

APPENDIX

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UNPUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4361

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY DOUGLAS, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:19-cr-00283-TDS-1)

Submitted: April 14, 2021

Decided: May 13, 2021

Before MOTZ, RICHARDSON, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

George E. Crump, III, Rockingham, North Carolina, for Appellant. Matthew G.T. Martin, United States Attorney, Nicole R. DuPre, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jerry Douglas, Jr., appeals his jury conviction and the 120-month sentence imposed for being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). Douglas first asserts that the district court erroneously denied his motion to suppress evidence of a bullet found in his possession and, absent evidence of the bullet, there was insufficient evidence to support his conviction. Douglas also argues that the district court erroneously denied his request for a justification defense jury instruction, and erred when it calculated the offense level used to calculate his Sentencing Guidelines range. Finding no error, we affirm.

In “reviewing a district court’s ruling on a motion to suppress, this Court reviews conclusions of law de novo and underlying factual findings for clear error. If, as here, the district court denied the motion to suppress, this Court construes the evidence in the light most favorable to the government.” *United States v. Fall*, 955 F.3d 363, 369-70 (4th Cir.), *cert. denied*, 141 S. Ct. 310 (2020) (internal citations, quotation marks, and brackets omitted). We find that law enforcement possessed probable cause to believe that Douglas assaulted a government official and, thus, we discern no error in the district court’s decision to deny Douglas’ motion to suppress evidence found incident to the lawful arrest. Having discerned no error in the district court’s decision to deny the motion to suppress, we reject Douglas’ argument that there was insufficient evidence to support his conviction.

We also discern no error in the district court’s refusal to instruct the jury regarding the justification defense. “As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable

jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988). “The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime . . . is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses.” *United States v. Bailey*, 444 U.S. 394, 416 (1980). Accordingly, “[i]f . . . an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.” *Id.*

Declining to give a proposed instruction amounts to reversible error, therefore, “only if [the proposed instruction] (1) was correct, (2) was not substantially covered by the charge that the district court actually gave to the jury, and (3) involved some point so important that the failure to give the instruction seriously impaired the defendant’s defense.” *United States v. Raza*, 876 F.3d 604, 614 (4th Cir. 2017) (internal quotation marks omitted). “We review a district court’s decision to give [or not give] a particular jury instruction for abuse of discretion.” *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018).

In order for a defendant to be entitled to a jury instruction on the affirmative defense of justification, the defendant must put forth sufficient evidence that: (1) he “was under unlawful and present threat of death or serious bodily injury;” (2) he “did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;” (3) he “had no reasonable alternative (to both the criminal act and the avoidance of the

threatened harm);” and (4) there was a “direct causal relationship between the criminal action and the avoidance of the threatened harm.” *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989). As Douglas failed to make a threshold showing of all the elements necessary to establish a justification defense, we discern no error stemming from the district court’s refusal to instruct the jury regarding the defense. *See United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007) (construing the affirmative justification defense very narrowly when it comes to felon in possession of firearm cases); *United States v. Gilbert*, 430 F.3d 215, 219 (4th Cir. 2005) (finding that justification defense is applicable in only the rarest of circumstances and that “the scenarios in which a defendant could even colorably assert its applicability are extraordinarily uncommon”).

Douglas last assigns error to the district court’s calculation of the base offense level attributable to his crime of conviction by arguing that the court erroneously determined that Douglas constructively possessed firearms. Douglas further asserts that the district court erroneously enhanced his offense level: (1) two levels, pursuant to U.S. Sentencing Guidelines Manual (USSG) § 2K2.1(b)(1)(A) (2018), based on the three firearms he argues he did not constructively possess; (2) four levels, pursuant to USSG § 2K2.1(b)(6)(B), based on his possession of ammunition in connection with another felony offense; and (3) six levels, pursuant to USSG § 3A1.2(c)(1), for assaulting a law enforcement officer during his crime of conviction.

In considering Guidelines challenges, we review the district court’s legal determinations de novo and its factual findings for clear error. *United States v. Dennings*, 922 F.3d 232, 235 (4th Cir. 2019). A factual finding is clearly erroneous when, “although

there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. Wooden*, 887 F.3d 591, 602 (4th Cir. 2018) (internal quotation marks omitted). “If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *United States v. Ferebee*, 957 F.3d 406, 417 (4th Cir. 2020) (internal quotation marks omitted).

We discern no error in the district court’s determination that Douglas was in constructive possession of firearms located within the common areas of the residence in which he was found on the evening of his arrest. *See United States v. Hall*, 858 F.3d 254, 259 (4th Cir. 2017) (recognizing that, under the “constructive possession theory,” the Government must “prove that Defendant knew of the contraband’s presence *and* had the power to exercise dominion and control over it” (internal quotation marks and brackets omitted)). We also discern no error in the district court’s decisions to reject Douglas’ objections to the remaining offense level enhancements. *See, e.g., United States v. Manigan*, 592 F.3d 621, 629 (4th Cir. 2010) (recognizing that the location or proximity of a seized firearm is relevant to a sentencing court’s analysis of whether it was possessed “in connection with” drug activities); *United States v. Jenkins*, 566 F.3d 160, 162 (4th Cir. 2009) (recognizing that the “in connection with” requirement of USSG §_2K2.1(b)(6) is met “if the firearm facilitated or had the potential of facilitating the other offense,” including it being “present for protection or to embolden the actor” (internal quotation

marks omitted))). We therefore find no error in the calculation of Douglas' Guidelines range.

Based on the foregoing, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: May 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4361
(1:19-cr-00283-TDS-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERRY DOUGLAS, JR.

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

United States District Court Middle District of North Carolina

UNITED STATES OF AMERICA

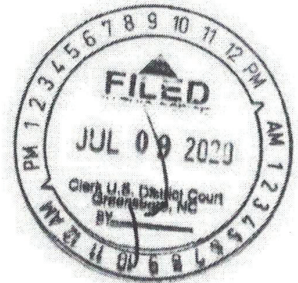
JUDGMENT IN A CRIMINAL CASE

v.

JERRY [NMN] DOUGLAS, JR.

Case Number: 1:19-CR-00283-1

USM Number: 34989-057



Robert L. McClellan

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☒ was found guilty on count 1s of the superseding indictment filed July 29, 2019 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|----------------------------|-----------------------------------|----------------------|--------------|
| 18:922(g)(1) and 924(a)(2) | Felon in Possession of Ammunition | August 27, 2018 | 1s |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☒ Count 1 of the original indictment filed May 29, 2019 is dismissed on the motion of the defendant without objection from the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the economic circumstances.

July 2, 2020

Date of Imposition of Judgment

Signature of Judge

Thomas D. Schroeder, United States District Judge

Name & Title of Judge

Date

July 7, 2020

DEFENDANT: JERRY [NMN] DOUGLAS, JR.
CASE NUMBER: 1:19-CR-00283-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **120 months.**

[120 months to run concurrent with any sentence imposed in 18CRS82896, 18CRS82904, 18CRS82910, 18CRS82911, 18CRS82912, 18CRS82913, 18CRS82914 and 18CRS82991.]

☒ The court makes the following recommendations to the Bureau of Prisons: That the defendant be designated to a facility where he may be given a full mental health evaluation and any appropriate mental health treatment, particularly for anger management. It is further recommended that the defendant be designated to a facility where he may receive vocational training and the most intensive form of substance abuse treatment provided by the Bureau of Prisons and, to the extent it does not conflict with that, the defendant be designated to a facility as close as possible to his home in North Carolina.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at _____ am/pm on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 pm on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____

_____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY

DEPUTY UNITED STATES MARSHAL

DEFENDANT: JERRY [NMN] DOUGLAS, JR.
CASE NUMBER: 1:19-CR-00283-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **Three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JERRY [NMN] DOUGLAS, JR.
CASE NUMBER: 1:19-CR-00283-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: JERRY [NMN] DOUGLAS, JR.
CASE NUMBER: 1:19-CR-00283-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall abide by the mandatory and standard conditions of supervised release.

The defendant shall provide any requested financial information to the probation officer.

The defendant shall submit to substance abuse testing, at any time, as directed by the probation officer. The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing and inpatient/residential treatment, and pay for treatment services, as directed by the probation officer. During the course of treatment, the defendant shall abstain from the use of alcoholic beverages.

The defendant shall cooperatively participate in a mental health treatment program, which may include inpatient treatment, and pay for treatment services, as directed by the probation officer.

The defendant shall submit his person, residence, office, vehicle, or any property under his control to a warrantless search. Such search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.

The defendant shall not associate with or be in the company of gang member/security threat group member. The defendant shall not frequent any locations where gangs/security threat groups congregate or meet. The defendant shall not wear, display, use, or possess any clothing or accessories which have any gang or security threat group significance.

DEFENDANT: JERRY [NMN] DOUGLAS, JR.
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | <u>Assessment</u> | <u>Restitution</u> | <u>Fine</u> | <u>AVAA Assessment*</u> | <u>JVTA Assessment**</u> |
|---------------|-------------------|--------------------|-------------|-------------------------|--------------------------|
| TOTALS | \$100.00 | \$.00 | \$.00 | | |

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement \$

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived pursuant to 18 U.S.C. Section 3612(f)(3) for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JERRY [NMN] DOUGLAS, JR.
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties: **To the extent the defendant cannot immediately comply, the Court recommends the defendant participate in the Inmate Financial Responsibility Program.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, 324 West Market Street, Greensboro, NC 27401-2544, unless otherwise directed by the court, the probation officer, or the United States Attorney. **Nothing herein shall prohibit the United States Attorney from pursuing collection of outstanding criminal monetary penalties.**

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: JERRY [NMN] DOUGLAS, JR.
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DISPOSITION OF EVIDENCE

☒ That at the expiration of time for appeal, the narcotics seized from the defendant shall be destroyed and the firearms seized shall be destroyed or returned to their lawful and rightful owner, if one can be determined.