IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50672
Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

RICHARD HOYOS, Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(EP 92 CR 403 H)

(September 19, 1995)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM*:

Defendant-Appellant Richard Hoyos ("Hoyos") appeals his conviction and sentence for possession with intent to distribute and conspiracy to possess with intent to distribute marijuana. All issues are raised for the first time on appeal. Finding no plain error, we affirm.

I.

A confidential informant informed law enforcement officers

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

that a white Cutlass Ciera with Texas license plate 710-TKV contained a large amount of marijuana. Officers located the car in an El Paso, Texas, shopping center and followed it to a nearby residence owned by codefendant, Leonel Baray-Banda ("Baray"). After several hours observing those entering and exiting the residence, the officers approached the home and obtained Baray's consent to search the residence. When officers entered the home, Hoyos ran, but was apprehended shortly thereafter. Officers found $9,658 in Hoyos' front pants pocket, and 291 pounds of marijuana on two tables and an Accuweigh scale in the garage.

A superseding indictment charged Hoyos and seven others with possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (count I) and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count II). All but Hoyos pleaded guilty. A jury found Hoyos guilty on both counts. Hoyos was sentenced to 121 months imprisonment on each count, to run concurrently, and four years supervised release.

II.

Hoyos raises all of his assignments of error for the first time on appeal. Under FED. R. CRIM. P. 52(b), we may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (*en banc*) (citing *United States v. Olano*, ___U.S.___, 113 S.Ct. 1770, 1776-79, 123

L.Ed.2d 508 (1993)), *cert. denied*, ___U.S.___, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the Court, but we will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Olano*, 113 S.Ct. at 1778.

When a defendant in a criminal case forfeits error by failing to object in district court, we may remedy the error only in the most exceptional case. *Calverley*, 37 F.3d at 162. The Supreme Court has directed appellate courts to determine whether a case is exceptional by using a two-part analysis. *Olano*, 113 S.Ct. at 1777-79.

First, the appellant has the burden to show that there is actually an error, that it is plain and that it affects substantial rights. *Id.* 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 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." *Id.* at 164.

Second, the Supreme Court has directed that, even when the appellant carries his 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 1778 (quoting FED. R. CRIM. P. 52(b)). As the Supreme Court states:

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Id. at 1779 (quoting *Atkinson*, 297 U.S. at 160).

III.

Hoyos argues that the Government's introduction of evidence that his brother-in-law, Armando Fernandez ("Fernandez"), and his friend, Herb Monsisvais ("Monsisvais"), both codefendants and alleged coconspirators, had been previously imprisoned for drug trafficking was a blatant and prejudicial attempt to taint his character through guilt by association.

Hoyos testified that Monsisvais invited him to watch a fight on television at Baray's home with Fernandez. He also testified that he entered the home through the garage, that he did not see any marijuana in garage, that he did not smell any marijuana odor, that he did not know that marijuana was present and that he had not discussed marijuana with them.

The Government asked Hoyos how long he had known Fernandez and Monsisvais, whether he had a close relationship with them and whether he knew that they had been imprisoned for marijuana trafficking. Hoyos answered that they were close and that he knew of their prior convictions for drug trafficking.

"[A] defendant's guilt may not be proven by showing he

associates with unsavory characters." *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. 1981), *cert. denied*, 459 U.S. 1021, 103 S.Ct. 387, 74 L.Ed.2d 518 (1982); *see also United States v. Parada-Talamantes*, 32 F.3d 168, 170 (5th Cir. 1994). We believe the Government's introduction of the codefendants' criminal history in conjunction with evidence of Hoyos' relationship or association with the codefendants is error in that it constitutes evidence of guilt by association. However, we find that this error does not affect any substantial right or the outcome of the proceedings. Two other codefendants, Morales-Enriquez and Murillo-Dominguez, testified that Hoyos initiated the purchase and importation of the marijuana from Mexico, and that he was actively supervising the inspection and repackaging of the marijuana at Baray's residence when the officers arrived. Considering the weighty evidence that Hoyos was personally involved in the drug trafficking, Hoyos cannot establish that any error affected any substantial right or the outcome of the proceedings. Consequently, we find no plain error.

IV.

Hoyos next argues that the Government's introduction of evidence that a codefendant and friend, Mark Kilmer ("Kilmer"), pleaded guilty just prior to this trial constituted plain error requiring reversal. Hoyos relies upon *United States v. Leach*, 918 F.2d 464, 467 (5th Cir. 1990), *cert. denied*, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed.2d 976 (1991), in which this Court reasserted that evidence about the conviction of a coconspirator is

inadmissible as substantive proof of the guilt of the defendant and is plain error. Hoyos argues that because he did not invite this evidence, it is plain error.

Contrary to his assertion, Hoyos in fact opened the door to this line of inquiry. Hoyos testified on direct and again on cross-examination that Kilmer's presence at the residence was the result of his invitation. The Government then asked if Hoyos knew that Kilmer had pleaded guilty; he answered yes. His testimony created the inference that both he and Kilmer were innocent bystanders caught at the wrong place at the wrong time. The Government's question rebutted this inference. Moreover, the district court instructed the jury that "the fact that an accomplice has entered a plea of guilty to the offense charged in not evidence in and of itself of the guilt of any other person." Therefore, we find no error.

V.

Hoyos contends that he was denied a fair trial when the prosecutor used his postarrest silence to impeach the exculpatory story he offered during his direct testimony. Hoyos testified that the ninety-six $100 bills found in his pants pocket represented the proceeds from the sale of a vehicle made earlier in the day. He stated that at the time the officers inquired about the money, he did not answer. On cross-examination, the prosecutor asked if he told the arresting officer, "I don't know anything about it." Hoyos answered, "Yes, I did, sir." When asked to confirm that he did in fact tell the officer that he did not know anything about

it, Hoyos answered that at the time of the seizure he "really didn't want to answer" and that he was "upset." When pressed, Hoyos denied saying anything. At this point, the prosecutor asked, "You didn't say, `Yeah, this guy just bought this car. I've got to get it to him because I've got to get the car and all that.'" When Hoyos answered no, the prosecutor passed the witness.

A prosecutor may not impeach a defendant's exculpatory story by using the defendant's immediate postarrest, post-*Miranda* warnings silence. *United States v. Laury*, 985 F.2d 1293, 1302 (5th Cir. 1993) (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)). *Doyle* violations are usually reviewed for harmless error. *Laury*, 985 F.2d at 1304. However, because Hoyos failed to object to the prosecutor's comments at trial, our review is limited to plain error. *Id.* As discussed earlier, the record contains overwhelming evidence of Hoyos' guilt. Therefore, we find that the prosecutor's error was not so prejudicial as to affect the outcome of the proceeding or any substantial right. *See Calverley*, 37 F.3d at 164.

VI.

For the reasons articulated above, the Hoyos's conviction and sentence are AFFIRMED.