

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60710
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SIDNEY MCKENZIE,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Mississippi

(3:94-CR-39-D)

(May 19, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

A three-count indictment charged Sidney McKenzie with (1) using a dangerous weapon to interfere with the official duties of Potts Camp, Mississippi, Postmaster Linda Hankins (Count 1), (2) carrying a firearm during a federal crime of violence (Count 2),

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and (3) possessing a firearm in the Potts Camp Post Office with the intent to commit another crime (Count 3). At trial, McKenzie moved for judgment of acquittal on all counts at the close of the Government's case. The district court granted the motion as to Counts 1 and 2 and denied it as to Count 3. At the close of all of the evidence, McKenzie renewed his motion for judgment of acquittal on Count 3, and the court denied it.

The jury found McKenzie guilty on Count 3. The district court sentenced him to serve 21 months in prison and three years on supervised release.

Postmaster Linda Hankins testified that, at about 5:30 p.m. on January 21, 1994, she heard loud talking and shouting coming from the post office lobby. She went into the lobby and saw McKenzie standing inside the post office pointing a gun at two men in the lobby. McKenzie was "ranting and raving and screaming and using obscenities." She continued, "Mr. McKenzie was hollering and screaming, 'I'm going to kill you sons of bitches. I'm going to kill you motherfuckers.' Exact words." His finger was on the trigger of the gun.

Fearing that McKenzie was going to shoot the two men, Hankins stepped between McKenzie and those men and repeatedly ordered McKenzie out of the post office. She forced him to leave by backing him out the door.

Timothy Scott testified that he and his friend Vance Mitchell were in the Potts Camp Post Office when McKenzie arrived. McKenzie stared at them, went out to his van, retrieved a rifle, and

motioned for Scott to come outside. Scott did not go outside, but McKenzie returned to the door of the post office, holding the door open with one hand. Scott did not remember whether McKenzie actually came inside the post office with the rifle. McKenzie yelled at Scott, accusing him of making a threatening telephone call. Hankins ordered McKenzie to leave, which he did.

Vance Mitchell testified that McKenzie stared at Scott, left the post office, got a gun from his van, and appeared to load it. McKenzie was yelling at Scott about threatening his family. McKenzie came back into the post office with the gun, standing in the doorway with most of his body inside.

Sheila Clayton, a passerby, testified that she saw McKenzie pointing the gun at the floor, not at Scott. Vera Churchill, the operator of a store near the post office, testified that McKenzie pointed the gun downward, not at any person, and never entered the post office with the gun.

OPINION

McKenzie argues that the evidence was insufficient to support the conviction on Count 3 because the government did not prove that he entered the post office with the rifle. When the sufficiency of the evidence is challenged, this court reviews the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). The conviction must be affirmed if any rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt.

United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991). The jury is in a unique position to determine the credibility of the various witnesses. United States v. Layne, 43 F.3d 127, 130 (5th Cir. 1995), cert. denied, 1995 WL 136061 (Apr. 17, 1995). This court defers to the jury's resolutions of conflicts in the evidence. Id.

Section 930(b) of Title 18 criminalizes the knowing possession of a firearm in a federal facility with the intent that the firearm be used in the commission of a crime. McKenzie's own summary of his argument shows the weakness of his insufficiency issue:

The government's evidence that Mr. McKenzie possessed a firearm in a federal facility was contradictory, and the Court should have sustained the defense motion for a judgment as a matter of law at the conclusion of the case. There was a great deal of doubt as to whether Mr. McKenzie ever entered the Post Office with a weapon, and a reasonable jury could not have found otherwise.

The assertion that the evidence is contradictory indicates that some evidence supports the conviction. The assertion that a reasonable jury could have found McKenzie not guilty does not address the question whether a reasonable jury could have found him guilty.

McKenzie is correct that the testimony was conflicting on whether he actually set foot inside the post office while carrying the rifle. Hankins stated that he did, and Mitchell said that most of his body was inside. Scott did not know, and other witnesses stated that McKenzie did not go inside. The jury apparently credited the testimony of Hankins and Mitchell. Determining credibility and weighing evidence is the function of the jury. The

evidence was not insufficient.

McKenzie also argues that he should have been sentenced under the guideline applicable to minor assault rather than the guideline applicable to aggravated assault. McKenzie raised the same issue in the district court, which found that McKenzie attempted an aggravated assault rather than a minor assault. The presentence report (PSR) used the 1993 Sentencing Guidelines Manual.

"A district court's findings of fact for purposes of applying the Sentencing Guidelines are reviewed under the clearly erroneous standard of review." United States v. Hooker, 997 F.2d 67, 75 (5th Cir. 1993). A factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985).

In sentencing, the district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including evidence not admissible at trial. U.S.S.G. § 6A1.3, comment; United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990). The district court also may rely on trial evidence in determining a sentencing. United States v. Jackson, 978 F.2d 903, 913 (5th Cir.), cert. denied, 113 S. Ct. 2429, 3055 (1993).

Guidelines § 2K2.5 prescribes the penalties for violations of 18 U.S.C. § 930. That guideline directs that, if the defendant used or possessed the firearm in connection with the commission or attempted commission of another offense, the guideline applicable to that other offense is to be used. U.S.S.G. § 2K2.5(c)(1)(A);

see U.S.S.G. § 2X1.1(c)(1). Guidelines §§ 2A2.1-2A2.3 address assaults.

In the PSR, the probation officer recommended the use of § 2A2.2, which is captioned, "Aggravated Assault." McKenzie objected, urging the use of § 2A2.3, which is captioned "Minor Assault." The district court overruled the objection, expressly relying on his memory of the trial testimony.

The application note to § 2A2.2 defines aggravated assault as "a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony." U.S.S.G. § 2A2.2, comment. (n.1). This court has found that the aggravated assault of § 2A2.2 is "akin to the federal offense of assault with a dangerous weapon with intent to do bodily harm." United States v. Perez, 897 F.2d 751, 753 (5th Cir.), cert. denied, 498 U.S. 865 (1990). The actor must be judged not by his undisclosed purpose to frighten, but from his visible conduct and "what one in the position of the victim might reasonably conclude." Id. In contrast, "`Minor assault' means a misdemeanor assault, or a felonious assault not covered by § 2A2.2." U.S.S.G. § 2A2.3, comment (n.1).

The testimony of Hankins, Scott, and Mitchell shows that an excited McKenzie threatened to kill Scott while holding a rifle. Therefore, the determination that McKenzie committed an aggravated assault, rather than a minor assault is not clearly erroneous.

AFFIRMED.