IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7762
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY H. MONTGOMERY,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Mississippi
CR H92 00005 P R

(July 19, 1993)

Before JOLLY, WIENER and E. M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Gary H. Montgomery appeals his conviction by a jury for possession of fully automatic firearms in violation of 18 U.S.C. § 922(o)(1). On appeal he claims that the guns in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

question were seized in violation of the Fourth Amendment of the United States Constitution; that the court improperly instructed the jury; that the evidence was insufficient to support the jury verdict; that he was entitled to a so-called "collectors" exception to the crime of conviction; that the district court should have severed the firearms charge from the explosives charge in his case; and that he was denied effective assistance of counsel. For the reasons set forth below, we find no reversible error and therefore affirm.

I

FACTS AND PROCEEDINGS

Montgomery kept several firearms locked in a gun vault in the home where his ex-wife and children lived in Hattiesburg, Mississippi. His son, Shane, was alleged to have been involved in the robbery of a warehouse in the Hattiesburg area. Detective Ken Ritchey of the Hattiesburg Police Department executed a search warrant at the ex-wife's home. The items listed on the search warrant were Voltaren tablets, Lopressor tablets, 5 plastic clocks, crystal hearts, heart models, ink pens, and "squeez" bottles. The Hattiesburg police had information that Shane had access to the gun vault.

During the execution of the search warrant, police asked Montgomery's ex-wife to open the gun vault so that the police could search for the stolen items. The combination was taped to the side of the vault; Montgomery's ex-wife slipped a yardstick between the vault and the wall and retrieved an envelope with the combination

on it. Detective Ritchey testified that when the vault was opened he immediately recognized three guns as being fully automatic. The Hattiesburg police contacted the Bureau of Alcohol, Tobacco and Firearms (BATF) and, based on discussions with the BATF, seized all of the firearms in the vault.

The next day, BATF Agent Roger Shanks confirmed that two of the weapons were semi-automatic AR-15 models that had been modified to operate automatically. Agent Shanks also determined that the two AR-15 s had not been registered as machine guns. A record search revealed that one of the two AR-15s was sold to Montgomery as a semi-automatic rifle. Montgomery admitted that when he bought the guns they were semi-automatic, and that he had originally intended to convert them to fully automatic, using M-16 parts. He stated further that his "interests shifted," so he had the M-16 parts placed in the AT-15s by a local gun dealer. Montgomery testified that he was told that if he did not insert the M-16 sears[1] into the AR-15s, the weapons were not automatic. He further testified that he had fired the guns "probably a hundred" times and that they did not fire automatically. Montgomery stated that he did not know who inserted the sears into the guns, and that he did not "go through the formality" of registering them.

Agent Shanks said that when he examined the two AR-15s they contained M-16 parts, including sears. Agent Shanks testified further that "It is a machinegun . . . without the auto[matic]

[1] The catch in a gunlock that holds the hammer in a halfcocked or fully-cocked position. WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY (2d Ed. 1988).

sear. The auto[matic] sear is put in there only to make the [automatic] function more reliable." During Montgomery's testimony, the court held a demonstration at which both AR-15s fired automatically without the automatic sears inserted.

The district court instructed the jury that the government was required to prove beyond a reasonable doubt that Montgomery knowingly possessed machine guns and that the two guns in question were machine guns. The jury found Montgomery guilty, and he was sentenced to ten months' imprisonment. Montgomery filed a notice of appeal in timely fashion.

II

ANALYSIS

A. Suppression of Evidence

Montgomery sought to suppress evidence seized during the warrant search of his ex-wife's house in Hattiesburg. He argues on appeal that the search of the gun vault and the seizure of the guns were illegal. Montgomery also points out that the Mississippi statute cited on the search warrant involves voting abuses. Detective Ritchey testified that the citation to that statute was the result of a typographical error.

