

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8579

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAMMYE GEIGER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
W92 CR 74 1

May 13, 1993

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Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Sammye Geiger was charged with being a felon in possession of both a firearm and ammunition, two violations of 18 U.S.C. §§ 922(g)(1) and 924(a). Geiger was convicted after trial and sentenced to concurrent imprisonment terms of seventy-two months, plus supervised release, fines, and a special assessment. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Early in the evening of May 8, 1992, police officers executed arrest warrants at a bar in Temple, Texas. As Officer Wills entered through a side door, he saw Geiger rising from a table. The nearest person to Geiger and the table was at least six feet away. Empty boxes were stacked next to the table.

Officer Wills arrested Geiger pursuant to a warrant. He then searched the area where he had first seen Geiger. Between the empty boxes and the wall, Officers Wills discovered a .45 caliber pistol. The pistol contained a magazine loaded with five rounds of .45 caliber ammunition. Detectives matched a fingerprint found on the magazine to the fingerprint of Geiger's left index finger. No prints adequate for comparison were lifted from the firearm.

At trial, Geiger attempted to establish that he did not possess the firearm, and that he touched the ammunition clip only momentarily. He presented evidence that his common law wife, Yolanda White, brought the pistol to outside the bar, gave it to a friend, and the friend allowed Geiger to examine the magazine.

White testified¹ that she became angry with Geiger on May 8, purchased the pistol in Dallas that morning, and travelled to Temple to confront Geiger. Outside the bar she met Geiger's friend Eddie, who learned that she had the pistol. Eddie informed Geiger inside the bar, who said he would not come out unless White gave the pistol to Eddie. She did so, and Eddie took it into the bar.

¹Although subpoenaed, White did not appear and could not be located at the time of trial. Finding her unavailable for the purposes of Fed. R. Evid. 804(b), the district court admitted White's testimony from the preliminary examination.

Geiger testified that he never saw the pistol. Eddie indicated that he had obtained the firearm. When Geiger expressed disbelief that White had a loaded weapon, Eddie handed him the magazine to prove that it was loaded. Geiger handed the ammunition clip back to Eddie as soon as he saw that it contained bullets. Geiger stated that he did not know what Eddie then did with the pistol or ammunition.

Before trial, Geiger stated that Eddie Chestnut was the person involved in these events. At trial, he prevaricated regarding Eddie's identity. He could not remember which of several persons known as Eddie who frequented the bar had been involved. The government called Eddie Chestnut, who contradicted White and Geiger's testimony. Chestnut testified that he saw White that afternoon, but denied receiving a gun from her or taking it to show Geiger. Chestnut further stated that White telephoned him that evening, asking him to state that he had taken the pistol from her, shown the magazine to Geiger, and then hidden the weapon. After he was subpoenaed, White called once more to ask that Chestnut tell that story at trial.

Geiger was convicted of conspiracy to deliver cocaine in Bell County, Texas, in 1991. He does not dispute that he is a felon within the scope of § 922. The firearm and ammunition found in the bar were manufactured outside the state of Texas.

Geiger's Batson complaint is without merit. During jury selection, the prosecutor used one peremptory challenge to exclude Mr. Colbert, a black venireman. The prosecution used four of the

six peremptory challenges allowed to it, and did not strike two other black venirepersons. Geiger objected to the exclusion of Mr. Colbert, and the district court asked the prosecutor to articulate a race-neutral reason.² The prosecutor stated the Mr. Colbert was attentive during defense counsel's voir dire, but had sat with crossed arms and looked at the wall and floor while the prosecutor and court spoke. The district court concluded that "body language" provided a race neutral explanation for the peremptory challenge.

The district court's finding on the validity of the proffered explanation is reviewed for clear error. United States v. Terrazas-Carrasco, 861 F.2d 93, 96 (5th Cir. 1988). Body language is a permissible reason for exercising a peremptory challenge. Id. at 95 n.1. Demeanor may indicate sympathies or antagonisms justifying peremptory exclusion of a venireperson. Geiger argues that the prosecutor's assertion of demeanor was pretextual. He suggests, without support, that prosecutors routinely invoke this subjective and almost irrefutable reason. The fact that the prosecution left strikes unused rather than excluding other black venirepersons undermines the pretext argument in this case. See id. at 95 (noting fact that prosecutor used only six of seven strikes on minority persons, while several minority persons remained, supported finding of no discrimination).

²We express no opinion on whether striking one of three black venirepersons, with two unused strikes remaining, supports a prima facie case of racial discrimination. We have held that striking one of two blacks does not. United States v. Branch, --- F.2d --- (5th Cir. April 14, 1993). This issue is not important where the prosecution provided a racially neutral explanation.

Geiger challenges the sufficiency of the evidence proving his possession of the firearm and ammunition. We must consider the evidence in the light most favorable to the government and must afford the government all reasonable inferences and credibility choices. United States v. McKnight, 953 F.2d 898, 901 n.3 (5th Cir.), cert. denied, 112 S. Ct. 2975, 119 L. Ed. 2d 594 (1992). The evidence is sufficient if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Id. A violation of § 922(g)(1) requires proof (1) that Geiger was a convicted felon; (2) that he knowingly possessed a firearm or ammunition; and (3) that the proscribed item travelled in interstate commerce. See United States v. Dancy, 861 F.2d 77, 80-81 (5th Cir. 1988). Geiger maintains that the second element was not established beyond a reasonable doubt.

Illegal possession of a firearm may be either actual or constructive. United States v. Knezek, 964 F.2d 394, 400 (5th Cir. 1992). A person has constructive possession if he knowingly has ownership, control, or dominion over the item itself or over the premises where the item is located. McKnight, 953 F.2d at 901. It may be proven with circumstantial evidence, but the prosecution cannot rely merely upon the defendant's physical proximity to the contraband. Id.

The government argues that constructive possession is established by the following evidence: Geiger's proximity to the firearm, the absence of anyone near the same table when Officer Hill entered, and Geiger's fingerprint on the ammunition magazine.

We note that the magazine, which contained the ammunition, is a component that may be removed from the firearm. Viewing the evidence in the light most favorable to the government, we must discredit Geiger's testimony that "Eddie" hid the firearm without Geiger's knowledge. The government contends that Geiger's attempt to create a defense involving Eddie Chestnut also supports the proof of constructive possession. We agree.

AFFIRMED.