United States Court of Appeals
For the Eighth Circuit

No. 23-3424

United States of America

Plaintiff - Appellee

v.

Darris Lamar Mull

Defendant - Appellant

Appeal from United States District Court
for the Western District of Missouri - Springfield

Submitted: May 8, 2024
Filed: August 29, 2024

Before SMITH, KELLY, and KOBES, Circuit Judges.

SMITH, Circuit Judge.

Darris Lamar Mull pleaded guilty to four counts of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). Mull's presentence investigation report (PSR) assessed a base offense level of 20 pursuant to U.S.S.G. § 2K2.1(a)(4)(B) because "the offense involved a semiautomatic firearm capable of accepting a large capacity magazine and [Mull] was a prohibited person at the time [he] committed the instant offense." R. Doc. 98, at 9. Mull objected, arguing that his

codefendant—not him—was responsible for that firearm. The district court[1] overruled the objection and sentenced Mull to 135 months' imprisonment. On appeal, Mull challenges the district court's application of the § 2K2.1(a)(4)(B) enhancement. Additionally, for the first time on appeal, Mull argues that 18 U.S.C. § 922(g)(1) violates his Second Amendment rights. We affirm.

I. *Background*

Mull, Cartevion Chapman, and Nicholas Caligone were together at a nightclub when someone began shooting in the parking lot. Caligone went outside and saw police marking off the perimeter. He also observed that his vehicle and Chapman's vehicle had been shot. Caligone spoke about the shooting with Helen Vernor, who has a child with Mull's brother. Vernor told Caligone that his vehicle and Chapman's vehicle were targeted because Mull may have stolen drugs and money from her house.

Mull, Chapman, and Caligone left the club and went to a hotel, where they met with other individuals. Chapman was armed with a Kel-Tec PLR-16 pistol—a "pretty big" gun—which he sat on the counter in the room where Mull was also present. R. Doc. 135, at 12. During this time, Mull received a call from his girlfriend, who informed him that Vernor and several other armed individuals were at Mull's home looking for him. Mull's children were home at the time. The armed individuals left Mull's residence upon learning children were present.

After the call, Mull and five or six individuals left the hotel and went to Mull's house to check on his family. Chapman and Mull rode with Caligone. Once at Mull's house, Caligone and Chapman stayed in the car. During that time, Chapman received

[1]The Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

multiple phone calls from Vernor, who requested that they come to her residence. When Mull came out of his house, he said, "Let's go to Helen's house." *Id.* at 16. Chapman rode with Caligone, while Mull rode with another friend.

Upon arriving at Vernor's home, Caligone attempted to park in the driveway, but Chapman told Caligone not to park there to avoid getting blocked in. Caligone then parked on the side of the road. Chapman got out and walked to another car where their friends were; Caligone stayed in his car talking on the phone. When Mull got out of his vehicle at Vernor's home, "people began shooting at him and his friends." R. Doc. 91, at 2. Mull and his companions returned fire. Specifically, Mull discharged a Smith & Wesson 9mm pistol, while Chapman shot back with the Kel-Tec. When Caligone heard the gunshots, he tried to leave, but Chapman jumped into his front-passenger seat. Caligone stopped again when Mull hit on the trunk of his car before climbing into the back seat.

Shortly thereafter, police pursued Caligone's car. Chapman told Caligone to keep driving. During the pursuit, Mull handed Chapman the Smith & Wesson, who then placed it in the glove box. According to Caligone, Chapman then passed the Kel-Tec "back to . . . Mull" in "the back seat." R. Doc. 135, at 20.[2] The Kel-Tec was "[t]oo big to fit in a glove box." *Id.* at 40. After stopping the vehicle, the police commanded the occupants to exit the vehicle. Caligone and Chapman got out, but Mull refused to comply and remained in the car. Chapman told a police officer that Mull had a gun. Eventually, Mull obeyed police commands to exit the vehicle. The police then searched the vehicle. Law enforcement could see in plain view the Kel-Tec protruding from underneath the back of the front-passenger seat, near where Mull had been sitting. It had a large-capacity 30-round magazine. In the glove box,

[2]In the factual basis for his plea, "Chapman stated he reached around from the front seat and hid the Kel-Tec . . . under the passenger seat." R. Doc. 60, at 2 (all caps omitted).

the police found the Smith & Wesson. A search conducted around Vernor's home uncovered shell casings matching the Kel-Tec and the Smith & Wesson firearms. Additionally, Mull and Chapman tested positive for gunpowder residue.

