IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7604
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROSA MARIA BENAVIDES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(L-93-CR-59-01)

(July 5, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

In this direct appeal of her criminal conviction by a jury of conspiracy to possess with intent to distribute and possession with intent to distribute marijuana, in violation of 21 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 841(a)(1) and (b)(1)(C), and § 846, Defendant-Appellant Rosa Maria Benavides complains that the district court erred in overruling her motion for a judgment of acquittal and in allowing prejudicial and improper conduct by the prosecutor and improper expert testimony. For the reasons set forth below, we find no reversible error and therefore affirm the jury's guilty verdict.

I

FACTS AND PROCEEDINGS

Benavides was charged with conspiracy to possess with intent to distribute (Count 1), possession with intent to distribute (Count 2), and distribution of marijuana (Count 3). The trial court denied Benavides' motion for judgment of acquittal, which she renewed at the close of the evidence, grounded in part on allegations that the government failed to prove beyond a reasonable doubt that there was no entrapment. The district court granted the motion as to Count 3 only. The jury found Benavides guilty of Counts 1 and 2, and she was sentenced to two concurrent 46-month terms of imprisonment, a three-year term of supervised release, and $100 in special assessments.

At trial, one Steve Villarreal testified that he had become friends with Benavides when they worked together at a department store, but that he had lost contact with her, except at the time that she left her job at the department store and obtained a job at E-Z Pawn. When Villarreal subsequently encountered Benavides at a shopping mall and complained to her that his hours at the department store had been cut, she suggested that he fill out a job

application at E-Z Pawn. He went to E-Z Pawn where Benavides was working to get the application. While he was there Benavides mentioned that she had seen him on television loading what looked like marijuana into a truck. They discussed Villarreal's interest in law enforcement and that he sometimes assisted the police as a volunteer.

Villarreal testified that Benavides asked him, "can you get some?" Surprised by Benavides' question, he replied, "can I get some what?", to which she responded, "can you get some from the evidence room?" Villarreal told her that he would check and get back to her. He testified that she said: "Fine. Give me a call today, if you can," adding that she was willing either to buy or to sell.

Immediately after this conversation, Villarreal tried unsuccessfully to contact two friends who were police officers. He was, though, able to detain another officer, Joe Lopez, who was assigned to the D.E.A. and who testified that Villarreal appeared anxious. Later Villarreal and D.E.A. Agent McNeese discussed introducing an undercover agent to Benavides.

Following McNeese's instructions, Villarreal called Benavides and told her that he had a friend from San Antonio who wanted to sell her some marijuana. Benavides replied that she would rather sell and that she had a friend who was willing to sell. Thereafter, pursuant to McNeese's instructions, Villarreal called Benavides and told her that his friend was willing to buy marijuana.

The next day Villarreal met with McNeese and D.E.A. Agent Melton Rodriguez, who was to pose as "Mel," the friend from San Antonio who was interested in buying marijuana. Villarreal and Rodriguez met Benavides at E-Z Pawn, where she said that she had 300 pounds to sell at $350 per pound. She asked whether they would be interested in buying more marijuana if she had more to sell, and Rodriguez said they would. Villarreal and Rodriguez left E-Z Pawn believing that Benavides would contact Villarreal as soon as the marijuana arrived.

Villarreal called Benavides twice that afternoon, but she said that the marijuana would not arrive until the next day. The next morning Villarreal called her and she told him that the marijuana still had not arrived. Thereafter, Rodriguez and Villarreal "flashed" $20,000 to Benavides to prove that they were serious. She told Villarreal that the marijuana had been "taken down" in Mexico, but that she might be able to get some more marijuana and would page him if she received any. Villarreal then started visiting E-Z Pawn about once a week to check with her.

Several months after the D.E.A.'s initial involvement in the case, Benavides called Villarreal to say that she had marijuana for sale. The day after that call Rodriguez met Benavides who told him that she had two loads of marijuana for sale: a 100-pound load of green marijuana for $325 per pound and a 200-pound load of higher quality marijuana for $350 per pound. When Rodriguez told her that he wanted a sample, she led him to her truck and gave him two samples. Rodriguez then told her that he wanted to buy the 200-

pound, higher quality load.

Benavides and Rodriguez made plans for the transaction pursuant to which Benavides was to switch vehicles with Villarreal at a meat market, load the marijuana into Villarreal's car, and proceed to a parking lot to exchange money, marijuana, and vehicles. When Benavides actually switched vehicles with Villarreal at the meat market as planned, she told Rodriguez that she only had 132 pounds to sell, the price for which would be $42,900. She gave him a paper bag in which to put her $3300 "cut."

