

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50318
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVE RODGERS,

Defendant-Appellant.

Appeal from United States District Court
for the Western District of Texas
(A-93-CR-147(1))

March 23, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

A jury convicted Steve Rodgers of being a convicted felon in possession of a firearm. Rodgers challenges his conviction, asserting that the indictment was insufficient and constructively amended, that the district court improperly allowed admission of certain evidence, and that the prosecutor made improper comments during argument. Finding no reversible error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

The Austin Police Department (APD) received a tip that Steve Rodgers was a convicted felon in possession of firearms. The APD began an investigation of Rodgers. After verifying that Rodgers resided at 830 Sussex, Officer Stan Farris notified Agent Clair Rayburn of the Bureau of Alcohol, Tobacco, and Firearms (ATF), who verified that Rodgers was a convicted felon. The APD and ATF obtained a search warrant for Rodgers' residence.

Officer Farris found a firearm in the closet of one of the bedrooms of the residence. APD Officer Craig Miller found a firearm in a hallway closet. APD Officer Paul Brick found a firearm behind a cabinet in the living room of the house. Rodgers was charged by a superseding indictment with being a convicted felon in possession of a firearm (Count I) and possessing a firearm which had an obliterated serial number (Count II). Before trial, Rodgers and the Government stipulated that Rodgers had been convicted of a felony and that two shotguns and a rifle seized at 830 Sussex Drive in Austin, Texas, had been manufactured outside of Texas and had been shipped in interstate commerce. The jury found him guilty as to Count I and not guilty as to Count II.

During the trial, Rodgers' two parole certificates were admitted into evidence, and testimony and other evidence was adduced regarding his gang affiliation. Rodgers challenges his conviction due to the admission of this evidence. He also asserts

a deficiency in, and constructive amendment of, the indictment. Finally, Rodgers asserts prosecutorial misconduct in the form of improper statements during argument, as well as cumulative error.

DISCUSSION

The Indictment

A. Sufficiency

Rodgers first contends that the superseding indictment of him was insufficient because it did not specify *which* weapon the grand jury accused him of possessing. Rodgers' contention is unavailing.

We review the sufficiency of the indictment *de novo*. *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1124, 127 L.Ed.2d 432 (1994) (citation omitted). "An adequate indictment 1) enumerates each *prima facie* element of the charged offense, 2) notifies the defendant of the charges filed against him, and 3) provides the defendant with a double jeopardy defense against future prosecutions." *Id.* (citations omitted).

The superseding indictment of Rodgers alleged:

On or about September 16, 1993, in Travis County, in the Western District of Texas, the Defendant,

STEVE RODGERS,
aka "Steve Enriquez",
aka "Shotgun",

a person who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm that had been shipped and transported in interstate commerce and affecting commerce, in violation of Title 18, United States Code, Sections 922(g) and 924(a).

The relevant statute provides that "[i]t shall be unlawful for any person -- (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; . . . to . . . possess in or affecting commerce, any firearm or ammunition[.]" 18 U.S.C. § 922(g).

Generally, "the language of the statute may guarantee sufficiency if all required elements are included in the statutory language." *United States v. Gordon*, 780 F.2d 1165, 1171 (5th Cir. 1986). Violation of § 922(g)(1) requires that a convicted felon knowingly possess a firearm and that his possession was in or affecting commerce. *United States v. Dancy*, 861 F.2d 77, 81-82 (5th Cir. 1988). Rodgers' indictment sufficiently alleged the *prima facie* elements of possession of a firearm by a convicted felon.

Indictments satisfy the [sufficiency] requirement if they describe the specific facts and circumstances surrounding the offense in question in such a manner as to inform the defendant of the particular offense charged. This Court reviews indictments for practical, not technical errors, and it will not reverse a conviction because of an error in the indictment unless that error misled the defendant to his or her prejudice.

Nevers, 7 F.3d at 63 (internal and concluding citations omitted).

The superseding indictment alleged that Rodgers possessed a weapon on or about September 16, 1993, in Austin, Texas, and that the weapon had a nexus with interstate commerce. In their trial stipulation, Rodgers and the Government described the three firearms seized on September 16 and averred that those firearms "were all manufactured outside the State of Texas and had

previously been shipped and transported in interstate commerce." The stipulation indicates that Rodgers could not have been surprised if the superseding indictment charged him with possession of any one or all three of the firearms.

