

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20529
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONDRICK LAMAR WALLACE,
a/k/a Rondrick L. Wallace,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR H 93 188 2

August 7, 1995

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Rondrick Lamar Wallace appeals his conviction by a jury of conspiracy with intent to distribute in excess of fifty grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, aiding and abetting the possession with intent to distribute

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

in excess of fifty grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2(a), and the use of a firearm during the commission of a drug-trafficking offense in violation of 18 U.S.C. § 924(c)(1). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 16, 1993, Wallace and two female companions, Cherry Lynn Smith and Nicole Brown, pulled into the parking lot of a Stop-N-Go convenience store in a Volkswagen Jetta driven by Wallace. Federal Drug Enforcement Agents were monitoring the trio from undercover positions. Smith exited the car and entered the convenience store. DEA Special Agent Norris Rogers, who was serving as an undercover crack cocaine purchaser, had arranged, through a series of antecedent phone conversations and meetings with Smith, to purchase four to seven ounces of crack cocaine from Smith that day. Special Agent Rogers entered the backseat of the Jetta on the driver's side and began speaking to Wallace and Smith. After a few moments, Brown exited the car and entered the convenience store, leaving Wallace and Special Agent Rogers alone in the car. At trial, an audiotape, a videotape, and the testimony of Special Agent Rogers revealed that Wallace told Special Agent Rogers that he wanted \$2,600 and handed Special Agent Rogers a clear plastic bag containing four one-ounce "cookie-shaped" pieces of crack cocaine. Wallace also told Special Agent Rogers that he could supply up to two kilograms of crack cocaine per week through either Brown or Smith. Special

Agent Rogers agreed to purchase the four crack cookies and told Wallace that he would have to return to his car in order to get the money. Special Agent Rogers exited the car and gave an arrest signal to his fellow agents.

As Wallace was being arrested, a DEA agent asked him if he had any weapons. Wallace replied that he had a revolver inside a phone bag in the front of the Jetta. Agents thereafter seized a .38 caliber weapon secreted inside the unzipped portion of a black cellular phone bag. The gun was located within arms reach of the driver's seat and was found to contain five rounds of hollow point bullets. A DEA laboratory report determined that the plastic bag handed to Special Agent Rogers by Wallace contained a total of 126 grams of crack cocaine.

Wallace was subsequently indicted on three counts: (1) conspiracy to possess with an intent to distribute in excess of fifty grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846; (2) aiding and abetting the possession with an intent to distribute in excess of fifty grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2(a) ; and (3) the use of a firearm during the commission of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). A jury found Wallace guilty on all three counts and the district court sentenced him to a total of 211 months imprisonment, with 151 months each for counts one and two to run concurrently, plus an additional 60 months for count three to run consecutively.

II. ANALYSIS

Wallace raises essentially five points of error on appeal: (1) the district court abused its discretion by limiting the scope of Wallace's voir dire; (2) the district court erred as a matter of law by denying Wallace's challenge of a juror for cause; (3) there was insufficient evidence for a reasonable jury to find Wallace guilty of violating 18 U.S.C. § 924(c)(1); (4) his conviction under 18 U.S.C. § 924(c)(1) violated the Double Jeopardy Clause; and (5) his indictment contained a fatally defective variance. We shall proceed to address each of these arguments in turn.

A. *Voir Dire*.

Wallace argues that his right to an impartial jury was impaired because the district court, during voir dire, prevented him from meaningfully exercising his peremptory challenges. Specifically, Wallace contends that the district court pretermitted his questioning of certain jurors regarding the burden of proof in count three (i.e., the § 924(c) offense of using or carrying a firearm during and in relation to a drug trafficking crime), which in turn thwarted his ability to reveal the prospective jurors' misperceptions or bias.

During voir dire, Wallace's counsel posed the following to the venire pool:

My question to you is: If you felt like somebody was guilty of a drug offense, is your mind open to the

possibility that they could be not guilty of the firearm offense? Is that possible? Is it possible that somebody could be guilty of trafficking in drugs but at the same time not intend for a weapon to become an integral part of the offense?

