UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-8344

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CORNELIUS BANMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-89-CR-460-H)

(March 23, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant Cornelius Banman was convicted of importing into the United States over fifty kilograms of marijuana, in violation of 21 U.S.C. § 952(a) and 960(a)(1) (1988), and of possessing with intent to distribute over 100 kilograms of marijuana, in violation 21 U.S.C. § 841 (a)(1). Banman appeals his conviction, contending that references by government witnesses to his post-arrest silence were improper, that the prosecutor improperly commented on his

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

failure to testify at trial, and that certain prosecutorial remarks made during closing argument deprived him of a fair trial. We affirm.

I

On November 23, 1989, Cornelius Banman drove from Mexico to a border station in El Paso, Texas in a pickup truck loaded with furniture. Abraham Froese, who drove another truck also transporting furniture, followed Banman to the border station. A drug-detecting dog alerted Customs Inspectors to the presence of drugs in Banman's truck. Subsequent inspection of the trucks by inspectors revealed that 238 pounds of marijuana was hidden in the side panels of both trucks and in the furniture both trucks were transporting.

A grand jury indictment charged Banman with one count of importing marijuana into the United States and one count of possessing marijuana with intent to distribute.[1] A jury convicted Banman of both charges and the district court sentenced Banman to a 66 month term of imprisonment.[2] Banman timely appealed his conviction.

II

A

Banman initially asserts that during the prosecution's case-in-chief, the prosecutor elicited three responses from two

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[1] The indictment also charged Banman with one count of conspiracy to import marijuana and one count of conspiracy to possess marijuana with intent to distribute. The jury acquitted Banman of these charges.

[2] The district court also sentenced Banman to a five year term of supervised release and a $100 special assessment.

government witnesses that improperly brought his post-arrest silence to the attention of the jury.[3] He contends that these references to his silence in the face of post-arrest questioning))after Customs Inspectors had administered *Miranda* warnings))violated his Fifth Amendment right against self-incrimination and deprived him of due process of law.

A defendant's post-arrest, post-*Miranda* warning silence may not be utilized by the prosecution at trial. *See Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91 (1976); *United States v. Shavers*, 615 F.2d 266, 269 (5th Cir. 1980). "Although `virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation,' a prosecutor's comments must be evaluated in

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[3] The first allegedly improper reference to Banman's post-arrest silence occurred when Agent Pileggi of the U.S. Customs Service stated, "And when [Banman] said he understood his rights, we asked him about the ownership of the pickup trucks, and he said they both belonged to him. And then I think he elected to speak to an attorney."

The second reference occurred during an exchange between the prosecutor and Agent Telarik of the U.S. Customs Service.

> Q (Prosecutor): Did he exercise his right not to say anything else in response to questions?
> A (Agent Telarik): He just))he was very cooperative, and he just))I think it was pretty much all over [after the *Miranda* warnings were given].

The third improper reference was made during the prosecutor's attempt to clarify Telarik's statement.

> Q (Prosecutor): The questions that . . . [Banman] answered had to do with filling out the form required for his personal history . . . ?
> A (Agent Telarik): That's the one I'm talking about, exactly. Yes.
> Q: Not to the ownership of the vehicles or how the marijuana got in there?
> A: No, no.
> Q: Because he exercised his rights?
> A: Right. . . .

context." *United States v. Laury*, 985 F.2d 1293, 1303 (5th Cir. 1993) (quoting *United States v. Shaw*, 701 F.2d 367, 381-82 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067, 104 S. Ct. 1419, 79 L. Ed. 2d 744 (1984)). Thus, whether the prosecutor's question or a witness's answer referred to a defendant's post-arrest silence is not necessarily dispositive. *See United States v. Carter*, 953 F.2d 1449, 1463 n.5 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2980, 119 L. Ed. 2d 598 (1992). Instead, the correct inquiry is the probable effect the remarks had on the jury within the context of the entire proceeding. *Id*.

