

20-4275-cr
United States v. Ramos

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit,
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of
3 New York, on the 17th day of May, two thousand twenty-two.
4

5 **PRESENT:**

1 **BARRINGTON D. PARKER,**
2 **MICHAEL H. PARK,**
3 **EUNICE C. LEE,**
4 *Circuit Judges.*

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3 **UNITED STATES OF AMERICA,**

4
5 *Appellee,*

6
7 v.

20-4275

8
9 **GREGORY RAMOS, a/k/a PROSPECT,**

10
11 *Defendant-Appellant.*
12 _____
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15 **FOR DEFENDANT-APPELLANT:**

HERBERT L. GREENMAN, Lipsitz Green
Scime Cambria LLP, Buffalo, NY.

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18 **FOR APPELLEE:**

MONICA J. RICHARDS, *for* Trini E. Ross,
United States Attorney for the Western
District of New York, Buffalo, NY.
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3 Appeal from a judgment of the United States District Court for the Western District of New
4 York (Vilardo, J).

5 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
6 **DECREED** that the judgment of the district court is **AFFIRMED**.

7 On August 23, 2016, the grand jury returned an indictment charging Defendant Gregory
8 Ramos with four counts: (1) possession with intent to distribute cocaine base, 21 U.S.C.
9 § 841(b)(1)(C); (2) possession with intent to distribute cocaine, 21 U.S.C. § 841(b)(1)(C); (3)
10 unlawful possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C.
11 § 924(c)(1)(A)(i); and (4) unlawful possession of a firearm by a person subject to a domestic
12 violence order of protection, 18 U.S.C. § 922(g)(8).

13 For count 1, the government's theory at trial was that on August 14, 2015, Ramos led police
14 on a high-speed chase in Buffalo, New York, during which he threw baggies containing cocaine
15 base, heroin, and butyryl fentanyl from his vehicle.¹ As to counts 2–4, the government proffered
16 evidence showing that on May 23, 2016, Ramos led police officers on another high-speed chase
17 through the City of Niagara Falls. During the chase, Ramos threw a bag with ammunition and a
18 loaded gun out of the car, which law enforcement later recovered. He also threw a second bag
19 out of the car containing an unknown quantity of white powder, which dissipated after hitting a
20 pursuing police vehicle. Ramos was eventually arrested with two cell phones and \$3,640 in cash
21 on his person. Police also searched Ramos's vehicle and recovered a small amount of cocaine
22 coating the interior of the vehicle as well as a digital scale with white residue, 200 plastic vials, an
23 additional \$804 in cash, and two tablet computers and a phone containing messages related to drug
24 trafficking.

¹ Ramos was not charged with the heroin and butyryl fentanyl conduct.

25 A jury found Ramos not guilty of count 1 and guilty on counts 2–4. Ramos filed two sets
26 of post-trial Rule 29 and Rule 33 motions, which the district court denied. Ramos timely appealed
27 and now raises the same arguments he made in his post-trial motions. We assume the parties’
28 familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

29 Ramos raises five arguments on appeal, all of which are meritless. *First*, Ramos argues
30 that there was insufficient evidence to convict him of possession of cocaine with intent to distribute
31 or possession of a firearm in furtherance of a drug trafficking crime. As to count 2, Ramos argues
32 that the small amount of cocaine recovered (0.56 grams) raises “no inference of an intent to
33 distribute.” Appellant’s Br. at 30. But, “view[ing] the evidence in the light most favorable to
34 the government, [and] drawing all inferences in the government’s favor,” *United States v. Alston*,
35 899 F.3d 135, 143 (2d Cir. 2018) (citation omitted), the circumstantial evidence was sufficient for
36 a rational jury to have found that (1) the reason a small amount of cocaine was recovered was
37 because Ramos discarded the cocaine during the police pursuit, and (2) he intended to distribute
38 the discarded cocaine. Ramos was found with multiple cell phones and over \$3,000 in cash on
39 his person, and his car contained a scale with white residue, plastic vials consistent with those used
40 to distribute drugs, and multiple electronic devices with messages related to drug trafficking.
41 Moreover, the fact that Ramos discarded the bag with white powder while being chased by the
42 police shows consciousness of guilt.

43 As to count 3, Ramos argues that there was no nexus between the firearm and the drug
44 trafficking crime. But there was sufficient evidence for the jury to convict Ramos on the firearm
45 count. “[A] drug dealer may be punished under [18 U.S.C.] § 924(c)(1)(A) where the charged
46 weapon is readily accessible to protect drugs, drug proceeds, or the drug dealer himself.” *United*
47 *States v. Snow*, 462 F.3d 55, 62–63 (2d Cir. 2006). Determining whether a firearm was used as

48 protection for drug-dealing activity is a fact-intensive question. *Id.* at 63. Here, before Ramos
49 discarded the firearm, it was loaded and located in his vehicle, which contained drugs, drug
50 proceeds, and drug paraphernalia. There was thus sufficient evidence that Ramos’s possession of
51 the firearm “facilitated or advanced the instant drug trafficking offense by protecting himself, his
52 drugs, and his business.” *Id.* (cleaned up); *see also id.* (concluding there was sufficient evidence
53 for a conviction under 18 U.S.C. § 924(c)(1)(A) where loaded handguns were found in the
54 bedroom where drugs were packaged and stored for sale and in close proximity to drug
55 paraphernalia, trace amounts of illegal narcotics, and drug proceeds).

56 *Second*, Ramos raises 19 instances of defense counsel allegedly providing him with
57 ineffective assistance of counsel. We affirm the district court’s finding that Ramos failed to show
58 that he was prejudiced by these various errors. In his brief, Ramos states only that “all of the
59 examples listed above were injurious to the defense” and does not explain how any specific
60 example prejudiced him. Appellant’s Br. at 38. For instance, Ramos argues that defense counsel
61 was deficient for opening the door to testimony about drug-related messages on his Facebook
62 account and for failing to investigate whether his Facebook account actually contained those
63 messages. But Ramos fails to explain how he was prejudiced by these alleged shortcomings when
64 the same witness that testified about the Facebook messages also testified about drug-related text
65 messages—unrelated to his Facebook account—that were on Ramos’s phone. In light of the
66 strong evidence against Ramos presented at trial, we conclude that Ramos did not show that “there
67 is a reasonable probability that, but for counsel’s [alleged] unprofessional errors, the result of the
68 proceeding would have been different.” *United States v. DiTomasso*, 932 F.3d 58, 69 (2d Cir.
69 2019) (citation omitted).

70 *Third*, Ramos argues that the district court abused its discretion by admitting the testimony
71 of two government witnesses, Officer Cory Higgins and Agent James McHugh, because their
72 expert testimony was not beyond the ken of the jury. We disagree. This Court has previously
73 affirmed the admission of Agent McHugh’s expert testimony regarding “the kinds of paraphernalia
74 or tools that are typically found in the possession of people who are distributing narcotics.”²
75 *United States v. Willis*, 14 F.4th 170, 185–86 (2d Cir. 2021); *see also United States v. Tutino*, 883
76 F.2d 1125, 1134 (2d Cir. 1989) (“This Court has repeatedly held that the operation of narcotics
77 dealers are a proper subject for expert testimony under Fed. R. Evid. 702.” (cleaned up)). As for
78 Officer Higgins—who testified as a lay witness—Ramos argues that he improperly veered into
79 expert testimony and that this expert testimony was not beyond the ken of the jury. Although this
80 Court has expressed concern when law enforcement officials testify as both fact and expert
81 witnesses, *see United States v. Dukagjini*, 326 F.3d 45, 53–54 (2d Cir. 2003), even assuming
82 portions of Officer Higgins’s testimony were improper, “[t]he inadmissible aspects of [Higgins’s]
83 testimony, viewed in relation to the prosecution’s formidable array of admissible evidence, was
84 merely corroborative and cumulative,” *id.* at 62.

85 *Fourth*, Ramos contends that the government committed prosecutorial misconduct in its
86 summation by shifting the burden of proof, vouching for witnesses’ credibility, putting at issue the
87 prosecutor’s own credibility, and suggesting that defense counsel did not believe its own case.

² Ramos also argues in passing that Agent McHugh did not provide information about the experience that provided the basis for his testimony and that McHugh’s testimony was designed to improperly bolster the testimony of Officer Higgins. Contrary to Ramos’s argument, Agent McHugh testified to the experience and expertise that provided the basis for his expert opinion about drug trafficking. Further, this testimony was also properly used to rehabilitate Officer Higgins’s testimony after it was attacked by defense counsel on cross-examination. *See United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992) (“[T]he credibility of a fact-witness may not be bolstered by arguing that the witness’s version of events is consistent with an expert’s description of patterns of criminal conduct, *at least where the witness’s version is not attacked as improbable or ambiguous evidence of such conduct.*” (emphasis added)).

88 Even if we were to assume that some of the prosecutor’s comments during summation were
89 improper, Ramos does not demonstrate that they caused “substantial prejudice by so infecting the
90 trial with unfairness as to make the resulting conviction a denial of due process.” *United States*
91 *v. Aquart*, 912 F.3d 1, 27 (2d Cir. 2018) (citation omitted). Ramos fails to address prejudice in
92 his brief except in conclusory fashion. There was strong evidence against Ramos, making it likely
93 that he would have been convicted even without the prosecutor’s allegedly improper comments.
94 And the trial court instructed the jury that the attorneys’ closing statements were not evidence and
95 that the government had the burden of proof. This is not the “rare case” where the prosecutor’s
96 summation comments were so prejudicial that relief from conviction is warranted.³ *Aquart*, 912
97 F.3d at 27.

98 *Fifth*, Ramos argues that the district court erred because it did not sever count 1, which
99 addressed the August 2015 incident and contained “inflammatory” evidence about butyryl fentanyl
100 from counts 2–4, which addressed the May 2016 incident.⁴ Appellant’s Br. 53. Federal Rule of
101 Criminal Procedure 14(a) states that “[i]f the joinder of offenses . . . appears to prejudice a
102 defendant . . . the court may order separate trials of counts.” “[T]he denial of a severance motion
103 should be reversed only when a defendant can show prejudice so severe as to amount to a denial
104 of a constitutionally fair trial or so severe that his conviction constituted a miscarriage of justice.”
105 *United States v. Blount*, 291 F.3d 201, 209 (2d Cir. 2002) (cleaned up). We conclude that the

³ Ramos also argues the prosecutor committed misconduct by using evidence about butyryl fentanyl and McHugh’s expert testimony in his summation. As explained above, McHugh’s expert testimony was properly admitted. And Ramos cannot show prejudice from the evidence about butyryl fentanyl where Ramos was acquitted on count 1, the only count related to the butyryl fentanyl.

⁴ Ramos characterizes his argument as a Rule 8 challenge, but it is more accurately characterized as a Rule 14 challenge. Rule 8 allows joinder of counts where “the offenses charged . . . are of the same or similar character.” Fed. R. Crim. P. 8(a). Ramos does not argue on appeal that the offenses charged for count 1 and counts 2–4 were not of similar character. Instead, Ramos argues that the court should have severed the counts because joinder was prejudicial.

106 evidence about butyryl fentanyl was not so prejudicial as to constitute a constitutionally
107 fair trial or a miscarriage of justice, especially in light of the strong evidence presented at trial on
108 counts 2–4.

109 Ramos also argues that there was a retroactive misjoinder in light of his acquittal on count
110 1. “The term retroactive misjoinder refers to circumstances in which the joinder of multiple
111 counts was proper initially, but later developments . . . render the initial joinder improper.” *United*
112 *States v. Hamilton*, 334 F.3d 170, 181 (2d Cir. 2003) (cleaned up). A defendant may be entitled
113 to a new trial if he can show “compelling prejudice” in the form of “prejudicial spillover,” which
114 “requires an assessment of the likelihood that the jury, in considering one particular count or
115 defendant, was affected by evidence that was relevant only to a different count or defendant.” *Id.*
116 at 182 (citation omitted). Here, Ramos fails to demonstrate prejudicial spillover where the jury
117 acquitted him on count 1, the only count related to the butyryl fentanyl. *See id.* at 183 (“The
118 absence of [prejudicial] spillover is most readily inferable where the jury has convicted a defendant
119 on some counts but not on others.” (listing cases)).

120 We have considered the remainder of Ramos’s arguments and find them to be without
121 merit. Accordingly, we affirm the judgment of the district court.

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FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court

A handwritten signature in cursive script that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal of the United States Second Circuit Court of Appeals. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around its perimeter.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: May 17, 2022

Docket #: 20-4275cr

Short Title: United States of America v. Ramos

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:16-cr-74-1

DC Court: WDNY (BUFFALO)

DC Judge: Roemer

DC Judge: Vilaro

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

United-States Court of Appeals for the Second Circuit
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New York, NY 10007

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DC Judge: Vilardo

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature