

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8737
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH R. GRILLO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(92 CR 383 B)

(September 23, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges:

PER CURIAM:¹

Joseph Robert Grillo was convicted by jury trial of conspiracy to falsify immigration documents, mail fraud, receipt of a gift by a public servant, and receipt of a bribe by a public official. He was sentenced to a 48-month term of imprisonment, a \$5,000 fine, a three-year term of supervised release, and a special assessment of \$550. Grillo challenges the district court's comments and rulings on objections made by the prosecution during defense counsel's

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cross-examination of Aguirre, a codefendant who testified at Grillo's trial.

Because we find Grillo's arguments meritless, we affirm.

I. FACTS AND PROCEEDINGS BELOW

Grillo was a Supervisory Immigration Officer at the Immigration and Naturalization Service (INS) office in El Paso, Texas. His section of the INS was responsible for interviewing alien applicants and determining their eligibility for various benefits pursuant to the Immigration and Nationality Act. JoAnn Aguirre, a codefendant, was a naturalization clerk under Grillo's supervision.

Grillo, Aguirre, and an attorney, Thomas Astbury, participated in a scheme to naturalize some of Astbury's clients who were not legally qualified for naturalization. Grillo interviewed the applicants, failing to ask them the legally required questions, and participated in the falsification of their applications. Grillo received, inter alia, rent, hotel accommodations, rental cars, and airline tickets in exchange for his services to Astbury's clients.

Grillo's codefendant, Aguirre, pleaded guilty by written plea agreement to falsifying INS papers in exchange for which the government agreed not to charge her with additional crimes. She testified at Grillo's trial. On appeal, Grillo attacks the district court's comments and rulings on objections during his cross-examination of Aguirre.

We have reviewed very carefully the exchanges between counsel, the judge, and Aguirre, of which Grillo complains. We disagree

with his contentions that his cross-examination of Aguirre was improperly limited or that the judge's comments had the effect of bolstering Aguirre's credibility to the jury.

During Aguirre's cross-examination, defense counsel sought to impeach Aguirre by showing she was promised that the government would recommend a two-level reduction in her sentence if she pled guilty, that she should receive a minor role in the conspiracy, and that the government would write a letter to the judge on her behalf recommending a downward departure in her sentence if she cooperated.

However, in fashioning his questions to Aguirre to bring out these facts, defense counsel wrongfully implied that the government was in control of the sentence Aguirre would receive. At that point, the trial judge intervened, simultaneously with the prosecution's objection, to clarify that the government could only make recommendations regarding Aguirre's sentence. Even after this clarification of the law by the judge, defense counsel continued at least two more times to imply that the judge would have to give Aguirre the two-level reduction, the downward departure, etc., that the government had agreed to recommend. The prosecution continued to object to defense counsel's improper characterizations, and the court continued to clarify to the jury that the government can only make recommendations on sentencing and that it is solely within the judge's providence whether to accept or reject the government's recommendations.

Grillo contends that the district court improperly limited his cross-examination of Aguirre, thereby violating his Sixth Amendment right to confrontation. He alleges that Aguirre was a "star witness," upon whose testimony the entire case depended. He neglects to mention that Astbury also pleaded guilty and testified extensively for the government. Grillo argues that the district court limited his ability to demonstrate Aguirre's motive and bias, and that, by limiting his cross-examination of Aguirre, the court deprived him of a significant component of his defense. He also argues that the judge's comments were prejudicial and had the effect of improperly bolstering Aguirre's credibility to the jury.

II. STANDARD OF REVIEW

The Confrontation Clause of the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him") guarantees a criminal defendant the right to cross-examine prosecution witnesses. U.S. v. Pace, 10 F.3d 1106, 1113 (5th Cir. 1993), cert. denied, 114 S.Ct. 2180 (1994). This right is especially important with respect to accomplices who may have substantial reasons to cooperate with the Government. U.S. v. Onori, 535 F.2d 938, 945 (5th Cir. 1976). The Confrontation Clause nevertheless accords a trial judge "wide latitude" to limit cross-examination. U.S. v. Tansley, 986 F.2d 880, 886 (5th Cir. 1993). The Confrontation Clause is satisfied when defense counsel has been "permitted to expose to the jury the facts from which jurors, as the sole triers

of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." U.S. v. Restivo, 8 F.3d 274, 278 (5th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3707 (U.S. March 28, 1994) (No. 93-1630) (internal quotation marks and citation omitted). If the Confrontation Clause has been satisfied, this Court reviews the trial court's restrictions on cross-examination for abuse of discretion.

Grillo failed to object at trial to the court's purported limitation on the scope of the cross-examination of Aguirre. See U.S. v. Graves, 5 F.3d 1546, 1551 (5th Cir. 1993), cert. denied, 114 S.Ct. 1829 (1994) (in the absence of an objection, the Court reviews for plain error the trial court's decision to withhold from the jury portions of an adverse witness' plea agreement). Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional case. U.S. v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994).