We normally review *Doyle* violations for harmless error. *See Carter*, 953 F.2d at 1462. However, Banman failed to object to the comments made by the witnesses. Consequently, we review the references to his post-arrest silence under the plain error standard. *Id*. at 1463. "Plain error is error so great that it cannot be cured at trial; the error `must be obvious, substantial, and so basic and prejudicial that the resulting trial lacks the fundamental elements of justice.'" *United States v. Davis*, 831 F.2d 63, 66 (5th Cir. 1987) (quoting *Unites States v. Birdsell*, 775 F.2d 645, 653 (5th Cir. 1985), *cert. denied*, 476 U.S. 1119, 106 S. Ct. 1979, 90 L. Ed. 2d 662 (1986)). We will reverse under the plain error standard "only to prevent a grave miscarriage of justice." *Laury*, 985 F. 2d at 1304.

We conclude that even if the witnesses' comments can be construed to refer to Banman's post-arrest silence, there is significant evidence in the record of Banman's guilt. *See id.* For

example, evidence presented to the jury demonstrated that: (1) Banman admitted to owning both vehicles in which the marijuana was found; (2) Banman confessed to participation in the marijuana smuggling operation, stating that he was offered $30,000 to transport marijuana from Mexico to Denver, Colorado; and (3) Banman stated that he saw the "press" used to compress the dry marijuana and that he observed related problems with compressing the dry marijuana. Consequently, the witnesses' statements do not constitute plain error. *See id*.

B

Banman next contends that the prosecutor improperly commented on his failure to testify, thereby violating his Fifth Amendment privilege against self-incrimination.[4] Banman objected to the prosecutor's comment and requested that the district court instruct the jury to disregard the prosecutor's comment. The district court gave the requested instruction, but denied Banman's subsequent motion for a mistrial.

"The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify." *United States v. Dula*, 989 F.2d 772, 776 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 172, 126 L. Ed. 2d 131 (1993). A prosecutor's remark constitutes a comment on the defendant's failure to testify if one of two alternative tests is satisfied:

[4] The allegedly improper comment by the prosecutor occurred when the district court asked if a prosecution witness could be excused. The prosecutor responded by stating, "Well, I'd like to keep him in case of rebuttal in case the defendant takes the stand."

"(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *United States v. Collins*, 972 F.2d 1385, 1406 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1812, 123 L. Ed. 2d 444 (1993). We must analyze the prosecutor's remarks "within the context of the trial in which they are made." *Dula*, 989 F.2d at 776.

After reviewing the record, we find that it was not the prosecutor's manifest intent to comment on Banman's failure to testify. The prosecutor did not mention Banman's failure to testify at any other time during the trial and did not focus on it when making the challenged comment. Furthermore, the remark appears to have been made inadvertently. *See Collins*, 972 F.2d at 1406 (asserting that the manifest intent alternative of "the test is not met `if some other explanation for his remark is equally plausible'") (quoting *United v. Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977)).

Banman also fails to demonstrate that the jury would infer that the prosecutor's remark "naturally and necessarily" commented on the defendant's failure to testify. Under this test, "`the question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury necessarily would have done so.'" *Collins*, 972 F.2d at 1406 (quoting *United States v. Carrodeguas*, 747 F.2d 1390, 1395 (11th Cir. 1984), *cert. denied*, 474 U.S. 816, 106 S. Ct. 60, 88 L. Ed. 2d

49 (1985)). The prosecutor's remark reasonably may be interpreted as a generic reference to the possibility of needing a witness for rebuttal testimony rather than as an invitation for the jury to focus on Banman's failure to testify. Consequently, it is not apparent that jurors would "necessarily" view the remark as a comment on Banman's failure to take the stand. *See Montoya v. Collins*, 955 F.2d 279, 287 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 820, 123 L. Ed. 2d 444 (1992) (finding that reasonable jurors could interpret a prosecutorial remark in a permissible manner rather than as a comment on the defendant's failure to testify); *United States v. Rocha*, 916 F.2d 219, 233 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2057, 114 L. Ed. 2d 462 (1991) (same).

