

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-2139  
Summary Calendar

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United States of America,

Plaintiff-Appellee,

VERSUS

Carol Hunter,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas

(CR-H-91-0200)

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(December 16, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, CIRCUIT JUDGE:\*

Appellant Carol Hunter was convicted of violating 21 U.S.C. §§ 841, 952, 955 after she transported a heroin-laden suitcase into the United States from Nigeria via an aircraft. Hunter appeals, contending that improper jury argument by the prosecutor impaired

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

her right to a fair trial and evidence excluded by the trial court hampered her defense. Finding no reversible error, we affirm.

### **I. Facts and Prior Proceedings**

To analyze the prosecutor's argument in context, it is necessary to understand the facts surrounding Hunter's arrest. In September 1992, after twelve years of separation from her husband, John Dike, Carol Hunter received a phone call from Dike requesting her to visit him in Houston, Texas.<sup>1</sup> Hunter testified that Dike wanted her to visit Nigeria to see the "motherland", and while she was there, to bring back a suitcase full of crushed diamonds. The crushed diamonds were to be secretly hidden within the suitcase in order to avoid paying duty. Hunter agreed and shortly thereafter took a two week trip to Nigeria paid for by Dike. Hunter testified that before she left for Nigeria, she definitely knew she was to pick up a suitcase containing concealed diamonds. She also testified that when she first arrived in Lagos, Nigeria, she stayed in the Delbar Hotel, but later moved to the Hotel Maridian to a room reserved under the name of Mr. and Mrs. John Oak. She explained that her hotel expenses for the trip were paid for by Dike's friends, who also served as her tour guide. In addition, Hunter testified that she kept a ledger of the expenses that she incurred on the trip because Dike had promised to reimburse her for all expenses, including lost wages and babysitting fees.

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<sup>1</sup>Carol Hunter was a resident of Detroit, Michigan, at the time.

Hunter testified that shortly before she left Nigeria, some of Dike's friends brought the diamond-laden suitcase to her, and she carried it on board the aircraft returning to the United States. As she passed through U.S. Customs in Houston, the suitcase was searched, and 1.1 kilograms of heroin were found in a false compartment within the suitcase.

Upon her arrest, Hunter was given Miranda warnings and the opportunity to cooperate with law enforcement officers to apprehend Dike. Hunter agreed to make a "controlled delivery" of the heroin to Dike. It is sufficient to say that the "controlled delivery" was unsuccessful and Dike escaped prosecution.

At Hunter's trial, both parties agreed that Hunter brought heroin into the country from Nigeria. The only issue was whether Hunter did so knowingly. Law enforcement officials present during the seizure at the Houston Intercontinental Airport testified that Hunter presented inconsistent statements concerning the events surrounding her trip to Nigeria.<sup>2</sup> Officers involved in the controlled delivery to Dike testified that Hunter admitted to them that she had known that the suitcase contained narcotics. Hunter's

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<sup>2</sup> For example, Hunter first told one customs agent that she had been to Nigeria to visit the family of her husband. When asked about her occupation, Hunter responded that she was an accountant. The agent himself was a former accountant and when he questioned her about common accounting practices, she admitted that she wasn't an accountant yet, but would soon take a job in accounting. Several hours later, Hunter admitted that her estranged husband was to pay her \$10,000 to smuggle diamond chips into the United States. At trial, Hunter testified that she had gone to Nigeria to see the "motherland" in order to study the customs and traditions of the country so that she could share her findings with the underprivileged black children in her community.

subsequent alleged confession that the suitcase contained narcotics was never memorialized in any form by law enforcement officials. Hunter subsequently testified that she never told any official that she knew or even suspected that the suitcase contained narcotics.

Hunter's defense at trial was that she did not possess the requisite intent for the crimes charged. To support her defense, Hunter employed psychologist Dr. Sally Webster, who testified that Hunter suffered from a personality disorder which included obsessive and self-defeating features. Webster described Hunter's disorder as an obsession with Dike similar to that of the battered woman's syndrome. According to Webster, Hunter could not think rationally or critically about Dike. Webster testified that Hunter's failure to question Dike about the true contents of the suitcase was consistent with this type personality disorder.

