IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1083

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES DODSON FOREMAN,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(CR3-91-150-R C/W CR3-91-201-R(CON. IN DC)

(February 9, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Charles Dodson Foreman was convicted of numerous drug-related crimes, including two counts of the use of a firearm in the commission of a drug trafficking offense. He was sentenced to a total of 303 months imprisonment to be followed by a three-

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[*]Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

year term of supervised release. Foreman appeals only his two firearm convictions. We affirm.

I.

In late 1990 and early 1991, as a part of a sting operation, undercover Government agents engaged in numerous drug-related transactions with Foreman and Foreman's associate, Michael Britton. On more than one occasion, Foreman supplied agents with methamphetamine. Government agents also arranged to provide Foreman with significant amounts of various chemical substances used in the manufacture of methamphetamine, including phenylacetic acid, formic acid, ether, formamide, and methylamine. In May 1991, an undercover agent gave Foreman twenty-five pounds of phenylacetic acid[2] in exchange for cash and methamphetamine. Thereafter, Foreman was arrested in his automobile. Police recovered a .38 caliber semiautomatic pistol in a jacket that was draped over the driver's seat; Foreman admitted that the pistol belonged to him. During a subsequent search of Foreman's residence, law enforcement authorities recovered significant evidence of methamphetamine distribution -- over 80 grams of the illicit substance, large amounts of United States currency, and drug scales and other paraphernalia -- as well as a small arsenal of firearms.[3]

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[2] Phenylacetic acid is a "listed" chemical under 21 U.S.C. § 802(34)(H).

[3] Authorities seized one .45 caliber pistol, one .41 caliber magnum revolver, one .357 magnum caliber revolver, one .410 gauge shotgun, three 12 gauge shotguns, one 16 gauge shotgun, one .30-.30 caliber rifle, one .22 caliber rifle, one .38 special pistol,

In the Government's original five-count indictment, Foreman was charged with a variety of drug-related offenses relating both to his possession of phenylacetic acid, which he intended to use in the manufacture of methamphetamine, and his distribution of methamphetamine.[4] In a superseding indictment, counts six and seven additionally charged Foreman with possessing a firearm "during and in relation to" a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1). Foreman was convicted of all counts following a jury trial.

II.

On appeal, Foreman raises three claims which relate to the sufficiency of counts six and seven of the superseding indictment and the adequacy of the district court's jury instructions on those counts. The pertinent language of the superseding indictment reads as follows:

> On or about May 7, 1991, . . . CHARLES DODSON FOREMAN, defendant, did knowingly and intentionally use a firearm during and in relation to each of the drug trafficking crimes listed below for which he may be prosecuted in a court of the United States:

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one .357 magnum rifle, and one bolt-action rifle of undetermined caliber.

[4] Those five counts were: i) conspiracy to possess a listed chemical, knowing and having reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance without authorization, in violation of 21 U.S.C. § 841(d)(2); ii) possession of a listed chemical, in violation of 21 U.S.C. § 841(d)(2); iii) using a telephone to facilitate the commission of a drug trafficking felony, in violation of 21 U.S.C. § 843(b); iv) two counts of distributing methamphetamine, in violation of 21 U.S.C. § 841(a)(1).

COUNT	DRUG TRAFFICKING CRIME
6	Distribution of methamphetamine
7	Conspiracy to possess a listed chemical

Each in violation of Title 18, United States Code, Sections 924(c)(1) and (2)

With respect to those two counts, the jury was instructed that:

> Counts 6 and 7 charge that on May 7, 1991, the Defendant Charles Dodson Foreman knowingly and intentionally used a firearm during and in relation to the distribution of methamphetamine (Count 6) and in the furtherance of a conspiracy to possess a listed chemical (Count 7), both in violation of 18 U.S.C. § 924(c)(1). In order to establish a violation of this statute, the Government must prove beyond a reasonable doubt:
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> First: That the defendant committed the crimes alleged in Counts 6 (distributing methamphetamine) and in Count 7 (conspiring to possess a listed chemical); and
> Second: That the defendant knowingly used or carried a firearm during and in relation to the defendant's commission of the crimes alleged in Counts 6 and 7.
>
> INSTRUCTIONS
>
> The Government is not required to prove that the defendant actually fired the weapon or brandished it at someone in order to prove "use" of a firearm, as charged in the indictment. However, you must be convinced beyond a reasonable doubt that the firearm was an integral part of the drug offenses charged.
> The term "firearm" means any weapon which will or is designed to expel a projectile by the action of an explosive. The term "drug trafficking crime" includes the distribution of methamphetamine (Count 6) and conspiracy to possess a listed chemical (Count 7).

A) The district court's failure to require the jury to specify that it unanimously found that a particular weapon was used "during and in relation to" each predicate offense

Foreman first argues that the district court erred by failing to give jurors a specific charge on counts six and seven that would have required jurors in effect to return a special

verdict unanimously finding that a particular weapon or weapons were used "during and in relation to" each of the two predicate offenses.[5]

This two-pronged argument is rather complex.[6] First, Foreman claims that because the superseding indictment and corresponding jury charge regarding counts six and seven simply referred to a "firearm," without specifying which firearm or firearms of the many seized, jurors could have convicted him on the two counts without reaching a unanimous agreement that any single weapon was used "during and in relation" to either the two predicate drug offenses. The possibility of such impermissible "mixing and matching" requires reversal, Foreman contends.

In a similar vein, Foreman argues that one or more jurors could have voted to render the general verdict based in part on evidence that was insufficient to convince a rational juror

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[5] The predicate drug offense for count six was distribution of methamphetamine (cross-referencing count one of the indictment); the predicate drug offense for count seven was conspiracy to possess a listed chemical (cross-referencing counts four and five of the indictment).

[6] As Foreman states in his brief:

> The . . . problem is that the jury's charge is so vague in regard to Counts Six and Seven that it is impossible to avoid two particular problems. (1) There is a potential for a less than unanimous verdict by the jury in regard to . . . which gun use went to which drug trafficking offense. (2) Because of the vagueness of the charge as worded, it is impossible to rule out the [possibility] that there may have been insufficient evidence for a determination by the jury that the particular guns in question and the use of those guns adequately support the jury's verdict in either Count Six or Count Seven.

beyond a reasonable doubt that one or more firearms were used "during and in relation to" each of the two predicate offenses. The basis of this second prong of Foreman's claim is the argument that some of the weapons seized by police and offered into evidence at trial were not sufficiently connected with the predicate drug crimes for purposes of establishing a § 924(c)(1) violation.[7] Foreman claims that only a unanimous special verdict specifying which particular weapons were involved in the two predicate offenses would have obviated the possibility that one or more jurors based their votes on insufficient evidence.

We observe that not only did Foreman's requested jury instructions fail to request any special instruction on unanimity, but also his oral objections to the charge did not complain of the absence of such a special instruction. Therefore, our review of the district court's failure to give the special instruction on unanimity is circumscribed by the "plain error" standard. See United States v. Razo-Leora, 961 F.2d 1140, 1147 (5th Cir. 1992) (citing cases). In this context, a plain error is one that is "`so fundamental as to have resulted in a miscarriage of justice.'" Id. (quoting United States v. Yamin, 838 F.2d 1346, 1350 (5th Cir. 1988).

To support a conviction under 18 U.S.C. § 924(c)(1), which separately criminalizes use of a firearm "during and in relation to" a drug trafficking offense, the Government is obligated to

[7] Although he never cites the case, Foreman is actually invoking Jackson v. Virginia, 443 U.S. 307 (1979), as he is in effect making an evidentiary sufficiency challenge.

show only that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking; the government is not required to show the weapon was affirmatively used, handled, or brandished. United States v. Molinar-Apodaca, 889 F.2d 1417, 1424 (5th Cir. 1989). Proof of possession of a firearm in such circumstances is sufficient to prove the requisite use if the possession is "an integral part of the felony." United States v. Rocha, 916 F.2d 219, 237 (5th Cir.), cert. denied, 111 S.Ct. 2057 (1991) (internal quotations omitted). The presence of loaded firearms at the home of a defendant where drugs, money, and ammunition are also found is sufficient to establish the use of a firearm as "an integral part" of a drug trafficking crime in violation of § 924(c)(1). Weapons in the home may facilitate a drug crime because a drug trafficker may use the guns to protect the drugs. The fact that the defendant is arrested at a different place from where the weapon is found is legally insignificant. United States v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir.), cert. denied, 112 S.Ct. 2278 (1992).

As is apparent from the above quotation of the jury charge regarding counts six and seven of the superseding indictment, the district court correctly instructed jurors on the general principles applicable to § 924(c)(1). Foreman's only complaint is that the court failed to require jurors to specify that they unanimously agreed that a particular weapon or weapons seized

were used "during and in relation to" the two predicate offenses. The Government argues that no such specificity is required.

