UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-1143

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM C. BRAGG,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(2 91 CR 11 (01))

(January 12, 1994)

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

PER CURIAM:[*]

The defendant, William C. Bragg, was convicted by a jury of conspiring (a) to commit mail fraud[1] and (b) to possess an unregistered destructive device, that is a bomb,[2] in violation of 18 U.S.C. § 371 (1988). On direct appeal we remanded to the district court for resentencing, and the district court sentenced

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] *See* 18 U.S.C. § 1341 (1988).

[2] *See* 26 U.S.C. §§ 5861(d), 5871 (1988).

Bragg to 60 months imprisonment. Bragg appeals his sentence, contending that the district court erred by (1) finding that, had it been the trier of fact, it would have convicted Bragg of conspiracy to possess an unregistered destructive device, that is a bomb; (2) applying the base offense level for attempted murder, U.S.S.G. § 2A2.1;[3] (3) enhancing Bragg's offense level because his victim sustained permanent or life-threatening bodily injuries, pursuant to U.S.S.G. § 2A2.1(b)(3); (4) enhancing Bragg's offense level because a firearm was discharged, pursuant to U.S.S.G. § 2A2.1(b)(2); (5) enhancing Bragg's offense level for obstruction of justice, pursuant to U.S.S.G. § 3C1.1; and (6) enhancing Bragg's offense level because his victim was unusually vulnerable, pursuant to U.S.S.G. § 3A1.1. Finding no reversible error, we affirm.

I

Bragg owned an investment business called Amarillo Bragg, through which he attempted to acquire a hazardous waste disposal well, with the help of investors such as Scotty McAninch. Bragg persuaded McAninch to acquire insurance policies on his life, with Bragg or Amarillo Bragg as beneficiary, to insure against the possibility that McAninch might die unexpectedly and fail to provide his promised investment in the waste disposal well. Bragg paid the premiums on the life insurance policies acquired by McAninch.

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[3] *See* United States Sentencing Commission, *Guidelines Manual,* § 2A2.1 (Nov. 1989).

While the life insurance policies were in effect, Bragg offered McAninch the opportunity to earn money by running errands for some of Bragg's friends. Bragg instructed McAninch to provide the number of a pay phone and then wait by the phone for instructions. In response to an anonymous call on the pay phone, McAninch went to retrieve a gray case from behind a building. When McAninch lifted the case, it exploded, seriously injuring him.

Bragg was indicted for conspiracy to commit mail fraud and possess an unregistered destructive device, that is a bomb, in violation of 18 U.S.C. § 371. The indictment alleged that Bragg and an unknown person attempted to cause the death of McAninch by arranging for him to pick up a gray case containing a bomb. Bragg was tried before a jury and found guilty on the conspiracy count.[4] The district court sentenced Bragg to 60 months imprisonment, and Bragg appealed.

U.S.S.G. § 1B1.2(d) (1989) provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." *Id.* However, if "the jury's verdict does not establish which offense(s) was the object of the conspiracy," § 1B1.2(d) "should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of

[4] Bragg was convicted on several additional counts which are not relevant to this appeal.

conspiring to commit that object offense." *Id.* comment. (n.5). Since the jury's verdict did not specify whether mail fraud or possession of an unregistered bomb was the object offense of Bragg's conspiracy, and since the district court did not find that it would convict Bragg either of conspiring to possess a bomb or of conspiring to commit mail fraud, if it were sitting as the trier of fact, we vacated Bragg's sentence and remanded for resentencing.

At resentencing, the district court found that, "if [it] were sitting as a trier of the facts in this cause, [it] would have convicted [Bragg] of conspiracy to possess an unregistered destructive device))that is, a bomb." The district court therefore computed Bragg's offense level on the basis of the guideline pertaining to unlawful possession of firearms, U.S.S.G. § 2K2.1, and the guideline pertaining to attempted murder, U.S.S.G. § 2A2.1.[5] Bragg's offense level of 37, along with his criminal history category of I, resulted in a guideline sentencing range of 210-262 months imprisonment. However, the district court sentenced Bragg to 60 months imprisonment, the statutory maximum provided by 18 U.S.C. § 371.

II

[5] Section 2K2.1(c)(2) provides, "[i]f the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above." Because Bragg conspired to possess the bomb in connection with the attempted murder of Scotty McAninch, the district court applied § 2X1.1 in respect to the guideline for attempted murder, U.S.S.G. § 2A2.1.

Bragg contends that his sentence is erroneous because the district court erred at resentencing by finding that, "if [it] were sitting as a trier of the facts in this cause, [it] would have convicted [Bragg] of conspiracy to possess an unregistered destructive device))that is, a bomb."[6] According to Bragg, the district court's finding is unsupported by the evidence, and therefore he should have been assigned an offense level for mail fraud, rather than for possession of an unregistered bomb. We review the district court's finding of fact for clear error. *See United States v. Rodriguez,* 925 F.2d 107, 109 (5th Cir. 1991) ("In examining a challenge to a sentence based on the Guidelines, we must accept the factual findings of the district court unless they are clearly erroneous . . . ."). We will not find a district court's ruling to be clearly erroneous unless we are left with the definite and firm conviction that a mistake has been committed. *United States v. Mitchell,* 964 F.2d 454, 457-58 (5th Cir. 1992).

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[6] Bragg's argument can be fairly construed only as a challenge to his sentence. Nevertheless, he asks this Court to enter a judgment of acquittal on the charge of conspiracy. In our prior opinion we rejected Bragg's sufficiency-of-the-evidence challenge to his conviction, and that decision is binding on this panel, as it is the law of the case. *See DFW Metro Line Serv. v. Southwestern Bell Tel. Corp.,* 988 F.2d 601, 604 (5th Cir.) ("The decision of a legal issue by an appellate court establishes the `law of the case' and must be followed in all subsequent proceedings in the same case at both the trial and appellate levels unless the evidence at a subsequent trial was substantially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.") (quoting *Reid v. Rolling Fork Pub. Util. Dist.,* 979 F.2d 1084, 1086 (5th Cir. 1992)), *cert. denied,* ___ U.S. ___, 114 S. Ct. 183, ___ L. Ed. 2d ___ (1993).

The district court's finding is not clearly erroneous, because it is supported by the evidence. In his prior appeal, Bragg argued that the evidence was insufficient to support his conviction for conspiracy to possess an unregistered destructive device. We rejected that argument after reviewing the evidence presented by the government. We observed that Bragg arranged for McAninch to obtain insurance policies on his life, designating Bragg or his company Amarillo Bragg as beneficiary, and that Bragg paid the premiums on the policies acquired. We further noted that, while the life insurance policies were in place, Bragg and an unidentified person sent McAninch to retrieve a package which exploded, severely injuring McAninch. Based on this evidence, we held that a reasonable jury could conclude that Bragg conspired with an unidentified person to possess and use an unregistered bomb. By the same token, the district court could reasonably conclude, based on the foregoing evidence, that Bragg conspired to possess an unregistered bomb. The district court's finding to that effect therefore is not clearly erroneous.[7]

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[7] The jury's verdict acquitting Bragg of possession of an unregistered destructive device does not leave us with "the definite and firm conviction that a mistake has been committed." Since possession of an unregistered bomb and conspiracy to possess an unregistered bomb have different elements, we conclude, as we did in our prior opinion, that "the fact that the jury acquitted [Bragg] of possession of an unregistered bomb does not indicate that he did not conspire to possess an unregistered bomb."

We are also unpersuaded by Bragg's argument that McAninch was the bomber and that he blew himself up accidentally. Bragg contends that McAninch was the bomber because (1) a bomb similar to the one which injured McAninch was built in a Federal Express box, and McAninch was known to have possessed a box of that sort; (2) the dynamite found in the Federal Express box came from Moab, Utah, and McAninch was known to have been near Moab; (3) a member of the

Bragg also argues that the probation officer, and by implication the district court, "incorrectly determined" that the appropriate offense level in this case was the one pertaining to attempted murder. *See* U.S.S.G. § 2A2.1. In support of that argument Bragg asserts that attempted murder "was an entirely new, separate, and uncharged provision of the United States Code." However, U.S.S.G. § 2K2.1(c)(2), which the district court applied at sentencing, explicitly provides for computation of the defendant's offense level on the basis of an offense other than the offense of conviction. *See* U.S.S.G. § 2K2.1(c)(2) (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) ("If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above."). Section 2K2.1(c)(2), on its face, does not require that the defendant be charged with the "other offense." *See id.* Neither does Bragg cite any authority which suggests that

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Amarillo bomb squad was "concerned" that McAninch might have been the bomber; and (4) McAninch's account of the explosion))that he picked up a grey case and it exploded in his hand))was contradicted by an explosives expert at trial. While this evidence may have some slight tendency to show that McAninch was the bomber, it is hardly so compelling as to convince us that the district court's finding of fact was implausible. *See United States v. Cooper,* 966 F.2d 936, 941-42 (5th Cir.) ("A factual finding is not clearly erroneous as long as it is plausible in light of the record read as a whole."), *cert. denied,* ___ U.S. ___, 113 S. Ct. 481, 121 L. Ed. 2d 386 (1992) .

only charged offenses may qualify as "another offense" under § 2K2.1(c)(2).[8] Bragg's argument is therefore without merit.

Bragg also contends that the district court erred by increasing his offense level because (1) McAninch suffered permanent or life-threatening injuries, *see* U.S.S.G. § 2A2.1(b)(3)(C); and (2) a firearm was discharged in the course of the offense. *See id.* § 2A2.1(b)(2)(A). Bragg argues that these enhancements were erroneous because they are related to the bombing and the evidence did not support the district court's finding that Bragg conspired to possess the bomb. As we have already found that the district court's finding is not clearly erroneous, Bragg's arguments are without merit.

Bragg further argues that the district court erred by increasing his offense level on account of (1) obstruction of justice, *see id.* § 3C1.1; and (2) an unusually vulnerable victim. *See id.* § 3A1.1. We need not decide whether the district court erred in these respects, since any error would be harmless. Even without the obstruction and vulnerable victim enhancements, Bragg would have been assigned an offense level of 29.[9] Given Bragg's

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[8] We have upheld the application § 2K2.1(c) in several cases where it is not apparent from our opinion that the defendant was charged with the "other offense." *See United States v. Chapman,* 7 F.3d 66, 69 (5th Cir. 1993); *United States v. Harris,* 932 F.2d 1529, 1537-38 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 324, 116 L. Ed. 2d 265 (1991); *United States v. Pologruto,* 914 F.2d 67, 69-70 (5th Cir. 1990).

[9] Bragg's base offense level under U.S.S.G. § 2A2.1 is 20. Five points were added for discharge of a firearm, pursuant to U.S.S.G. § 2A2.1(b)(2)(A), and four more points were added because McAninch suffered permanent or life-threatening injuries, pursuant to U.S.S.G. § 2A2.1(b)(3)(C).

criminal history category of I, his sentencing range without the obstruction and vulnerable victim enhancements would have been 87-108 months, which exceeds the statutory maximum sentence of five years provided by 18 U.S.C. § 371, which the district court imposed. "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1. Therefore the enhancements of which Bragg complains did not affect his sentence, and they constitute, at most, harmless error. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.").

III

For the foregoing reasons, we **AFFIRM**.