Mull was charged with four counts of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). Chapman and Caligone were also charged with one count of being a felon in possession of a firearm. Mull pleaded guilty, without a written agreement, to the four counts. The government and Mull stipulated as to the factual basis for Mull's guilty plea.

Prior to sentencing, the PSR calculated a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(B), based on the Kel-Tec's large capacity magazine. The PSR then assessed a two-level enhancement under § 2K2.1(b)(1)(A) for the number of firearms; a four-level enhancement under § 2K2.1(b)(4)(B) for a firearm with an obliterated serial number; and another four-level enhancement under § 2K2.1(b)(6)(B) for possession of a firearm in connection with another felony. After a three-level reduction for acceptance of responsibility, the PSR calculated a total offense level of 27. With a criminal history category of V, Mull's advisory Guidelines range was 120 to 150 months' imprisonment.

Mull objected to portions of the PSR, challenging his base offense level and application of the § 2K2.1(a)(4)(B) enhancement. In his objection, he noted that in Chapman's signed factual basis for his plea, Chapman admitted to knowingly possessing the Kel-Tec and to "putting the Kel-Tec . . . under [the] passenger side seat after the shooting." R. Doc. 98, at 31 (citing R. Doc. 60, at 2). Additionally, Caligone's plea agreement "emphasized that Chapman was carrying the 'lil machine gun' that matched the description of the Kel-Tec." *Id.* (citing R. Doc. 69). Mull pointed out that his stipulated factual basis admitted knowing possession of the Smith & Wesson, not the Kel-Tec. In his sentencing memorandum, Mull argued that it was not reasonably foreseeable to him that Chapman would possess the Kel-Tec and that

he did not constructively possess the gun. As a result, Mull contended that his base offense level should be 14, resulting in a much lower advisory Guidelines range of 70 to 87 months' imprisonment. He then requested a downward variance to 36 months' imprisonment.

At sentencing, Caligone testified about the shootout. Additionally, FBI Task Force Officer Brad Nicholson testified about the investigation, including the recovery of the Smith & Wesson and Kel-Tec firearms from the vehicle occupied by Caligone, Chapman, and Mull. At the conclusion of the testimony, the court indicated its "inclination" to overrule Mull's objection to application of the § 2K2.1(a)(4)(B) enhancement. The court found "[t]he most persuasive part of the enhancement" to be Caligone's "testimony regarding the [hotel room] when the gun was on the counter and [Mull] was present." R. Doc. 135, at 42.

The court afforded counsel the opportunity to comment before making its final determination. Mull's counsel argued that the enhancement should not apply because no evidence existed that Mull knew or had reason to know that Chapman was a felon and that Mull assisted Chapman in possession of the Kel-Tec. The district court expressed confusion as to this argument given that aiding and abetting was never an asserted theory of liability by the government. The government then gave two reasons for application of the § 2K2.1(a)(4)(B) enhancement. First, based on relevant conduct, Mull was involved in joint criminal activity with Chapman when they engaged in a shooting together. Second, Mull was in constructive possession of the Kel-Tec because he was aware Chapman had the gun and the gun was visible to him and within his reach in the vehicle. The district court overruled Mull's objection, stating that it "agree[d] with the arguments of the government." *Id.* at 47. It "adopt[ed] the factual content and the calculations [of the PSR] completely and in total." *Id.*

Ultimately, after hearing further arguments from the parties, the district court sentenced Mull to a total sentence of 135 months' imprisonment. The district court based its sentence on the 18 U.S.C. § 3553(a) factors and noted "that . . . the appropriate sentence in this case would be 135 months regardless of the ruling in the enhancement. So, in other words, if the enhancement objection would have been sustained, that would not have changed the sentence of a 135-month total sentence." *Id.* at 76.

II. *Discussion*

On appeal, Mull challenges the district court's application of the § 2K2.1(a)(4)(B) enhancement. Additionally, for the first time on appeal, Mull argues that 18 U.S.C. § 922(g)(1) violates his Second Amendment rights.

