**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 94-30381
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DETRICK BICKHAM,

Defendant-Appellant.

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Appeal from the United States District Court
For the Eastern District of Louisiana

(CR-93-394-M)

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(January 23, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Following a jury trial, Detrick Bickham was convicted of armed robbery of an automobile, unlawful transportation of a motor vehicle in interstate commerce, and use of a firearm during a crime of violence. The district court sentenced Bickham to two 114-month terms of imprisonment as to the armed robbery and unlawful

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

transportation offenses, to run concurrently. The district court also imposed a 60-month term of imprisonment as to the firearms offense, to run consecutively to the 114-month terms of imprisonment. The district court imposed a three-year term of supervised release for each offense.

Bickham argues that the district court erred in imposing, over his objection, consecutive sentences for the armed carjacking offense and for the offense of use of a firearm during that offense. Bickham contends that some district courts have determined that imposing consecutive sentences for carjacking and for using a firearm during a crime of violence violate the Fifth Amendment's prohibition against double jeopardy. Bickham contends that these district court rulings may eventually create a circuit split.

Bickham further argues that this Court's panel decision, United States v. Holloway, 905 F.2d 893 (5th Cir. 1990), determining that the double jeopardy clause does not prohibit punishment for both a federal crime of violence and use of a weapon during that offense, may have been implicitly overruled by the Supreme Court in United States v. Dixon, ___ U.S. ___, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), because Dixon overruled Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), upon which Holloway relies. Id. at 10-15. Bickham suggests that this Court revisit the issue en banc.

This Court has already considered and rejected Bickham's argument that Dixon implicitly overruled Holloway. See United

States v. Gonzales, ____ F.3d ____, 1994 WL 693193 at *2 and nn. 6-7 (5th Cir. December 12, 1994). Further, subsequent to Dixon, this Court has upheld the imposition of cumulative punishment for armed robbery of a motor vehicle and for use of a firearm during that offense, based on the line of cases recognizing the legality of imposing cumulative punishments under 18 U.S.C. § 2113 (federal bank robbery) and § 924(c). See United States v. Portillo, 18 F.3d 290, 291-92 (5th Cir. 1994); see also United States v. Singleton, 16 F.3d 1419, 1428 (5th Cir. 1994). Bickham's contentions that Holloway has been overruled and that his consecutive sentences violate double jeopardy are without merit.

Bickham contends that the district court erred in refusing to allow him to introduce into evidence a statement pursuant to Fed. R. Evid. 804(b)(3), which allows the hearsay exception of declarations against an out-of-court declarant's penal interest. Bickham argues that the district court failed to recognize this hearsay exception, thus foreclosing Bickham from demonstrating the requisites of the exception, including the requirement that the declarant be unavailable.

The government contends that at the time Bickham attempted to assert the hearsay exception, he did not make the proper foundation. Specifically, the government argues that Bickham did not make the requisite showing that the declarant was unavailable or demonstrate corroborating circumstances that would indicate the trustworthiness of the declarant's statement.

For a defendant to use the hearsay exception of Rule 804(b)(3): "`(1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) corroborating circumstances must indicate the trustworthiness of the statement.'" United States v. Sanchez-Sotelo, 8 F.3d 202, 213 (5th Cir. 1993) (quoting United States v. Briscoe, 742 F.2d 842, 846 (5th Cir. 1984)), cert. denied, 114 S. Ct. 1410 (1994).

At trial, before Bickham called Henry Tyrone James as a defense witness, Bickham explained that he wanted to ask James questions regarding statements made to James by Lonnie Bickham, II,[1] which were against Lonnie's penal interest. Bickham proffered to the district court that he wanted to ask James if Lonnie ever gave James another explanation for how the car was obtained or how anyone else had obtained the car. The government's indictment against Bickham was based in large part on Lonnie's sworn statement to the U.S. Naval Investigative Service in which he alleged that Bickham and two other unidentified individuals had carjacked a white 300ZX Nissan using an electric stun gun and a 9 mm pistol.

The district court sustained the government's objection, stating that, under the circumstances described by Bickham, it did not believe the testimony to be admissible hearsay. The district court further stated that it was committed to the ruling "which may be viewed by some reviewing court as incorrect."

[1]It is unclear whether Bickham and Lonnie are related. Tameco Bickham, Bickham's wife, testified that she thought the two men were cousins.

