

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-2179  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMY ROSSI SAMUEL,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Southern District of Texas  
(CR H 91 139)

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(December 2, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Count One of Jimmy Rossi Samuel's indictment charged him with the possession of a firearm by a convicted felon, and Count Two charged him with the use of a firearm in relation to a drug trafficking crime. A jury found him guilty on both counts. The district court sentenced Samuel to serve consecutive prison terms

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

of 27 months on the first count and 60 months on the second count.

I

A

Samuel first argues that the evidence was insufficient to show that he committed a drug trafficking offense, which is an element of the crime of the use of a firearm during such an offense. He also argues that the evidence was insufficient to show that he actually possessed a weapon. Samuel had moved for a judgment of acquittal on the ground of insufficient evidence.

On a claim of insufficiency, this court examines the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. The evidence is sufficient if a reasonable trier of fact could have found that it established guilt beyond a reasonable doubt. Every reasonable hypothesis of innocence need not be excluded, nor need the evidence be entirely inconsistent with innocent conduct. U.S. v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, --- U.S. ---, 112 S. Ct. 2288 (1992).

The indictment charged Samuel with using a weapon in relation to the crime of knowingly and intentionally possessing cocaine with intent to distribute. The government's burden was to prove that the defendant used or carried a firearm during or in relation to that offense. U.S. v. Pigrum, 922 F.2d 249, 254 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 111 S.Ct. 2064 (1991). "The government need not prove actual use or brandishing of the weapon, but may meet its

burden by showing that the weapon facilitated, or could have facilitated, the drug trafficking offense." U.S. v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2278 (1992). The presence of the weapons at the home of the defendant where drugs, cash, and ammunition are found is sufficient. Id.

B

Government witnesses gave the following testimony. Samuel's driver's license showed that he lived at 4822 Macridge in Houston. On January 16, 1990, law enforcement officers executed a search warrant at the house at that address. Upon entering the house, they went immediately to a room referred to throughout trial as bedroom #4, a room no larger than ten square feet. It contained a twin bed, which took up most of the room, a chest of drawers, and a night stand.

There they found Samuel in the bed, covered by a sheet up to his neck. They demanded that he bring his hands out from under the sheet. He did not respond. Upon the officers repeating the command, Samuel pulled out one hand. Upon the command being given a third time, Samuel rose, pulling out the other hand, with which he held a clear plastic sandwich bag. Samuel ripped the bag and tossed the contents around the room.

The bag contained cocaine. Officers estimated that, before Samuel scattered its contents, the bag contained approximately one-half to one ounce of cocaine. Samuel stipulated that the agents

recovered 4.8 grams of 91.8% pure cocaine scattered about the bedroom.

Twenty-eight grams are in an ounce. An officer testified that most cocaine users use approximately one-quarter gram to a gram, sometimes as much as one-eighth of an ounce (which would be seven grams).

Officers found three firearms in bedroom #4. They found a .22 caliber revolver in a gym bag in the bottom of the chest of drawers, a .22 caliber rifle with a scope underneath the bed, and a 9 mm semi-automatic pistol lodged underneath the top mattress of the bed. All of the weapons were operational, and the .22 caliber pistol was loaded.

Cash in the amount of \$1300 lay under the top mattress, near the gun. An operational triple beam scale was also in the bedroom. That is the sort of scale typically used by drug dealers. No paraphernalia indicative of cocaine use, such as mirrors, razor blades, hypodermic needles, cocaine spoons, inhalers, and straws, were found in the house.

Dennis Brown and Lena Dunn occupied bedroom #1, in which other weapons were found. Bedroom #2 was decorated for a small child. Bedroom #3 had no furniture and contained materials that looked like building supplies.

Immediately following his arrest, Samuel offered to help agents apprehend his supplier, from whom he said he could obtain a kilogram of cocaine, which had a street value of \$100,000. Samuel

did not give the supplier's name or telephone number but purported to make a call to him, which was unsuccessful.

C

Samuel put on one fact witness, his mother's aunt, who testified as follows. The house belonged to Samuel's mother, Lena Brown. In addition to Samuel and his mother and stepfather, three unrelated men and Samuel's sister lived in the house. Bedroom #1 was Samuel's mother's (where officers found the mother and stepfather, Dennis Brown). The sister lived in bedroom #2 (which was decorated for a child). Samuel lived in bedroom #3 (which had no furniture but had building supplies). The three unrelated men shared bedroom #4 (where officers found Samuel).

Samuel put on one expert witness, who testified that the amount of cocaine recovered from bedroom #3, 4.8 grams, could be about a week's supply for a habitual user. Twenty grams would be an amount that a habitual user might have on hand, if he wanted to be sure not to run out between contacts with his dealer.

Bedroom #4, the room in which the agents found Samuel, measures no more than ten feet square and contains one twin bed. A rational juror would be entitled to disbelieve the aunt's testimony that, in the four-bedroom house, three unrelated men lived in that room. Bedroom #3, where the aunt said Samuel lived, contained no furniture. Furthermore, Samuel was in the bed in bedroom #4. A rational juror could have concluded that bedroom #4 was Samuel's room, over which he had dominion and control.