Finally, "[i]n the unlikely event of a subsequent indictment, defendant could surely rely upon the entire record . . . to avoid double jeopardy." *United States v. Haas*, 583 F.2d 216, 221 (5th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1788, 60 L.Ed.2d 240 (1979). Rodgers' indictment therefore satisfies the third prerequisite for sufficiency.

B. Constructive Amendment

Rodgers next contends that the Government constructively amended his indictment by introducing evidence that he possessed three firearms. Rodgers argues that the petit jury might have convicted him of possession of a firearm that the grand jury did not accuse him of possessing. The district court considered but rejected this contention at trial. Although this precise issue is *res nova* in this circuit, its underlying principles are well settled.

In United States v. Arlen, 947 F.2d 139, 144 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1480, 117 L.Ed.2d 623 (1992) (internal and concluding citations omitted), we observed the following:

The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment. The indictment cannot be "broadened or altered" except by the grand jury. A constructive amendment occurs when the trial

court "through its instructions and facts it permits in evidence, allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment."

"[Constructive amendment] occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993) (*citation omitted*). Constructive amendment of an indictment requires reversal of the conviction. *Id.*

Drawing upon the principles attendant to the question of constructive amendment in this Circuit and in the Seventh Circuit which has addressed this issue, we find that the following non-exclusive factors are important in determining whether an indictment has been constructively amended:

(1) Whether the factual basis presented in the evidence invites the jury to convict on a basis broader than that charged in the indictment? *See Doucet*, 994 F.2d at 173. Here, we inquire whether the crime charged in the indictment is materially different or substantially altered at trial, such that it is impossible to know whether the grand jury indicted the defendant for the crime actually proved. *See United States v. Gunning*, 984 F.2d 1476, 1482 (7th Cir. 1993);

(2) Whether there is a material difference between what the indictment called on the jury to do and what the evidence, argument, or jury instruction calls upon the jury to do? *See Doucet, id.* The inquiry here is whether the facts presented to the

jury are "distinctly different from the set of facts set forth in the charging instrument." See *Gunning, id.* (7th Cir. 1993)

(3) Whether such invitation undercuts the defense prepared in response to the indictment? See *Doucet, id.*;

(4) Whether the indictment is specific, exact, or limiting, such that its terms make its specifications an essential part of the charge? See *United States v. Leichtnam*, 948 F.2d 370, 379 (7th Cir. 1991); *United States v. Goines*, 988 F.2d 750, 773-774 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 241, 126 L.Ed.2d 195, *cert. denied*, 114 S. Ct. 483, 126 L.Ed.2d 433, and *cert. denied*, 114 S. Ct. 558, 126 L.Ed.2d 458 (1993). See and compare, *United States v. Robison*, 904 F.2d 365, 369 (6th Cir. 1990), *cert. denied*, 498 U.S. 946, 111 S.Ct. 360, 112 L.Ed.2d 323 (1990) (an indictment specifying that a defendant carried a particular firearm is not constructively amended by instructions that the Government need prove only that the defendant carried any firearm, even when the evidence indicates that the defendant carried a firearm different than that specified in the indictment).

The instant indictment is couched in general terms which do not make the description of the firearm an essential part of the indictment. The facts presented at trial were the same as those set forth in the charging instrument, except for the number (but not specific description) of firearms. The number of firearms is not a substantial alteration such that it is impossible to know whether the grand jury would have indicted for the crime that was proved. In and of itself, the evidence presented about the number

of firearms is not a material difference which required the jury to do anything more, less, or different than was required by the superseding indictment.

The indictment did not allege a particular firearm. Rodgers thus was not indicted for possessing one firearm and convicted of possessing another, a situation this Court has suggested might constitute a constructive amendment. *See United States v. Young*, 730 F.2d 221, 224 (5th Cir. 1984); *but see Robison*, 904 F.2d at 369. Rodgers did not face the possibility of being convicted on a theory different than that alleged in the indictment. Proof that Rodgers possessed any of the three firearms satisfied the literal terms of the indictment. Moreover, Rodgers was apprised by the indictment of the particular theory upon which the Government proceeded, *see and compare Doucet*, 994 F.2d at 172, and has failed to show prejudice which arises solely from the difference in the number of weapons found in his apartment and the number of weapons charged in the indictment.

