Appendix

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERNEST ARMANDO ANDUJO, Defendant-Appellant.	No. 20-50043 D.C. No. 2:18-cr-00835-DSF-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted November 17, 2021**
Pasadena, California

Before: RAWLINSON and LEE, Circuit Judges, and KENNELLY,*** District Judge.

Ernest Andujo appeals his convictions for possession of unregistered firearm silencers in violation of 26 U.S.C. § 5861(d) and possession of firearm silencers

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

without a serial number in violation of 26 U.S.C. § 5861(i). As the facts are known to the parties, we repeat them only as necessary to explain our decision. We have jurisdiction to hear the appeal under 28 U.S.C. § 1291, and we affirm.

If a party preserves his or her claim of error on a district court's evidentiary ruling, this court reviews for abuse of discretion. *United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020). But if a witness's opinion was not objected to at trial, the plain-error standard applies. *Id.*

1. The admission of the expert's testimony on defining and explaining what a silencer is, the methods of classifying a silencer, and the requirements of the National Firearms Act was not plain error. An expert may give an opinion about an ultimate issue. Fed. R. Evid. 704(a). An expert "may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004). Indeed, "it is sometimes impossible for an expert to render his or her opinion on a subject without resorting to language that recurs in the applicable legal standard." *United States v. Diaz*, 876 F.3d 1194, 1198 (9th Cir. 2017). The expert's testimony on these issues used legal terms to explain the factual basis for her opinions, and so the admission of her testimony was not plain error.

2. Andujo did object to the expert's testimony about whether the law included an exception for silencers used as props or on movie sets. Even if the

district court abused its discretion in admitting this testimony, any error from such admission was harmless. *United States v. Rodriguez*, 971 F.3d 1005, 1019 (9th Cir. 2020). Andujo offers no evidence that the expert's testimony was incorrect. Moreover, the government presented overwhelming evidence that the silver cylinders possessed by Andujo were silencers. Thus, "it is more probable than not that the jury would have reached the same verdict" even without the expert testimony. *Id.*

3. Although "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged," Fed. R. Evid. 704(b), the expert never gave an opinion on Andujo's mental state. To the extent that the expert's testimony supported an inference about Andujo's mental state, there was no plain error. *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997).

4. Finally, the indictment was not constructively amended by the government's proof at trial. *United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014). We review for plain error. *Id.* at 1188. The prosecution focused throughout the trial, including during closing argument, on the two silver cylinders that were recovered from Andujo's home. The full context of the prosecutor's closing argument makes clear that he mentioned the oil filter as evidence of Andujo's knowledge that the silver cylinders were silencers, not that the oil filter itself could

be a silencer on which to convict Andujo.

AFFIRMED.

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERNEST ARMANDO ANDUJO, Defendant-Appellant.	No. 20-50043 D.C. No. 2:18-cr-00835-DSF-1 Central District of California, Los Angeles ORDER

Before: RAWLINSON and LEE, Circuit Judges, and KENNELLY,* District Judge.

Judges Rawlinson and Lee voted to deny the petition for rehearing en banc. Judge Kennelly recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

All judges on the panel voted to deny the petition for panel rehearing. The petition for panel rehearing is DENIED.

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ERNEST ANDUJO, Defendant.	CR 18-835 DSF Order DENYING Motion for New Trial or Judgment of Acquittal (Dkt. No. 100)

Defendant Ernest Andujo was convicted of one count of possessing an unregistered firearm silencer and one count of possessing a firearm silencer without serial number after a jury trial. He now moves for a new trial or judgment of acquittal.

The Court may set aside the jury verdict and order a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). Motions for new trial should only be granted "in exceptional circumstances in which the evidence weighs heavily against the verdict." United States v. Chen, 754 F.2d 817, 821 (9th Cir. 1985). A motion for judgment of acquittal under Rule 29 requires a court to "review the evidence presented against the defendant in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Lombera-Valdovinos, 429 F.3d 927, 928 (9th Cir. 2005).

Defendant discusses post-trial changes to the Ninth Circuit model instruction relevant to this case.[1] To the degree he intends to argue that this change renders the Court's instructions inaccurate, he is incorrect. The Court instructed the jury that Defendant had to have "kn[own] of the specific characteristics of the firearm silencer" to be guilty of either count, which is in accord with the law and the revised model instruction.

Possible misstatements by the government to the grand jury are not grounds for a new trial after conviction because probable cause is clearly present where a jury has convicted beyond a reasonable doubt.[2] United States v. Caruto, 663 F.3d 394, 402 (9th Cir. 2011).

Defendant claims that the government's Rule 16 expert disclosure for ATF Agent Eve Eisenbise was inadequate because it failed to disclose that Eisenbise was able to conclude that the objects in question were silencers without discharging an attached firearm. But nothing in the Eisenbise Rule 16 disclosure or the supplemental disclosure suggests that Eisenbise needed to fire a firearm with the alleged silencers attached to conclude that they were silencers. The initial disclosure stated that "she conducted an examination to determine the effectiveness of the devices in diminishing the sound levels of a portable firearm. She found that each device is capable of diminishing the sound report of a portable firearm." Def. Ex. C. In addition, the supplemental Rule 16 notice specifically discussed physical characteristics of the

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[1] The Ninth Circuit records the dates on which changes are made to its model instructions. This instruction does not appear to have been changed since 2015. The point is irrelevant, however, as the Court instructed as requested by the defense and in accordance with the law.

[2] The portion of the grand jury proceedings quoted by Defendant also does not contain any misstatement. The prosecutor specifically noted that the government would have to prove that a defendant "knew that [the objects] were firearms." See Mem. at 3 (citing Def. Ex. B at 11).

alleged silencers that could be observed without a firing test. See Def. Ex. D (noting baffles and spacers in accused silencers).[3]

There is also nothing in the government's examination of Eisenbise that could have misled the jury as to the requirements of the crimes charged. Eisenbise's testimony went directly to her noticed area of expertise: whether the objects at issue qualified as silencers, and thus firearms, under the National Firearms Act. Defendant appears to believe that the objects are not silencers if Defendant did not know that they were silencers. See, e.g., Mem. at 18. But Defendant's knowledge is a separate issue from whether the object is a silencer. To be found guilty, Defendant had to both possess an object that is a silencer and know the characteristics of the object, i.e., that it muffles gunshot noise. Eisenbise's testimony was concerned with whether the object was a silencer, not Defendant's knowledge of the silencer's characteristics.

Defendant's objections to the government's closing examination are also unpersuasive. The large array of weapons found with the silencers provided circumstantial evidence that Defendant knew enough about weapons to know that the objects at issue were silencers. Defendant's complaint is that Defendant's purported firearms knowledge was not particularly good evidence that Defendant knew that the objects in question actually functioned to muffle gunshots. But even if that is so, it makes the argument less persuasive, not improper.

Because none of Defendant's stated objections are valid, there is no basis for a new trial. Defendant makes no independent argument in favor of a judgment of acquittal and the Court finds that the evidence in the record, taken in the light most favorable to the government, supports the guilty verdict.

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[3] The substance of Eisenbise's expected testimony was further clarified by disclosure of her notes and the government's trial memorandum, both of which are consistent with her actual testimony at trial.

The motion is DENIED.

IT IS SO ORDERED.

Date: December 11, 2019

Dale S. Fischer
United States District Judge