

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50223
Summary Calendar

CHRISTOPHER COLUMBUS COOPER,

Plaintiff-Appellant,

versus

RICHARD CZECH, Chief of Police
for the City of Midland, ET AL,

Defendants,

RONNIE BRYANT, Police Officer
for the City of Midland, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(M 93 CV 69)

August 9, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:*

Plaintiff-appellant Christopher Columbus Cooper (Cooper)
appeals from an adverse jury verdict in his section 1983 suit

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

seeking damages for the allegedly improper search of his car and motel room. We affirm.

Facts and Proceedings Below

On November 13, 1991, David Bradshaw (Bradshaw), a special narcotics investigator with the Texas Department of Public Safety Narcotics Service, received a tip from a reliable confidential informant that a man known to the informant as Chris, Christopher Columbus, or Columbus Cooper was registered at a Midland, Texas, motel under an assumed name. Bradshaw contacted Officer Sue Rudie (Rudie) of the Midland County Sheriff's Office to help him identify the individual, and they determined that it was Cooper. A computer check showed that Cooper was wanted on three outstanding felony warrants and one misdemeanor warrant in Ector County, Texas. A call to the Ector County Sheriff's Office confirmed that the warrants were still outstanding. This investigation also revealed that Cooper was considered armed and dangerous.

Bradshaw and Rudie obtained a photo of Cooper and took it to the motel, where employees identified Cooper as the person renting a room under the name "Victor Dean." Bradshaw and Rudie, together with Officer Ronald Bryant (Bryant) of the Midland Police Department, then set up surveillance of Cooper's motel room. At approximately 1:40 a.m. on November 14, 1991, the three officers saw a car meeting the description of Cooper's vehicle drive past one of the surveillance vehicles and then make a U-turn and park on the opposite side of the motel. Bradshaw pulled his car behind Cooper's to prevent it from backing out of the parking lot.

Cooper was sitting in the front passenger seat of the car; his wife was driving. After Cooper exited the car, Bradshaw immediately handcuffed Cooper, patted him down, and placed him under arrest. Bradshaw then asked Cooper for permission to search the car. Cooper gave his consent to the search but said that the car belonged to his wife. Bradshaw then asked Cooper's wife, whom Rudie had moved away from the car to a nearby stairwell, if he could search the car; she gave her consent to the search.

Cooper then admitted that there was a safe in the trunk of the car and told Bradshaw that the key to the safe was in a "fanny pack" that Cooper was wearing around his waist. Although Cooper offered to get the key if the officers unhandcuffed him, Bradshaw retrieved the key and opened the safe, which was found to contain \$1568 in cash, six gold chains, two watches, and three business sales permits. The officers also found a loaded .40-caliber handgun in a red tool box in the trunk and \$507 in cash in the passenger compartment of the car. They called for a canine unit to check the vehicle and the currency for narcotics; although no drugs were found in the car, the drug dog did alert to the money. Meanwhile, Cooper was taken to the Ector County jail.

After the drug dog alerted to the money, Bradshaw asked Cooper's wife if the officers could search the motel room, and she consented. During the search of the room, which had a kitchenette, Bradshaw noticed a pan with about two or three inches of water in it on the burner and a box of baking soda on the counter nearby. Bradshaw testified that, in his experience, baking soda is used to

turn powder cocaine into crack cocaine rocks. He lifted up the burner and saw a white crystalline residue on the aluminum foil lining the burner pan; the residue field-tested positive for cocaine. Cooper's wife also directed the officers to two handguns in a piece of luggage in the room. Bryant made an inventory list of everything taken from the room, and Cooper's wife signed it. Many of these items were returned on February 14, 1992, to the attorney representing Cooper on the criminal charges; more were returned to Cooper's wife on September 23, 1992, by the property officer in charge of the case.

On May 11, 1993, Cooper, by then incarcerated in a federal prison in Texas,¹ filed suit in federal district court pursuant to 42 U.S.C. § 1983 against Bradshaw, Rudie, Bryant, Midland Chief of Police Richard Czech (Czech), and Midland Sheriff Gary Painter (Painter). Cooper, proceeding pro se and *in forma pauperis*, alleged that Bradshaw, Rudie, and Bryant had violated Cooper's constitutional rights by illegally searching the car and motel room and by illegally seizing items found therein. The complaint further alleged that Czech and Painter were liable for failing to properly supervise the actions of their subordinates, Bryant and Rudie, respectively. In addition, Cooper alleged that Defendants had deprived him of property without due process of law by converting property seized during the searches.

All parties consented to a jury trial before a magistrate

¹Cooper is currently, and was at the time of trial on February 7, 1994, incarcerated in Oklahoma.

judge. Cooper filed a motion in limine on January 24, 1994,² in which he requested that evidence of his other crimes be ruled inadmissible at trial under Rules 404(b) and 403 of the Federal Rules of Evidence and that evidence of the trace amount of cocaine found during the searches be excluded because that evidence had never been the basis of any charges against Cooper. At the close of the first day of trial, the magistrate judge ruled that exhibits proving Cooper's prior convictions would not be admitted into evidence unless Defendants showed that Cooper was being untruthful about some aspect of his criminal record because Cooper, who testified in his own behalf, had not denied his prior convictions on cross-examination. The magistrate judge denied the motion in limine insofar as it requested exclusion of the evidence of the cocaine, finding that Cooper had opened the door by eliciting testimony that he was not involved in drug offenses. Although Cooper raised a general objection when counsel for Bradshaw asked him on cross-examination if he was running a crack cocaine operation out of the motel room, the magistrate judge did not rule on the objection, and Cooper immediately answered the question. Cooper did not object when Bradshaw testified on direct that he had found the cocaine residue in the apartment.