The government previously stated that it had provided Bickham with a copy of James' statement, which apparently contained Lonnie's declarations against his penal interest. However, because the statement does not appear in the record, it is difficult to review the district court's ruling regarding Lonnie's out-of-court statements.

Assuming arguendo that the district court erred by excluding the evidence, the district court's ruling is subject to harmless error review. See United States v. Evans, 950 F.2d 187, 190-91 (5th Cir. 1991) (district court's hearsay ruling subject to harmless error analysis). "[U]nless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." Schneble v. Florida, 405 U.S. 427, 432, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972).

Dr. Charles Mead testified at trial that he was entering his 300ZX Nissan automobile parked in his driveway when a man ran toward the car and pointed a 9 mm pistol at Mead through the window. The man had just exited from a late model white Mustang that was parked across the street. The man pulled Mead out of the car while another individual stunned Mead from behind by placing a stun device to the back of his neck.

The individual with the stun device proceeded to stun Mead approximately fifteen times, during which Mead was afraid his heart

rate would go into a kind of arrhythmia.[2] Also during that time, someone took Mead's wallet from his back pocket. Mead then observed his car being driven away. The person with the stun gun continued to shock Mead for approximately a minute after Mead's car was driven away before getting into the second car and leaving. Mead suffered small thermal burns over the back of his neck, his back, and the back of his left leg.

Mead stated that he had an unobstructed view of the man with the 9 mm pistol for approximately five seconds and felt that he was able to identify him. Mead identified Bickham at trial as the man with the 9 mm pistol. Mead also previously identified Bickham in a photographic lineup. Mead testified that he was confident in his identification of Bickham as the assailant. The second man was never identified.

Mead identified a 9 mm pistol introduced into evidence by the government as appearing similar to the pistol that Bickham pointed at Mead during the attack. This pistol was recovered from Bickham by the Virginia Beach Police Department during an unrelated shooting incident after the carjacking. Mead also identified his tennis racket, which was in his vehicle at the time it was stolen. This tennis racket was recovered from Bickham's apartment pursuant to the issuance of a federal search warrant. The stun gun that was introduced into evidence by the government and that was identified by Mead as appearing similar to the one applied to his neck and

[2]Arrhythmia is an irregularity in the force or rhythm of the heartbeat. Webster's II New Riverside University Dictionary 126 (2d ed. 1988).

back was also recovered from Bickham's apartment. Tameco Bickham, Bickham's wife, testified that Lonnie owned the stun gun.

Mead's car was seized outside Bickham's home in an apartment complex in Portsmouth, Virginia. Bickham informed law enforcement officials that he purchased the vehicle for $7,000 from a New Orleans Police officer named Mike. At the time of the seizure, the Nissan had a license tag which was registered to Bickham for a white 1991 Ford Mustang GT. The government introduced into evidence a fraudulent registration form for the Nissan which showed the Mustang's license number as the license plate number for the Nissan. FBI Special Agent Peter Linder, an expert in the field of document examination, examined the Nissan's fraudulent registration form and the registration form for the Mustang and concluded that the Mustang's registration form was used as the model to create the Nissan's altered certificate.

Finally, Lisa Mead, Mead's wife, testified that she observed a white Mustang outside her home the night before the attack. After being shown a picture of Bickham's Mustang, Lisa also testified that the car she saw the night before the attack looked similar to, and could have been the same car, as the car portrayed in the picture.

The evidence demonstrating Bickham's guilt for the crimes for which he was charged was weighty. Especially damaging was Mead's identification in a photographic lineup and at trial of Bickham as the assailant with the pistol and the retrieval of the weapons, the stolen Nissan, and the forged registration from Bickham's

possession. Even if the district court had allowed Bickham to elicit from James statements against Lonnie's penal interest implicating Lonnie in the carjacking, such evidence would have been so insignificant by comparison with the evidence of guilt that it would have been beyond any reasonable possibility for the evidence to have contributed to the conviction. Additionally, Lonnie's implication of himself would not necessarily have excluded Bickham's participation in the offense. It was possible that Lonnie knew about the offense because he was the unidentified man with the stun gun. Consequently, any error in the district court's refusal to allow Lonnie's statements against his penal interest into evidence was harmless.

AFFIRMED.