

1 **United States Court of Appeals**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term 2011

5
6 (Argued: March 22, 2012 Decided: July 6, 2012)

7
8 No. 11-676-cr

9
10 _____
11 UNITED STATES OF AMERICA,
12 *Appellee,*

13
14 -v.-

15
16 WALIK WILLIAMS,
17 *Defendant-Appellant.*
18 _____

19
20 Before: SACK, LIVINGSTON, and LYNCH, *Circuit Judges.*

21
22 Defendant-Appellant Walik Williams (“Williams”) appeals from a
23 judgment of conviction and sentence imposed following a jury trial in the United
24 States District Court for the Eastern District of New York (Block, *J.*). Williams
25 contends that certain statements made by the prosecution during summation
26 denied him a fair trial. Finding no plain error in the trial proceedings, we
27 AFFIRM.

28 AMANDA HECTOR, Assistant United States
29 Attorney (Amy Busa, Assistant United States
30 Attorney, *on the brief*), for Loretta E. Lynch,
31 United States Attorney, Eastern District of New
32 York, Brooklyn, NY, *for Appellee.*

33
34 EDWARD S. ZAS, Federal Defenders of New York,
35 Inc., Appeals Bureau, New York, NY, *for*
36 *Defendant-Appellant.*
37

1 LIVINGSTON, *Circuit Judge*:

2 Defendant-Appellant Walik Williams (“Williams”) appeals from a
3 judgment of the United States District Court for the Eastern District of New
4 York (Block, *J.*), entered February 11, 2011, convicting Williams, following a
5 two-day jury trial, of one count of unlawful possession of a firearm by a convicted
6 felon in violation of 18 U.S.C. § 922(g)(2), and sentencing him principally to 70
7 months’ imprisonment. Williams argues that statements made by the
8 prosecution during its summation and rebuttal summation deprived him of his
9 right to a fair trial. He focuses in particular on criticisms by the prosecution of
10 certain arguments made by the defense, on the prosecution’s characterization of
11 witness testimony as “the truth” and “the absolute truth,” and on the
12 prosecution’s statement in rebuttal summation that “[t]his is not a search for
13 reasonable doubt. This is a search for truth and the truth is that the defendant
14 possessed that gun on July 25, 2009.” No objection to these statements was
15 made at trial.

16 We conclude that the Assistant United States Attorney (“AUSA”) erred in
17 her statement that “this is not a search for reasonable doubt[,] this is a search
18 for truth” We find no other error in the prosecutor’s summations and no
19 procedural defect rising to the level of plain error. Accordingly, we AFFIRM the
20 district court’s judgment of conviction and sentence.

BACKGROUND

1. *The Government's Case*

The evidence at trial, which we review in the light most favorable to the government, *see United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004), established that Williams, having previously been convicted of a felony, was found in possession of a weapon on July 25, 2009, when two New York City Police Department (“NYPD”) officers heard gunshots coming from the area of Marcy and Lexington Avenues in Brooklyn and, upon arriving at the scene in an unmarked car, saw Williams standing on the street, firing a gun.

Officer Kevin Brennan and Lieutenant Christopher Devaney were the principal prosecution witnesses. They were in an unmarked vehicle at the corner of Marcy and Lexington Avenues in Brooklyn at around 10:20 p.m. on the night of July 25, 2009, when they heard about six gunshots, followed by as many as fifteen shots, coming from Lexington Avenue. As they turned onto Lexington, they observed dozens of people running into buildings and jumping behind and under cars on the residential street. The officers first observed Williams firing his gun as they drove up Lexington Avenue. They then saw him run across the street, in front of their car. Williams, apparently unaware of the vehicle, next walked in their direction with the gun in his right hand.

1 Officer Brennan and Lieutenant Devaney testified that as Williams
2 approached, he eventually made eye contact with the officers. At this point,
3 Williams pinned his right hand to his side as if to conceal the weapon he was
4 carrying. He then gestured toward the corner of Tompkins and Lexington
5 Avenues, as if to guide them there. When Officer Brennan responded by
6 jumping out of the car and identifying himself as a police officer, Williams began
7 to run.

