

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50732
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICK STEPHENS,

Defendant-Appellant,

Appeal from the United States District Court
for the Western District of Texas
SA 94 CR 59 1

June 29, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Stephens challenges his conviction for conspiracy to manufacture and distribute methamphetamine. We affirm.

I.

Rick Stephens and David Pace were indicted for conspiracy to manufacture and distribute methamphetamine beginning in December 1987 and continuing until March 1994. Stephens was found guilty as

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

charged following a jury trial. At trial, Stephens testified that he had not been involved with the manufacture or distribution of methamphetamine since December 1986.

Five of Stephens's co-conspirators--David Pace, John Yeater, Donald Romano, Robert Vaughan and James Pruitt--also testified at trial and implicated Stephens in the conspiracy.. Defense counsel in his opening statement referred to the co-conspirators as "people who themselves were already convicted, or who have pled guilty and in exchange for that and a lenient sentence, . . . have agreed to come in and say what is needed to prove a case against my client." Each of the co-conspirators then testified on direct examination by the government that he had entered a guilty plea with respect to his involvement in the methamphetamine manufacturing conspiracy. Defense counsel did not object to any of this testimony. Defense counsel then cross-examined each co-conspirator concerning his guilty plea.

Following the guilty verdict, the district court sentenced Stephens to 240 months of imprisonment and ten-years of supervised release. Stephens timely filed a notice of appeal.

II.

A.

Stephens contends first that the district court erred by admitting in his co-conspirators' testimony concerning their guilty pleas as substantive evidence of his own guilt. Because Stephens did not object to this testimony, we review for plain error. Fed. R. Civ. P. 52(b). Under the plain error standard, we must find

that (1) there was error, (2) it was plain, and (3) it affects substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995).

"[E]vidence about the conviction of a coconspirator is not admissible as substantive proof of the guilt of a defendant." United States v. Leach, 918 F.2d 464, 467 (5th Cir. 1990) (footnote omitted), cert. denied, 501 U.S. 1207 (1991). However, the prosecution may bring out the guilty plea of an accomplice, provided that the evidence serves a legitimate evidentiary purpose and the jury is given an appropriate limiting instruction. United States v. Valley, 928 F.2d 130, 133 (5th Cir. 1991). We have recognized that the prosecution can bring out a witness' guilty plea in anticipation of the defense's plan to use such evidence to impeach the witness. United States v. Borchardt, 698 F.2d 697, 701 (5th Cir. 1983). Here, defense counsel's opening argument indicated that the defense planned to use the guilty pleas to impeach the co-conspirators.

Moreover, the district court clearly instructed the jury that evidence of the guilty pleas could not be considered as substantive evidence of guilt.² The court's instruction served to cure any

² The district court instructed the jury as follows:

An alleged accomplice, including one who has entered into a plea agreement with the Government, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never

possible misuse of the evidence. Thus, the district court did not commit plain error by allowing the co-conspirators to testify as to their guilty pleas and convictions.

B.

Stephens asserts next that during closing argument, the prosecutor improperly referred to evidence outside of the record.³

convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt. The fact that an accomplice has entered a plea of guilty to the offense charged is not evidence, in and of itself, of the guilt of any other person.

³ In rebuttal to defense counsel's closing argument that the government did not prove a single large conspiracy, the prosecutor stated:

Essentially, what Rick Stephens is saying, I think, through the defense of evidence is, I'm a meth cook. I mean, that's a given. We started this trial with a given, I'm a meth cook, but I'm not this meth cook.

* * *

Jose Freddie Saldivar, we told you, was the leader of the band. It's unquestioned. Jose Freddie Saldivar, we told you, was the line, if you will, that goes straight on through this conspiracy.

You haven't been presented the entire Saldivar conspiracy. You heard enough evidence on David Scott Fitzgerald, and how Mike Pruitt took some of the chemicals to his unit at the storage depot. You haven't heard evidence of the manufacturing -- [defense counsel objects and is overruled].

You have heard the case agents discuss the Mills County lab. But, the whole, entire Mills County lab is not before you. The focus of this trial is on Rick Stephens, and that's what's been presented to you.

Stephens objected on this basis, but the district court overruled the objection. In reviewing a claim of prosecutorial misconduct in closing argument, we determine whether the misconduct casts serious doubt upon the correctness of the jury's verdict. United States v. Willis, 6 F.3d 257, 263 (5th Cir. 1993). In doing so, we look at three factors: (1) the magnitude of the prejudicial effect, if any, of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction. Id. at 263-64. The district court's determination in this regard is given deference. Id. at 263.

Stephens argues that the prosecutor implied that further evidence of Stephen's participation in the conspiracy existed but had not been presented. We disagree. Taken in context, the argument was not an attempt to expand the evidence beyond that which was produced at trial. Rather, one reasonable interpretation of the remarks is that the prosecutor was merely summarizing the evidence by establishing a timeline of the conspiracy, which spanned from 1987 to 1994, and establishing Stephens' involvement in that conspiracy. Moreover, if the jury interpreted the remarks differently, any potential prejudice caused by these remarks was reduced by the district court's instruction that "any statements, objections, or arguments by the lawyers are not evidence." Given the context of the prosecutor's argument and the instruction of the district court, the argument does not come close to casting doubt

upon the jury's verdict.⁴

AFFIRMED. Motion denied.

⁴ Stephens has filed a motion for reconsideration of this court's denial of his motion to substitute counsel. The motion was denied originally because Stephens had not shown a conflict of interest that would prevent meaningful representation. Because the instant motion presents nothing to alter that conclusion, the motion is denied. We also deny Stephen's motion to file a pro se reply brief.