IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2475

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONALD RAY SANDERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-179)

(September 26, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Donald Ray Sanders was charged with being a convicted felon in possession of two firearms pursuant to 18 U.S.C. §§ 922(g)(1) and 924(e)(1). A jury found Sanders guilty, and the district court sentenced him to prison for 264 months to be followed by five years of supervised release. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

On January 14, 1991, the residence of Donald Alexander in Nacogdoches, Texas, was burglarized. Alexander's Marlin 30.30 caliber rifle and Remington .22 caliber rifle were both stolen.

Cassie McClelland, manager of Pa & Granny's Pawn Shop in Pasadena, Texas, testified that on January 15, 1991, the day after the burglary, Sanders entered the store and pawned the Marlin. Scott Jezek, a pawnbroker at the A-1 All-American Pawn Shop in Pasadena, Texas, also testified that on January 15, 1991, he believed that Sanders pawned the Remington at his store.

Detective Mike Kelly, an investigator with the Deep East Texas Narcotics Task Force, testified that on March 6, 1991, while Sanders was in police custody, Kelly met with Sanders and Sanders signed a written statement ("March 6 confession"). In this statement, Sanders admitted to possessing and pawning the stolen guns. On March 18, 1991, Sanders signed a hand-written confession before Detective Channel of the Nacogdoches Police Department ("March 18 confession").

On August 19, 1992, Sanders was charged with being a felon in possession of a firearm. On December 3, 1992, the district court held a hearing on Sanders's motion to suppress the March 6 confession. The court denied the motion. A jury eventually found Sanders guilty of the charged violation and the district court sentenced him to 264 months imprisonment followed by five years of supervised release.

Sanders asserts three errors on appeal: 1) the district court committed reversible error by misstating the government's burden of proof to the venire panel; 2) the district court erred in refusing to grant Sanders's motion to suppress; and 3) the evidence was insufficient to sustain Sanders's conviction for being a felon in possession of a firearm.

II. GOVERNMENT'S BURDEN OF PROOF

Sanders argues that the district court mischaracterized "reasonable doubt" to the jury and substantially reduced the government's burden of proof. Sanders specifically complains of the following statement the trial judge made to the jury panel during voir dire:

> The government does not have to prove the case, of course, beyond any doubt, just as it does not need to prove a case beyond a reasonable doubt; that is a case based upon reason as you apply your own reason to the evidence received in the case.

(emphasis added). Sanders, however, did not object when the judge made the statement and did not otherwise raise the error to the district court.

A. Standard of Review

Because Sanders did not object to the judge's statement, we may review the statement 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)).

B. DISCUSSION

When evaluating the prejudicial effects of a trial judge's erroneous remarks to the jury, we must not consider the statement

in isolation but must view the proceedings as a whole. See United States v. Lance, 853 F.2d 1177, 1182 (5th Cir. 1988); see also United States v. Eargle, 921 F.2d 56, 58 (5th Cir.) (finding no error from syntactical error in jury charge when viewed in context of entire charge), cert. denied, 112 S. Ct. 52 (1991). A few sentences before the judge made the statement in question, the judge told the venire panel that the government had to prove its case "beyond a reasonable doubt." The district court, moreover, properly instructed the jury on "reasonable doubt" before the trial commenced. Additionally, Sanders concedes that the district court properly instructed the jury at the close of the evidence.

It appears, therefore, that the statement in question was nothing more than a slip of the tongue during the jury voir dire. Therefore, Sanders has not met his burden of showing the alleged error prejudiced the outcome of the case. Moreover, even if Sanders has shown sufficient prejudice, he has not shown an error that seriously affects the fairness, integrity or public reputation of the proceedings. Accordingly, we will not exercise our discretion to correct the alleged error.[1]

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[1] Sanders argues that when a constitutionally deficient reasonable doubt instruction is given, a court of appeals cannot conduct harmless error analysis, citing Sullivan v. Louisiana, 113 S. Ct. 2078, 2081-82 (1993). While Sanders correctly states the rule, Sullivan is distinguishable from the case at bar. Sullivan involved a constitutionally deficient reasonable doubt instruction given to the jury at the close of evidence. In this case, however, the judge misstated the reasonable doubt standard in voir dire, but stated the standard correctly at least two more times, including in the charge at the close of the evidence.

