

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60595
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGELIO GONZALEZ-CABALLERO,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR B-90-32
- - - - -

August 22, 1995

Before KING, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

Rogelio Gonzalez-Caballero contends that he was deprived of a fair trial by the prosecutor's statement during closing argument that "[t]here were 278 pounds, 124,000 marijuana cigarettes, that didn't make it to the streets or didn't get passed onto little children." As Gonzalez-Caballero did not object to this statement at trial, this court reviews for plain error only. United States v. Resio-Trejo, 45 F.3d 907, 913 (5th Cir. 1995).

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Under Fed. R. Crim. P. 52(b), this court 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, 113 S. Ct. 1770, 1777-79 (1993)), cert. denied, 115 S. Ct. 1266 (1995). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

A prosecutor may appeal to the jury to act as the conscience of the community as long as his comments are not calculated to inflame or impassion the jury. See United States v. Brown, 887 F.2d 537, 542 (5th Cir. 1989). Even assuming arguendo that the prosecutor impermissibly appealed to the jury's emotion by commenting that 124,000 cigarettes "didn't get passed onto little children," this comment does not constitute plain error.

In determining the overall degree of prejudice, this court considers the district court's cautionary instructions to the jury and the strength of the evidence against the defendant. United States v. Washington, 44 F.3d 1271, 1279 (5th Cir.), cert. denied, 115 S. Ct. 2011 (1995). The district court cautioned the jury immediately before closing arguments that the attorneys' statements were not evidence. Furthermore, the evidence establishing guilt was overwhelming. Thus, in the context of the

trial as a whole, any prejudicial effect from the prosecutor's brief remark was insignificant. Accordingly, the complained-of comment did not affect substantial rights and did not amount to plain error.

AFFIRMED.