A. *Sentencing Enhancement*

Mull argues that the district court procedurally erred in applying the § 2K2.1(a)(4)(B) enhancement. *See United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (improper calculation of Guidelines range). "To the extent an asserted procedural error involves interpretation of the guidelines, we review the district court's construction and application of the [S]entencing [G]uidelines *de novo*." *United States v. Heath*, 624 F.3d 884, 886 (8th Cir. 2010). "We review factual findings at sentencing for clear error under the preponderance-of-the-evidence standard." *United States v. Fleming*, 103 F.4th 509, 514 (8th Cir. 2024).

Mull pleaded guilty to four counts of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). "[A] felon in possession of most firearms would have a base offense level of 14 . . . ." *United States v. Price*, 649 F.3d 857, 859 (8th Cir. 2011) (citing U.S.S.G. § 2K2.1(a)(6)). But "if . . . the . . . offense involved a . . . semiautomatic firearm that is capable of accepting a large capacity magazine," the base offense level is enhanced to 20. U.S.S.G. § 2K2.1(a)(4)(B). A "large capacity magazine" is a magazine capable of "accept[ing] more than 15 rounds of

ammunition." *Id.* § 2K2.1 cmt. n.2. The Kel-Tec—which Chapman used during the shootout—is indisputably a semiautomatic firearm capable of accepting a large capacity magazine. The only question is whether Mull's "offense involved" the Kel-Tec. *See id.* § 2K2.1(a)(4)(B).

"Under the Guidelines, where a guideline provides for more than one base offense level, the offense level is determined based on a defendant's relevant conduct." *United States v. Langford*, 533 F. App'x 948, 951 (11th Cir. 2013) (citing U.S.S.G. § 1B1.3(a); U.S.S.G. § 1B1.1 cmt. n.1(I) (defining "offense" as "the offense of conviction *and all relevant conduct* under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context" (emphasis added)). Relevant conduct includes

> in the case of a *jointly undertaken criminal activity* (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions that were—
>
> > (i) within the scope of the jointly undertaken criminal activity,
> >
> > (ii) in furtherance of that criminal activity, and
> >
> > (iii) reasonably foreseeable in connection with that criminal activity;
> >
> > that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense . . . .

U.S.S.G. § 1B1.3(a)(1)(B) (emphasis added). "The conduct of others that meets all three criteria . . . (i.e., 'within the scope,' 'in furtherance,' and 'reasonably foreseeable') is relevant conduct . . . ." *Id.* § 1B1.3 cmt. n.3(A). "When jointly

undertaken criminal activity is involved, the focus is on the acts and omissions for which the defendant is to be held accountable in determining the applicable sentencing range, not on whether the defendant is criminally liable for an offense." *United States v. McVay*, 996 F.3d 845, 849 (8th Cir. 2021) (citing U.S.S.G. § 1B1.3 cmt. n.1).

"In order to determine the defendant's accountability for the conduct of others . . . , the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement)." *Id.* § 1B1.3 cmt. n.3(B). "[T]he accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity." *Id.* In determining whether a defendant is accountable for another's conduct, "the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." *Id.*

The district court concluded that Mull's and Chapman's participation in the shootout at Vernor's home was jointly-undertaken-criminal-activity relevant conduct. "This finding was not clearly erroneous." *See United States v. Hogue*, 66 F.4th 756, 765 (8th Cir. 2023) (standard of review). First, the record supports a finding that Mull and Chapman agreed to jointly engage in criminal activity and that Chapman's possession and use of the Kel-Tec was within the scope of that activity. Mull does not contest that he and Chapman engaged in criminal activity by shooting firearms at Vernor's home. *See* R. Doc. 135, at 34–35, 37; R. Doc. 60, at 1-2; R. Doc. 91, at 2. And the evidence shows that Mull and Chapman *jointly* participated in the shootout at Vernor's home. At the time that Mull suggested that they go to Vernor's home, the men were aware that (1) Mull's dispute with Vernor involved drugs and money; (2) the shooting of Caligone's and Chapman's cars occurred *because of* this dispute; and (3) Vernor and several armed individuals had just gone to Mull's home looking for him. Additionally, while at the hotel, Chapman placed a "pretty big" Kel-Tec on the

counter in the same hotel room in which Mull was present. R. Doc. 135, at 12. When the three men departed the hotel for Mull's residence, they all rode together. Once at Vernor's home, Mull and Chapman engaged in a shootout before fleeing the scene together in Caligone's car. As a result, Chapman's use of the Kel-Tec was "within the scope of the jointly undertaken criminal activity." *Id.* § 1B1.3(a)(1)(B)(i).

Second, the record supports a finding that Chapman's possession and use of the Kel-Tec "was in furtherance of the jointly undertaken criminal activity." *Id.* § 1B1.3 cmt. n.3(C). Chapman used the Kel-Tec to return fire during the shootout at Vernor's home.

Finally, the record supports a finding that Chapman's possession and use of the Kel-Tec "was reasonably foreseeable" to Mull. *Id.* § 1B1.3 cmt. n.3(D). Based on the evidence previously discussed, Mull knew or should have known that *another* confrontation with gunfire would result from him, Chapman, and Caligone going to Vernor's home. This was not a "random ambush" as Mull suggests. *See* Reply Br. at 2. Indeed, Mull possessed and used a firearm at Vernor's residence and should have reasonably foreseen that Chapman would do the same. Mull admitted as much at sentencing, stating:

> So the guns—whoever had guns or whatever, like I said, this is another point where I need to be more attentive to myself and my own life, but it wasn't just Mr. Chapman who had a firearm. There were other people who carry firearms. I just was —like, it—you know, like, I'm drinking and just doing my thing. I wasn't really focused on people having guns. *So me knowing or not knowing, you know, I—I knew, but I didn't know.* Like, I wasn't like, oh, that's his gun, that's his gun. It was just, like, never nothing that was on my mind.

R. Doc. 135, at 55–56 (emphasis added).

In summary, the district court did not clearly err in finding that Mull's relevant conduct included Chapman's possession and use of the Kel-Tec as part of their joint criminal activity; therefore, the district court's application of the § 2K2.1(a)(4)(B) enhancement was not erroneous. [3]

B. *Second Amendment*

Mull next argues, for the first time on appeal, that his felon-in-possession convictions violate his Second Amendment rights because a federal firearm ban cannot be imposed except by amendment to the Constitution. He further asserts that even if Congress could ban a citizen's right to possess a firearm for prior convictions, those convictions must be historically recognized.

Mull concedes that plain-error review applies. *See* Appellant's Br. at 24; *see also United States v. Simmons*, 70 F.4th 1086, 1091 (8th Cir. 2023) (stating that to satisfy plain-error review, a defendant "must show (1) an error, (2) the error was plain, and (3) that it affected a substantial right").

We discern no error, plain or otherwise. Mull's argument is foreclosed by Eighth Circuit precedent. *See United States v. Jackson*, No. 22-2870, 2024 WL 3711155, at *4 (8th Cir. Aug. 8, 2024) (holding that 18 U.S.C. § 922(g)(1) did not violate the Second Amendment as applied to defendant whose predicate offenses were non-violent drug offenses); *United States v. Lowry*, No. 23-2942, 2024 WL 3819783, at *3 (8th Cir. Aug. 15, 2024) (holding that *Jackson* "foreclosed" the defendant's argument "that his conviction under 18 U.S.C. § 922(g)(1) violates his constitutional right to keep and bear arms under the Second Amendment"); *United States v. Cunningham*, No. 22-1080, 2024 WL 3840135, at *3 (8th Cir. Aug. 16,

[3]Because we hold that the district court did not clearly err in applying the § 2K2.1(a)(4)(B) enhancement to Mull based on relevant conduct, we need not address the government's argument that Mull constructively possessed the Kel-Tec or that the district court's application of the enhancement was harmless.

2024) (holding that *Jackson* "foreclosed" the defendant's argument "that the Second Amendment guaranteed his right to possess a firearm, despite his status as a twice-convicted felon, because neither of his prior offenses qualified as a 'violent' offense based on the elements of the crime" because "there is no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) as applied to a particular defendant").

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.
