IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 94-30105

Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUNIOR LEE ELEY,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-93-162-A)

---

(October 18, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[*]

Appellant was convicted for being a felon in possession of a firearm. He appeals the district court's denial of his motions for a mistrial and for a new trial, challenges one of the jury instructions, and argues that the prosecutor made improper comments. We affirm.

On October 15, 1992, appellant was outside a bar with his

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

drunken cousin, who had a gun. What occurred between them is in dispute, but by the time the police arrived, appellant and the gun were in appellant's girlfriend's car. Appellant was arrested and convicted for being a felon in possession of a firearm.

I.

During jury deliberations, the courtroom deputy mistakenly admitted to the jury room an unredacted version of appellant's statement to the police. In the unredacted statement, jurors read that appellant had three prior felony convictions and that he was currently on probation for aggravated battery. Appellant argues that this prejudiced his case and that his motions for mistrial and for a new trial should have been granted.

Unquestionably, the jury should never have seen the unredacted statement. However, because the unredacted statement probably did not alter the jury's verdict, we affirm the district court's denial of those motions. See United States v. Luffred, 911 F.2d 1011, 1014 (5th Cir. 1990) (stating that defendant is entitled to new trial if extrinsic evidence is received into jury room "unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it.") (internal quotation marks omitted). The mistakenly admitted evidence was mainly cumulative of legitimate evidence. The jury already knew from a stipulation by the parties that appellant was a convicted felon. They had received hints at trial that he had at least two prior convictions: one in 1985, as a law enforcement officer testified; and another in 1992, as the stipulation stated.

Further, the prior convictions were not relevant to any element of the crime. The only impact they could have had on appellant's case was to encourage the jury to convict him for his prior bad acts. Yet the court helped cure whatever prejudice the statement might have caused. Cf. United States v. Yeagin, 927 F.2d 798, 801-03 (5th Cir. 1991) (finding reversible error in court's admitting, without limiting instruction, slightly probative and highly prejudicial prior conviction evidence). It instructed the jury at the start of its deliberations that "the defendant is not on trial for any act or conduct not alleged in the indictment." As soon as a jury question alerted the court that the jury had seen the unredacted statement, the court told the jury to disregard it.

Finally, although the fact that the jury asked the judge about the unredacted statement may raise a presumption of prejudice, the government's overwhelming case against appellant rebuts the presumption and proves the error harmless. See Luffred, 911 F.2d at 1014-15 (weight of evidence against defendant is one factor in determining whether government has rebutted a presumption that extrinsic evidence in jury room prejudiced verdict). The only element of the crime that government had to prove -- that appellant knowingly received a firearm -- was well supported by trial testimony. (Appellant conceded the other elements of the crime by stipulation.) The arresting officer testified that appellant admitted he had the gun in the car, although appellant had originally denied it. Appellant's cousin, who was a witness for the defense, testified that after passing the gun back and forth as

he and appellant tried to decide who should hold it, he (the cousin) finally gave the gun back to appellant and told him to drive back to the house with it. Appellant drove away and was subsequently arrested with the gun. Because the evidence overwhelmingly demonstrates appellant's guilt, because the court's instructions minimized the prejudicial effect of the unredacted statement, and because the unredacted statement disclosed evidence that was mainly cumulative of evidence already admitted, the district court's denial of appellant's motion for a mistrial and for a new trial was not an abuse of discretion.

II.

Appellant also challenges the district court's refusal to submit to the jury an instruction on the justification defense. Appellant's theory of the case was that he had to take the gun from his angry and aggressive drunken cousin to keep him from hurting himself, appellant, or anyone else.

The court did give appellant's requested instruction implicitly, stating that "possession of a firearm by a convicted felon either before any danger arises or for any significant period of time afterwards is a violation of the felon in possession of a weapon statute."

Its refusal to give a more explicit instruction was not error. The court found no evidence that appellant's cousin's possession of the gun placed appellant or anyone else in immediate danger. Nor was there any evidence that appellant himself had to hold the gun for his cousin. Family members, who were celebrating inside the

bar, could have kept the gun instead. Accordingly, appellant could not have satisfied the justification defense test. See, e.g., United States v. Harvey, 897 F.2d 1300, 1304-05 (5th Cir. 1990) (justification defense to possession of a firearm by a felon requires showing that, inter alia, defendant was under an unlawful and imminent threat of bodily injury or death, and that defendant had no reasonable legal alternative to violating the law), cert. denied, 498 U.S. 1003 (1990), and overruled on other grounds, United States v. Lambert, 984 F.2d 658 (5th Cir. 1993). Because the jury could not have found that appellant had a valid justification defense, the court's refusal to give the instruction could not have seriously impeded the defense and was not error. See United States v. Arditti, 955 F.2d 331, 339 (5th Cir. 1992) (refusal to give jury instruction is not reversible error unless, inter alia, it seriously impairs effective presentation of a defense), cert. denied, 113 S. Ct. 597 (1992), and cert. denied, 113 S. Ct. 980 (1993).

III.

Lastly, appellant contends that the prosecutor's comments in closing were improper. In rebuttal closing, the prosecutor told the jury not to "give Junior Lee Eley back his gun, . . . give him back the five bullets, spent casing from that night, . . . give him back the other four bullets and say, 'Have at it, go to it, we don't care anymore.' . . . You have the opportunity to say 'Enough' and not put these bullets and this gun back in this convicted felon's hands." Appellant also alleges that the prosecutor

brandished the gun during his closing, but we will defer to the district court's factual finding that he held but did not brandish the gun.

After the prosecutor's statement, the court recessed for lunch. After lunch, appellant raised two other arguments before finally objecting to the prosecutor's statement. Consequently, appellant might not have timely preserved the error for this court's review. See United States v. Martinez, 962 F.2d 1161, 1166 (5th Cir. 1992) (objection not timely when made after both sides have rested). But see United States v. Dorr, 636 F.2d 117, 120 (5th Cir. 1981) (non-contemporaneous objection still timely even when made after judge instructs jury and jury leaves courtroom). Even if the objection were timely, we would not find reversible error here. The prosecutor's comments and his holding of the gun were not so prejudicial as to have altered the verdict. As discussed above, the evidence against defendant was overwhelming. See United States v. Iredia, 866 F.2d 114 (5th Cir.) (to reverse for improper comments, court must consider magnitude of statements' prejudicial effect, efficacy of district court's responsive instruction, and weight of other evidence of guilt), cert. denied, 492 U.S. 921 (1989).

IV.

Because none of appellant's arguments is availing, we affirm the conviction below.