

**Eleventh Circuit's decision below
on remand from this Court**

941 F.3d 1018

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Dan REED, Defendant-Appellant.

No. 17-12699

|

Non-Argument Calendar

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(October 28, 2019)

Synopsis

Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 6:15-cr-00162-GAP-KRS-1, Gregory Presnell, Senior District Judge, of possessing firearm as felon, and he appealed. The Court of Appeals,  752 Fed.Appx. 851, affirmed. Certiorari was granted. The United States Supreme Court, 139 S.Ct. 2776, vacated and remanded.

[Holding:] On remand, the Court of Appeals, William H. Pryor, Circuit Judge, held that failure to allege that defendant knew he was felon or to instruct jury to find that he knew he was felon was not reversible error.

Affirmed.

Procedural Posture(s): Appellate Review.

West Headnotes (5)

[1] **Weapons**  Other individuals prohibited from possession

In prosecution for possessing firearm and ammunition while being illegally or unlawfully in United States, government must prove both that defendant knew he possessed firearm and that he knew he belonged to relevant category of persons barred from possessing firearm.  18

U.S.C.A. §§ 922(g),  924(a)(2).

16 Cases that cite this headnote

[2] **Criminal Law**  Necessity of Objections in General

To establish plain error, defendant must prove that error occurred that was both plain and that affected his substantial rights, and if he does so, Court of Appeals may, in its discretion, correct plain error if it seriously affects fairness, integrity, or public reputation of judicial proceedings.

28 Cases that cite this headnote

[3] **Criminal Law**  Necessity of Objections in General

As reviewing court, Court of Appeals may consult whole record when considering effect of any error on defendant's substantial rights, for purposes of plain error review.

23 Cases that cite this headnote

[4] **Criminal Law**  Scope of Inquiry

In reviewing criminal cases, it is particularly important for appellate courts to relive whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure.

2 Cases that cite this headnote

[5] **Criminal Law**  Requisites and sufficiency of accusation

Criminal Law  Elements of offense and defenses

Plain error that occurred when defendant's indictment charging him with being felon in possession of firearm failed to allege that he knew he was felon and when jury was not instructed to find that he knew he was felon did not affect his substantial rights or fairness, integrity, or public reputation of his trial, and thus did not warrant reversal of his conviction, where defendant had been convicted in state court of eight felonies, stipulated that he previously had

been convicted of felony offenses, testified that he knew he was not supposed to have gun, and admitted at sentencing that he had served minimum of 18 years in prison before being arrested for possessing firearm. 18 U.S.C.A. § 922(g)(1).

35 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Middle District of Florida

Before WILLIAM PRYOR, NEWSOM and JULIE CARNES, Circuit Judges.

ON REMAND FROM THE UNITED STATES SUPREME COURT

WILLIAM PRYOR, Circuit Judge:

This appeal on remand from the Supreme Court requires us to revisit Dan Reed's conviction for possessing a firearm as a felon. After we affirmed Reed's conviction, *United States v. Reed*, 752 F. App'x 851 (11th Cir. 2018), the Supreme Court issued its decision in *Rehaif v. United States*, — U.S. —, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019). The Court then granted Reed's petition, vacated our judgment, and remanded his appeal for reconsideration in the light of *Rehaif*. At our direction, the parties filed supplemental

letter briefs addressing the effect of *Rehaif* on Reed's conviction. Reed asks that we vacate his conviction or, in the alternative, ***1020** grant him a new trial because *Rehaif* made plain that errors occurred when his indictment failed to allege, his jury was not instructed to find, and the government

was not required to prove that he knew he was a felon when he possessed the firearm. The United States argues that we must "when addressing plain error ... evaluate a case ... by viewing such a claim against the entire record," *United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), and that the record establishes that Reed knew of his status as a felon. Because we conclude that Reed cannot establish the errors affected his substantial rights, see *Molina-Martinez v. United States*, — U.S. —, 136 S. Ct. 1338, 1343, 194 L.Ed.2d 444 (2016), we affirm his conviction.

