

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

January 4, 2013

Lyle W. Cayce
Clerk

No. 12-50288

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ERNEST ANTHONY MONTOYA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:11-CR-333-1

Before HIGGINBOTHAM, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

A jury convicted Ernest Anthony Montoya of aiding and abetting the possession with intent to distribute 100 kilograms or more, but less than 1,000 kilograms, of marijuana. The district court sentenced Montoya to 63 months of imprisonment. Montoya argues that his conviction should be reversed because the prosecutor's rebuttal argument improperly bolstered the credibility of two cooperating witnesses. He concedes that review of this claim is for plain error.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 12-50288

To show plain error, the appellant must show a forfeited error that is clear or obvious and that affects his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If the appellant makes such a showing, this court has the discretion to correct the error but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Even assuming that the prosecutor's remarks constituted obvious error, Montoya has not shown that they had the "probable effect" of preventing the jury from "judg[ing] the evidence fairly." *United States v. Young*, 470 U.S. 1, 12 (1985). The evidence against Montoya was "substantial and virtually uncontradicted," *id.* at 20, and Montoya points to no reason why the jury should not be presumed to have heeded the district court's instructions that remarks of counsel are not evidence. *See United States v. Gallardo-Trapero*, 185 F.3d 307, 321 (5th Cir. 1999).

AFFIRMED.