IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8415

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ERIC CAMPOS, JR.,
and
RENE GARZA BOTELLO,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(SA-92-CR-207(2))

(June 29, 1994)

Before GARWOOD, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

A jury convicted defendant Eric Campos of conspiracy to possess cocaine with intent to distribute. Defendant Rene Botello was convicted of possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, and use of

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 Pursuant to that rule, the court has determined that this opinion should not be published.

a person under eighteen years of age to avoid detection and apprehension. Finding no error, we affirm.

I.

The first argument raised by the defendants is that the prosecutor's use of peremptory challenges was racially discriminatory. The defendants assert that the district court implicitly held that the defendants had established a prima facie case of discrimination but that the district court found that the government's proffered reasons were valid. We disagree.

During the discussion which ended in the judge overruling the objection, the prosecutor stated that his position was that the defendants had not established a prima facie case. We therefore believe that the district court's ruling was a finding of no prima facie case. We also hold that the district court's finding of no prima facie case was not clear error. A prima facie case of racial discrimination "requires a defendant to `come forward with facts, not just numbers alone.'" United States v. Branch, 989 F.2d 752, 755 (5th Cir.), cert. denied, 113 S. Ct. 3060 (1993). The defendants asserted that the prosecution used three of its six strikes against Hispanics, and that three Hispanics remained on the jury, a lesser percentage than the percentage of Hispanics in San Antonio, where the case was tried; however, defendants never asserted below, and do not assert on appeal, that the proportion of Hispanics on the venire subject to strike was less than fifty percent.

Botello argues that the district court erred by adopting the magistrate judge's recommendation that there had been no illegal search and seizure of Botello's pickup truck. Even assuming that the stop of Botello's pickup truck was an arrest, rather than an investigatory stop, we believe the officer had probable cause for arrest under the collective knowledge doctrine.

During the trial, agent Holcomb testified that another occupant of Botello's pickup truck never admitted to possessing, or owning, the firearm and the cocaine found on his person. Botello claims that the testimony was hearsay. At the trial level, however, Botello failed to object to Holcomb's testimony. Therefore Botello has not preserved the error for review. See United States v. Williams, 998 F.2d 258, 262 (5th Cir. 1993), cert. denied, 114 S. Ct. 940 (1994). Although this court may reverse for plain errors that were not preserved for appeal, see FED. R. CRIM. P. 52(b), Holcomb's statement did not rise to the level of error that is "so obvious that failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. Evans, 848 F.2d 1352, 1359 (5th Cir. 1988) (citations and internal quotations omitted).

At trial, witnesses for Botello testified that they had never seen Botello in Campos's neighborhood. The government's sole rebuttal witness, agent Holcomb, testified that Botello's lawyer had stated at the pretrial detention hearing that Botello did indeed frequent Campos's neighborhood. Botello argues that Holcomb's testimony is hearsay. We disagree. The statement was

admissible as an admission by a party under FED. R. EVID. 801(d)(2).

Campos argues that he is entitled to a new trial because, during closing argument, the prosecutor commented on Campos's failure to dispute that he had negotiated a drug deal. Campos objected that this was a comment on his failure to testify. The district court sustained Campos's objection and instructed the jury to disregard the remark. The court told the jury not to consider any comments on Campos's constitutional right not to testify, that a defendant may testify if he chooses to do so, but that his decision not to do so may not be held against him. The district court's instruction cured any prejudice to Campos.

The district court gave an additional jury charge to the effect that a mistake by a witness does not necessarily mean that the witness was not telling the truth. The court later explained that if the jury considered the additional charge to be a comment on the evidence, the jury could disregard the jury charge. We do not find any error in the charge or clarifying remark. A court can indeed comment on the evidence as long as it tells the jury that it is not bound by the court's comments. United States v. Canales, 744 F.2d 413, 434 (5th Cir. 1984).

The defendants also argue that the district court erred in answering two jury notes by (1) instructing that the government need not prove that Botello possessed cocaine at one particular location or at a particular time and by (2) instructing that the jury need not find that Botello and Campos were "together" to find that a conspiracy existed between them. We do not find these

answers erroneous.

Botello avers that the district court erred by finding that Botello's 1977 conviction for possession of a prohibited weapon and his 1979 conviction for possession of marihuana were not "related cases" under U.S.S.G. § 4A1.2. Because Botello's two prior convictions were separated by intervening arrests, we affirm. See U.S.S.G. § 4A1.2, application note 3.

Campos argues that the district court failed to make a specific factual finding regarding his claim that the prosecutor refused to let him plead guilty. Such a claim does not allege a factual inaccuracy in the presentence report, and so it was unnecessary for the district court to make a finding or determination under FED. R. CRIM P. 32(c)(3)(D).

AFFIRMED.