[W]hen the indictment charges a violation of a statute in general terms, proof of acts of the kind described, although those acts are not specifically mentioned in the indictment, does not constructively amend it, at least absent a demonstration that this was, or might have been, prejudicial to the defendant.

United States v. Malatesta, 583 F.2d 748, 756 (5th Cir. 1978), *modified on other grounds*, 590 F.2d 1379, 1382 (5th Cir. 1979) (en banc) (footnote omitted), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777, and *cert. denied*, 444 U.S. 846, 100 S.Ct.

91, 62 L.Ed.2d 59 (1979). Accordingly, we conclude that there has been no constructive amendment of Rodgers' indictment.

Admission of Evidence

Rodgers challenges as error the admission of his parole certificates and of evidence that he was a gang member. This court reviews the evidentiary rulings of district courts in criminal trials under a heightened abuse of discretion standard. *United States v. Carrillo*, 981 F.2d 772, 774 (5th Cir. 1993).

[W]here the probative value of relevant evidence is substantially outweighed by its potential for unfair prejudice, it should be excluded. An important consideration relating to probative value is the prosecutorial need for such evidence. Another central consideration in determining probative value is how strongly the proffered evidence tends to prove an issue of consequence in the litigation.

United States v. Palmer, 37 F.3d 1080, 1084 (5th Cir. 1994) (citations omitted). We shall examine each of the allegedly erroneous admissions.

A. Parole Certificates

Rodgers contends that the district court erred by allowing the jury to hear that he had been convicted previously and by allowing into evidence two parole certificates and a copy of one of those certificates found in two bedrooms of the house. Rodgers argues that the certificates were irrelevant because he had stipulated to his prior felony conviction and that the prejudicial effect of the certificates substantially outweighed any probative

value.¹ By contrast, the Government contends that the district court properly allowed the jury to hear that Rodgers was a convicted felon.

Rodgers' stipulation that he was a convicted felon was relevant to show his status as a convicted felon and therefore properly was read to the jury. The prior felony conviction is an element of the instant offense; we find no error in allowing the jury to hear that Rodgers had been convicted of a felony. See *Palmer*, 37 F.3d at 1084-1085.

In *Palmer*, this court examined the admissibility of parole certificates in the face of a stipulation that the defendant was a convicted felon, and determined that "evidence of the predicate offense has no probative value apart from establishing [the defendant's] status." *Palmer*, 37 F.3d at 1085. The defendant's parole certificate in that case indicated that he was on parole for life and was subject to drug and alcohol treatment restrictions.

Rodgers' stipulation did not inform the jury of the nature of his prior convictions. One of the parole certificates indicated that his first parole term began on November 16, 1989, with a discharge date of November 1, 1991. The certificate also indicated that Rodgers was subject to a number of standard conditions of parole, including a requirement that he not own,

¹ Rodgers stipulated that "[p]rior to September 16, 1993[,] the Defendant was duly and legally convicted in court of a felony offense punishable by a term of imprisonment exceeding one (1) year under the laws of the State of Texas and the United States of America."

possess, use, or carry a firearm. The certificate indicated that Rodgers was subject to special parole conditions prohibiting him from the use of alcoholic beverages, inhalants, or intoxicating vapors, and requiring him to participate in a "special review caseload." The other certificate indicated that his second parole term began on August 28, 1991, with a discharge date of November 9, 1995. The certificate also indicated that Rodgers was subject to several standard conditions of parole. Additionally, the certificate indicated that Rodgers was "assigned to the highest level of supervision or supervision case load" pending further evaluation.

The Government asserts that the certificates properly were admitted because they were relevant to show that Rodgers occupied the house and to show that Rodgers knew that he could not possess firearms. The jury heard evidence that the parole certificates were found among other documents in the house that was Rodgers' residence. These other documents included personal letters and a utility bill addressed to Rodgers at that residence. Also in the residence were personal photographs and a photographic identification card of Rodgers. Some of the various documents and photographs were in the same rooms in which the firearms were found. Even without the parole certificate, these documents and photographs were sufficient to tie Rodgers to the residence and to specific rooms in which the firearms were found.

Although Rodgers' respective two- and four-year parole terms imply less serious offenses than the life term of parole

involved in *Palmer*, Rodgers' parole certificates showed the jury that he had been convicted of at least two prior felonies and was subject to heightened supervision on parole. None of the details of Rodgers' previous offenses or terms of parole was relevant to the elements of the felon-in-possession charge, and Rodgers' knowledge that a convicted felon cannot possess a firearm is not an element of Rodgers' offense. See *Dancy*, 861 F.2d at 81-82. Rodgers' knowledge of the parole condition therefore was irrelevant to the Government's case.

