

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40979
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMIE JAMES JOSEPH,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:93-CR-145)

(May 18, 1995)

Before KING, JOHNSON, and DeMOSS, Circuit Judges.

JOHNSON, Circuit Judge:¹

Jamie James Joseph ("Joseph") appeals his convictions for transportation of a stolen motor vehicle in interstate commerce and possession of a firearm by a convicted felon. Joseph claims that the district court abused its discretion by denying his motion for mistrial on the ground that a witness gave prejudicial testimony. As a second reversal ground, Joseph asserts that a variance between the indictment and the proof at trial constituted plain error.

¹Local 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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

Because we do not find merit in either of these two grounds for reversal, we affirm.

I. Facts and Procedural History

On the evening of March 25, 1993, an armed man approached sixty-nine-year-old Allen Blackwood ("Blackwood") of Baton Rouge, Louisiana and took Blackwood's wallet and gray, 1985 Buick Park Avenue, four-door sedan. On August 19, 1993, a federal grand jury returned a two-count indictment against Joseph charging him with interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. § 2312 and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) in connection with the armed robbery of Blackwood. Prior to and during the trial, Blackwood described the person who robbed him in a manner which generally corresponded to the appearance of Joseph. However, Blackwood was unable to positively identify Joseph as the robber from a photographic lineup. Consequently, the identity of the robber was a prime issue at trial.

In order to connect Joseph to the crime and to show that he took the car across state lines, evidence was presented at trial to demonstrate what had occurred between the time the car was stolen and the time it was recovered. Evidence was presented that on March 31, 1993, a man entered the offices of a certified public accountant in Churchpoint, Louisiana, and asked Mrs. Geraldine Wimberly ("Wimberly") if there were any jobs available in the office. Wimberly replied that no work was available, and the man started out the door. He then turned around, brandished a small

gun, and demanded money. The man took Wimberly's money and jewelry, along with some company checks. He hit her in the back of her head, put her into a small bathroom, and instructed her to remain there. Wimberly described the man who had robbed her to the police in a manner consistent with Joseph's appearance and then later positively identified Joseph as the culprit, both from a photographic lineup and during the trial.

On April 1, 1993, Clyde and Louise Owens ("Mr. Owens" and "Mrs. Owens") were sitting in a swing in their backyard in Port Arthur, Texas, when Mrs. Owens saw a black man exit a car next to a vacant house across the street from the Owens' home. Mr. and Mrs. Owens went into their house because they were expecting a visitor to arrive. As the couple walked through the hallway of the house, someone grabbed Mrs. Owens. Mr. Owens was blind and could not see the intruder; however, he could hear Mrs. Owens gagging and choking. Mr. Owens reached out to grab the intruder, but the intruder hit Mr. Owens on the head with a gun causing Mr. Owens to fall to the floor bleeding. Mrs. Owens was thrown over Mr. Owens' knees. The intruder then placed his knees across Mrs. Owens' chest, at which time she was able to discern that the intruder was a man. The man took her glasses, jewelry, and money. The intruder then ordered Mr. and Mrs. Owens to go into the bathroom and remain there.

About this time, the visitor who Mr. Owens had been expecting, Timothy Blanton ("Blanton"), arrived. The intruder walked calmly from the back of the house, greeted Blanton, and then proceeded

toward his car. When Blanton realized that something was amiss, he attempted to follow the intruder. However, the man warned Blanton to stay away, threatened him with a gun, and then fired several shots at Blanton.

Blanton later described the car that the intruder had driven as a gray, four-door Oldsmobile. Although he was able to record the license number as 456A414, he was unable to make a positive identification of the intruder as Joseph from a photo lineup.

Some time after the robbery, police officers asked Mrs. Owens if she could identify the person who attacked her. Mrs. Owens stated that her glasses were missing so she "prayed to God to give [her] the strength to know the right man." (Record Vol. II, P. 84) Mrs. Owens narrowed the choice down to two pictures, but did not positively identify either because she did not have her glasses. She did, however, indicate which of the two she thought was the culprit and the police indicated to her that she had, in fact, chosen defendant Joseph. The next day, when Mrs. Owens had located her glasses, she called the police and requested that they bring the picture back to her home. Mrs. Owens was able to make a positive identification of defendant Joseph as the culprit at that time. Mrs. Owens testified as to all of the aforementioned at trial² in addition to making an in-court identification of

²Mrs. Owens testified on direct examination as follows:

Q. Did there come a time after you were assaulted and robbed when the police asked if you could identify the person who had attacked you?

A. Oh, yes.

defendant Joseph as the intruder during the trial itself.