III. MOTION TO SUPPRESS

Sanders argues that the district court erred by failing to suppress the March 6 and March 18 confessions. In his motion to suppress, Sanders argued that the March 6 confession should be suppressed because he did not recall giving or signing a statement on that date. Sanders maintains that Officer Kelly's testimony that Sanders signed the confession on March 6 is a lie. While Sanders has no reason to doubt that his signature appears on the March 6 confession, he contends that he must have signed the March 6 confession at another time without knowing what it was. As to the March 18 confession, Sanders argues on appeal that it was the product of police coercion and therefore inadmissible.

A. Standard of Review

In reviewing the district court's ruling on a motion to suppress a confession, we must give credence to the credibility choices and findings of fact of the district court unless they are clearly erroneous. United States v. Ornelas-Rodriguez, 12 F.3d 1339, 1346 (5th Cir.), cert. denied, 114 S. Ct. 2713 (1994); United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993), cert. denied, 114 S. Ct. 2150 (1994). A district court's finding is clearly erroneous "only when the reviewing court is left with the `definite and firm conviction that a mistake has been committed.'" Ornelas-Rodriguez, 12 F.3d at 1347 (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)). We must view the evidence in the light most favorable to the party

prevailing in district court. Cardenas, 9 F.3d at 1147. The ultimate issue of voluntariness is a legal question which is reviewed de novo, requiring us to make an independent evaluation. Ornelas-Rodriguez, 12 F.3d at 1347; Cardenas, 9 F.3d at 1147.

In a suppression hearing, the government must prove by a preponderance of the evidence that a defendant voluntarily waived his rights and that the statements he made were voluntary. United States v. Restrepo, 994 F.2d 173, 183 (5th Cir. 1993). A confession is voluntary if it is the product of the defendant's free and rational choice. Id. It is voluntary in the absence of official overreaching, either by direct coercion or subtle psychological persuasion. Id. Whether a confession is voluntary is determined by considering the "totality of the circumstances." Id.

B. DISCUSSION

1. The March 6 confession

At the suppression hearing, Investigator Kelly testified that on March 6, he had a telephone conversation with Detective Channel of the Nacogdoches Police Department regarding several burglaries in the Nacogdoches area. Investigator Kelly learned from Detective Channel that Sanders had been arrested with respect to one of the burglaries and that Sanders had been cooperative in supplying information about the other burglaries. Kelly testified that he and Sanders met in an interview room and he gave Sanders his Miranda[2] warnings. Kelly testified that

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

during the interview, Sanders appeared relaxed, comfortable, and truthful.

Kelly further testified that after the interview, he wrote down by hand what Sanders had said and then had Sanders read over it. Sanders confirmed that it "looked correct." Kelly and Sanders then went to Kelly's office, where Kelly typed the statement. Sanders then read the statement again, acknowledged that it was correct, and signed it. Sanders, however, denied having an interview alone with Detective Kelly on March 6 at the county jail. According to Sanders, Detective Kelly lied about the statement.

After the hearing on Sanders's motion to suppress the March 6 confession, the trial court found as follows:

> The Court finds that the Government has established, at least by a preponderance of the evidence, that . . . [the March 6 confession] is a voluntary statement of the defendant.
>
> The Court finds that it was voluntary in the sense that it was a product of a free and deliberate choice, rather than intimidation, coercion or deception, and that the defendant made a waiver of his rights with a full awareness of both the nature of the rights being abandoned and the consequences of his decision to abandon it [sic].
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> In so finding, the Court has considered the totality of the circumstances surrounding the interrogation, including that the Miranda rights were waived voluntarily.

As noted above, Sanders's only argument concerning the March 6 confession is that "Kelly lied when he claimed Appellant made the . . . statement."[3] In other words, Sanders is not

[3] Sanders does not challenge the legal conclusions the

challenging the voluntariness of the statement or rights waiver, but the fact of actually making the statement at all. After reviewing the record, we do not have a "definite and firm conviction" that the district court erred in finding that Sanders did not actually give and sign the March 6 confession. Because it was for the trial court to make the judgment on the credibility and weight of the testimony, see Ornelas-Rodriguez, 12 F.3d at 1346, and there is evidence in the record to support the judge's findings, we conclude the trial court did not clearly err in finding that Sanders signed the March 6 confession.

2. The March 18 confession

Sanders does not deny making the March 18 confession. Sanders indicates that Kelly and Channel wanted him to make a statement about Steven Beulow[4] and that he was afraid during the interview. Sanders said he believed the burglary charges against him would be dismissed if he made a statement. According to Sanders, he was not informed of his rights until after he made the statement. Sanders maintains that, viewing the totality of the circumstances, the confession and rights waiver were not voluntary, but instead induced by police coercion.

In his pretrial motion to suppress, Sanders did not seek to suppress the March 18 confession. His motion refers only to the

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trial court drew from its fact-finding, but only contests the finding that Sanders actually gave and signed the March 6 confession.

[4] Steven Beulow apparently was with Sanders when the guns were pawned. The name also appears in the record as "Bulow" and "Buelow."

March 6 confession, he attached only the March 6 confession as an exhibit with his motion, and the trial judge's findings concerned only the March 6 confession. Motions to suppress evidence must be raised before trial, and the failure to do so constitutes a waiver unless the court grants relief from the waiver "for cause shown." FED. R. CRIM. P. 12(b)(3), (f). Sanders does not provide any reason why he did not challenge the admission of the March 18 confession before trial in a motion to suppress.

Sanders also failed to object to the admission of the March 18 confession at any time during the trial. Therefore, we may review only for plain error because the argument is raised for the first time on appeal. See FED. R. CRIM. P. 52(b); Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15.[5] As noted

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[5] However, an argument can be made that we cannot even review this alleged error due to Sanders's failure to object at trial. In Olano, the Supreme Court discussed the distinction between waiver and forfeiture of rights, stating that "waived" error, i.e. error that is intentionally and knowingly abandoned, is not reviewable:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." . . . Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). . . . If a legal rule was violated during the District Court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

The difference between the two is quite significant. If a right has been forfeited, a party can still appeal under Rule 52(b) for plain error. If, however, a right has been waived, no "error" can occur and even Rule 52(b) review is foreclosed.

Rules 12(b)(3) and 12(f) indicate that a motion to suppress must be made before trial, otherwise it is "waive[d]." FED. R.

above, for error to be plain, it must be obvious or apparent. Olano, 113 S. Ct. at 1777; Rodriguez, 15 F.3d at 415. Sanders fails to explain how the record indicates that the alleged error was obvious. After our own independent analysis of the record, we find no obvious error in admitting the March 18 confession. The record does not compel the conclusion that the March 18 confession was coerced. Given that, the trial court did not err in failing to find, sua sponte, that the March 18 confession was the product of police coercion. Furthermore, even if the trial court erred in failing to exclude the March 18 confession, we would decline to exercise our discretion because Sanders has not persuaded us that the alleged error will "seriously [affect] the fairness, integrity or public reputation of judicial proceedings." Olano, 113 S. Ct. at 1779.

IV. SUFFICIENCY OF THE EVIDENCE

Sanders argues that his conviction for being a felon in possession of a firearm is not supported by sufficient evidence. To establish the offense, the government had to prove (1) Sanders

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CRIM. P. 12(b)(3), (f). The issue is whether "waiver" as the Supreme Court used it in Olano means the same thing as "waiver" in Rule 12. If "waiver" means the same in both contexts, there can be no error for us to evaluate. Alternatively, it is plausible to argue that the Supreme Court did not intend to totally eliminate plain error analysis for inadvertent failure (as opposed to "intentional relinquishment or abandonment of a known right") to make a pretrial motion to suppress, indicating that "waiver" as it is used in Rule 12(f) really means "forfeiture."

Regardless of which interpretation is correct, our conclusion remains unchanged: the admission of the March 18 confession does not amount to error, plain or otherwise.

knowingly possessed a firearm (2) after having been convicted of a felony and (3) that the firearm was in or affected interstate commerce. See 18 U.S.C. §§ 922(g)(1), 924(a)(1); United States v. Wright, 24 F.3d 732, 734 (5th Cir. 1994). According to Sanders, the government did not sufficiently prove that he knowingly possessed the firearms in question. Sanders's main contention is that, notwithstanding the personal information about him written on the pawn tickets and his signature on the tickets, he went with someone to the pawnshop and allowed the other person to use his identification, but never actually had possession of the rifles.

A. Standard of Review

In evaluating the sufficiency of the evidence, we examine "all evidence, whether direct or circumstantial, and all inferences drawn from this evidence, in the light most favorable to the verdict." Ornelas-Rodriguez, 12 F.3d at 1344. The evidence is sufficient if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994). "It is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." Ornelas-Rodriguez, 12 F.3d at 1344.

