

Paul Hunt
unpublished

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Elkins Division

UNITED STATES OF AMERICA

v.

FRANK R. FATO, SR.

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)
) C.R. 90-160
)
)

MEMORANDUM OPINION

This matter is before the Court on the defendant's Motion for a New Trial pursuant to Fed. R. Crim. P. 33. The defendant, Frank R. Fato, Sr. was convicted by a jury of three counts of a three-count indictment on October 9, 1991. For the reasons stated below, the defendant's motion is DENIED.

The defendant contends that *- Evidence* allow the introduction of a record *- Rule 404(b)* of the Government's chief witness, *- Rule 511* *- Cautionary Instructions.* evidence should have come in under Fed. the defendant, to show proof of *- Allen Charge* or accident. The Court disagrees.

Mr. Butcher's arrest/conviction solely of state misdemeanor charges. ought to introduce this record was, as Mr. Fato admits in his motion, for "impeachment of [Mr. Butcher's] character." Under Fed. R. Evid. 609, evidence of past crimes to attack a witness' character are inadmissible unless the crimes are felonies or involve dishonesty

or false statement. Because Mr. Butcher's record consisted of misdemeanor violations not involving false statement or dishonesty, this record was properly excluded under Rule 609.

II

The defendant claims that the Court should have allowed Marva Stout and Debbie Butcher to testify as to certain alleged uncharged acts committed by Mr. Butcher which may have shown his proclivity for revenge. Evidence of these acts are admissible under Fed. R. Evid. 404(b), the defense argues. This argument is without merit.

The testimony sought to be elicited from Marva Stout and Debbie Butcher was not relevant to his motive or intent in this case. In addition, the evidence was not probative of truthfulness or untruthfulness and could thus not be admissible under Fed. R. Evid. 608(b). Lastly, the evidence was prejudicial and was not probative of any of the issues in the case. Thus, it was properly excluded under Fed. R. Evid. 403 and 404(b).

III

The defendant argues that his fifth amendment rights were violated when the Government inquired on direct examination of a witness from Leisure Associates, Inc. as to whether or not Mr. Fato's fire loss claim had been paid, to which the witness responded that it had not been paid because the defendant refused to provide an oral statement. The prejudicial nature of this question, the defense maintains, could not be cured by a cautionary instruction.

The defendant did not object to the Government's question

until after the witness had stated that Mr. Fato would not give an oral statement. At a sidebar conference immediately following the question and answer at issue, the Court ruled that the answer by the witness did in fact violate Mr. Fato's fifth amendment privilege against self-incrimination. Although it was unlikely that the defendant was prejudiced by this evidence, the Court gave a cautionary instruction to the jury to disregard the last question and answer. The Court told the jury that the last response of the witness was not proper evidence to be considered in this case.

This cautionary instruction was sufficient to overcome the prejudicial effect, if any, of the witness' answer. In any event, a jury is generally presumed to follow an instruction to disregard evidence where, as here, there are no facts to support the notion that they could not ignore the improper evidence. United States v. Jones, 907 F.2d 456, 460 (4th Cir. 1990). Moreover, in light of the abundant evidence against the defendant, there was no reasonable probability that the jury's verdict was influenced by the jury's hearing this later-excluded evidence. See, id.; United States v. Barnes, 747 F.2d 246 (4th Cir. 1984).

IV

The Government's chief witness, Mr. Butcher, had a severe speech impediment which made it very difficult for the jury to understand his responses to questions. For this reason, the Government asked if it could lead the witness on direct examination. The Court denied this request but permitted the prosecuting attorney, if necessary, to repeat what she understood

to be Mr. Butcher's responses and then to ask the witness if her restatement was accurate. The defendant contends that this practice rendered cross examination meaningless. This argument is not persuasive.

The Court fails to see how cross examination was impaired by the lack of an interpreter's presence in the courtroom. The defense counsel was able to ask Mr. Butcher any question he wished on cross. If the witness' response was not clear, Mr. Butcher was asked to restate his testimony. Although this process may have lengthened the trial, it did not benefit one side or the other.

Under Fed. R. Evid. 611, the Court has discretion to control the mode of a witness' interrogation. Allowing the Government to repeat Mr. Butcher's responses on direct examination was not prejudicial to the defendant and was clearly within the Court's authority under Rule 611.

V

The defendant claims he was prejudiced by certain remarks made by the Court. However, the defendant does not specify what those remarks were, nor does the defendant identify at what point in the trial such statements were made. Obviously, it is difficult for the Court to rule on such a broad, unspecified objection. In any event, the Court recalls making no comments which prejudiced the defendant's right to a fair and impartial trial.

VI

The defendant argues that the Court improperly prohibited proper impeachment questioning by the defense of Judith

DeTessieres, a financial consultant. Again, Mr. Fato does not specify how or when the Court prohibited the defense from impeaching the witness. As a matter of fact, the cross examination of Ms. DeTessieres was, in the Court's opinion, both thorough and effective from the defendant's standpoint.

VII

After the jury reported a problem in their progress towards reaching a verdict, the Court gave the jury an Allen charge. The defendant claims that the Allen charge, as given by the Court, did not maintain a fair balance between the interests of the Government and the rights of the defendant. The Court disagrees.

The Court's charge was a proper and balanced version of the Allen charge, which did not aid one side over another, but only served to encourage and induce the jury towards reaching a verdict one way or the other. Among other cautions, the jury was emphatically told not to surrender their conscientious convictions. In such a way, the charge did not invade the province of the jury, nor did it have a coercive effect on the jury. See, United States v. West, 877 F.2d 281, 291 (4th Cir. 1989).

VIII

In conclusion, the Court finds no merit in Mr. Fato's arguments in support of his motion for a new trial. Accordingly, the motion is DENIED.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE