

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7229
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT MORRIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CR J92 00113(L))

(April 1, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:¹

Robert Morris challenges his conviction and sentence for use of a Colt .25 pistol during a drug-trafficking offense. We affirm.

I.

Jackson, Mississippi police officers entered the home of Robert Morris pursuant to a search warrant and discovered Morris, his son, George Morris, and Clifton Babbitt in the den. Morris was

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sitting on a sofa wrapped in a quilt. Under the quilt were two grocery bags containing marijuana and approximately \$9200 in cash.

A Colt .25 automatic pistol was hidden under a newspaper on a table next to Morris. The room also contained scales, a police scanner, and other drug paraphernalia. Another \$6000 in cash was hidden throughout the house. Morris gave the officers keys to a locked security closet. Inside the closet, the officers found a safe, several long guns, and a handgun. Morris then provided the combination to the safe which contained several handguns, including a Ruger .22 caliber pistol with an obliterated serial number.

Morris was charged with possession with intent to distribute 1206 grams of marijuana (Count I), use of the Colt .25 pistol during a drug-trafficking offense (Count II), and possession or receipt of the Ruger .22 caliber pistol with an obliterated serial number (Count III). He pleaded guilty to the drug charge and went to trial on the gun charges. Morris testified that he did not traffic in narcotics from his home. He contended that he used the Colt .25 pistol to protect his house, and that it was in a briefcase some distance from where he was arrested. The jury convicted him of Count II and acquitted him of Count III. We consider each of Morris's arguments below.

II.

A.

Morris argues first that the district court abused its discretion by admitting into evidence weapons that were not specifically charged in the indictment, and that this error

resulted in a constructive amendment of the indictment. Specifically, he suggests that the district court erred by admitting the additional guns into evidence without balancing their relevance against the possibility that they would unduly prejudice the jury. **See United States v. Beechum**, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), **cert. denied**, 440 U.S. (1979). He contends that the additional guns should have been excluded as irrelevant.

At trial, Morris moved to prohibit the government from introducing into evidence most of the seized items, including any guns not identified in the indictment, police scanners, and other drug-related items. Morris argued that the weapons would "inflame and prejudice the jury."

The government responded that the scanners and the guns were relevant to Morris's interest in protecting his drug supply and to whether he had used the charged gun in furtherance of his drug trade. The government pointed out that Morris had been aware from the outset of the proceedings of the government's intent to introduce all of the weapons into evidence. Without stating its reasons for the record, the district court ruled that the evidence was admissible.

We review the district court's evidentiary rulings under an abuse of discretion standard. **United States v. Brown**, 7 F.3d 1155, 1163 (5th Cir. 1993). If abuse is found, the rulings then are reviewed for harmless error. **United States v. Capote-Capote**, 946 F.2d 1100, 1105 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 2278 (1992).

We are satisfied that the district court did not err in admitting the weapons into evidence. The weapons and drug paraphernalia were relevant to the government's theory that Morris dealt drugs from his home. **See United States v. Martinez**, 808 F.2d 1050, 1057 (5th Cir. 1987) (firearms are "tools of the trade" of drug traffickers). Morris testified that after he sold the marijuana he dropped it at locations outside his home. This evidence was also probative on the issue of whether Morris had knowingly possessed the illegal Ruger pistol. **See United States v. Gadison**, 8 F.3d 186, 192 (5th Cir. 1993); **Capote-Capote**, 946 F.2d at 1104.

B.

Morris also argues that his conviction must be reversed because the evidence of other weapons and the prosecutor's closing argument constructively amended the indictment. According to Morris, it is possible that the jury convicted him based on the weapons found in the closet, rather than the Colt .25 charged in the indictment.

A constructive amendment occurs if the trial court's instructions and evidentiary rulings allow proof of an essential element of a crime on an alternative basis permitted by statute but not charged in the indictment. **United States v. Restivo**, 8 F.3d 274, 279 n.20 (5th Cir. 1993). If this occurs, reversal is required. **Id.** Because Morris did not present his theory of constructive amendment to the district court, we review his challenge for plain

error. **See id.** at 278-79; **United States v. Olano**, 113 S.Ct. 1770, 1776 (1993).

The indictment charged that Morris had "knowingly used and carried . . . [a] Colt .25 caliber semi-automatic pistol, serial number 278, during and in relation to a drug trafficking crime" A copy of the indictment was furnished to the jury during its deliberations. The court instructed the jury that it should consider separately each count and the evidence pertaining to it, and that Morris was "not on trial for any act, conduct or offense not alleged in the indictment." The jury is presumed to have followed this instruction. **Zafiro v. United States**, 113 S.Ct. 933, 939 (1993).

No constructive amendment occurred in this case because the evidence at trial overwhelmingly established the essential elements of the offense as they were alleged in the indictment, and the jury instructions did not permit the jury to convict based on allegations outside the indictment.

C.

Morris argues next that the district court committed reversible error by refusing to instruct the jury that "strategic proximity" to drugs and firearms is not alone enough to convict under 18 U.S.C. § 924(c)(1).

We review a jury charge to determine whether, as a whole, it clearly and correctly states the law as applied to the facts of the case. **United States v. Lara-Velasquez**, 919 F.2d 946, 950 (5th Cir. 1990). A trial court has substantial latitude in fashioning an

instruction that fairly and adequately covers the issues. **United States v. Allibhai**, 939 F.2d 244, 251 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 967 (1992). A party appealing the refusal to give a requested instruction must show that: (1) the requested instruction was substantially correct; (2) it was not substantially covered by the trial court's instructions to the jury; and (3) it concerned an important issue so that the omission of the instruction seriously impaired the defendant's ability to present a given defense. **United States v. Broussard**, 987 F.2d 215, 223 (5th Cir. 1993). We review a district court's refusal to give a particular instruction for abuse of discretion. **United States v. Lokey**, 945 F.2d 825, 839 (5th Cir. 1991).

Morris requested that the jury be instructed that:

The government is not required to prove that the defendant actually fired the weapon or brandished it at someone in order to prove "use", as the term is used in this instruction. However, you must be convinced beyond a reasonable doubt that the firearm played a role in or facilitated the commission of the drug offense trafficking crime, that is to say, there must be some relation between the firearm and the drug. In other words, you must find that the firearm was an integral part of the drug offense charged.

Strategic proximity to drugs and firearms is not alone enough to convict.

The district court instructed the jury as follows:

The government is not required to prove that the defendant actually fired the weapon or brandished it at someone in order to prove use, as that term is used in this instruction. Nor, [sic] is the government required to prove that the defendant had actual possession or used the firearm in any affirmative manner. However, you must be convinced beyond a rea-

sonable doubt that the firearm played a role in or facilitated the commission of a drug offense. This requirement may be satisfied by evidence which convinces you beyond a reasonable doubt that the firearm was available to provide protection to the defendant in connection with the engagement in drug trafficking. In other words, you must find that the firearm was an integral part of the drug offense charged.

The "strategic proximity" instruction requested by Morris is a correct statement of the law. **See United States v. Wilson**, 884 F.2d 174, 177 (5th Cir. 1989). However, Morris has not demonstrated reversible error because, as the substance of the instruction was substantially covered by the trial court's instructions to the jury, its omission did not seriously impair Morris's ability to present a defense. **See Broussard**, 987 F.2d at 223.

D.

Morris argues finally that the district court erred in refusing to reduce his offense level for acceptance of responsibility on the drug charge because he exercised his right to stand trial on the gun charge.

The sentencing judge is in a unique position to evaluate whether a defendant has accepted responsibility. **United States v. Brigman**, 953 F.2d 906, 909 (5th Cir.), **petition for cert. filed**, (United States Aug. 4, 1992) (No. 92-5417). The defendant bears the burden of proving that he is entitled to the downward adjustment, **United States v. Kinder**, 946 F.2d 362, 367 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 2290 (1992), and is not entitled to a reduction simply because he has entered a guilty plea. U.S.S.G §

3E1.1 comment. n.3; **see United States v. Shipley**, 963 F.2d 56, 58 (5th Cir.), **cert. denied**, 113 S.Ct. 348 (1992).

A defendant cannot deny part of his relevant criminal conduct and receive a reduction for acceptance of responsibility as to the conduct that he has admitted. **United States v. Smith**, ___ F.3d ___ (5th Cir. Jan. 28, 1994, No. 92-7614), 1994 WL 22393 at *4; **see United States v. Kleinebreil**, 966 F.2d 945, 953-54 (5th Cir. 1992). We apply a highly deferential standard of review to a district court's refusal to credit a defendant's acceptance of responsibility. **See Thomas**, 1994 WL 18033 at *16 & n.39 (applying "clearly erroneous" standard and noting, that there "appear[ed] to be no practical difference" between that standard and the "without foundation" or "great deference" standards used in other cases).

To be entitled to the two-level reduction a defendant must accept responsibility for all relevant conduct. U.S.S.G. § 3E1.1(a), comment. (n. 1(a)). "[A] defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." **Id.**

This case is distinguishable from **Broussard**, 987 F.2d at 224, in which we remanded for reconsideration as to whether a defendant who exercised his right to stand trial had accepted responsibility for a § 924(c)(1) offense. Broussard admitted that he owned the guns and where they were located in his home. **Id.** The sole issue at trial was whether § 924(c)(1) applied to the uncontested facts. **Id.**

Morris disputed the location of the gun on which the § 924(c)(1) violation was based, testifying that it was kept in a locked briefcase in a place that was not readily available to him. The government's evidence indicated that the gun was hidden under a newspaper on a table next to Morris. The district court therefore was entitled to conclude that Morris testified falsely on this critical point.

III.

For the foregoing reasons, Morris's conviction and sentence for use of a Colt .25 pistol during a drug-trafficking offense are
AFFIRMED.