

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5476

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH DORIES MATTE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:93CR42-1)

(October 12, 1994)

Before KING, HIGGINBOTHAM, and DeMOSS Circuit Judges.

PER CURIAM:*

Joseph Dories Matte, Jr. ("Matte") was indicted and convicted by a jury for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Alleging no evidence or insufficient evidence, Matte, proceeding pro se, appeals this conviction. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

The evidence surrounding the seizure of the firearm is relatively uncontested. On December 23, 1992, Major Charles Little ("Little") of the Jefferson County Sheriff's Department, Warrant Division, attempted to execute a warrant to arrest Matte for "a bond forfeiture for misdemeanor theft by check." Little received a tip from an informant that Matte could be found at a house in Beaumont, Texas. Little and another deputy proceeded to the house of Mary Parker ("Parker"), who was later revealed to be mother of Matte's estranged common-law wife. Although Parker initially denied that Matte was in the house, she eventually allowed the officers into the house and told them that Matte could be found in the back bedroom.

The deputies entered the bedroom and noticed a "very narrow bed" and "what appeared to be a person in the bed with covers around their head." Little pulled back the covers of the bed and discovered clothing, suitcases, and soft bags in a "configuration that . . . appeared to be a person." Little began to leave the room and search the house when he heard the other officer issue a command. After a brief search, Little learned the other deputy had discovered Matte in a "fetal position" in the bedroom closet.

Little informed Matte that he was under arrest. Then, according to Little's testimony, Matte intimated that he had his bond, exclaimed "I have something to show you," and "lunged" toward the objects on the bed. At that time, Little restrained and handcuffed Matte. Little then retrieved the bag and by "just

touching it . . . could determine it contained a weapon." A more extensive search of the bag revealed a Taurus PT92 9-millimeter pistol, phone bills for J.D. Matte, Sr. ("Matte, Sr.") (Matte's father who died between the arrest and trial), and medication for "Joseph Matte." The other items on the bed were also examined; they included Matte's check books, address books, and mail.

At trial, there was conflicting testimony about the ownership of the gun. Joseph Banks ("Banks") testified about the sale of the gun, recollecting that when he sold the gun, he filled out a receipt with the buyer's name, driver's license number, the serial number of the gun, and other information. Notably, at the trial, Banks identified the gun and Matte as the man who purchased the gun.

Darlene Foxworth ("Foxworth"), Matte's estranged common-law wife, also testified. While on the stand, she compared the driver's license number on the receipt Banks issued for the gun with Matte's driver's license number and noted that they did not match. Instead, Foxworth stated that the number on the receipt corresponded to Matte, Sr.'s driver's license. Foxworth further commented that after Matte was arrested, Parker asked her to retrieve a receipt for a gun Matte, Sr. had sold to Parker. Foxworth testified that she picked up the receipt from Matte, Sr. and that the receipt reflected a sale by Matte, Sr. to Parker. Additionally, Foxworth testified that the receipt described the same gun that was found in the bag at Parker's house. Foxworth stated that the receipt she received was not an original, but

rather was created on the day she went to see Matte, Sr. and back-dated several months. Finally, after comparing the signatures on the receipt provided by Banks with the receipt she received from Matte, Sr., Foxworth testified that the signature on both receipts belonged to Matte, Sr.

On rebuttal, the government called Parker. Parker testified that Matte lived with her for two weeks prior to the arrest, and that she had seen Matte with a pistol "a couple of times." She also testified that, on the day of his arrest, Matte asked her to say that the gun belonged to her. Further, while Parker admitted that at one time she claimed that she owned the gun, she testified that the "whole story that the gun was [hers] and that [she] bought it from Mr. Matte, Sr. was a total fabrication."

At the conclusion of the government's case, Matte moved for an instructed verdict. The district court denied this motion and submitted the case to the jury. The jury found Matte guilty of illegal possession of a firearm as charged in the indictment. Alleging no evidence or insufficient evidence, Matte appeals.

II. STANDARD OF REVIEW

We are reluctant to upset the findings of a jury, and thus, we do not inquire whether the "evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt." United States v. Pigrum, 922 F.2d 249, 254 (5th Cir. 1991). Rather, we will "sustain the verdict if a rational trier of fact could have found all elements

of the offense beyond a reasonable doubt."¹ United States v. Osum, 943 F.2d 1394, 1404 (5th Cir. 1991); see also United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993) ("The standard of review in assessing a challenge to the sufficiency of the evidence in a criminal case is whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt."), cert. denied, 114 S. Ct. 1310 (1994). Moreover, as we have often noted, "[o]n appeal this court must view the evidence and . . . all inferences reasonably drawn from it, in the light most favorable to the verdict." Osum, 943 F.2d at 1404; accord Mergerson, 4 F.3d at 341. Finally, we note that this standard applies regardless of whether the conviction is based on direct or circumstantial evidence. Mergerson, 4 F.3d at 341.

