

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3787
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIE R. BATES,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 93-226 A)

(June 2, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

In appealing his conviction and sentence for violating 18 U.S.C. §§ 922(g)(1), 924(a)(2) (proscribing possession of firearms by a felon), Willie Bates challenges the admission into evidence of a Firearms Transaction Record, and the denial of a reduction in his offense level for acceptance of responsibility. We **AFFIRM**.

I.

On November 21, 1991, Bates pleaded guilty in state court to possession of crack cocaine, a felony punishable by a term of imprisonment of more than one year. See La. Rev. Stat. 40:967. He

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 Pursuant to that rule, the court has determined that this opinion should not be published.

received a sentence of two years imprisonment, suspended, and was placed on two years probation. One of the conditions of Bates's probation -- specified in the Conditions of Probation form that Bates stipulated he signed at sentencing -- was that he not own or possess firearms.

On January 7, 1992, however (about seven weeks after pleading guilty to the cocaine charge), Bates pawned two firearms (a .45 caliber pistol and a 9 mm pistol), receiving a \$200 loan. Then, on January 17, 1992, he returned to the pawnshop and redeemed the firearms.

In order for Bates to redeem the firearms, the pawnshop operator required him to complete a Firearms Transaction Record (Bureau of Alcohol, Tobacco and Firearms (ATF) Form 4473). The form's question 8(b) asked Bates whether he had

been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?
(NOTE: A "yes" answer is necessary if the judge could have given a sentence of more than one year....)

The form also stated that "[a]n untruthful answer may subject you to criminal prosecution" and that "a person who answers 'Yes' to any of the above questions [including question 8(b)] is prohibited from purchasing and/or possessing a firearm, except as otherwise provided by Federal law." Bates answered "no" to question 8(b).²

² Bates testified that he answered "no" to question 8(b) because he had not been imprisoned following the state cocaine conviction, and thus did not think that the question applied to him. At trial, however, he stipulated that he was a convicted felon.

On January 21, 1992, Bates again pawned the firearms at the same shop.

Bates was indicted in May 1993, on one count of violating 18 U.S.C. §§ 922(g)(1), 924(a)(2).³ Before trial, the government filed a memorandum requesting that the court rule on the admissibility of the ATF form. Bates objected to its admission, although he stipulated that he had signed the form. The district court found the form admissible, either as intrinsic evidence of Bates's felon-in-possession offense, or as extrinsic evidence. The court also granted Bates's motion *in limine* to exclude any reference to the fact that his previous felony had been a drug charge.

At trial, Bates's only contention was that he lacked the relevant motive or intent to violate 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He claimed he had neither read nor received copies of the probation forms he signed, and therefore did not know they prohibited his owning or possessing a firearm. Also, he contended

³ 18 U.S.C. § 922(g)(1) provides, in relevant part:

(g) It shall be unlawful for any person --
(1) who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year...

to ... possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

And, 18 U.S.C. § 924(a)(2) provides, in relevant part, that whoever knowingly violates [18 U.S.C. § 922(g)] ... shall be fined as provided in this title, or imprisoned not more than 10 years, or both.

that, when he pawned and redeemed the firearms, he did not realize (despite the plain wording of the ATF form) that he was prohibited from possessing them because he was a felon. Bates was tried by a jury and convicted. He was sentenced to 21 months imprisonment, to be followed by three years supervised release.

II.

On appeal, Bates raises two issues: that the district court abused its discretion by admitting the ATF form; and that it erred by not granting him a two-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1.

A.

We review evidentiary rulings only for abuse of discretion. *E.g.*, **United States v. Carillo**, 981 F.2d 772, 774 (5th Cir. 1993). As noted, the district court found that the ATF form was admissible as intrinsic evidence or, alternatively, as extrinsic evidence. Evidence that is "inextricably intertwined" with the evidence used to prove the crime charged is intrinsic evidence. *E.g.*, **United States v. Royal**, 972 F.2d 643, 647 (5th Cir. 1992) (no abuse of discretion in admitting evidence of prior cocaine sales as "critical background information necessary to understand the charged conspiracy"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1258 (1993). Intrinsic evidence also includes evidence of acts that are part of a "single criminal episode" or that are "necessary preliminaries" to the crime charged. *Id.* (citing and quoting **United States v. Williams**, 900 F.2d 823, 825 (5th Cir. 1990)). The district court found that the ATF form was "inextricably