Approximately fifteen minutes before the incident at the Owens' home, a man had gone to the home of Robbie Graham ("Graham"), a neighbor, and had asked for work. Graham told the man that she was having a meeting with ladies from her church and he left. Graham watched the man head toward the direction of the Owens' home as he left her home. In a photographic lineup, Graham was able to identify Joseph as the man whom she had seen that day;

Q. How did they go about that? What did they do then?

A. This happened on Thursday afternoon, and on Saturday afternoon, I would say maybe shortly after lunch, I think, sometime that afternoon, there were two policemen came to our house and wanted me to identify the picture. Is that what you're asking for?

Q. Yes, Ma'am, go right ahead.

A. We. . you see, my purse and my glasses were missing and I thought they had been taken away. So I looked at the pictures and I prayed to God to give me strength to know the right man. I narrowed it down to two. The police said, "Well, you're a hundred percent right." I said, "yes, but I --"

[Defense counsel]: Your Honor, I'd object to the hearsay.

THE COURT: Okay. Yeah.

[Defense counsel]: I'd ask that be stricken.

THE COURT: Ms. Owens, don't refer to what the police said. Just tell us what you saw rather than what the police said. I'll sustain the objection and order that the last comment be stricken.

[Defense counsel]: And we move for a mistrial.

THE COURT: Denied. Ladies and gentlemen, disregard Ms. Owens's last comment. Let's got to the next question.

however, she did not recognize him in court.

At trial Mrs. Vivian Ballou ("Ballou") testified that later on the same day as the robbery of the Owens, while she was working at the Health Department in Port Arthur, a black man entered who asked to see a nurse. The man had given one of the nurses some jewelry that he wanted to sell. The nurse showed the jewelry to Ballou, and Ballou was able to identify the jewelry that the man was attempting to sell. The jewelry that Ballou identified was the same jewelry that Wimberly identified as belonging to her. Ballou identified defendant Joseph from a photo lineup as the man who tried to sell her the jewelry.

Detective Rodney Balsamo ("Detective Balsamo"), a Port Arthur police officer, testified during the trial that the car stolen from Blackwood in Baton Rouge, Louisiana, was found in Port Arthur Texas in a shopping center parking lot on April 1, 1993. With Blackwood's consent, a search of his car was conducted. In the trunk of the car, officers found a red, hooded sweatshirt along with other clothing articles, including clothes that Ballou described Joseph as wearing when he tried to sell her the jewelry. The police also found jewelry taken from the Owens and Wimberly, money, and a gun. Fingerprints lifted from the interior of the car matched Joseph's.

A jury found Joseph guilty of transporting a stolen motor vehicle in interstate commerce³ and possession of a firearm after

³Specifically, Joseph was indicted of unlawfully transporting a 1985 Oldsmobile, Ninety-Eight, four-door bearing Louisiana license plate number 456A414. However, the proof at trial was that

being convicted of felony. The district court sentenced Joseph to separate terms of imprisonment of 120 months on each count, with 115 months of the sentence in the firearm possession count to run consecutively to the transporting a stolen vehicle count. Additionally, the district court ordered concurrent three-year terms of supervised release with special conditions to follow the prison terms, restitution in the amount of \$2296.29, and a special assessment of \$100. Joseph now appeals the convictions.

II. Discussion

Because Joseph attacks his conviction on two separate and distinct bases, each will be analyzed individually.

A. Refusal to Grant Mistrial

This Court will reverse a district court's refusal to grant a mistrial only for an abuse of discretion. *United States v. Limones*, 8 F.3d 1004, 1007, *cert. denied*, 114 S. Ct. 1562 (1994). Where a motion for mistrial involves the presentation of prejudicial testimony before the jury, a new trial is required only if there is a significant possibility that the prejudicial evidence had a substantial impact upon the jury verdict, viewed in light of the entire record. *Id.* at 1007-08.

Joseph complains that Mrs. Owens' statement that "[t]he police said, 'Well, you're a hundred percent right. . . .'" upon her identification of Joseph from the photographic lineup constituted grounds for a mistrial. Joseph argues that since identity was the

the stolen car was a 1985 Buick Park Avenue, four-door sedan with Louisiana license number 456A414.

main issue at trial Mrs. Owens' statement concerning the officer's opinion of her identification had a substantial impact on the jury's decision. He asserts that the officer's statement was incurable because members of the jury must have felt relieved when reaching their decision that the officers had confirmed Mrs. Owens' identification.

The possibility that Mrs. Owens' testimony had a substantial impact on the jury was less than significant. The district court immediately instructed the jury to disregard Mrs. Owens' statement concerning the police officer. Moreover, Mrs. Owens continued to testify that she was concerned about her ability to identify Joseph because her glasses, which had been removed during the robbery, were missing. She testified that on Sunday morning, she found her glasses and informed the police that they could return with the pictures which they had previously shown her. With the help of her glasses, Mrs. Owens had no problem positively identifying Joseph.