Webster testified that she based her conclusion, in part, on the letters that Dike had written to Hunter between 1979 and 1984. The letters showed a pattern of acceptance and then rejection of Hunter and the marriage. Webster testified that Hunter apparently harbored hope of one day restoring her marriage based on these letters and sporadic phone calls spanning twelve years. Hunter testified that she indeed believed that one day she would be reunited with Dike.

Hunter attempted to introduce Dike's letters into evidence to show the basis of Webster's conclusions, but the district court denied the request. Hunter was subsequently convicted and

sentenced to 121 months in prison followed by five years supervised release. She timely appeals to this Court.

## II. Discussion

### A. Exclusion of the Letters

Hunter contends that the district court erred when it refused to admit Dike's love letters, either to show the basis of Webster's opinion, or as non-hearsay to show the effect of the letter on Hunter. Hunter's contention is unconvincing.

A reviewing court will reverse a district court's ruling on the admissibility of evidence only on finding an abuse of discretion. **United States v. Shaw**, 920 F.2d 1225, 1229 (5th Cir.), **cert. denied**, \_\_\_U.S.\_\_\_, 111 S.Ct. 2038 (1991). The district court did not abuse its discretion when it declined to admit the letters. Fed R. Evid. 703 states:

[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Clearly the rule is a permissive one. Webster was allowed to testify about the effects that the letters had on Hunter. Additionally, Webster alluded to the general tenor of at least some of those letters. The district court satisfied the rule inasmuch as Webster based her opinion of Hunter's condition on the letters from Dike, and the court allowed her to testify about the letters.

Second, while the letters might not have been hearsay if used to show their effect on Hunter, their exclusion was not an abuse of discretion. **See** Fed. R. Evid. 801(c). Hunter testified about having received the letters; about the general tenor of the

letters; and about how at least some of the letters made her feel. It is unlikely that the letters themselves would have strengthened her testimony.

### **B. Closing Argument**

Hunter argues that statements made by the prosecutor during closing argument, taken individually and cumulatively, deprived her of a fair trial. This Court's task in reviewing a claim of improper prosecutorial comments is to decide whether the comments substantially affected the defendant's right to a fair trial. **United States v. Diaz-Carreon**, 915 F.2d 951, 956 (5th Cir. 1990) (citations omitted). If the comments cast serious doubt upon the correctness of the jury's verdict, then reversal is required. **United States v. Goff**, 847 F.2d, 149, 165 (5th Cir.), **cert. denied sub nom. Kuntze v. United States**, 488 U.S. 932, 109 S.Ct. 324, 102 L.Ed.2d 341 (1988). In making that determination, the Court is to consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of the appellant's guilt. **Goff**, 847 at 165. "If the evidence to support a conviction is strong, then it is unlikely that the defendant was prejudiced by improper arguments of the prosecutor and reversal is not required." **United States v. Casel**, 995 F.2d 1299, 1308 (5th Cir. 1993) (citation omitted). "The magnitude of the prejudicial effect is tested in part by looking at the prosecutor's remarks in context, and attempting to elucidate their intended effect." **Id.** (citations omitted). Having laid out the applicable legal standard, we now

review the allegedly improper prosecutorial arguments in turn.

First, Hunter argues that the prosecutor improperly attempted to shift the burden of proof.<sup>3</sup> For example, Hunter objected during closing argument when the prosecutor implied that she had failed to introduce evidence of her innocence. Specifically, the prosecutor stated, "She has no witnesses to back up her story." Record at 412. The objection was sustained, and a cautionary instruction was given by the trial court. When viewed in the context of the prosecutor's entire closing argument, however, we conclude that the prosecutor was not intending to imply that Hunter had to prove her innocence. Rather, the prosecutor was commenting on the plausibility of Hunter's defense and the weight of the government's case against her.

