APPENDIX

APPENDIX

Appendix A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v

XAVIER SIMS

Case Number: 5:20-cr-55-JA-PRL

USM Number: 12322-509

Mark Rosenblum, FPD
200 W Forsyth Street, Suite 1240
Jacksonville, FL 32202

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty of Count One of the Indictment. The defendant is adjudicated guilty of this offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 U.S.C. § 922(g)(1) & 18 U.S.C. § 924(a)(2)	Possession of a Firearm by a Convicted Felon	February 3, 2020	One

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

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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

May 21, 2021

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

May 24, 2021

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned **for a total term of 115 months.**

- Defendant shall be given credit for any time previously served in this case while in Federal custody.

  The Court recommends to the Bureau of Prisons that the defendant be housed at FCC, Coleman, Florida.

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

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 U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release **for a term of 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. The mandatory drug testing requirements of the Violent Crime Control Act are imposed. The Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions as follows.

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. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
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:________________________

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall submit to a search of his or her person, residence, place of business, any storage units under the defendant's control, or vehicle, conducted by the 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 a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	Assessment	Restitution	Fine	AVAA Assessment[1]	JVTA Assessment[2]
TOTALS	$100.00 Due Immediately	None So Ordered	Waived	Not Applicable	Not Applicable

SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be 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 Clerk, U.S. District Court, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

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) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Preliminary Order of Forfeiture (Doc. 102), that are subject to forfeiture.

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution 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 the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[1] Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
[2] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

Appendix B

2022 WL 17088478
Only the Westlaw citation
is currently available.
United States Court of
Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Xavier SIMS, Defendant-Appellant.

No. 21-11966
|
Non-Argument Calendar
|
Filed: 11/21/2022

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 5:20-cr-00055-JA-PRL-1

Attorneys and Law Firms

U.S. Attorney Service - Middle District of Florida, U.S. Attorney, Germaine Seider, Sean Siekkinen, Assistant U.S. Attorney, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee.

Meghan Ann Collins, James T. Skuthan, Federal Public Defender's Office, Orlando, FL, Mark Rosenblum, Federal Public Defender's Office, Jacksonville, FL, for Defendant-Appellant.

Before Newsom, Grant, and Hull, Circuit Judges.

Opinion

PER CURIAM:

***1** After a jury trial, Xavier Sims appeals his conviction for possession by a convicted felon of a firearm or ammunition in or affecting interstate commerce, in violation of 18 U.S.C. § 922(g)(1). Sims argues that the district court abused its discretion by allowing the government to introduce evidence of a shooting that occurred minutes before and in close proximity to his gun possession. Sims contends the district court violated Federal Rules of Evidence 401, 403, and 404(b). Sims further contends that his conviction under § 922(g) plainly violates the Commerce Clause. After review, we affirm.

I. BACKGROUND

Because Sims claims the district court erred in certain evidentiary rulings, we review the history of the case and the relevant trial testimony.

On the evening of February 2, 2020, Tamara McDonald was at home with her three children and a man she had recently begun dating. Sims is McDonald's ex-boyfriend and the three children's father. Sims arrived at McDonald's home to pick up their eldest child for an overnight visit at Sims's house.

Soon after Sims drove away with their child, McDonald received a phone call from Sims during which he asked who was at her house. McDonald refused to answer. Soon after that call ended, McDonald called Sims back, and Sims told her, "Tamara, either that dude gonna come outside or I'm going to shoot your house up." McDonald hung up the phone. But, worried about her child who was with Sims, McDonald called Sims back. Sims stated that after he dropped their eldest child off, he was coming back to her home. Sims also repeated his earlier threat.

After that third phone call ended, McDonald put her other two children in the car and drove to Sims's house to get her eldest child. When McDonald arrived at Sims's house, Sims was not there. McDonald honked her car's horn, and the eldest child ran out to her car.

Now with all three children in her car, McDonald drove to a gas station and called 911 around 9:00 p.m. Sims pulled up next to her at the gas station in a silver Dodge Neon, which belonged to Sims's new girlfriend. McDonald drove away, and Sims followed her for a while. When Sims eventually stopped following her, McDonald pulled over on the side of the road to wait for a responding officer.

When Marion County Sheriff's Deputy Devin Burgoyne arrived, McDonald called Sims and put the phone on speaker so that Deputy Burgoyne could hear their conversation. McDonald asked Sims about threatening to shoot up her home. Sims did not deny that he made such threats.

After speaking with Deputy Burgoyne and showing him where Sims lived, McDonald drove home. She and her three children went to sleep.

Around 1:00 a.m., McDonald heard gunshots and bullets hitting her home. She immediately called 911 and told the 911 operator she thought Sims was shooting at her house, although she did not look outside to see what was going on or who shot at her home. A be-on-the-lookout alert was issued for the Dodge Neon that Sims was driving.

Thirteen minutes after McDonald heard gunshots and called 911, Marion County Sheriff's Corporal Colton Sullivan spotted a Dodge Neon headed away from McDonald's home. Corporal Sullivan stopped the vehicle at a gas station. Then, Corporal Sullivan drew his gun, ordered Sims to get out of the vehicle with his hands up, searched Sims for weapons, and waited for backup officers to arrive. After backup arrived, the officers searched the vehicle. They found a .40-caliber Glock handgun, two magazine clips, and ten spent casings in the trunk. The officers arrested Sims.

***2** Sims was charged with one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Sims pleaded not guilty.

Sims filed a motion in limine to exclude evidence of the shooting at McDonald's home under Federal Rules of Evidence 401, 403, and 404(b). Sims argued that the fact a shooting happened at McDonald's home did not make his possession of a firearm more or less probable, and there was scant evidence to link the two events. Alternatively, Sims contended that the evidence would cause unfair prejudice, confuse the issues, mislead the jury, waste time, needlessly present cumulative evidence, or cause undue delay. Lastly, Sims argued that the evidence was of a prior bad act that could cause the jury to convict him because they were outraged that he shot at McDonald's home.

The government responded that, because the gun was found in the trunk of the vehicle Sims was driving, circumstantial evidence was needed to prove that he constructively possessed the firearm. The government argued that the evidence of the shooting was admissible because (1) it was a relevant part of the "chain of events" that concluded with Sims's arrest; (2) it was not extrinsic evidence under Rule 404(b) and was not being offered to prove that Sims is a bad person; (3) it would tend to prove that Sims had motive to possess the firearm, had the opportunity and intent to do so, planned to do so, and that it was no mistake or accident that Sims was found in the vehicle with the gun; and (4) thus the probative value of the evidence was extremely high and not outweighed by any of the Rule 403 concerns.

The district court held a hearing to address Sims's motion in limine. After hearing argument from both parties, the district court found that the evidence of the shooting and events leading up to it were relevant and not outweighed by the danger of unfair prejudice. The district court, however, advised counsel to proceed with caution in order to avoid a Rule 403 or Rule 404(b) issue. The district court later issued an order denying Sims's motion in limine for the reasons stated in open court.

During Sims's trial, the government called Special Agent Justin Mace of the Bureau of Alcohol, Tobacco, and Firearms to testify. Special Agent Mace testified that the firearm found in the trunk of the vehicle Sims was driving was manufactured in Austria and imported into Georgia. He further testified that the ammunition was manufactured in Illinois.

After both parties rested and presented their closing arguments, the district court issued a limiting instruction to the jury. The court instructed the jury not to consider any prior acts evidence to decide whether Sims engaged in the activity alleged in the indictment, and rather, to consider it only for the limited purpose of determining whether Sims had the state of mind, intent, motive, or opportunity to commit the acts charged in the indictment.

The jury convicted Sims. The district court sentenced him to 115 months' imprisonment followed by 3 years of supervised release.

II. ADMISSIBILITY OF THE SHOOTING EVIDENCE

On appeal, Sims argues that the evidence of the shooting should have been excluded (1) as irrelevant under Rule 401, (2) as a prior bad act offered to show his propensity to commit the crime charged under Rule 404(b), or (3) as unduly prejudicial under Rule 403. [1]

***3** After careful review of the record, we explain why the evidence was relevant under Rule 401, was not extrinsic under Rule 404(b), and has significant probative value and was not unduly prejudicial under Rule 403.

A. Rule 401

Sims argues the evidence of the shooting is irrelevant because McDonald did not see the shooter during the incident at her house. We disagree.

The Federal Rules of Evidence define relevant evidence as evidence that "has any tendency to make a fact more or less probable," provided that "the fact is of consequence in determining the action." Fed. R. Evid. 401. Generally, relevant evidence is admissible unless otherwise specified. Fed. R. Evid. 402.

The offense set forth in § 922(g) "entails three distinct elements: (1) that the defendant was a convicted felon; (2) that the defendant was in knowing possession of a firearm; and (3) that the firearm was in or affecting interstate commerce." *United States v. Jernigan*, 341 F.3d 1273, 1279 (11th Cir. 2003); 18 U.S.C. § 922(g)(1). The Supreme Court has held that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the [g]overnment 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." *Rehaif v. United States*, 588 U.S. ——, 139 S. Ct. 2191, 2200, 204 L.Ed.2d 594 (2019).

Here, the evidence of the shooting was highly relevant to show Sims's knowing possession of the gun in the trunk of the vehicle that was not owned or leased by him. Corporal Sullivan spotted Sims driving the silver Dodge Neon only 13 minutes after McDonald heard gunshots and called 911. Therefore, Sims's use of a gun at the shooting "plainly bore on [his] knowledge" that there was a gun in the trunk of the car just minutes after the shooting. *See Jernigan*, 341 F.3d at 1281 (emphasis omitted). By pleading not guilty to the charges, Sims made knowledge and possession of a firearm an issue in the case. *See, e.g.*, *United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005) (concluding that the district court did not abuse its discretion in admitting evidence of the defendant's prior possession of a firearm because the defendant's not guilty plea in a felon-in-possession case rendered the mens rea element a material issue that the government was required to prove).

Significantly, the police had found the gun in a vehicle that Sims did not own. Thus, the shooting evidence was highly probative of Sims's knowing possession of the firearm in the trunk.

B. Rule 404(b)

Sims argues that the evidence of the shooting is a prior bad act offered to show his propensity to commit the crime charged. He claims that the evidence was not relevant to whether he knowingly possessed the firearm. He contends that the evidence of the shooting was weak and unsupported by corroboration and that it was not relevant to any issue aside from his character. We disagree.

Rule 404(b) prohibits the introduction of evidence of a crime, wrong, or other act to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). It does, however, allow such evidence for other purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Further, such evidence is admissible if it is "(1) [of] an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998) (quotation marks omitted). "Rule 404(b) is a rule of inclusion, and accordingly 404(b) evidence, like other relevant evidence, should not be lightly excluded when it is central to the prosecution's case." *United States v. Kapordelis*, 569 F.3d 1291, 1313 (11th Cir. 2009) (cleaned up).

***4** Here, the evidence of the shooting was intrinsic. It "was vital to an understanding of the context of the government's case against [Sims] and, therefore, can be said to be 'inextricably intertwined' with the government's proof of the charged offense[ ]." *See* *McLean*, 138 F.3d at 1404. In other words, the evidence of the shooting provided necessary context to the charged offense and was properly admitted by the district court.

C. Rule 403

Sims argues that the evidence of the shooting was unduly prejudicial and should have been excluded on that basis. Sims contends that the government should have restricted evidence to matters related to possession of the firearm or offered an edited version of the shooting. Sims alleges that the government painted him as a horrible man by describing the shooting at trial. We disagree.

Relevant evidence "may" be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. However, exclusion under Rule 403 is an extraordinary remedy that courts should employ "only sparingly since it permits the trial court to exclude concededly probative evidence." *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006).

The district court did not abuse its discretion in ruling the probative value outweighed any prejudice. As explained above, the evidence of the shooting was highly probative. Importantly, there was no *unfair* prejudice here. Certainly, the evidence of the shooting was damaging to Sims's defense. But all relevant evidence is inherently prejudicial. And Rule 403 does not permit a court to exclude the government's evidence simply because it may hurt the defendant. *See* *United States v. Terzado-Madruga*, 897 F.2d 1099, 1119 (11th Cir. 1990) ("Simply because the evidence is damaging or prejudicial to a defendant's case does not mean ... that the evidence should be excluded."). "It is only *unfair* prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *Id.* (alteration adopted). And, to the extent the evidence of the shooting is arguably unfairly prejudicial, it still does not substantially outweigh its probative value.

III. COMMERCE CLAUSE

For the first time on appeal, Sims argues that § 922(g) is unconstitutional under the Commerce Clause and, as a result, his conviction and sentence are invalid.[2] This argument is foreclosed by our precedent. As Sims acknowledges, this Court has "clearly held that § 922(g) is constitutional under the Commerce Clause." *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017) (citing *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996)).

This Court has also rejected as-applied challenges to § 922(g), holding that the government proves a "minimal nexus" to interstate commerce where it demonstrates that the firearms were manufactured outside of the state in which the offense took place and thus, necessarily traveled in interstate commerce. *United States v. Wright*, 607 F.3d 708, 715–16 (11th Cir. 2010). We have rejected *Lopez* challenges to § 922(g), concluding that "[n]othing in *Lopez* suggest[ed] that the minimal nexus test should be changed." *McAllister*, 77 F.3d at 390 (quotation marks omitted).

***5** In light of *McAllister* and *Wright*, Sims's constitutionality arguments regarding § 922(g) lack merit and thus do not establish error, much less plain error. Here, the government presented evidence, by way of Special Agent Mace, showing that the firearm and ammunition that Sims possessed had traveled in interstate commerce, and therefore, satisfied the minimal nexus requirement.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 17088478

Footnotes

1 We review the admission of evidence under Rules 401, 403, and 404(b) for abuse of discretion. *United States v. Culver*, 598 F.3d 740, 747 (11th Cir. 2010); *United States v. Matthews*, 431 F.3d 1296, 1308 (11th Cir. 2005).

2 Generally, we review the constitutionality of a statute *de novo*, as it is a question of law. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). However, if the issue is raised for the first time on appeal, we review for plain error only. *Id.* Plain error occurs only if (1) there was error, (2) it was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation marks omitted).

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