No. _____

In The

Supreme Court of the United States

GABRIEL DANIEL MORRISON MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petitioner was gravely prejudiced by the erroneous admission of opinion testimony that another witness was truthful.

2. Whether the prosecutor denied the petitioner his right to a fair trial when he subverted the burden of proof by suggesting that the jury had to credit his co-defendant's account over the account given by a government witness in order to acquit.

3. Whether the petitioner was denied his due process right to a fair trial by the egregiously improper remarks by the prosecutors in their closing arguments.

4. Whether the petitioner was denied his right to a fair trial by the trial court's refusal to comply with the jury's request to read back the testimony of two witnesses.

5. Whether the petitioner's decision not to testify in his own behalf was either knowing or voluntary.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gabriel Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. a1) was unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 16, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment states, in pertinent part, that:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . .

The Sixth Amendment states, in pertinent part, that:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This case presents compelling reasons for this Court to grant certiorari and review the merits of the petitioner's claims. At several crucial stages of his trial, the petitioner was subjected to unfair and highly prejudicial conduct committed by the prosecution, as well as improper rulings by the trial court. In affirming the petitioner's judgment of conviction, the Court of Appeals either sanctioned these improprieties or disregarded them as harmless. However, when the improper conduct and the erroneous rulings are viewed in proper context, it is clear that the petitioner was deprived of his fundamental right to a fair trial.

1. The petitioner and his co-defendant Antonio McGhee were charged with robbing at gunpoint the contents of a Sears delivery truck on January 10, 2012 in Hampton, Virginia. It was further charged that the petitioner and McGhee were assisted in the robbery by truck helper Travis Williams, who testified for the government pursuant to a cooperation agreement, and that truck driver Anthony Wilson was

an innocent victim of the robbery. In contrast, co-defendant McGhee testified that Wilson had also assisted him, the petitioner and Williams in staging what appeared to be a robbery but was, in actuality, nothing more than a larceny.

2. The government's star witness was Travis Williams, a regular marijuana user since the age of 15 who admitted that he sometimes experienced problems with his memory. For his participation in the charge offense, Williams pled guilty to conspiracy to interfering with commerce by robbery and brandishing a firearm during a crime of violence. Testifying pursuant to a cooperation agreement with the government, he hoped that in return, he would receive a vastly reduced sentence than he would have otherwise received.

Williams claimed that the petitioner had sold marijuana to him and occasionally smoked it with him as well. He claimed further that in 2011, the petitioner had asked him if he wanted to rob a Sears truck with him. The petitioner supposedly brought the subject up a second time and on that occasion, showed him a long rifle, causing Williams to feel threatened. About one week later, he claimed that he was approached by co-defendant McGhee who expressed the belief that Williams was going to help him rob the truck.

During the week preceding the offense in question, plans were made to commit the truck theft. On the morning of January 10, 2012, Williams and

Wilson drove their truck to the location where they were to make the first appliance delivery of the day. After Williams installed a washing machine in a house, he returned to the truck and found that Wilson's hands were bound and his face covered with duct tape. The petitioner and McGhee then drove the truck to several locations where they offloaded the truck's merchandise. After the final stop, Williams removed the duct tape that had been used to bind his hands and then removed the tape from Wilson's face. He and Wilson then phoned their employer and informed him that they had been robbed.

Anthony Wilson insisted that he did not participate in the theft from the Sears truck and that he had himself been robbed of personal property by the men who committed the theft of the merchandise. And his assistant manager testified that Wilson was a truthful individual.

Two witnesses called by the government gave brief testimony that tended to undermine the theory that Wilson was an innocent victim of the alleged robbery. One of these witnesses, Anne Ledoyen testified that on the morning in question, she had observed two men exit the Sears truck and drive away in a U-haul truck, an account that suggested that McGhee, the appellant, Williams and Wilson had all participated in the theft of the merchandise.