The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. U.S. v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial

rights.² Olano, 113 S.Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S.Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden of proving a plain forfeited error-affecting substantial rights, he must also show that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. "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." Olano, 113 S.Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

[T]he standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936). 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."

Olano, 113 S.Ct. at 1779 (quoting Atkinson, 297 U.S. at 160).

Thus, this Court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

²Fed. R. Crim. P. 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In most cases, the error must have been prejudicial to be deemed to have affected substantial rights, i.e., it must have affected the outcome of the proceedings. Olano, supra, 113 S.Ct. at 1778.

III. DISCUSSION

A. Purported Limiting of the Cross-Examination of Aguirre

Grillo's argument concerning the purported limiting of the cross-examination of Aguirre is unavailing for several reasons. The government correctly notes that Grillo fails to explain exactly how the court limited his cross-examination of Aguirre. The government convincingly argues that the district court did not so much limit the scope of Grillo's cross-examination of Aguirre as it sustained objections to improper questioning by Grillo's counsel and instructed the jury accordingly. See Tansley, supra, 986 F.2d at 886 (trial court has wide latitude to limit confusing cross-examination).

The jury was made aware, during Aguirre's direct examination, that as part of her plea agreement, she would not be charged with any crime besides making false statements on INS papers. The jury heard that the Government agreed that she should receive a two-level acceptance of responsibility reduction, as well as a reduction for playing a minor role in the offense. Further, the district court instructed the jury that the Government entered into plea agreements with both accomplices in which the Government recommended lesser sentences than the accomplices would have received in exchange for providing truthful testimony at trial. The court also instructed the jury that the testimony of an alleged accomplice:

[I]s always to be received with caution and weighed with great care. You should never convict the Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt.

The fact that an accomplice has entered a plea of guilty to the offense charged is not evidence, in and of itself, of the guilt of any other person.

For the foregoing reasons, we conclude that the Confrontation Clause was satisfied and the district court did not abuse its discretion or commit error, plain or otherwise, in its rulings on the government's objections during the cross-examination of Aguirre.

B. Propriety of the District Court's Comments

Grillo argues that the district court made prejudicial comments about the evidence and on his cross-examination of Aguirre. He argues that the district court "strayed from the requisite neutrality" during trial. This Court has described the role of the trial judge as follows:

It is axiomatic . . . that the trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution. On the other hand, a federal judge is not a mere moderator of the proceedings He may comment on the evidence, may question witnesses and elicit facts not yet adduced or clarify those previously presented, and may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion. Only when a judge's conduct strays from neutrality is the defendant thereby denied a constitutionally fair trial.

U.S. v. Carpenter, 776 F.2d 1291, 1294 (5th Cir. 1985) (citation omitted). This Court looks at the trial as a whole in determining whether the "trial judge overstepped the bounds of acceptable conduct[.]" U.S. v. Lance, 853 F.2d 1177, 1182 (5th Cir. 1988). "[E]ven a comment arguably suggesting a judge's opinion concerning guilt is not necessarily reversible error but must be reviewed under the totality of the circumstances, considering factors such

as the context of the remark, the person to whom it is directed, and the presence of curative instructions." Id. Grillo concedes that he did not object to the judge's comments or questioning of Aguirre during the trial. Thus, the plain error standard applies.

Grillo contends that the comments had the effect of bolstering Aguirre's credibility to the jury. He argues that the district court's "instructions to the jury and admonition of defense counsel misl[ed] the jury, and was extremely prejudicial without a curative instruction by the judge to the jury." He contends that the judge's comments showed that he thought Grillo's counsel was attempting to mislead the jury.

Contrary to Grillo's argument, the trial judge did give a cautionary instruction regarding comments he made. The trial judge advised the jury that they had the exclusive power to weigh the evidence and make credibility determinations, and that they must follow the law and disregard any questions or comments made by the judge except for his instructions on the law.

Grillo does not contend that the district court's comments misrepresented the law. See U.S. v. Esparza, 882 F.2d 143, 146 (5th Cir. 1989). This Court has noted that the district court may interrupt counsel to correct errors. Carpenter, 776 F.2d at 1294. A judge may clarify facts for the jury as a matter of discretion. U.S. v. Bourgeois, 950 F.2d 980, 985 (5th Cir. 1992). Grillo himself acknowledges that the comments constituted clarifications of the law pertaining to sentencing. The judge's comments in no way bolstered Aguirre's credibility; the trial judge merely limited

defense counsel's questions to the actual facts of her plea agreement and clarified the law to the jury as to who had ultimate discretion in sentencing Aguirre.

The trial judge's comments did not constitute plain error; certainly they did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." (Citation and internal quotation marks omitted.) See Olano, 113 S.Ct. at 1779.

CONCLUSION

Finding no plain error in the district court's purported limiting of the cross-examination of Aguirre or in the comments made by the trial judge, we reject Grillo's contentions. The decision of the district court is AFFIRMED.