Outline for Issues Preservation Presentation

Federal Public Defender's Office

Southern District of Ohio

10.30.2020

Standards of Review

DE NOVO – deciding the issue without any deference to the lower court's findings or conclusions

CLEARLY ERRONEOUS – the reviewing court is "left with the definite and firm conviction that a mistake had been committed."

ABUSE OF DISCRETION – "a definite and firm conviction that the trial court committed a clear error of judgment." "A district court abuses its discretion when it relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law."

PLAIN ERROR – an (1) error, that is (2), that (3) "affects substantial rights", AND (4) "seriously affected the fairness, integrity, or reputation of the trial proceedings"

Plain Error Problem

United States v. Al-Maliki, 787 F.3d 784 (6th Cir. 2015) "A lack of binding case law that answers the question presented will also preclude our finding of plain error."

Sufficiency

To successfully preserve a Rule 29 motion for appeal, the defendant must make the motion "at the end of the prosecution's case-in-chief and at the close of evidence." *United States v. Kuehne*, 547 F.3d 667, 696 (6th Cir. 2008) Failure to do so "constitutes a waiver of the objections to the sufficiency of the evidence."

When the defendant "fail[s] to make a timely renewal of his [previously unsuccessful] Rule 29 motion at the close of all the evidence[,]" like Raymore did, we review that challenge under a " 'manifest miscarriage of justice' standard." Id. at 696–97 (quoting United States v. Carnes, 309 F.3d 950, 956 (6th Cir. 2002)). Under that standard, we will not reverse a conviction unless "the record is devoid of evidence pointing to guilt." – *United States v. Raymore* 965 F.3d 475 (6th Cir. 2020).

Rebuttal – same rule - *United States v. Dunnican*, 961 F.3d 859, 877 (6th Cir. 2020).

Expert Witness

United States v. Johnson, 488 F.3d 690, 698 (6th Cir. 2007) - When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately enhances the witness's stature and detracts from the court's neutrality and detachment. "Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so."

Proper method under *Johnson* : (1) ask qualifying questions, and (2) elicit the opinion testimony. If opposing side objects, they get to voir dire on basis of knowledge. No certification in front of the jury.

United States v. Ledbetter, 929 F.3d 338, 350 (6th Cir. 2019) – finding error but not plain error for failing to disclose pretrial, because district court could have fixed with less drastic measures

Hybrid Witness

United States v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006)

A general instruction on weighing officer testimony does not guard against a jury mistakenly weighing opinion testimony as if the opinion were fact, nor does it instruct the jury that they are free to reject the opinions given. Nor does such a general instruction regarding possible law enforcement bias address the additional risk of bias in forming expert conclusions regarding one's own investigation. Here, no instruction on expert witness testimony was given, let alone an instruction on the agents' dual role as fact and expert witnesses. We conclude that the jury instruction given was insufficient to guard against the risk of confusion inherent when a law enforcement agent testifies as both a fact witness and as an expert witness.

"When an agent gives opinions that rely on the agent's specialized training as a law enforcement officer, that testimony is expert testimony, and the agent must be qualified under Rule 702." *United States v. Kilpatrick*, 798 F.3d 365, 384 (6th Cir. 2015).

Closing Argument

Cannot make personal attacks on opposing counsel -*United States v. Prodoehl*, 791 F. App'x 527, 535 (6th Cir. 2019)

Cannot bolster witnesses through reference to evidence not presented to the jury - *United States v. Meadows*, 822 F. App'x 434, 442 (6th Cir. 2020)

Cannot vouch for credibility of its own witnesses - *Stermer v. Warren*, 959 F.3d 704, 729 (6th Cir. 2020)

Cannot shift burden of proof - *United States v. Bradley*, 917 F.3d 493, 506 (6th Cir. 2019) – scale metaphor

Cannot urge the jury to "send a message" to the community - *United States v. Cleveland*, 907 F.3d 423, 438 (6th Cir. 2018)

Bostic

Do not need to object on substantive reasonableness grounds to preserve anything - *United States v. Penson*, 526 F.3d 331, 337 (6th Cir.2008)

A general "procedural reasonableness grounds" objection is meaningless, and protects nothing for appeal. *United States v. Martinez*, 432 F. App'x 526, 533 (6th Cir. 2011)

"When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, --- U.S. ---, 136 S. Ct. 1338 (2016)

Special Conditions of SR

The condition of supervised release must reasonably related to the dual goals of probation, the rehabilitation of the defendant and the protection of the public. *United States v. Cover*, 800 F.3d 275, 282 (6th Cir. 2015)

A district court must adequately state in open court at the time of sentencing its rationale for mandating special conditions of supervised release. *United States v. Brogdon*, 503 F.3d 555, 563 (6th Cir. 2007)

As to special condition terms, the district court is required to find that the condition would not involve "a greater deprivation of liberty than is reasonably necessary". *United States v. Lewis*, 498 F.3d 393,395 (6th Cir. 2007)

Plea Issues

United States v. Ushery, 785 F.3d 210 (6th Cir. 2015) – Rule 11 violation, judge participated in the plea negotiations. No plain error.

United States v. Carter, 814 F. App'x 1000, 1002 (6th Cir. 2020) – no plain error on Government breach of plea