NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-2074

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 13, 2009
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
	)	
WAYLAND MULLINS,	)	
	)	
Defendant-Appellant.	)	

O R D E R

Before: GIBBONS and MCKEAGUE, Circuit Judges; SHADUR, District Judge.*

Wayland Mullins, proceeding through counsel, appeals his judgment of conviction and sentence. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On April 20, 2007, following a jury trial, Mullins was found guilty of conspiracy against rights, in violation of 18 U.S.C. § 241; interference with housing rights, in violation of 42 U.S.C. § 3631(a); use of fire in the commission of a felony, in violation of 18 U.S.C. § 844(h)(1); and conspiracy to obstruct justice, in violation of 18 U.S.C. § 371 (J.A., p. 46). Mullins was sentenced to serve a total of 207 months of imprisonment followed by a total of two years of supervised release and ordered to pay a special assessment in the amount of $400 and restitution in the amount of $12,400.

*The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

Mullins filed a timely appeal. He contends that he was denied due process, a fair trial, and effective assistance of counsel because "multiple hearsay statements of [co-defendant] Ricky Cotton were admitted at trial even though Cotton did not testify, where defense counsel did not object to the statements, including a statement vouching for Cotton's veracity, and later the court ruled that Cotton did not have to testify once he asserted his Fifth Amendment privilege against self-incrimination."

Mullins argues that hearsay statements made by co-defendant Cotton were improperly admitted during his trial through the testimony of Federal Bureau of Investigation (FBI) Special Agent Matthew Smith. Smith investigated the arson incident which ultimately led to Mullins's convictions and was called to testify by the government.

During cross-examination by defense counsel, Smith was asked to "tell us what Ricky Cotton said" regarding a fire that occurred in Taylor, Michigan on July 28 or 29, 2002. In response, Smith stated that Cotton "told us that he was there that night there when the talk - - Wayland Mullins started talking about wanting to set the [victims'] house on fire" and that he and four other men "enticed Wayland Mullins to set the fire and watched Wayland Mullins set the fire." When defense counsel asked Smith if he believed Cotton, Smith replied affirmatively. Defense counsel's further questioning focused on Cotton's statement that Charles Proctor was present on the night the fire was set and Smith's belief that Cotton's statement regarding Proctor's presence was true.

Defense counsel also questioned Smith about other statements made by Cotton during the course of the FBI investigation and Smith testified that Cotton "told us numerous lies, but the final story we believe." Smith testified that he believed Cotton's "final story" to be the truth because "based on the evidence and facts of this case, his final story matches the evidence, and the fact from all the witnesses . . . [a]s to how the fire was set, as Mr. Mullins walking over there, breaking out the glass, pouring the gasoline, lighting the fire." Smith also testified that Cotton was charged with the same crimes that Mullins was charged with and that Cotton "made a deal" with the government to plead guilty to some charges in exchange for the dismissal of others.

Because defense counsel did not object to the testimony he elicited from Smith during cross-examination, we review the challenged testimony for plain error. *United States v. McConer*, 530

F.3d 484, 500 (6th Cir. 2008). "To show plain error, a defendant must establish the following: "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Arnold*, 486 F.3d 177, 194 (6th Cir. 2007) (quoting *United States v. Cotton*, 535 U.S. 625, 631 (2002)) (internal quotation marks and brackets omitted). "If these three conditions are met, 'an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Cotton*, 535 U.S. at 631).

Upon review, we conclude that Mullins has failed to demonstrate plain error. Even if we assume that error occurred during the trial, Mullins failed to demonstrate that the error affected his substantial rights and seriously affected the integrity of his criminal proceedings. The record contains overwhelming evidence of Mullins's guilt irrespective of the challenged testimony. Specifically, the record contains evidence that Mullins did not want the victims to reside in his neighborhood because of their African-American race and he made his feelings clear to other people; an eyewitness and co-conspirator testified as to how Mullins set the fire and his testimony was consistent with the testimony of expert witnesses regarding the nature and origin of the fire; and another witness testified that Mullins admitted being responsible for the fire and setting it in an effort to cause the African-American victims to move from his neighborhood. Under these circumstances, the challenged testimony does not constitute plain error.

We decline to address Mullins's ineffective assistance of counsel claim. Claims of ineffective assistance of counsel are generally disfavored on direct appeal and are more appropriately brought by filing a 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence. *Massaro v. United States*, 538 U.S. 500, 504-07 (2003); *United States v. Carr*, 5 F.3d 986, 993 (6th Cir. 1993). This is so because the record frequently is not adequately developed at the time of the direct appeal to permit review of an ineffective assistance of counsel claim. *Massaro*, 538 U.S. at 504-05; *Carr*, 5 F.3d at 993. Because defense counsel elicited, and did not object to, the testimony that Mullins now challenges, it appears that counsel's decision to pursue the line of questioning at issue was strategic. However, the record simply is not adequately developed at this time to determine whether

defense counsel's strategy was reasonable. *See United States v. Lopez-Medina*, 461 F.3d 724, 737 (6th Cir. 2006); *United States v. Sullivan*, 431 F.3d 976, 986 (6th Cir. 2005).

Accordingly, we affirm the district court's judgment.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk