cases it means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." Id. at 1778. Furthermore, the appellant, not the government, has the burden of persuasion on the issue of prejudice. Id.

Fourth, the appellant must convince the court of appeals to exercise its discretion to reverse the error. Id. Satisfying the first three criteria alone is insufficient:

> 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. The language of the Rule ("may be noticed"), the nature of forfeiture, and the established appellate practice that Congress intended to continue, all point to this conclusion . . . . The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Id. at 1778-79 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

III. ISSUES ON APPEAL

A. LEWIS'S TESTIMONY

Pedro contends that the district court erred in allowing Special Agent Mike Lewis of the Georgia Bureau of Investigation[2] to testify concerning his opinion of the significance of a card found in Mejia's possession. The card had Pedro's name on it, a phone number, and a code. Pedro challenges the following testimony:

> Q: I'm going to show you what's been marked as Government Exhibit 60, which is a portion out of the address book we discussed earlier. Based on your experience, do you have an opinion in the context of a narcotics investigation what the lower card on this enhancement shows?
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> [Pedro's Counsel]: I object to that question, Your Honor. He's asked for the opinion of what a phone number and a name is. I'm going to object on the

[2] The Georgia Bureau of Investigation is involved because Mejia was arrested in Atlanta, Georgia.

grounds of relevancy to that. The item speaks for itself.

THE COURT: Sustained. Can you rephrase the question, sir, if you can.

. . . .

Q: Based on your experience as an investigator over 14 years, do you have an opinion in connection -- based on your experience in investigating narcotics traffickers, what it means when you find on a narcotics trafficker a card with a phone number and a code next to it?

[Pedro's Counsel]: I'm going to object again, Your Honor. Same objection.

THE COURT: Overruled.

A: Well, the code is to identify someone in the drug business to someone else so he'll know who to contact.

. . . .

Q: Based on your training and experience, why do drug traffickers use codes in connection with pagers?

A: Well, one, they want to know -- be very sure who they're speaking to because they often will not recognize the phone number since they're not often -- they're very mobile; and, second, it's highly likely that the guy that was given that number may not be known to the other man. He just knows that star 100 [the code next to the phone number on the card] is the guy I'm supposed to deal with.

Pedro asserts that Lewis's lay opinion is not admissible under Federal Evidence Rule 701. According to Pedro, the witness must have "personal knowledge of the facts from which the opinion is derived," there must "be a rational connection between the opinion and the observed factual basis from which it is derived," and "the opinion must be helpful to the trier of fact in understanding the testimony or determining an issue of fact."

United States v. Carlock, 806 F.2d 535, 551 (5th Cir. 1986), cert. denied, 480 U.S. 949, and cert. denied, 480 U.S. 950 (1987). Pedro contends that it was not "established that Agent Lewis had personal knowledge of the facts that Tiberio Mejia, the person from whom the card in question was obtained, was a drug trafficker," the conclusion that Mejia was in the drug business is irrational, and Lewis's opinion was a meaningless assertion that was not helpful to the jury.

The government argues that Lewis testified as an expert under Rule 702 and not as a lay person under Rule 701. The government also asserts that Pedro objected to Lewis's testimony at trial on the grounds of relevancy and not based on Rule 701. Because Pedro's objection to Lewis's testimony on grounds of relevancy in the district court was significantly different from the Rule 701 challenge on appeal, we review for plain error only. Olano, 113 S. Ct. at 1776; Martinez, 962 F.2d at 1166.

Pedro's argument fails the Olano analysis because there was no clear or obvious error. Pedro simply has not carried his burden and persuaded us the testimony was both inadmissible and that its inadmissibility should have been obvious or apparent to the trial judge. Olano, 113 S. Ct. at 1778. Furthermore, even if he has shown an obvious error, Pedro has not convinced us that we should exercise our discretion and reverse. We are not persuaded that allowing this officer's testimony concerning the operating patterns of the drug culture "seriously affect[s] the fairness, integrity or public reputation of judicial

proceedings." Id. at 1778-79. We conclude that the district court did not plainly err in allowing the officer's testimony.

B. Comment on Inability to Speak English

Pedro contends that the prosecutor's comment in closing argument concerning his inability to speak English constitutes reversible error. The prosecutor stated:

> Can you ignore that in reaching a true and just verdict? Really believe that? 19 years of experience -- 19 years of experience. I don't argue that because I want you to say just because [Burnias]'s got 19 years, he should be believable. I got one for you. I got one for you. 18 years in the United States, [Pedro]'s got kids going to school here in the Houston area and he can't speak any English? How does he communicate with his kids --

Pedro objected to the comment, arguing that the remark was improper and prejudicial, and the district court sustained Pedro's objection. At the end of closing argument, Pedro moved for a mistrial, arguing that the prosecutor appealed to the jury's prejudice by asking them to hold against Pedro his inability to speak English. The government responded that the comment went to Pedro's credibility because it was a reasonable deduction that a man who had been in Houston that long and had three children in school was not being completely honest. The district court denied the motion for a mistrial and asked if Pedro wanted an instruction. When Pedro indicated he wanted a curative instruction, the district court told the jury the following:

> Ladies and gentlemen, I have an instruction for you. You are not to necessarily consider negatively the matter that the defendants do not

> speak English. You are to decide this case based upon the evidence and the evidence alone.

Pedro neither objected to the curative instruction nor gave any further indication that he was dissatisfied with the court's actions.

Pedro argues on appeal that the comment was prejudicial because it was "intended to inflame the jury against [H]ispanics" and thus violated his right to equal protection.[3] Pedro also asserts that the district court did not give an adequate curative instruction because: 1) it did not rebuke the prosecutor, 2) defense counsel was not given an opportunity to participate in drafting the instruction, and 3) defense counsel was not permitted to review the instruction. Further, Pedro contends that "the evidence was as susceptible of innocence as of guilt."

Even when properly preserved for appellate review, "[i]nappropriate prosecutorial remarks are not necessarily reversible error." United States v. Diaz-Carreon, 915 F.2d 951, 958 (5th Cir. 1990). We have previously recognized that a

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[3] Pedro never mentioned the Fourteenth Amendment or the Equal Protection Clause at trial. The tenor of his trial objection was unfair prejudice, as prohibited by Federal Evidence Rule 403. Because this equal protection challenge was not made with specificity, if at all, at trial, this argument is new on appeal. FED. R. EVID. 103 (a)(1); Martinez, 962 F.2d at 1166. Therefore, we review for plain error only. Olano, 113 S. Ct. at 1776. Even under a plain error analysis, there is no factual basis in the record to support this claim. The prosecutor's comments were directed toward Pedro's credibility as a witness and not at his Hispanic heritage. Furthermore, the comment, even if construed to be a racial slur, was not "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." United States v. Iredia, 866 F.2d 114, 117 (5th Cir.), cert. denied, 492 U.S. 921 (1989). Therefore, we find no merit in this argument.

defendant's conviction "is not to be lightly overturned on the basis of a prosecutor's comments standing alone." United States v. Rocha, 916 F.2d 219, 234 (5th Cir. 1990), cert. denied, 500 U.S. 934 (1991). Because the trial judge is in the best position to evaluate the impact of improper prosecutorial arguments, "[a]bsent an abuse of discretion, the district court's ruling will not be set aside on appeal." Id.

Pedro, however, did not preserve the alleged error. Pedro received the relief he sought when the district court gave the instruction. As we have repeatedly emphasized, after the trial court sustains an objection and gives a curative instruction, the objecting party must express any further dissatisfaction to preserve error for appellate review. See, e.g., United States v. Canales, 744 F.2d 413, 431 (5th Cir. 1984) (noting that reversing when the objecting party expresses no further dissatisfaction "go[es] against the implicit judgment of both the trial court and the defendant's trial counsel that the trial court's corrective action was adequate and appropriate"). Because Pedro neither objected to the adequacy of the instruction nor renewed his motion for a mistrial after the instruction, the plain-error standard of review applies. We recently made this point very clear:

> Because logically there is little difference between a case that comes to use where no objection has been made to the alleged impropriety and one where no further objection has been made to the trial judge's handling of an impropriety, we conclude[] . . . that the plain-error standard of review should apply.

United States v. Carter, 953 F.2d 1449, 1466 (5th Cir.), cert. denied, 112 S. Ct. 2980 (1992).

Pedro has failed to persuade us that the district court's failure to grant a mistrial or to correct its instruction constitutes an obvious error. Olano, 113 S. Ct. at 1777. The district court gave a cautionary instruction, the evidence against Pedro was strong, and the comment was only a small part of the prosecutor's closing argument. Given these circumstances, even if the prosecutor's comment was error, Pedro has not carried his burden of showing that it affected his substantial right to a fair trial. See Rocha, 916 F.2d at 235 (finding, at most, a minimal prejudice from prosecutorial remarks because the court gave a cautionary instruction, the comment was only a small portion of the overall closing, and the evidence of guilt was strong). Furthermore, Pedro has not persuaded us that failure to reverse would undermine the integrity of the judicial system. Olano, 113 S. Ct. at 1778-79. Therefore, we reject Pedro's argument.