Wallace's counsel then asked this question, in a rephrased manner, to the potential jurors sitting on rows one, two, and three. If the jurors raised their hand, Wallace's counsel engaged in a colloquy with them regarding their concerns. After it became apparent that there was considerable confusion among the jurors as to which party bore the burden of proving that the .38 caliber weapon was used or carried during and in relation to the drug trafficking charges, the prosecutor asked the court

to intervene at this point and instruct [the venire] that the burden of proof is on the government and that certainly the government has got to prove that they used or carried a firearm during and in relation to the commission of the crimes alleged in counts one and two and they should basically follow the court's instructions and hold the government to its burden of proof . . . I mean, they seem to be adrift at sea here with the idea of the basic rules of the game here. . .

. .

The district court agreed with the prosecutor and admonished the jury at length:

I feel like you have got a lot of confusion about this and I want to kind of straighten out things and get us back on an even keel here.

On count three, Mr. Wallace is accused of knowingly, intentionally, and unlawfully, during and in relation to the drug trafficking crimes alleged in counts one and two of this indictment, used and carried a firearm.

The government is required to prove to you beyond a reasonable doubt, before you could find Mr. Wallace guilty of this crime, the government is required to prove to you, first of all, that there was a drug trafficking crime; in other words, they would have to prove either count one or on count two or both count one and count two, that would be the first thing they

would have to do. The second thing they would have to do would be to prove to you use and carrying of the firearm during and in relation to the drug trafficking crime. And the question is whether or not there are any of you who could not follow that law, but, rather, would convict Mr. Wallace of count three of the indictment only if the government proved that he possessed a firearm.

He's not being accused of illegally possessing a firearm, that's not what count three says. Count three says using and carrying a firearm during and in relation to the two drug trafficking offenses that are alleged in count one and count two respectively.

So, I want to be sure you understand the question. What counsel wants to know is are you going to convict Mr. Wallace of count three if the government just proves to you that he possessed a firearm. That's what we need to know. And I am telling you that the government has to prove to you more than simply Mr. Wallace possessed a firearm. They've got to prove more to you. . . .

The court then asked each row of the venire panel whether, if the government proved beyond a reasonable doubt that Wallace possessed a firearm, there was anyone who "would require Mr. Wallace to come forward and explain to you why he had the gun or what he was doing with it or whatever" No member of the venire raised their hand in the affirmative.

Wallace then moved to strike jurors 4, 10, 25, 26, and 27 for cause-- the jurors who had raised their hand in response to the question posed by Wallace's counsel. Jurors 25, 26, and 27 were not individually questioned by Wallace's counsel prior to the court's admonishment. After the court's admonishment, however, the court re-posed Wallace's initial question and these jurors did not raise their hand again.

In response to Wallace's motion to strike these jurors for cause, the prosecutor suggested that the court "interview those

five people, either separately or somehow, to make sure that our record is clear on this point so that we don't have to retry this case later." The court agreed and individually questioned each of the five venire members challenged by Wallace for cause. Both Wallace's attorney and the prosecutor were permitted to question the venire members. After questioning of these five venire members was completed, the court struck one venire member for cause and denied Wallace's request to strike another.

"The district court has broad discretion in conducting voir dire and the reviewing court will not overturn its decision regarding impartiality absent a clear abuse of discretion." United States v. Shannon, 21 F.3d 77, 82 (5th Cir.), cert. denied, 115 S. Ct. 260 (1994); United States v. Rodriguez, 993 F.2d 1170, 1176 (5th Cir. 1993), cert. denied, 114 S. Ct. 1547 (1994). Furthermore, an abuse of discretion will be found only if the questioning of prospective jurors is insufficient to permit a defendant to exercise a "reasonably knowledgeable right of challenge." Id. Included within the district court's discretion during voir dire is the power to submit proposed questions to prospective jurors. United States v. Quiroz-Hernandez, 48 F.3d 858, 868 (5th Cir.), modified on other grounds, 1995 U.S. App. LEXIS 10311 (5th Cir. May 8, 1995). "[T]he inquiry is whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." Id. at 868 (internal quotation and citation omitted); see also United States v. Parker, 877 F.2d

327, 331 (5th Cir.) (hybrid procedure of questioning jurors as a group and individually upheld because "reasonable assurance that prejudice would be discovered, if present.") (internal quotations and citation omitted), cert. denied, 493 U.S. 871 (1989).

Wallace contends that he "was never permitted to flush out the basis for hands raised in response to [Wallace's counsel's] question, which question addressed the most fundamental ability of the potential juror to be impartial." Wallace does not explain, however, how the district court's admonishment left him without sufficient information upon which to exercise his challenges for cause or otherwise limited his discovery of juror prejudice. The record is clear that Wallace's counsel was permitted to question these jurors individually. Moreover, the court's admonishment was not misleading, it helped clarify for the venire that the government bore the burden of proof, and, if anything, appears to have *helped*, not hindered, discovery of potential prejudice. Under these circumstances, we cannot say that the district court clearly abused its discretion by admonishing the jury and thereafter questioning the five jurors who had expressed confusion.

B. Challenge for Cause.

Wallace next argues that the district court erred in refusing Wallace's request to strike juror twenty-six, Ms. Schmidt, for cause. Specifically, Wallace contends that Schmidt's prejudice was revealed when she replied as follows to a

question regarding the burden of proof with regard to count three (i.e., the firearms charge):

My problem is that I think that if somebody has a weapon and that he's a threat, whether it's being brandished or used. To me, that's just directly linked with what he is being charged with. I just think that a weapon is a weapon, I don't distinguish the fact that he is using or that he is brandishing it or holding it in any manner no matter what it is, it's being used as a threat. . . .

After a prolonged disquisition with the court, however, the following exchange took place:

THE COURT: So, in other words, the mere possession of the gun would not be enough for you because you want to hear all the evidence, right?

MS. SCHMIDT: That's right.

While the Sixth Amendment undoubtedly guarantees a right to an impartial jury which will render a verdict based solely on the evidence presented in court, see Irvin v. Dowd, 366 U.S. 717 (1961); United States v. Apodaca, 666 F.2d 89, 94 (5th Cir.), cert. denied, 459 U.S. 823 (1982), the party asserting a challenge for cause must prove "actual prejudice." Apodaca, 666 F.2d at 94. Moreover, whether the party asserting a challenge for cause has met this burden is a matter committed to the discretion of the trial judge and will not be disturbed unless the error is manifest. Mu'Min v. Virginia, 500 U.S. 415, 427-28 (1991).

In the case at hand, Wallace contends in a conclusory fashion that he was prejudiced by the court's refusal to strike Schmidt for cause, yet he proffers no theory to explain how Schmidt's responses reveal an actual prejudice against him.

Moreover, Wallace does not cite a single authority to support his contention of prejudice but merely states that he requested that the juror be struck and that "this request was denied." Because Wallace points us to no authority supporting his contention, we cannot conclude that the district court committed an error, much less a manifest error, by denying Wallace's request, and we must affirm. See FED. R. APP. P. 28(a)(6) ("The [appellant's] argument must contain the contentions of the appellant on the issues presented . . . with citations to the authorities, statutes, and partes of the record relied on. . . ."); United States v. Heacock, 31 F.3d 249, 258 (5th Cir. 1994) (noting that the failure to present supporting authority for an argument effectively abandons such argument on appeal); accord Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), cert. denied, 498 U.S. 966 (1990).

C. Sufficiency of the Evidence.

Wallace contends that there is insufficient evidence to support his conviction for violation of 18 U.S.C. § 924(c)(1) which states:

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years

18 U.S.C. § 924(c).

Specifically, Wallace argues that "[t]here was no evidence that [Wallace] used the weapon during the commission of the offense.

Nor was there any evidence that [Wallace] carried the weapon `during and in relation to' the commission of the offense. . . ."

The scope of our review of the sufficiency of the evidence after conviction by a jury is narrow. We must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994). We must consider the evidence in the light most favorable to the verdict, including all inferences that can be drawn therefrom. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 500 U.S. 936 (1991). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. Id. at 254; accord United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983).