Finally, even if a prosecutor comments on a defendant's failure to testify, the district court can offset any alleged harm by instructing the jury to disregard the prosecutor's comment. *See United States v. Knight*, 898 F.2d 436, 439 (5th Cir. 1990); *United States v. Smith*, 890 F.2d 711, 716 (5th Cir. 1989). Here, the district court instructed the jury both after Banman's objection to the prosecutor's remark and in its charge that Banman's silence could not be used against him. Thus, the district court negated any harm caused by the prosecutor's comment. *See Dula*, 989 F.2d at 777 (holding that even if harm was caused by the prosecutor's comments, it was offset by the court's instructions to the jury in the charge).

C

Banman next argues that two remarks made by the prosecutor during closing argument were improper and violated his right to a fair trial. Because Banman failed to object to the prosecutor's remarks, we review Banman's claim using the plain error standard. *See United States v. Hernandez*, 891 F.2d 521, 527 (5th Cir. 1989), *cert. denied*, 495 U.S. 909, 110 S. Ct. 1935, 109 L. Ed. 2d 298 (1990). Plain error is "error so great that it cannot be cured at trial; the error `must be obvious, substantial, and so basic and prejudicial that the resulting trial lacks the fundamental elements of justice.'" *Id*. (citations omitted). The crucial question on review is whether the statements "`cast serious doubt upon the correctness of the jury verdict.'" *Id*. (citations omitted). In making this determination this court must analyze three factors: "(1) the magnitude of the prejudicial effect of the comments; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of the appellant['s] guilt." *Id*. (citations omitted); *see also United States v. Sanchez-Sotelo*, 8 F.3d 202, 211 (5th Cir. 1993).

Banman first complains of a reference by the prosecutor to his religious affiliation.[5] First, while the prosecutor's remark may

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[5] The prosecutor stated to the jury:

> And what happens at the bridge? I believe that the inference that you should take from the evidence is that [Banman] went to make a declaration on the liquor that he had, knowing that his cover as a Mennonite would speed him right on by the bridge. Nobody would suspect a Mennonite of narcotics smuggling.

However, the evidence introduced at trial failed to indicate that Customs Inspectors knew of Banman's religious orientation at the time Banman attempted to cross the border.

have been imprudent, we find the prejudicial effect of the statement to be minimal. Second, because Banman's defense counsel did not object to the statement, no curative instructions were given. However, the district court in the jury charge did instruct the jurors that comments made during closing arguments should not be considered to be evidence. *See Zafiro v. United States*, ___ U.S. ___, 113 S. Ct. 933, 939, 122 L. Ed. 2d 317 (1993) (stating that "`juries are presumed to follow their instructions'") (quoting *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709, 95 L. Ed. 2d 176 (1987)). Third, the evidence was more than sufficient to support the jury's rendition of a guilty verdict against Banman. Consequently, we conclude that the prosecutor's comment regarding Banman's religious affiliation did not contribute to Banman's conviction and, therefore, that the statement does not constitute plain error. *See Hernandez*, 891 F.2d at 527.

Banman also asserts that the prosecutor mischaracterized his defense during closing argument by stating that it rested on attacking the credibility of a prosecution witness.[6] However, Banman concedes that his "case rested on discrediting [the prosecution witness's] testimony." Thus, the prejudicial effect of a prosecutorial statement characterizing the defense's position in this manner is necessarily inconsequential. Furthermore, as we stated earlier, the evidence of guilt was overwhelming.

[6] The witness, a Canadian police officer, testified that Banman confessed to his participation in the marijuana smuggling operation. During closing arguments, the prosecutor stated: "Ladies and gentlemen, you hear[d] the testimony of [the officer. Banman would] ask you, `Well [Banman's] statement wasn't recorded anywhere, so therefore the officer is lying.'"

Accordingly, the prosecutor's remark did not "cast serious doubt on the correctness of the jury verdict." *Id.* (citations omitted).

III

For the foregoing reasons, we AFFIRM the judgment of the district court.