C. Comments on Failure to Produce Evidence

Domingo argues that the prosecutor improperly shifted the burden of proof when the prosecutor commented on Domingo's failure to produce evidence that others could have placed the cocaine in the trunk of the Camaro while the Camaro was inside the garage. Domingo also contends that the prosecutor effectively challenged Domingo to fill "in the blanks left by the

incomplete government surveillance in his case by testifying himself."

Specifically, Domingo's argument involves the examination of Sergeant Davis. On cross-examination, Domingo's counsel questioned Davis about his surveillance of the house on Bayou Place Court where Domingo drove the Camaro. Davis stated that he saw no one else come and go during the five or ten minutes that Domingo was at the residence. Davis agreed that any number of people could have come and gone from the house before he began his surveillance and that there was no way of knowing if anyone was in the house at the same time as Domingo. He testified that he had not actually seen Domingo place the bag containing cocaine in the trunk of the Camaro.

On redirect, the government inquired further into this issue:

> Q: Do you remember being cross-examined about do you agree that at the residence at 10707 [Bayou Place Court] there could have been other people in the garage when Domingo Guzman backed it into that particular residence? Do you remember that question?
>
> A: Yes, sir.
>
> Q: Do you remember the question: Would you agree there could have been other people in that residence when Domingo Guzman backed that particular car into that garage? Do you remember that question?
>
> A: Yes, sir.
>
> Q: Certainly, we'd have to guess at that, don't we, whether or not there were other people in that residence or garage -- wouldn't we?
>
> A: Yes, sir.

Q: We could also guess then if we were going to guess that the people who are family members in the back of the courtroom today might have been there on that occasion, couldn't we --

A: Yes, sir.

Q: -- if we were going to guess, right?

A: Yes, sir.

Q: If they were, they could testify for us if they knew anything, right?

[Pedro's Counsel]: Object. There's two reasons --

[Domingo's Counsel]: I object. He's asking him to draw a conclusion that he's unable to do.

THE COURT: Sustained.

. . . .

Q: Then, with regard to the person backing this particular black Camaro into this particular garage on that day, would you agree with me then that person would know if anyone else was in that garage?

A: Yes, sir.

[Domingo's Counsel]: Your Honor, I object.

. . . .

The very nature of that question calls upon my client to testify. It's an improper comment on my client's not testifying. I've already alerted this jury he's not going to testify. It's an improper statement as to my client's testimony.

. . . .

And it makes it to where it now is going to put a supposition in the jury's mind, if my client doesn't testify, he's got something to hide about people being in there or not. These are improper comments.

. . . .

> That is an improper comment on my client's not testifying. It is a direct challenge to him to testify to explain if other people were there. I would have to ask for a mistrial at this time, Your Honor, because of the improper reference to my client not testifying.

After considering arguments outside the presence of the jury, the district court overruled the objection and recessed for lunch. When the district court re-opened a little over an hour later, Domingo objected on grounds that the government's comment shifted the burden of proof to the defense. The district court overruled the objection, and Domingo requested an instruction to the jury to disregard the last question and answer. The district court told the jury "to disregard the last question and the last answer that was elicited just prior to the lunch break."

However, for the first time on appeal, Domingo asserts that the curative instruction was inadequate because it was given after a lunch recess (one hour and 15 minutes later) and not immediately, it did not specifically identify the content of the "last question and answer," and it was silent as to which party had the burden of proof. Because Domingo expressed no dissatisfaction with the trial court's instruction at the time it was given, we review here only for plain error. Carter, 953 F.2d at 1465-66; Canales, 744 F.2d at 431.

Domingo's argument fails because he has not carried his burden of showing that any error in the curative instruction was clear or obvious. Olano, 113 S. Ct. at 1777. The district court gave the instruction at its first opportunity at the beginning of the next session, and the "last question" asked by the prosecutor

could be discerned by the jury. Moreover, the district court instructed to the jury before deliberation that the government has the burden of proof and that the defendant is not obligated to produce any evidence or to testify. Furthermore, we are not persuaded that this alleged error, if uncorrected, would undermine the fairness and integrity of the judicial system. Id. at 1778-79.

IV. CONCLUSION

For the forgoing reasons, we AFFIRM the judgment of the district court.