

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5629
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTHONY PAZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

(1:93-CR-76-1)

(August 3, 1994)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

On February 4, 1993, two Beaumont Police officers were working narcotics interdiction along Interstate 10 when they stopped Anthony Paz's vehicle for a routine traffic violation. During the stop, one of the officers noticed that both Paz and his passenger,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Eloise Ramirez, were wearing t-shirts imprinted with the phrase, "Legalize Marijuana". When the officers asked Paz about his travel plans, he told them that he and Ramirez had dropped off his son in Dallas, then had driven through Houston on their way to New Orleans. The officers observed that Paz and Ramirez were very nervous. Based on their nervous behavior, their clothing and the fact that they were traveling from Houston, a known major source city for drugs, the officers asked Ramirez, the true owner of the car, for consent to search the car. She gave verbal permission and then signed a consent form.

When the officers opened the trunk of the vehicle, they noticed that the spare tire had recently been removed from the rim. The officers released some of the air in the tire and immediately smelled the odor of marijuana. Another officer soon arrived at the scene with a dog, which alerted to the presence of narcotics in the tire. Immediately thereafter, one of the officers asked Paz if he was carrying any weapons. Paz produced a .25 caliber pistol loaded with six live rounds from his back pocket. Both Ramirez and Paz, along with the vehicle, were then transported to the maintenance facility at the police department where the tire was broken down and two bundles of marijuana wrapped in gray duct tape were found.

Following a jury trial, Paz was convicted for possession of less than 50 kilograms of marijuana with the intent to distribute, in violation of 18 U.S.C. § 841(a)(1) and possession of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). He timely appeals to this Court.

Discussion

Paz challenges the sufficiency of the evidence to convict him of the § 924(c) firearm's violation. He argues that the Government did not prove that the firearm played an integral role in, or otherwise facilitated, the drug-trafficking offense because he testified that he carried the registered firearm from Chicago for personal protection on his trip, and the purpose of the trip was to return his son to the child's mother in Dallas. He also testified that he did not plan to carry narcotics on this trip, rather, it was not until he met one of his friends in Houston that he agreed to transport the marijuana to Chicago. Paz denied that he would have used the gun to protect the drugs. He further contends that the fact that his gun was not semi-automatic supports his contentions because it is common knowledge that drug dealers prefer semi-automatic weapons for protection, and his gun was not semi-automatic.

In order to obtain a conviction under § 924(c), the Government must prove beyond a reasonable doubt that (1) Paz committed the drug-trafficking crime, (2) he knowingly used or carried a firearm, (3) during and in relation to that crime. **United States v. Willis**, 6 F.3d 257, 264 (5th Cir. 1993). The Government need not prove affirmative use of a firearm to establish a violation of 18 U.S.C. § 924(c); it is enough that "the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." **United States v. Raborn**, 872 F.2d 589, 595 (5th Cir. 1989).

In the instant case, it is clear that Paz carried a firearm during or in relationship to a drug-trafficking crime.¹ Paz was apprehended carrying a loaded firearm in his back pocket while transporting over nine pounds of marijuana from Texas to Chicago for distribution. Paz testified that he carried the firearm for protection. Clearly the record is not devoid of evidence from which the jury could have found that Paz had the ability to use the firearm for intimidation or protection of himself or his property, thus facilitating his possession with intent to distribute the marijuana. **See United States v. Fisher**, 22 F.3d 574, 577-578 (5th Cir. 1994)(jury appropriately could have inferred that defendant's statement that weapons were used for protection included protection of illegal activities); **see also United States v. Velgar-Vivero**, 8 F.3d 236, 241-42 (5th Cir. 1993)(loaded guns within defendant's reach satisfy requirement that firearm need only be available to provide protection during the commission of offense), **cert. denied**, 114 S.Ct. 1865 (1994). Accordingly, there is no error.

Paz also contends that his § 924(c) conviction should be reversed because the district court's jury instruction failed to

¹ We note in passing that the proper standard of review for the review of evidence, when no motion for acquittal has been made, is currently in a state of flux in this Circuit. Suffice it to say that Paz did not move for judgment of acquittal, and the evidence is sufficient under any standard of review. **Compare United States v. Pennington**, 20 F.3d 593, 597 n.2 (5th Cir. 1994)(evidence reviewed under rational jury standard as if there had been motion for acquittal, describing some motions for acquittal as "empty rituals") **with United States v. Pierre**, 958 F.2d 1304 (5th Cir. 1992)(no motion for acquittal, therefore review limited to plain error).

explain adequately the Government's burden of proof respecting the defendant's "use" of the firearm. Paz argues that the Government was required to prove that the firearm was an *integral part* of the drug offense, not merely that it was present or available for protection.² Essentially what Paz objects to is the following part of the instruction: "In other words, you must find that the firearm *could* have been used to protect, facilitate, or have the potential to facilitate drug trafficking." (Emphasis added.) Paz contends that this sentence, which is not part of the Fifth Circuit Pattern Jury Charge, allows the jury to mistakenly believe that they could convict Paz for the mere possession of the weapon because the jury was never instructed that it must find that the firearm was an integral part of the drug offense.

The standard of review we apply to jury instructions is whether "the court's charge, as a whole, is a correct statement of

² The district court gave the following instruction on the § 924(c) offense:

The government is not required to prove that the defendant actually fired the weapon or brandished it at someone in order to prove "use", as that term is used in this instruction. However, you must be convinced beyond a reasonable doubt that the firearm played a role in or facilitated the commission of a drug offense. In other words, you must find that the firearm could have been used to protect, facilitate, or have the potential to facilitate drug trafficking. Further, this element does not depend on proof that the defendant had actual possession of the firearm or used it in any affirmative manner, but it does require evidence that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking, if any.

the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." **United States v. Chen**, 913 F.2d 183, 186 (5th Cir. 1990)(citations omitted). Further, the "presence of an imprecise or misleading statement within the jury instruction does not by itself entitle defendants to a reversal. Reversible error exists only if the jury charge, as a whole, misled the jury as to the elements of the offense." **United States v. Pace**, 10 F.3d 1106, 1121 (5th Cir. 1993), **cert. denied**, 114 S. Ct. 2180, (1994). Specifically, a § 924(c) instruction has to "unmistakenly inform[] the jury that there must be some connection between the possession or availability of the firearm and the [defendant's] involvement in drug trafficking." **Id.**

In the present case, the jury instruction, taken as a whole, stated the proper elements of the offense. The jury was not instructed that "use" could be established by a showing of the mere availability or possession of the firearm. Rather, the jury was instructed that the firearm must play a role in the offense.³ Further, the jury was instructed that the Government had the burden to produce evidence showing a connection between the availability or presence of the firearm **and** the defendant's engagement in drug trafficking.⁴ This is a correct statement of the law. **See e.g.,**

³ "However, you must be convinced beyond a reasonable doubt that the firearm played a **role** in or **facilitated** the commission of a drug offense." (Emphasis added.)

⁴ "...it does require evidence that the firearm was available to provide protection to the defendant **in connection with** his engagement in drug trafficking, if any." (Emphasis added.)

Pace, 10 F.3d at 1121; **United States v. Beverly**, 921 F.2d 559, 562 (5th Cir. 1991); **United States v. Featherston**, 949 F.2d 770, 776 (5th Cir. 1991); **United States v. Molinar-Apodaca**, 889 F.2d 1417, 1424 (5th Cir. 1989). Because the district court informed the jury that there must be a connection or nexus between the firearm and the offense, the jury was not misled, and the district court did not commit reversible error.

Conclusion

Based on the foregoing, the conviction is AFFIRMED.