I. BACKGROUND

Before trial, Reed stipulated that, "at the time of the alleged crime, [he] previously had been convicted of a felony offense, that is, a crime punishable by imprisonment for a term in excess of one year" and that he "never has had his civil rights restored, including the right to keep and bear firearms and ammunition ..." Based on Reed's stipulation, the United States redacted from Reed's indictment the information about his eight prior felony convictions in Volusia County, Florida.

18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(e)(1).

During trial, Reed acknowledged that he was not allowed to have a gun and asserted an affirmative defense of justification. When asked during cross-examination if "you knew you weren't supposed to have that gun," Reed answered, "Yes, sir." Reed argued that he was entitled to arm himself while quarreling with his neighbor after having a similar encounter the night before with unknown men who battered him. See *Reed*, 752 F. App'x at 853.

After both parties rested, the district court instructed the jury that it had to find beyond a reasonable doubt that Reed "knowingly possessed" the firearm after being convicted of a felony and reminded them that the "stipulation ... established that the Defendant had been convicted of a prior felony." The district court also instructed the jury on Reed's defense of justification. The jury found Reed guilty of being a felon in possession of a firearm. 18 U.S.C. § 922(g)(1).

Reed's presentence investigation report stated that he had been incarcerated for lengthy terms before possessing the firearm. *Reed*, 752 F. App'x at 853. Reed did not object to the statements in his report that he had served more than 18 years in prison following his conviction

in 1990 for unlawfully possessing with intent to sell or deliver a controlled substance. The district court also found, over Reed's objection, that he had served 30 months of imprisonment following his conviction in 1987 for unlawfully selling or delivering a controlled substance. *Id.* at 854.

II. STANDARD OF REVIEW

We review for plain error Reed's new challenges to his indictment, *United States v. Sperrazza*, 804 F.3d 1113, 1118–19 (11th Cir. 2015), the jury instructions, *United States v. Joseph*, 709 F.3d 1082, 1093 (11th Cir. 2013), and the sufficiency of the evidence, *United States v. Baston*, 818 F.3d 651, 664 (11th Cir. 2016).

III. DISCUSSION

[1] The Supreme Court clarified in *Rehaif* that, “in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” 139 S. Ct. at 2200. As a result, *1021 *Rehaif* abrogated *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997), which held that a defendant does not have to know of his status as a felon to prove that he knowingly possessed a firearm after a felony conviction. Because Reed is on direct appeal, *Rehaif* applies to his conviction. *See* *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

[2] Our review is for plain error. *United States v. Vonn*, 535 U.S. 55, 58–59, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). Its test “places a daunting obstacle before [Reed]” in seeking relief from his conviction. *United States v. DiFalco*, 837 F.3d 1207, 1221 (11th Cir. 2016) (citation and internal quotation marks omitted). Reed must prove that an error occurred that was both plain and that affected his substantial rights. *See* *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). If he does so, we may, in our discretion, correct the plain error if it “seriously affect[s] the fairness, integrity, or public reputation of judicial

proceedings.” *Id.* (alteration adopted) (citation and internal quotation marks omitted).

[3] [4] As the “reviewing court[, we] may consult the whole record when considering the effect of any error on [Reed's] substantial rights.” *Vonn*, 535 U.S. at 59, 122 S.Ct. 1043; *see also* *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (observing that a court reviewing for plain error is “informed by the entire record”). We cannot “properly evaluate [Reed's claims of error] except by viewing [them] against the entire record,” *Young*, 470 U.S. at 16, 105 S.Ct. 1038, because Federal Rule of Criminal Procedure 52(b) “authorizes the Courts of Appeals to correct only particularly egregious errors,” *id.* at 15, 105 S.Ct. 1038 (citation and internal quotation marks omitted). And “[i]n reviewing criminal cases [like Reed's], it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure.” *Id.* at 16, 105 S.Ct. 1038 (quoting *Johnson v. United States*, 318 U.S. 189, 202, 63 S.Ct. 549, 87 L.Ed. 704 (1943) (Frankfurter, J., concurring)). So we consider proceedings that both precede and postdate the errors about which Reed complains. *See* *Dominguez Benitez*, 542 U.S. at 77, 84–85, 124 S.Ct. 2333 (identifying statements from the defendant and counsel during a status conference, “the overall strength of the Government's case[,] and any possible defenses that appear from the record” as “[r]elevant evidence” in determining whether a warning omitted from the Rule 11 colloquy made a difference to the outcome); *Vonn*, 535 U.S. at 74–76, 122 S.Ct. 1043 (instructing the appellate court on remand to consider the entire record).

