

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-1063

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEVIN SAMUELS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:CR-92-319-P)

(December 27, 1993)

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

PER CURIAM:*

Kevin Samuels appeals his conviction and sentence for the following offenses: obstructing, delaying, and affecting commerce by robbery, in violation of 18 U.S.C. § 1951(a) (1988); using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1) (1988); assaulting a federal officer, in violation of 18 U.S.C. § 111 (1988). Finding no error, we affirm.

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

On June 13, 1992, Samuels entered the Lucky Food Mart, a check-cashing business that also sells lottery tickets and limited grocery items. After beating the store owner with his pistol, and robbing him of \$68,000.00, Samuels ran out the front door to a waiting car. The car sped away, ran a red light, and crashed into several parked cars. After jumping out of the disabled vehicle, Samuels ran to Bonnie and Clyde's, a nearby car stereo store. After obtaining the keys to an employee's pickup by threats of force, Samuels drove away in the pickup.

Pursuant to a warrant for Samuels's arrest, agents with the Federal Bureau of Investigations ("FBI") arrived at Samuels's residence. Shortly thereafter, Samuels, driving a red Nissan, exited his driveway at a high rate of speed and sped toward a parked FBI vehicle manned by agents Joseph Ullman and Dennis Brady. Agent Ullman tried unsuccessfully to avoid a collision by putting his car in reverse. After ramming the agents' car, Samuels was detained and arrested.

Samuels was charged with two counts of obstructing, delaying and affecting commerce by robbery, in violation of 18 U.S.C. § 1951(a), two counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 111, and two counts of assaulting a federal officer, in violation of 18 U.S.C. § 111. The jury returned a guilty verdict on all counts. Samuels was sentenced to an aggregate 533 months of imprisonment, followed by three years of supervised release.

On appeal, Samuels contends that: (a) the government improperly commented on his failure to testify; (b) the district court erred in instructing the jury; (c) the evidence was insufficient to support his conviction of using or carrying a firearm during a crime of violence; and (d) the district court erred in applying the enhancement provision of 18 U.S.C. § 924(c).¹

II

A

Samuels first contends that the government made a remark))i.e., used the term "uncontroverted"))which could be construed as an improper comment on Samuels's failure to testify. "[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence" ² In determining whether a prosecutor's remarks constitute comments about a defendant's silence, we must decide whether (1) the prosecutor's manifest intent was to comment on the defendant's silence or (2) the

¹ Samuels also contends that "[f]or the Court to permit a panel with only 3 blacks, and 2 of those unavailable for the jury, is tantamount to permitting the prosecutors to arbitrarily strike the black jurors, violating the constitutional rights of Appellant." Since, however, he does not provide any analysis in support of his contention, we need not address this issue. See *United States v. Green*, 964 F.2d 365, 371 (5th Cir. 1992) (stating that the "[f]ailure to prosecute an issue on appeal constitutes waiver of the issue"), *cert. denied*, 113 S. Ct. 984 (1993).

² *Griffin v. State of California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965).

character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence.³

At closing argument, the government argued in pertinent part:

The last two counts, of course, involve the assaults. Mr. Rodgers [defense counsel] got up here and he suggested to you what? He said well, he's just not guilty of the two counts of assaulting those officers. But you know something, the defendant told you, didn't he, through the testimony of the officers and the agents that testified that's just not true.

He admitted, despite what Mr. Rodgers said, he admitted and even, in fact, I wrote a note down, Mr. Rodgers said, he may have said while he was down there with those officers, that he intended to ram them. No, folks, there's no may or maybe about it. He did say that. *That's uncontroverted.*

Reviewing the government's remark in this context, it seems to us that the remark could be construed as referring to the uncontradicted state of the evidence, rather than Samuels's failure to testify. We further note that the statements alluded to by the government could have been controverted by means other than calling Samuels to the witness stand. We therefore cannot conclude that either the government's manifest intent was to comment on Samuels's silence or that the jury would naturally and necessarily construe the government's remark to be a comment on Samuels's silence. Accordingly, we reject Samuels's first contention on appeal.⁴

³ *United States v. Jones*, 648 F.2d 215, 218 (5th Cir. 1981) (per curiam).

⁴ Even were we to conclude that the government's remark violated Samuels's rights under the Fifth Amendment, we would find the resulting error harmless in light of the great weight of the evidence against Samuels, the singular nature to the remark, and the district court's immediate instruction to the jury to disregard the remark.

B

Samuels next contends that the district court erred in instructing the jury on the offense of using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1). The district court instructed the jury as follows:

[T]itle 18, United States Code, Section 924(c)(1), makes it a crime for anyone to use or carry a firearm during and in relation to a crime of violence.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt: First, that the defendant committed the crime alleged in Counts 1 and 3 of the indictment, and Second, that the defendant used or carried a firearm during and in relation to the defendant's commission of the crime.

Samuels argues that the instruction should have included "the necessary jurisdictional element of some law, state or federal, which renders the possession of the firearm unlawful." We disagree because the unlawful possession of a firearm is not an element of an offense under § 924(c)(1). That statute states that "[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall . . . be sentenced to imprisonment for five years." Because Samuels does not challenge the district court's instruction on any other ground, we reject his second contention on appeal.

C

Samuels also contends that the evidence was insufficient to support his conviction of obstructing, delaying, and affecting commerce by robbery, in violation of 18 U.S.C. § 1951(a). In

assessing a challenge to the sufficiency of the evidence, we must consider the evidence in the light most favorable to the verdict and must afford the government the benefit of all reasonable inferences and credibility choices.⁵ The evidence is sufficient if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt based upon the evidence presented at trial.⁶

To convict Samuels of obstructing, delaying, and affecting commerce by robbery, the government had to prove, *inter alia*, that Samuels's conduct in some way affected commerce.⁷ Samuels argues that the evidence supporting this element was insufficient. The evidence showed that Bonnie and Clyde's sold, delivered, and installed stereo equipment which traveled in interstate commerce, and that the stolen pickup was used to deliver such equipment. Based on this evidence, a rational trier of fact could have concluded beyond a reasonable doubt that Samuels's theft of the pickup affected interstate commerce.⁸ We therefore hold that the evidence was sufficient to support his conviction.

D

⁵ *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989).

⁶ *Id.*

⁷ 18 U.S.C. § 1951(a).

⁸ The effect on interstate commerce need not be substantial to meet the statutory requirement. *United States v. Wright*, 797 F.2d 245, 248-49 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1887 (1987); *United States v. Villarreal*, 764 F.2d 1048, 1052 (5th Cir.), *cert. denied*, 106 S. Ct. 272 (1985).

Lastly, Samuels contends that the district court erred in applying the enhancement provision of 18 U.S.C. § 924(c). That provision provides that "[i]n the case of [a defendant's] second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years." In applying the enhancement provision to Samuels, the district court interpreted the term "second or subsequent conviction" to include convictions resulting from the same indictment as the first conviction. Samuels argues that the term "second or subsequent conviction" should be interpreted to require that an offender be convicted under *separate* indictments. Because Samuels's argument is foreclosed by the Supreme Court's recent decision in *United States v. Deal*, 113 S. Ct. 1993 (1993),⁹ we reject his final contention on appeal.

III

For the foregoing reasons, we AFFIRM.

⁹ See *Deal*, 113 S. Ct. at 1996-99 (holding that the "second or subsequent conviction" within the meaning § 924(c) can result from the same indictment as the first conviction under that statute).