

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-3116

September Term, 2017

FILED ON: APRIL 6, 2018

UNITED STATES OF AMERICA,
APPELLEE

v.

ANTHONY MARCELLUS JAMES,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cr-00126-1)

Before: GARLAND, *Chief Judge*, and ROGERS and KAVANAUGH, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED and ADJUDGED that the case be remanded to the United States District Court for the District of Columbia for proceedings consistent with this order.

Anthony James appeals his conviction for possession with intent to distribute 28 grams or more of cocaine base. At trial, the government presented expert testimony by Detective Joseph Abdalla, an expert on the D.C. drug trade. James' first contention is that some of this testimony violated Federal Rule of Evidence 704(b), which precludes an expert witness from opining on whether the defendant had the mental state that constitutes an element of the crime charged. A district court's evidentiary rulings are normally reviewed for abuse of discretion, but because James did not object during trial, we review for plain error. *United States v. Miller*, 395 F.3d 452, 454-55 (D.C. Cir. 2005).

The testimony in this case mirrors that addressed in *United States v. Miller*, and we reject James' contention for the same reasons we rejected the defendant's identical contention in that case. Like the expert in *Miller*, Detective Abdalla expressly disclaimed any firsthand knowledge of the facts of James' case. Trial Tr. 7/12/13 at 497:13-15. And even if the prosecutor's questions might have invited an impermissible response, Abdalla's response was not impermissible and instead indicated that his answers were based on his generalized knowledge of the drug trade rather than on any special insight into James' mental processes. Trial Tr. 7/16/13 at 530:1-533:24; *see Miller*, 395 F.3d at 455; *United States v. Watson*, 171 F.3d 695, 703 (D.C. Cir. 1999). Given this context, "any abuse of discretion" in allowing the testimony "wasn't obvious enough to qualify as plain error." *Miller*, 395 F.3d at 456. Likewise, the prosecutor's reference to Abdalla's testimony during closing arguments does not change this analysis because, although the prosecutor's repeated use of the word "intended" was problematic, it did not change the fact that the expert did not testify that he had any personal knowledge of James' mental state.

Although we reject James' challenge under the plain error standard, the prosecutor's questions in this case did create a risk that the expert would respond with impermissible testimony. We have previously described the appropriate manner in which to examine an expert on the drug trade, *compare United States v. Boyd*, 55 F.3d 667, 672 (D.C. Cir. 1995) (disapproving mirroring hypotheticals), *with United States v. White*, 116 F.3d 903, 921-22 (D.C. Cir. 1997) (describing a "textbook direct examination of a drug expert"), and we encourage the U.S. Attorney's Office to create a model set of questions for use by its prosecutors in such examinations.

Although James represented himself at trial, the district court appointed standby counsel to assist him. James' second contention on appeal is that standby counsel's performance was constitutionally deficient. At this juncture, we need not decide whether standby counsel can be the subject of a constitutional ineffective assistance claim. *Compare Downey v. People*, 25 P.3d 1200, 1204 (Colo. 2001) (collecting state-court cases considering such claims), *with, e.g., United States v. Oliver*, 630 F.3d 397, 413 (5th Cir. 2011) (holding that there is no right to effective assistance of standby counsel), *and United States v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998) (same). Instead, we will follow our "general practice" of remanding ineffective assistance claims to the district court for an evidentiary hearing in the first instance. *See United States v. Rashad*, 331 F.3d 908, 909 (D.C. Cir. 2003).

On remand, the district court can determine whether standby counsel's performance was deficient and prejudicial. Resolution of those questions may depend on the scope of the defendant's waiver of counsel and of the standby counsel's role in this case. Those are all factual questions, the resolution of which may make it unnecessary to decide the constitutional question that this circuit has not yet addressed. *See Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (internal quotation marks omitted)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk