IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3389
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KENNETH WAYNE JACKSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 92-274-G)

(August 19, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Kenneth Jackson appeals his conviction of first-degree murder of a U.S. Postal Service employee, in violation of 18 U.S.C. §§ 1111, 1112, and 1114. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Jackson argues that the district court erred in ruling that the testimony of Rosalie Brown, his mother, was not derived from an illegal search. Police executed a search warrant at Brown's residence, where Jackson was living, and questioned Brown about her ownership of a gun. The district court granted Jackson's motion to suppress evidence obtained in the search of the residence.

At trial, the government asked Brown whether she kept a gun in her house. Without objecting on the record, defense counsel requested a sidebar, which is unintelligible on the video tape record on appeal. The government then asked Brown, without objection, whether she had a gun in her house. She testified that she had a small gun she kept in her bedroom closet but that she had not seen it in five years. The government asked her whether she had tried to find the gun on April 29, 1992, the date the search warrant was executed. She answered, "I told [the searching officers] I had one up there . . . ." A sidebar conference was held following defense objection, and the judge excluded this line of questioning as fruit of the poisonous tree.

Jackson contends that the court erred in finding that Brown's testimony also was not fruit of the poisonous tree. He argues that her testimony was tainted by the illegal search because the initial contact with Brown was simultaneous with the illegal search, her trial testimony was not voluntary, and there was no inevitable discovery of the gun evidence.

Jackson does not identify what portions of Brown's testimony

were erroneously admitted. Defense counsel contends that the district court admitted Brown's testimony over his objections. Defense counsel requested a sidebar but did not object on the record or state grounds for his objection.

We review evidentiary rulings for abuse of discretion. United States v. Brown, 7 F.3d 1155, 1163 (5th Cir. 1993). In direct criminal appeals, review of evidentiary rulings is "necessarily heightened." United States v. Hays, 872 F.2d 582, 587 (5th Cir. 1989). To preserve a claim of error for appellate review, a party must timely object to the admission of the evidence and state the specific ground of the objection. FED. R. EVID. 103(a)(1); United States v. Martinez, 962 F.2d 1161, 1165-66 & n.8 (5th Cir. 1992). We may correct a forfeited error if it is a plain error and affects the substantial rights of the party. FED. R. EVID. 103(a)(1);[1] United States v. Olano, 113 S. Ct. 1770, 1777 (1993) (interpreting FED. R. CRIM. P. 52(b)). An error is plain if it is clear or obvious. Olano, 113 S. Ct. at 1777-78. To "affect substantial rights . . . the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." Id.

The question is whether Brown's testimony about owning a gun is fruit of the poisonous tree or is sufficiently distinguishable from the illegal search to be purged of its taint. There are three exceptions to the exclusionary rule: if the evidence (1) has an attenuated link to the illegal search; (2) derives from an

[1] The "wording of the plain error principle is from Rule 52(b) of the Federal Rules of Criminal Procedure." Advisory Committee note to rule 103(d).

independent source; or (3) inevitably would have been discovered. United States v. Caldwell, 750 F.2d 341, 344 (5th Cir. 1984), cert. denied, 471 U.S. 1007 (1985). In determining the applicability of the exclusionary rule to live-witness testimony, courts consider (1) the willingness of the witness to testify freely and (2) the cost of excluding the testimony balanced against the deterrent purpose of the exclusionary rule. United States v. Ceccolini, 435 U.S. 268, 276-78 (1978).

Any error in the admission of Brown's testimony is not obvious, and Jackson does not argue, and has not shown, that admission of Brown's testimony affected his substantial rights. Brown was questioned only about her ownership of a gun and her knowledge of the operability of it; no testimony was elicited that linked Jackson to the gun. Other testimony about Brown's gun ownership was admitted without objection: Larry Spears, Jackson's brother who lived across the street from Brown, testified that his mother once owned what he believed to be a .22 caliber revolver in her house.

II.

Jackson argues that he was denied a fair trial because the district court admitted evidence of other crimes not included in the indictment))specifically, statements by Celisa Burl and Francis Landix. Jackson argues that the government did not offer the testimony for any purpose admissible under FED. R. EVID. 404(b) and that the district court erred by failing to make a sufficient

ruling on the admissibility of the evidence. The government argues that it did not offer the evidence but that these were unsolicited statements of the witnesses and not offered pursuant to rule 404(b).

Extrinsic evidence of other offenses or wrongs is admissible under rule 404(b) if the district court determines that (1) it is relevant to an issue other than the character of the defendant and (2) the prejudicial effect of the evidence does not outweigh its probative value. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). A district court is not required to conduct this analysis sua sponte in the absence of an objection. United States v. Greenwood, 974 F.2d 1449, 1462 n.8 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). If a defendant fails to object at trial to extrinsic evidence, we will reverse only if the admission of the evidence resulted in plain error. Id. at 1462.

A.

Burl testified that while she was on a date with Jackson, she observed him in possession of a .22 caliber pistol in his car:

MR. KAMMER: Okay, what happened after you pulled into the parking lot?

MS. BURL: Okay. We pulled up there and sit and we was talking and I reached over to him and asked him why do you have you hand down on the side of the seat like that? And that's when he came up with the gun, and he put the gun to my head . . . .

MR. KAMMER: Excuse me? He showed you the gun?

MS. BURL: Yes.

MR. KAMMER: Tender the witness, your honor.

MR. KING [defense counsel]: Judge, can we approach the bench?

Jackson asserts in his brief that "[d]efense counsel promptly objected." No contemporaneous objection was made on the record, however, and the sidebar remarks are unclear. Jackson argues that Burl's testimony was highly prejudicial and that "[t]he extrinsic act testified to by Celisa Burl was grave in nature and not the subject of a conviction."

