

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20325

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYFORD STEWART,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Southern District of Texas

(CR-H-93-81-1)

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(September 29, 1995)

Before REAVLEY, JOLLY, and WIENER, Circuit Judges:

PER CURIAM\*:

Defendant-Appellant Rayford Stewart appeals his conviction as a felon in possession of a firearm, arguing that the district court failed adequately to instruct the jury that evidence of his prior

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

felony convictions could only be considered for impeachment purposes. After reviewing the jury instructions in context, we find no reversible error and affirm Stewart's conviction.

I

FACTS AND PROCEEDINGS

Stewart was charged in a single-count indictment as a felon in possession of a firearm. Generally, this crime requires proof of three elements: (1) the defendant is a prior felon, (2) who knowingly possessed a firearm, (3) that has travelled in interstate commerce.<sup>1</sup> In this case, however, the parties stipulated that Stewart was a convicted felon, apparently alleviating the government's need to prove the "prior felon" element.

During the trial, Stewart took the stand in his own defense. On cross-examination, the government elicited, as impeachment evidence, that Stewart had been convicted of two prior felonies: (1) aggravated assault and (2) voluntary manslaughter. As a result, the district court added to its proposed jury instruction on the impeachment of witnesses a specific instruction on the impeachment of a witness-defendant (proposed instruction).

At the charging conference, Stewart objected to the proposed instruction, noting that it varied from the Fifth Circuit's Pattern Jury Instruction and arguing that it failed to limit adequately the jury's consideration of his prior convictions. Stewart requested that, instead of the proposed instruction, the court give this Circuit's Pattern Jury Instruction:

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<sup>1</sup> See 18 U.S.C. § 922(g)(1) (West 1976 & Supp. 1995).

You have been told that the defendant, \_\_\_\_\_ was found guilty in 19\_\_ of [e.g.: bank robbery]. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of the defendant's testimony you will believe in his trial. The fact that the defendant was previously found guilty of another crime does not mean that defendant committed the crime for which the defendant is on trial, and you must not use this conviction as proof of the crime charged in this case.<sup>2</sup>

Stewart contended that the Pattern Instruction would limit the consideration of his prior felonies to the issue of impeachment, but that the proposed instruction would not. The district court denied Stewart's request, but agreed to consider modifying its proposed instruction.

Stewart then requested that the last sentence of the proposed instruction be replaced with the last sentence of his Pattern Instruction to limit more sufficiently the jury's use of the prior convictions. The government countered that Stewart's concerns were unwarranted, as the proposed instruction made clear to the jury that Stewart's prior convictions were brought to their attention for impeachment purposes only. The district court agreed to modify the proposed instruction slightly, but denied Stewart's request to replace the last sentence in its entirety. As modified by the court, the instruction actually given to the jury reads as follows:

When the defendant does testify, however, his testimony should be weighed and his credibility evaluated in the same way as that of any other witness. The fact that a witness has previously been convicted of a felony or arrested is a factor you may consider in deciding whether to believe that witness, but it does not necessarily

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<sup>2</sup> Pattern Criminal Jury Instruction 1.13 (1990).

destroy the witness's credibility.

This conviction and arrest have been brought to your attention because it may be considered in your decision, as with any witness, how much of the defendant's testimony you will believe in this trial. The fact that the defendant was previously found guilty of another crime is not, standing alone, proof that the defendant committed the crime for which he is now on trial.

Additionally, the district court's instructions included an explanation of all three elements of the crime and charged that the jury must, in order to convict, find that the government proved all three elements beyond a reasonable doubt. Despite the stipulation that Stewart had previously committed a felony, neither party objected to this instruction. Thus, the court was allowed to require the jury to determine whether Stewart was a convicted felon. The jury found Stewart guilty, after which he timely filed a notice of appeal.

## II

### ANALYSIS

#### A. PROPERLY PRESERVED FOR REVIEW?

On appeal, Stewart argues that the phrase "standing alone" made the instruction inadequate by allowing the jury to consider evidence of his prior convictions for the impermissible purpose of showing he had "a propensity to commit crime and that he committed the crime charged in the indictment." In a preemptive response, the government contends that Stewart failed to preserve for appellate review his objection to the jury instructions. Our ultimate conclusion--that the jury instructions were not so unclear as to mislead the jury--renders this procedural analysis unnecessary. Therefore, we assume *arguendo* that Stewart did

preserve his objections and proceed to the merits of his appeal.

B. STANDARD OF REVIEW

A district court has substantial latitude in framing its instructions to the jury.<sup>3</sup> Jury instructions are reviewed to determine whether "the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them."<sup>4</sup> The presence of an imprecise or misleading statement within the jury instruction does not by itself entitle a defendant to a reversal.<sup>5</sup> Instead, reversible error exists only if the jury charge, as a whole, misled the jury as to the legal issues involved.<sup>6</sup>

C. JURY INSTRUCTIONS: REVERSIBLE ERROR?

Stewart contends that the jury instructions should have expressly prohibited the jury from considering his prior convictions for any purpose but impeachment. And, because the instructions did not, insists Stewart, his conviction must be reversed.

After reviewing all of the jury instructions in context, we

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<sup>3</sup> United States v. Willis, 38 F.3d 170, 179 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 115 S.Ct. 2585, 132 L.Ed.2d 834 (1995).

<sup>4</sup> United States v. Devoll, 39 F.3d 575 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1701, 131 L.Ed.2d 563 (1994); United States v. Pace, 10 F.3d 1106, 1120-21 (5th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2180, 128 L.Ed.2d 899 (1994)).

<sup>5</sup> See United States v. Kingston, 875 F.2d 1091, 1098, reh'g denied, 878 F.2d 815 (5th Cir. 1989).

<sup>6</sup> United States v. Branch, 46 F.3d 440, 443 n.2 (5th Cir. 1995).

are unable to discern any reversible error. The last two sentences of the actual instruction read as follows:

This conviction and arrest have been brought to your attention because it may be considered in your decision, as with any witness, [sic] how much of the defendant's testimony you will believe in this trial. The fact that the defendant was previously found guilty of another crime is not, standing alone, proof that the defendant committed the crime for which he is now on trial.

This instruction could not have misled the jury. The first sentence tells the jury that evidence of prior convictions is to be considered for impeachment purposes. It neither permits nor invites jurors to consider the evidence for any other purpose. The second sentence tells the jury that Stewart cannot be convicted on the basis of his previous conviction, standing alone.

Although the instruction did not expressly limit consideration of Stewart's prior felonies to impeachment, it did state that the convictions were brought to the jury's attention "to determine how much of the defendant's testimony you will believe . . . ." True, the instruction may not be as crystal clear as Stewart would have liked,<sup>7</sup> but, in context, we cannot say that the instruction was so confusing or otherwise deficient as to mislead the jury on the issue of law. Accordingly, we find no reversible error and affirm Stewart's conviction.

AFFIRMED.

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<sup>7</sup> The district court's reason for not taking advantage of the safe-harbor of the Pattern Jury Instructions and, instead, assuming the risk of tailor-making her own, is not apparent on the record; but that is her prerogative. And here, her tailoring was sufficient to avoid reversal.