IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8403
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEVIN GLENN RAWLS,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(W-92-CR-28)

(February 3, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Kevin Glenn Rawls appeals his jury conviction and resulting sentence for possession of a firearm by a felon and making a false statement in the acquisition of a firearm,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in violation of 18 U.S.C. §§ 922(g)(1), 924(a), and 922(a)(6). Specifically, he assigns as reversible error the district court's admission of evidence that he insists was hearsay; the alleged insufficiency of the evidence to prove that he knowingly made a false statement in connection with his acquisition of a firearm; the propriety of applying the preponderance-of-the-evidence standard to the government's burden of proof of his underlying convictions to support his career offender status; and the court's characterization of two acts of burglary occurring in close temporal and spatial proximity as two separate crimes rather than a single criminal episode. Finding no reversible error, we affirm.

I.

FACTS AND PROCEEDINGS

The record reflects that Rawls presented a Dan Wesson .357 Magnum revolver at Praco Pawn Shop in Waco, Texas, to pawn as security for a $40 loan. He signed the pawn slip and, when he later redeemed the revolver, indicated "No" on the ATF Form 4473 which questioned whether he had ever been convicted by any court of a crime punishable by a term exceeding one year.

Thereafter, Rawls presented the same revolver at Lone Star Pawn Shop in Waco to pawn as security for a $60 loan, signing the pawn slip in the process. The gun had not been redeemed at the time Rawls was arrested.

ATF agents, equipped with a search warrant, searched Rawls' home. They found, inter alia, the Lone Star pawn ticket and nine

rounds of .38 caliber ammunitionSQa type of ammunition suitable for use in the Dan Wesson revolver. Rawls was given Miranda warnings but he waived them. He admitted pawning the Dan Wesson revolver at each of the pawn shops but indicated that the revolver belonged to his girlfriend.

A handwriting expert for ATF testified to a positive identification of Rawls' handwriting based on a comparison of exemplars and his signature on the pawn slip. A weapons expert for ATF testified that the Dan Wesson revolver was manufactured in Massachusetts, so that its presence in Texas showed that it had to have been transported in interstate commerce. The expert identified the plain inscription "Monson, Massachusetts" on the gun and added that his reading materials indicated that there were no plants in Texas that manufactured the Dan Wesson model in question. Rawls repeatedly objected on grounds that the basis for the expert's knowledge was derived from hearsay or "information . . . learned from other people or from reading materials." The district court overruled Rawls' hearsay objections on four different occasions.

Rawls was convicted by a jury of (count 1) possession of a firearm by a previously convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a), and (count 2) acquisition of a firearm by knowingly making a false written statement in violation of § 922(a)(6). The government sought an enhanced sentence under § 924(e)(1) based on two burglary convictions resulting from offenses committed on the same date and a robbery committed three

years after the burglaries.

The parties stipulated that Rawls was a felon as established by his conviction for robbery. The district court sentenced Rawls to concurrent terms of 188 months on count 1 and 60 months on count 2, and Rawls timely appealed.

II

ANALYSIS

A. Hearsay by Expert Witness

Rawls argues that the district court erred when it overruled his objections to reliance by the government's weapons expert on hearsay, in violation of Fed. R. Evid. 801 and 802, in establishing the place of manufacture of the firearm. His argument lacks merit.

Rawls has mischaracterized his admissibility argument by challenging the admissibility of the facts and data underlying the expert's testimony. See Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1114 (5th Cir. 1991), cert. denied, 112 S.Ct. 1280 (1992). Because the interstate nexus of the weapon was highly relevant, evidence of that nexus which might otherwise be inadmissible may be admitted when expert opinion on point is grounded on data and facts reasonably relied upon by such experts. See Christophersen, 939 F.2d at 1114. Fed. R. Evid. 703 was designed to allow experts to rely on facts or data not otherwise admissible as evidence when such facts or data are of the "type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." See id. A weapons expert may determine the origin of a firearm "by consulting

markings on the gun, trade publications, and company catalogues." United States v. Harper, 802 F.2d 115, 121 (5th Cir. 1986). When an ATF agent is testifying as an expert, Harper is the governing law. United States v. Merritt, 882 F.2d 916, 920 (5th Cir. 1989), cert. denied, 496 U.S. 907 (1990). Here, the ATF agent clearly was testifying as an expert; even Rawls acknowledged that the expert's qualifications "speak for themselves."

