

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-60167
Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,
versus
CLEOTHA COX, Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi
(CR-5:93-8)

(September 12, 1994)

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

PER CURIAM¹:

Defendant-Appellant Cleotha Cox ("Cox") was convicted by a jury for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) while at a nightclub in Yazoo City, Mississippi on March 28, 1993. At trial, Horace Johnson ("Johnson"), the club owner, testified that he saw Cox pull a gun on a female bartender. Johnson then told his security guard, Willie Clark ("Clark"), about the gun, and the two followed Cox outside to a car. Johnson also testified that Clark asked Cox,

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

while he was sitting in the car, if he had a gun. Johnson stated that Cox said he did have a gun. Clark then reached into the car, patted Cox down and pulled out a gun.

Clark testified that several people rushed out of the nightclub hollering, "He got a gun, he got a gun...." When Clark asked Johnson who had a gun, Johnson pointed out Cox. Clark testified that he approached the car that Cox had entered. Clark walked up to the driver's side. Cox was seated on the passenger's side. Clark stated that he asked everyone in the car, including Cox, if anyone had a gun. Clark testified that he walked around to the passenger's side, and Cox told him that he did have a gun. Clark stated that he told Cox to put his hands on the dashboard, whereupon Clark reached inside the car door and pulled a gun from Cox's waistband under his coat.

Cox stated that he did not have a gun with him in the nightclub that evening. He testified that he was searched from head to toe when he entered the club, and that the search revealed no weapons. Cox stated that when he entered the club, he chatted with a few people and ordered a beer. He testified that he did not speak to the female bartender because she was not behind the bar. Cox testified that after he got a beer, he left the club, walked to the car and entered the passenger's side. Cox next testified that Clark approached the driver's side of the car and asked if anyone had a gun. Everyone said no. Cox stated that Clark then went to the passenger's side and asked Cox to step out of the car. Clark searched Cox. Not finding anything on Cox's person, Clark searched

the car. He found a gun under the driver's seat. Cox testified that he never saw the gun until the day of trial. He did, however, stipulate to proof of his prior conviction for aggravated assault.

Following his conviction, the district court sentenced Cox to a term of imprisonment of 51 months. Cox filed a motion to stay the appeal and remand the cause for a possible evidentiary hearing before the district court with respect to Cox's purported discovery of new evidence, which was denied on July 13, 1994. His Supplemental Motion to Stay Proceedings was also denied. Cox challenges his conviction on two grounds: 1) that the district court abused its discretion in refusing to admit evidence of his acquittal of a misdemeanor charge and 2) that the evidence adduced at trial was insufficient to support his conviction. We AFFIRM.

EVIDENTIARY RULINGS

Cox contends the district court's refusal to admit evidence of his acquittal of a misdemeanor charge of carrying a concealed weapon, which arose out of the same events as the instant offense, was an abuse of discretion because it severely limited his ability to go forward with his case, such that he could not properly present his case-in-chief. He argues that his hands were tied in explaining very crucial details relating to how the charges in this case originated. Specifically, he could not demonstrate to the jury exactly why he was arrested and the result of the original arresting charge.² In addition, Cox argues that the court erred by

² Cox also devotes a substantial portion of his brief to the argument that the Government should not have been allowed to bring an oral motion *in limine* on the morning of the trial

denying his motion to suppress his alleged statement, "Yea, I've got a gun," to Clark because it was made following Clark's warrantless search of the car in which Cox was sitting.

This Court reviews the evidentiary rulings of a trial court for abuse of discretion. *United States v. McAfee*, 8 F.3d 1010, 1017 (5th Cir. 1993) (exclusion of evidence reviewed only for abuse of discretion); see also *United States v. Brown*, 7 F.3d 1155, 1163 (5th Cir. 1993). We find Cox has presented no grounds for relief. His assertion that an explanation of the acquittal was vital for the defense fails to demonstrate why the jury needed to know the chronology of the state proceedings or why Cox's acquittal on a concealed-weapons charge was probative in the instant proceeding in which the Government had to prove only that Cox knowingly possessed a gun and was a convicted felon. Cox did not demonstrate that the district court abused its discretion by deciding not admit evidence of the misdemeanor acquittal for carrying a concealed weapon because it was not relevant and would confuse the jury. See *United States v. Anderson*, 933 F.2d 1261, 1268 (5th Cir. 1991) ("evidence in criminal trials must be strictly relevant to the particular offense charged") (internal quotation and citation omitted).

because the motion was made in violation of FED. R. CRIM. P. 12, and after the deadline imposed by the magistrate judge for the filing of motions. We find that this argument has no merit. Rule 12 provides: 1) motions may be written or oral at the discretion of the judge and may be made and resolved at any time before trial and 2) objections to a defense must be made within the time set by the court unless the court grants an extension thereof. FED. R. CRIM. P. 12(a)-(h). The district court's specific authorization of the Government's oral motion on the morning of trial is an appropriate exercise of the discretion granted to it under Rule 12.

Cox also failed to show why the district court's admission of Cox's response to Clark's question whether he had a gun was an abuse of discretion. Although Cox seeks to characterize the admission as the tainted fruit of a warrantless search because Clark did not question him until after Clark removed Cox from the car and conducted a search of the car, Johnson's and Clark's testimony provides evidence that Clark asked the question immediately after approaching the car, and that Cox was frisked while seated in the car after he told Clark that he had a gun. The conflicting testimony created a credibility question for the jury, which was resolved by crediting Johnson's and Clark's testimony. Under that scenario, the court did not need to address the question whether the admission was tainted, and therefore the admission of the Cox's statement, pursuant to Federal Rule of Evidence 801(d), was not an abuse of discretion.

SUFFICIENCY OF THE EVIDENCE

Cox next contends that the evidence was insufficient to support his conviction because Johnson's in-court identification of Cox was prompted by the Government and contaminated by the district court's recess. In order to obtain a conviction under § 922(g)(1), the Government must prove beyond a reasonable doubt: 1) Cox knowingly possessed a firearm; 2) he possessed it having been convicted of a felony; and 3) the firearm had travelled in interstate commerce. *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir. 1988). Cox concedes elements two and three, contesting only the sufficiency of the Government's evidence that he knowingly

possessed the gun.

When a motion for judgment of acquittal has been made at the close of the defendant's case, this Court examines the evidence in a light most favorable to the prosecution and upholds the conviction if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *United States v. Gallo*, 927 F.2d 815, 820 (5th Cir. 1991).

It is not necessary that the evidence exclude every reasonable hypothesis of innocence . . .; the jury is free to choose among reasonable constructions of the evidence The only question is whether a rational jury could have found each essential element of the offense beyond a reasonable doubt.

United States v. Pennington, 20 F.3d 593, 597 (5th Cir. 1994) (internal citations omitted).

Cox's argument that Johnson's in-court identification is tainted is unconvincing. Although Johnson's identification might be characterized as tentative, Cox failed to allege any specific facts showing an impropriety on the part of the Government or the district court. See *United States v. Casilla*, 20 F.3d 600, 602 (5th Cir. 1994) ("[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"), *petition for cert. filed*, (U.S. July 19, 22, 25, 1994) (Nos. 94-5245, 94-5313, 94-5388). Moreover, the evidence supports the jury's determination that Cox knowingly possessed a gun. Johnson testified: 1) he saw Cox pull a gun in the club; 2) he followed Cox outside and pointed him out to Clark; 3) he watched Clark approach the car; 4) he heard Clark question Cox; and 5) he

watched Clark frisk Cox inside the car and remove a gun from him. Clark testified: 1) immediately prior to Cox's exit from the club, several people ran out yelling "He got a gun, he got a gun..."; 2) he watched Cox get into a car; 3) he walked over to the car and asked Cox if he had a gun; 4) Cox replied that he did; and 5) he reached in the front window of the car and inside Cox's coat and pulled a gun from his waistband. Viewed in a light most favorable to the prosecution, ample evidence exists which would support a reasonable jury's conclusion that Cox knowingly possessed a gun beyond a reasonable doubt. AFFIRM.