IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8381

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELMO LOCKETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CR-368-1)

(March 8, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

A jury convicted Elmo Lockett on two counts of possessing a firearm as a convicted felon and two counts of making false statements in connection with acquisition of a firearm. The district court imposed a prison sentence, supervised release, and a fine. Lockett argues on appeal that the government presented insufficient evidence to convict and that the district court failed

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to consider the relevant statutory and guideline criteria before imposing the fine. We AFFIRM.

I.

Lockett acquired two guns from the Broadway Pawn and Jewelry Co., of San Antonio, Texas. In both transactions, Lockett falsely wrote that he had not previously been convicted of a felony when, in fact, he had. A grand jury returned a four-count indictment against Lockett, charging him with two counts of possession of a firearm by a convicted felon and two counts of making false statements in connection with the acquisition of a firearm. The Government subsequently filed a sentencing enhancement information, alleging that Lockett had four prior felony convictions and giving notice that it would seek an enhanced sentence under 18 U.S.C. § 924(e)(1), which provides for a mandatory minimum sentence of fifteen years. Lockett pleaded not guilty to the charges and went to trial. The jury convicted him on all four counts. Following a hearing, the district court sentenced Lockett to 269 months in prison and a $4,000 fine.

On appeal, Lockett contends that the evidence was insufficient to support his convictions on the felon-in-possession counts because the Government failed to show that he possessed "real" weapons that had traveled in interstate commerce. He also argues that the district court erred by imposing a fine because the court failed to consider the relevant statutory and Guidelines factors, including his ability to pay.

II.

A.

Lockett moved for judgment of acquittal at the close of the Government's case, and renewed his motion after presenting his evidence, thereby preserving his challenge to the sufficiency of the evidence. See U.S. v. Pruneda-Gonzalez, 953 F.2d 190, 193-94 (5th Cir.), cert. denied, 112 S.Ct. 2952 (1992) (citations omitted). We review the sufficiency of the evidence to determine "whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." U.S. v. Martinez, 975 F.2d 159, 160-61 (5th Cir. 1992), cert. denied, 113 S.Ct. 1346 (1993) (citations omitted). In making our determination, we view the evidence "in the light most favorable to the Government." U.S. v. Shabazz, 993 F.2d 431, 441 (5th Cir. 1993) (citations omitted). See also Martinez, 975 F.2d at 161 ("All reasonable inferences from the evidence must be construed in favor of the jury verdict.") (citations omitted). It is not necessary that the evidence exclude every rational hypothesis of innocence, and we will accept all credibility determinations supporting the verdict. U.S. v. Sparks, 2 F.3d 574, 579 (5th Cir. 1993), cert. denied, 114 S.Ct. 720 (1994) (citations omitted).

The essential elements of possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1) are: (1) the defendant knowingly possessed a firearm; (2) the defendant was previously convicted for a crime punishable by imprisonment for more than one year; and (3) the firearm possessed by the defendant was in or affecting interstate commerce. U.S. v Dancy, 861 F.2d 77, 81 (5th

Cir. 1988). The parties stipulated that Lockett had been convicted of a crime punishable by more than one year of imprisonment.

i.

The Government relied on documentary evidence and the testimony of James Hofacker, the manager and part owner of the Broadway Pawn and Jewelry Co., to establish that Lockett possessed firearms. Hofacker testified he had been involved with firearms transactions for 20 years. He stated that Lockett had been in the pawnshop a number of times.

The first of the two transactions at issue took place on February 5, 1991. Hofacker identified the Alcohol, Tobacco, and Firearms form 4473 pertaining to the first transaction. He testified that Lockett responded to question 8(b) of the form by denying any prior felony convictions, and that Lockett signed the form certifying that his answers were true. Lockett presented Hofacker with his Texas driver's license as identification, and the license number Hofacker recorded on the ATF form matched the number on Lockett's license. The prosecutor asked Hofacker: "Did Lockett walk out with a gun from your pawn shop on that day"? Hofacker responded: "Yes, he did." Hofacker identified the weapon involved as a Smith & Wesson Model 66, .357 Magnum revolver. Hofacker's records indicated that Lockett had pawned the weapon in 1990.

Hofacker further testified that on April 9, 1991, Lockett filled out another ATF form 4473 in connection with the acquisition of a Colt Commander, .45 caliber, semi-automatic pistol. Lockett again denied any prior felony convictions and signed the form in

Hofacker's presence. Hofacker stated that Lockett left the pawnshop with the pistol. Hofacker's business records revealed that Lockett had pawned the gun previously. Hofacker noted that Lockett used his Texas driver's license for identification.

Hofacker testified that as a pawnbroker he only dealt with real guns. His direct examination proceeded as follows:

Q Do you deal in toy guns, or anything like that?

A No, we don't.

Q All the guns that you deal with, are they real firearms?

A Yes.