Rawls argues that the government's failure to establish specifically that the facts or data upon which the expert relied were "of a type reasonably relied upon by experts in the particular field" presented the triggering of Rule 703. This argument is also lacking in merit. Rawls attempts to support his contention by citing Rule 703 and the Commentary only, the latter indicating that "notice should be taken that the Rule requires that the facts or data `be of the type reasonably relied upon by experts in the particular field.'" On direct examination, however, the expert testified 1) as to his qualifications, training and experience; 2) that he maintained a library of publications regarding the manufacturers of weapons; 3) that he conferred with other ATF experts on interstate nexus of firearms; and 4) that he determined the manufacturing site of the subject revolver by observing the markings on the gun and consulting reading materials and other individuals. Harper confirms that the sources used by this expert were those reasonably relied upon by weapons experts. Thus the district court did not err when it overruled Rawls' hearsay objection.

B. Sufficiency of Evidence

Rawls argues next that a "yes" answer to ATF Form 4473 would not be necessary if he had (1) been pardoned, or (2) had his civil rights restored pursuant to Texas law. Therefore, he continues, the government's failure to prove either proposition affirmatively rendered the mere stipulation of felon status insufficient to convict him for misrepresenting that status when he acquired the firearm. This argument collapses as a misstatement of the law.

The government must prove every 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). In determining whether the government has met its burden, we will 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 convict Rawls under § 922(a)(6) for acquisition or attempted acquisition of a firearm by furnishing a false statement, the government need only prove that Rawls (1) intended to ship, transport, possess, or receive a firearm with an interstate nexus, (2) had been convicted of a felony ("term exceeding one year") in any court, and (3) uttered any false statement intended to facilitate acquisition of the firearm. See 18 U.S.C. §§ 922(a)(6) and 922(g)(1) (to establish unlawfulness of the acquisition). Rawls cites no authority to support his argument that additional proof is required. We are not required to consider arguments that are unsupported by authority. See Fed.R.App.P. 28(a)(5) (as

amended July 1, 1991); United States v. Baker, 883 F.2d 13, 15 (5th Cir.), cert. denied, 493 U.S. 983 (1989).

Nevertheless, we find the logic of Rawls' argument puzzling to say the least. The statute does not require the government to provide affirmative proof that would undermine the reliability of the parties' stipulation that Rawls was, in fact, a previously convicted felon. See § 922(a)(6). Information contained on an ATF Form 4473 is admissible. See Harper, 802 F.2d at 121 n.8. Evidence was also presented at trial regarding Rawls' declaration about his alleged non-felon status.

The government cites United States v. Cabrera, 786 F.2d 1097 (11th Cir. 1986) to support its contention that "a convicted felon must clear his status, if it is unclear, before buying a firearm." See id. at 1098 (citation omitted). Rawls raises no argument that undermines the reliability of the government's proof. Therefore, the combination of the stipulation of felon status and evidence of Rawls' false disclosure on the ATF form was sufficient to support Rawls' conviction.

C. Preponderance of Evidence Standard for Determining Career Offender Status

Rawls argues that his constitutional right to due process and confrontation require proof beyond a reasonable doubt of factual sentencing elements needed for enhanced sentencing under § 924(e)(1), the federal career offender statute. Like his other arguments, this one too is unmeritorious.

Pursuant to § 924(e)(1), if a defendant has committed three

previous "violent felonies" on different occasions, the sentencing must include incarceration for not less than 15 years and must include a fine of not more than $25,000. The government must prove the existence of the three felonies by a preponderance of the evidence. United States v. Affleck, 861 F.2d 97, 98-99 (5th Cir. 1988), cert. denied, 489 U.S. 1058 (1989).

Rawls is requesting that we "revisit" our decisions in Affleck and in United States v. Quintero, 872 F.2d 107 (5th Cir. 1989), cert. denied, 496 U.S. 905 (1990), which followed Affleck. Like Rawls, the defendant in Affleck argued that the § 924(e)(1) enhancement of his sentence following conviction under § 922(g) constituted a denial of due process. Affleck, 861 F.2d at 98-99. But in Affleck we rejected that argument. Id. We also rejected the argument raised by the defendant in Affleck that § 924(e)(1) constituted a separate substantive offense sufficient to trigger the "beyond a reasonable doubt" standard required by In Re Winship. Affleck, 861 F.2d at 98-99. In so doing we followed McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), and held that § 924(e)(1) is merely a sentence-enhancement statute that allows the "preponderance of evidence" standard generally applicable in sentencing proceedings once the defendant has been "constitutionally convicted" under In Re Winship's higher standard. Affleck, 861 F.2d at 99.

Rawls seeks to distinguish McMillan, arguing that inasmuch as § 924(e)(1) enhancement actually increases Rawls' minimum sentence nearly five times the maximum sentence available for the underlying

violation of § 922(g) (from 33 months to 188 months), the "beyond-a-reasonable-doubt" standard would be necessary to establish the factual sentencing elements. This is the same unmeritorious argument we rejected in Affleck. See id. at 99. First, a prior decision by a panel of this court may not be disturbed by a subsequent panel; that may be done only upon reconsideration by the court en banc. United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990). Moreover, we are of the opinion that Rawls offers no substantive argument that would be sufficient to justify reversal of Affleck. The government need prove the existence of the three previous convictions by a preponderance of the evidence only.

D. Separate Occurrences

Rawls argues that the district court's § 924(e)(1) enhancement was improper because the two burglaries, which were perpetrated on the same date, occurred in such close proximity of time and location that they could not be deemed "separate occurrences." We disagree.

Section 924(e)(1) requires that the three requisite felonies be "committed on occasions different from one another." See id. "Where multiple convictions fall within the orbit of a continuous course of conduct, courts have treated the offenses as a single criminal transaction for purposes of sentence enhancement." United States v. Washington, 898 F.2d 439, 441 (5th Cir.), cert. denied, 111 S.Ct. 122 (1990).

Rawls argues that the two burglaries occurring on the same evening within minutes of each other were in such temporal

proximity as to constitute a single episode of criminal conduct. In Washington, we held that two separate felonies had occurred. There, the defendant robbed a victim at a convenience store, left, then returned and robbed the same victim "after a few hours of no criminal activity." See Washington, 898 F.2d at 442. Here, Rawls had burglarized a paint company by kicking in a plate glass door, then broke into a nearby office facility through a ladies' restroom window. Numerous internal doors to offices inside the second building were kicked in to gain entry to those interior offices. Noticing a trail of blood left by Rawls, the police followed his footsteps throughout the burglarized property. As Rawls left a weaving trail, police conjectured that he was intoxicated.

Rawls cites authority in other circuits in an effort to support his contention that the two burglaries he committed were part of a single episode. For example, he cites as factually similar, United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991), in which the Eleventh Circuit vacated an enhanced sentence under § 924(e). To escape detection by the police, the defendant in Sweeting fled to another home after committing the initial burglary. Sweeting, 933 F.2d at 967. Noting that § 924(e) requires three convictions for crimes that are "temporally distinct," the Eleventh Circuit held that Sweeting's flight into the second home was part of a single episode for purposes of sentencing. Id. The facts in Sweeting, however, are distinguishable from the instant facts. Here, there is no evidence that, when Rawls committed the second burglary, he was in the

process of fleeing to escape detection from the first one.

Rawls argues that there was "no safe escape" when he moved from one situs to the other and that the close proximity of the burglary sites--a matter of feet--further supports his contention that his two crimes were part of a single criminal episode. Rawls is thus arguing that a "safe escape" preceding the second burglary is required to isolate the burglaries sufficiently to allow separate-episode status. Id. For support Rawls cites United States v. Schlieman, 894 F.2d 909 (7th Cir.), cert. denied, 111 S.Ct. 155 (1990), in which the Seventh Circuit noted that the defendant's flight from a burglary situs was a "safe escape." Id. at 913. There, objective facts put in issue whether the defendant had actually safely escaped. The defendant fled to a phone booth where he was observed by a policeman who was investigating the burglary. Id. at 910. When the policeman approached, the defendant knocked the officer down and then escaped. Id. That incident resulted in an aggravated battery charge which the Seventh Circuit held to be an episode that was separate from the burglary for purposes of enhancement under § 924(e). Id. at 910, 913. On those facts, it is unclear what "safe escape" really is. Most importantly, the facts in Schlieman could be construed to support the conclusion that the defendant had been apprehended in the course of flight from the first offense, which fairly seems to contradict Sweeting. At any rate, the instant case is distinguishable, as Rawls clearly left one burglary site and moved to another with no indication that he feared apprehension or that

he was escaping or otherwise in flight. Additionally, while the "safe escape" theory seems to comport with our view in Washington, which considered the lapse of time when no criminal activity occurred, we did not expressly hold that "a few hours of no criminal activity" was a prerequisite to a determination that the subsequent criminal activity was a separate criminal episode. See Washington, 898 F.2d at 442.

Rawls also cites United States v. Antonie, 953 F.2d 496 (9th Cir. 1991), cert. denied, 113 S.Ct. 138 (1992), in which the defendant committed two robberies separated by a forty-minute interval. Rawls cites Antonie because the Ninth Circuit held that the two robberies were separate occurrences and noted that they took place in different cities and at different times, and involved different victims. Antonie, 953 F.2d at 498-99. These variables have also been considered by the Seventh Circuit. See Schlieman, 894 F.2d at 913. Nevertheless, Rawls' reliance on Antonie is misplaced. Rawls' crimes did occur at different times, did involve different victims (properties), and were committed in different locations, albeit the distance between crime sites and the time between occurrences were, as Rawls notes, very close.

The problem created by close spatial proximity was considered by the Tenth Circuit in United States v. Tisdale, 921 F.2d 1095 (10th Cir. 1990), cert. denied, 112 S.Ct. 596 (1991). The facts in Tisdale most closely resemble the facts in the instant case because there the defendant broke into a shopping mall and burglarized two separate businesses and a post office inside the mall. Id. at

1098. The Tenth Circuit held that those offenses were separate criminal episodes even though the record did not indicate the precise time of those burglaries. Id. at 1098-99. The closeness of the locations of the separate businesses to each other was therefore not material to a finding that separate criminal episodes occurred in the mall.

Rawls disagrees with Tisdale and argues that the Tenth Circuit cannot be squared with the 1988 Amendment to the Armed Career Criminals Act. As Rawls concedes, however, the Tenth Circuit considered the amended language in § 924(e)(1), which requires that the offenses be "committed on occasions different from one another."

The 1988 Amendment was added after the Supreme Court's decision in Petty v. United States, 481 U.S. 1034, 107 S.Ct. 1968, 95 L.Ed.2d 18 (1987), which remanded an enhanced sentence when the defendant robbed six persons simultaneously in a restaurant. See United States v. Petty, 798 F.2d 1157, 1159-60 (8th Cir. 1986), on remand, 828 F.2d 2 (1987), cert. denied, 486 U.S. 1057 (1988). The language in the 1988 Amendment was designed to eliminate enhancement when multiple convictions stem from a single criminal episode. The facts in the instant case, as in Antonie, Tisdale, and Schlieman, are clearly different from those in Petty.

Perhaps the most important factor distinguishing Petty is that when Rawls left the site of his first burglary, he was free to leave or to commit another burglary. See Tisdale, 921 F.2d at 1099 (discussing Petty). Rawls' burglary of the second building cannot

be considered an afterthought, just as the two crimes cannot be considered an inextricably intertwined series of events constituting a single episode. Rather than electing to leave the first burglarized business, Rawls, like Tisdale, chose to enter the second building where he kicked in numerous doors to various separate enterprises. Considering those burglaries as one episode would not be addressing the evil calculated by the Supreme Court's reversal of Petty and embodied in the amended language of the Armed Career Criminals Act. Furthermore, Antonie, Tisdale, Schlieman, as well as our decision in Washington, all hold that violent felonies committed on the same day and in close temporal and spatial proximity still may be considered as separate episodes for sentencing under § 924(e)(1).

For the above reasons, we find no reversible error in the district court's determination that the burglaries were separate criminal episodes under § 924(e)(1). Rawls' sentence is, therefore,

AFFIRMED.