

NOTICE
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2013 IL App (4th) 111098-U

NO. 4-11-1098

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 29, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
JAMEL T. TRAVERS,)	No. 10CF1485
Defendant-Appellant.)	
)	Honorable
)	Timothy J. Steadman,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The State's reliance, in closing argument, on the fact the defendant exercised his constitutional right to deny police officers consent to search his property as proof the defendant knowingly possessed a controlled substance was not plain error as defendant introduced the evidence of the defendant's lack of consent at trial.

¶ 2 In September 2011, a jury found defendant, Jamel T. Travers, guilty of unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2010)). Defendant was sentenced to a prison term of 8 1/2 years. Defendant appeals his conviction, arguing the State, during closing argument, committed plain error when it improperly used his right to refuse consent to a search of his property against him. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Following his October 5, 2010, arrest, the State charged defendant with one count of unlawful cannabis trafficking (720 ILCS 550/5.1(a) (West 2010)) and one count of

unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2010)).

At a jury trial, four detectives with the Street Crimes Unit of the Decatur police department testified.

¶ 5 Detective Chad Larner testified his duties involved monitoring activities of the Greyhound bus system. Detective Larner stated mass transportation was often used to traffic drugs. Greyhound did not require individuals to provide identification when traveling, and luggage was not screened. Greyhound buses stopped at the Pilot Travel Center (Pilot) near Illinois Route 48 and I-72 for a 20-25 minute "travel rest." During this time, passengers were permitted to exit the bus and enter the travel center.

¶ 6 Detective Larner testified, on Tuesday, October 5, 2010, he and Detective Scott Rosenberg were conducting surveillance at Pilot. Detective Larner and Detective Rosenberg were dressed in plain clothes, but wore outer bulletproof vests with bright gold lettering indicating they were police officers. The bus arrived and stopped. The driver exited the bus. Passengers followed. Most of the passengers entered Pilot, but a few remained outside the bus. Detective Larner and Detective Rosenberg boarded the bus and noticed a small number of passengers remained seated on the bus. Detective Larner checked the bathroom and determined it was not occupied. Detective Larner spoke to a male passenger, who remained seated in the back of the bus. Detective Larner then exited the bus to talk to other passengers.

¶ 7 Once outside the bus, Detective Larner spoke with defendant. At the time, Detective Larner stood approximately 10 feet from the front of the bus. As defendant approached the bus, Detective Larner "casually asked" defendant if he had a second to

speak with him. Defendant indicated he did. Detective Larner asked defendant his destination and his departure location. Defendant indicated he was traveling from Phoenix, Arizona, to Illinois. Detective Larner asked defendant for his specific destination. Defendant told him he was traveling to Chicago. Wanting to confirm defendant's statements, Detective Larner asked if he could see defendant's boarding pass or bus ticket. Defendant put his hands in his pants pockets, appearing to search for one, but then stopped and stated he did not know where it was. This concerned Detective Larner, who followed up by asking if defendant would show him some identification. Defendant produced identification, indicating defendant resided in Indianapolis. Detective Larner also asked the reason he had been to Phoenix. Defendant told him he was there for four days for a family reunion. The officer asked on what day the family reunion occurred. Defendant responded it was on a Wednesday. Because the "four days" statement was inconsistent with the "Wednesday" statement, Detective Larner questioned whether defendant was telling the truth.

¶ 8 According to Detective Larner, he asked defendant if he was traveling with any luggage. Defendant stated he was, and he told Detective Larner his luggage was in the bus undercarriage. Detective Larner asked defendant if he had a carry-on bag. Defendant told him he did not. Detective Larner decided to board the bus with defendant. Detective Larner asked defendant where he had been sitting on the bus. Defendant then sat in a seat near the middle of the bus. At that point, Detective Larner noticed a blue duffel bag in the area directly beneath the seat. Detective Larner then asked defendant if the duffel bag belonged to him. Defendant apologized, stating he had made a mistake about where he

was sitting. Defendant stood and began walking to the rear of the bus and showed Detective Larner where he had been sitting. Defendant identified a seat. Detective Larner knew defendant had not been sitting in that seat because, when Detective Larner initially boarded the bus, the man with whom he spoke had been sitting there.

¶ 9 Detective Larner exited the bus and spoke to Detective Rosenbery. Detective Larner asked Detective Rosenbery to observe defendant, who remained seated. Detective Larner went to speak with the bus operator to determine whether a Jamel Travers was traveling on the bus. She confirmed Jamel Travers was a passenger. Detective Larner reboarded the bus and confronted defendant regarding "the musical chairs escapade" that occurred. Detective Larner asked defendant if he would exit the bus to speak with him further. As they were walking down the aisle, near the front of the bus, defendant stopped, pointed to a seat, and stated he had been sitting there. Detective Larner observed a suitcase resting in the seat. He asked defendant if the suitcase was his. Defendant stated it was and apologized, indicating he forgot where he put his luggage. Detective Larner picked up the suitcase and followed defendant off the bus.

¶ 10 According to Detective Larner, he asked defendant if he could search his person. Defendant agreed. During this search, Detective Larner located a bus ticket or boarding pass that had been "significantly torn up into several numerous small pieces." Defendant provided no explanation for the torn ticket. Defendant consented to Detective Larner's search of his suitcase. When Detective Larner opened the suitcase, he found "an extremely large object packaged." This package was concealed inside a large freezer-type bag secured by duct tape. On top of this package, Detective Larner found multiple dryer

sheets. The detectives seized the items and transported them to the police station.

¶ 11 On cross-examination, Detective Larner testified the bus traveled from St. Louis, Missouri, with stops in Springfield and Decatur, Illinois. Detective Larner could not state where the bus stopped before St. Louis, because buses traveling from different locations converge in St. Louis. Detective Larner testified the suitcase contained no markers indicating it belonged to defendant. No clothes were inside the suitcase. Detective Larner stated no clothes would have fit with the 17 pounds of marijuana inside.

¶ 12 During cross-examination, the following conversation occurred between Detective Larner and defense counsel:

"Q. *** Your prior testimony, on direct examination, was that [defendant] consented to the search of his luggage?

A. Yes.

Q. Isn't it true that when you initially asked him[,] he did not consent and that you had contacted Officer Jostes to come out with his K-9 unit Duco?

A. Correct.

Q. And that you pulled two other suitcases out from the bottom of the bus to use as, I guess, comparisons?

A. Yes.

Q. And that you told [defendant] that you were gonna get a search warrant anyway's [*sic*]?

A. No. That is not correct. What I explained to [defen-

dant], after the K-9 sniff of those pieces of luggage, the K-9 subsequently provided a positive indication to [defendant's] luggage. And at that time I walked over to [defendant], who was not handcuffed at that time, but was still standing in front of the bus, and I explained to [defendant] that a K-9, a certified K-9[,] had alerted to the presence of an illegal drug odor emanating [from the] suitcase.

I explained to [defendant] that at that time I had probable cause as a law[-]enforcement officer in the State of Illinois to apply and seek a search warrant for that luggage. At that time, in explaining it to him, I did once again offer him the opportunity to consent to a search of his luggage[. A]t which time, he provided consent to do so.

Q. And when you, initially, asked him he didn't give consent, right?

A. When I initially asked him he said[, ']no, I'll just wait for the K-9.[']"

¶ 13 Detective Larner did not perform any fingerprint analysis of the suitcase or the contents. Detective Larner estimated the street value of the marijuana to be around \$70,000. Detective Larner could not recall finding any money on defendant when he was searched. He agreed he would remember if he had recovered a substantial amount of money on defendant.

¶ 14 On redirect examination, the State asked Detective Lerner, for the first time, a question indicating defendant initially refused the request to search the bag.

¶ 15 Detective Scott Rosenbery testified he and Detective Lerner arrived at Pilot at 10:15 a.m. on October 5, 2010. They were there to perform a "Transportation Safety Check." After the bus stopped, Detective Rosenbery boarded the bus to speak with the passengers who remained on the bus during the rest stop. While on the bus, Detective Rosenbery saw Detective Lerner and defendant board the bus together. The two walked past him to the rear of the bus. Detective Rosenbery continued to talk to other passengers. Detective Lerner then walked back toward the front of the bus and advised Detective Rosenbery to watch defendant while Detective Lerner exited the bus. Detective Rosenbery then engaged defendant in conversation. Defendant told Detective Rosenbery he was traveling from Phoenix to Indianapolis and he had attended a family reunion over the weekend. After Detective Lerner boarded the bus again, Detective Lerner asked defendant to exit the bus. At that point, Detective Rosenbery remained on the bus.

¶ 16 According to Detective Rosenbery, he had contact with defendant again outside the bus. Detective Lerner advised him defendant consented to a search of his person but not of his luggage.

¶ 17 On cross-examination, Detective Rosenbery testified defendant did not seem nervous when he was talking to him. Detective Rosenbery denied Detective Lerner told defendant, after the canine's alert on the bag, defendant better consent to let them search or he was going to obtain a search warrant and search it anyway. According to Detective Rosenbery, Detective Lerner told defendant the dog had alerted and he would be applying

for a search warrant. Detective Rosenbery testified no demand was made.

¶ 18 Detective Scott Cline testified he was a certified crime-scene investigator.

Detective Cline tested the substance found in the suitcase and determined it contained slightly over 18 pounds of cannabis.

¶ 19 Detective Chad Ramey testified as an expert in the field of cannabis distribution.

According to Detective Ramey, the vast majority of cannabis distributed in Macon County originated in South America or Mexico. It would cross the border into, usually, Arizona and Texas. The cannabis seen in Decatur was transported by interstates or shipped. The cannabis found in the suitcase had a street value of roughly \$80,000. Fabric-softener sheets were used in the distribution of cannabis to mask the odor of the cannabis from the police or canine units.

¶ 20 In closing argument, the prosecutor stated the following:

"What happens once they get outside, after the um—officer searches his person? After he consents search of his person, he finds the ticket. The officer asks for consent to search his bag. He says [']nope.['] He denies consent to search the bag. What does that tell you about what he knows about what's inside his bag? He says—the officer says, 'Well, can you describe the contents of your bag?' 'I'll just wait for the K-9.' "

¶ 21 Defense counsel, in closing argument, also made statements regarding defendant's consent to search the suitcase:

"And now [the prosecutor] states he knew what was in the

bag. He knew it was there? Did he? How would he have known? Well, he didn't consent. Well, he said he didn't consent. Well, we're just gonna go get the dogs anyways. We're gonna apply for a search warrant. Would a person who's transporting 18 pounds of marijuana consent to opening a bag? There's logic in it. Why would you have them open a bag if you knew that there was 18 pounds of marijuana in there. It doesn't make any sense, ladies and gentlemen."

¶ 22 The prosecutor responded as follows:

"The question was why would somebody consent to searching their bag when it contains 18 pounds of cannabis? You've got to remember when this was timed. He consented to his person. They found the ripped-up bus ticket. He refused consent to the bag. The K-9 came and it made a positive indication for the presence of cannabis and he was told by the officers [']we have a positive indication for cannabis on your bag. At this point, we have enough information to obtain a search warrant. [']Okay[']. Then, go search it. You might as well go ahead and search it.[']"

¶ 23 The jury found defendant guilty of unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2010)). The trial court sentenced him to a prison term of 8 1/2 years.

¶ 24 This appeal followed.