Samuel argues that the government did not prove that he had the intent to distribute. Intent to distribute may be inferred from a large quantity of drugs. U.S. v. Romero-Reyna, 867 F.2d 834, 836 (5th Cir. 1989). The evidence on quantity was equivocal. Only 4.8 grams were recovered; officers estimated that Samuel could have had an ounce.

When the amount of cocaine in a defendant's possession is relatively small, the intent to distribute may be inferred from other circumstances, such as paraphernalia associated with distribution, large amounts of cash, and the quality of the cocaine. U.S. v. Munoz, 957 F.2d 171, 174 (5th Cir. 1992), cert. denied, \_\_\_ U.S. \_\_\_, 1992 WL 228045, No. 92-411 (Oct. 13, 1992). Munoz himself had 10.5 grams of high quality cocaine, \$1000 cash, and a list of large amounts of marijuana. Munoz denied personal consumption. Id. at 172, 174.

Samuel had an estimated 14 to 28 grams of 91% pure cocaine, \$1300 cash, and a scale associated with distribution. He claimed personal consumption, but the absence of paraphernalia associated with such use blunts that claim.

In addition to the foregoing, Samuel had three weapons within easy reach, one of which was loaded. This court is aware of "the virtual omnipresence of firearms in the illegal drug business." U.S. v. Espinoza, 826 F.2d 317, 319 (5th Cir. 1987).

Additionally, a rational juror would not have ignored Samuel's scattering the cocaine around the bedroom. A juror could have inferred that he was attempting to dissipate the quantity to lessen the severity of the crime with which he could be charged.

Samuel also told officers about a person who could supply a kilogram of cocaine. Given all of these circumstances, a rational juror could have concluded that Samuel had the intent to distribute the cocaine.

#### E

Samuel also argues that the government did not show that he actually used the weapons. The government, however, need only have shown that the weapons could have facilitated the drug trafficking offense, which could have been shown by their presence in the home of the defendant where drugs, cash, and ammunition were found. Capote-Capote, 946 F.2d at 1104. The weapons were not merely in Samuel's home where drugs and money were found. One was under the mattress where Samuel lay with the cocaine in his hand. Another was under the bed. A third was a few feet away. The evidence was sufficient.

#### II

Samuel next argues that the evidence was insufficient to prove that he possessed the firearms, either actually or constructively. The possession may be actual or constructive. Constructive possession is the ownership, control, or dominion over the contraband itself or over the premises in which the contraband is

concealed. U.S. v. Smith, 930 F.2d 1081, 1084 n.1, 1085 (5th Cir. 1991). A rational juror could have believed that bedroom #4 was Samuel's. With the weapons so close to him, a rational juror could certainly have found actual or constructive possession.

### III

Samuel next argues that the district court erroneously gave a deliberate ignorance instruction. The government responds that the court did not give such an instruction. The court instructed the jury as follows:

"Knowingly" means that an act was done voluntarily and not because of mistake or accident.

"Intentionally" means an the act was done with a conscious purpose to violate the law.

A defendant can still be found to have acted knowingly or intentionally if he closed his eyes on purpose to avoid learning all the facts or law.

Samuel had objected to this instruction.

The standard of review of a claim that a jury instruction was inappropriate is whether the charge, as a whole, correctly stated the law and clearly instructed the jurors on how to apply the law to the facts before them. U.S. v. Lara-Velasquez, 919 F.2d 946, 950 (5th Cir. 1990). The "willful blindness" charge is also known as the "deliberate ignorance" instruction. Id. at 950-51. This Court has consistently upheld such an instruction as long as sufficient evidence supported its insertion into the charge. Id. at 951.



The instruction is properly given when the facts support an inference that the defendant subjectively knew his act to be illegal and that he purposely contrived to avoid learning of the illegal conduct. Id. at 952. "[T]he instruction is nothing more than a refined circumstantial evidence instruction properly tailored to the facts of a case . . . ." Id. at 951 (citation omitted).

An erroneous deliberate ignorance instruction can be prejudicial. Because such an instruction permits a conviction without a finding that the defendant was actually aware that his conduct was unlawful, the instruction "poses the risk that a jury might convict the defendant on a lesser negligence standard -- the defendant should have been aware of the illegal conduct." Id. at 951.

The sentence in the instruction referring to closing one's eyes fits the definition of a deliberate ignorance instruction. The circumstances of the case, however, do not call for the instruction. The government has identified no testimony that would support an inference that Samuel deliberately closed his eyes to any fact or law, as the instruction states. This court's analysis, then, looks to whether the challenged sentence makes the charge as a whole an incorrect statement of the law in the context of the facts.

