

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1310
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANDREW DOYLE HOGG,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-0432-G(1))

(September 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Andrew Doyle Hogg appeals his convictions for use of a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) and (2); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924 (e)(1). Finding no reversible error, we **AFFIRM**.

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In April 1992, Dallas police officers had information that Hogg and Sheila Martin were supplying drugs in an area in South Dallas. Officers John Paul Jones, Jr. and Michael Stanley, who were observing the area around Hogg's mother's house, watched Hogg and Martin leave the house. Hogg and Martin got into a car; according to Martin's testimony, Hogg then placed a 9 millimeter pistol under the passenger seat.

Martin and Hogg drove away, with Hogg in the passenger seat and Martin driving. Officers Jones and Stanley stopped the car for a traffic violation, and Stanley asked Martin if she had drugs or guns in the car. Martin said that she did not; and when Stanley asked for permission to search the car, Martin consented.

Jones and Stanley searched the car. Jones retrieved a pistol from under the passenger seat of the car; at trial, Stanley and Martin identified the pistol as belonging to Hogg. The police arrested Hogg. Jones then searched the trunk of the car, and retrieved a bottle of heroin and another gun, later identified as Martin's.

A later investigation by Agent Lisa McClennon of the Bureau of Alcohol, Tobacco and Firearms failed to produce usable fingerprints from the 9 millimeter pistol. McClennon testified that police had searched Hogg's hotel room, where they found 9 millimeter ammunition.

Hogg pleaded guilty to possession with intent to distribute heroin and conspiracy to possess with intent to distribute heroin

(counts 1 and 2 of the indictment). He was convicted by a jury of possession of a firearm in connection with a drug-trafficking offense, and possession of a firearm by a convicted felon (counts 3 and 4). Hogg was sentenced, *inter alia*, to a 240-month term of imprisonment on each of counts 1, 2, and 4, with counts 2 and 4 running concurrently to each other and to the sentence imposed on count 1. Hogg was sentenced to a 60-month term of imprisonment on count 3, to run consecutively to the terms imposed on counts 1, 2, and 4. He appeals only his convictions on counts 3 and 4.

II.

Hogg contends that the evidence presented at trial was insufficient to establish that he was a felon in possession of a firearm during the commission of a drug-trafficking offense. He maintains that Martin's testimony about his possession of the 9 millimeter pistol was not credible. Hogg also contends that statements made by the prosecutor during closing argument, relating to the status of charges against Martin, constitute reversible error.

A.

In reviewing a sufficiency of the evidence challenge, we view the evidence (direct or circumstantial), and all reasonable inferences drawn from it, in the light most favorable to the government. *E.g.*, ***United States v. Mergerson***, 995 F.2d 1285 (5th Cir. 1993) (citing ***Jackson v. Virginia***, 443 U.S. 307, 319 (1942); ***United States v. Triplett***, 922 F.2d 1174 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2245 (1991)). For assessing the sufficiency

of the evidence in a criminal case, the standard of review is normally whether "a reasonable trier of fact could find that the evidence establishe[d] guilt beyond a reasonable doubt." **United States v. Bell**, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *affirmed on other grounds*, 462 U.S. 356 (1983).

Here, however, the standard of review is more deferential, because Hogg did not move in district court for a judgment of acquittal.² Thus, the judgment may be set aside only to avoid a "manifest miscarriage of justice." **United States v. Singer**, 970 F.2d 1414, 1418 (5th Cir. 1992) (quoting **United States v. Hernandez**, 962 F.2d 1152, 1156 (5th Cir. 1992)). Indeed, under this standard, the conviction may be reversed only where the record is "devoid of evidence pointing to guilt." **Id.** (quoting **United States v. Pruneda-Gonzalez**, 953 F.2d 190, 194 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2952 (1992); and **United States v. Robles-Pantoja**, 887 F.2d 1250, 1254 (5th Cir. 1989)).

Hogg appeals his convictions for use or carrying of a firearm in relation to a drug-trafficking offense, and for possession of a firearm by a convicted felon. He contends that, as to each offense, the government failed to prove the required element of his knowing possession of a firearm.³ In large part, Hogg asserts that

² When offered the opportunity to so move when the government completed its case-in-chief, defense counsel declined to do so. Nor did he so move after all of the evidence had been presented.

³ To convict a defendant of the use or carrying of a firearm in relation to a drug-trafficking offense, under 18 U.S.C. §924(c)(1), the government must prove that the defendant committed a drug-trafficking crime; that the defendant carried a firearm during and in relation to the commission of that crime; and that the defendant

Martin's testimony regarding his ownership of the gun was not credible, and that, therefore, there was insufficient evidence to show that he knowingly possessed the gun. This argument is unavailing.

Needless to say, our role in reviewing the credibility of a witness is extremely limited. **United States v. Casel**, 995 F.2d 1299, 1303 (5th Cir. 1993) (quoting **United States v. Bell**, 678 F.2d at 549). Because the jury is "the ultimate arbiter" of a witness' credibility, the test for finding testimony incredible as a matter of law is stringent. **United States v. Lindell**, 881 F.2d 1313, 1322 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (citations omitted). For an appellate court to consider it incredible, the testimony must be "factually impossible"; the court will intervene only if the testimony is "so unbelievable on its face that it defies physical laws." **Casel**, 995 F.2d at 1304; **United States v. Castaneda**, 951 F.2d 44, 48 (5th Cir. 1992).

Martin's testimony, while arguably conflicting in some instances, was not "factually impossible"; nor was it "so unbelievable on its face" as to "def[y] physical laws." At trial, Martin testified that Hogg owned the 9 millimeter pistol found

knowingly possessed the firearm. **United States v. Blankenship**, 923 F.2d 1110, 1114 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2262 (1991).

To convict a defendant of possession of a firearm by a convicted felon, under 18 U.S.C. §§ 922(g)(1) and 924 (e)(1), the government must prove that the defendant previously had been convicted of a felony; that the defendant knowingly possessed a firearm; and that the possession of the firearm was in or affecting interstate commerce. **United States v. Dancy**, 861 F.2d 77, 81 (5th Cir. 1988).

under the passenger seat of her car, and that he put it there. In earlier statements to Agent McClennon, Martin identified the gun once as a .38 caliber pistol, and once as a 9 millimeter pistol. Although the statements were inconsistent, Martin's second statement (that Hogg's gun, found in the car, was a 9 millimeter) was consistent with her trial testimony. Further, as our court has held, "[t]he mere fact that the witness' memory is later shown to be somewhat flawed will not suffice to demonstrate that the witness' entire testimony is 'incredible.'" **United States v. Case1**, 995 F.2d at 1304.

Moreover, the government presented additional evidence that the gun was Hogg's. For example, Officer Stanley testified that the gun was found in the passenger side of the front seat. To prove that a defendant had possession of a firearm, the government need not prove that the weapon was actually used, handled, or brandished by the defendant, so long as the weapon was available to the defendant 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); *see also United States v. Coburn*, 876 F.2d 372, 375 (5th Cir. 1989) (unloaded gun in rear window of defendant's truck constituted "use" for purposes of statute). Here, the gun was found beneath Hogg's seat. In several cases with similar facts, we have held evidence that a firearm was beneath the

defendant's seat, or on the floorboard of the car, to be sufficient to sustain a conviction.⁴

In sum, the record is not devoid of evidence pointing to guilt. Hogg's contention fails.

B.

Hogg also contends that the prosecutor improperly bolstered Martin's testimony by commenting, in his rebuttal argument: "And I want to tell you right now, ladies and gentlemen, as a representative of the United States government that the gun charge against Sheila Martin has not, as she testified, been dropped." This contention, as well, must fail.

When reviewing a claim of prosecutorial misconduct, "[t]he basic question ... is whether the jury would have found appellant[] guilty had it not been for the prosecutor's improper argument." *United States v. Goff*, 847 F.2d 149, 165 (5th Cir.), *modified in part*, 847 F.2d at 178-79 (5th Cir.) (en banc), *cert. denied*, 488 U.S. 932 (1988). An improper statement by the prosecution must be considered in light of the magnitude of the statement's prejudicial effect; the effect of any cautionary instruction given; and the

⁴ *United States v. Rocha*, 916 F.2d at 237; *United States v. Featherson*, 949 F.2d 770 (5th Cir. 1990) (conviction for possession upheld where unloaded semi-automatic weapon was found beneath defendant's seat, with ammunition in trunk), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1771 (1992); *United States v. Munoz-Fabela*, 896 F.2d 908 (5th Cir.) (conviction for possession upheld where gun was on floorboard of car, defendant was not the owner, defendant's fingerprints were not on gun, and defendant denied knowledge of gun), *cert. denied*, ___ U.S. ___, 111 S.Ct. 76 (1990). As with actual use of the firearm, ownership of the gun is also irrelevant, because the government need only show that the gun was available to facilitate a crime. *Id.* at 911.

strength of the evidence of the defendant's guilt. *Id.*; accord, *United States v. Arce*, No. 92-2233, slip op. 5835, 5842 (5th Cir. Aug. 3, 1993) (quoting *United States v. Simpson*, 901 F.2d 1223, 1227 (5th Cir. 1990)).

Martin testified on cross-examination that she had been charged with possession of a firearm in connection with a drug-trafficking offense, but that the charge had been dropped. On redirect, she testified that she remembered that her plea agreement stated that the "government will move to dismiss any of the remaining counts of the indictment at the time of sentencing...". Martin stated that she had not been sentenced, and that the indictment against her remained in effect. Defense counsel, in his closing, referred to Martin's original statement that the charge against her had been dropped, and that it had been dropped in return for Martin's testimony in Hogg's trial. The district judge overruled the prosecutor's objection that the remark was "patently untrue". Defense counsel continued, stating that the charge against Martin had been dropped in exchange for her guilty plea to counts 1 and 2 of the indictment and her testimony in Hogg's trial, and that Martin "would like to do the least amount of time" required. In rebuttal, the prosecutor made the statement in issue.

The prosecutor's statement was testimonial in nature. It tended to bolster Martin's redirect testimony, and contradict her cross-examination testimony. The statement, however, did not prejudice Hogg in any substantial fashion. The prosecutor properly could have reminded the jury that Martin had testified on redirect

that the charges against her had not been dismissed. Additionally, the district judge sustained defense counsel's objection ("He's testifying.") to the prosecutor's comment. The district judge did not instruct the jury to disregard the comment, but defense counsel did not request such an instruction. In any event, before trial, the court had instructed the jury that the arguments of counsel are not evidence. Finally, the evidence against Hogg is more than sufficient to support his conviction.

III.

For the foregoing reasons, the judgment is

AFFIRMED.