¹ Because of an apparent error in the transcript, a portion of the record is obscured. Thus, it is unclear whether the defense renewed its motion for judgment of acquittal at the conclusion of the trial. The briefs submitted to this court also fail to shed any light on this issue. In this circuit, there is some question whether the standard of review changes in a claim of insufficient evidence when a defendant fails to reassert his motion for acquittal at the close of trial. Compare United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988) (holding that when a defendant does not renew his motion for acquittal at the close of his case, the standard of review is "much stricter, . . . [and] limited to whether there was a manifest miscarriage of justice." (internal quotation and citation omitted)) with United States v. Pennington, 20 F.3d 593, 597 n.2 (5th Cir. 1994) (noting that regardless of motions for acquittal, the relevant question is "whether there was sufficient evidence for a rational jury to . . . convict[]"). Because we find that the result in this case is the same under either standard (if the two actually differ), we decline to reach the issue.

III. DISCUSSION

Section 922 is violated when (1) a convicted felon (2) possesses a firearm that (3) travelled in or affected interstate commerce. 18 U.S.C. § 922(g); United States v. Wright, 24 F.3d 732, 734 (5th Cir. 1994). Matte does not contest that he is a convicted felon or that the gun in question travelled in or affected interstate commerce. Instead, Matte contends that the government failed to adduce evidence sufficient to prove, beyond a reasonable doubt, that he was in possession of the gun.

We have held that "illegal possession of a firearm may be either actual or constructive." United States v. Knezek, 964 F.2d 394, 400 (5th Cir. 1992). Moreover, in construing constructive possession, we "prefer[] a commonsense, fact-specific approach." United States v. McKnight, 953 F.2d 898, 902 (5th Cir.), cert. denied, 112 S. Ct. 2975 (1992). Thus, "constructive possession need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence." Id. at 901.

Matte argues that the government failed to prove that he was in possession of the gun. In support of his claim of insufficient evidence, Matte points to testimony that the driver's license number and the signature on Banks's receipt corresponded to the driver's license number and signature of Matte's father's, Matte, Sr. Matte also highlights the fact that when Little executed the arrest warrant, he never saw Matte holding the bag that contained the gun.

Despite these contentions, we find that there was ample evidence for rational trier of fact to find, beyond a reasonable doubt, that Matte was in possession of the gun. The gun was found on a bed, along with items bearing Matte's name, a few feet away from where Matte was hiding. While more than mere physical proximity is required to sustain a conviction for possession, McKnight, 953 F.2d at 901, here there was other evidence indicating possession. First, Banks identified Matte as the person to whom he sold the gun.² Second, Parker, who lived in the house where Matte was arrested, testified that she had seen Matte with a gun. Finally, Parker testified that the story Foxworth recounted about Parker purchasing the gun from Matte, Sr. was a fabrication. Based on this evidence, a rational jury clearly could find that Matte possessed the gun.

Matte also points to two cases, United States v. Blue, 957 F.2d 106 (4th Cir. 1992), and United States v. Beverly, 750 F.2d 34 (6th Cir. 1984), in which convictions based on constructive possession were reversed. In Beverly, the Sixth Circuit found that evidence placing the defendant in the kitchen of a house near a waste basket containing two guns, one of which had the

² Matte challenges Banks's credibility because of the discrepancy regarding the driver's license numbers. In reviewing this testimony, we consider "the jury . . . the ultimate arbiter of the credibility of a witness[, and] testimony generally should not be set aside as a matter of law unless it asserts facts that the witness could not have observed or events that could not have occurred under the laws of nature." United States v. Osum, 943 F.2d 1394, 1105 (5th Cir. 1991). In light of Banks's in court identification of Matte and the deference we give a jury's credibility determination, we decline to upset the jury's apparent evaluation of Banks's testimony.

defendant's fingerprints on it, was insufficient to support constructive possession. Beverly, 750 F.2d at 36-37. Similarly, in Blue, the Fourth Circuit reversed a conviction based on the movement of the defendant's shoulder when a gun was found under the seat of a car in which he was a passenger. Blue, 957 F.2d at 108.

Both cases, however, are distinguishable on their facts. Unlike the defendants in Blue or Beverly, Matte was identified as the purchaser of the gun and was seen carrying a gun in the house where the gun was found. Furthermore, unlike the situation in Blue or Beverly, the gun in the instant case was discovered among items belonging to Matte. In light of these differences, Matte can find no solace in either Blue or Beverly. We conclude that these facts provide sufficient evidence for a reasonable trier of fact to conclude Matte was in possession of the gun.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.