In order to obtain a conviction against Wallace under § 924(c), the government must prove, beyond a reasonable doubt, that: (1) Wallace committed a drug-trafficking crime; and (2) he knowingly used or carried a firearm; (3) during and in relation to the drug-trafficking crime. United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993). Wallace challenges the sufficiency of the government's evidence only with regard to the third element-- namely, whether Wallace used the .38 caliber gun "during and in relation to" the substantive counts of conspiracy and aiding and abetting. In order to establish a nexus between a firearm and a

drug-trafficking offense, the government need not prove that the gun was actually used or brandished; all that is required is proof that "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, *whether or not such display or discharge in fact occurred . . .*" United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989) (quoting United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985)) (emphasis added). Indeed, a conviction under § 924(c) may be maintained if the government proves that the firearm "was available to provide protection to the defendant in connection with his engagement in drug trafficking." Willis, 6 F.3d at 264 (internal quotations and citation omitted).

In the case at bar, the gun was found loaded and within arm's reach of Wallace. Moreover, because the gun was inside an unzipped portion of a cellular phone bag, it was readily accessible. These facts, construed in the light most favorable to the verdict, would permit a reasonable juror to infer that the gun was present in the vehicle for the personal protection of Wallace during and in relation to the drug-trafficking offense. The fact that Wallace and a co-worker testified that Wallace carried a gun to work for personal protection and that Smith testified that she did not know that the gun was in the car, while certainly relevant, does not prevent a reasonable jury from concluding that the gun was being used to provide protection during the commission of the drug-trafficking offense. A jury is

free to choose among reasonable constructions of the evidence, and the government's theory argued at trial-- that the gun was present for purposes of providing protection during the drug-trafficking offense-- is a reasonable construction that we may not disturb.

D. Double Jeopardy.

In a related argument, Wallace contends that because there is no evidence that the gun played a role in the drug-trafficking offense, imposing an additional five-year sentence under § 924(c) violates the Double Jeopardy Clause. U.S. CONST. amend. V. In light of our conclusion above that there is sufficient evidence to support the jury's verdict with regard to count three, this argument is likewise without merit.¹

E. Indictment Variance.

Wallace's final contention is that there was a "defective variance between the indictment and the evidence as to count three." Specifically, Wallace states that, under the indictment,

¹ To the extent that Wallace's argument may be construed as a direct attack on the constitutional validity of § 924(c) itself, we have explicitly held that § 924(c) does not violate the Double Jeopardy Clause. See, e.g., United States v. Minnifield, No. 93-4368 (5th Cir. Mar. 10, 1994) (unpublished opinion) (holding that § 924(c) does not violate Double Jeopardy Clause in relation to predicate drug-trafficking offense because it requires additional proof that firearm was used or carried in relation to the drug offense); cf. United States v. Singleton, 16 F.3d 1419 (5th Cir. 1994) (holding that § 924(c) does not violate Double Jeopardy Clause in relation to carjacking conviction under 18 U.S.C. § 2119).

the government was required to prove that Wallace committed the other two offenses (i.e., conspiracy and aiding and abetting) "knowingly, intentionally, and unlawfully," with respect to the firearm. Thus, Wallace argues, the indictment requires proof of an additional element not required in the statute-- namely, that the offenses were committed "unlawfully"-- and hence, the government must prove this additional "unlawful" element in order to carry its burden of proof.

The Sixth Circuit addressed this issue in United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991), cert. denied, 502 U.S. 1045 (1992), and concluded:

Unlawfulness is not an element of 924(c). The conviction based upon proof of the elements comprising section 924(c) will not be set aside because of an excess allegation in the complaint unless that allegation in some way prejudices the defendant-- in this case there was no prejudice; the use of "unlawfully" in the indictment was mere surplusage.

Id. at 367. We agree. In this case, the use of the term "unlawfully" merely conveyed to Wallace that the government believed his conduct to be against the law cited in the indictment. It did not, therefore, expand the scope of the statute or impose upon the government a higher burden of proof but was, as the Sixth Circuit correctly concluded, "mere surplusage." Accordingly, this argument is without merit.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