Further, Wimberly and Graham also identified Joseph from the photographic lineup, Blanton was able to report the license number from the car the intruder drove to and from the Owens' home, and Joseph's fingerprints and clothing were found in the stolen car. In view of the record as a whole, the district court did not abuse its discretion in denying Joseph's motion for a mistrial based on Mrs. Owens' testimony.

B. Variance Between Indictment and Trial Proof⁴

Although Joseph did move for a judgment of acquittal during the trial, he did not raise the specific issue of fatal-variance in the district court. Therefore, Joseph must satisfy the plain error standard in order to prevail on this issue.

Under Rule 52(b) of the Federal Rules of Criminal Procedure, this Court may correct forfeited errors only when the appellant can establish the following factors: 1) that there is an error, 2) that such error is clear or obvious, and 3) that the error affects his or her substantial rights. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994), *cert. denied* 115 S. Ct. 1266 (1995). If these factors are established, the decision to correct the forfeited error lies within the sound discretion of this Court, and the Court will not exercise that discretion unless the error seriously affects the fairness, integrity, or reputation of judicial proceedings. *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993).

Parties are required to challenge errors in the district court. 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. *Calverley*, 37 F.3d at 162. The Supreme Court has directed the Courts of Appeals to determine whether a case is exceptional by using a two-part analysis. *Olano*, 113 S.

⁴Joseph has framed his argument on this issue as a challenge to the sufficiency of the evidence. However, this issue is more properly analyzed as whether there was a fatal variance between the indictment and the proof at trial.

Ct. at 1777-79.

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. *Olano*, 113 S. Ct. at 1777-78; *United States v. Rodriguez*, 15 F.3d 408, 414-15 (5th Cir. 1994); FED. R. CRIM. P. 52(b). 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. In 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 meeting this stringent burden. *See Olano*, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that even when the appellant has carried this 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 1178 (quoting FED. R. CRIM. P. 52(b)). Thus, this Court's discretion to correct an error pursuant to Rule 52(b) should be narrowly exercised. *See Rodriguez*, 15 F.3d at 416-17.

The general rule that allegations and proof should correspond is based on two requirements: 1) that the accused shall be definitely informed as to the charges against him or her, so that he or she may be enabled to present his or her defense and not be taken by surprise by the evidence offered at trial and 2) that the

accused may be protected against another prosecution for the same offense. *United States v. Phillips*, 625 F.2d 543, 545 (5th Cir. Unit B 1980). This Court will only reverse a claim of fatal variance on review if the evidence at trial in fact varied from what the indictment alleged and the variance prejudiced the defendant's substantial rights. *United States v. Faulkner*, 17 F.3d 745, 760 (5th Cir.), *cert. denied*, 115 S. Ct. 193 (1994). "A material variance occurs when a variation between proof and indictment occurs, but does not modify an essential element of the offense charged." *United States v. Thomas*, 12 F.3d 1350, 1357 (5th Cir.), *cert. denied*, 114 S. Ct. 1861 & 2119 (1994). If a material variance occurs, the Court uses harmless error analysis to determine if the defendant has been prejudiced. *Id.*

To convict Joseph under 18 U.S.C. § 2312, the Government had to prove that: 1) there was a stolen vehicle, 2) Joseph knew that the vehicle was stolen, and 3) Joseph transported the vehicle in interstate commerce. *See United States v Webster*, 750 F.2d 307, 339 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985).

The indictment against Joseph indicates that the grand jury incorrectly charged that the stolen motor vehicle was "a 1985 Oldsmobile, Ninety-Eight" instead of "a 1985 Buick Park Avenue." Thus, the primary question before this Court becomes whether this error in the indictment affected Joseph's substantial rights so as to constitute plain error.

The variance between the indictment and the trial proof did not cause Joseph to be either uninformed as to the charges against

him or deprived of the ability to present his defense. The license plate number of the car named in the indictment was correct. Blackwood identified the car that was recovered in Port Arthur as being his car. Moreover, the variance in the make of the car did not modify an essential element of the offense. Because Joseph does not challenge the sufficiency of the evidence as to any of the essential elements of the offense, the variance that occurred in the indictment was harmless and did not prejudice Joseph's substantial rights. Thus, Joseph has not carried his burden as to the first step of the *Olan* plain error analysis and this claim is without merit.

III. Conclusion

The district court did not abuse its discretion in denying Joseph's motion for mistrial on the ground that a witness gave prejudicial testimony. Any inappropriate testimony was rendered harmless due to additional testimony given by the same and other witnesses. Additionally, Joseph has not demonstrated that the variance between the indictment and the proof at trial constituted plain error since he cannot point this Court to any prejudice of his substantial rights. Therefore, the district court judgment of conviction should be affirmed.

AFFIRMED.