

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9084
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TYRONE JACKSON,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(3:92-CR-243-G)

(May 4, 1994)

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

PER CURIAM:*

Defendant-Appellant Tyrone Jackson was convicted for conspiracy to distribute cocaine, distribution of cocaine, possession with intent to distribute cocaine, and possession of a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. §§ 2 and 924(c)(1), and 21 U.S.C. §§ 841(a)(1) and 846. Appealing the firearms conviction, he contends that the evidence was insufficient to support possessing a firearm during and in relation to a drug-trafficking crime; and by separate motion argues for application of a particular standard of review. Finding no reversible error, we affirm Jackson's conviction, and we deny his motion as unnecessary.

I

FACTS AND PROCEEDINGS

After Jackson was convicted by the jury he was sentenced to 98 months imprisonment and three years of supervised release. At Jackson's trial, Wendell Frost, a special agent with the Bureau of Alcohol, Tobacco and Firearms (BATF), testified that he was assisting in an undercover investigation that involved Jackson. At one point, Agent Frost attempted to purchase cocaine from Jackson, who expressed concern that Agent Frost was a policeman then asked Agent Frost to drive around the block. When Agent Frost returned to Jackson's location he successfully completed a purchase of cocaine from Cedric Washington. While Agent Frost was circling the block, Jackson had approved the sale to the agent and ordered Washington to complete it.

In April 1992, BATF agents conducted surveillance of the location where Jackson was selling cocaine and later executed a search warrant which resulted in the seizure of narcotics. At noon that day, prior to the execution of the warrant, Agent Frost had

observed Jackson in possession of a handgun in an area where the cocaine was being distributed. Agent Frost described the gun as a Smith & Wesson blue-steel revolver. The government then presented a videotape of Jackson brandishing a gun. Jackson later handed the revolver to Reymundo Lissalde, who took it to a nearby house in a manner suggesting that he was trying to conceal the gun, with the barrel of the gun pointing toward the ground.

Agent Frost testified that the revolver which he saw in Jackson's possession was not recovered during the execution of the search warrant and that he never saw that gun being fired. He also stated that he heard shots being fired late in the afternoon of the day on which he had observed Jackson in possession of the revolver. Agent Frost testified: "[At] approximately 5:35, 5:45 that day[,] we observed Tyrone Jackson come down the street and move out to the left of us and out of our view which would be to the left of the location, and almost immediately we heard three or four shots go off."

Reymundo Lissalde testified that the videotape depicted Jackson handing Lissalde a gun. He testified further that the gun was real and that he returned the gun to the house where he placed it under the couch to hide it from his mother. Lissalde stated that, about fifteen minutes after taking the gun to the house, Jackson asked him to retrieve it. After Lissalde returned the gun, Jackson proceeded down the street in his wheelchair.

On cross-examination, Lissalde testified that he had rarely fired guns and that he had never loaded or cleaned the gun that he

handed to Jackson. Lissalde maintained nonetheless that there was a "big difference" between a real gun and a play gun and that he knew the gun in question was real.

II

ANALYSIS

Jackson appeals his conviction for using or carrying a firearm in relation to a drug-trafficking offense. He contends that there was insufficient evidence that he possessed an actual firearm. The standard of review of a challenge of the sufficiency of the evidence to support a criminal conviction is whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The standard of review is the same, whether the evidence is direct or circumstantial. United States v. Bryant, 770 F.2d 1283, 1288 (5th Cir. 1985), cert. denied, 475 U.S. 1030 (1986). The evidence is viewed in the light most favorable to the government, with all reasonable inferences and credibility choices made in support of the verdict. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

At the close of the government's case, counsel for Jackson moved for acquittal on counts five (distribution of cocaine) and seven (possession of a firearm in furtherance of drug trafficking) of the indictment. At the close of all of the evidence, counsel moved for acquittal on "both counts." In response to the government's argument that the "devoid of evidence pointing to

guilt" standard should apply, Jackson has filed an "Agreed Motion for the Court to Review the Sufficiency Under the 'In the Light Most Favorable to the Government' Standard." Because Jackson moved for acquittal on the possession-of-a-firearm charge and one other charge at the close of the government's evidence and then renewed the motion for acquittal as to "both counts" at the close of all of the evidence, we inferred that "both counts" include the count in question and that the "in the light most favorable to the government" standard applies.

Jackson asserts that Lissalde's testimony to the effect that the gun was "real" was not credible, and that, therefore, there was insufficient evidence to show that he possessed an actual firearm. Unfortunately for Jackson, though, our role in reviewing the credibility of a witness is extremely limited. See United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990). As the jury is "the ultimate arbiter" of a witness's credibility, the test for finding testimony incredible as a matter of law is stringent. Id. For an appellate court to consider testimony to be incredible, it must be "so unbelievable on its face that it defies physical laws." Id.

Although Lissalde's testimony was arguably conflicting in some instances, it was not "so unbelievable on its face" as to "def[y] physical laws." At trial, Lissalde testified that Jackson possessed a real gun. He also acknowledged that, in an earlier statement to an agent of Jackson's attorney, he (Lissalde) had stated that the revolver was a BB gun. Lissalde testified that he

told the agent that the revolver was a BB gun because he was afraid of being hurt. Even though Lissalde's admission of providing Jackson's counsel with false information casts some doubt upon the reliability of his trial testimony, it does not rise to a level that mandates our intervention. Moreover, Lissalde's testimony that Jackson possessed a real gun is corroborated by the evidence that Lissalde hid the gun when he returned it to the house and that he carried the gun in a concealing manner.

To prove that Jackson possessed the firearm, the government did not have to prove that the gun was actually used, handled, or brandished by Jackson, so long as it was available to him to facilitate the commission of the offense. United States v. Rocha, 916 F.2d 219, 237 (5th Cir. 1990), cert. denied, 111 S.Ct. 2057 (1991). Nevertheless, Jackson did brandish the firearm during an ongoing conspiracy to distribute cocaine in an area where the cocaine was being distributed. We conclude that there was sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that Jackson committed the charged offense. In light of the foregoing analysis, Jackson's motion regarding the standard of review is denied as unnecessary.

AFFIRMED.