intertwined" with the felon-in-possession charge in the instant case, because it was

integral to the charge against the defendant in this case. The subject of [the ATF form] relates to the purchase of the firearms which are the subject of the indictment in this case. Moreover, such evidence is highly probative [of] the defendant's intent as it relates to the possession of the firearms at issue in this case. The ATF form and the defendant's responses contained therein are directly probative of his guilty state of mind because the form sets out in great detail the meaning of the questions contained therein and further indicates in no uncertain terms the consequences of an affirmative answer, which are that [Bates] would be prohibited from purchasing or possessing a firearm.

The Court agrees with the Government that the aforementioned evidence is intrinsic and inextricably intertwined with the charged offense insofar as it relates to the purchase of the very firearms which are the subject of the indictment charging possession of the aforesaid firearms.

The district court did not abuse its discretion by finding that the ATF form was intrinsic evidence. As the government stated in its pretrial memorandum, the form was offered to show Bates's "state of mind, intent, and motive at the very time of the offense".

In other words, the ATF form was relevant to whether Bates knowingly violated 18 U.S.C. § 922(g)(1) so as to be punishable under 18 U.S.C. § 924(a)(2); and, it may have helped the jury to "evaluate all the circumstances under which [he] acted." **Royal**, 972 F.2d at 647 (citing and quoting **Williams**, 925 F.2d at 825). Nor was it so highly prejudicial, confusing, or misleading as to warrant exclusion under Federal Rule of Evidence 403.⁴

⁴ This is especially true given the district court's granting Bates's motion *in limine* to exclude any reference to the nature of

B.

With regard to his sentence, Bates challenges the district court's refusal to grant his request for a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(a) (adjustment is available "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense...."). We review the decision to deny such an adjustment "under a standard of review even more deferential than a pure clearly erroneous standard". *E.g.*, **United States v. Tello**, 9 F.3d 1119, 1122 (5th Cir. 1993) (citing and quoting **United States v. Watson**, 988 F.2d 544, 551 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 698 (1994)) (internal citation and quotation marks omitted); **United States v. Pofahl**, 990 F.2d 1456, 1485 (5th Cir.); *cert. denied*, ___ U.S. ___, 114 S. Ct. 266 (1993). The burden is on the defendant to prove his entitlement to an adjustment. **Tello**, 9 F.3d at 1124.

The fact that a defendant goes to trial, rather than pleading guilty, does not, in itself, prohibit an acceptance of responsibility adjustment. U.S.S.G. § 3E1.1 comment. (n.2). The adjustment, however, "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the

his previous felony.

Because we hold that the form was intrinsic evidence and that the district court did not abuse its discretion in admitting it as such, we need not reach Bates's contention that it was extrinsic evidence (which, he contends, should have been excluded both because it was unduly prejudicial and because it was impermissibly offered to prove his character in violation of Federal Rule of Evidence 404(b)).

essential factual elements of guilt", *id.*, including, as here, denying the essential mental state required for the offense.

The denial of the adjustment is supported by Bates's attempt to minimize or deny his knowing involvement in the offense, and by the recommendation in the Presentence Investigation Report (PSR) that the adjustment be denied for those reasons.⁵ See *Watson*, 988 F.2d at 551 (attempt to minimize or deny involvement supports denial of adjustment); *United States v. McDonald*, 964 F.2d 390, 393 (5th Cir. 1992) (PSR has sufficient minimum indicia of reliability that district court may rely on it in sentencing). Under the very applicable deferential standard of review, the district court did not err in refusing to decrease Bates's offense level under § 3E1.1(a).

III.

For the foregoing reasons, Bates's conviction and sentence are

AFFIRMED.

⁵ Bates objected to the PSR's recommendation against an adjustment for acceptance of responsibility. The Addendum to the PSR states that the recommendation was not revised because, as noted, Bates

indicated he was not in possession of the firearms since [they] were in the pawn shop.... [and because] Bates does not feel he was in violation of the conditions of his probation. As such, the defendant has not accepted responsibility for his involvement in the offense.