

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2091

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELBERT ALLEN CHILDS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
H CR 91 108 1

(July 8, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Elbert Allen Childs appeals from his conviction for possession of a firearm in and affecting commerce while a convicted felon, and from the sentence he received for that conviction. We affirm both his conviction and sentence.

* 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 Pursuant to that rule, we have determined that this opinion should not be published.

I

At approximately 2:00 a.m. on the morning of April 26, 1991, while Houston Police Sergeants Nicholas Matson and Larry Murray were on plain-clothes patrol, a maroon Jaguar ran a red light and almost collided with their unmarked vehicle. They followed the Jaguar, which stopped on its own shortly thereafter. The officers approached the vehicle as its three occupants were exiting; Childs, who was the last to leave the vehicle, hesitated when exiting and glanced back inside. Matson identified himself as a police officer and asked the individuals to walk to the rear of the vehicle. Murray obtained identification from the three individuals: the driver was identified as Olean Ayers, the front-seat passenger was identified as Foley Cage, and the sole rear-seat passenger was identified as Childs.

Matson then approached the vehicle and saw a .22 carbine rifle and a .357 magnum revolver in plain view. The rifle, which was loaded, was positioned with its trigger near the center of the back seat close to where Childs had been sitting. The revolver, which also was loaded, was stuck between the armrests with the butt of the weapon protruding.

Childs was convicted by a jury of possession of a firearm in and affecting commerce while a convicted felon in violation of 18 U.S.C. §§ 922(g)(1), 924(e). He was sentenced to a 235-month term of incarceration, a five-year term of supervised release, and a \$50 special assessment. Childs now appeals from both his conviction and sentence.

II

Childs raises the following issues on appeal: (a) whether the evidence presented at trial is sufficient to support his conviction; (b) whether the district court abused its discretion in admitting photographs depicting the relative positions of the firearms; (c) whether he was deprived of a fair trial due to the cumulative effect of alleged district court errors; and (d) whether the district court erred in determining that his prior burglary convictions under Texas law constitute "violent felonies" for enhancement purposes pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4(a).

A

Childs asserts that the evidence introduced against him at trial is insufficient to support his conviction. Specifically, he maintains that the evidence is both legally and factually insufficient to prove either actual or constructive possession of the rifle and revolver.

When considering a challenge to the sufficiency of the evidence, we usually consider all of the evidence in the light most favorable to the prosecution and determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt based upon the evidence presented at trial. United States v. Robles-Pantoja, 887 F.2d 1250, 1254 (5th Cir. 1989); United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983). "However, when the defendant moves for judgment of acquittal [based on the

insufficiency of the evidence] at the close of the government's case in chief, and defense evidence is thereafter presented but the defendant fails to renew the motion at the conclusion of all the evidence, he waives objection to the denial of his earlier motion." Robles-Pantoja, 887 F.2d at 1254. Under such circumstances, our review of a challenge to the sufficiency of the evidence is "limited to the determination of whether there was a manifest miscarriage of justice. Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt." Id. (internal citations and quotations omitted). Childs moved for a judgment of acquittal after the Government's case-in-chief, and he failed to renew his motion at the conclusion of the evidence. Accordingly, our review of the sufficiency of the evidence is limited to determining whether Childs' conviction constitutes a "manifest miscarriage of justice." Id.

To obtain a conviction for possession of a firearm in and affecting commerce by a convicted felon, the burden was on the government to prove beyond a reasonable doubt that Childs: (1) was convicted of a felony; (2) thereafter knowingly possessed a firearm; and (3) that his possession of the firearm was in or affected commerce. United States v. Dancy, 861 F.2d 77, 81 (5th Cir. 1988). Possession may be actual or constructive. United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991). To satisfy the commerce element, it is sufficient that the Government demonstrate that the firearm has "a past connection to interstate commerce." United States v. Fitzhugh, 984 F.2d. 143, 146 (5th

Cir. 1993). Childs' challenge to the sufficiency of the evidence is limited to an assertion that the evidence is not sufficient to establish either actual or constructive possession.

The jury is free to choose between reasonable constructions of the evidence. Bell, 678 F.2d at 549. Furthermore, a conviction may be based solely on uncorroborated testimony of an accomplice when that testimony is not incredible or facially insubstantial. United States v. Silva, 748 F.2d 262, 266 (5th Cir. 1984). Testimony will be deemed incredible when it is so facially unbelievable that it defies physical laws. United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990). Moreover, the government need not defuse every reasonable hypothesis of innocence for a conviction to stand. United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992).

We conclude that the record contains evidence of actual possession which is sufficient to support Childs' conviction. Specifically, at trial, Ayers testified regarding the events leading up to Childs' arrest on the morning of April 26, 1991. According to Ayers, he spent the evening of April 25 with Cage at a nightclub in Houston, and they were going to the parking lot at closing time when they saw Childs. Childs then asked them for a ride, and, before climbing into the back seat of the Jaguar Ayers was driving, Childs reached into the front seat of another car, grabbed a rifle, and brought it with him into the Jaguar. At trial, Ayers identified the rifle and the revolver taken from the

back seat of the Jaguar, but testified that he had not seen the revolver before the police found it. Although Childs offered testimony contrary to Ayers' at trial, the record is not "devoid of evidence pointing to [Childs'] guilt." Robles-Pantoja, 887 F.2d at 1254. Accordingly, we conclude that the evidence is sufficient to sustain Child's conviction.

B

Childs also asserts that the district court abused its discretion by admitting photographs demonstrating the relative positions of the firearms found in the Jaguar. Specifically, he alleges that: (1) the photographs were staged and do not fairly depict the crime scene; (2) the photographs' probative value is outweighed by their prejudicial influence; (3) the photographs are cumulative of oral testimony; and (4) the district court failed to instruct the jury that the photographs depict reconstructions of the crime scene. However, Childs' attorney has briefed only the assertion that the photographs do not fairly depict the crime scene. As we stated in Matter of Texas Mortgage Services Corp., 761 F.2d 1068, 1073-74 (5th Cir. 1985) (emphasis in original and quotation omitted), "issues not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals." See generally FED. R. APP. P. 28(a) ("Briefs of the Appellant"); C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3974, at 421 n.1 (1977 & Supp. 1992). Accordingly, although Childs' accuracy challenge to the district court's admission of

the photographs is properly before us, we conclude that his other challenges to this evidence have been waived.

A district court's decision to admit evidence is reviewed only for abuse of discretion. United States v. Williams, 957 F.2d 1238, 1244 (5th Cir. 1981). Pursuant to Rule 901(a) of the Federal Rules of Evidence ("Requirement of Authentication or Identification"), as a precondition for admissibility, evidence must be authenticated by other evidence "sufficient to support a finding that the matter in question is what its proponent claims" United States v. Clayton, 643 F.2d 1071, 1074 (5th Cir. 1981). However, absolute certainty regarding authenticity is not required. United States v. Mojica, 746 F.2d 242, 245 (5th Cir. 1984). In challenging the government's photographs, Childs maintains that the proper predicate was not laid for their admission and asserts that, because the case before us is one of constructive possession, the district court should have excluded the photographs. We have already concluded that the evidence in the case before us supports a finding of actual possession. See supra Part II.A. Moreover, Matson testified at trial that one of the photographs is "very close" to an accurate depiction of the position of the weapons and that the remainder of the photographs portray accurate depictions of the weapons found in the Jaguar. We conclude that, because Matson's testimony authenticates the photographs in accordance with Rule 901(a), Childs has failed to show how the district court abused its discretion by admitting them into evidence.

C

Childs also asserts that the cumulative effect of the district court's alleged errors deprived him of a fair trial and violated his right to due process. To reverse a conviction due to the cumulative effect of alleged district court errors, those errors must have "so infected the entire trial that the resulting conviction violates due process." Derden v. McNeel, 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc), cert. denied, 1993 WL 98222 (1993). As the preceding discussions illustrate, Childs has failed to show trial error, let alone that such error "infected the entire trial" so as to deprive him of due process. Id. Accordingly, we conclude that Childs' assertion that he was deprived of due process by cumulative error is without merit.

D

Childs' final assertion is that the district court erred in applying 18 U.S.C. § 924(e)(1) and U.S.S.G § 4B1.4(a) when enhancing his sentence. According to Childs, because two of his three prior Texas state burglary convictions were for burglary of a building, they should not qualify as "violent felonies" for enhancement purposes. We disagree.

Childs does not challenge the fact that his criminal history includes three Texas state burglary convictions, and he concedes that his one conviction for burglary of a habitation qualifies as a "violent felony." See United States v. Cruz, 882 F.2d 922, 923 (5th Cir. 1989) (burglary of a dwelling constitutes a "crime of violence" under U.S.S.G. § 4B1.1). Childs also acknowledges that

his two convictions for burglary of a building satisfy the section 924(e)(1) enhancement test enunciated by the Supreme Court in Taylor v. United States, 495 U.S. 575, 599, 110 S.Ct. 2143 (1990).¹ Specifically, Childs states that "the Supreme Court appeared to foreclose the possibility that burglary of a nonhabitation would be classified as a non-violent crime." Nonetheless, Childs challenges the Supreme Court's holding in Taylor, asserting that, "under the Taylor definition [of burglary], the emphasis on the threat of violence would be lost and the possibility of enhancement for technical burglary would be quite real."

The Texas burglary statute that formed the basis of the convictions at issue contains all the elements needed to satisfy the Taylor standard. See TEX. PENAL CODE ANN. § 30.02(a) (Vernon 1979); supra note 1. Moreover, subsequent to the issuance of Taylor, we have expressly held that a conviction under section 30.02 for burglary of a building qualifies as a "violent felony" for enhancement purposes under 18 U.S.C. § 924(e). See United States v. Martinez, 962 F.2d 1161, 1168-69 (5th Cir. 1992).

¹ According to the Court:

a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime.

Id. at 599.

Accordingly, we conclude that the district court did not err in enhancing Childs' sentence.

III

For the foregoing reasons, we AFFIRM Childs' conviction and sentence.