Antonio McGhee testified that he agreed to participate in a staged robbery of a Sears truck with the

petitioner, Williams and Wilson. During his cross-examination, the prosecutor asked him if Wilson "got it wrong" when he testified that he did not participate in the theft and if he understood that the jury would have to decide whether to believe him or Wilson. McGhee was forced to acknowledge both of these propositions.

After his trial counsel announced that the petitioner would be testifying, the petitioner took the witness stand in preparation. However, during a colloquy that ensued, the trial court advised the petitioner of the benefits that would accrue to him if he didn't testify. At the conclusion of this colloquy, the petitioner stated that he did not wish to testify and the defense then rested.

During the closing arguments, the prosecutor informed the jury that "the government does not take plea agreements and guilty pleas from individuals without ensuring that they come forward with the information they have about criminal conduct"; that the petitioner had to be held accountable for his actions because "justice denied anywhere diminishes justice everywhere;" and that the defense presented was "invented," "fabricated," "bogus" and a "red herring" designed to divert the jurors' attention from the evidence in the case. And when he referred to co-defendant McGhee's false statements, the prosecutor opined, "Criminals do that."

In the course of their deliberations, the jurors sent a note requesting a readback of the testimony of

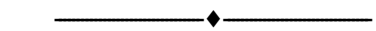
Ledoyen and another witness. Trial counsel urged the court to comply with this request. However, the trial court declined and informed the jury, "We can't read back the testimony to you. To do that would tend to emphasize one piece of testimony over another, in my view. And so you must rely upon your best recollection of the evidence as you all have heard that evidence during the trial."

The jury subsequently convicted the petitioner of all charges submitted.

3. The petitioner appealed his conviction in the United States Court of Appeals for the Fourth Circuit. On that appeal, he argued that his due process right to a fair trial was violated by the trial court's allowance of testimony by Ms. Edwards that Anthony Wilson was an honest person; by the prosecutor's cross-examination of McGhee suggesting that the jury could only acquit if they credited his testimony over Wilson's; and by the prosecutor's egregiously improper remarks during closing arguments. He also argued that his decision not to testify in his own behalf was not made knowingly and voluntarily due to the trial court's misleading statements, and that the trial court had erred when it refused the jury's request to have the testimony of two witnesses reread.

4. In a decision filed September 16, 2014, the United States Court of Appeals for the Fourth Circuit affirmed the petitioner's judgment of conviction in its entirety. In so ruling, that court held that any opinion

testimony regarding Wilson's truthfulness was harmless; that in cross-examining McGhee, the prosecutor had not forced him to assert that Wilson had lied to the extent that it invaded the province of the jury; that although some of the prosecutor's closing argument remarks were "problematic," they did not deny the petitioner his right to a fair trial; that the trial court's refusal to re-read the testimony requested by the jury was proper; and that the petitioner's decision not to testify in his own behalf was made knowingly and voluntarily.



REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS GRAVELY PREJUDICED BY THE ERRONEOUS ADMISSION OF OPINION TESTIMONY THAT ANOTHER WITNESS WAS TRUTHFUL.

The core of the defense was that there was no robbery perpetrated in this case and that no firearm was used during the commission of the truck theft. In fact, the defense contended that the theft of merchandise from the Sears truck was planned by the petitioner, his co-defendant and the two truck workers – Anthony Wilson and Travis Williams. Of course, Wilson insisted that he did not participate in such a plan and that he was simply an innocent victim. And while the defense certainly challenged Wilson's account, there was no evidence to suggest that Wilson's character for truthfulness had been attacked by opinion or reputation evidence. Nevertheless, the trial

court permitted the government to call Wilson's supervisor to testify that in her opinion Wilson was an honest man. This ruling was clearly erroneous and contributed to the denial of the petitioner's right to a fair trial.

