

May 27, 2022

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEVONTE JEMELL STARKS,

Defendant - Appellant.

No. 19-3256

**Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:18-CR-40105-JTM)**

Paige A. Nichols, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, with her on the briefs), Office of the Kansas Federal Public Defender, Topeka, Kansas, for Defendant-Appellant.

James A. Brown, Assistant United States Attorney (Duston J. Slinkard, Acting United States Attorney, with him on the brief), Office of the United States Attorney, District of Kansas, Topeka, Kansas, for Plaintiff-Appellee.

Before **HOLMES**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **PHILLIPS**, Circuit Judge.

HOLMES, Circuit Judge.

Devonte Starks appeals from his convictions for possession with intent to distribute fentanyl and possession with intent to distribute heroin. The central question that we must address is whether Mr. Starks’s conviction can be upheld after the government advised the jury in its closing argument that Mr. Starks’s right to be presumed innocent no longer existed after the presentation of the trial evidence (i.e., the “presumption-of-innocence advisement”). Mr. Starks did not object to this presumption-of-innocence advisement. Accordingly, we review his appellate challenge under the rigorous plain-error rubric. Under that rubric, we conclude—as the government concedes—that the district court committed clear or obvious error in allowing this advisement to stand uncorrected before the jury. We further believe that this error had some prejudicial effects. Irrespective of whether those effects, standing alone, were sufficient to affect Mr. Starks’s substantial rights and warrant reversal, we conclude that, when those effects are cumulated with the prejudicial effects stemming from two other errors—which the government also concedes—Mr. Starks’s convictions cannot stand. Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we **reverse** Mr. Starks’s convictions and **remand** the case to the district court with instructions to **vacate** its judgment and to conduct further proceedings consistent with this opinion.

I

A

On September 17, 2018, Kansas Highway Patrol Troopers Goheen and Birney stopped a Toyota Camry (“Toyota”) and a Chevrolet Impala (“Chevy”) that were driving single file across Interstate 70 (“I-70”) in Kansas. The Chevy was occupied by two men—Mr. Starks and Kevin Scott—and contained drug paraphernalia, but no drugs. The Toyota was occupied by two women—Toya Avery and Lamika Watt—and contained two drug-laden suitcases holding two kilograms of fentanyl and four kilograms of heroin.

More specifically, Trooper Goheen initially focused on the cars because the Toyota was following the Chevy too closely on the highway. By the time the troopers caught up to the vehicles, they had switched positions and the Chevy (occupied by Mr. Starks and Mr. Scott) was following the Toyota too closely. Trooper Goheen checked the Kansas Turnpike’s computer system—which stores photographs that cameras on the turnpike take of vehicular traffic on I-70—and noted that, on September 13, 2018 (i.e., four days prior), the same two vehicles had passed the Bonner Springs turnpike station, traveling in the same lane, six seconds apart. Based on that information, Trooper Goheen inferred that the vehicles had been intentionally traveling together.

Trooper Goheen pulled up next to the Toyota—occupied by Ms. Avery and Ms. Watt. And, when he did so, the Chevy pulled in behind his vehicle and began

following it too closely. Trooper Goheen radioed Trooper Birney to stop the Chevy for a following-too-closely violation, and he did so. Around the same time, Trooper Goheen observed that the license-plate bracket of the Toyota obscured the state of registration (i.e., Ohio), which is a traffic offense, and he accordingly stopped the Toyota.

Trooper Goheen approached the Toyota on the driver's side. When Ms. Avery, who was driving the Toyota, rolled down her window, Trooper Goheen smelled burnt marijuana. He also observed that Ms. Avery's hands were shaking when she produced her license. Both Ms. Avery and Ms. Watt denied traveling with the occupants of the Chevy. They stated that they were coming from Utah and Colorado and were headed to Kansas City. Ms. Watt said that she was on a business trip that involved recruiting people. They provided Trooper Goheen with a rental agreement for the Toyota; according to the rental agreement, Ms. Watt had rented the vehicle in Ohio five days prior, on the morning of September 12, 2018.

Because of (among other things) the smell of marijuana, Trooper Goheen suspected Ms. Avery and Ms. Watt of committing a criminal offense and instructed them to get out of the Toyota, so he could search it. During the search, Trooper Goheen found fentanyl and heroin in two suitcases in the trunk. Trooper Goheen arrested Ms. Avery and Ms. Watt, both of whom denied knowledge of the drugs. The packages were not tested for fingerprints or DNA.

Meanwhile, Trooper Birney had pulled over the Chevy; Mr. Starks was driving and Mr. Scott was the passenger. As with the Toyota, Trooper Birney smelled burnt marijuana inside this vehicle. Mr. Starks and Mr. Scott told Trooper Birney that they were not traveling with the Toyota and did not know its occupants. Mr. Starks explained that he was following the Toyota too closely because he had his cruise control set and the Toyota slowed down. The Chevy also was a rental vehicle. Trooper Birney obtained the rental agreement; it showed that Mr. Scott had rented the vehicle. When Trooper Birney questioned the two men about their travel plans, they said that Mr. Scott had picked up Mr. Starks in Arizona and they had spent some time in Las Vegas. And, now, they were heading to Topeka, Kansas, to see Mr. Starks's son.

When Trooper Birney returned to his vehicle to perform a records check of Mr. Starks's license, he learned on the radio from Trooper Goheen that, four days prior, the same two vehicles had passed the Bonner Springs turnpike station, traveling in the same lane, six seconds apart, and that Trooper Goheen had found drugs in the Toyota. Trooper Birney then returned to the Chevy and questioned Mr. Starks and Mr. Scott about the marijuana smell; both men denied having or smoking marijuana. Under questioning from Trooper Birney, both men also denied again knowing the occupants of the Toyota. Trooper Birney searched the Chevy but found no controlled substances. He did discover, however, items associated with illegal drugs in the Chevy's trunk—specifically, syringes, a

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