

full hearing on February 14. Smith's motion should be denied on both grounds.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT SMITH'S CONVICTION

3. The elements of 18 U.S.C. § 922(g), the offense charged in both Counts, are that (1) the defendant previously had been convicted of a crime punishable by a term of imprisonment exceeding one year; (2) the defendant knowingly possessed, transported, shipped, or received the firearm; and (3) the possession was in or affecting commerce. United States v. Langley, 62 F.3d 602, 606 (4th Cir. 1995) (en banc), cert. denied 516 U.S. 1083 (1996). In the instant motion, Smith only challenges the sufficiency of the evidence that he "possessed" firearms.

A. Standard of Review

4. "A defendant challenging the sufficiency of the evidence to support his conviction bears a heavy burden." United States v. Beidler, 110 F.3d 1064, 1067 (4th Cir. 1997). In evaluating a jury's verdict, the evidence must be viewed in the light most favorable to the government; a verdict will be overturned only if no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Reaves, 48 F.3d 763, 771 (4th Cir.), cert. denied, 515 U.S. 1151 (1995). Further, the court "must consider circumstantial as well as direct evidence,

and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982); United States v. Campbell, 977 F.2d 854 (4th Cir. 1992), cert. denied, 507 U.S. 978 (1993).

B. Evidence Supporting Count One

5. In this case, there was more than enough evidence for the jury reasonably to have found Smith guilty of Count 1. Count 1 charged that Smith possessed a firearm at Gilbert Small Arms Range, Inc. in Lorton, Virginia ("Gilbert"). The jury properly could have found beyond a reasonable doubt that on June 12, 1998, Smith went to Gilbert, where he paid the fees and filled out the necessary paperwork to obtain a membership at the Gilbert range, rented an H&K rifle and purchased ammunition from Gilbert, and had either sole or joint possession of that rifle on the indoor shooting range.

6. Smith stipulated that he signed GEX-32,¹ the Gilbert range membership application, and GEX-33, the Gilbert range card. Tr. 128.² Ernest Lyles, the co-owner and general manager of Gilbert, testified that, in order to shoot at Gilbert's private club gun range, one must first join as a member, which Smith did on June 12, 1998 using GEX-32. One must also show photo

¹ "GEX-__" means "Government Exhibit No. __."

² "Tr. __" designates page citations to the trial transcript, relevant excerpts of which are attached hereto. ...

identification; Smith presented his driver's license, whose number Mr. Lyles recorded in Gilbert's monthly member logbook, GEX-35. A range member must also fill out a range card each time one actually enters the range (to shoot), which Smith did on June 12, 1998, using GEX-33. Tr. 130-134. Tr.
140

7. As reflected on the June 12, 1998 range card, Smith rented from Gilbert a Heckler & Koch 9 millimeter semiautomatic rifle, GEX-14 (the "H&K rifle"). He also purchased 200 rounds of 9 millimeter ammunition for the H&K rifle and paid for range time for himself and a companion. He also rented the required ear and eye protection needed for himself and the companion to enter the range. Tr. 132-34, 143-48.³ As Mr. Lyles testified and the jury reasonably could have found, someone coming to the gun range simply to observe need not (and reasonably would not) have rented a rifle and purchased ammunition. Tr. 143-44.

8. Significantly, as Mr. Lyles clearly and unequivocally testified, Smith and Smith alone was responsible for the H&K rifle he rented: "William Smith. If that gun showed up missing and that's the last person I had rented [it to], that's who I'd go to to find my gun." Tr. 147. Smith was responsible for the control and safe return of the H&K rifle he rented. By itself, this is sufficient to show a degree of control over the weapon to Gilbert
Policy

³ That same day at Gilbert, Smith also purchased 12 gauge shotgun ammunition and special ordered a Choate pistol grip shotgun stock identical to the one found on a Mossberg shotgun seized from Smith's apartment. Tr. 135-37; GEX-36A.

for a jury reasonably to have found that Smith possessed it.

9. All reasonable inferences from the evidence point to Smith's actual possession and use of the H&K rifle on June 12, 1998. The jury was presented with evidence establishing a clear motive for Smith to have rented and used the H&K rifle at Gilbert: he wanted to test out the German-built original version of the U.S.-manufactured Special Weapons 9 millimeter "knock-off" rifle that was subsequently found in his apartment on July 7, 2000. GEX-18; Tr. 90, 97 (the Special Weapons rifle made in Arizona is a "knock-off" or "copy" of the H&K rifle made in Germany); Tr. 138-39 (the Special Weapons rifle is "almost an exact copy" of the H&K rifle; the H&K can no longer legally be imported because of an assault weapon ban). Further, the jury reasonably could have found that given Smith's obvious and extreme affinity for firearms, it would be wholly unreasonable for him to have gone to Gilbert, filled out the paperwork and paid for range time, rented the H&K rifle and purchased ammunition, and not actually have fired the H&K rifle on the range.