Federal Rule of Evidence ("FRE") 608(a) strictly limits the use of opinion evidence attesting to a witness's character for truthfulness to those cases in which the "character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise" has previously been assailed. Neither vigorous cross-examination nor the contradiction of a witness by other evidence suffices to admit evidence of a witness's truthful character under Rule 608(a). *United States v. Thomas*, 768 F.2d 611, 618 (5th Cir. 1985); *United States v. Danehy*, 680 F.2d 1311, 1314 (11th Cir. 1982). This rule is consistent with the principle that credibility determinations "are within the sole province of the jury." *United States v. Lowe*, 65 F.3d 1137, 1142 (4th Cir. 1995).

Here, the defense never sought to attack Wilson's reputation for truthfulness. In fact, the cross-examination of Wilson was fairly ineffectual and certainly did not constitute a "slashing" attack that might have permitted the government to offer evidence of his good character in rebuttal. *United States v. Dring*, 930 F.2d 687, 692 (9th Cir. 1991). Under any interpretation, it cannot be concluded that the defense invited the triggering of the rehabilitation contemplated by FRE 608(a) and it is clear that

the allowance of testimony regarding Wilson's good reputation for truthfulness was erroneous.

Nor can it be concluded that the admission of testimony regarding Wilson's reputation for truthfulness was harmless, as the Court of Appeals found. Though Wilson did not identify the petitioner as a perpetrator, as Williams did, his testimony established almost all of the elements of the offenses charged. Moreover, the prosecutor emphasized the erroneously admitted evidence when he argued in his closing statement that Edwards believed him to be an honest person. Under the circumstances, it cannot be said "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

II. THE PROSECUTOR DENIED THE PETITIONER HIS RIGHT TO A FAIR TRIAL WHEN HE SUBVERTED THE BURDEN OF PROOF BY SUGGESTING THAT THE JURY HAD TO CREDIT HIS CO-DEFENDANT'S ACCOUNT OVER THE ACCOUNT GIVEN BY A GOVERNMENT WITNESS IN ORDER TO ACQUIT.

During his cross-examination of the petitioner's co-defendant, the prosecutor repeatedly asked McGhee to comment on the veracity of government witness Wilson and suggested that in order to decide the case, the jury would have to choose between his version of

events and Wilson's. This line of inquiry subverted the burden of proof and further compromised the petitioner's right to a fair trial.

Virtually all of the federal courts of appeals have condemned prosecutors for asking a defendant to comment on the veracity of a government witness. *United States v. Schmitz*, 634 F.3d 1247, 1268 (11th Cir. 2011); *United States v. Harris*, 471 F.3d 507, 511 (3d Cir. 2006); *United States v. Thomas*, 453 F.3d 838, 846 (7th Cir. 2006); *United States v. Williams*, 343 F.3d 423, 437 (5th Cir. 2003); *United States v. Sanchez*, 176 F.3d 1214, 1219-20 (9th Cir. 1999); *United States v. Sullivan*, 85 F.3d 743, 749-50 (1st Cir. 1996); *United States v. Boyd*, 54 F.3d 868, 871 (D.C. Cir. 1995); *United States v. Richter*, 826 F.2d 206, 208 (2d Cir. 1987). The reasons for this prohibition are numerous and sound.

First, the Federal Rules of Evidence do not permit such questions. *United States v. Henderson*, 409 F.3d 1293, 1299 (11th Cir. 2005). Second, such questions invade the province of the jurors who are responsible for making credibility determinations. *United States v. Kelly*, 592 F.3d 586, 594 (4th Cir. 2010). And third, such questions place defendants in a "no-win" predicament by forcing them to choose "to either undermine their own testimony or essentially accuse another of being a liar." *United States v. Harris*, 471 F.3d at 511.