8 Officer Brennan pursued him. As he chased Williams from six to eight feet
9 behind, Brennan saw Williams toss his weapon to the ground in front of 375
10 Lexington Avenue. Brennan, who never lost sight of Williams from the moment
11 he first observed him, overtook Williams only a few blocks away. Officer
12 Brennan thereafter recovered a .40 caliber pistol from the area where he had
13 seen Williams' weapon discarded. The officers also found five spent .40 caliber
14 shell casings in the area where they had observed Williams shooting—casings
15 shown at trial to have been fired from the pistol they had recovered. Officer
16 Brennan testified that at the precinct that night, during arrest processing,
17 Williams asked him, in substance, why Williams had been arrested when “there
18 was at least five guns out there.”

19 *2. The Defense Case*

20 In her opening statement, defense counsel predicted that Officer Brennan
21 and Lieutenant Devaney would commit perjury about the events of July 25, 2009

1 when they testified at trial, and that their stories would “defy common sense.”
2 The defense called two witnesses of its own. The first, Lashanda Haynes,
3 testified that she was playing cards with her sister, Williams, and a friend at a
4 table outside 385 Lexington Avenue when the shooting began. She ran, as did
5 Williams. She never saw him shoot a firearm, although she could not rule out
6 the possibility that he had a concealed weapon. Next, Phillip Martin, a retired
7 NYPD detective, testified that if someone is firing a weapon, police procedure
8 requires that officers take cover and notify other officers of a description of the
9 shooter and the direction of his travel.

10 *3. The Summations*

11 The prosecution’s initial summation began with a detailed discussion of
12 Officer Brennan’s testimony, and how it alone was sufficient to establish that
13 Williams had possessed the gun and ammunition, as charged. The prosecution
14 then reminded the jury about the defense contention, in its opening statement,
15 that the officers’ testimony would defy common sense. After summarizing and
16 criticizing arguments put forward by defense counsel in the cross examination
17 of various witnesses (such as that the officers’ testimony should not be believed
18 because they never radioed a description of the man they saw or called for
19 backup), the AUSA said:

20 Ladies and gentlemen, it’s the defendant’s suggestions that defy
21 logic here. And you know why, because the evidence in this case is
22 overwhelming. And so the defense has to grasp at straws, has to

1 focus on distractions and that's why you see a whole parade of these
2 suggestions that just don't hold any water.

3
4 They are distractions from the facts that are relevant and critical to
5 the decision that you need to make in this case and that is whether
6 the defendant possessed that gun and ammunition on July 25.

7
8 Now, we just talked about a number of the irrelevant and
9 distracting ways in which the defense has attempted to take your
10 eyes off of the ball, to divert your attention from the real question
11 that you have to decide.

12
13 Now let's talk about how it is that you know that Officer Brennan
14 is telling you the truth.

15
16 App. 294. The AUSA then canvassed several reasons that Officer Brennan's
17 testimony should be believed, pointing, among other things, to the corroborating
18 testimony provided by Lieutenant Devaney and to the forensic evidence. The
19 AUSA concluded by asserting that all the evidence, considered together, proved
20 its case beyond a reasonable doubt.

21 In the defense summation, counsel argued that a number of putative
22 inconsistencies in the testimony of the prosecution's witnesses rendered that
23 testimony incredible and that the infirmities in this testimony, when combined
24 with other alleged shortcomings in the prosecution's case, precluded the
25 government from meeting its burden of proof beyond a reasonable doubt. The
26 defense focused, among other things, on: (1) the supposed unlikelihood that
27 Officer Brennan would chase after Williams without ensuring the discarded
28 weapon had been secured; (2) the absence of DNA or fingerprint evidence; (3) the

1 alleged failure of the officers to radio for help; and (4) the fact that no civilian
2 witnesses had been called to testify for the prosecution. The defense concluded
3 by telling the jury that after hearing all the evidence, “you know what’s missing,
4 a credible story, a story you can trust . . . any assurances they got the right guy,
5 any proof beyond a reasonable doubt.” App. 322.

6 On rebuttal summation, the AUSA began by saying:

7 [F]aced with what is overwhelming evidence in this case, the
8 defense just did the only thing that they can do, which is again to
9 focus on distractions, things that don’t really bear on the
10 fundamental question that you need to decide. Let’s walk through
11 some of the defense’s arguments and talk about why they don’t hold
12 any water.

13
14 *Id.*

15 After going back through the arguments, evidence, and testimony in the
16 case, the AUSA closed with the following statement:

17 The defense has focused on distraction arguments to take your eyes
18 off the ball. Don’t do it. This is not a search for reasonable doubt.
19 This is a search for truth and the truth is that the defendant
20 possessed that gun on July 25, 2009. Hold the defendant
21 accountable with the only verdict that’s consistent with the evidence
22 you have seen and heard in this case, a verdict of guilty.

23
24 App. 330-331. Defense counsel did not object to these statements.

25 4. *The Instructions*

26 After a short break following summations, the district court delivered its
27 charge to the jury. Early in the charge, the court said the following on the
28 government’s burden of proof:

1 We've spoken about the presumption of innocence and reasonable
2 doubt. You all know from your life experience, watching television,
3 that the burden of proof in a criminal case is proof beyond a
4 reasonable doubt. What is it? Okay. The law presumes a
5 defendant to be innocent of all the charges against him. I told you
6 that before. I, therefore, instruct you once again the defendant is to
7 be presumed by you to be innocent throughout your deliberations on
8 this indictment until such time, if ever, that you as a jury are
9 satisfied that the government has proven the defendant guilty
10 beyond a reasonable doubt.

11
12 Thus, the defendant, although accused of the crime in the
13 indictment, begins the trial with a clean slate, that is, no evidence
14 against him. The indictment, as I already told you, is not evidence
15 of any kind, cannot be considered by you whatsoever.

16
17 App. 337-338.

18
19 The court further instructed, also at the start of the charge:

20
21 Now, the burden once again is always upon the government to prove
22 guilt beyond a reasonable doubt. This is with respect to each of the
23 elements that compose the crimes. This burden never shifts to the
24 defendant. The law never imposes upon a defendant in a criminal
25 case the burden or duty to call any witnesses or produce any
26 evidence.

27
28 The defendant is not even obligated to produce any evidence by
29 cross-examining the witnesses for the government. The
30 presumption of innocence alone, therefore, is sufficient to acquit a
31 defendant.

32
33 App. 338. The district court also specifically advised the jury that if it "view[ed]
34 the evidence as reasonably permitting either of two conclusions, one of
35 innocence, the other of guilt, you must, of course, adopt the conclusion of
36 innocence." App. 339. The court then cautioned that "[t]his does not mean,
37 however, that the government's burden of proof is ever less than proof beyond

1 a reasonable doubt.” *Id.* The court gave the remainder of its charge, after which
2 the jury deliberated, and returned a guilty verdict the next day. Following
3 sentencing, Williams timely filed the present appeal.

4 DISCUSSION

5 On appeal, Williams argues that reversal of his conviction is required
6 because the prosecution made improper statements in the course of summation
7 that denied Williams a fair trial. A defendant who, like Williams, “seeks to
8 overturn his conviction based on alleged prosecutorial misconduct in summation
9 bears a ‘heavy burden.’” *United States v. Farhane*, 634 F.3d 127, 167 (2d Cir.
10 2011) (quoting *United States v. Feliciano*, 223 F.3d 102, 123 (2d Cir. 2000)). The
11 defendant must show not simply that a particular summation comment was
12 improper, but that the comment, “viewed against the entire argument to the
13 jury, and in the context of the entire trial, was so severe and significant as to
14 have substantially prejudiced him,” *id.* (internal quotation marks and citations
15 omitted), such that “the resulting conviction [was] a denial of due process,”
16 *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *United States*
17 *v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999)).

18 Where, as here, the defendant did not object at trial to the statements
19 forming the basis of his appeal, the plain error standard applies, requiring us to
20 reject any assignment of error that does not “amount to flagrant abuse” which
21 “seriously affects the fairness, integrity, or public reputation of judicial

1 proceedings,” and causes “substantial prejudice” to the defendant. *Id.* (internal
2 quotation marks omitted). With these principles in mind, we consider each of
3 Williams’s assertions of prosecutorial misconduct in turn.

4 I.

5 Williams argues first that the prosecution’s assertions that the defense
6 was “grasp[ing] at straws,” “focus[ing] on distractions,” and “attempt[ing] to take
7 [the jury’s] eyes off the ball” were improper attacks on defense counsel that
8 require reversal. We disagree.