In general, the jury is solely responsible for determining the weight and credibility of the evidence. United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993). The jury is free to choose among reasonable inferences that can be drawn from the evidence. Id. "[T]estimony generally should not be declared incredible as a matter of law unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature." United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991). We will not substitute our own determination of credibility for that of the jury. See Martinez, 975 F.2d at 161. We must concentrate not on whether the jury was correct, but if the jury made a rational decision. Ornelas-Rodriguez, 12 F.3d at 1344.

B. DISCUSSION

We find sufficient evidence to support the conclusion that Sanders knowingly possessed both the Marlin and Remington rifles. Cassie McClelland, manager of Pa & Granny's Pawn Shop in Pasadena, Texas, testified that on January 15, 1991, the day after the burglary, Sanders and Beulow entered the store. Sanders had a Marlin rifle and Beulow had a video cassette recorder. McClelland said that she recognized Sanders and Beulow because they had both pawned items at her store on December 27, 1990. According to McClelland's testimony, Sanders carried in the rifle and handed it to her. McClelland explained that her mother, the owner of the shop, typed the information into the

computer while McClelland read to her the information from the rifle. To complete the transaction, McClelland required Sanders to produce a valid photo identification card issued by the State of Texas. Furthermore, a handwriting expert confirmed that Sanders signed the pawn ticket.

Sanders asserts that McClelland's testimony was "erroneous" and "not believable." Sanders also questions McClelland's incentives for testifying, arguing that she "had a motive to lie in that she would loose [sic] her business if she admitted they did not examine photo identifications." However, such credibility choices are exclusively within the province of the jury. Martinez, 975 F.2d at 161. The jury was aware of all the factors Sanders contends makes McClelland's testimony unbelievable and yet chose to believe McClelland. McClelland's testimony does not assert facts that she could not have physically observed or events that could not have occurred under the laws of nature and therefore we will not declare her testimony incredible as a matter of law. See Osum, 943 F.2d at 1405. Viewed in the light most favorable to the verdict, the jury could have rationally believed McClelland's testimony that Sanders entered the store with the Marlin and handed it to her.

The evidence was also sufficient for the jury to conclude that Sanders knowingly possessed the Remington. Jezek, a pawnbroker at the A-1 All-American Pawn Shop, testified that on January 15, 1991, a man presented Sanders's driver's license and pawned the Remington at his store. Although Jezek could not

identify Sanders at trial, Jezek testified that he believed that Sanders pawned the gun. Jezek based this belief upon what he testified was the specific procedure that the shop always follows when someone pawns a gun. First, the shop asks for state-issued photo identification. The person attempting to pawn the firearm must hand the pawnbroker that person's own identification. The pawnbroker writes the person's name and address on the pawn ticket. The pawnbroker also writes down on the ticket the number of the person's driver's license, the person's date of birth, eye color, height, race, and sex.

Based on the store's procedure, which Jezek swore the store has never failed to use, Jezek testified at trial that he believed he took Sanders's identification from Sanders and not someone else. Jezek testified that it would have been unusual for someone pawning a gun to use someone else's identification and that, as far as Jezek could tell, it was a normal transaction. Furthermore, an expert forensic document examiner testified that it was "probable" that Sanders signed the ticket from the A-1 All American Pawn Shop.

In challenging the sufficiency of the evidence, Sanders relies primarily on Jezek's testimony that he did not specifically recall the transaction in which the Remington rifle was pawned. Jezek, however, expressly stated at trial that, as far as he could tell, the transaction in question was "normal." Jezek also testified that the person attempting to pawn the firearm must be the person who hands him identification. Jezek

claimed he could not ever recall following a different procedure in accepting identification. He further specifically testified that no one but Sanders would have handed him identification. Sanders also questions Jezek's motive in that "Jezek admitted that if they did not follow proper procedure in identifying people who pawn guns, they could loose [sic] their license."

As with McClelland's testimony, the jury could have reasonably inferred from Jezek's testimony that Sanders was the person who pawned the Remington. As discussed above, the jury is free to choose among rational inferences from the evidence. Ornelas-Rodriguez, 12 F.3d at 1344; Martinez, 975 F.2d at 161. The jury evaluated Jezek's credibility, and it is not our role to re-evaluate, based on a cold record, Jezek's credibility. Martinez, 975 F.2d at 161.

V. CONCLUSION

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