For purposes of analysis, it is helpful to divide the various weapons seized in relation to the two predicate offenses listed in the indictment and jury charge. The predicate offense for count six was distribution of methamphetamine, which cross-referenced counts four and five of the indictment. The predicate offense for count seven was conspiracy to possess a listed chemical, which cross-referenced count one of the indictment. At trial, the Government's evidence and arguments made it unmistakably clear that the single .38 caliber pistol seized from Foreman's jacket in his automobile -- of which he admitted possession -- was the only weapon involved in the conspiracy to possess a listed chemical, which was the predicate crime of count seven of the indictment. When Foreman was arrested while driving his automobile, he was returning from an illegal delivery of phenylacetic acid. Similarly, the Government's evidence and jury arguments made it unmistakable that the weapons seized at Foreman's apartment were not used "during and in relation to" the conspiracy to possess phenylacetic acid, but instead only were relevant for purposes of count six of the indictment, whose predicate offense was distribution of methamphetamine.

Whatever the merits of Foreman's argument that the district court should have given a unanimity instruction, we can hardly say that its absence was plain error. Jurors were instructed that counts six and seven concerned separate predicate crimes;

they simply were not instructed to specify which firearms related to which predicate crime in rendering their general verdict. Because of the clear demarcation in the evidence and jury arguments between the two predicate offenses at trial, there was no appreciable danger that jurors could have failed to understand that count six concerned Foreman's distribution of methamphetamine and that count seven concerned the conspiracy to possess a listed chemical. Cf. United States v. Privette, 947 F.2d 1259, 1263 (5th Cir. 1991) (in a § 924(c)(1) case, court noted that "the facts of a case might permit no reasonable conclusions" except that a particular firearm was involved in a particular drug crime, when more than one firearm and more than one drug offense were involved). Thus, there was no realistic danger that Foreman's jurors, in reaching their general verdict, could have reached what was in effect a non-unanimous decision on either count six or seven by "mixing and matching" the different weapons involved in the two separate predicate crimes.

We agree with Foreman, however, that there is more of a danger that his jury may have "mixed and matched" multiple weapons in determining that a firearm was used "during and in relation to" the distribution of methamphetamine. Unlike count seven, the venue of the commission of count six was Foreman's home, from which police seized approximately a dozen firearms. However, at trial, despite brief mention of the fact that numerous firearms were found in Foreman's residence, the great weight of the evidence and testimony concerned only two of the

weapons seized at Foreman's home -- a .357 caliber pistol found in the master bedroom and a sawed-off shotgun found on a work bench.[8] Thus, there is a theoretical possibility that Foreman's jurors may have "mixed and matched" the weapons seized from Foreman's home in convicting him of count six.

We must determine whether this was problematic. In doing so, we address Foreman's two related, but distinct, grounds of error. First, if indeed jurors "mixed and matched" the firearms seized from Foreman's residence, there is a theoretical possibility that no twelve jurors could have voted to convict on count six with respect to the same firearm. If this were the case, and the general verdict were thus a patchwork of juror agreements on multiple weapons, an argument could be made that reversal would be necessary. However, because there was overwhelming evidence that at least one weapon was directly linked to methamphetamine distribution -- namely, the .357 caliber pistol seized from Foreman's master bedroom -- we have no reason to believe that the jurors' unanimous general verdict on count six was a product of patchwork. Furthermore, if indeed less than a unanimous number of jurors considered other firearms as well as the .357 caliber pistol, this consideration of the

[8] As Foreman states in his brief, "[t]he evidence in this case refers primarily to three separate weapons: (1) [the] handgun recovered in [the] coat found in [the] El Camino driven by Appellant at the time of his arrest; (2) [the] sawed-off shotgun recovered from a work bench in the home at 4414 Ridgedale, Mesquite, Texas; and (3) [the] handgun recovered in the bedroom next to some cash and methamphetamine in the drawer next to the bed . . . . "

other firearms would have been irrelevant since jurors were of one mind with respect to at least one firearm. We thus see no need to reverse on this ground.

We believe the same analysis applies to Foreman's related claim that a patchwork general verdict could have been based, in part, on insufficiently linked weapons -- thus, implicating the rule in Jackson v. Virginia, 443 U.S. 307 (1979). We consider it impossible that a rational juror in this case could have found that a weapon other than the .357 caliber pistol found in Foreman's master bedroom was linked to the predicate drug crime and not also have found that the .357 caliber pistol was linked as well. As discussed, supra, that particular firearm was found lying next to methamphetamine and United States currency. No other firearm of the dozen seized was as directly linked to the predicate drug crime.[9]

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[9] Foreman cites a Third Circuit case which, he contends, requires reversal. In United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989), the court was faced with a situation superficially similar to what we face in the present case. The indictment charging a § 924(c)(1) violation and the corresponding jury charge in that case made reference to four firearms found in and around the defendant's home, yet the jury returned a general verdict not specifying whether jurors had reached a unanimous decision with respect to one or more of the four weapons. Id. at 597. The Third Circuit held that "[s]ince the jury's general verdict does not reveal which of the guns the jury had concluded he had used during the conspiracy, we can uphold the verdict only if all the firearms can be deemed to have been used in the cocaine trafficking conspiracy." Id. (citing cases). Because three of the four guns at issue were found inside a trashcan on the porch of the house, the court reversed, holding that the evidence did not support a finding that all four weapons were used "during and in relation to" the predicate drug crime. Id. Whatever the merits of the Third Circuit's approach in Theodoropoulos, we believe that case is distinguishable because the shotgun found in the defendant's apartment, which the court

B. Foreman's Double Jeopardy claims

Foreman next claims that there was a double jeopardy violation because the Government failed to link the two predicate drug offenses alleged in counts six and seven of the superseding indictment to discrete uses of firearms. Foreman simply rehashes the essential argument that he raised supra.

To support his theory of double jeopardy, Foreman cites United States v. Privette, 947 F.2d 1259 (5th Cir.), cert. denied, 112 S.Ct. 1279 (1992). In Privette, the Government charged the defendant with two separate violations of § 924(c)(1), based on several predicate drug offenses. However, the Government failed specifically to allege that each of the two firearms offenses was based on a different predicate drug crime. Id. at 1262 & n.1. This court reversed, holding that each § 924(c)(1) charge must be tied to a specific and separate drug trafficking offense to avoid the possibility that the jury would base two firearms charges on the same drug trafficking crime. We remanded for resentencing, in which we required the Government to elect only one of the two firearms counts. Privette, 947 F.2d at 1262-63. We noted that to avoid violating double jeopardy principles, the indictment should clearly identify the drug offense supporting each firearms count. Id. at 1263.

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considered sufficiently linked to the predicate offense, was not as directly linked with the predicate drug offense as the .357 pistol in Foreman's case. See Theodoropoulos, 866 F.2d at 595-97. Where, as in the present case, there is at least one firearm unquestionably linked to the predicate crime, the district court's failure to require a special verdict on which firearm the juror found to be linked does not amount to plain error.

In Foreman's case the Government avoided any double jeopardy problem by establishing the necessary linkage between each firearm charge and its corresponding predicate drug offense. The superseding indictment specifically mentioned the particular drug offense supporting each firearms count. Even if this were not so, we noted in Privette that the facts of a case might permit no reasonable conclusion of double punishment. Privette, 947 F.2d at 1263. Here, the facts are such that there is no doubt that the firearm seized from Foreman's car was directly linked to the conspiracy to possess the listed chemical; nor is there any doubt that the at least one firearm seized from his residence (the .357 caliber pistol located in his bedroom) was directly linked to the distribution of methamphetamine.

Finally, Foreman argues that the district court's jury instructions regarding counts six and seven of the superseding indictment resulted in double jeopardy. He argues that since the jury instructions did not require jurors to specify which particular firearm was used in connection with each of the two § 924(c)(1) charges, the jury could have convicted him of the same "gun use" on the two different firearms charges, thereby resulting in a double sentence for the same criminal violation. He distinguishes this claim from his first claim by pointing out that the latter suggested the possibility of a non-unanimous verdict, while this claim is based on the possibility that his jury could have taken two bites at the same apple by basing both § 924(c)(1) counts on the same "gun use."

While the claims are distinct, our rationale for rejecting the two claims is identical. While the superseding indictment and jury instructions simply referred to a "firearm," without specifying which firearm or firearms supported the Government's allegations, we believe that "the facts of [this] case permit no reasonable conclusion of double punishment." Privette, 947 F.2d at 1263. As we stated above, the evidence permits only one rational finding: the pistol seized from Foreman's car was clearly the basis of count seven and the firearms in Foreman's house (in particular, the pistol seized from his bedroom) were the basis of count six. There was no double jeopardy violation.

III.

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