B.

Landix testified as follows:

MR. HARPER: Did he tell you anything about your wedding plans?

MS. LANDIX: Yeah, he said, . . . "Francis . . . I changed my mind about the wedding." I said, "what you mean." He said, "I don't want to get married next year, I want to get married this year." I said, "This year?" He said, "Yeah." I said, "Why?" He said, . . . "You see this murder robbery they had?" He said, "I'm an ex-con." He said, I got a record." He said, "The first person they're going to look for is me." He said, "I want you to be my wife."

Defense counsel did not object to this testimony, which Jackson argues is prejudicial because through it "the state placed before the jury the defendant's criminal history."

C.

Jackson implies in his brief that he objected to Burl's and Landix's testimony and argues that "the trial court reversibly

erred in allowing the government to elicit this evidence over defense counsel objections." If counsel did object, he did not do so on the record or obtain a ruling on the record. Thus, admission of the testimony of Burl and Landix will be reviewed for plain error. See FED. R. EVID. 103(a)(1); Martinez, 962 F.2d at 1165-66 & n.8.

Because defense counsel did not object to the admission of Burl's or Landix's testimony or request a rule 404(b) determination, the district court did not err by not making a Beechum ruling. See Greenwood, 974 F.2d at 1462, n.8. Additionally, the district court gave a curative instruction admonishing the jury to ignore this type of evidence.

III.

Jackson argues that the district court erred in denying his motion to suppress evidence seized in two searches of the vehicle he was using. The first application to search the 1984 Chevrolet was made at 7:47 p.m. on April 29, 1992. The affidavit in support of the warrant alleged that jewelry, a revolver, and other evidence was taken in a robbery at the Video Express Store in Reserve, Louisiana. The affidavit in support of probable cause stated that the victim of a robbery had identified Jackson through a photographic line-up as the perpetrator; that Landix stated that Jackson had been using the car; and that Jackson was driving the car when he was arrested for the video store robbery. During this search, officers observed two postal money orders. Officers made a second

application for a search warrant at 11:22 p.m. on April 29, 1992, pursuant to which two unnegotiated U.S. postal money orders identified as being stolen during the murder were seized.

The district court denied the motion to suppress this evidence, finding that the affidavit supported a nexus between the automobile and the items to be seized and that the magistrate could make a reasonable inference that Jackson was using the car on the day of the robbery. The district court found alternatively that the good-faith exception applied.

Jackson argues that the district court erred in denying his motion to suppress, on the basis that the first warrant did not show a sufficient nexus between the alleged crime (the armed robbery of the video store) and the vehicle. He contends that the government did not prove a good-faith reliance upon the warrant and that the second search was the fruit of the first illegal search. He avers that it is obvious that the money orders were found during the first search and were used to establish probable cause for the second search.

Jackson concludes that the illegality of the first search tainted the second search, making the seized money orders "fruits of the poisonous tree." He argues that the admission of the evidence seized in the search of the vehicle was highly prejudicial, as it "was the most damning evidence offered against the defendant"; thus it was reversible error.

The government argues that the first search was supported by probable cause or, alternatively, good-faith reliance upon the

validity of the warrant. The government also contends that the officers could have conducted a warrantless search of the car because they had probable cause.

We review the denial of a motion to suppress evidence seized pursuant to a warrant to determine, first, whether the good-faith exception to the exclusionary rule applies and, second, whether the warrant was supported by probable cause. United States v. Satterwhite, 980 F.2d 317, 320 (5th Cir. 1992). If the good-faith exception applies, we usually do not reach the probable cause issue. Id. (citation omitted). For a search warrant to be valid, "a magistrate need only have a substantial basis for concluding that a search would uncover evidence of wrongdoing." United States v. Brown, 941 F.2d 1300, 1302 (5th Cir.), cert. denied, 112 S. Ct. 648 (1991). A magistrate must be permitted to "draw reasonable inferences from the material he receives, and his ultimate probable cause decision should be paid great deference by reviewing courts." United States v. May, 819 F.2d 531, 535 (5th Cir. 1987).

The affidavit supporting a warrant must show a nexus between the place to be searched and the evidence sought, either through direct observation or through normal inferences as to where the articles sought would be located. See United States v. Freeman, 685 F.2d 942, 949 (5th Cir. 1982). "[E]vidence obtained by officers in objectively reasonable good-faith reliance upon a search warrant is admissible, even though the affidavit on which the warrant was based was insufficient to establish probable

cause." Satterwhite, 980 F.2d at 320.

This Court reviews de novo the reasonableness of an officer's reliance upon a warrant. Id. at 321. "When a warrant is supported by more than a `bare bones' affidavit, officers may rely in good faith on the warrant's validity." Id. The exclusionary rule should not be permitted to deter the actions of a law enforcement officer, acting with objective good faith, who has obtained a search warrant from a judicial officer and has acted within the scope of the warrant. Id. (citing United States v. Leon, 468 U.S. 897 (1984)).

The affidavit in support of the search warrant of the vehicle gave the magistrate more than "bare bones." It provided him with the following facts: The victim of a robbery identified Jackson as the robber, and Jackson had been using the vehicle to be searched and was arrested while driving the vehicle. The magistrate could reasonably infer that Jackson was using the vehicle at the time of the robbery and that the items to be seized might be located in that vehicle. See Freeman, 685 F.2d at 949.

The officers reasonably relied upon the allegations in the warrant to establish probable cause for the first search. This court "need not reach the probable cause issue if the good-faith exception applies, and the case does not involve a `novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates.'" Satterwhite, 980 F.2d at 320 (quoting Illinois v. Gates, 462 U.S. 213, 264 (1983) (White, J., concurring)). No novel question is at issue here.

AFFIRMED.