Reed has established errors in his indictment and at his trial that *Rehaif* made plain. *Rehaif* made clear that the government must prove that a defendant knew of his prohibited status when he possessed a firearm or ammunition. 139 S. Ct. at 2194, 2200. The government concedes that plain error occurred when Reed's indictment failed to allege that he knew he was a felon and when the jury was not instructed to find that Reed knew he was a felon. And, as Reed argues, error occurred when the government was not required to prove that Reed knew he was a felon.

[5] Nevertheless, Reed cannot “show a reasonable probability that, but for the error[s], the outcome of [his trial] would have been different.”  *Molina-Martinez*, 136 S. Ct. at 1343 (citation and internal quotation marks omitted). When Reed possessed the firearm, he had been convicted of eight felony convictions in a Florida court. *See*  *1022 *Dominguez Benitez*, 542 U.S. at 84–85, 124 S.Ct. 2333. And the jury could have inferred that Reed knew he was a felon from his stipulation and from his testimony that he *knew* he was not supposed to have a gun. Reed also admitted at sentencing that he had served a minimum of 18 years in prison before being arrested for possessing the firearm. *See*  *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) (“It is the law of this circuit that a failure to object to

allegations of fact in a PSI admits those facts for sentencing purposes.”). Because the record establishes that Reed knew he was a felon, he cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial.

IV. CONCLUSION

We **AFFIRM** Reed’s conviction.

All Citations

941 F.3d 1018, 28 Fla. L. Weekly Fed. C 503

Eleventh Circuit's Order denying rehearing and rehearing en banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12699-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DAN REED,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON REMAND FROM THE UNITED STATES SUPREME COURT

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, NEWSOM and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petitions for Panel Rehearing are also denied. (FRAP 40)

ORD-46

**Eleventh Circuit's decision below
issued before *Rehaif***

752 Fed.Appx. 851

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Dan REED, Defendant-Appellant.

No. 17-12699

|

Non-Argument Calendar

|

(October 19, 2018)

Synopsis

Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 6:15-cr-00162-GAP-KRS-1, of possessing a firearm as a felon and was given enhanced sentence under Armed Career Criminal Act. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] district court acted within its discretion in excluding proffered expert testimony from neuropsychologist;

[2] exclusion of neuropsychologist's proffered expert testimony did not deprive defendant of fair opportunity to present his defense;

[3] district court did not clearly err by finding that defendant was convicted of prior unlawful sale of controlled substance, as predicate offense for enhancement of his sentence;

[4] defendant's prior conviction under Florida law for possession with intent to sell or deliver a controlled substance was serious drug offense, for purposes of sentence enhancement;

[5] district court's consideration of defendant's prior convictions did not violate Fifth or Sixth Amendments; and

[6] application of mandatory minimum sentence under the Act did not violate Eighth Amendment.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (6)

[1] **Criminal Law** Mental condition or capacity

District court acted within its discretion in excluding defendant's proffered expert testimony from neuropsychologist regarding defendant's mental disabilities and his affirmative defense of justification as irrelevant and inadmissible, in prosecution for possessing firearm as a felon; proposed testimony would not have assisted jury in determining whether defendant faced actual imminent harm or whether a reasonable option existed for his protection, jury could discern from firsthand accounts of defendant's behavior whether he was justified in possessing firearm, and proposed testimony was inadmissible opinion about whether defendant did or did not have mental state or condition constituting element of his defense. 18 U.S.C.A. § 922(g); Fed. R. Evid. 702, 704(b).

