

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8431
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL DOMINGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(A-92-CR-10)

(June 7, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Daniel Dominguez complained on appeal that, at his criminal jury trial on firearms charges, the district court erred in sustaining the government's hearsay objection to the admission into evidence of a statement Dominguez had made orally to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF) of the United States Treasury Department. Finding no reversible error in the district court's evidentiary ruling, we affirm.

I

FACTS AND PROCEEDINGS

A jury convicted Dominguez of two counts of receipt and possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1), and one count of making a false statement to a firearms dealer in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(1). The district court sentenced Dominguez to 188 months of imprisonment on each count of possession of a firearm and 60 months of imprisonment on the count of making a false statement to a firearms dealer. The terms of imprisonment imposed in the possession counts are to run concurrently with the term of imprisonment imposed in the false statement count, and a five-year term of supervised release is to follow release from confinement.

II

ANALYSIS

On appeal, Dominguez complains that the district court erroneously sustained the government's hearsay objection to the introduction of an oral statement he gave to an ATF agent. Dominguez contends that his statement to the ATF agent was admissible under Fed. R. Evid. 803(3) as an exception to the hearsay rule; specifically, that it was a representation of what he was thinking in the present. Dominguez contends this statement was

relevant to show lack of intent to commit the crimes for which he was accused, and that exclusion of the statement was harmful to him in that it hindered his defense of lack of the requisite mens rea.

Evidentiary rulings are reviewed for abuse of discretion. United States v. Liu, 960 F.2d 449, 452 (5th Cir.), cert. denied, 113 S.Ct. 418 (1992). Even if abuse is found, the error is reviewed under the harmless error doctrine. Id. In a harmless error examination, the "primary question is what effect the error had, or reasonably may have had, upon the jury's decision." United States v. Bernal, 814 F.2d 175, 184 (5th Cir. 1987) (citation omitted). The error must be viewed "in relation to the entire proceedings." Id. (citation omitted). When the evidence of guilt is overwhelming, the error is harmless if it would not have a substantial impact on the jury's verdict. United States v. Williams, 957 F.2d 1238, 1244 (5th Cir. 1992) (citing Bernal, 814 F.2d at 184).

Dominguez sought to elicit testimony of an ATF agent⁵⁰the one who had interviewed Dominguez and obtained samples of his handwriting in connection with this case⁵⁰to the effect that the agent had been told by Dominguez that the gun belonged to his former brother-in-law, Jimmy Guerra, who asked Dominguez to take out the pawn in question because he (Guerra) did not have any identification. Dominguez argued that this statement was admissible hearsay under Fed. R. Evid. 803(3) because it reflected Dominguez's belief (state of mind) at the time of the interview that someone else owned the gun. The district court sustained the

government's objection that the statement was inadmissible hearsay as an out of court statement offered for the truth of the matter asserted.

At trial, a clerk from the E-Z Pawn Shop testified that someone with Dominguez's identification card pawned a gun. The clerk stated that he assumed it was Dominguez because the person in possession of the identification card looked similar to the picture and matched the height and eye color description. The store clerk could not positively identify Dominguez as the person who pawned the gun, but in view of the identification card, the clerk was certain he did not receive the gun from someone else. The clerk could not recall if another person was with Dominguez when he pawned the gun or later when he retrieved it.

The clerk and Dominguez agreed on a loan of \$25 for the gun. After processing the paperwork on the shop's computer, the clerk gave Dominguez a pawn ticket. Dominguez checked the ticket for errors, then signed it. The clerk then gave Dominguez his copy of the ticket and the \$25.

More than a week later Dominguez appeared at the shop to remove the gun from pawn, but he did not have his pawn ticket. The clerk then asked for his identification card, which Dominguez produced. The card appeared to be the same one produced during the earlier visit. After checking to make sure that the names and identification numbers were the same, the clerk redeemed Dominguez's loan, had Dominguez sign a statement for the lost pawn ticket and fill out a federal firearms form, and handed the gun to

Dominguez. The clerk watched as Dominguez answered "no" to the question on the federal firearms form whether he had ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.

Tracy Tate, Dominguez's parole officer, stated that Dominguez's file revealed that he had been told on four separate occasions that he could not own, possess, use or sell a firearm or have one under his control. She also stated that during a home visit with Dominguez he admitted to her that he had possessed a firearm.

Mary Ann Riker, a forensic document examiner for the ATF, compared the store copy of the pawn ticket, the statement concerning the lost pawn ticket, and the federal firearms form, with handwriting exemplars obtained from Dominguez. Riker indicated that it appeared Dominguez had signed the copy of the pawn ticket although the signature on the carbon copy was too faint to give a conclusive opinion. As for the other documents, Riker stated her opinion that they were definitely signed by Dominguez.

Guerra testified that he asked Dominguez to come along when he (Guerra) pawned his gun; and that when the clerk at the pawn store noticed that Guerra's identification card was expired, Dominguez offered to use his identification card. Guerra also testified that he was in possession of the gun at all times, and that Dominguez merely completed and signed the paperwork. Guerra stated that Dominguez went with him to retrieve the gun as well; and that Guerra did not have the pawn ticket, so the clerk made another.

According to Guerra, the clerk then retrieved the gun and gave it directly to Guerra.

From the foregoing evidence a jury could have reasonably concluded that Dominguez knowingly possessed and exercised control over the gun by pawning it. The jury was entitled either to believe or disbelieve Guerra's testimony. If the jury had accepted Guerra's story that he owned and pawned the gun, the jury would have been able to infer that Dominguez believed the gun to belong to someone else.

Also, Dominguez's statement to the ATF agent as to his belief that another person owned the gun does not go to whether Dominguez had the requisite mens rea to commit the offense of being a felon in possession or control of a firearm. Consequently, Dominguez's exculpatory statement would not have added substantially to the evidence presented to the jury. In light of the predominant evidence of Dominguez's guilt, any error the district court may have made in not admitting Dominguez's exculpatory statement could not have so affected the jury's decision as to warrant reversal.

AFFIRMED.