Here, when McGhee was asked on cross-examination if he disagreed with government witness

Wilson's account and if Wilson "got it wrong," he was essentially being asked by the prosecutor if Wilson had lied, the very tactic that is condemned. Moreover, not content with forcing McGhee to comment on Wilson's veracity, the prosecutor went further and asked him if he understood that the jury "would have to make a decision as to who they're going to believe" and "would have to make a decision whether they believe you or if they believe Anthony Wilson." These questions tended to subvert the burden of proof by suggesting improperly that the jury could only acquit if they believed McGhee and disbelieved Wilson. *United States v. Vargas*, 583 F.2d 380, 386-87 (7th Cir. 1978) (error to tell jurors they had to choose between the two stories); *United States v. Stanfield*, 521 F.2d 122, 125 (9th Cir. 1975) ("The test is, of course, not which side is more believable, but whether, taking all of the evidence in the case into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt.").

Moreover, the petitioner was severely prejudiced by the prosecutor's improper questioning of McGhee. As noted, the questions misled the jurors by suggesting that they were required to choose between the accounts given by McGhee and Wilson in order to reach a verdict. And the error was compounded when the prosecutor argued in his closing statement, "But consider, for Antonio McGhee to be right, at least a number of witnesses, at least Wilson, Williams, and even Linda Linhart, have to be wrong. And that

means that Anthony Wilson has come in and committed perjury."

In short, the improper questioning of the petitioner's co-defendant, coupled with the prosecutor's improper comments, unfairly distorted the burden of proof. The effect of this misconduct was to "infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1975).

III. THE PETITIONER WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE EGREGIOUSLY IMPROPER REMARKS BY THE PROSECUTORS IN THEIR CLOSING ARGUMENTS.

As discussed in Point II herein, the prosecutor's improper cross-examination of the petitioner's co-defendant was certainly egregious. But it was not the only instance of misconduct in which the prosecutor engaged. In addition, the prosecutor committed numerous, serious improprieties during the closing statements. As a result, the petitioner's due process right to fair trial was further compromised. *United States v. Young*, 470 U.S. 1 (1985).

As this Court held nearly 80 years ago:

> "The United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

> therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States, 295 U.S. 78, 88 (1935).

Here, the prosecutor struck numerous foul blows with comments that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

While the prosecutor was certainly entitled to present and comment on evidence regarding Travis Williams's obligation to give truthful testimony pursuant to his cooperation agreement, he was not at liberty to suggest that he could somehow monitor and accurately verify the truthfulness of Williams's testimony. *United States v. Bowie*, 892 F.2d 1494, 1498 (10th Cir. 1990). But this was precisely what the prosecutor suggested when he argued to the jury, "the government does not take plea agreements and guilty pleas from individuals without ensuring that they come forward with the information they have about

criminal conduct." *See United States v. DiLoreto*, 888 F.2d 996, 999-1000 (3d Cir. 1989).

Nor was the prosecutor at liberty to argue that in order to acquit, the jury would have to find that the government witnesses had lied. Thus, when he argued that "for [co-defendant] Antonio McGhee to be right, at least a number of witnesses . . . have to be wrong. And that means that Anthony Wilson has come in and committed perjury," the prosecutor blatantly distorted the burden of proof. *United States v. Reed*, 724 F.2d 677, 681 (8th Cir. 1984).

Not content to vouch for the credibility of his own witnesses and distort the burden of proof, the prosecutor also denigrated the defense which he repeatedly characterized as a "red herring," "invented," "fabricated" and "bogus." These egregiously improper remarks suggested that defense counsel had attempted to divert the jurors' attention from the legitimate trial issues and that his arguments were therefore unworthy of belief. *See United States v. Vaccaro*, 115 F.3d 1211, 1218 (5th Cir. 1997). And repeatedly calling co-defendant McGhee a liar, whose lies constituted "evidence of consciousness of guilt," was a particularly foul blow since it suggested to the jury that he had abused the constitutional right to testify in his own behalf and that he had "attempted to manipulate the outcome of the trial to avoid being held responsible for his true actions." *United States v. Woods*, 710 F.3d 195, 203 (4th Cir. 2013).