[2] **Criminal Law** Mental condition or capacity

Exclusion of defendant's proffered expert testimony from neuropsychologist regarding defendant's mental disabilities did not deprive defendant of fair opportunity to present his justification defense to jury, in prosecution for possessing firearm as a felon; exclusion did not prevent defendant from informing jury of his mental limitations or impair his ability to present his justification defense through testimony of his mother and from defendant himself, defendant testified that he obtained gun because he feared men who robbed him previous evening would return and reinjure him or harm his mother, and

district court instructed jury that it could consider justification defense.

[3] Sentencing and Punishment  Identity

District court did not clearly err by finding that defendant was convicted of prior unlawful sale of controlled substance, as predicate offense for enhancement of his sentence for possessing firearm by a felon under the Armed Career Criminal Act; information presented by government was from sufficiently reliable source, and fingerprint card, certified police affidavit, docket sheet, written judgment, and report from National Crime Center that contained either defendant's name or known alias and different combinations of his social security number, date of birth, and dates of arrest and sentencing related to prior offense, along with fingerprint examiner's identification of defendant's thumb print on fingerprint card established with reasonable certainty that defendant was convicted of prior offense.  18 U.S.C.A. § 924(e).

[4] Sentencing and Punishment  Miscellaneous particular offenses

Defendant's prior conviction under Florida law for unlawful possession with intent to sell or deliver a controlled substance was serious drug offense, for purposes of enhancing his sentence for possessing firearm by a felon under the Armed Career Criminal Act, though defendant asserted that Florida statute also punished act of purchasing illegal drug, where judgment of conviction stated defendant possessed illegal drug to "sell or deliver" not to purchase.  18 U.S.C.A. § 924(e)(2)(A)(ii);  Fla. Stat. Ann. § 893.13(1)(a)(1).

1 Cases that cite this headnote

[5] Constitutional Law  Habitual and career offenders

Sentencing and Punishment  Necessity of special allegations or charges

Sentencing and Punishment  Existence and eligibility of prior conviction

District court's consideration of defendant's prior convictions in enhancing his sentence for possessing a firearm as a felon under the Armed Career Criminal Act did not violate defendant's rights under Fifth Amendment Due Process Clause or Sixth Amendment, though convictions were neither alleged in his indictment nor proved to jury beyond a reasonable doubt, as Constitution did not prevent district court from finding fact of his prior convictions or using them to designate him as armed career criminal. U.S. Const. Amends. 5, 6;  18 U.S.C.A. § 924(e).

[6] Sentencing and Punishment  Weapons and explosives

Sentencing and Punishment  Habitual offenders and career criminals

Application of mandatory minimum sentence under Armed Career Criminal Act in prosecution for possessing firearm as a felon did not violate Eighth Amendment, though defendant asserted sentence failed to account for his mental disabilities, as the imposition of a statutory 15-year sentence for recidivism was neither disproportionate to the offense of being a felon in possession of a firearm nor cruel and unusual punishment. U.S. Const. Amend. 8;  18 U.S.C.A. § 924(e).

Attorneys and Law Firms

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Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:15-cr-00162-GAP-KRS-1

Before WILLIAM PRYOR, NEWSOM and JULIE CARNES, Circuit Judges.

Opinion

PER CURIAM:

*853 Dan Reed appeals his conviction and sentence of 180 months of imprisonment for possessing a firearm as a felon. 18 U.S.C. §§ 922(g)(1), 924(a)(2), (e)(1). Reed challenges the exclusion of testimony from his mental health expert, Dr. Robert Cohen, the enhancement of his sentence under the Armed Career Criminal Act, and the constitutionality of section 922(g). We affirm.

I. BACKGROUND

The morning of January 16, 2015, Reed—his face bruised and bandaged—appeared at the fence that separated his back yard from a public storage facility where he occasionally performed odd jobs for its owner, Paul Camp. Reed told Camp that he had been robbed the previous evening. At Camp’s request, Reed remained on his property, and eventually he walked home. Later that day, Reed returned to the fence line wielding a gun and shouting that he was “going to kill everybody.”