¶ 25

II. ANALYSIS

¶ 26

Defendant argues the prosecutor committed reversible error by arguing the jury could infer defendant knew what was in the suitcase because he initially refused to consent to a search of the bag. Defendant maintains this argument improperly penalized defendant for exercising a constitutional right.

¶ 27

A. Standard of Review

¶ 28

"Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*." *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007). When reviewing a prosecutor's comments during closing argument, reviewing courts ask whether the comments engendered "substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Wheeler*, 226 Ill. 2d at 123, 871 N.E.2d at 745. If a court of review cannot conclude "the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123, 871 N.E.2d at 745.

¶ 29

B. Plain-Error Doctrine

¶ 30

Defendant did not object at trial to the prosecutor's comments nor did he raise the issue in a written posttrial motion. Despite the resulting forfeiture (see *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010)), defendant maintains reversal is proper as plain error. Under the plain-error doctrine, we may consider an otherwise forfeited argument when the evidence is closely balanced or the error is of such magnitude the accused is denied a fair and impartial trial. *People v. Turner*, 128 Ill. 2d 540,

555, 539 N.E.2d 1196, 1202 (1989). The first step in this analysis is to determine whether an error occurred. *People v. Owens*, 372 Ill. App. 3d 616, 620, 874 N.E.2d 116, 118 (2007).

¶ 31

C. Prosecutor's Statements

¶ 32

Defendant's case law establishes a prosecutor or a court should not rely upon the person's use of a constitutional privilege to convict that person. In *People v. Herrero*, 324 Ill. App. 3d 876, 887-88, 756 N.E.2d 234, 245 (2001), the reviewing court found error when the prosecutor commented on the defendant's decision to exercise his constitutional right to have a trial by jury. The court determined the prosecutor's comments cast "a shadow over the proceedings that simply cannot be ignored." *Herrero*, 324 Ill. App. 3d at 887-88, 756 N.E.2d at 245.

¶ 33

Moreover, in *Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring), when the petitioner appeared before a grand jury, he invoked the protections of the fifth amendment and declined to answer certain questions. At trial, the petitioner took the stand on his own behalf and answered questions he refused to answer before the grand jury. The trial court instructed the jury it could consider the petitioner's invocation of his fifth- amendment rights before the grand jury in determining whether the petitioner was a truthful witness. *Grunewald*, 353 U.S. at 425 (Black, J., concurring). The majority determined, "under the circumstances of this case," the trial court committed prejudicial error and ordered a new trial. *Grunewald*, 353 U.S. at 424. Four justices concurred but observed the following:

"I can think of no special circumstances that would justify use of a

constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution." *Grunewald*, 353 U.S. at 425-26 (Black, J., concurring).

¶ 34 Here, defendant, before his arrest, exercised his right not to consent to a search of his property. See *United States v. Drayton*, 536 U.S. 194, 206-07 (2002) (demonstrating individuals have the constitutional right not to consent to a search of their persons or property). During closing argument, the prosecutor twice told the jury defendant exercised this right and argued defendant's exercise of this right established he knew the contents of the suitcase.

¶ 35 However, no error occurred. Defendant introduced to the jury the evidence he did not consent. When the prosecutor questioned Detective Larner, the prosecutor did not ask questions regarding whether defendant initially refused to consent to a search of his suitcase. The prosecutor instead led Detective Larner from a question describing the suitcase defendant identified, past the circumstances involving the canine unit and defendant's initial refusal to consent, to the following question: "And once you were given consent to search the suitcase, upon opening it what, if anything, did you find?" Defendant, during cross-examination, asked Detective Larner whether he testified

defendant consented to the search and then, upon eliciting testimony regarding the canine search, asked the following: "And when you, initially, asked him he didn't give consent, right?" The jury knew of defendant's refusal to consent because defendant told them via the cross-examination of Detective Lerner. Defendant elicited the evidence, and the prosecutor was free in closing argument to comment upon that evidence.

¶ 36

III. CONCLUSION

¶ 37

We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 38

Affirmed.