

APPENDIX

A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 24 2024

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISAIAS DELGADO,

Defendant-Appellant.

No. 22-10212

D.C. No.

4:19-cr-01094-JGZ-JR-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Argued and Submitted April 8, 2024
Phoenix, Arizona

Before: HAWKINS, BADE, and DESAI, Circuit Judges.

Isaias Delgado challenges his jury trial conviction and sentence on one count of dealing firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. On de novo review, we conclude Delgado has not demonstrated that the government withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83

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

(1963). *See United States v. Wilkes*, 662 F.3d 524, 534 (9th Cir. 2011). Delgado has not shown that either Exhibit 97 or the border crossing chart was “favorable to the defense and material to [his] guilt or punishment.” *See Smith v. Cain*, 565 U.S. 73, 75 (2012). It is undisputed that Delgado already possessed the audio recording of the conversation transcribed as Exhibit 97. *See Wilkes*, 662 F.3d at 535 (“[E]vidence is material if it is of a different character than evidence already known to the defense.” (internal quotation marks and citation omitted)). Further, the record demonstrates that the border crossing summary was not relevant to any issues at trial and was disclosed during the presentence investigation phase at a time when it could still be used during the sentencing hearing. *See United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) (disclosure “must be made at a time when disclosure would be of value to the accused” (quoting *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985))).

2. Delgado also has failed to show any evidentiary error. If a defendant has preserved an evidentiary objection, we review the decision to admit or exclude evidence for abuse of discretion. *See United States v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018). If the defendant failed to raise the objection below, we review for plain error. *See id.* at 925.

a. The district court did not plainly err by admitting into evidence several firearms seized by agents of the Bureau of Alcohol, Tobacco, Firearms, and

Explosives (“ATF”). *See id.* The record does not support Delgado’s contention that the government tampered with the evidence. Rather, Agent Cunningham testified that three of the firearms may have been assembled after ATF agents seized the component parts and all firearms were rendered safe for storage; the firearms otherwise remained in the condition in which ATF agents found them at the time of seizure.

b. The district court did not abuse its discretion by overruling Delgado’s hearsay objection to certain portions of Agent Bort’s testimony regarding his conversation with Delgado. Nor has Delgado established, for purposes of de novo review, that admission of those statements violated his rights under the Confrontation Clause. *See United States v. Brooks*, 772 F.3d 1161, 1167 (9th Cir. 2014). Delgado’s statements were admissible in the government’s case-in-chief as non-hearsay under Federal Rule of Evidence 801(d)(2)(A). Delgado has not shown that the statements of the GunBroker.com dealer were testimonial in nature or offered for the truth of the matter asserted. *See Lucero v. Holland*, 902 F.3d 979, 989 (9th Cir. 2018); *United States v. Arteaga*, 117 F.3d 388, 396 (9th Cir. 1997). Even assuming Delgado could establish that the statements of Roman Noble were inadmissible hearsay, any error in allowing Agent Bort to testify about those statements was clearly harmless, as Roman Noble also testified at trial about his conversation with Delgado and was cross-examined by defense counsel. *See*

Brooks, 772 F.3d at 1171 (court may sua sponte consider issue of harmlessness where, among other things, the harmlessness of an error is certain).

c. The district court similarly did not abuse its discretion by sustaining the government's hearsay objection when Delgado attempted to have Agent Bort testify about Delgado's own statements. *See United States v. Liera-Morales*, 759 F.3d 1105, 1111 (9th Cir. 2014). Agent Bort's direct testimony regarding Delgado's statements that a particular rifle had a jamming issue was not misleading as to whether Delgado claimed to have fired the gun. Consequently, it did not trigger the rule of completeness, *see id.*, and Delgado identifies no other basis on which the statements were admissible.

d. Finally, the district court did not abuse its discretion in connection with certain portions of Agent Cunningham and Agent Bort's testimony. To the extent that Agent Cunningham's statements at trial involved lay opinion testimony about certain "red flags" in her investigation, income thresholds for dealers, and her observations of Delgado's shooting range video, those statements were permissibly based on her involvement in the investigation. *See United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995). And although the district court initially overruled Delgado's objection to Agent Bort's testimony regarding Delgado's familiarity with certain laws, the district court ultimately struck the entire line of questioning and instructed the jury not to consider the testimony.

3. Reviewing de novo Delgado's claim that the government engaged in improper burden shifting, we conclude that the government's single question about whether Delgado had produced certain records of sale was not so prejudicial as to render his trial fundamentally unfair. *Hein v. Sullivan*, 601 F.3d 897, 912–13 (9th Cir. 2010). The district court immediately reminded the jury of the government's burden of proof, sustained defense counsel's objection, and issued a curative instruction. *See id.*

4. Nor did the district court abuse its discretion in applying a firearms trafficking sentencing enhancement under U.S.S.G. § 2K2.1(b)(5). *See United States v. Parlor*, 2 F.4th 807, 811 (9th Cir. 2021). The government presented additional evidence regarding firearms trafficking during the sentencing hearings, and the district court permissibly made additional factual findings when applying the enhancement. *See id.* at 814–15. We decline to consider Delgado's remaining arguments, which he raised for the first time in his reply brief. *See United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006).

5. Finally, we decline to consider on direct review Delgado's claim that his trial counsel rendered ineffective assistance. *See United States v. Velte*, 331 F.3d 673, 681 (9th Cir. 2003).

AFFIRMED.

APPENDIX

B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Isaias Delgado

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-19-01094-001-TUC-JGZ (JR)

Barbara Tapper Catrillo (Retained)

Attorney for Defendant

USM#: 14290-508

ICE# A047338006

THERE WAS A VERDICT OF guilty on 8/12/2021 to Count 1 of the Indictment. On 8/9/2021 Counts 2-4 of the Indictment were dismissed without prejudice on motion of the Government.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §922(a)(1)(A) and 924(a)(1)(D) Engaging in the Business of Dealing Firearms Without a License, a Class D Felony offense, as charged in Count 1 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **THIRTY-SIX (36) MONTHS** on Count 1 of the Indictment, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **TWENTY-FOUR (24) MONTHS** on Count 1 of the Indictment.

IT IS FURTHER ORDERED that the Final Order of Forfeiture (Doc. 204) is incorporated in this Judgment and made part thereof.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$100.00 FINE: \$2,000.00 RESTITUTION: N/A

The defendant shall pay a special assessment of \$100.00 which shall be due immediately.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 1 of the Indictment.

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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, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, 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.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or 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.

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- 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.

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SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) You must cooperate in the collection of DNA as directed by the probation officer.
- 2) You must submit your person, property, house, residence, vehicle, papers, or office to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

THE DEFENDANT IS ADVISED OF THE RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.


The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons and recommends that the defendant be placed in an institution in southern Arizona to facilitate family visitations.

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

Date of Imposition of Sentence: **Tuesday, August 23, 2022**

Dated this 24th day of August, 2022.


Honorable Jennifer C. Zipp
United States District Judge

RETURN

I have executed this Judgment as follows:

defendant delivered on _____ to _____ at _____, the institution
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal

By: _____
Deputy Marshal

APPENDIX

C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ISAIAS DELGADO,

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No. 22-10212

D.C. No.

4:19-cr-01094-JGZ-JR-1

District of Arizona,
Tucson

ORDER

Before: HAWKINS, BADE, and DESAI, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing.

Judges Bade and Desai have voted to deny Appellant's petition for rehearing en banc, and Judge Hawkins so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and petition for rehearing en banc are denied.