Cooper also filed two previous motions in limine. These first two motions, which were essentially identical, asked generally that the court rule on the admissibility of all evidence to be presented at trial and on the relevance of all Defendants' requests for admissions, answers to interrogatories, and production of documents; more specifically, they requested a ruling on the admissibility at trial of evidence of Cooper's past criminal history. Both these motions were denied prior to trial.

Following the close of the plaintiff's evidence, the magistrate judge directed a verdict for Czech and Painter, finding that the evidence was legally insufficient to support a verdict against them.³ The trial proceeded against Bradshaw, Rudie, and Bryant, and the jury returned a verdict in their favor. Cooper filed a motion for a new trial, arguing that the jury's verdict was against the clear weight of the evidence, that the jury instructions on consent to search were improper, and that defense counsel engaged in improper and inflammatory argument during closing. The magistrate judge denied the motion and entered a take-nothing judgment against Cooper on March 4, 1994. Cooper appeals.

Discussion

Cooper first challenges the sufficiency of the evidence to support the jury's determination that the officers had consent to search the car and the motel room. Although Cooper has framed this as a sufficiency challenge, his brief on appeal makes clear that what he is really complaining about is the jury's failure to credit his and his wife's assertions that she did not unequivocally consent to the searches. The conflict between this testimony and that of the officers that Cooper's wife did in fact give her consent was an issue for the jury to resolve. See *Martin v. Thomas*, 973 F.2d 449, 453 & n.3 (5th Cir. 1992). There was some conflicting testimony as to the exact words Cooper's wife used in

Cooper does not complain on appeal of the judgment in favor of these two defendants.

response to the officers' requests to search and also with respect to whether she was handcuffed at the time she gave consent to search the car.⁴ That the jury chose to credit the officers' version of events rather than Cooper's, however, offers no ground for relief on appeal; we will not disturb such credibility determinations so long as "the record contains any competent and substantial evidence tending fairly to support the verdict." *Id.* at 453. We find that standard met here.

Cooper next argues that the magistrate judge erred in denying his motion in limine. Specifically, he complains of the admission into evidence of testimony concerning the trace amount of cocaine found in the motel room.⁵ As noted above, the magistrate judge denied Cooper's motion in limine with respect to this issue. However, "[i]n order to preserve error for appellate review, a proper objection must be made at trial. Fed.R.Evid. 103(a)(1). Thus, a party whose motion in limine is overruled must renew his objection when the error he sought to prevent is about to occur at trial." *Petty v. Ideco, a Division of Dresser Industries, Inc.*, 761 F.2d 1146, 1150 (5th Cir. 1985). Because Cooper failed to

Cooper's wife was handcuffed when she first got out of the car. Although her estimate of how long she remained handcuffed differed from that of the officers, she was unhandcuffed relatively soon thereafter and was clearly told that she was not being arrested.

Although appellate counsel for Bradshaw makes an argument concerning the admissibility of evidence of Cooper's prior criminal record, it seems clear to us that the magistrate judge granted Cooper's motion in limine as to this evidence, holding that it could only be used for impeachment purposes, and moreover that Cooper is not complaining on appeal of the admission of this evidence.

object at trial to the admission of testimony concerning the trace amounts of cocaine found, our review is limited to plain error. *Id.* No such error occurred here.⁶

Cooper also contends that the magistrate judge improperly instructed the jury on the issue of consent to search. We disagree. The instruction, which tracked this Court's pattern jury instruction, clearly and adequately presented the contested issue to the jury and was not otherwise misleading. *See Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985) ("The ultimate test remains, however, whether the instructions that were actually given were adequate: `A party is entitled to reversal for a district court's failure to give a particularly requested instruction only if the jury was misled by the instructions that were actually given.'") (citation omitted). Although Cooper requested instructions that would have placed more emphasis on the requirement that a valid consent to search must be freely and voluntarily given, the wording of an adequate and non-misleading instruction is wholly a matter for the trial court. *Id.*

Cooper also alleges that the magistrate judge erred in failing to instruct the jury on his Fourteenth Amendment claim for deprivation of property as a result of the search. As Cooper neither requested such an instruction nor objected to its absence,

We note that, even if Cooper had properly preserved error as to the admissibility of this evidence, the district court did not abuse its discretion in admitting it. Cooper's wife testified on direct examination that no criminal activity was going on in the motel room; the cocaine evidence was proper to rebut that testimony.

he has waived any right to complain of the alleged error on appeal.

Next, Cooper complains that defense counsel made improper and prejudicial comments during closing arguments. His appellate brief, however, fails to direct this Court to the specific remarks that he alleges are improper. We therefore will not consider this argument. *See L & A Contracting v. Southern Concrete Services*, 17 F.3d 106, 113 (5th Cir. 1994) (points not adequately briefed are deemed abandoned); Fed.R.App.P. 28(a)(6).

Finally, Cooper contends that the magistrate judge abused his discretion in denying Cooper's motion for a new trial. The decision whether to grant a new trial is within the trial court's sound discretion. *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992). The trial court is particularly entitled to deference when it has denied the motion for new trial and upheld the jury's verdict. *Id.* "[T]he verdict must be affirmed unless the evidence points so strongly and overwhelmingly in favor of one party . . . that reasonable persons could not arrive at a contrary conclusion." *Id.* In this case, Cooper merely makes the conclusory allegation that substantial errors occurred that affected the fundamental fairness of the trial; he cites no record evidence to support this contention. He therefore has failed to demonstrate that the jury's verdict is against the great weight of the evidence. The magistrate judge did not abuse his discretion in denying the motion.

Conclusion

For these reasons, the judgment is AFFIRMED.