IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10378

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYFORD GLEN ROBERSON, a/k/a Rayford Roberson,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas
(3:93 CR 370 X)

May 9, 1995

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Roberson appeals his conviction for credit card fraud claiming that the district court's behavior during trial deprived him of a fair trial. We affirm.

Roberson contends that the district court judge overstepped his role as neutral arbiter during his trial. We agree that some of the judge's comments and questions were inappropriate.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Some of the district court's questions of Roberson, asked after the Government had stated that it had no further questions, had a prosecutorial, cross-examining tone. For example, the judge tried to establish through his questions that Roberson was accusing the police of framing him, even though the defense did not allege that Roberson was framed and the prosecution did not raise the issue. The court's questions revealed the incredulity of the judge towards Roberson's testimony. He stated, "[a]nd they framed you because of that? . . . If they didn't know you or hadn't met you before, why do you suppose they would want to frame you?" In addition, when referring to the evidence connecting Roberson to the other defendants and the stolen merchandise the judge stated, "[i]t's a pretty big coincidence." The record shows several other instances during Roberson's testimony where the judge questioned or interjected comments, seemingly not for the purpose of clarifying ambiguity but to elicit new information or emphasize his own disbelief with respect to Roberson's statements. This court has stated that:

> When a defendant takes the stand in his own behalf, any unnecessary comments by the court are too likely to have a detrimental effect on the jury's ability to decide the case impartially. "It is well known . . . that juries are highly sensitive to every utterance by the trial judge, the trial arbiter . . . ." This is especially true where the judge's remarks are directed to the defendant.
> United States v. Middlebrooks, 618 F.2d 273, 277 (5th Cir. 1980)(citation omitted).

The judge also improperly asked a government witness, the Secret Service Agent investigating the case, if he believed that statements made by Roberson's two codefendants were truthful.

This court has held that testimony of one witness about whether to believe the testimony of other witnesses in the case is "`wholly without value to the trier of fact in reaching a decision.'" United States v. Price, 722 F.2d 88, 90 (5th Cir. 1983)(citation omitted).

In questioning a witness who purchased some of the property fraudulently obtained with the credit card numbers the judge again indicated incredulity towards the testimony. The judge demonstrated his belief that the merchandise purchased was stolen when he asked, "[a]nd Mr. Roberson assured you that it wasn't [hot] and that was good enough for you, and you gave him 37 one hundred dollar bills and that was the end of it." The judge should not "trespass on the jury's functions and responsibilities" which include "the right to assess credibility in finding the facts." United States v. Cisneros, 491 F.2d 1068, 1074 (5th Cir. 1974)(citations omitted).

These are examples of instances during Roberson's trial when the district court exceeded his role as a neutral arbiter. As the Eighth Circuit has stated:

> A trial judge's isolated questioning to clarify ambiguities is one thing; however, a trial judge cannot assume the mantle of an advocate and take over the cross-examination for the government to merely emphasize the government's proof or to question the credibility of the defendant and his witnesses. A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury. A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony. A trial court should never assume the burden of direct or cross-examination. United States v. Bland, 697 F.2d 262, 265-66 (8th Cir. 1983).

Roberson failed, however, to object to the judge's behavior at trial. As we noted in a recent opinion, "the failure of a litigant to assert a right in the trial court likely will result in its forfeiture." United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994)(en banc), cert. denied, 115 S.Ct. 1266 (1995). In that case we explained that if an error is plain it may still require reversal even though the defendant did not object to it at trial, but only if the error affects substantial rights. Generally, an error affects substantial rights when it affects the outcome of the proceeding. Id. at 164 (citing United States v. Olano, 113 S.Ct. 1770, 1778 (1993)).

We have carefully read the entire record in this case and it is clear that the outcome of the case would not be different even if the district court judge had not made any comments and had not asked any questions. The evidence against Roberson was overwhelming. It included the following: 1) statements signed by two codefendants consistently describing the fraudulent scheme; 2) in-court testimony of a third conspirator also describing the fraudulent scheme in a manner consistent with the statements of the other defendants; 3) a piece of paper with Roberson's fingerprints on it listing other people's credit card numbers; and 4) the fact that Roberson sold several computers shortly after those same computers were fraudulently purchased using credit card numbers also used in mail order purchases taken by Roberson's codefendant Devra Belser.

AFFIRMED.