UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-11141
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHNNY DEWAYNE SLAINE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93 CR 407 G)

(October 20, 1995)

Before DAVIS, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:[1]

Slaine challenges the district court's rejection of his insanity defense to a bank robbery charge. We find no plain error and affirm.

I.

The grand jury issued an indictment charging Johnny Dewayne Slaine with robbing the Bank of America. Slaine's attorney filed a notice of intent to raise the defense of insanity and requested a competency hearing pursuant to 18 U.S.C. § 4243. The district

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

court ordered Slaine committed for an evaluation to determine both his competency to stand trial and his sanity at the time of the offense.

Slaine was committed to the Federal Medical Center, Rochester, Minnesota (FMC Rochester). The staff at FMC Rochester concluded that Slaine was competent to stand trial and competent at the time of the alleged offense. The district court found Slaine competent to stand trial.

The parties agreed to have the district court try the case. Following a bench trial at which both sides presented expert testimony, the district court rejected Slaine's insanity defense and convicted him of bank robbery. The court sentenced Slaine to a term of fifty-one months.

II.

Slaine does not dispute that he committed the robbery. He argues, however, that the district court rejected his insanity defense based on inadmissible evidence.

The parties agree that the expert testimony violated FED. R. EVID. 704(b) because both experts expressed opinions as to an element of Slaine's insanity defense, i.e., whether he could appreciate "the nature and quality and wrongfulness of his acts." They also agree that because there were no objections to the testimony, this court should review the issue for plain error.

Insanity is an affirmative defense to prosecution for a federal crime. 18 U.S.C. § 17. A defendant who pleads insanity must show that, at the time of the crime, a severe mental disease or defect made him unable to "appreciate the nature and quality or

the wrongfulness of his acts." 18 U.S.C. § 17. The defendant must establish his criminal insanity at the time of the offense by clear and convincing evidence. United States v. Barton, 992 F.2d 66, 69 n.5 (5th Cir. 1993). Clear and convincing evidence is that which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." Id. at n.6 (quotation and citation omitted).

Slaine's insanity defense was based on his assertion that he heard voices which caused him to throw himself to the ground and told him that they would cut off his brother's penis if Slaine did not rob a bank. Federal Rule of Evidence 704(b) prohibits expert witnesses from stating opinions "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto." FED. R. EVID. 704(b).

However, both mental health experts testified that, in their opinion, Slaine knew the difference between right and wrong, understood the concept of bank robbery, and knew that robbing a bank was against the law.[2] Slaine asserts that this testimony

[2] The experts disagreed whether Slaine heard threatening voices which deprived him of the ability to control his conduct and compelled him to rob the bank; however, whether Slaine's conduct was volitional is irrelevant to his legal sanity. 18 U.S.C. § 17; United States v. Lyons, 731 F.2d 243, 248 (5th Cir.) (en banc), cert. denied, 469 U.S. 930 (1984); compare R. 6, 112-13 and 140.

constitutes plain error because it concerns the ultimate issue raised by his insanity defense in contravention of Rule 704(b).

The Government responds that Slaine opened the door to these questions by asking Dr. Schmitt on direct examination whether it was possible for a paranoid schizophrenic to hear voices which are "so compelling that it can override their expense [sic] of right or wrong?" Dr. Schmitt answered affirmatively, and counsel then elicited Dr. Schmitt's opinion that "that [had] happened in this particular case." Slaine also challenges similar testimony from the Government's expert witness, Dr. Andrew Simcox.

Parties are required to challenge errors in the district court. See FED. R. CRIM. PROC. 52(b). 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. United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, 113 S. Ct. 1770, 1777-79 (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, and that it affects substantial rights. Id. Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial

rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. 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, "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. PROC. 52(b)). "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.'" Id. at 1779 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). Thus, this court's discretion to correct an error pursuant to Rule 52(b) is narrow. United States v. Rodriguez, 15 F.3d 408, 416-17 (5th Cir. 1994).

In a bench trial, the judge is presumed to base his verdict on admissible evidence and to disregard inadmissible evidence. United States v. Cardenas, 9 F.3d 1139, 1154-55 (5th Cir. 1993), cert. denied, 114 S. Ct. 2150 (1994). The court has indicated that it will not find error unless the judge "*express[ly]* reli[ed]" on the inadmissible evidence. Id. at 1155 (emphasis in original).

The trial judge gave oral reasons for his rejection of Slaine's insanity defense. The judge noted that both experts agreed that Slaine had been aware that he was robbing a bank and that his conduct was wrongful. He rejected as legally immaterial

Dr. Schmitt's testimony that Slaine had acted against his will. Concluding that Slaine's conduct following the robbery supported the experts' conclusions that he understood that his actions were wrong, the judge found that Slaine had failed to establish that he was innocent by reason of insanity. It is thus not entirely clear from the reasons for judgment whether the district court relied on the experts' opinions as dispositive of Slaine's sanity or merely cited those opinions to support his own conclusion that Slaine was sane when he committed the robbery.

Even if we were to conclude that the court committed plain error, we would nevertheless exercise our discretion as required by Olano to affirm this conviction. As the district court observed, the evidence regarding Slaine's conduct following the robbery supported the district court's conclusion that Slaine understood that his actions were wrong and undermined his insanity defense. For example, although the day was not sunny, Slaine wore "very dark sunglasses" and a cap when he robbed the bank. He was armed with a knife and carried a bag for the teller to put the money in. Officers followed signals from a transmitting device secreted in the loot and arrested Slaine at an acquaintance's apartment.[3] The money from the robbery was hidden in the toilet tank. The cap, sunglasses, and shirt worn by the robbery were hidden under a bed. A knife similar to the one used by the robber was on the kitchen counter with some dishes.

[3] Slaine apparently went straight from the bank to the apartment and purchased cocaine.

After he had been informed of his rights, Slaine admitted to F.B.I. Agent Paul Shannon that he had robbed the bank, but he refused to sign a statement because Slaine "knew a signed statement could be admitted against him in state court as a confession." Slaine said that he had used a knife instead of a gun because "gun charges give you aggravated time." Slaine mentioned being compelled to rob the bank by voices only after Agent Shannon commented that a number of the robbery suspects Shannon had interviewed had "said that voices have told them to rob banks." Slaine asked Agent Shannon what his likely sentence would be if the case "went federal" and how a federal sentence would compare to the probable sentence he would receive if he was prosecuted in state court. Finally, Slaine wanted to know "what kind of bond he could get in the federal system."

This evidence leads us to conclude that the expert opinions likely played a minimal role in the court's conclusion. Under these circumstances, we are persuaded that even without the inadmissible portion of the expert testimony the district court would have reached the same conclusion: At the time of the offense, Slaine was able to appreciate the nature and quality or the wrongfulness of his acts. We therefore conclude that the admission of the expert opinion did not prejudice Slaine's substantial rights. Calverley, 37 F.3d at 164.

For these reasons, the conviction is affirmed.

AFFIRMED.