Obviously, the defense realizes how implausible their position is. No one could go on this all expense trip to Nigeria, pick up a suitcase where they knew something was in a hidden compartment and not recognize or very, very strongly suspect that there was a controlled substance in there....[I]magine someone giving you...\$200,000 worth of [heroin]...and not letting you know about it. Really. Her story is so implausible it's contrary to common sense. The government has met its burden of proof beyond a reasonable doubt....It would have been great if we had a taped confession. The real world doesn't work that way, but these officers [who] were sworn to protect the public, [are] telling you based on their independent memory that she told them that she knew there was narcotics in that bag. She has no witnesses to back up her story.

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<sup>3</sup> A prosecutor may not "misstate the jury's function or the burden of proof." **United States v. Cantu**, 846 F.2d 1134, 1138 (5th Cir. 1989).



Record at 411-412. The prosecutor's argument was in response to attacks by the defense during closing argument on the credibility and motivation of the law enforcement officers involved in this case. As we have stated before, a prosecutor may respond to character assassinations on government witnesses and may point out the lack of any reason to think a witness is lying. **Case1**, 995 F.2d at 1309. Obviously implausible or inconsistent stories may be commented upon by prosecutors. **United States v. Shabazz**, 993 F.2d 431, 441-442 (5th Cir. 1993)(citations omitted). The government's case against Hunter was strong. She gave an implausible account of events that took her to Nigeria and back to Houston where she was found with 1.1 kilograms of heroin in her suitcase. She gave inconsistent statements to law enforcement officers, and three of those officers testified that she admitted to having knowledge that illegal drugs were concealed in the suitcase. It is unlikely that the defendant was prejudiced by the prosecutor's remark even if it were improper. **Case1**, 995 F.2d at 1308.

Second, Hunter argues that the prosecutor improperly told the jury that in order to acquit, the jury must believe that the law enforcement officers lied. Hunter did not object to the prosecutor's remark, therefore this Court reviews the comments under the "plain error" standard of review. **Goff**, 847 F.2d at 162. Under this standard, reversal is only required if the comments by the prosecutor "seriously affected the fairness, integrity, or public reputation of judicial proceedings[s] and resulted in a miscarriage of justice." **Id.** The prosecutor's comments here do

not rise to the level of plain error. In context, the prosecution was merely responding to defense counsel's argument that none of the veteran law enforcement agents recorded Hunter's alleged confession and that this fact was peculiar and should not be accorded much weight.

Third, Hunter argues that the prosecutor improperly expressed his personal opinion about the case when he said that the Government believed Hunter was guilty. Specifically, the prosecution remarked, "[b]elieve me, ladies and gentlemen of the jury, the only reason she cooperated was that she wanted to get the best deal she could from the government." Record at 395. Hunter did not object. The challenged remark only indirectly implied that the prosecutor believed Hunter guilty and the remark is a fair statement of the inference the Government wished the jury to draw from the evidence. As such, the remark is not plainly erroneous. Next, Hunter complains that the prosecutor improperly vouched for the Government's witnesses when he asked, "would these officers risk perjuring themselves and putting their career[s] in jeopardy to convict a person who lives 1300 miles away [sic] in Detroit?" Record at 400. Hunter did not object to this statement. Again, a prosecutor may respond to character assassination visited upon the Government's witnesses, and may point to the lack of any reason to think a witness is lying. **Case1**, 995 F.2d at 1309. This remark is not plainly erroneous.

Finally, Hunter argues that the prosecutor inflamed the jury by commenting that Hunter had possessed sufficient heroin to

provide "91,000 hits" of heroin to "91,000 addicts in this city...." Hunter objected to this statement. The district court sustained the objection and issued a cautionary instruction to the jury. The prosecutor's reference to 91,000 "hits" of heroin merely restated trial testimony which accounted for the street value and the potential street quantity of the heroin seized from Hunter's suitcase. The prosecutor's reference to "addicts," while not based on evidence adduced at trial, was not sufficiently inflammatory to constitute reversible error given the evidence of Hunter's guilt.<sup>4</sup>

#### **Conclusion**

Based on the foregoing, we affirm Hunter's conviction.

AFFIRMED.

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<sup>4</sup> Hunter also complains of the prosecutor's characterization of heroin as "poison". Hunter did not object to this remark, and we do not believe that calling heroin poison is sufficiently inflammatory to constitute plain error.