

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30027

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD WENDELL COLLIER,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana
(CR-93-62-B-M-2)

(December 22, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Ronald Wendell Collier appeals his conviction for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (1988). Finding no reversible error, we affirm.

While executing a warrant to search an apartment for narcotics-related materials, Louisiana State Police Sergeant Jerome Viator observed Collier in a crouched position near the foot of a bed. Sergeant Viator ordered Collier to get down on the ground and

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

show his hands. As Collier knelt down to the floor, Sergeant Viator, standing approximately three feet from Collier, observed Collier remove a revolver from his left rear pants pocket and push it beneath the bed.

After Sergeant Viator and other state police officers secured the entire apartment, they searched each of the individuals found there. When Trooper Calamia searched Collier, he found several bullets in Collier's front pants pocket. Testing later revealed that the bullets were compatible with use in the revolver.

Collier was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Following a jury trial, Collier was convicted, and the district court sentenced him to a fifty-seven-month term of imprisonment and a three-year term of supervised release.

Collier appeals, contending that (1) the evidence was insufficient to support his conviction, (2) the Government committed prosecutorial misconduct by making improper comments in its opening and closing statements, and (3) the Government's failure to turn over reports concerning statements made by others present during the search of the apartment violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).¹

Collier challenges the sufficiency of the evidence to sustain

¹ Collier also contends, in a single sentence in the "Summary of Argument" section of his brief, that "it was improper for the Court to depart upward on Collier's sentence." However, he does not pursue this argument anywhere else in his brief, and we therefore do not address it. See *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (holding that appellant had "abandoned . . . arguments by failing to argue them in the body of his brief").

his conviction for possession of a firearm by a convicted felon. On appeal, we view the evidence "in the light most favorable to the jury verdict" and will affirm "if a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt." *United States v. Castro*, 15 F.3d 417, 419 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 127, ___ L. Ed. 2d ___ (1994).

A conviction for possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1)² requires that the Government prove beyond a reasonable doubt that "(1) the defendant had a previous felony conviction, (2) that the defendant possessed a firearm, and (3) the firearm had travelled in or affected interstate commerce." *United States v. Wright*, 24 F.3d 732, 734 (5th Cir. 1994).

Collier argues that the evidence was insufficient to prove that he ever possessed the gun. Sergeant Viator testified that he was standing only three feet from Collier when he saw Collier with the firearm. He also testified that Collier was the only person on the scene with a gun. Sergeant Viator described the gun he saw in Collier's hands and identified the gun at trial. Viewing the evidence in the light most favorable to the government, we hold that a rational jury could find beyond a reasonable doubt that

² 18 U.S.C. § 922(g)(1) provides that "[i]t shall be unlawful for any person . . . who has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Collier possessed the gun.³

Collier also argues that the prosecutor made improper and prejudicial statements to the jury. When reviewing a claim of prosecutorial misconduct, we must determine "whether the prosecutor's remarks cast serious doubt upon the correctness of the jury's verdict." *United States v. Goff*, 847 F.2d 149, 165 (5th Cir.), cert. denied, 488 U.S. 932, 109 S. Ct. 324, 102 L. Ed. 2d 341 (1988). In making this determination, we consider "(1) the magnitude of the prejudicial effect of the statements, (2) the efficacy of any cautionary instructions, and (3) the strength of the evidence of [the appellant's] guilt." *Id.*

Collier argues that the following remark made by the prosecutor in his opening statement attacked defense counsel for the purpose of discrediting him in front of the jury:

It is often a tactic, ladies and gentlemen, of the defense to try to make a simple case complex. And it is even a tactic often seen, to try to say the United States should prove a case different than that which is presented to you. They may even demand that we prove things that don't have to be proved, as you will hear the court instruct you.

Supplemental Record on Appeal, vol. 3, at 16. The prosecutor's statement was not a personal attack on defense counsel. Rather, it

³ Collier points to defense witness testimony and other statements by Viator in an attempt to discredit Viator's testimony. However, "[t]he jury is solely responsible for determining the weight and credibility of the evidence; this court will not substitute its own determination of credibility for that of the jury." *United States v. Casilla*, 20 F.3d 600, 602 (5th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 240, ___ L. Ed. 2d ___ (1994).

Collier also argues that there was evidence showing that someone other than Collier owned the firearm, and that "[i]t is not rational to believe that Ronald Collier would possess Ephraim Patterson's gun." This argument misses the point. Regardless of who owned the gun, the evidence at trial established that Collier possessed it at the time of the search.

was a request that the jury focus on the relevant issues at trial. Even if it were an attack on defense counsel, Collier concedes that the attack was "oblique and mild." We cannot conclude that it prejudiced Collier sufficiently to warrant reversal. Furthermore, the district court instructed the jurors to consider only their own interpretations of the evidence and not to consider as evidence any of the lawyers' statements. Finally, the direct evidence against Collier was extremely strong.⁴

Collier complains of another comment by the prosecutor, "I'll take the credibility to [sic] Sgt. Viator over the defendant's witness any day of the week, any day of my life." Collier contends that the statement improperly expressed the prosecutor's personal opinion of the evidence, but defense counsel did not object at trial to the comment. When defense counsel fails to object to a prosecutor's statements, we apply the plain error standard of review. *United States v. Pierre*, 958 F.2d 1304, 1312 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 113 S. Ct. 280, 121 L. Ed. 2d 207 (1992). Collier has not demonstrated plain error because he has not shown that the second statement seriously affected "the fairness, integrity, or public reputation of the judicial proceeding and resulted in a miscarriage of justice." *Goff*, 847 F.2d at 162.

⁴ Collier also challenges the prosecutor's statement that "as I told you on [sic] my closing earlier, the combination of a felon with a gun is combustible. Even worse, the combination of a felon and a gun going to get high at a place where there are multiple people--." The court sustained Collier's objection at trial, and we cannot conclude that the prosecutor's statement so prejudiced Collier as to warrant reversal, especially in light of the ample evidence supporting Collier's conviction.

Lastly, Collier argues that the Government's failure to turn over to the defense several reports concerning statements made by others present during the search of the apartment violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). To demonstrate a *Brady* violation, the accused must show that (1) the prosecution suppressed or withheld evidence, (2) the evidence was favorable, and (3) the evidence was material to the defense. *United States v. Stephens*, 964 F.2d 424, 435 (5th Cir. 1992). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985).

Collier argues that the reports constituted *Brady* material, the suppression of which prevented effective cross-examination of government witnesses concerning who owned the gun and where the gun was ordinarily stored. Neither of these issues are material, however, because they do not relate to Collier's possession of the gun when Sergeant Viator observed him. Collier also argues that these same reports could have enabled him to locate additional witnesses. However, Collier does not identify what evidence these potential witnesses could have disclosed other than evidence regarding ownership of the gun and its whereabouts at times other than the time of the arrest. Consequently, Collier has not shown a "reasonable probability" that "the result of the proceeding would

have been different." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383.

For the foregoing reasons, we **AFFIRM**.