Finally, the improper remarks by the prosecutor cannot be considered harmless. Vouching for the credibility of his witness may have led the jury to believe that the prosecutor had some device for ensuring the truthfulness of the witness. Impugning the co-defendant's decision to testify very likely caused the jury to reject his account completely. Given the pervasiveness and deliberate nature of the improper remarks and the relative weakness of the case, it is fair to conclude that the petitioner suffered undue prejudice as a result of these improprieties. *See United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1984).

IV. THE PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO COMPLY WITH THE JURY'S REQUEST TO READ BACK THE TESTIMONY OF TWO WITNESSES.

In the course of their deliberations, the jury requested a readback of the testimony of two witnesses. One of those witnesses, Anne Ledoyen, had offered brief but significant testimony that tended to support the defense which contended that the petitioner, McGhee, Williams and Wilson had staged a robbery and that accordingly, the petitioner and his co-defendant were not guilty of the offenses charged. Though defense counsel urged the court to comply with the jury's request, the trial court rejected it and explained to the jury, "We can't read back the testimony to you. To do that would tend to emphasize one

piece of testimony over another." The jury made no further requests before finding the petitioner guilty of the offenses submitted. This ruling certainly denied the petitioner his right to a fair trial.

While it is often held that the decision to permit a readback of testimony requested by a jury is within the trial court's discretion, the rationale for such discretion is two-fold: first, because requests to re-read testimony may slow the trial if the requested testimony is lengthy, and second, because reading only a portion of the testimony may cause the jury to give that portion undue emphasis. *United States v. Rice*, 550 F.2d 1364, 1375 (5th Cir. 1974). Where those concerns are not present, the trial court's refusal to comply with a readback requested by a jury is erroneous. *United States v. Zarintash*, 736 F.2d 66, 70 (3d Cir. 1984). Moreover, the federal courts of appeals appear to take somewhat different approaches to the soundness of a blanket policy prohibiting the rereading of witnesses's testimony. Thus, the Second Circuit has stated that it has "never sanctioned a broad prohibition against readbacks." *United States v. Criollo*, 962 F.2d 241, 243 (2d Cir. 1992). Indeed, the Second Circuit has held that the policy of merely discouraging readbacks "does not seem to be a particularly wise policy." *United States v. Damsky*, 740 F.2d 134, 138 (2d Cir. 1984).

Here, the rationale for rejecting readback requests from a jury was completely inapplicable. Ledoyen's testimony spanned only 14 pages in the trial transcript. The testimony of Raymond Palamar,

the second witness who was the subject of the read-back request, totaled a mere 8 pages. Accordingly, there was no risk that re-reading their testimony would delay the trial in any significant way. *See United States v. Raab*, 453 F.2d 1012, 1014 (3d Cir. 1971) (finding error where the requested testimony consisted of 40 pages).

Furthermore, there was no risk that the jurors would accord undue emphasis to the testimony they requested to have re-read. Both Ledoyen and Palamar were completely disinterested witnesses who were not involved in the offense in any way. And if the trial court were truly concerned about the impact of permitting the testimonial readback, it could have instructed the jury accordingly. In any event, with respect to Ledoyen, whose testimony "went to the heart of the jury's determination of guilt or innocence," *United States v. Zarintash*, 736 F.2d at 71, it cannot be concluded that it was proper for the trial court to deny the requested readback. And it certainly cannot be concluded that the petitioner received a fair trial as a result.

V. THE PETITIONER'S DECISION NOT TO TESTIFY IN HIS OWN BEHALF WAS NEITHER KNOWING NOR VOLUNTARY.

"A defendant's right to testify in his own defense is rooted in the Constitution's Due Process Clause, Compulsory Process Clause, and Fifth Amendment right against self-incrimination." *United States v.*

Woods, 710 F.3d 195, 200 (4th Cir. 2013), *citing Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987). Moreover, because the right to testify is fundamental in nature, any waiver of the right must be made knowingly and voluntarily. *United States v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998). And in assessing the validity of such a waiver, this Court has instructed courts to "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Though trial counsel has the primary responsibility for advising a defendant of his right to testify, "trial courts must take steps to insure that important constitutional rights have been voluntarily and intelligently waived." *Ortega v. O'Leary*, 843 F.2d 258, 261 (7th Cir. 1988), *citing Brady v. United States*, 397 U.S. 742, 748 (1970). Thus, where a defendant expressed confusion about his right to testify, the Eleventh Circuit held that the trial court was required to correct his misunderstanding by conducting a searching inquiry to ensure that any waiver of that right was made knowingly and voluntarily. *United States v. Ly*, 646 F.3d 1307, 1317-18 (11th Cir. 2011).

Here, where the petitioner expressed obvious confusion regarding his right to testify, the trial court ventured into the fray and conducted an inquiry. Once the trial court took on this task, it was required to ensure that the petitioner's decision as to whether or not to testify was knowing and voluntary. But the record reflects that the trial court failed to discharge that duty.

While the trial court made sure to inform the petitioner of all of the disadvantages of testifying, it did not inform him of the advantage of testifying – the opportunity to tell the jury his side of the story. *Rock v. Arkansas*, 483 U.S. at 52 (the "right to present his own version of events in his own words"). Nor did the trial court inform the petitioner that the decision to testify or not testify was his and his alone. *United States v. Ward*, 598 F.3d 1054, 1059 (8th Cir. 2010).

Furthermore, the atmosphere surrounding the colloquy between the trial court and the petitioner was rushed and pressured. The colloquy took place shortly before the trial recessed at 6:26 p.m., following a lengthy proceeding for which the trial court thanked the jurors for "making arrangements to stay later tonight." The colloquy occurred while the jurors were waiting in the hallway just outside the courtroom. And in the course of the colloquy, the trial court advised the petitioner, "You've got to make a decision now about whether you want to testify or not," a statement that left the petitioner with little opportunity to reflect on such a momentous decision.

Finally, it is clear that the petitioner was prejudiced by the invalid waiver of his right to testify. While the government presented an impressive number of witnesses, the defense presented nothing. Under the circumstances, there is a reasonable probability that the petitioner's testimony would have affected the outcome of the trial. *United States v.*

Marcus, 560 U.S. 258, 262 (2010). This Court should therefore grant the petition for certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-4628

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GABRIEL DANIEL MORRISON MITCHELL, a/k/a G,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Mark S. Davis, District Judge. (4:12-cr-00010-MSD-LRL-2)

Submitted: August 29, 2014
Decided: September 16, 2014

Before NIEMEYER, GREGORY, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Randall D. Unger, LAW OFFICE OF RANDALL D. UNGER, Bayside, New York, for Appellant. Dana J. Boente, United States Attorney, Howard J. Zlotnick, Brian J. Samuels, Assistant United States Attorneys, Newport News, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Gabriel Daniel Morrison Mitchell of conspiracy to interfere with commerce by robbery, in violation of 18 U.S.C. § 1951 (2012); interference with commerce by robbery, in violation of 18 U.S.C. § 1951; carjacking, in violation of 18 U.S.C. § 2119 (2012); and possessing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (2012). The district court sentenced Mitchell to a term of 260 months' imprisonment. On appeal, Mitchell asserts that the district court erred in admitting testimony in violation of Fed. R. Evid. 608(a); the Government improperly cross-examined a defense witness about another witness's credibility; the Government made improper remarks during closing argument; the district court erroneously refused to read back a portion of the testimony as requested by the jury; and the district court failed to ensure that Mitchell knowingly and voluntarily waived his right to testify. Finding no merit in Mitchell's arguments, we affirm.

A.

We review a district court's evidentiary rulings for abuse of discretion and will only overturn rulings that are arbitrary and irrational. *United States v. Cloud*, 680 F.3d 396, 401 (4th Cir. 2012). Further, evidentiary rulings are subject to harmless error review; an error is harmless when we can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010) (internal quotation marks omitted). We conclude, based on the record, that any opinion testimony presented in violation of Rule 608(a) was harmless.