Camp called 911, and Harry Oakley of the Daytona Beach Police Department responded to the call. Oakley, who had known Reed for several years, approached Reed and asked if he had a gun. Reed responded affirmatively and moved his hand to allow Officer Oakley to remove the gun from Reed’s waistband. Oakley asked Reed why he was brandishing the gun and Reed responded that he was talking to the individuals who had assaulted him, although he acknowledged that his back yard was empty.

Oakley arrested Reed after receiving a report that he was a convicted felon. When interviewed later, Reed stated that he armed himself because several persons had attacked him the previous evening and he feared they planned to return to harm him or to “shoot[] up his mother’s house.”

After his indictment, Reed filed notice that he intended to call Dr. Cohen, a neuropsychologist, to testify regarding Reed’s mental disabilities and his affirmative defense of justification. The government moved *in limine* to exclude Dr. Cohen’s testimony as irrelevant and inadmissible. The district court granted the motion of the government with the explanation that Reed’s “subjective perception of threats and subjective ability to consider reasonable alternatives is not relevant to a justification defense and that Cohen’s testimony … would not assist the trier of fact.” Before trial, Reed moved for reconsideration and proffered Dr. Cohen’s testimony. The district court denied Reed’s motion for reconsideration.

The jury convicted Reed, and the probation office prepared a presentence investigation report that classified him as an armed career criminal based on his three prior convictions in Florida courts for serious drug offenses. 18 U.S.C. § 924(e). The report stated that Reed had been convicted in 1987 for unlawfully selling a controlled substance, in 1990 for unlawfully possessing with intent to sell or deliver a controlled substance, and in 2011 for selling cocaine near a place of worship or business. With a total offense level of 33 and a criminal history of V, the report provided a recommended sentencing range *854 of 210 to 262 months of imprisonment. The report also stated that Reed faced a statutory sentence of 15 years to imprisonment for life.

Reed objected to the presentence report and argued that he had less than the three predicate offenses required for the sentence enhancement. Reed argued that his 1990 conviction did not qualify as a serious drug offense. He also argued that the government could not prove he committed the 1987 drug offense.

At sentencing, the government presented evidence that connected Reed to the 1987 drug offense. Cynthia Oteri, a fingerprint examiner with the Daytona Beach Police Department, testified that the right thumb on the fingerprint card made of the arrestee in the 1987 case matched both the thumb print collected from Reed for his federal firearm offense and the prints associated with his 1990 and 2011 drug convictions. Oteri testified that she obtained the fingerprint card from the print unit of Volusia County Sheriff’s Office, and the manager of its print unit, Mary Seney, authenticated the fingerprint card and testified that it was transferred to her office from the Daytona Beach Police Department around 1995. Seney stated that the fingerprint card and a report of Reed’s criminal history produced by the National Crime Information Center had identical aliases, dates of birth and

arrest, and originating case numbers. The government also introduced a certified police affidavit, docket sheet, and judgment for the 1987 offense, which had certain identical data as the fingerprint card. The fingerprint card had the same offender name, personal characteristics, and date of birth as the affidavit and had the same aliases, offense, and dates of birth and arrest as the docket sheet. The docket sheet, judgment, and National Crime Center report had the same charge, originating case number, sentence, and dates of birth, arrest, and sentencing.

After “considering the evidence as a whole, [the district court ruled that] the government … met its burden of proving that [Reed] was convicted of the [1986] offense....” The district court observed that “all of the documents name Dan Reed or some variation of that name, including his alias ‘Tom Tom’ ” and “consistently show[ed] that [Reed] was arrested for the sale of cocaine and sentenced to 30 months DOC.” The district court also observed that “[t]he docket sheet, affidavit, NCIC, and fingerprint card all reflect [Reed’s] birthdate of October 20, 1965”; “[t]he docket sheet and affidavit specify an offense date of July 9, 1986”; and “the docket sheet, NCIC, and fingerprint card show an August 15, 1986 arrest date.”

The district court ruled that Reed’s prior convictions qualified as serious drug offenses under the Armed Career Criminal Act. The district court imposed a fifteen-year sentence of imprisonment, the minimum under the Act. The district court also described that sentence as “unjust.”

II. STANDARDS OF REVIEW

Three standards of review govern this appeal. Our review of the exclusion of expert testimony is deferential and only for abuse of discretion, under which “we [will] not reverse an evidentiary decision of a district court unless the ruling is manifestly erroneous.”  *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (internal quotation marks and citation omitted). “We review *de novo* whether a conviction qualifies as a serious drug offense under the [Armed Career Criminal Act].”  *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016), cert. denied, — U.S. —, 138 S.Ct. 1282, 200 L.Ed.2d 477 (2018). We review related findings of fact for clear error. *855 *United States v. Wilson*, 183 F.3d 1291, 1301 (11th Cir. 1999).

III. DISCUSSION

Reed raises six challenges to his conviction and sentence. First, Reed argues that he was denied a fair trial because the jury was unable to consider Dr. Cohen’s testimony about Reed’s mental disabilities and their effect on his perception of reasonableness when assessing his defense of justification. As his second and third issues, Reed argues that the government failed to prove that he committed a drug crime in 1986 and that his 1990 conviction in a Florida court for unlawful possession with intent to sell or deliver a controlled substance does not qualify as a serious drug offense. Reed argues in his fourth and fifth issues, for the first time on appeal, that the enhancement of his sentence based on offenses that were neither charged in his indictment nor proved to a jury violated his rights under the Fifth and Sixth Amendments and that the imposition of the statutory minimum sentence violated the Eighth Amendment and the Due Process Clause. As his sixth issue, Reed challenges, also for the first time, the constitutionality of the firearm statute,  18 U.S.C. § 922(g). We address his arguments in turn.

[1] The district court did not abuse its discretion by excluding testimony from Dr. Cohen that was irrelevant and inadmissible. The affirmative defense of justification is available to a defendant in “extraordinary circumstances” to excuse his unlawful possession of a firearm in a situation where he faces “unlawful and present, imminent, and impending threat of death or serious bodily injury” and he has “no reasonable legal alternative to violating the law.”

 *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000). Dr. Cohen’s proposed testimony about Reed’s mental disabilities would not have assisted the jury in determining whether Reed faced actual imminent harm or whether a reasonable option existed for his protection. *See Fed. R. Evid. 702*. The jury could discern from firsthand accounts of Reed’s behavior whether he was justified in possessing the firearm. Dr. Cohen’s proposed testimony was inadmissible as “an opinion about whether [Reed] did or did not have a mental state or condition that constitutes an element … of [his] defense” of justification, *Fed. R. Evid. 704(b)*. Dr. Cohen opined that Reed was “certainly under duress” when he possessed the firearm, that his intellectual disability and psychosis divested him of the ability to act rationally or to make good judgments, and that he “act[ed] out in [a] way that [was] a little excessive, but in his mind ma[d]e the most sense.” Dr. Cohen addressed directly the element

of immediacy in his written report, where he stated Reed possessed the firearm “because he believed that he and/or his family was under a real threat” due to his “assault[] the day prior and ... not [being] on psychiatric medication at the time.” The district court acted well within its discretion in excluding Dr. Cohen’s testimony.

[2] The exclusion of Dr. Cohen’s testimony did not prevent Reed from informing the jury of his mental limitations or impair his ability to present his justification defense. For example, Officer Oakley testified that, because he was familiar with Reed, he surmised that Reed was “venting” by waiving a gun and uttering threats to his attackers. Reed’s mother told the jury that Reed had “stopped learning” after ingesting aspirin as a child, that he was “schizophrenic” and fluctuated between functioning as a child and as an adult, and that he was “a little different from other children.” And Reed testified that he obtained the gun because he feared that the *856 men who robbed him the previous evening would return and re-injure him or harm his mother. See  *United States v. De La Mata*, 266 F.3d 1275, 1301 (11th Cir. 2001) (concluding that the exclusion of testimony did not affect the defendant’s ability to present his good faith defense). Based on the evidence supporting Reed’s justification defense, the district court instructed the jury that, if it found “that the government [had] proved beyond a reasonable doubt that [Reed] committed the crime as charged, [they] must then consider whether [he] should nevertheless be found not guilty because his actions were justified.” The district court instructed the jury then to consider if Reed “prove[d] by a preponderance of [the] evidence” the four elements required to excuse his offense based on justification. Reed was given a fair opportunity to present his defense to the jury.