9 Just as we “see nothing inherently wrong with characterizing a defense
10 tactic as desperate,” *United States v. Elias*, 285 F.3d 183, 190 n.3 (2d Cir. 2002),
11 we do not think it improper or excessive, without more, for a prosecutor to
12 criticize defense arguments as merely being attempts to “grasp at straws” or
13 “focus on distractions.” Williams does not argue that the prosecutor
14 mischaracterized the defense arguments in order to make them appear
15 inconsequential. And as we have said before, “summations—and particularly
16 rebuttal summations—are not detached exposition[s] . . . with every word
17 carefully constructed . . . before the event.” *Farhane*, 634 F.3d at 167 (internal
18 quotation marks omitted) (second omission in original). “A prosecutor is not
19 precluded from vigorous advocacy, or the use of colorful adjectives, in
20 summation.” *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992).

1 Similarly, in the context of a summation focused on the evidence, and on
2 demonstrating for the jury why the prosecution established proof beyond a
3 reasonable doubt, we do not deem a prosecutor’s fleeting remarks to the effect
4 that defense counsel was attempting to distract the jury to be improper. Here,
5 the prosecutor twice cautioned the jury that defense counsel was trying “to take
6 your eyes off the ball.” This is a far cry, indeed, from the sort of sustained attack
7 on the integrity of defense counsel that we held to be reversible error in *United*
8 *States v. Friedman*, 909 F.2d 705, 708 (2d Cir. 1990) (reversing a conviction
9 where, *inter alia*, the prosecution stated in summation that “some people
10 [defense counsel] would have you pull down the wool over your eyes and forget
11 all that, because while some people . . . go out and investigate drug dealers and
12 prosecute drug dealers and try to see them brought to justice, there are others
13 who defend them, try to get them off, perhaps even for high fees”) (omission in
14 original). *See also United States v. Millar*, 79 F.3d 338, 343-344 (2d Cir. 1996)
15 (refusing to reverse a conviction where the prosecution stated in summation that
16 the defense case was “hog wash” and a “smoke screen,” and suggested that
17 defense counsel was trying to “confuse” the members of the jury and “lead them
18 astray”). Indeed, the remarks here amounted to nothing more than a legitimate
19 “attempt to focus the jury’s attention upon the evidence and away from defense
20 counsel’s claims.” *Rivera*, 971 F.2d at 883. We see no error in these remarks,
21 much less plain error.

II.

Williams additionally argues that the prosecution's summation improperly vouched for the testimony of prosecution witnesses as "the truth" or "the absolute truth," and that the AUSA improperly stated at the close of rebuttal summation that "the truth is that the defendant possessed that gun on July 25, 2009." "Attorney statements vouching for the credibility of witnesses are generally improper because they imply the existence of" evidence not placed before the jury, *United States v. Perez*, 144 F.3d 204, 210 (2d Cir. 1998) (internal quotation marks and brackets omitted), and because "prosecutorial vouching 'carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence,'" *United States v. Newton*, 369 F.3d 659, 681 (2d Cir. 2004) (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985)).

Nonetheless, "what might superficially appear to be improper vouching for witness credibility may turn out on closer examination to be permissible reference to the evidence in the case." *Perez*, 144 F.3d at 210. Here, in characterizing the testimony of prosecution witnesses as "the truth" or the "absolute truth," the AUSA "did not suggest that [s]he had special knowledge of facts not before the jury." *Id.* Rather, in each of the instances cited by Williams as improper, it is clear from context that the AUSA was asserting that the statements in question were true because of specific evidence in the trial record,

1 and that after characterizing the statements as “the truth,” the AUSA “then
2 directed the jury’s attention to the evidence supporting [her] contention.” *Id.*
3 Thus, in one of the instances cited by Williams, Appellant’s Br. at 20, the AUSA
4 said:

5 Putting aside the defendant’s statement, the demeanor and nature
6 of the officer’s testimony, your common sense, if that all wasn’t
7 enough, there’s another reason that [] backs up that these officers
8 are telling you the truth, [and that is] the ballistics evidence.

9
10 App. 300. As in *United States v. Perez*, this argument, which simply marshalled
11 the evidence that the government urged proved its case, “did not imply the
12 existence of extraneous proof” and cannot be characterized as improper
13 vouching. 144 F.3d at 210 (internal quotation marks and brackets omitted).

14 Nor do we think that the AUSA improperly vouched for the credibility of
15 witnesses or their testimony by her statement that “the truth is that the
16 defendant possessed that gun on July 25, 2009.” App. 330-331. This statement,
17 made at the end of rebuttal summation, was immediately followed by the
18 AUSA’s request for the jury to “[h]old the defendant accountable with the only
19 verdict that’s consistent with the *evidence you have seen and heard in this case*,
20 a verdict of guilty.” App. 331 (emphasis added). Viewed in context, this
21 statement was not improper vouching but a rhetorical flourish bringing the
22 rebuttal summation to a close. As in *United States v. Miller*, 116 F.3d 641, 683
23 (2d Cir. 1997), “[w]e doubt that [this] statement . . . would have been viewed by

1 the jury as more than an exhortation to find [defendant] guilty based on the
2 evidence.”