The information on the parole certificates contained information about "matters which were not probative of the elements of the charged offenses." *Palmer*, 37 F.3d at 1085. Through these parole certificates, "the jury received information which had a tendency to suggest a decision on an improper basis." *Palmer*, *id.* at 1087. The probative value of the parole certificates was marginal. Their potential prejudicial effect was substantial. Accordingly, we find that their admission was an abuse of discretion which was clear error. See *Palmer*, 37 F.3d at 1085. We thus turn to examine whether this error was harmless.

"An error is harmless if the reviewing court is sure, after viewing the entire record, that the error did not influence the jury or had a very slight effect on its verdict." *Id.* at 1087 (citation omitted). The evidence against Rodgers was very strong. The jury heard testimony that police found a firearm in each of two rooms in which they had also found various items of mail addressed to Rodgers, and found the third firearm in the hallway closet of

the house. The jury also heard that Rodgers (1) told Officer Farris that the guns at the house belonged to him, (2) told APD Officer Michael Huckaby that there were three firearms in the house but they belonged to Rodgers' stepfather, and (3) told Agent Rayburn that he owned one of the firearms and that his stepfather owned the other two.

If the admission of the parole certificates focused the jury's attention upon the prejudicial information so as to curtail the jury's ability to believe the defendant's version of the facts, then the admission of the certificates was not harmless. See *Palmer*, 37 F.3d at 1987. However, given the strength of the evidence against Rodgers, we are sure that the effect of this prejudicial information upon the jury's verdict, if any, was very slight. For this reason, we find that the error in admission of these certificates was harmless.

Extrinsic Act Evidence

Rodgers next contends that the district court improperly admitted evidence of his affiliation with the Latin Kings gang. Rodgers argues that the gang evidence was irrelevant extrinsic-act evidence and was highly prejudicial. The Government counters that the evidence was relevant to Rodgers' motive for possessing the firearms in the house; that evidence of Rodgers' gang affiliation corroborated the police witnesses' testimony regarding Rodgers' statements to them; and that the admission of the evidence was at most harmless error. We find neither argument persuasive, but we

do agree that the error, if any, associated with this evidence is harmless.

The evidence which Rodgers challenges as irrelevant and prejudicial includes the following: Rodgers told Officer Farris, Officer Huckaby, and Agent Rayburn that he possessed the guns at the house because he needed protection due to his affiliation with the Latin Kings gang. Rodgers also said that he kept the guns in the house to protect himself from other gang members who disliked him. There were many drive-by shootings directed at Rodgers' house and car. Officer Farris had observed that Rodgers' house and car were riddled with bullet holes. Officer Farris identified (1) photographs of Rodgers and other Latino men making what Officer Farris identified as the Latin Kings' hand sign; (2) a photograph of Rodgers exhibiting a Latin Kings tattoo; (3) and a photograph of Rodgers' car which shows a bullet hole in the car. Officer Farris also identified a file folder emblazoned with two symbols of the Latin Kings. Attached to that file folder was a letter from an apparent Latin King who was in prison. Police found the photographs and the file folder in one of the bedrooms at Rodgers' residence. In addition to the testimony and the evidence identified by Officer Farris, the Government introduced an envelope emblazoned with a sketch of a crown, but which contained no explicit identification as a gang emblem.

With regard to the testimony that Rodgers had told law enforcement officials that he possessed the weapons because he feared violence due to his gang affiliation, the potential

prejudicial impact of this testimony was slight because the officers neither implicated Rodgers in illegal gang activity nor testified about any specific criminal activities of the Latin Kings. By contrast, the probative value of Rodgers' statement that he possessed the weapons is great regarding the element of "knowing possession". Accordingly, we find no abuse of discretion in admission of this testimony.

The physical evidence of Rodgers' gang affiliation and the photographs of his bullet-ridden car was both probative and cumulative because it corroborated the officers' testimony about his statement that he possessed the weapons due to a fear of violence. Therefore, the probative value of this evidence was less than that of the officers' testimony. The photographs of Rodgers and other apparent Latin King members depict the men making hand signs; drinking beer; standing in a kitchen; and celebrating in front of a Christmas tree. They do not show the men engaged in any illegal or offensive activities. The photographs show a man who appears to be Rodgers individually displaying a Latin King tattoo and holding a carton of beer. Given that the jury had heard the testimony that Rodgers was a Latin King, the photographs of him and his confederates were not inflammatory. Likewise, the photographs of Rodgers' car show only one bullet hole and, in light of Officer Farris' testimony that Rodgers had said that his car had been the target of shooting, these photographs were not inflammatory. The probative value of this evidence is minimal. It does not make more or less likely any element of the charged offense. Nevertheless,

we have viewed this evidence and find that its potential prejudicial impact is also minimal and, therefore, did not substantially outweigh its probative value so as to render its admission an abuse of discretion.

The Latin Kings' emblems depicted on the folder (pen-and-ink sketches of automatic weapons and a sword dripping blood) are similarly tangential to any material fact at issue herein. Although the slight probative value of these sketches gives us pause, we do not find that their prejudicial nature is so substantial that the admission of this evidence was an abuse of discretion.

Finally, the most troubling evidence of Rodgers' gang affiliation is the letter from an apparent gang member in prison. The letter indicates, *inter alia*, that its writer was disturbed by news that an individual named "Sly" was associating with an individual named "Creature," who "was the one who stabbed that wet-back in the head[.]" Although a close reading of the letter indicates that the writer was upset about Sly's association with "Creature", the letter could easily be read to suggest that Rodgers was associated with criminals, that some of the Latin Kings were criminals, or that Rodgers was associated with an individual who had stabbed somebody. The potential prejudicial impact of the letter was substantial. *See United States v. Parada-Talamantes*, 32 F.3d 168, 170 (5th Cir. 1994) (evidence of guilt by association generally inadmissible to prove guilt). In light of the other evidence that Rodgers' feared violence due to his gang affiliation,

the probative value of the letter was negligible and it was an abuse of discretion to allow admission of this letter. As is discussed above, however, the evidence of Rodgers' guilt was very strong. The letter could not have had more than a very slight effect on the jury's verdict. See *Palmer*, 37 F.3d at 1087. For this reason, we find that this error was harmless.

In summary, given the admissibility of Rodgers' statement to the officers, the question is not whether the jury was infected with knowledge of his gang membership. At issue here is whether this evidence was inflammatory or indicative of anything other than that which Rodgers acknowledged, i.e., that he was a member of a gang. Although much of this evidence could just as easily have been omitted, its inclusion was merely cumulative and does not rise to the level of reversible error.

Prosecutorial Misconduct

Rodgers contends that the prosecutor made several improper references to his gang affiliation during closing arguments. The question in reviewing a claim of prosecutorial misconduct is to decide whether the misconduct casts serious doubt upon the correctness of the jury's verdict. *United States v. Carter*, 953 F.2d 1449, 1457 (5th Cir. 1992), *cert. denied sub nom Hammack v. United States*, 112 S. Ct. 2980, 119 L.Ed.2d 598 (1992) (citations omitted). In making that determination, the Court is to consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and

(3) the strength of the evidence of the appellants' guilt. *Carter, id.*

A prosecutor may tell jurors what inferences he wishes them to draw from the evidence. *United States v. Laury*, 985 F.2d 1293, 1307 (5th Cir. 1993). However, a prosecutor's comments may constitute misconduct when they refer to facts outside the record. *United States v. Davis*, 792 F.2d 1299, 1307 (5th Cir. 1986), *cert denied*, 479 U.S. 964, 107 S.Ct. 464, 93 L.Ed.2d 409 (1986). It is also possible for a prosecutor's remarks, taken as a whole, to violate a defendant's substantial rights even if any single comment does not require reversal. *United States v. Iredia*, 866 F.2d 114, 118 (5th Cir. 1989), *cert. denied*, 492 U.S. 921, 109 S.Ct. 3250, 106 L.Ed.2d 596 (1989). "[T]he test for determining whether a conviction should be overturned is whether the prosecutor's remarks were *both* inappropriate *and* harmful." *United States v. Rocha*, 916 F.2d 219, 234 (5th Cir. 1990), *cert. denied*, 500 U.S. 934, 111 S.Ct. 2957, 114 L.Ed.2d 462 (1991).

Rodgers alludes to several references to his gang membership during closing arguments. Rodgers objected to all but one of the following comments:

The prosecutor paraphrased Rodgers' conversation with Officer Farris as follows:

I possessed the weapons. I got problems with gangs. I'm a gang member. I've been involved in shootings. What's with the holes in your house? They are bullet holes. What's with the holes in your car? They are holes from shotgun shells, holes from fire fights in the neighborhood.

Mr. Villarreal asked what kind of neighborhood is this. It's a fairly nice neighborhood except for that one house where this Defendant decides he has to have weapons so he can get in these little gang fights and fire fights.

Rodgers objected that this remark referred to information outside the record, and moved for a mistrial. His objection was overruled and his motion for mistrial denied.²

The prosecutor proceeded to discuss the photographs and other gang-related evidence found at Rodgers' house as follows:

[The police] find the photographs as Officer Farris explained that had the Defendant in them, and there are numerous photographs where they are giving the old Kings sign, a gang sign. The guy who took photographs, or somebody took photographs that were in the Defendant's house of his car that had holes in it. He is proud of them. He likes his gang membership, and this --

At this point, the district court sustained Rodgers' objection to the prosecutor's statement and instructed the jury to disregard it.

Evidently undeterred, the prosecutor commented, "[t]his isn't the Boy Scouts. The Boy Scouts have a little . . . [t]hey don't have weapons in it." The district court overruled Rodgers' objection to this comment about the Boy Scouts.

The prosecutor also remarked, "[n]ow, why would somebody do that or possess one with an altered number? How about a felon

² The jury had heard evidence that Rodgers' neighborhood was quiet and middle-class, with well-kept homes and well-trimmed yards and that Rodgers' house was out of place in the neighborhood because it was run down and was riddled with bullet holes. Thus, contrary to Rodgers' objection, the prosecutor's remarks did not refer to information outside of the record.

that ain[']t supposed to have it? How about somebody who is going to be engaged in gang shootings?" Shortly thereafter, the prosecutor remarked that Rodgers "had these weapons so he could pop them off and use them. That's what he admitted. That makes him dangerous." The district court overruled Rodgers' objections.

During rebuttal, the prosecutor remarked, "Don't bite off on this, 'Well, Steve did this and Steve did that,' using his first name. This guy is a gang member that uses weapons and possesses them because he's a gang member and uses weapons." Rodgers did not object to this remark.

When the district court overruled Rodgers' objections, it reminded the jurors that they are the exclusive judges of the evidence and facts in the case and that both counsel are accorded some leeway in stating their interpretation of the evidence. When the district court sustained Rodgers' objection, it instructed the jury to disregard the prosecutor's statement.

We find that the prosecutor's statements were improper and inappropriate. As discussed above, the jury had heard testimony that Rodgers said he needed guns to protect himself from gang violence. The references to "fire fights" and Rodgers' desire to be involved in "gang fights" and shootings mischaracterized the testimony which had indicated that Rodgers possessed the firearms for defensive reasons and that Rodgers had been the target of numerous shootings. However, because of the strength of the evidence of Rodgers' guilt and the district court's admonitions to the jury, we find that these improper statements cast no serious

doubt upon the correctness of the verdict, whether viewed individually or cumulatively. Accordingly, as to those remarks which were allowed³ either over Rodgers' objection or due to Rodgers' failure to object, we find that the error was harmless.

Cumulative Error

Rodgers finally contends that the errors of the trial court and misconduct of the Government cumulatively violated his right to a fair trial. This contention is unavailing.

Trial errors that are harmless when considered alone may mandate reversal when considered cumulatively, if the cumulative effect is to deny the defendant's right to a fair trial. *United States v. Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978). However, "[c]umulative reversible error, although not unknown to [this court's] jurisprudence, is a rarity." *Iredia*, 866 F.2d at 118.

The Government's evidence and the prosecutor's arguments focused much more attention on Rodgers' gang background than was necessary to corroborate the trial testimony. Additionally, the parole certificates should not have been admitted. Nevertheless, the Government presented a very strong case that Rodgers knowingly possessed the firearms found in his residence. Read in its entirety, the record does not indicate that Rodgers' trial was fundamentally unfair.

³ As to the comments to which Rodgers' objection was sustained, we find that the admonition to the jury was sufficient.

CONCLUSION

For the foregoing reasons, we find no reversible error and Rodgers' conviction is AFFIRMED.