During the course of the exchange, surveillance officers spotted a white Cadillac occupied by two males who were watching the Benavides and Villarreal vehicles. Shortly after Benavides drove Villarreal's car to her house, the white Cadillac arrived there. The driver and the passenger of the Cadillac left the car and spoke to Benavides. She then backed Villarreal's car toward the house and opened the trunk. The two men in the white Cadillac left a short while later, as did Benavides. Once in the parking lot, Benavides opened the trunk of the car to show Rodriguez the marijuana. She was arrested shortly thereafter.

Not surprisingly, Benavides' testimony differed from that of the government's witnesses. Under her version, she and Villarreal did not meet by chance in a mall; rather Villarreal had appeared at E-Z Pawn looking for work. She testified further that he said that he "didn't have to work hard for the money; that he would get it easily because he would be a drug dealer." Benavides denied that she asked Villarreal if he could get "some" (marijuana) from the

evidence room, contending that she did not even know what an evidence room was.

Benavides also testified that she and Villarreal dated and that she became involved in the drug transaction because she had fallen in love with him. She insisted that Villarreal told her that he was in the drug business and was in danger of being harmed by another dealer unless he got marijuana to sell. According to Benavides, Villarreal told her that she would have to deliver the marijuana because he was being watched by the police. She testified that she followed Villarreal's instructions when she obtained the marijuana and agreed to sell it to Rodriguez; and that she had learned about the types and prices of marijuana from Villarreal.

II

ANALYSIS

A. Motion for Acquittal

Benavides argues that the district court erred in overruling her motion for an acquittal. She contends that the government failed to show, beyond a reasonable doubt, that she was predisposed to commit the offense.

To prove entrapment, the defendant must "make a prima facie showing that government conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it." United States v. Hudson, 982 F.2d 160, 162 (5th Cir.) (internal quotations and citations omitted), cert. denied, 114 S.Ct. 100 (1993). If the defendant thus makes a prima facie

showing, "the burden shifts to the government to prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." Id. (citation and internal quotations omitted). "Entrapment as a matter of law is established only where a reasonable jury could not find that the government discharged its burden of proving the defendant was predisposed to commit the charged crime." United States v. Arditti, 955 F.2d 331, 342 (5th Cir.), cert. denied, 113 S.Ct. 597 (1992) (citation omitted). The district court found that Benavides made a prima facie showing of entrapment, but the jury rejected the defense.

> On appeal from a conviction wherein the jury has rejected the entrapment defense, the standard of review is the same as that which applies to the sufficiency of the evidence. Consequently, this Court must look to the evidence to determine whether, viewing reasonable inferences and credibility choices in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense. United States v. Duvall, 846 F.2d 966 (5th Cir. 1988).

United States v. Johnson, 872 F.2d 612, 621 (5th Cir. 1989).

When properly characterized, Benavides' arguments amount to nothing more than challenges to the credibility of the testimony. As the district court noted in its instructions to the jury "[the evidence presents] pretty clear cut choices of one version being entrapment and one not. So that's up to you." The jury alone is 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). Here, the jury chose to disbelieve Benavides' version of the events. As the ultimate arbiter of witness credibility, the jury was entitled to credit the testimony of Villarreal and the other government witnesses over that of Benavides.

Based on the evidence, the jury could have believed: that Benavides first asked Villarreal if he could get her some marijuana; that she told Villarreal that she was willing to buy or to sell; that she was knowledgeable about marijuana and drug transactions; and that she initiated contact with Villarreal to tell him that the marijuana had arrived. When all reasonable inferences are construed in favor of the verdict, it is clear that the government adduced sufficient evidence to support the jury's conclusion. Therefore, the government bore its burden of establishing Benavides' predisposition to commit the offenses for which she was convicted.

B. Prosecutorial Misconduct

Benavides argues that prosecutorial misconduct during closing argument and during direct examination of Villarreal probably resulted in an improper verdict and thus constituted a denial of due process.

