

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

GREGORY LYNN McCOY,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 22-2385

United States of America

Plaintiff - Appellee

v.

Gregory Lynn McCoy

Defendant - Appellant

No. 22-2412

United States of America

Plaintiff - Appellee

v.

Gregory Lynn McCoy

Defendant - Appellant

Appeal from United States District Court
for the District of Minnesota

Submitted: May 12, 2023
Filed: June 13, 2023

Before SMITH, Chief Judge, COLLOTON and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Gregory Lynn McCoy was convicted of being an armed career criminal in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The district court¹ sentenced him to 262 months in prison. McCoy appeals, challenging: (1) the admission of evidence (field tests and a photograph); (2) the sufficiency of the evidence; and (3) the sentence (an adjustment and an enhancement). Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

In 2019, police learned that McCoy, a convicted felon, had a pistol and had sold drugs. A state judge issued a search warrant for his residence. While waiting to begin the search, officers saw McCoy arrive in his vehicle and go inside. Entering, police found McCoy in his upstairs bedroom. There, officers found baggies of drugs, ecstasy pills, a digital scale, rubber gloves, and cutting agents. Field testing showed that the baggies contained cocaine, heroin, and methamphetamine. In the living-room closet, officers found a box of .45-caliber MagTech ammunition.

A drug dog alerted to McCoy's vehicle. There, police found a glass pipe and a .45-caliber semi-automatic pistol, with two fully loaded magazines of .45-caliber MagTech ammunition. They photographed the glass pipe but later accidentally ran over it.

A jury convicted McCoy of unlawfully possessing a firearm. Applying an adjustment for obstructing justice under U.S.S.G. § 3C1.1 and an enhancement for possessing a firearm in connection with a controlled substance offense under U.S.S.G. § 4B1.4(b)(3)(A), the district court sentenced McCoy to 262 months in prison.

¹The Honorable Nancy E. Brasel, United States District Judge for the District of Minnesota.

I.

McCoy argues that the district court erred in admitting (1) testimony about the field tests of the narcotics, and (2) the photograph of the glass pipe from McCoy's vehicle.

At trial, McCoy objected to the field testing only for relevance and lack of foundation—neither of which he mentions on appeal. He did not object to the photograph. This court thus reviews only for plain error. *See United States v. Pirani*, 406 F.3d 543, 549-50 (8th Cir. 2005) (en banc), *citing United States v. Olano*, 507 U.S. 725, 732-36 (1993). This court reverses only if there was an error, that was plain, that affected substantial rights, and seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

A.

On appeal, McCoy challenges only the scientific reliability of the field tests. The officer who conducted the tests was trained and certified in using them. He testified to the procedures and the results. *See United States v. Eisler*, 567 F.2d 814, 817 (8th Cir. 1977) (holding that an experienced agent familiar with field tests could testify about the results of the test he conducted). The district did not err, let alone plainly err, by admitting the testimony about the field tests. *See United States v. Downey*, 672 Fed. Appx. 615, 616 (8th Cir. 2016) (holding that “a court may rely on circumstantial evidence such as field tests or testimony describing the substance”).

B.

McCoy argues that the photograph of the pipe was inadmissible because it was (1) not inventoried or referenced in the police reports; (2) poor quality; (3) and highly prejudicial. The contents of police reports do not govern the admissibility of evidence. *See Sosna v. Binnington*, 321 F.3d 742, 744 (8th Cir. 2003) (“The Federal

Rules of Evidence govern the admissibility of evidence.”). The photograph’s quality does not preclude its admissibility. *Cf. United States v. De La Torre*, 907 F.3d 581, 591-92 (8th Cir. 2018) (holding that the audio’s poor quality “did not render the recording wholly untrustworthy”); *United States v. Williams*, 512 F.3d 1040, 1044 (8th Cir. 2008) (holding the court did not abuse its discretion by admitting the recordings of drug buys—inaudible over 40 times). The evidence was not inadmissible simply because it was prejudicial. *See, e.g., United States v. Fechner*, 952 F.3d 954, 958 (8th Cir. 2020) (holding that a district court has broad discretion to admit probative evidence even when it is prejudicial).

The district court did not err, let alone plainly err, by admitting the photograph of the pipe.

II.

McCoy believes the evidence at trial was insufficient to convict. Specifically, he claims there is no evidence that the .45-caliber pistol was a “firearm.” This court reviews the sufficiency of the evidence de novo. *See United States v. Birdine*, 515 F.3d 842, 844 (8th Cir. 2008).

To convict McCoy for possession of a firearm as a convicted felon under 18 U.S.C. § 922(g)(1), the evidence must prove that McCoy’s pistol met the definition of a firearm under 18 U.S.C. § 921(a)(3). *See United States v. Hardin*, 889 F.3d 945, 947 (8th Cir. 2018). A firearm is “any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” 18 U.S.C. § 921(a)(3). Proof that a firearm was operable is not required. *Hardin*, 889 F.3d at 948-49.

McCoy’s pistol, retrieved from his vehicle, was admitted into evidence (with the only objection at trial being “chain of custody,” which is not raised on appeal). The jury saw the pistol and photographs of it. An ATF agent, testifying as an expert, testified that it met the federal definition of a firearm. The pistol and the testimony

are sufficient to prove that the pistol was a firearm. *See United States v. Dobbs*, 449 F.3d 904, 911 (8th Cir. 2006) (holding that lay testimony from an eyewitness is sufficient to determine whether an object is a firearm under 18 U.S.C. § 921(a)(3)(A)); *United States v. Mullins*, 446 F.3d 750, 755 (8th Cir. 2006) (finding expert testimony from an ATF agent sufficient to determine that the defendant's gun met the federal definition of a firearm, even when the gun evaluated by the agent was a model and not the original).

The evidence sufficiently proved that McCoy's .45-caliber pistol was a firearm under 18 U.S.C. §§ 921(a)(3) and 922(g).

III.

McCoy argues the district court erred in adjusting and enhancing his offense level. This court reviews the district court's factual findings for clear error and its application of the guidelines *de novo*. *See United States v. Beckman*, 787 F.3d 466, 494 (8th Cir. 2015).

A.

The district court applied an obstruction-of-justice adjustment under U.S.S.G. § 3C1.1 based on McCoy's trial testimony. This court need not address his challenge to this adjustment because it did not affect his sentence. The adjustment raised his base offense level to 30. But because McCoy was an armed career criminal, his base offense level was 34. *See U.S.S.G. § 4B1.2(b)(3)(A)*. Any adjustment under U.S.S.G. § 3C1.1 was moot.

B.

The district court relied on the gun-possession-in-connection-with-a-drug-offense in setting the base offense level of 34. McCoy disputes the enhancement because the gun was found in his vehicle, while the drugs were found in his bedroom.

The district court found that McCoy was a drug dealer—not merely a drug user—due to the packaging of the drugs, the evidence found in the search and police investigations, and his own testimony that he intended to distribute drugs. An ATF special agent testified about a firearm’s use in the drug trade. The pistol was in close proximity to the drugs. *See United States v. Vang*, 3 F.4th 1064, 1067 (8th Cir. 2021) (“Drugs do not need to be found next to the firearms in order to establish a nexus”; rather, “[a] nexus can exist when a firearm is in proximity to items identified as relating to drug trafficking.”). Officers saw McCoy leave his vehicle (that had the pistol and pipe) and enter his residence, where they found him in his bedroom with drugs. *See id.* (finding sufficient evidence of a nexus where the firearm was two stories above the drugs because the firearm was found in a room with drug paraphernalia and there was expert testimony about drug traffickers using guns). *See also United States v. Goodrich*, 739 F.3d 1091, 1098 (8th Cir. 2014) (holding that a jury may infer that a firearm was used in connection with a drug offense if it was in close proximity to the drugs, quickly accessible, and an expert testified about the use of firearms in the drug trade).

The district court did not err in applying the enhancement.

* * * * *

The judgment is affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-2385

United States of America

Plaintiff - Appellee

v.

Gregory Lynn McCoy

Defendant - Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:20-cr-00150-NEB-1)

JUDGMENT

Before SMITH, Chief Judge, COLLOTON, and BENTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 13, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-2385

United States of America

Appellee

v.

Gregory Lynn McCoy

Appellant

No: 22-2412

United States of America

Appellee

v.

Gregory Lynn McCoy

Appellant

Appeals from U.S. District Court for the District of Minnesota
(0:20-cr-00150-NEB-1)
(0:99-cr-00278-DWF-1)

MANDATE

In accordance with the opinion and judgments of June 13, 2023, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matters.

July 06, 2023

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

GREGORY LYNN MCCOYCase Number: **20-CR-150-NEB-BRT (1)**USM Number: **04249-041****Jordan Kushner**

Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count of
- pleaded nolo contendere to count(s) which was accepted by the court
- was found guilty on count 1 the Indictment after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:922(g)(1) and 924(e) ARMED CAREER CRIMINAL IN POSSESSION OF A FIREARM	10/22/2019	1

The defendant is sentenced as provided in pages 2 through 5 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.
- \$100.00 Special Assessment is due and payable immediately.

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.

June 16, 2022

Date of Imposition of Judgment

s/Nancy E. Brasel

Signature of Judge

NANCY E. BRASEL
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

June 23, 2022

Date

AO 245B (Rev. 11/16) Sheet 2 - Imprisonment

DEFENDANT: GREGORY LYNN MCCOY
CASE NUMBER: 20-CR-150-NEB-BRT (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: 262 months. This term shall be served consecutively to the revocation sentence in case 99-278 (DWF/AJB).

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

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 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 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

AO 245B (Rev. 11/16) Sheet 3 – Supervised Release

DEFENDANT: GREGORY LYNN MCCOY
CASE NUMBER: 20-CR-150-NEB-BRT (1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **five (5) 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)*

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

DEFENDANT: GREGORY LYNN MCCOY
 CASE NUMBER: 20-CR-150-NEB-BRT (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 _____

Probation Officer's Signature _____ Date _____

DEFENDANT: GREGORY LYNN MCCOY
CASE NUMBER: 20-CR-150-NEB-BRT (1)

SPECIAL CONDITIONS OF SUPERVISION

- a. The defendant shall submit to substance abuse testing approved and directed by the probation officer.

- The defendant shall forfeit to the United States all his right, title, and interest in all items listed in the preliminary order of forfeiture.