As Montgomery did not challenge the validity of the search warrant in the district court, we review that challenge on appeal under the plain error standard. We correct such an error only if it "`seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" United States v. Olano, __ U.S. ____, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993) (quoting

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936) (alteration in original) (citation omitted)).

Even though the typographical error cited a voting-fraud statute, the rest of the warrant, the affidavit attached thereto, and the testimony of Detective Ritchey show that the officers were relying on the validity of the warrant in executing the search for the recovery of stolen property. The officers' good-faith reliance on the validity of the search warrant is not trumped by the typographical error. See United States v. Leon, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The incorrect citation to the voting statute does not rise to the level of plain error.

Montgomery's substantive argument that the rifles were wrongfully seized is grounded in his insistence that their automatic character was not immediately apparent to the officers who opened the gun vault. "[A] plain view seizure requires that (1) the police's initial intrusion be supported by a warrant or recognized exception to the warrant requirement, and (2) the incriminating character of the object seized be immediately apparent." United States v. Coleman, 969 F.2d 126, 131 (5th Cir. 1992) (footnotes omitted) (citing Horton v. California, 496 U.S. 128, 135, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)).

The search of the gun vault was conducted pursuant to a warrant issued on an affidavit in which a local officer stated he had probable cause to believe that the house contained contraband related to a burglary thought to have been committed by Montgomery's teen-aged son. As the belief that the gun safe could

contain the sample drugs and other items which were the object of the search was reasonable, the search of the gun safe did not exceed the scope of the warrant. See United States v. Thomas, 973 F.2d 1152, 1158 (5th Cir. 1992). "[A]ny container situated within residential premises which is the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant." United States v. GIWA, 831 F.2d 538, 543-44 (5th Cir. 1987) (internal quotations omitted); see United States v. Morris, 647 F.2d 568, 573 (5th Cir. Unit B June 1981).

Montgomery argues that the plain view analysis does not apply because (1) the AR-15s are not criminal per se, (2) no one but an expert could tell that the AR-15s are not criminal per se, (3) no one but an expert could tell that the AR-15s were fully automatic, (4) the officers seized guns from the vault that are legal and are not automatic, and (5) Detective Ritchey's apposite testimony is "rife with inconsistencies." But Montgomery failed to raise before the district court the issue whether the automatic character of the AR-15s was immediately apparent. Therefore, his contention that the seizure cannot be justified under the plain-view analysis is examined by this court for plain error only.

Detective Ritchey testified that he recognized three automatic rifles immediately upon the vault's being opened; and that he then contacted the BATF and seized the weapons. Agent Shanks of the BATF testified that the automatic character of the guns was readily apparent because the selector switch (which controls whether the

gun is in the safety, semi-automatic, or fully automatic mode) was not "original equipment." Original equipment Colt AR-15s have a blued finish; the automatic parts on Montgomery's AR-15s were silver. One of the witnesses for Montgomery's defense testified that "at first glance . . . everybody would categorize those guns as a machine gun." As this testimony indicates that the incriminating character of the AR-15s was immediately apparent, the district court did not commit plain error when it denied Montgomery's motion to suppress.

Montgomery next insists that the removal of the guns from the vault constituted an impermissible "second search" under the Fourth Amendment, similar to that in Arizona v. Hicks, 480 U.S. 321, 323, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). In Hicks, an officer involved in the search of an apartment noticed expensive stereo components that seemed out of place. He moved the stereo components to examine and record their serial numbers. Id. He subsequently reported the serial numbers to police headquarters, learned that they were stolen property, and seized them. Id. The Supreme Court concluded that the moving of the stereo equipment was a search separate from the search that was the lawful objective of entering the apartment. Id. at 324-35.

The removal of the guns from the vault is factually distinguishable from the moving of the stereo equipment in Hicks because Detective Ritchey had probable cause to believe the guns were automatic weapons immediately upon the opening of the gun vault--without touching or moving anything in the safe, including

the guns. As the automatic character of the firearms was readily apparent, Hicks does not apply.