3 III.

4 Finally, Williams criticizes the AUSA’s closing statement in rebuttal
5 summation that “this is not a search for reasonable doubt. This is a search for
6 truth” App. 330. As the government conceded at argument, this statement
7 was improper and should not have been made. Though “arriving at the truth is
8 a fundamental goal of our legal system,” *United States v. Shamsideen*, 511 F.3d
9 340, 346 (2d Cir. 2008) (internal quotation marks omitted), “[a] variety of
10 constitutional and procedural rules define the means by which truth is best
11 ascertained in a free society,” *id.*; foremost among those rules in a criminal
12 prosecution are the presumption of innocence and the requirement of proof of
13 guilt beyond a reasonable doubt.

14 To say that “this is not a search for reasonable doubt” but “a search for
15 truth” has the potential to distract the jury from the bedrock principles that
16 “even if the jury strongly suspects that the government’s version of events is
17 true, it cannot vote to convict unless it finds that the government has actually
18 proved each element of the charged crime beyond a reasonable doubt,” and “that
19 if the evidence is insufficient to permit [the jury] independently to ‘find the
20 truth,’ its duty, in light of the presumption of innocence, is to acquit.”
21 *Shamsideen*, 511 F.3d at 346-347. The prosecution thus erred here by failing to

1 frame the question for the jury “by reference not to a general search for truth but
2 to the reasonable doubt standard that the law has long recognized as the best
3 means to achieve the ultimate goals of truth and justice.” *Id.* at 347.

4 Even if the AUSA’s reference to a “search for truth” was both unwise and
5 erroneous, however, that does not mean that reversal is required. The defense
6 did not object to the statement challenged here, and our review is thus only for
7 plain error. And under plain error review, Williams must demonstrate not only
8 that there was an “error” that is “clear or obvious,” but also that “the error
9 ‘affected the appellant’s substantial rights, which in the ordinary case means’ it
10 ‘affected the outcome of the district court proceedings’; *and* . . . ‘the error
11 seriously affect[s] the fairness, integrity or public reputation of judicial
12 proceedings.’” *United States v. Zangari*, 677 F.3d 86, No. 10-4546, 2012 WL
13 1323189, at *7 (2d Cir. Apr. 18, 2012) (quoting *United States v. Marcus*, 130 S.
14 Ct. 2159, 2164 (2010)) (emphasis added).

15 In this case, the AUSA asserted that “this is not a search for reasonable
16 doubt” but “a search for truth” at the very end of rebuttal summation. This
17 isolated remark was followed directly by the court’s charge to the jury, which
18 began with an extensive discussion of the presumption of innocence and the
19 requirement that the government prove guilt beyond a reasonable doubt. App.
20 337-339. Further, in charging the jury on each of the elements of the offense
21 charged, the district court repeatedly stated that the government was required

1 to prove those elements beyond a reasonable doubt. App. 351-356. We presume
2 that jurors follow their instructions. *See United States v. Stewart*, 590 F.3d 93,
3 124 (2d Cir. 2009). And given the timing of these proper instructions (so soon
4 after the improper remark was made), we cannot conclude that their practical
5 effect would have been markedly different if Williams had properly objected and
6 obtained a curative instruction.

7 At any rate, the Supreme Court has admonished that even
8 “[i]nappropriate prosecutorial comments, standing alone, [do] not justify . . .
9 revers[ing] a criminal conviction obtained in an otherwise fair proceeding.”
10 *Young*, 470 U.S. at 11. When considered in the context of the entire trial, we
11 perceive no basis for concluding that Williams was prejudiced by the single
12 improper comment here, much less that he was denied due process. Indeed, we
13 cannot conclude that Williams received anything other than a fair trial.
14 Williams has not made out a showing of plain error, and thus reversal of the
15 conviction is not called for in this case.

16 CONCLUSION

17 We have reviewed Williams’s remaining arguments and find them to be
18 without merit. For the foregoing reasons, the judgment of conviction is
19 AFFIRMED.