B.

In asserting error by the Government in its cross-examination of Mitchell's codefendant, Antonio McGhee, Mitchell acknowledges that our review is for plain error. Under this standard of review, Fed. R. Crim. P. 52(b) "authorizes an appeals court to correct a forfeited error only if (1) there is an error, (2) the error is plain, and (3) the error affects substantial rights." *Henderson v. United States*, 133 S. Ct. 1121, 1126 (2013) (internal quotation marks and brackets omitted). Because Rule 52(b) is permissive, we will correct the error only if it "seriously affects the fairness, integrity or public reputation of judicial

proceedings." *Id.* at 1126-27 (internal quotations marks and brackets omitted).

Appellate courts have held that it is inappropriate for counsel to ask one witness whether another witness is lying because "[s]uch questions invade the province of the jury and force a witness to testify as to something he cannot know, i.e., whether another is intentionally seeking to mislead the tribunal." *United States v. Harris*, 471 F.3d 507, 511 (3d Cir. 2006) (collecting cases). Here, the Government did not ask McGhee whether another witness was "lying" or otherwise force him to testify to something about which he could not know. Rather than seeking to invade the jury's province, the Government's questions highlighted the fact that credibility determinations were for the jury to decide. In any event, we conclude that Mitchell fails to establish plain error. *See United States v. Beasley*, 495 F.3d 142, 149 (4th Cir. 2007) (finding no plain error in absence of controlling precedent).

C.

Although we have held that error that is plain occurs when a prosecutor states that a defendant has lied under oath, *see United States v. Woods*, 710 F.3d 195, 203 (4th Cir.), *cert. denied*, 134 S. Ct. 312 (2013), we will reverse a conviction based on improper prosecutorial remarks only if "the remarks were, in fact, improper, and . . . the improper remarks so prejudiced the defendant's substantial rights that the defendant

was denied a fair trial." *United States v. Chong Lam*, 677 F.3d 190, 209 (4th Cir. 2012) (internal quotation marks omitted). In assessing prejudice, we consider

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters; (5) whether the prosecutor's remarks were invited by improper conduct of defense counsel; and (6) whether curative instructions were given to the jury.

United States v. Wilson, 624 F.3d 640, 656-57 (4th Cir. 2010). These factors are to be viewed in the context of the trial as a whole, and no single factor is dispositive. *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010). Our assessment of the record in light of the above factors leads us to conclude that Mitchell was not so prejudiced by the prosecutor's problematic remarks that he was denied a fair trial.

D.

Mitchell complains that the trial court refused the jury's request during deliberation to have the testimony of two witnesses read back to it. We review a district court's response to a jury request for abuse of discretion. *United States v. Foster*, 507 F.3d 233,

244 (4th Cir. 2007). Although the trial court has wide discretion to allow rereading of trial testimony, it is disfavored because the jury might accord that testimony undue emphasis. *See United States v. Rodgers*, 109 F.3d 1138, 1143-44 (6th Cir. 1997). Here, the district court denied the jury's request precisely for this reason, and we conclude that the district court did not abuse its discretion.

E.

Finally, Mitchell argues that the district court failed to fully inquire into whether Mitchell's decision not to testify on his own behalf was a knowing and voluntary waiver of his right to do so. Because he failed to raise this issue below, our review is for plain error. *See Henderson*, 133 S. Ct. at 1126-27 (providing standard). We find no error, plain or otherwise, as there is no affirmative duty on a district court to obtain an on-the-record waiver of a defendant's right to testify. *See United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *see also Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998) ("[T]rial counsel, not the court, has the primary responsibility for advising the defendant of his right to testify and for explaining the tactical implications of doing so or not.").

Based on the foregoing, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately

presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED