No._____

In the Supreme Court of the United States

DAVID HOUSTON VARGAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court for the Tenth Circuit

APPENDIX

SCOTT KEITH WILSON
Federal Public Defender,
District of Utah

BENJAMIN C. MCMURRAY
Assistant Federal Public Defender,
46 W. Broadway, Suite 110
Salt Lake City, Utah 84101
(801) 524-4010
Benji_McMurray@fd.org

TABLE OF APPENDICES

A1
APPENDIX A
Decision of the Tenth Circuit Court of Appeals
United States v. Thompson, 23 F.4th 1277 (10th Cir. 2022)

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2025

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. BRANDON KEITH THOMPSON, Defendant - Appellant.	No. 24-4006

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:21-CR-00316-DBB-1)

Jessica Stengel, Assistant Federal Public Defender (and Scott Keith Wilson, Federal Public Defender, with her on the briefs), Salt Lake City, Utah, for Defendant - Appellant.

Tyler Murray, Assistant United States Attorney (and Trina A. Higgins, United States Attorney, with him on the brief), Salt Lake City, Utah, for Plaintiff - Appellee.

Before **HARTZ**, **KELLY**, and **ROSSMAN**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant, Brandon K. Thompson, was convicted of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and was sentenced to 110 months' imprisonment and three years' supervised release. I R. 519–20. On appeal, he argues that (1) the district court's jury instruction on actual possession incorrectly stated the law,

(2) the jury was not instructed on his theory of the case, (3) the evidence was insufficient to demonstrate knowing possession, and (4) 18 U.S.C. § 922(g)(1) is an unconstitutional exercise of Congress's power under the Commerce Clause. Aplt. Br. at 1–2. Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

On July 8, 2021, employees at an AT&T store in Sandy, Utah, saw Mr. Thompson "messing" with an area where Apple watches were on display. III R. 395–99. After confronting Mr. Thompson about a missing watch, one of the employees activated a security alarm which alerted the police. Id. at 401–02. Sandy Police Officers Nystrom and Johnson responded to the alert. Id. at 418–19, 495–96. Officer Johnson went inside the store and asked Mr. Thompson for permission to pat him down. Id. at 498. Mr. Thompson initially agreed, but then changed his mind and ran out of the store. Id. at 498–99. Officer Johnson radioed that Mr. Thompson was fleeing, and Officer Nystrom turned on her body camera as both officers ran after Mr. Thompson. Id. at 421–22, 499.

The officers attempted to tackle Mr. Thompson, who tripped and fell into a parked car during the struggle. II Supp. R. Ex. 1a. Officer Johnson attempted to handcuff Mr. Thompson and got on top of him. Id. Mr. Thompson then grabbed onto Officer Johnson's holster and firearm with both of his hands and began to pull. Id.; see also I Supp. R. Ex. 2–3.

At this time, Eusebio Santos, a retired New York Police Department officer, saw the officers attempting to subdue Mr. Thompson. III R. 346, 355. Mr. Santos got out of

his truck to help. Id. at 357. According to Mr. Santos, Mr. Thompson had "completely gripped" the firearm, had pulled it partially out of the holster, and had his finger on the trigger. Id. at 360–62.

As Mr. Santos approached, Mr. Thompson pulled the trigger causing a round to fire into the ground. Id. at 424; II Supp. R. Ex. 1a. Officer Nystrom radioed that shots were fired. III R. 425–26. After the shot, a melee followed with Mr. Santos and the officers attempting to get Mr. Thompson's hands off of the firearm. Id. at 503, 506–07; II Supp. R. Ex. 1a. The struggle ended when Officer Johnson tased Mr. Thompson, and the officers then detained him. III R. 506–09.

At trial, the government introduced testimony from Mr. Santos, Officer Nystrom, and Officer Johnson, as well as video evidence of the altercation between Mr. Thompson and the officers, which was recorded on Officer Nystrom's body camera. Id. at 346, 408, 475; II Supp. R. Ex. 1a. Officer Johnson testified that his holster had a lever which needed to be switched to remove the firearm from the holster. III R. 565. This made the firearm's trigger inaccessible and invisible while it was in the holster. Id. at 414–15, 504. Additionally, the firearm had a safety mechanism that was located within the trigger itself. Id. at 477, 485–86. The trigger had two stages (the safety trigger and the actual trigger) which both had to be pressed fully in order to shoot the firearm. Id. at 485–86.

Discussion

I. The district court did not abuse its discretion by declining to instruct the jury that actual possession must be exclusive.

Before trial, the parties stipulated that Mr. Thompson was a felon at the time of the incident, knew that he had his hands on Officer Johnson's firearm, knew how a firearm operated, and intended to possess the firearm. I R. 360. Thus, the trial focused on whether Mr. Thompson had actual possession of the firearm. Mr. Thompson's proposed jury instructions defined actual possession in terms of "control or dominion," and his trial counsel clarified that "the idea of dominion is the power to exclude others[.]" Id. at 164–66; III R. 637, 641–42. The district court declined to give this instruction because it found that Tenth Circuit precedent never indicated that language regarding "dominion" or "exclusive control" should be imported from constructive possession into actual possession. III R. 643–44. The district court's instruction regarding actual possession provided in pertinent part:

> A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. The amount of time a person knowingly has direct physical control over a thing need not be lengthy, a second or two can be sufficient.

Id. at 672.

On appeal, Mr. Thompson argues that the district court abused its discretion by improperly instructing the jury on actual possession. Aplt. Br. at 17. More specifically, he argues that the district court omitted the "critical" requirement that actual possession must be exclusive. Id. We review a properly preserved claim of error in jury instructions

for an abuse of discretion.[1] United States v. Benvie, 18 F.4th 665, 669 (10th Cir. 2021). In the jury instruction context, "[a] district court abuses its discretion when its decision is arbitrary, capricious or whimsical or falls outside the bounds of permissible choice in the circumstances." United States v. Olea-Monarez, 908 F.3d 636, 639 (10th Cir. 2018) (quotations omitted). We review the jury instructions as a whole de novo "to determine whether they properly state the law and issues in a particular case." Benvie, 18 F.4th at 669.

The Supreme Court has recognized that "possession" can be either "actual" or "constructive." Henderson v. United States, 575 U.S. 622, 626 (2015). "Actual possession exists when a person has direct physical control over a thing." Id. (emphasis added). Comparatively, "[c]onstructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object." Id. The concept of "exclusive" control over an object may arise in the constructive possession context. See United States v. Johnson, 46 F.4th 1183, 1187 (10th Cir. 2022). For example, "[w]hen a defendant has exclusive control over the property where contraband is found, a jury can reasonably infer the defendant constructively

[1] We reject the government's argument that Mr. Thompson's challenge to this instruction should be reviewed for plain error. See Aplee. Br. at 23–24. To preserve a claim of error in jury instructions, a party "must inform the court of the specific objection and the grounds for the objection[.]" Fed. R. Crim. P. 30(d). Here, Mr. Thompson's counsel argued at both the pretrial conference and the final jury instruction conference that the jury should be instructed that actual possession requires the power to exclude others. See III R. 150, 637, 641–42. Though counsel used both "dominion and control" and "the power to exclude others" interchangeably, these phrases raised the same argument, which the district court understood and ruled on fully. See id. at 637–48.

possessed the contraband." Id. (emphasis added); see also United States v. Samora, 954 F.3d 1286, 1290 (10th Cir. 2020) ("Knowledge, dominion, and control can be inferred when a defendant has exclusive control over the premises in which the firearm was found.").

Mr. Thompson now argues that actual possession — not constructive possession — requires exclusive control. Aplt. Br. at 17–18. Mr. Thompson relies on United States v. Johnson, where this court found evidence of actual possession where a defendant sat on a firearm because doing so "conceal[ed] it from the sight of others" and "require[d] anyone who would try to make contact with or control the item to physically move the person sitting on it." 46 F.4th at 1188–89. From this, Mr. Thompson argues that actual possession over a firearm requires knowing, exclusive dominion. Aplt. Br. at 27–28. He also relies on "car crime" cases, decisions of our sibling circuits, pattern jury instructions,[2] law review articles, and dictionary definitions. Id. at 21–26.

But none of these sources speak to whether Tenth Circuit law requires an instruction that actual possession must be exclusive. Johnson involved a faulty constructive possession instruction that omitted the element of intent. 46 F.4th at 1186. Mr. Johnson argued that reversal of his firearm convictions was required because the constructive possession instruction was faulty and the evidence of actual possession was weak or insufficient, so the court could not rely upon it. 46 F.4th at 1186–89 ("At its

[2] The district court correctly noted that the Tenth Circuit's pattern jury instruction titled "Actual or Constructive Possession" would not be useful because it deals almost entirely with constructive possession and never defines actual possession. See I R. 407; Tenth Cir. Crim. Pattern Jury Inst. No. 1.31.

core, [Mr. Johnson's] argument is that the evidence he had been sitting on the gun . . . is not enough to demonstrate actual possession. We disagree."). Johnson suggests that a defendant's exclusive possession of a firearm may be a factor to consider when assessing the sufficiency of the evidence for actual possession. Id. But Johnson in no way suggests that we should graft language regarding exclusivity from the constructive possession context onto the requirements for actual possession. Indeed, Mr. Thompson's trial counsel acknowledged that this court has not incorporated the concept of exclusivity into its law on actual possession. See I R. 402–03; see also Oral Arg. at 1:25–2:50 (appellate counsel acknowledging the same).

Given the absence of support for Mr. Thompson's position, we can hardly say that the district court abused its discretion in refusing his requested instruction. Critically, the language of the instruction accurately stated the law and closely tracked the Supreme Court and Tenth Circuit definitions of actual possession. See III R. 672; Henderson, 575 U.S. at 626 ("Actual possession exists when a person has direct physical control over a thing."); Johnson, 46 F.4th at 1188 (explaining that "a mere second or two" of control can be sufficient for actual possession of a firearm). The district court's decision to focus the jury on whether Mr. Thompson achieved direct physical control of the firearm — the "sine qua non" of actual possession — was appropriate. III R. 647.

II. The district court did not abuse its discretion by refusing to give Mr. Thompson's requested instruction on his theory of the case.

Mr. Thompson next argues that the district court abused its discretion by refusing to instruct the jury on his theory of the case. Aplt. Br. at 32. Mr. Thompson challenges

the district court's refusal to give two of his requested instructions: (1) an instruction regarding momentary possession, and (2) an instruction regarding attempted possession. Id. at 35–36; I R. 219. We review a district court's refusal to give a requested instruction on the defendant's theory of the case for an abuse of discretion. United States v. Britt, 79 F.4th 1280, 1286 (10th Cir. 2023). "A criminal defendant is entitled to an instruction on his theory of defense provided that theory is supported by some evidence and the law." United States v. Beckstrom, 647 F.3d 1012, 1016 (10th Cir. 2011) (quotations omitted). However, a district court does not err in refusing to give a requested instruction on the defendant's theory of the case if that theory is adequately conveyed by other instructions. See United States v. Martin, 528 F.3d 746, 753 (10th Cir. 2008).

The first proposed instruction would have instructed that "a person is not in possession of an object simply because the person momentarily touches or tries to touch it." Aplt. Br. at 35; I R. 219. The second would have instructed that the jury must find Mr. Thompson not guilty if it concluded that he "attempted or tried to possess the firearm, but never had control or dominion over it." Aplt. Br. at 35–36; I R. 219. Both instructions related to Mr. Thompson's theory that although he attempted to possess the firearm, he merely touched it and never had control over it. III R. 697, 701.

Even though the district court did not adopt Mr. Thompson's requested instructions, it still adequately conveyed his theory of the case. The district court addressed the degree of control necessary for actual possession by instructing that "[t]he amount of time a person knowingly has direct physical control over a thing need not be lengthy, a second or two can be sufficient." Id. at 672. This language is more in line with

this court's precedent than Mr. Thompson's proposed language, and properly instructed the jury on the necessary degree of control. See Johnson, 46 F.4th at 1187–89. The court also instructed that the jury must find Mr. Thompson not guilty if it found that he merely attempted to control the firearm. By instructing that Mr. Thompson needed to have "direct physical control over [the firearm] at a given time" the district court clearly explained that Mr. Thompson had to succeed in controlling the firearm to be guilty. III R. 672. Although the instruction never used the word "attempt," the district court was not required to use the exact language that Mr. Thompson requested. United States v. Dozal, 173 F.3d 787, 797 (10th Cir. 1999). Thus, the instructions adequately conveyed Mr. Thompson's theory of the case to the jury.

III. The evidence was sufficient to show that Mr. Thompson had actual possession of the firearm.

Mr. Thompson next argues that the evidence was insufficient to show that he knowingly controlled the firearm. Aplt. Br. at 37, 39. We review challenges to the sufficiency of the evidence de novo, "viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the government." United States v. Dewberry, 790 F.3d 1022, 1028 (10th Cir. 2015) (quotations omitted). "We will reverse only if no rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." Id. (quotations omitted). Because we owe "considerable deference to the jury's verdict," we neither weigh conflicting evidence nor consider the credibility of witnesses. Id.

The government needed to prove that "(1) [Mr. Thompson] had previously been convicted of a felony; (2) he thereafter knowingly possessed a firearm; and (3) the possession was in or affecting interstate commerce." Samora, 954 F.3d at 1290. On appeal, Mr. Thompson challenges only the sufficiency of the evidence as to second element — that he knowingly possessed a firearm. Aplt. Br. at 39.

The government claims that this challenge is resolved squarely by our decision in United States v. Coleman, 9 F.3d 1480 (10th Cir. 1993). Aplee. Br. at 19–21. In Coleman, this court held that the defendant "used" a firearm in a crime of violence for the purposes of 18 U.S.C. § 924(c) when he went to rob a bank unarmed but later struggled with a security guard to get the guard's firearm. 9 F.3d at 1482–84. This court rejected the defendant's argument that struggling with the security guard never gave him "enough control or possession of the weapon to 'use' it." Id. But Coleman was decided in the context of the "use" of a weapon under § 924(c), which "does not require that the assailant have a precise, measurable amount of physical dominion or control over a weapon." Id. at 1484. This context differs from the standard in this case, which required the government to prove that Mr. Thompson had "direct physical control" over the firearm. Henderson, 575 U.S. at 626.

Though Coleman does not control our analysis, ample evidence supports the jury's conclusion that Mr. Thompson had direct physical control of the firearm. First, video evidence clearly showed that Mr. Thompson had both of his hands on the gun and was aggressively pulling on it for much longer than a few seconds before the firearm discharged. II Supp R. Ex. 1a; I Supp. R. Ex. 2–3. The video evidence was bolstered by

testimony from Mr. Santos and the officers that Mr. Thompson had his hands on the gun, and as Mr. Thompson himself acknowledges, supports the reasonable inference that he was the one who pulled the trigger. III R. 359–62, 470, 546; Aplt. Br. at 41. The government also introduced evidence that the firearm's holster had a securing mechanism that would conceal the trigger unless the firearm was pulled out of the holster. III R. 565. Additionally, the firearm's trigger safety mechanism had two stages which both needed to be pressed fully in order to shoot the firearm. Id. at 485–86. Thus, "[v]iewing all the evidence collectively and in the light most favorable to the Government, a reasonable jury could conclude that [Mr. Thompson] had direct physical control over the firearm." United States v. Morales, 758 F.3d 1232, 1236 (10th Cir. 2014) (quotations omitted).

Mr. Thompson's arguments about his mental state are misplaced. Mr. Thompson makes much of the fact that, despite the government's burden to prove that he knowingly possessed the firearm, the government did not offer evidence of his mental state. See Aplt. Br. at 39; Aplt. Supp. Auth. This argument ignores the fact that the parties stipulated that Mr. Thompson knew that he had his hands on a firearm, knew how a firearm operated, and intended to possess the firearm. I R. 360; III R. 331–32. These stipulations, combined with the strong evidence of Mr. Thompson's control over the firearm, were sufficient to sustain a conviction.

IV. 18 U.S.C. § 922(g)(1) is constitutional under the Commerce Clause.

Finally, Mr. Thompson argues that 18 U.S.C. § 922(g)(1) is an unconstitutional exercise of Congress's Commerce Clause powers. Aplt. Br. at 44. Mr. Thompson correctly acknowledges that this argument is foreclosed by precedent from both the

Supreme Court and this circuit, and he raises it for preservation purposes only. Id.; see also Scarborough v. United States, 431 U.S. 563 (1977); United States v. Urbano, 563 F.3d 1150, 1153–55 (10th Cir. 2009). Accordingly, the district court's judgment is

AFFIRMED.

A13
Appendix B
Decision of the U.S. District Court
United States v. Thompson, 671 F. Supp. 3d 1290 (D. Utah 2023)

671 F.Supp.3d 1290
United States District Court, D. Utah.

UNITED STATES of America, Plaintiff,
v.
Brandon Keith THOMPSON, Defendant.

Case No. 2:21-cr-00316-DBB
|
Signed April 27, 2023

Synopsis
Background: Defendant filed post-verdict motion for judgment of acquittal for being a felon in possession of a firearm, following denial of post-verdict oral motion for judgment of acquittal, which was a renewal of oral motion for judgment of acquittal filed at close of Government's case in chief, for which District Court had reserved ruling.

Holdings: The District Court, David B. Barlow, J., held that:

[1] evidence was sufficient to establish interstate element of defendant's conviction;

[2] Commerce Clause did not require government to prove firearm possessed by defendant was "in and affecting commerce" at time he was charged; and

[3] statute prohibiting felon from possessing a firearm was constitutionally applied to defendant.

Motion denied.

Procedural Posture(s): Post-Trial Hearing Motion; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection.

West Headnotes (6)

[1] **Criminal Law** Suspicion or conjecture; reasonable doubt
Criminal Law Hearing and determination
In considering a motion for judgment of acquittal, the district court asks only whether taking the evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt. Fed. R. Crim. P. 29.

[2] **Criminal Law** Weight and Sufficiency of Evidence in General
Criminal Law Insufficiency of Evidence
In determining a judgment of acquittal, the district court must not weigh conflicting evidence or consider the credibility of the witnesses, but simply determine whether the evidence, if believed, would establish each element of the crime; this standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Fed. R. Crim. P. 29.

[3] **Criminal Law** Verdict supported by evidence

When evaluating the sufficiency of the evidence supporting a conviction, the district court owes considerable deference to the jury's verdict. Fed. R. Crim. P. 29.

[4] **Criminal Law** Experts

Weapons Interstate connection

Evidence was sufficient to support jury's finding that, before defendant possessed firearm, it had moved from one state to another or from a foreign country to the United States, as required to establish interstate element of defendant's conviction for being a felon in possession of a firearm; government's expert witness testified that firearm involved in case was manufactured in Austria and that it was imported to Georgia, prior to its transportation across state lines to Utah, where defendant was charged, and police officer testified that police department issued firearm to him in Utah as part of his employment. 18 U.S.C.A. § 922(g)(1).

[5] **Commerce** Weapons and explosives

Weapons Miscellaneous particular issues

Commerce Clause did not require government to prove firearm possessed by defendant, a convicted felon, was "in and affecting commerce" at the time when he was charged with being a felon in possession of a firearm, and thus evidence was sufficient to show defendant possessed a firearm that was "in and affecting commerce," as required for defendant's conviction, even though defendant claimed evidence only showed firearm's prior movement in interstate commerce. U.S. Const. art. 1, § 8, cl. 3; 18 U.S.C.A. § 922(g)(1).

[6] **Commerce** Weapons and explosives

Weapons Violation of other rights or provisions

Weapons Miscellaneous particular issues

Statute prohibiting felon from possessing a firearm was constitutionally applied to defendant, a convicted felon, who possessed a handgun that had been manufactured in Austria, imported to Georgia, and transported across state lines to defendant in Utah, even if gun was not for sale or had been removed from commerce when defendant possessed it; firearm need only have traveled across state lines for minimal nexus with interstate commerce to have been met, and no further showing of the actual effect of defendant's actions on interstate commerce was required. U.S. Const. art. 1, § 8, cl. 3; 18 U.S.C.A. § 922(g)(1).

Attorneys and Law Firms

***1291** Angela Jean Clifford, Assistant U.S. Attorney, Jennifer Muyskens, Bryan N. Reeves, U.S. Attorney's Office, Salt Lake City, UT, for Plaintiff.

Benjamin A. Hamilton, Public Defender, Benjamin C. McMurray, Federal Public Defender District of Utah, Salt Lake City, UT, for Defendant.

MEMORANDUM DECISION AND ORDER DENYING [126] DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

David Barlow, United States District Judge

On February 1, 2023, a jury found defendant Brandon Keith Thompson guilty of the charge Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). Mr. Thompson now moves for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, arguing that the government failed to prove beyond a reasonable doubt that he possessed a firearm that was "in or affecting" interstate commerce. [1] The court has considered the briefing and relevant case law and determines that the motion may be decided without a hearing. For the reasons stated in this Memorandum Decision and Order, the Motion is DENIED.

***1292 BACKGROUND**

The United States charged Mr. Thompson with a single count, Felon in Possession of a Firearm. [2] The indictment states:

> On or about July 8, 2021, in the District of Utah, Brandon Keith Thompson, defendant herein, knowing he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed a firearm, to wit: a Glock 17 handgun, and the firearm was in and affecting commerce; in violation of 18 U.S.C. § 922(g)(1). [3]

Section 922(g)(1) expressly provides:

> It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

On November 23, 2021, Mr. Thompson filed a motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(1). In the motion, Mr. Thompson argued that the indictment should be dismissed because the facts of the case did not support a theory of possession. [4] Mr. Thompson did not, at that time, challenge the constitutionality of 18 U.S.C. § 922(g)(1). The court denied Mr. Thompson's motion to dismiss, finding that it could not determine, as a matter of law, that the United States would be incapable of proving its case. [5]

Mr. Thompson's trial commenced on January 30, 2023. [6] Prior to and during trial the parties litigated how the court should instruct the jury as to the elements of the offense, including the interstate commerce requirement. [7] After briefing and oral argument, the court ruled that it would instruct the jury on the elements of the offense in accord with Tenth Circuit Pattern Criminal Jury Instruction 2.44. [8] Accordingly, General Jury Instruction No. 18, like pattern instruction 2.44, required the United States to prove, beyond a reasonable doubt, that "before the defendant possessed the firearm, the firearm had moved at some time from one state to another or from a foreign country to the United States." [9]

During Mr. Thompson's trial, the United States presented the testimony of an expert witness, Tyler Olsen. Mr. Olsen testified that the firearm in this case, a Glock, was manufactured in Austria and imported to the State of Georgia, in the United States, prior to its transportation across state lines to the State of Utah. Mr. Olsen also testified that Glock did not manufacture any firearms in the State of Utah. Another government witness, Officer Johnson, testified that he was issued the Glock by the Sandy Police Department in the State of Utah.

On January 31, 2023, at the close of the United States' case in chief, outside the presence of the jury, Mr. Thompson made ***1293** an oral motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The court heard argument and reserved ruling on Mr. Thompson's motion. [10] Later that same day, the jury returned a verdict of guilty on the single count in the indictment. [11] After the jury was excused, Mr. Thompson renewed his oral motion for judgment of acquittal. The court denied the motion.

On February 14, 2023, Mr. Thompson filed the Motion for Judgment of Acquittal that is now before the court. [12] In the motion, Mr. Thompson argues that there was insufficient evidence for the jury to conclude, beyond a reasonable doubt, that Mr. Thompson possessed a firearm that was "in or affecting" interstate commerce. [13]

LEGAL STANDARD

[1] [2] [3] Federal Rule of Criminal Procedure 29(a) provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." In considering a motion under Rule 29, the court "ask[s] only whether taking the evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." [14] The court "must not weigh conflicting evidence or consider the credibility of the witnesses, but simply 'determine whether the evidence, if believed, would establish each element of the crime.' " [15] "This standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." [16] When evaluating the sufficiency of the evidence supporting a conviction, courts "owe considerable deference to the jury's verdict." [17]

ANALYSIS

[4] Applying these legal principles, the court must determine "whether the evidence, if believed, would establish the [interstate commerce] element of the crime." [18] At Mr. Thompson's trial, the court instructed the jury on the elements of the offense in accord with Tenth Circuit Pattern Criminal Jury Instruction 2.44. [19] The court's instruction stated, with regard to the interstate commerce element, that to find the defendant guilty, the jury must be convinced that the government has proved, beyond a reasonable doubt, that "before the defendant possessed the firearm, the firearm had moved at some time from one state to another or from a foreign country to the United States." [20] To prove this element, the United States offered the testimony of expert witness Tyler Olsen. Mr. Olsen testified that the firearm ***1294** in this case was a Glock; that Glock did not manufacture any firearms in the State of Utah; that the Glock involved in this case was manufactured in the country of Austria; and that the Glock was imported to the State of Georgia, in the United States, prior to its transportation across state lines to the State of Utah. In addition, Officer Johnson testified that the Sandy Police Department issued the Glock to him in Utah as part of his employment as an officer.

The court finds, and Mr. Thompson does not dispute, that from this evidence the jury could have reasonably concluded, beyond a reasonable doubt, that before Mr. Thompson possessed the firearm, it had moved from one state to another, as that element was defined in General Jury Instruction No. 18.

Mr. Thompson's sufficiency of the evidence argument is different. He claims that the government *charged* him in the Indictment with possessing a firearm that was "in and affecting commerce," using language tracking that of § 922(g)(1). [21] However, at trial the court instructed the jury using a "watered down" commerce element that required the government to prove only that the firearm was manufactured somewhere other than Utah. [22] According to Mr. Thompson, because the government was only required to prove the firearm's prior movement in commerce, there was insufficient evidence at trial to show, and no reasonable jury could have found, that the firearm Mr. Thompson possessed was "in and affecting commerce" as charged in the Indictment.

Based on the foregoing, Mr. Thompson argues, "if the court finds that [the commerce element] is satisfied as a matter of law by the fact that the gun was manufactured in a foreign country, then 18 U.S.C. § 922(g)(1) is unconstitutional on its face." [23] Mr. Thompson also asserts that § 922(g)(1) is unconstitutional "as applied" in this case. He contends that the wording of § 922(g)(1) calls for present tense "in or affecting commerce," which would require a jury to find that the firearm was "in or affecting commerce" at the time of the charged possession. However, according to Mr. Thompson, the undisputed testimony at trial showed that the gun Mr. Thompson possessed was no longer in commerce – it was not for sale and had been removed from commerce by the Sandy Police Department. And, therefore, if the court had properly required the jury to find that the gun was "in or affecting commerce" at the moment of the crime, no reasonable jury could have found him guilty because there was no evidence that the gun was "in or affecting commerce." [24]

In response, the United States claims that Mr. Thompson's motion is untimely under Rule 12(b)(3) and should be dismissed on that basis. [25] According to the government, although Mr. Thompson's motion is styled as a Rule 29 motion for judgment of acquittal, the motion challenges the constitutionality of § 922(g)(1), the offense charged in the indictment, and should have been raised prior to trial. [26] Rule 12 requires that a defendant seeking to challenge "a defect in the indictment" must raise that defense in a pretrial motion if "the basis for the motion is then reasonably available" and "the motion can be determined without a trial on the merits." [27]

***1295** Mr. Thompson asserts, however, that his constitutional arguments are not untimely because nowhere does he claim that the indictment was defective. [28] To the contrary, according to Mr. Thompson, "the constitutional problem here was not apparent from the *indictment* but from the way that § 922(g) was interpreted and applied at trial." [29] It is Mr. Thompson's position that, "if the court had required the government to prove that [he] possessed a firearm 'in or affecting commerce,' there would be no constitutional problem." [30] And, Mr. Thompson adds, the motion is not untimely because the court did not make a final ruling on the jury instructions until after the trial started. [31]

The court agrees with the government that the nature of Mr. Thompson's motion – arguing that § 922(g)(1) is unconstitutional on its face and as applied – is more akin to a motion to dismiss for failure to state an offense under Rule 12 than a motion for judgment of acquittal under Rule 29. [32] In this case, it appears that the basis for Mr. Thompson's constitutional challenge to § 922(g)(1) was reasonably available or known to Mr. Thompson prior to trial and could have been resolved without a trial on the merits. As the government points out, the cases on which Mr. Thompson relies for his facial challenge are several years old, and the facts on which he relies for his "as applied" challenge were known or could have been ascertained prior to trial. [33] Moreover, as explained in greater detail below, the court's interpretation and application of § 922(g)(1) was not novel or new; it was consistent with long-standing, well-established precedent. [34] Similarly, although the court did not make a final ruling on the ***1296** disputed jury instructions until after the trial started, the court's instruction to the jury mirrored Tenth Circuit Criminal Pattern Jury Instruction 2.44, which the Tenth Circuit confirmed, more than a decade earlier, is the "the instruction designed to be given in § 922(g)(1) cases." [35]

[5] Notwithstanding the foregoing, to the extent Mr. Thompson's motion challenging the constitutionality of § 922(g)(1) can be construed as a motion for judgment of acquittal, the motion must be denied. The Tenth Circuit has squarely and repeatedly rejected commerce clause challenges to § 922(g)(1) like those advanced by Mr. Thompson.[36] The prior Tenth Circuit decisions are grounded in *Scarborough v. United States*,[37] wherein the Supreme Court held that, in addition to the other elements of the crime of being a felon in possession, the government need only prove that the firearm possessed by the defendant had been, "at some time, in interstate commerce."[38] While the Tenth Circuit has "acknowledged the apparent alteration in the Supreme Court commerce clause jurisprudence in light of *Gonzales v. Raich* [545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)], *United States v. Morrison* [529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000)], and *United States v. Lopez* [514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)],"[39] it has, nonetheless, consistently continued to uphold the constitutionality of § 922(g)(1), finding it is bound by Supreme Court and its own precedent.[40] Mr. Thompson's arguments do not permit this court to reject controlling authority,[41] and Mr. Thompson acknowledges as much in his motion.[42]

***1297** **[6]** Mr. Thompson's "as applied" challenge to § 922(g)(1) does not yield a different result. It is inconsequential that the firearm in this case was not for sale or had been removed from commerce by an "end user"[43] and, therefore, was supposedly no longer "in or affecting commerce" when Mr. Thompson possessed it. The Tenth Circuit has consistently rejected such "as applied" challenges. In the context of § 922(g)(1), binding precedent is clear: if a firearm has traveled across state lines, the minimal nexus with interstate commerce is met and the statute can be applied. No further showing of the actual effect of the defendant's actions[44] on interstate commerce is required.[45]

CONCLUSION

Because this court is bound by Supreme Court and Tenth Circuit precedent upholding the constitutionality of 18 U.S.C. § 922(g)(1), Mr. Thompson's motion is DENIED.

All Citations

671 F.Supp.3d 1290

Footnotes

1 Motion for Judgment of Acquittal, ECF No. 126, filed Feb. 14, 2023.

2 Indictment, ECF No. 1, filed Aug. 4, 2021.

3 *Id.*

4 Mot. to Dismiss Indictment, ECF No. 24, filed Nov. 23, 2021.

5 Mem. Dec. and Order, ECF No. 33, filed Jan. 1, 2022.

6 ECF No. 113.

7 *See, e.g.,* Def.'s Obj. to Proposed Jury Instr., ECF No. 94, filed Oct. 20, 2022; Govt's Mem. in Supp. of Tenth Circuit Crim. Pattern Jury Instr. 2.44, ECF No. 96, filed Oct. 23, 2022.

8 General Jury Instr. No. 18, ECF No. 120, filed Feb. 1, 2023.

9 *Id.*

10 Minute Entry, ECF No. 115.

11 Jury Verdict, ECF No. 122, dated Jan. 31, 2023, filed Feb. 1, 2023.

12 ECF No. 126.

13 *Id.* at 1.

14 *United States v. McKissick*, 204 F.3d 1282, 1289 (10th Cir. 2000) (citation omitted).

15 *United States v. Vallo*, 238 F.3d 1242, 1247 (10th Cir. 2001) (citation and alteration omitted).

16 *Id.* (citation omitted).

17 *United States v. Mullins*, 613 F.3d 1273, 1280 (10th Cir. 2010).

18 *Vallo*, 238 F.3d at 1247.

19 *Compare* ECF No. 120, Instr. No. 18 *with* Tenth Circuit Criminal Pattern Jury Instr. No. 2.44 at 158 (3d ed. 2021). *See United States v. Urbano*, 563 F.3d 1150, 1153 n.2 (10th Cir. 2009) (describing Tenth Circuit Criminal Pattern Jury Instruction 2.44 as "the instruction designed to be given in § 922(g)(1) cases").

20 ECF No. 120, Instr. No. 18.

21 ECF No. 130 at 2.

22 *Id.* at 1.

23 ECF No. 126 at 1.

24 *Id.* at 2–3 n.1.

25 ECF No. 129 at 5.

26 *Id.*

27 Fed. R. Crim. P. 12(b)(3).

28 ECF No. 130 at 2.

29 *Id.* at 3 (emphasis added).

30 *Id.*

31 *Id.* at 2.

32 *See, e.g., United States v. Hill*, 2:19-cr-189-DAK, 2020 WL 491261, at *1 (D. Utah Jan. 30, 2020) (concluding that defendant's constitutional void for vagueness challenge to the statute was untimely under Rule 12(b)(3) because it "could and should have been raised before trial"); *United States v. Wagoner*, 4:20-cr-00018, 2022 WL 17418000, at 3 (W.D.

Va. Dec. 5, 2022) (concluding that defendant's Rule 29 motion raising a constitutional challenge to § 922(g)(1) failed to comply with Rule 12(b)(3)(B)(v)'s requirement that any alleged defect in the indictment be raised by motion prior to trial); *see also, e.g., United States v. West*, 576 Fed. App'x 729 n.10 (10th Cir. 2014) (unpublished) (holding that under the current language of Rule 12(b)(3), a facial challenge to a statute based on a commerce clause argument must be timely raised).

33 ECF No. 129 at 7 (referring to ECF No. 126 at 4, citing cases decided between 1977 and 2006).

34 Given the well-established precedent construing the statute to require only a minimal nexus with commerce, Defendants routinely file pretrial motions claiming that § 922(g)(1) is an unconstitutional extension of the commerce clause, despite the indictment's "in or affecting commerce" language. *See, e.g., United States v. Kirby*, 490 Fed. App'x 113, 114 (10th Cir. 2012) (upholding district court's denial of defendant's motion to dismiss indictment and rejecting defendant's argument that Congress exceeded its power under the Commerce Clause in enacting § 922(g)(1)); *see also, e.g., United States v. Rambo*, No. 13-10123, 2013 WL 6231376, at *1 (D. Kan. Dec. 2, 2013) (denying defendant's motion to dismiss indictment and rejecting defendant's argument that § 922(g)(1) is unconstitutional because it reaches beyond the scope of Congress's power under the Commerce Clause); *United States v. Gibson*, 1:19-cr-59, 2021 WL 5908947, at *1 (N.D. Ind. Dec. 14, 2021) (denying defendant's motion to dismiss indictment finding that defendant's arguments that § 922(g)(1) exceeds Congress's Commerce Clause power have been repeatedly rejected by the circuit).

35 *Urbano*, 563 F.3d at 1155 & n.2 (upholding district court's refusal to instruct the jury in accord with pattern instruction 1.39, "which requires *some* effect on interstate commerce," and indicating that Criminal Pattern Jury Instruction 2.44 is "the instruction designed to be given in § 922(g)(1) cases").

36 *See, e.g., United States v. Campbell*, 603 F.3d 1218, 1220 n.1 (10th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Urbano*, 563 F.3d 1150, 1154 (10th Cir. 2009); *United States v. Dorris*, 236 F.3d 582, 586 (10th Cir. 2000); *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995).

37 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977).

38 *Id.* at 575, 97 S.Ct. 1963; *see United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006) (explaining that "*Scarborough* decided only a question of statutory interpretation about a previous version of the felon-in-possession statute, but the decision assumed that Congress could constitutionally regulate the possession of firearms solely because they had moved across state lines").

39 *Campbell*, 603 F.3d at 1220 n.1 (citations omitted).

40 *See, e.g., id.* ("Because we are bound by *Scarborough* and *Patton*'s holdings, we reject Defendant's Commerce Clause challenge to Section 922(g)(1)'s prohibition of felons' intrastate possession of ammunition that once traveled in interstate commerce."); *Patton*, 451 F.3d at 634 ("The constitutional understanding implicit in *Scarborough*—that Congress may regulate any firearm that has ever traversed state lines—has been repeatedly adopted for felon-in-possession statutes by this Court."); *see also, e.g., Kirby*, 490 Fed. App'x at 114–15 (affirming district court's judgment upholding the constitutionality of § 922(g)(1) "[b]ecause we, like the district court, are bound by Supreme Court and Tenth Circuit precedent upholding the constitutionality of 18 U.S.C. § 922(g)(1)").

41 *See United States v. Nichols*, 169 F.3d 1255, 1261 (10th Cir. 1999).

42 *See* ECF No. 130 at 4 (acknowledging that "the Tenth Circuit relied on *Patton* ... to reject a post-*Raich* facial challenge to § 922(g)(1) and recognizing, "[i]n light of *Campbell*," that "this court is precluded from finding that § 922(g)(1) is facially unconstitutional and press[ing] this argument to preserve it for future appeal").

43 Mr. Thompson's reliance on *United States v. Levine*, 41 F.3d 607, 614 (10th Cir. 1994), is misplaced. Although he finds language in *Levine* that seems to support his claim that evidence that the firearm was "taken out of commerce by an end user" should factor into the court's analysis, *Levine*, which was decided in 1994, considered the interstate nexus requirement in the context of a tainted consumer product. It would be improper for this court to seize upon language from an older consumer products case while ignoring more recent precedent directly addressing § 922(g)(1).

44 The defense also argues that "[o reasonable jury could have found that Mr. Thompson possessed a firearm 'in or affecting' interstate commerce." ECF No. 130 at 1. Even without the evidence of the firearm having traveled from Austria to Georgia to Utah, the defense claim would still be incorrect based on the evidence adduced at trial.

45 *Urbano*, 563 F.3d at 1154 (rejecting defendant's as "as applied" challenge to § 922(g)(1)); *Farnsworth*, 92 F.3d at 1006–07 (rejecting defendant's "as applied" challenge to § 922(g)(1) and reiterating that § 922(g)(1)'s "requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause").

End of Document

MS. CLIFFORD: The government has no objection to this instruction.

MR. MCMURRAY: Judge, we have a couple of objections with respect to the fourth element of this instruction. First of all, with respect to the statement that the fourth element is satisfied by the fact that the firearm had moved at some time from one state to another or from a foreign country to the United States. I think the court mentioned previously and we acknowledge that this language comes from Tenth Circuit pattern instructions. We would object to this language because as a general proposition this language removes a critical element of the -- from the jury's deliberation by telling the jury how that element is satisfied.

The fact that this has been given in other cases on different facts does not guarantee that it's appropriate in all cases. The text of Section 922(g) requires proof that the gun is in or effecting commerce. Not was, but it is a present tense requirement. At the time the possession of the gun must be in or effecting commerce. And the jury ought to be able to decide whether or not that element has been satisfied.

Our position, Your Honor, is that the fourth element should be given using the statutory language. If further instruction is needed about what that language

means, we could talk about what that might look like. But in this case, we have elicited testimony that the firearm, though it did have a nexus, at one point it did move in foreign commerce, it had reached its final destination, it was not for sale, it was owned by the Sandy Police Department, and therefore it was no longer in commerce.

12:38:50

At a minimum, the jury ought to be able to decide whether this element has been established. And as written, this instruction takes that issue away from the jury.

12:39:06

THE COURT: Okay. Thank you, counsel. So the Tenth Circuit pattern jury instruction reads, you know, the way that instruction number 18 does. It mirrors it. This element that is in here about the firearm had moved at some time from one state to another, or from a foreign country to the United States, is directly from that Tenth Circuit pattern jury instruction. Definitely applies to this case. If we had any doubt about it, the Tenth Circuit made it plain in the *Urbano* case that 244 is the correct instruction to give in this case and I am going to give it.

12:39:25

12:39:43

MR. MCMURRAY: Um, Your Honor, one other objection to this. Our position is that following the *Rehaif* case, we believe or we would argue that this fourth element is subject to a mens rea requirement of knowing. The Supreme Court in *Rehaif* explained, "That the mens rea for 922(g) is actually found in Section 924(a), specifically

12:40:06

A24
APPENDIX D
Government's Proposed Jury Instructions,
Case No. 2:21-cr-316 (D. Utah Sept. 23, 2022)

INSTRUCTION NO. 19

The defendant is charged in Count I of the Superseding Indictment with a violation of 18 U.S.C. § 922(g)(1). This law makes it a crime to possess a firearm or ammunition as a felon.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: Knowing he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year;

Second: The defendant knowingly possessed any firearm; and

Third: The firearm or ammunition was in or affecting commerce.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

INSTRUCTION NO. ___

Interstate and Foreign Commerce

Interstate commerce means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

Foreign commerce means commerce between any part of the United States (including its territorial waters), and any other country (including its territorial waters).

Tenth Circuit Pattern Criminal Jury Instructions 1.39

INSTRUCTION NO. ___

Interstate and Foreign Commerce – Effect On

If you decide that there was any effect at all on interstate or foreign commerce, then that is enough to satisfy this element. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate or foreign commerce.

Tenth Circuit Pattern Criminal Jury Instructions 1.39.1

A27
APPENDIX F
Government's Second Supplemental Proposed Jury Instructions,
Case No. 2:21-cr-316 (D. Utah Oct. 20, 2022)

TRINA A. HIGGINS, United States Attorney (#7349)
ANGELA JEAN CLIFFORD, Assistant United States Attorney (#17485)
JENNIFER K. MUYSKENS, Assistant United States Attorney (DC #475353)
Attorneys for the United States of America
Office of the United States Attorney
111 South Main Street, Suite 1800
Salt Lake City, Utah 84111-2176
Telephone: (801) 524-5682

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, vs. BRANDON KEITH THOMPSON, Defendant.	Case No. 2:21-CR-00316 DBB THE UNITED STATES' *SECOND* SUPPLEMENTAL PROPOSED GENERAL JURY INSTRUCTIONS Judge David Barlow

The United States, by and through the undersigned Assistant United States Attorneys, respectfully submits the attached second supplemental proposed general jury instruction to be included with the other submitted proposed general jury instructions.

This instruction is a modification of Proposed Instruction No. 19. (*See* ECF No. 69-2). This proposed instruction follows the Tenth Circuit Pattern Jury Instruction 2.44 *verbatim*. The United States is seeking this modification of Instruction No. 19 following a discussion with defense counsel on Tenth Circuit Pattern Jury Instructions 1.39 and 1.39.1 regarding interstate commerce. Defense counsel raised concern, with which the United States agrees, that the "commerce" referenced in Tenth Circuit Pattern Jury Instructions 1.39 and 1.39.1 should be clearly related to the movement of the firearm at

issue in this case. In review of the Tenth Circuit Pattern Jury Instruction, the United States noticed that Tenth Circuit Pattern Jury Instruction 2.44 clarifies that the commerce element is related to the firearm by expressly stating that the movement of the firearm through interstate or foreign commerce constitutes satisfaction of the commerce nexus element in 18 U.S.C. § 922(g)(1). Counsel for the defendant advised the United States of their objection to the use of Tenth Circuit Pattern Jury Instruction 2.44.

Tenth Circuit Pattern Jury Instruction 2.44 better clarifies all of the elements of the offense, including the interstate commerce element. Adoption of Tenth Circuit Pattern Jury Instruction 2.44 will avoid juror confusion about which items may affect interstate commerce, and most accurately tracks with the law of this Circuit.

The United States agrees with the use of this proposed instruction in the *preliminary* jury instructions as well, if the Court adopts this instruction for the *general* instructions.

The following is the United States' proposed revised Instruction No. 19, which tracks the language of Tenth Circuit Pattern Jury Instruction 2.44 *verbatim*:

(*Continued on the next page*)

INSTRUCTION NO. 19

The defendant is charged in Count I of the Indictment with a violation of 18 U.S.C. § 922(g)(1).

This law makes it a crime for any person who has been previously convicted in any court of a felony to knowingly possess any firearm, in or affecting interstate or foreign commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly possessed a firearm;

Second: the defendant was convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year, before he possessed the firearm; and

Third: before the defendant possessed the firearm, the firearm had moved at some time from one state to another or from a foreign country to the United States.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Tenth Circuit Pattern Criminal Jury Instruction 2.44

DATED this 20th day of October, 2022.

Respectfully submitted,

TRINA A. HIGGINS
United States Attorney

By: */s/ Angela Jean Clifford*
ANGELA JEAN CLIFFORD
JENNIFER K. MUYSKENS
Assistant United States Attorneys