Montgomery argues finally that the Supreme Court's decision in O'Connor v. Ortega, 480 U.S. 709, 719, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1986), demonstrates that he had an additional expectation of privacy in the gun vault, which expectation was violated by the search. O'Connor involved a public employer's warrantless administrative search of the files and desk in an employee's office. O'Connor, 480 U.S. at 712-14. In contrast, the search of Montgomery's ex-wife's home and the gun vault therein to which she had access was supported by a valid search warrant granted in furtherance of a criminal investigation. As nothing indicates that O'Connor is applicable when a valid warrant has issued, Montgomery's reliance on that case is misplaced.

B. Jury Instructions

Montgomery next posits that the district court erred when it failed to instruct the jury that, to convict Montgomery, they would have to find that he had knowledge of the automatic character of the guns, i.e., that they were illegal even without the automatic sear. The district court instructed the jury that the government was required to prove beyond a reasonable doubt that Montgomery knowingly possessed machine guns and that the two guns in question were machine guns. The district court defined the term "machine gun" as:

> [A]ny weapon which shoots, is designed to shoot, or can be readily restored to shoot automatically more than one shot without manually reloading by a single function of the trigger. The term shall also include the frame or

> receiver of any such weapon, any part designed and intended solely and exclusively or a combination of parts -- of parts designed and intended for use in converting a weapon into a machine gun and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

This instruction reflects the statutory definition of "machine gun." See 26 U.S.C. § 5845(b); 18 U.S.C. § 921(a)(23).

The standard of review for a claim of jury instruction error is "`whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them.'" United States v. Lara-Velasquez, 919 F.2d 946, 950 (5th Cir. 1990) (quoting United States v. Stacey, 896 F.2d 75, 77 (5th Cir. 1990)) (emphasis added in Lara-Velasquez). The district court's jury instruction tracks the language of the statute defining "machine gun" and was a correct statement of law.

The district court's instruction also covered the factual issue of the attachment of the automatic sear. The language "can be readily restored" includes the circumstance in which a part, such as the automatic sear, required for automatic operation, is not attached to the mechanism. Therefore, the jury instruction, taken as a whole, sufficiently included Montgomery's knowledge regarding the automatic character of the firearms.

C. Sufficiency of the Evidence

Montgomery also argues that the government failed to prove his knowledge of the automatic quality of the AR-15s. The government must prove each element of the offense for which the accused is charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358,

364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard of review is whether the "jury could rationally have reached a verdict of guilty beyond a reasonable doubt." United States v. Powell, 469 U.S. 57, 67, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). "The test is not whether the evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Salazar, 958 F.2d 1285, 1294 (5th Cir.)., cert. denied, 113 S.Ct. 185 (1992). In determining whether the government has met its burden, we weigh all reasonable inferences derived from the evidence in a light most favorable to the verdict. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989).

To obtain a conviction under 18 U.S.C. § 922(o), the government must prove that the defendant knowingly possessed a machine gun. See United States v. Anderson, 885 F.2d 1248, 1255-56 (5th Cir. 1989) (en banc). Montgomery testified that he took the two AR-15s to a gunsmith to have them converted to fire automatically. Montgomery testified that M-16 parts were inserted in the guns when he received them from the gunsmith; however, he believed that the guns were not automatic unless the automatic sear was placed in them. A demonstration proved that the rifles would fire automatically even without the automatic sears. There was sufficient evidence to prove that Montgomery knew the rifles were automatic.

Montgomery contends that because he had not exercised any

indicia of ownership over the machine guns since 1984, the government failed to prove that he possessed the machine guns. Proof of ownership is not essential to proof of possession. See, e.g., United States v. Rocha, 916 F.2d 219, 237 (5th Cir. 1990), cert. denied, 111 S.Ct. 2057 (1991). Montgomery installed the gun vault, placed the weapons in the vault, and had complete access to the weapons any time that he was in the Hattiesburg residence. The evidence was sufficient to prove that Montgomery possessed the firearms. See Rocha, 916 F.2d at 237.

Montgomery, however, insists that the government was required to prove that the firearms were not registered and, because of dicta stated in United States v. Seven Miscellaneous Firearms, 503 F.Supp. 565, 576 (D. D.C. 1980), the government was required by the Brady rule to disclose that the BATF records regarding registration are incomplete. Montgomery admitted that he did not register the firearms.

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), held that the prosecution's suppression of evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material when a reasonable probability exists that its disclosure would have caused a different outcome at trial. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). As Montgomery admitted that he did not register the firearms, information regarding defects in the national firearms

records was not material to the question of his guilt or innocence.

D. The "Collectors" Exception

Montgomery argues that his automatic weapons fall within a "collectors" exception to 18 U.S.C. § 922(o). Title 18 U.S.C. § 922(o), however, does not include any reference to collectors. In the context of firearms, the term "collector" is defined at 18 U.S.C. § 921(a)(13), and applies to other aspects of the statutory scheme. See, e.g., 18 U.S.C. § 922(a)(2)-(b). Inasmuch as "collector" is not mentioned in connection with § 922(o), it does not provide an affirmative defense or engage an element of the crime of possession of a machine gun.

Montgomery also insists that the possession of a souvenir or curio is not a crime. He is correct that, as to some crimes that are not implicated by the instant appeal, there is an exception for firearms that are curios or relics when they are possessed by a collector. See 18 U.S.C. § 921(a)(13); 27 C.F.R. § 178.11 (1992). Montgomery, however, has not alleged any facts that would indicate that his machine guns were souvenirs or curios; and, as stated above, the collectors exception is not applicable to his case anyway.

E. Severance

Montgomery urges that the district court erred by trying him for the possession of machine guns and for knowingly storing stolen explosives. "Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction."

FED. R. CRIM. P. 8(a). "Misjoinder under rule 8 is a matter of law, which is completely reviewable on appeal; but rule 8 is to be broadly construed in favor of initial joinder." United States v. Fortenberry, 914 F.2d 671, 675 (5th Cir. 1990). As Montgomery failed to move for severance of the two counts in the indictment, his claim is reviewed only for plain error. United States v. Howton, 688 F.2d 272, 278 (5th Cir. 1982).

The plastic explosives were recovered during the same search that revealed the illegal machine guns. As the machine gun-possession and the explosive-storing charges arose from the same search and clearly were of similar character, the district court's allowing the two counts of the indictment to be tried together was not clear error.

F. Ineffective Assistance of Counsel

We consider alleged ineffective assistance of counsel on direct appeal only in "rare cases where the record allow[s] us to evaluate fairly the merits of the claim." United States v. Higdon, 832 F.2d 312, 314 (5th Cir. 1987), cert., denied, 484 U.S. 1075 (1988). Montgomery argues that his trial counsel "failed to introduce key evidence" and failed to object to improper jury instructions.

The district court did not consider counsel's performance, which, given that the sentencing judge granted Montgomery a downward departure, apparently substantially reduced Montgomery's exposure to incarceration and other penalties. Montgomery's counsel has not had an opportunity to explain his actions and

tactical reasoning, and the omitted "key evidence" remains a mystery. As we cannot fully evaluate Montgomery's contentions on this appeal, his is not one of those "rare cases" envisioned by the Higdon decision. We therefore decline to consider the issue, without, however, prejudicing Montgomery's right to raise it in a proper proceeding under 28 U.S.C. § 2255. See, e.g., United States v. Rinard, 956 F.2d 85, 87 & n.5 (5th Cir. 1992).

H. Miscellany

The government's cross-appeal was voluntarily dismissed. Consequently, Montgomery's arguments regarding that cross-appeal need not be addressed.

AFFIRMED.