In describing the weapons that Lockett pawned, Hofacker noted their make and model. He also testified that the form he filled out before releasing the weapons to Lockett was necessary only for real firearms. Further, Hofacker testified that the Smith & Wesson model 66 .357 magnum that he released to Lockett was a "real gun."

And, indeed, Lockett, when asked whether the firearms were real, did not deny that they were. He responded evasively, "I guess they were, sir, according to the slip, sir."

Hofacker's testimony and the Government's exhibits are sufficient to establish that Lockett possessed the firearms. See, e.g., U.S. v. Lugo, 597 F.2d 1055, 1056 (5th Cir.), cert. denied, 444 U.S. 902 (1979) (affirming conviction based on pawnshop employee's testimony concerning shop procedures and pawn ticket identifying defendant as person in possession of weapon). Lockett asserts that the Government's evidence did not exclude the possibility that the weapons were replicas. This assertion is

beside the point, however, as the evidence need not exclude every rational hypothesis of innocence. See Sparks, 2 F.3d at 579. Moreover, Hofacker, who had 20 years of experience in dealing with firearms, testified that the Smith & Wesson Lockett obtained was a real gun, and that he accurately recorded the make and model of both guns on the ATF forms.

ii.

The Government introduced expert testimony from ATF agent Larry Swisher to show that the weapons had traveled in interstate commerce. Swisher testified that the Smith & Wesson model listed on the ATF form is manufactured in Massachusetts. He testified that the Colt model identified on the other ATF form is manufactured in Connecticut. Swisher explained that he could determine where the firearms were made from the weapon-type based on his experience and by researching ATF materials and trade publications.

The Government may rely on expert testimony to establish the interstate commerce element of this offense. See, e.g., U.S. v. Wallace, 889 F.2d 580, 584 (5th Cir. 1989), cert. denied, 497 U.S. 1006(1990). "The government need not produce the firearm in question to satisfy [the interstate commerce] element; proof that the firearm was manufactured outside the state of possession will suffice." U.S. v. Cox, 942 F.2d 1282, 1286 (8th Cir. 1991), cert. denied, 112 S.Ct. 1298 (1992). Hofacker, who had twenty years experience in dealing with firearms, testified that Lockett pawned a Smith & Wesson .357 Magnum and a Colt Commander semiautomatic .45

caliber pistol. Swisher testified that these weapons are manufactured outside of Texas. We have held that evidence that a gun "was made by a company which does not manufacture or assemble guns in Texas" is "sufficient to establish the requisite interstate nexus." Wallace, 889 F.2d at 584.

B.

Lockett next contends that the district court erred by imposing a fine without considering the criteria prescribed by the sentencing statute or the guidelines. The presentence report indicated that Lockett was earning $500 per month prior to his arrest, that his only asset was an $800 car, and that he could not pay a lump-sum fine. The PSR observed, however, that "[t]he Federal Bureau of Prisons has a voluntary Inmate Financial Responsibility Program, and if employed while incarcerated, Mr. Lockett can begin immediate payment toward a Court-imposed fine. Also, Mr. Lockett could pay financial sanctions while under a period of supervision." The PSR calculated the minimum fine for Lockett's offense as $17,500. At the sentencing hearing, the Government suggested the court fine Lockett $4,800, and allow him to pay it through his participation in the inmate financial responsibility program. The court imposed a $4,000 fine, and the judgment explained that the fine "is below the guideline range because of the defendant's inability to pay."

Lockett did not object to the information in the PSR concerning his ability to pay a fine while incarcerated, the government's recommendation for a fine, or the imposition of the

fine. Therefore, he cannot challenge the fine on appeal absent a showing of plain error. U.S. v. Matovsky, 935 F.2d 719, 722 (5th Cir. 1991). "'Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." U.S. v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991).

Lockett has failed to show plain error. He correctly points out that 18 U.S.C. § 3572(a) and U.S.S.G. § 5E1.2(d) set out a number of factors the court must consider in determining whether to impose a fine and the amount of that fine. Contrary to his argument, however, the record indicates the court considered Lockett's inability to pay a fine within the range set by U.S.S.G. § 5E1.2(c) ($17,500 to $175,000), and pursuant to § 5E1.2(f), departed downward from that range, imposing a fine of $4,000. In view of Lockett's 269-month sentence, Lockett could earn the money to pay his fine while incarcerated or upon his release, as indicated in the PSR.

We do not require a district court to make express findings on the statutory and guideline criteria before imposing a fine. See, e.g. Matovsky, 935 F.2d at 722; United States v. Hagmann, 950 F.2d 175 (5th Cir. 1991), cert. denied, 113 S.Ct. 108 (1992) (citations omitted). Moreover, the district court did not plainly err by imposing a fine based on Lockett's future earning capacity. See U.S. v. O'Banion, 943 F.2d 1422, 1432 n.11 (5th Cir. 1991)

(citations omitted). The court considered Lockett's situation in light of the relevant statutory and guideline provisions, and made a downward departure from the guideline range.