We may reverse a conviction based on prosecutorial misconduct if the prosecutor's remarks were both inappropriate and harmful. United States v. O'Banion, 943 F.2d 1422, 1431 (5th Cir. 1991). A determination must be made whether the remarks "`affected substantial rights of the accused.'" Id. (citation omitted). In

other words, we must decide "whether the misconduct casts serious doubt upon the correctness of the jury's verdict." United States v. Kelley, 981 F.2d 1464, 1473 (5th Cir.), (citation omitted), cert. denied, 113 S.Ct. 2427 (1993). A criminal conviction will not be overturned lightly based solely on the comments made by a prosecutor. See O'Banion, 943 F.2d at 1431. In making this determination, we must consider "1) the magnitude of the prejudicial effect of the statements; 2) the efficacy of any cautionary instructions; and 3) the strength of the evidence of the [defendant's] guilt." Kelley, 981 F.2d at 1473 (internal quotations omitted).

1. Closing Argument

Benavides complains of three instances of purported prosecutorial misconduct during the government's closing argument. She contends first that the prosecutor improperly argued that a failure of the jury to convict Benavides would result in the firing of law enforcement officers who testified on behalf of the government. Benavides objected at trial to the following portion of the prosecutor's closing argument:

> [W]hy did not only Steve lie about everything, but each and every police officer who testified must have also joined in this conspiracy against this defendant . . . He's not only taking a chance of losing his job as a police officer . . .

The court overruled the objection.

On appeal, Benavides fails to explain how or why this portion of the prosecutor's closing argument constitutes misconduct. We need not consider inadequately briefed issues. See Yohey v.

Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Furthermore, the statements do not appear to be improper. As the district court correctly suggested, the argument was responsive to Benavides' testimony that the government's witnesses were lying and, thus, the prosecutor's argument was not improper commentary on the jury's role as the judge of the credibility of witnesses. See United States v. Diaz-Carreon, 915 F.2d 951, 956 (5th Cir. 1990). During argument to the jury, prosecutors are permitted to draw reasonable inferences from the evidence presented. United States v. Enstam, 622 F.2d 857, 869 (5th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

Second, Benavides urges that the prosecutor improperly argued that if the jury did not convict Benavides, Villarreal would never become a law enforcement officer. At trial, Benavides objected to the following portion of the prosecutor's closing argument:

> Another thing you must ask yourself why to [sic] is, why would Steve give up one hundred thousand dollars worth of marijuana to get on with the police force? I mean, that's what they say his motivation to do this is, to get on with the police force. So he's got a hundred thousand dollars--ninety-seven thousand dollars worth of marijuana and he gives this up to the police to get the poor innocent defendant into trouble so he can curry some favor. Which you heard from the testimony that there is no favor because he's not going to pass the test or get admitted to a police department `cause he was an informant. In fact, the opposite is probably true. If it comes out that he was a liar, if the judge doesn't believe him and you don't believe him, he'll probably never get in any police department. . . .

The court overruled the objection as well as Benavides' motion for

a mistrial. The prosecutor's argument was responsive to defense counsel's cross-examination and Benavides' testimony that Villarreal lied. Again, prosecutors are permitted to draw reasonable inferences from the evidence presented. Enstam, 622 F.2d at 869.

Third, Benavides insists that the prosecutor improperly argued that defense counsel was trying to mislead the jury. Purportedly the prosecutor stated:

> You heard the evidence. I don't know what else to tell you. The judge will instruct you on entrapment. Don't let the defendant's counsel mislead you. The only issue on entrapment is at the very beginning, who had the intent . . . .

As Benavides did not object at trial to this portion of the closing argument, we review it for plain error only. See United States v. Sanchez-Sotelo, 8 F.3d 202, 211 (5th Cir. 1993), cert. denied, 114 S.Ct. 1410 (1994). Plain error amounts to error that is "clear" or "obvious" and that affects "substantial rights." United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993).

"[T]he plain-error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Cartwright, 6 F.3d 294, 300 (5th Cir. 1993) (internal quotation and citations omitted). The above-quoted comment did not amount to plain error. "In evaluating the propriety of prosecutorial comments, it is appropriate to examine the comments in context." Diaz-Carreon, 915 F.2d at 958, n.14. Although it is

not proper for a prosecutor to attack the character or challenge the integrity of defense counsel, United States v. Goff, 847 F.2d 149, 162 (5th Cir.), cert. denied, 488 U.S. 932 (1988), the statement, "[d]on't let the defendant's counsel mislead you," immediately followed by, "[t]he only issue on entrapment is at the very beginning, who had the intent . . . ," did not so much constitute an attack on the character of Benavides' counsel as it constituted an attack on a legal position.

