

APPENDIX A

NOT FOR PUBLICATION**FILED**

UNITED STATES COURT OF APPEALS

MAR 10 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-30162

Plaintiff-Appellee,

D.C. No. 2:16-cr-00320-RSM-1

v.

ROBERT STANARD,

MEMORANDUM^{*}

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted September 4, 2020
Seattle, Washington

Before: BYBEE and COLLINS, Circuit Judges, and SOTO,^{**} District Judge.

Robert Stanard appeals his conviction, after a jury trial, for being a felon in possession of a firearm (Count One), 18 U.S.C. § 922(g)(1); being a felon in possession of ammunition (Count Two), *id.*; possessing an unregistered silencer (Count Three), 26 U.S.C. §§ 5841, 5861(d), 5871; and conspiring to obstruct justice (Count Four), 18 U.S.C. §§ 371, 1503. We affirm.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

^{**} The Honorable James Alan Soto, United States District Judge for the District of Arizona, sitting by designation.

1. We reject Stanard's argument that the district court erred in denying his motion to suppress the evidence of the firearms and ammunition found in his house and garage. Reviewing for clear error and drawing all inferences in favor of the court's decision, *see United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004), we conclude that the district court properly found that Stanard's wife Anna had voluntarily consented to show an officer, who was responding to a domestic violence report against Stanard, the loaded pistol in the lockbox in the Stanards' bedroom and the firearms and ammunition in the safe in their garage.

As the district court specifically found after considering the testimony at the suppression hearing, Anna was treated by the officers as a victim rather than a suspect; she was never in custody or handcuffed or threatened with arrest; and the officers never drew their weapons on her. *See United States v. Brown*, 563 F.3d 410, 416 (9th Cir. 2009); *Patayan Soriano*, 361 F.3d at 504. Further, the officer never told Anna that he "could obtain a search warrant if [she] refused to consent." *United States v. Russell*, 664 F.3d 1279, 1282 (9th Cir. 2012); *see also Patayan Soriano*, 361 F.3d at 504. The court also noted that Anna was very cooperative with the officers, leading them to the gun in the bedroom and then to the gun safe in the garage and opening it. Although no *Miranda* warnings were given and Anna was never expressly told that she could refuse to consent, those considerations do not weigh against voluntariness in light of the officers' treatment of her as a victim

and her own cooperative attitude. While the district court recognized that Anna was obviously emotional at the time, that was understandable given the immediately preceding events, and the court reasonably concluded that, considering all of the circumstances, that did not render her consent involuntary.

There was no clear error. *See Patayan Soriano*, 361 F.3d at 501.

2. Stanard also argues, for the first time on appeal, that the statutes underlying Counts One through Three, *see* 18 U.S.C. § 922(g)(1) and 26 U.S.C. § 5861(d), exceed the scope of Congress's Commerce Clause authority under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). We have held, however, after the Supreme Court rendered its decisions in *Lopez* and *Morrison*, that the prohibitions in 18 U.S.C. § 922(g) are a valid exercise of Congress's authority under the Commerce Clause. *United States v. Latu*, 479 F.3d 1153, 1156–257 (9th Cir. 2007). After *Lopez*, but before *Morrison*, we also held that 26 U.S.C. § 5861(d) is a valid exercise of Congress's taxing power. *Hunter v. United States*, 73 F.3d 260, 262 (9th Cir. 1996); *cf. National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 567 (2012) (noting that the Court had upheld, under the taxing power, "such obviously regulatory measures as taxes on . . . sawed-off shotguns" in *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)). In support of his contention that *Latu* and *Hunter* were wrongly decided, Stanard points to the various dissents in *United States v.*

Alderman, 565 F.3d 641 (9th Cir. 2009) (rejecting challenge under *Lopez* and *Morrison* to 18 U.S.C. § 931, which criminalizes possession of body armor), *reh'g en banc denied*, 593 F.3d 1141 (9th Cir. 2010), *cert. denied*, 562 U.S. 1163 (2011). We are, of course, bound by the majority opinion in *Alderman*, whose reasoning only further underscores that this three-judge panel lacks authority to reconsider *Latu* or *Hunter*. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

3. Stanard contends that, under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the indictment in this case was deficient because it did not allege that he had knowledge of his status as a felon, which is what made it unlawful for him to possess the firearms and ammunition. Because Stanard did not raise this challenge below, we review only for plain error, which requires Stanard to “show that (1) there was an error, (2) the error is clear or obvious, (3) the error affected his substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Johnson*, 979 F.3d 632, 636 (9th Cir. 2020). Stanard cannot establish the third and fourth prongs of plain error review because he cannot show that an error-free indictment would have led to a different outcome here. See *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019). Stanard stipulated that he had been previously convicted of a felony, and the jury heard overwhelming testimony from the Stanards’ roommate,

Anna, Anna's mother, and Stanard himself that Stanard knew he was not permitted to possess firearms or ammunition due to his prior felony conviction. There is no reasonable probability that, but for the error, the outcome would have been any different. *Johnson*, 979 F.3d at 638.

4. Finally, Stanard argues, for the first time on appeal, that his convictions for being a felon in possession of a firearm and for being a felon in possession of ammunition are multiplicitous. Reviewing for plain error, *United States v. Zalapa*, 509 F.3d 1060, 1064 (9th Cir. 2007), we reject this contention.

In *United States v. Keen*, 104 F.3d 1111 (9th Cir. 1996), we held that a defendant may not be convicted and sentenced for multiple violations of 18 U.S.C. § 922(g)(1) based on the simultaneous possession of a firearm and its accompanying ammunition. *Id.* at 1118–20. In a footnote, we reserved the question whether the same rule would apply when a gun and its ammunition are held in physically separate places. *Id.* at 1118 & n.11. The record in this case makes it highly unlikely that *Keen*'s rule was violated here. Using a special verdict form for Count One, the jury concluded that Stanard possessed *two* different firearms, an AR-15-style rifle *and* a .380 caliber pistol. On a general verdict form for Count Two, the jury concluded that Stanard possessed ammunition. The uncontested evidence at trial established that the .380 pistol was stored in a lockbox in the Stanards' bedroom and the rifle was stored in the Stanards' garage,

which was a separate building that was freestanding from the house. The uncontested evidence also established that ammunition for *both* weapons was stored in the garage and that ammunition for the .380 pistol was stored with that pistol in the house. Thus, regardless of whether the ammunition that was the basis of the jury's finding on Count Two related to the rifle or the .380 pistol, the jury necessarily found that Stanard also possessed the *other* firearm. Therefore, Stanard's convictions for possession of a firearm and possession of ammunition involve two different and separately chargeable violations of § 922(g)(1). *See Keen*, 104 F.3d at 1118 n.11; *United States v. Szalkiewicz*, 944 F.2d 653, 653 (9th Cir. 1991); *United States v. Gann*, 732 F.2d 714, 717, 721 (9th Cir. 1984). At a minimum, there was no plain error that affected substantial rights and undermined the fairness, integrity, or public reputation of the proceedings. *Johnson*, 979 F.3d at 636.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Western District of Washington

UNITED STATES OF AMERICA

v.

ROBERT A. STANARD

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16CR00320RSM-001

USM Number: 08757-081

Gilbert Levy and Jennifer Kaplan

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(s) 1 through 4 of the Superseding Indictment 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 U.S.C. §922(g)(1) | Felon in Possession of a Firearm | 10/29/16 | 1 |
| 18 U.S.C. §922(g)(1) | Felon in Possession of Ammunition | 10/29/16 | 2 |
| 18 U.S.C. §5861(d) | Possession of an Unregistered Firearm | 10/29/16 | 3 |
| 18 U.S.C. §371 | Conspiracy to Obstruct of Justice | 01/11/18 | 4 |

The defendant is sentenced as provided in pages 2 through 7 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(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must 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 must notify the court and United States Attorney of material changes in economic circumstances.

Assistant United States Attorney

July 13, 2018

Date of Imposition of Judgment

Signature of Judge

The Honorable Ricardo S. Martinez
Chief United States District Judge

Name and Title of Judge

Date

July 13, 2018

DEFENDANT: **ROBERT A. STANARD**
CASE NUMBER: 2:16CR00320RSM-001

IMPRISONMENT

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

84 months custody on Counts 1, 2 & 3

60 months custody on Count 4, all to run concurrent

The court makes the following recommendations to the Bureau of Prisons:

*FCI Terre Haute, with Defendant to remain
at FDC Seatac for an additional 120 days following
entry of judgment*

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

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

at _____ a.m. p.m. 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 p.m. 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: **ROBERT A. STANARD**
CASE NUMBER: 2:16CR00320RSM-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three 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 you pose 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 additional conditions on the attached pages.

DEFENDANT: **ROBERT A. STANARD**
CASE NUMBER: 2:16CR00320RSM-001

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: **ROBERT A. STANARD**
CASE NUMBER: 2:16CR00320RSM-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate as instructed by the U.S. Probation Officer in a program approved by the probation office for treatment of narcotic addiction, drug dependency, or substance abuse, which may include testing to determine if defendant has reverted to the use of drugs or alcohol. The defendant shall also abstain from the use of alcohol and/or other intoxicants during the term of supervision. Defendant must contribute towards the cost of any programs, to the extent defendant is financially able to do so, as determined by the U.S. Probation Officer. In addition to urinalysis testing that may be a part of a formal drug treatment program, the defendant shall submit up to eight (8) urinalysis tests per month.
- 2.* The defendant shall provide the probation officer with access to any requested financial information including authorization to conduct credit checks and obtain copies of the defendant's federal income tax returns.
3. The defendant shall maintain a single checking account in his or her name. The defendant shall deposit into this account all income, monetary gains, or other pecuniary proceeds, and make use of this account for payment of all personal expenses. This account, and all other bank accounts, must be disclosed to the probation office.
4. The defendant shall participate as directed in the Moral Reconation Therapy program approved by the United States Probation and Pretrial Services Office. The defendant must contribute towards the cost of any programs, to the extent the defendant is financially able to do so, as determined by the U.S. Probation Officer.
5. The defendant shall submit his or her person, property, house, residence, storage unit, vehicle, papers, computers (as defined in 18 U.S.C. §1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search 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 supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

DEFENDANT: **ROBERT A. STANARD**
CASE NUMBER: 2:16CR00320RSM-001

CRIMINAL MONETARY PENALTIES

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

| | <u>Assessment</u> | <u>JVTA Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
|--------|-------------------|-------------------------|-------------|--------------------|
| TOTALS | \$ 400 | N/A | Waived | N/A |

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.

| <u>Name of Payee</u> | <u>Total Loss*</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|--------------------|----------------------------|-------------------------------|
| TOTALS | \$ 0.00 | \$ 0.00 | |

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 for the fine restitution

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

The court finds the defendant is financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived.

* 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: **ROBERT A. STANARD**
CASE NUMBER: 2:16CR00320RSM-001

SCHEDULE OF PAYMENTS

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

PAYMENT IS DUE IMMEDIATELY. Any unpaid amount shall be paid to Clerk's Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.

During the period of imprisonment, no less than 25% of their inmate gross monthly income or \$25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program.

During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.

During the period of probation, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after the date of this judgment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States Attorney's Office of any material change in the defendant's financial circumstances that might affect the ability to pay restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

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

Joint and Several

Defendant and Co-Defendant Names and 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:
See Preliminary Order of Forfeiture (ECF No. 141).

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