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for another
person?*

10. Finally, the jury properly could have found Smith guilty of Count 1, regardless whether Smith possessed the H&K rifle solely or jointly with his companion. As the Court instructed the jury in response to their inquiry, without objection from Smith:

To possess means to have something within a person's control. This does not necessarily mean that the defendant

must hold it physically, that is, have actual possession of it. . . . As long as the firearm or firearms are within the defendant's control, he possesses it or them.

If you find that the defendant either had actual possession of the firearms at issue or that he had the power and intention to exercise control over them, even though the . . . firearms were not in his physical possession, you may find that the government has proven possession.

The law also recognizes that possession may be sole or joint. If one person alone possesses it, that is sole possession. However, it is possible that more than one person may have the power and intention to exercise control over the firearm or firearms. This is called joint possession.

If you find that the defendant had such power and intention, then he possessed the firearm or firearms under this element even if he possessed the firearms jointly with another. Proof of ownership of the firearm or firearms is not required.

Tr. 216-16. This instruction, taken verbatim from 2 L. Sand, et al., Modern Federal Jury Instructions, 35-49 (2000), is a correct statement of the law of possession. See, e.g., United States v. Blue, 957 F.2d 106, 107 (4th Cir. 1992); United States v. Jones, 945 F.2d 747, 749-50 (4th Cir. 1991).

11. The evidence that Smith possessed the H&K rifle is substantially stronger than that found to be sufficient for conviction in United States v. Rahman, 83 F.3d 89, 92-93 (4th Cir.), cert. denied, 519 U.S. 998 (1996). In that case, the only evidence of possession of a firearm in violation of 18 U.S.C. §922(g) was a sales receipt and Firearms Transaction Report signed by the defendant. The Court of Appeals held that the jury could reject the defendant's proffered explanation that he was merely a straw purchaser who never took possession of the

only one person

firearms and did not live at the residence where the firearms were seized. Id. The Court reviewed the evidence it found sufficient to convict:

Store receipts listed Rahman as the purchaser of the firearms, and the dates of the receipts corresponded to those on the Firearms Transaction Records--forms that Rahman admittedly completed and signed. As such, the evidence clearly demonstrated that Rahman was present and purchased the firearms. Viewing this evidence and the reasonable inferences to be drawn from it in the light most favorable to the Government, we conclude that a rational jury could find that Rahman possessed the weapons at the time he purchased them.

Id. at - (citing United States v. Wight, 968 F.2d 1393, 1395, 1397-99 (1st Cir.1992) (upholding conviction on joint constructive possession theory where defendant was passenger in van containing firearm during drug deal; noting that evidence sufficient to convict may be entirely circumstantial)).

12. Here, the evidence unequivocally shows that Smith was present, rented the H&K, and became responsible for the weapon. He bought a membership to the Gilbert range, bought ammunition for the firearm he rented, and completed the required paperwork to enter the range and fire the weapon. As the Court of Appeals determined in Rahman, nothing more is necessary for a rational jury to conclude Smith possessed the H&K rifle.

II. Suppression of Evidence Reargument

13. Smith next argues that both counts of the indictment must be dismissed because the evidence upon which they were based was illegally seized from his apartment on July 7 and 26, 2000. Smith is in essence asking that this Court reconsider his failed

argument that the evidence against him be suppressed under the guise of a Rule 29 motion. This is not proper. The Court ruled on this motion after extensive briefing and an evidentiary hearing on February 14, and no evidence was adduced at trial to call the correctness of this ruling into question.⁴

14. The United States relies on the arguments in the Government's Response to Defendant's Motion to Suppress (filed Jan. 31, 2001) and the evidence and argument in the record at the February 14 hearing in opposing this portion of Smith's motion. The Court's ruling at that time is correct and need not be revisited.

15. The only new issue raised by Smith in this portion of his motion is the claim that evidence ultimately leading to discovery of the H&K rifle rental at Gilbert was seized from Smith's apartment pursuant to the second search warrant, executed by ATF agents on July 26. There is no evidence in the record - and no truth to the allegation - that anything seized in Smith's apartment directly or indirectly led to the discovery of Smith's Gilbert firearm possession.⁵

⁴ At trial, Counsel introduced a single cellular telephone record that was consistent with evidence already in the record in the February 14 suppression hearing. See Tr. 220-22.

⁵ Although there is no record evidence regarding the source of leads about Smith's possession of the H&K rifle at the Gilbert range, the United States proffers that the source of this information was the original complainant against Smith, Ms. Karen Campbell, who in interviews on July 11, 2000 and August 24, 2000 identified Gilbert as one gun range where Smith had used firearms. ATF agents followed up on Campbell's lead, and on September 26,

CONCLUSION

16. For the reasons set forth above, defendant's motion for acquittal should be denied.

Respectfully submitted,

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2000, obtained from Gilbert documents relating to Smith's 1998 range membership and usage, as well as his pistol grip shotgun stock purchase. See GEX-32, -33, -34A, -36. ...

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing
GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR ACQUITTAL was
served by mail, first class postage prepaid, on counsel listed
below on this 13th day of March, 2001.

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