[3] The district court did not clearly err by finding that Reed was convicted in 1987 of the unlawful sale of a controlled substance. The government connected Reed to the offense by a preponderance of the evidence, *see United States v. Alicea*, 875 F.3d 606, 608 (11th Cir. 2017), through “presenting reliable and specific evidence,”  *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir. 2012). It was entitled to present “any information (including hearsay), regardless of its admissibility at trial, ... provided that the information is sufficiently reliable.” *United States v. Wilson*, 183 F.3d 1291, 1301 (11th Cir. 1999). And the information the government presented was equivalent to what we have sanctioned as sufficiently reliable sources, such as “a [presentence investigation report], the on-the-record

statements of a probation officer, and the notes of another probation officer,” *id.*, uncertified docket sheets,  *United States v. Brown*, 526 F.3d 691, 710 (11th Cir. 2008), *vacated on other grounds*, 556 U.S. 1150, 129 S.Ct. 1668, 173 L.Ed.2d 1050 (2009), and two convictions in New York courts using different given names based on a “probation officer’s undisputed notation that both convictions bore an identification number identical to the one in [the defendant’s] National Crime Information Center report,” *Alicea*, 875 F.3d at 609. The fingerprint card, certified police affidavit, docket sheet, written judgment, and report from the National Crime Center that contained either Reed’s name or a known alias and different combinations of his social security number, his date of birth, and the charge and dates of arrest and sentencing related to the 1987 offense, along with Oteri’s identification of Reed’s thumb print on the fingerprint card, established with reasonable certainty that Reed was convicted of the 1987 drug offense. Reed argues that the district court erroneously relied on the affidavit and docket sheet because they were not admitted as exhibits and that the fingerprint card was unreliable because there were gaps in the chain of custody, but those alleged defects are irrelevant because a sentencing hearing is not governed by the Federal Rules of Evidence, *see Wilson*, 183 F.3d at 1301. The district court did not clearly err in counting the 1987 conviction, which clearly qualifies as a serious drug offense, as a predicate offense for Reed’s sentence enhancement.

[4] Reed’s challenge to the classification of his conviction in 1990 for the unlawful possession with intent to sell or deliver a controlled substance,  Fla. Stat. § 893.13(1)(a)(1), as a serious drug offense is foreclosed by our precedents. In  *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), we held that a violation of  section 893.13(1)(a)(1) “is ... a serious drug offense.” A “serious drug offense ... [is] an offense under State law, involving manufacturing, distributing, or possessing with *857 intent to manufacture or distribute, a controlled substance.”  18 U.S.C. § 924(e) (2)(A)(ii). Reed argues that his drug conviction did not qualify as a serious drug offense in 1990 because  section 893.13 also punished the act of purchasing an illegal drug, yet he acknowledges that in  *Spaho v. United States Attorney General*, 837 F.3d 1172 (11th Cir. 2016), we held that the alternative acts punished “are elements rather than means” and the modified categorical approach, instead of the categorical approach, applies,  *id.* at 1177. Reed’s judgment

of conviction, which states that he possessed an illegal drug to “sell or deliver,” not to purchase, qualifies as a serious drug offense.

Reed also challenges the classification of his prior conviction on the ground that “Florida law does not require remuneration,” but that argument fails. “We look to the plain language of the definitions to determine their elements,”  *Smith*, 775 F.3d at 1267, and a serious drug offense has no remuneration requirement.