Moreover, even if the comment was inappropriate, "[i]nappropriate . . . prosecutorial remarks are not necessarily reversible error." Diaz-Carreon, 915 F.2d at 958. To constitute reversible error, the comment must "affect substantially the defendant's right to a fair trial." Id. at 958-59 (internal quotation and citation omitted). Even though the statement did encourage the jurors not to believe defense counsel as to the law on entrapment, the statement surely did not rise to the level of plain error. See Goff, 847 F.2d at 162.

2. Direct Examination of Villarreal

Paralleling one of her claims of misconduct during closing argument, Benavides argues that, through questions propounded to Villarreal on direct examination, the prosecutor improperly suggested that in the absence of a guilty verdict, Villarreal would not be able to land a job with the police. The following exchange occurred during the direct examination of Villarreal:

> Prosecutor: Counsel spent some time talking to you about . . . that perhaps your motive to be involved with this defendant was to curry favor with the police department and you said

> that that was not true, correct?
> Villarreal: Correct
> Prosecutor: Okay, what do you suppose would happen to your chances of becoming a police officer if this jury or this judge decided that you were up here making up this whole story and lying under oath?
> Defense Counsel: I'm going to object to that and move for a mistrial at this point in time.
> . . .
> The Court: No, Counsel. I'll sustain the objection, but I don't . . . I can't even conceive of a ground for a mistrial.
> Defense Counsel: We'd ask for an instruction, your Honor.
> The Court: And [sic] instruction about what?
> Defense Counsel: To disregard the question.
> The Court: Disregard the question. That's a hypothetical question that's got nothing to do with what we have to do here today. What's the next question?

The question was not improper as it was prompted by Benavides' counsel's cross-examination of Villarreal wherein he asked:

> And you have told us that your activities in this instance were not motivated by the hope or desire for monetary payment, but you do expect that this will help you to get a job with the police department, do you not?

Even assuming that the comment was improper, the district court's timely instruction to the jury to disregard the statement and decide the case on the evidence cured any prejudicial impact the statement may have had. See United States v. Villarreal, 963 F.2d 725, 729 (5th Cir.), cert. denied, 113 S.Ct. 353 (1992).

Therefore, in the overall context of the trial, any prejudicial effect from the prosecutor's remarks during his closing argument and during the direct examination of Villarreal was insignificant. Albeit disputed, there was strong evidence of Benavides' guilt. The prosecutor's comments, therefore, cast no

doubt on the correctness of the jury's verdict.

C. Improper Inferences from Questioning of Witness

Benavides contends that, through the questioning of Rodriguez, the prosecutor conveyed the idea that Benavides was a polished drug dealer. During the trial, the prosecutor asked Rodriguez whether he had "any doubt in [his] mind . . . that Ms. Benavides was a dope dealer by the way she carried on a conversation and by the things that she said and by the things that she did?" Benavides' counsel objected to this question and the prosecutor responded that he was offering Rodriguez as an expert. The district court sustained the objection so the prosecutor's question went unanswered. Assuming that the question was improper, the prosecutor's mere asking the unanswered question, did not, by itself constitute reversible error. Moreover, Benavides did not request a curative instruction.

Benavides contends that the court erred in admitting improper "expert" testimony by Rodriguez which suggested that Benavides' "conduct was consistent with that of drug dealers." As she concedes, however, she failed to object at trial. Therefore, the plain error standard applies.

Although Benavides characterizes portions of Rodriguez's testimony as improper "expert" testimony, the district court refused to allow Rodriguez to testify as an expert. The testimony Benavides cites on appeal is as follows:

> Q: . . . In your experience as an undercover officer working these various deals, is it usual or unusual that deals do not go exactly according to plan?
> A: Usual.

> Q: And it would be usual or unusual that one of the dope dealers would be calling the other one and touching base with the other one to see what the deal was?
> A: That's usual also.
> . . .
> Q: . . . [A]nd is [it] common among dope dealers [not to want to do drug deals at night]?
> A: Yes.
> . . .
> A: She appeared quite nervous.
> Q: Is that common or uncommon?
> A: Common.

This testimony is proper lay testimony; Rodriguez is merely testifying as to his experiences. See Fed. R. Evid. 701. But even if the testimony was improper, it did not amount to plain error.

III

CONCLUSION

For the foregoing reasons, we conclude that the district court committed no reversible error, so that Benavides' conviction should be, and therefore is,

AFFIRMED.