UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-41356
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ZACK ZEMBLIEST SMITH, III,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:94-CR-68)

(July 24, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

A jury found Zack Zembliest Smith III guilty of obstructing, delaying, and affecting commerce through robberies of three related stores (Counts I, III, and V) in violation of the Hobbs Act, and using and carrying a firearm during and in relation to those violent crimes (Counts II, IV, and VI). We affirm.

I.

Smith first argues that the evidence was insufficient to establish the effect on interstate commerce as required to confer

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

federal jurisdiction under the Hobbs Act. We view the evidence in the light most favorable to the Government with all reasonable inferences and credibility choices made in support of the verdict. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

A valid Hobbs Act robbery conviction requires the Government to prove that the defendant's conduct "obstruct[ed], delay[ed] or affect[ed] commerce or the movement of any article or commodity in commerce.'" United States v. Davis, 30 F.3d 613, 615 (5th Cir. 1994) (quoting 18 U.S.C. § 1915(a)), cert. denied, 115 S.Ct. 769 (1995). The Government need show only that the robbery had a de minimis effect on interstate commerce. United States v. Collins, 40 F.3d 95, 99 (5th Cir. 1994), cert. denied 115 S.Ct. 1986 (1995). The effect on interstate commerce may be direct or indirect. Id. The depletion-of-assets theory is an indirect effect usually applied to businesses engaged in interstate commerce. Id. That is, a depletion of resources of a business permits the reasonable inference that its operations are obstructed or delayed. Espereti v. United States, 406 F.2d 148, 150 (5th Cir.), cert. denied, 394 U.S. 1000 (1969).

Smith asserts that no evidence was produced to establish an interruption in the business of the stores or a de minimis effect on interstate commerce. The jury heard testimony that over $20,000 was taken in the three robberies. That money would have been used to pay for merchandise, salaries, and other operating expenses. Merchandise is purchased from wholesalers in Louisiana and Texas,

and 75-80% of the merchandise is packaged or produced outside the State of Texas. Additionally, the stores service shoppers from other states and accept food stamps.

Viewed in the light most favorable to the verdict, this evidence shows that at least some of the stolen money would have been used to purchase other merchandise originating outside Texas. Under the depletion-of-assets theory, a jury could reasonably infer that the business operations of the stores were obstructed or delayed and that interstate commerce was affected to some minimal degree. Contrary to Smith's suggestion, proof that the business temporarily or permanently closed because of the robbery is not required.

Smith also contends that the evidence in support of Counts V and VI failed to establish "actual or threatened force, violence, or fear of injury" as required to support a robbery conviction under the Hobbs Act. See 18 U.S.C.A. § 1951(b)(1) (West 1984). With no evidence that he actually threatened the store clerk, Pamela Stevens, Smith argues, the evidence at best established simple theft. Smith also argues that the firearm was displayed and discharged after the offense against Stevens, and did not cause her to part with the property.

This Court has held,

> The obstruction of commerce by robbery statute requires proof of threats or force; it does not require evidence that the defendant possessed a weapon. By contrast, the firearm statute requires evidence that the defendant used or carried a weapon, but does not require proof that the weapon was used to threaten or force.

United States v. Martinez, 28 F.2d 444, 446 (5th Cir.), cert. denied, 115 S.Ct. 281 (1994) (footnote omitted).

Stevens testified that Smith approached the window of the courtesy booth and twice ordered her to "give me what you've got." She realized that she was being robbed and gave Smith approximately $1,300. Stevens stated that she did not consent to Smith's taking the money but that she was in fear of her life because she had been robbed before. Smith did not tell Stevens that he had a gun, but Stevens observed that he had both hands in his pockets. Stevens stated that she was concentrating on giving Smith what he wanted so that he would not hurt her. Richard Ganter, the store manager, testified that when Smith ran from the store, Ganter followed him, and Smith shot at Ganter with a small pistol.

Viewed most favorably to the verdict, this evidence supports the findings that Smith took the property from Stevens under threat or force (Count V) and that Smith used or carried a firearm during the commission of a robbery (Count VI).

II.

Smith asserts that the indictment was fundamentally defective, because each count alleged a robbery of a store rather than a robbery of a natural person. He argues that the statute requires that the robbery be directed toward a person, because only a natural individual can be threatened with force or placed in fear.

Because Smith asserts a ground of error not raised below, we will reverse only upon a finding of plain error. Fed. R. Crim. P. 52(b). Plain error is "an 'error' that is 'plain' and that

'affect[s] substantial rights of the defendant.'" United States v. Olano, 113 S.Ct. 1770, 1776 (1993); see also United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994).

An error is "plain" if it is apparent or obvious "and, at a minimum, . . . was clear under current law at the time of trial." Calverley, at 162-63. An error is plain if it is so conspicuous that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." United States v. Frady, 456 U.S. 152, 163 (1982); see also Calverley, 37 F.3d at 163.

Smith has not demonstrated plain error. "[A]n indictment is sufficient if it [1] contains the elements of the offense charged and [2] fairly informs a defendant of the charge against him[,] and [3] enables him to plead acquittal or conviction in bar of future prosecutions for the same offense." United States v. Hagmann, 950 F.2d 175, 183 (5th Cir. 1991), cert. denied, 113 S.Ct. 108 (1992). The date of each offense and the name and address of each store appear in the indictment. The indictment need not identify the natural person who was robbed to be sufficient.

Even if plain error were shown, we would not exercise our discretion to correct it, because it does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. See Calverley, 37 F.3d at 164; see also Olano, 113 S.Ct. at 1776.

III.

The judgment of the district court is therefore

AFFIRMED.