

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7590  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MARTINEZ-MANCILLA and  
RAUL GONZALEZ-RIOS,

Defendants-Appellants.

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Appeals from the United States District Court  
For the Southern District of Texas  
(CR-B92-068-03)

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( May 25, 1993 )

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:\*

Convicted by a jury of controlled substance offenses, Juan Martinez-Mancilla and Raul Gonzalez-Rios appeal, complaining of improper comments by the prosecutor. Concluding that these comments, albeit improper, did not deny the defendants a fair

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

trial, we affirm.

### Background

Martinez-Mancilla offered to sell Larry Councilman, an undercover DEA agent, 120 kilograms of marihuana which he said he had transported from Mexico. They agreed on a price of \$95,000. Martinez-Mancilla arranged a meeting between Councilman and the owners of the contraband, the Lara-Rodriguez brothers, to finalize the terms of the transaction. Gonzales-Rios arrived with Miguel and Carlos Lara-Rodriguez for that meeting, although he was not present during the negotiations. After confirming quantity and price, Miguel Lara-Rodriguez told Councilman to meet him in an hour at a nearby grocery store where they were to make the exchange by switching cars.

The Lara-Rodriguez brothers left with Gonzalez-Rios and drove to a house where a DEA surveillance unit observed Gonzalez-Rios load empty feed bags into the trunk of a red Buick. The Buick was driven to the rear of another house, where the surveillance team lost it, but it reappeared, driven by Gonzalez-Rios, at the grocery store where the exchange was to take place. Miguel Lara-Rodriguez arrived separately. Councilman arrived shortly thereafter. Gonzalez-Rios opened the trunk of the red Buick and showed Councilman the marihuana, some of it inside the feed bags. At Councilman's instructions, Gonzalez-Rios drove the red Buick to Councilman's motel, where he was arrested and the marihuana was seized. Lara-Rodriguez left the grocery store in the car

supposedly containing the money. He escaped but without the money; the DEA had not placed money in the car. Martinez-Mancilla was apprehended thereafter.

A grand jury indicted Martinez-Mancilla and Gonzalez-Rios for conspiracy to possess with intent to distribute more than 100 kilograms of marihuana in violation of 21 U.S.C. § 846 and for the underlying substantive offense of possession with intent to distribute 117 kilograms of marihuana in contravention of 21 U.S.C. § 841(a)(1). Both defendants testified, admitting illegal entry into the United States but claiming to be mere bystanders at the scene of the drug transaction. The jury convicted the defendants on both counts. Martinez-Mancilla was sentenced to 70 months imprisonment and Gonzalez-Rios was sentenced to 60 months. Martinez-Mancilla timely appealed. Gonzalez-Rios' appeal was late but was allowed by the district court pursuant to F.R.A.P. 4(b).

#### Analysis

The sole issue presented for review is the propriety of certain comments made by the prosecutor during rebuttal argument. The objectionable comments were as follows:

PROSECUTOR: There is a certain passion, a little anger, right, that people who break the law who come into the United States. First of all, they have already broken the law, who have the audacity to come here and hide behind the same principles that we are told such as the presumption of innocence.

You know, the presumption of innocence is there to protect the innocent, not to shield the guilty.

So it makes me mad, ladies and gentlemen, that they can come and stand here behind those attorneys that are

being paid to defend them . . .

COUNSEL FOR MARTINEZ-MANCILLA: Your Honor? Excuse me, Mr. Lara. I have to object to that, Your Honor, because the defendant, as you explained earlier to the court at the very beginning of the jury . . .

PROSECUTOR: What is his objection, Your Honor?

COUNSEL FOR MARTINEZ-MANCILLA: That he is entitled to presumption of innocence regardless of considering what country he is from or what his creed or religion. Those are your own words, Judge.

THE COURT: Ladies and gentlemen of the jury, remember my instructions to you. Any time reference is made to law that is inconsistent to that which I have given you in your instructions, you are to disregard all together. You may proceed.

PROSECUTOR: I don't care where they are from. But there is no question that they are here illegally and they broke the law to come here. And they will continue to break the law. And that's exactly what they did when they got involved in this drug case.

And it does make me mad. It does that they can stand here with a straight face and tell you that, to get up on the stand [and] lie to you.

At the conclusion of argument, both defendants moved for a mistrial, which was denied.

We agree with the defendants that the above-quoted comments were improper. "A prosecutor may not give a personal opinion about the veracity of a witness."<sup>1</sup> Even more egregiously, a prosecutor may not imply that a defendant should be denied the presumption of innocence because of his alienage or his criminal history. The government's argument that the jury more likely interpreted the reference to illegal entry as an attack on the defendants'

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<sup>1</sup> **United States v. Murrah**, 888 F.2d 24, 26 (5th Cir. 1989).

credibility is disingenuous. The prosecutor decried "the audacity" of illegal entrants who "hide behind" the presumption of innocence; the relevance of that vitriol to credibility is secondary at best.

We remind:

As representative of the government the prosecutor is compelled to seek justice, not convictions. Justice is served only when convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. Those rules have not resulted from happenstance or indifference but are the product of measured, reasoned thought, marching under the guidon that criminal convictions should be based upon guilt clearly proven in a calm, reflective atmosphere, free of undue passion and prejudice.<sup>2</sup>

Prosecutorial argument of the type challenged herein does violence to this coveted standard.

Our conclusion that the prosecutor's remarks were improper, however, is only the first step of our analysis. Improper prosecutorial comments do not warrant reversal unless they substantially affect the defendant's right to a fair trial. This determination depends on the magnitude of the prejudicial effect of the statements, the efficacy of the district court's cautionary instruction, and the strength of the evidence of guilt.<sup>3</sup> We review the district court's denial of a motion for a mistrial based on prosecutorial misconduct for abuse of discretion.<sup>4</sup> Applying this

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<sup>2</sup> **Id.**, 888 F.2d at 27.

<sup>3</sup> **Murrah; United States v. Lokey**, 945 F.2d 825 (5th Cir. 1991).

<sup>4</sup> **United States v. Rocha**, 916 F.2d 219 (5th Cir. 1990), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991).

standard, we decline to vacate the convictions and order a new trial.

The evidence against both defendants was strong. Councilman's testimony directly proved their complicity. According to Councilman, Martinez-Mancilla conducted the initial round of negotiations for the sale of marihuana which he admittedly had brought into the country and Gonzalez-Rios drove the vehicle containing the marihuana to the exchange site, where he opened the trunk to display it to Councilman. By contrast, the prejudicial effect of the offending comments, considered in the context of the prosecutor's closing argument as a whole and in the wake of the district court's instructions, was weak. A more pointed curative instruction should have been given.<sup>5</sup> We nonetheless conclude that on balance the improper comments do not undermine the reliability of the jury's verdict.

AFFIRMED.

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<sup>5</sup> See **United States v. O'Banion**, 943 F.2d 1422 (5th Cir. 1991).