**UNITED STATES COURT OF APPEALS**
**for the Fifth Circuit**

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No. 93-4950
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HERMAN LEE BARNUM,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Texas
(4:92-CR-48)

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(January 19, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant Barnum was convicted by a jury of assault on a federal officer, making a false statement in the acquisition of a firearm (two counts), and being a felon in possession of a firearm. He appeals. We affirm.

Barnum's argument that the evidence is insufficient to convict him of assault on a federal officer is frivolous. The evidence shows that federal officers attempting to execute a search warrant on Barnum's home encountered him at his home in his vehicle,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

clearly identified themselves as federal officers, were wearing clothing plainly marked to show that they were officers, and ordered Barnum to stop. Barnum quickly altered the direction of his vehicle toward a previously identified ATF officer and ran him down. This evidence is not only sufficient for conviction but overwhelming.

Appellant likewise complains of the insufficiency of the evidence to show his possession of a firearm. The evidence established that Barnum owned the residence searched, had shown it as his residence when he purchased a firearm, lived in the residence, and that three weapons were found in unconcealed locations in the residence. One defense witness testified that another person shared the residence with Barnum at the time of the search. Appellant argues that the government should be required to prove that this other person did not own the weapons. We disagree. See United States v. McKnight, 953 F.2d 898, 901 (5th Cir.), cert. denied, 112 S.Ct. 2975 (1992); see also United States v. Mergerson, 4 F.3d 337, 349 (5th Cir. 1993). It is plausible that the jury did not believe the defense evidence concerning another occupant.

Trial counsel did not move for acquittal and Appellant assigns this as the basis for his argument that trial counsel was ineffective. To meet the standard of Strickland v. Washington, 466 U.S. 668, 686 (1984), Appellant must show prejudice. To do that, Appellant must show that the motion if made would have been granted. See United States v. Rosalez-Orozco, No. 92-8363, Lexis 29753 (5th Cir. Nov. 16, 1993). As we have just shown, the

evidence was sufficient for conviction. The motion, therefore, would not have been successful and Appellant cannot show prejudice.

Barnum complains that the district court erred when it denied his motion for mistrial after an ATF agent testified to the execution of two prior search warrants on Appellant's premises. The district court instructed the jury to disregard this testimony and there is no indication that the jury did not follow that instruction. The evidence was clearly not "devastating" to Appellant's case. See Greer v. Miller, 483 U.S. 756, 766 n. 8 (1987).

During closing argument the prosecutor made improper references to additional police officers who could have testified to the events which transpired at Appellant's arrest. This statement, clearly improper, was made in response to defense counsel's improper argument that the government did not call these officers because they could not or would not corroborate the description of events given by the officer who did testify. This statement did not affect Appellant's right to a fair trial. See United States v. Rodrigo, 934 F.2d 595, 598 (5th Cir.), cert. denied, 112 S. Ct. 641 (1991). Additionally, the district court did instruct the jurors that what counsel said was not evidence and that their verdict had to be based only upon the evidence. The prosecutor's remarks cast no serious doubt on the correctness of the jury verdict. United States v. Jones, 839 F.2d 1041, 1049 (5th Cir.), cert. denied, 486 U.S. 1024 (1988).

Barnum argues that his sentence under 18 U.S.C. § 924(e) was

ex post facto because his prior offenses, used for sentence enhancement, occurred before the effective date of that section. The instant offense was, of course, committed after its effective date. Section 924(e) did not increase punishment for Appellant's prior crimes. It only enhanced the punishment of the crime he committed after its effective date. Punishment for this crime was not made more burdensome after it was committed. United States v. Leonard, 868 F.2d 1393, 1399-1400 (5th Cir. 1989) (reversed on other grounds), cert. denied, 496 U.S. 904 (1990); United States v. Jordan, 870 F.2d 1310, 1314-15 (7th Cir.), cert. denied, 493 U.S. 831 (1989).

The district court found that Barnum had obstructed justice by attempting escape and sentenced him accordingly. He objected to the district court's finding claiming that he had no knowledge of the pair of shoes delivered to him while in custody which had hacksaw blades hidden in the soles. Whether a defendant obstructed justice is a factual determination. United States v. Rivera, 879 F.2d 1247, 1254 (5th Cir.), cert. denied, 493 U.S. 998 (1989). We examine for clear error. United States v. Morales-Vasquez, 919 F.2d 258, 263 (5th Cir. 1990). The district court found that "the evidence supports the logical and reasonable inference that [Barnum] participated, at least to some extent, in a scheme to have shoes delivered to him that had hacksaw blades in them delivered to him in the jail." These findings are plausible considering all of the evidence in the record and certainly are not clearly erroneous. See United States v. Alfaro, 919 F.2d 962, 967 (5th Cir. 1990).

AFFIRMED.