After the erroneous instruction, the district court addressed the counts against Samuel, stating that, to convict on the count of

possession of a firearm by a convicted felon, the jury must find that Samuel "knowingly possessed a firearm." The court told the jury that possession could be actual or constructive. "A person constructively possesses something when he knowingly has both the power and the intention to exercise authority or control over it, either directly or through another, if he was not exercising control at a particular time."

As to the count of using a weapon in relation to a drug trafficking crime, the court stated, "It is a drug trafficking crime for anyone knowingly and intentionally to possess a controlled substance with the intent to distribute it." A guilty verdict requires the jury to find that "The Defendant possessed the cocaine with the intent to distribute it; And the Defendant knowingly used a firearm in relation to his possession of cocaine with the intent to distribute it." The court further stated:

A person uses a firearm in relation to a crime when he had possession or control of a gun in a way that may have facilitated his commission of the crime. He does not have to have shown the gun or fired it. Even if he only had the opportunity or ability to show or fire the gun to help him with the crime, that is enough.

Without any evidence that Samuel did close his eyes to unlawful conduct, the jury would not have been able to take the court's explanation that "[a] defendant can still be found to have acted knowingly or intentionally if he closed his eyes on purpose" and apply it to the knowledge and intent elements of the two offenses. The jury would not have attributed negligence, rather

than intent, to Samuel. The deliberate ignorance was surplusage. It did not create the risk of prejudice.

#### IV

Samuel further argues that the district court erroneously refused to give a jury instruction that he had requested. The refusal, he argues, deprived the jury of the opportunity to consider one of his defense theories.

The requested instruction read:

The defendant claims that the firearms were hidden from view -- one under a mattress, one under a bed, and one under a dresser. If you find that the firearms were hidden from view, then mere presence in the house and control over the house are not sufficient to show possession. The government must also present other evidence showing consciousness of guilt by the defendant.

Instead of the entirety of the foregoing, the district court gave a portion of it at the conclusion of its instruction defining constructive possession. It stated, "Mere presence where a firearm may have been found is not sufficient."

A trial court has substantial latitude in fashioning an instruction that fairly and adequately covers the issues. U.S. v. Allibhai, 939 F.2d 244, 251 (5th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 967 (1992). When a requested instruction has been refused, we will reverse for abuse of discretion when three criteria are met: (1) the requested instruction was substantially correct, (2) the actual instruction did not substantially cover the same substance, and (3) the failure to give the requested instruction seriously impaired the defense. U.S. v. Arditti, 955

F.2d 331, 339 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3171, No. 92-382 (Aug. 31, 1992).

First, the requested instruction is not correct in the context of this case. Samuel was not merely present in the house. He was in the bedroom, inches from two guns and feet from a third. His defense had been that it was not his bedroom, which, if believed, could have led the jury to conclude that he did not constructively possess the guns. Proof of constructive possession, however, does not require other evidence of consciousness of guilt. Smith, 930 F.2d at 1085. Second, the actual instruction correctly defined constructive possession. Id.

Third, the instruction did not impair the defense. Samuel argued to the jury that he did not have dominion over the house or bedroom. He argued that the guns were hidden. The government did not prove that he actually knew that they were there. Samuel has failed to show that the refusal of his requested instruction was error.

V

Finally, Samuel argues that the evidence was insufficient to support a finding at sentencing that one of the guns was stolen, which finding resulted in a two-point increase in offense level. This court reviews a Guidelines sentence to determine whether the district court correctly applied the Guidelines to factual findings that are not clearly erroneous. U.S. v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990). A clearly erroneous finding is one that is

not plausible in the light of the record viewed in its entirety. Anderson v. Bessemer City, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 84 L. Ed. 2d 518 (1985). Legal conclusions regarding the Guidelines are freely reviewed. Manthei, 913 F.2d 1133. The district court may consider any evidence that has "sufficient indicia of reliability," including hearsay. U.S.S.G. § 6A1.3, comment.; Manthei, 913 F.2d at 1138. The PSR itself also bears such indicia. U.S. v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990).

The PSR reported that one of the weapons found in the bedroom, a "browning 9mm caliber pistol, serial number 245PP74484," was stolen and recommended the two-level increase. Samuel objected, claiming that he neither stole the gun nor knew that it was stolen.

At sentencing, Samuel did not pursue that objection, and he does not on appeal. Instead, at sentencing as on appeal, Samuel objected that the evidence was insufficient to prove that the gun actually was stolen. The court responded that, if Samuel had objected earlier, testimony could have been heard on that question. Nevertheless, a probation officer who was present volunteered that her office had a copy of a complaint of the stolen weapon. The court asked the probation officer if she would make a copy of the complaint for counsel. Counsel interrupted, asserting that, even if the complaint were produced, that would not prove that the gun had been stolen. The court held the evidence sufficient.

The theft of the gun was reported in the PSR. The probation officer was apparently willing to produce a copy of the complaint.

The PSR, supported by a complaint, is sufficiently reliable for the district court to have concluded that the gun was stolen.

VI

For the reasons we have stated in this opinion, the conviction and sentence of Jimmy Rossi Samuel is

A F F I R M E D.