FILED
United States Court of Appeals
Tenth Circuit

February 26, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MAURICE ALYN MICKLING, Defendant - Appellant.	No. 15-1089 (D.C. No. 1:14-CR-00016-RM-1) (D. Colo.)

ORDER AND JUDGMENT*

Before **BRISCOE, SEYMOUR** and **LUCERO**, Circuit Judges.

This is a direct appeal by Maurice Mickling following his convictions on three counts: (1) possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922 and 924; (2) possession of a controlled substance (namely, cocaine base) with intent to distribute in violation of 21 U.S.C. § 841; and (3) possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A). He conceded guilt on Count 1. His only defense to Counts 2 and 3 was that he had possessed the cocaine base for personal use, not for distribution. He was found guilty by a jury on

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

all three counts and sentenced to 192 months' incarceration, although the advisory sentencing guideline range was much higher.

Mickling appeals his convictions on two grounds; both are subject to plain error review. First, he argues that the government's expert witness, Detective Daniel Wiley, violated Federal Rule of Evidence 704(b), which prohibits an expert in a criminal case from opining on the defendant's mental state when that mental state is an element of the crime charged. Second, Mickling argues that his due process rights were violated under Napue v. Illinois because the government knowingly offered perjured testimony, which was material, through its fact witness, Rhiannon Cheney.

Mickling seeks a reversal on all counts or, in the alternative, a reversal on Counts 2 and 3 and a remand on Count 1 for a new trial or resentencing.[1] We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

A. Factual Background

Law enforcement officers drove to a hotel in Denver to arrest Mickling on an outstanding warrant. Mickling walked out of the hotel and past an unmarked van in which a SWAT team was sitting. Recognizing him, one of the officers opened the door and ordered him to freeze. Mickling fled, removing a handgun from his waistband and

[1] Although Mickling does not appeal his conviction on Count 1 or the sentence imposed on any count, he suggests the sentencing range on Count 3 was the "driver" of the sentence imposed on Count 1. If Count 3 is reversed, Mickling argues the district court should have the opportunity to reconsider the sentence imposed on Count 1. He offers no argument in support of his request for a new trial on Count 1.

throwing it across the street, and dropping a toiletries bag on the ground. He was apprehended, and the officers retrieved the bag and gun. The bag contained approximately 3.6 grams of cocaine base, a small digital scale, some plastic wrapping, and various personal items. The gun was a nine-millimeter handgun loaded with fifteen rounds, with one round in the chamber. Mickling had approximately $750 in his pocket.

B. Trial

At trial, the government called Detective Wiley to testify as an expert witness about the drug trade in Denver. Wiley testified that he had reviewed the evidence in the case, and that the physical evidence included approximately 3.6 grams of crack cocaine, a small battery-powered scale, a nine-millimeter handgun, and approximately $750. He was then asked:

> Q: Now, based upon everything that you have read about this case, and looked at in this case, based upon your experience and training, purchasing drugs, and working narcotic cases as an investigator, have you formed an opinion as to whether or not the crack cocaine as in Government's Exhibit 1 is consistent with possession with the intent to distribute or—
>
> A: Yes—
>
> Q: —or consistent with personal use?
>
> A: It's consistent with possession with intent to distribute.
>
> Q: Now, why do you say that?
>
> A: The fact that someone has 3.5 grams or an eightball of crack cocaine indicates that they are a dealer and not a user.
>
> Q: What does—you testified the tools of the trade include

guns, scales, money, plastic, what does this case have in it?

A: Guns, money, plastic, drugs, scale.

Q: And does that confirm your opinion?

A: It does. Yes. All of those factors together. Yes.

App. III at 256. Finally, he testified that he had never seen a nondistributing user of crack cocaine who possessed 3.6 grams on their person.

The government also called a lay witness, Cheney, to testify about her personal relationship with Mickling. She testified that she knew Mickling, and had met him in 2010. She then said she did not see him again until 2013, and that in 2013, she saw him about seven or eight times. She said she never witnessed Mickling use crack cocaine, and had never known him to be a user of crack cocaine.

II

A. Standard of Review: Plain Error

Mickling raises two evidentiary challenges on appeal. He did not object when this evidence was presented at trial. Without a contemporaneous objection to alleged improper testimony, we review for plain error. United States v. Hill, 749 F.3d 1250, 1257 (10th Cir. 2014) (alleged improper opinion by an expert witness in a criminal case); United States v. Caballero, 277 F.3d 1235, 1243–44 (10th Cir. 2002) (alleged perjury constituting prosecutorial misconduct under Napue).

To satisfy the high threshold to achieve a reversal on plain error review, Mickling must show "[1] an 'error' [2] that is 'plain' and [3] that 'affect[s] substantial rights.'"

United States v. Olano, 507 U.S. 725, 732 (1993) (fourth alteration in original) (quoting Fed. R. Crim. P. 52(b)). If these three prongs are met, then we may exercise discretion to reverse only if we determine that "[4] the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Id. (second alteration in original) (quoting United States v. Young, 470 U.S. 1, 15 (1985)); see also United States v. Story, 635 F.3d 1241, 1244 (10th Cir. 2011) (citing United States v. Cotton, 535 U.S. 625, 631–32 (2002)).

As regards the first and second prongs of plain error, an error is plain "if it is obvious or clear, i.e., if it is contrary to well-settled law." Hill, 749 F.3d at 1258 (quoting United States v. Edgar, 348 F.3d 867, 871 (10th Cir. 2003)). Under the third prong of plain error, the error must affect the defendant's substantial rights, prejudicing the defendant "by affect[ing] the outcome of the district court proceedings." Olano, 507 U.S. at 734. The burden is on the defendant to show this prejudice. Id. at 735. "That is, he must demonstrate 'a reasonable probability that but for the error claimed, the result of the proceeding would have been different.'" Hill, 749 F.3d at 1263 (quoting United States v. Trujillo-Terrazas, 405 F.3d 814, 818 (10th Cir. 2005)). This does not entail a preponderance standard, but rather requires "a probability sufficient to undermine confidence in the outcome." Id. (quoting United States v. Hasan, 526 F.3d 653, 665 (10th Cir. 2008)). Even if the defendant can satisfy these three prongs, we may only exercise our discretion to reverse under the fourth prong if we are convinced that the error seriously affects the "fairness, integrity, or public reputation of judicial proceedings."

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