[5] [6] Reed raises three new challenges to his sentence, but he cannot establish that the district court committed any error, much less plain error, because his arguments are foreclosed by our precedents. First, Reed argues that this sentence violates his rights under the Fifth and Sixth Amendments because the convictions were neither alleged in his indictment nor proved to a jury beyond a reasonable doubt, but the Constitution does not “prevent[] the district court from finding the fact of [Reed’s] prior convictions, or using them to designate him an Armed Career Criminal,”  *id.* at 1266 (quoting *United States v. Gibson*, 434 F.3d 1234, 1246 (11th Cir. 2006)) (alteration adopted). See   *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Second, Reed argues that the application of the mandatory minimum sentence,  18 U.S.C. § 924(e), violates the Eighth Amendment because it fails to account for his mental disabilities, but the imposition of a statutory fifteen-year sentence for recidivism “is neither

disproportionate to the offense [of being a felon in possession or a firearm] nor cruel and unusual punishment,”  *Smith*, 775 F.3d at 1266. Third, Reed argues that the mandatory sentence violates the Due Process Clause because it prevented the district court from considering “mitigating factors,” but “mandatory minimum sentencing provisions … [do not] deprive[] [a defendant] of an individualized sentencing proceeding … [in] violat[ion of] due process,”  *United States v. Holmes*, 838 F.2d 1175, 1177 (11th Cir. 1988).

The district court also committed no error, much less plain error, in convicting Reed because, as he concedes, his constitutional challenge to  section 922(g)(1) is foreclosed by precedent. We have held that “the jurisdictional element of the statute, i.e., the requirement that the felon ‘possess in or affecting commerce, any firearm or ammunition,’ immunizes  § 922(g)(1) from [a] facial constitutional attack,” *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001), and that  section 922(g)(1) is constitutional as applied to a defendant who possesses a firearm that traveled in interstate commerce, *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011).

We **AFFIRM** Reed’s conviction and sentence.

All Citations

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District Court's evidentiary decisions

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS.

CASE NO: 6:15-cr-162-Orl-31KRS

DAN REED

ORDER

This matter comes before the Court on the Government's Motion in Limine to Exclude the Testimony of Robert E. Cohen (Doc. 64). The Government seeks to preclude Cohen, a psychologist, from testifying in support of the Defendant's justification defense. The Defendant argues that Cohen's expert testimony would assist jurors in understanding how his birth condition – mental retardation – affects perception of threats and the ability to consider reasonable alternatives. (Doc. 66 at 7). Upon review, the Court concludes that a defendant's subjective perception of threats and subjective ability to consider reasonable alternatives is not relevant to a justification defense, and that Cohen's testimony therefore would not assist the trier of fact. Accordingly, it is hereby

ORDERED that the Government's Motion in Limine to Exclude the Testimony of Robert E. Cohen (Doc. 64) is **GRANTED**.

DONE and **ORDERED** in Orlando, Florida on June 21, 2016.





GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket No. 6:15-cr-162-Orl-31KRS

UNITED STATES OF AMERICA	:	
	:	Orlando, Florida
Plaintiff	:	June 22, 2016
	:	9:00 a.m.
v.	:	
	:	
DAN REED	:	
	:	
Defendant	:	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Embry Kidd

For the Defendant: Alicia Marie Scott

Court Reporter: Sandra K. Tremel, RMR/CRR
sandy.tremel@gmail.com

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

Direct Examination - Dr. Cohen

1 lunch hour.

2 MS. SCOTT: I apologize, Your Honor.

3 THE COURT: Lisa can make a copy and bring it back
4 to me.

5 We will be in recess for about 30 minutes.

6 (luncheon recess at 1:00 p.m.)

7 THE COURT: Okay. With respect to the motion for
8 reconsideration, with regard to Dr. Cohen, the motion is
9 denied. I'm troubled by the ruling, but that's my
10 understanding of the current state of the law. So if I'm
11 wrong, welcome to have the 11th Circuit correct me in that
12 regard.

13 Is there anything else before we bring the jury in
14 for openings?

15 MR. KIDD: Your Honor, I just want to revisit the
16 having the other agent here. If we were to remove the
17 other agent from our witness list and affirmatively say we
18 are not going to call him, would the Court permit him to be
19 in the courtroom?

20 THE COURT: Sure.

21 MR. KIDD: Okay. We will do that.

22 THE COURT: Okay. All right.

23 MR. KIDD: I'll let him know.

24 THE COURT: You can have 15 government reps in
25 here if you want, but -- as long as they don't testify.