

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 18-3669NE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL W. PARSONS

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Honorable John M. Gerrard, Chief United States District Court Judge

BRIEF OF APPELLANT

Submitted by:

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SUGGESTION OF ORAL ARGUMENT

This case comes before this Court pursuant to Appellant's appeal of his conviction pursuant to a jury trial and the sentence imposed by the Honorable John M. Gerrard. After sentencing the Appellant filed his timely Notice of Appeal. This Appeal raises the issue of the sufficiency of evidence to sustain the conviction based upon trial testimony and evidence thus if sufficient evidence existed to support the guilty verdict as to the Count of the Indictment. The Appellant respectfully suggests that the facts and legal arguments necessary to resolve the issues raised by this appeal may be presented in the briefs and the record.

However, if it is deemed that oral argument is necessary as it may significantly aid the Court in its review of this appeal should the Court believe such oral argument to be necessary, the Appellant would submit that no more than fifteen minutes of oral argument would be required for each side.

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STATEMENT OF JURISDICTION

1. Michael Parsons appeals from the Judgment and Sentence imposed by the United States District Court for the District of Nebraska pursuant to a jury verdict of guilty to the count of the Indictment with the Honorable John M. Gerrard presiding.

2. Federal jurisdiction over the subject matter of this case is proper pursuant to 18 U.S.C. § 3231 and 18 U.S.C. § 922 because Michael Parsons was charged with federal crimes.

3. The United States Court of Appeals for the Eighth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 based on entry of final judgment by the District Court on December 13, 2018.

4. Michael Parson's Notice of Appeal was filed on December 13, 2018, and is therefore timely pursuant to Fed. R. App. P. 4(b)(1)(a)(I).

5. This appeal is from a final judgment in a criminal case that disposes of all of the parties' claims.

STATEMENT OF THE ISSUES

I. WHETHER OR NOT SUFFICIENT EVIDENCE EXISTED TO CONVICT THE DEFENDANT AS IT RELATES TO THE COUNT OF THE INDICTMENT. WHETHER OR NOT THE DISTRICT COURT SHOULD HAVE SUSTAINED THE DEFENDANT’S MOTION OF JUDGMENT OF ACQUITTAL MADE AFTER THE GOVERNMENT RESTED. NO SUFFICIENT EVIDENCE EXISTED AS TO THE ESSENTIAL ELEMENTS NECESSARY AND REQUIRED IN THE CRIME CHARGED. THE TRIAL COURT SHOULD HAVE AS A MATTER OF LAW SUSTAINED THE RULE 29 MOTION.

United States v. Dukes, 432 F. 3d 910 (8th Cir. 2006)

United States v. Hamilton, 332 F.3d 1144 (8th Cir. 2003)

United States v. Patton, 899 F. 3d 560 (8th Cir. 2018)

United States v. White, 816 F. 3d 976 (8th Cir. 2016)

STATEMENT OF THE CASE

PURSUANT TO FRAP 28(a)(6)

An Indictment was filed in the United States District Court for the District of Nebraska on April 19, 2017 charging Michael Parsons with a violation of 18 U.S.C. 922(g) Felon in Possession of a Firearm. To this Indictment Parsons entered a plea of not guilty.

The Defendant went to jury trial on August 28, 2018 and was subsequently convicted pursuant to the jury verdict on August 30, 2018 to the Count contained in the Indictment (722:3-8).

Various versions/updates of the presentence report were prepared (hereinafter called “PSR”) which ultimately recommended that the Defendant be found to be in an offense level of 28 and a criminal history category III. The Defendant filed numerous objections to the PSR and subsequent Revised PSR complaining of various matters, including the sufficiency of the evidence as it related to the evidence to support the conviction of the Defendant and ultimately to the calculation by U.S. Probation as to the sentencing options available to the trial court and other conclusions and opinions tendered by the Probation Office. The sentencing hearing was held on December 7, 2018. Certain objections to the PSR by the Defendant were discussed as they related to essentially whether or not

the government had produced sufficient evidence to support the guilty verdicts and the admissibility of certain evidence. The Court overruled all objections to the PSR and determined that the Defendant was at an offense level 28 with a criminal history of III with a resultant guideline range of 97-120 months. (Sent. Trans: 772:3-9). After allocution the Court sentenced the Defendant to 84 months. (Sent. Trans:808:2-24).

The Defendant filed his timely Notice of Appeal on December 13, 2018. The Defendant contends that the trial court erred in; 1.) that the evidence at trial was insufficient to sustain his convictions on the charge contained in the Indictment as the government had completely failed to produce any evidence as it relates to the essential element the crime charged and that the Court erred when it did not sustain the Defendant's Motion for Acquittal pursuant to Rule 29 at the conclusion of the government's case and then renewed at the close of the Defendant's case. Clearly, this Motion should have been sustained as no evidence was adduced to support the conviction as necessary evidence had not been produced for the jury as to certain essential elements to be proved to the jury by proof beyond a reasonable doubt.

It is essential to restate the following and then to recite the facts of the case and trial testimony as follows: An Indictment was filed in the United States District Court for the District of Nebraska on April 19, 2017 charging Michael Parsons with a violation of 18 U.S.C. 922(g) Felon in Possession of a Firearm. To this Indictment Parsons entered a plea of not guilty.

Todd Weverka was the Board president of the Arapahoe Airport. (182:20-25). He along with others had access to a key to the hangar at the airport. (187:1-9). There was no video equipment at the airport. (187:10-22). The airplane in question that authorities believed Parsons flew into the Arapahoe Airport sat unattended for almost 3 months in the hangar at the airport. (195:6-17). Weverka also admitted going into the plane himself on numerous occasions. (196:3-12). He also believed that the plane had been moved around by others numerous times. (198:3-11). The plane was unlocked the entire 3 months it sat at the airport. (198:21-23). Weverka admitted that he had lied to law enforcement during the investigation of this matter and as a result entered into a diversion agreement with the federal government. (200:10-25; 201:1-2).

Sheriff Kurt Kapperman questioned the veracity and honesty concerning Weverka because Weverka had lied to him in the past. (264:2-19). The sheriff wanted Weverka to be indicted by the U.S. Attorney's Office. (285:6-13).

The sheriff was able to identify Parsons from identification located in the room in which Parsons was arrested. This identification indicated that Parsons was an Ambassador for the Chilcotin, the county of Chilcotin, the Tsilhqot'in Nation. (265:11-22).

The sheriff, testifying as to the items removed from the plane, indicated that no DNA or fingerprint analysis was conducted on any of the items to his knowledge. (270:2-14).

On March 10, 2017 at approximately 8:30a.m. the sheriff walked around the plane at the airport when he noticed that the door to the airplane was ajar. (278:6-13; 280:13-17). The last time the sheriff had seen the plane in January of 2017 the door to the airplane was locked because he had locked it himself. He was concerned because that would indicate that other people would have access to the inside of the plane. (280:18-25; 281:10-25).

FBI agent Monte Czaplewski testified that conducting an inventory search of the plane after the arrest of Parsons was a possibility. (434:9-11). This was discussed between the agent and the local sheriff. No inventory search of the plane was done. (434:18-25; 435:1-2, 20-25; 436:1-4). The plane sat for approximately 3 months before it was searched. (442:10-13).

The FBI agent further testified that he too had concerns with Weverka's truthfulness and that he was aware of Weverka being indicted by the federal prosecutors office and that Weverka was presently on a federal pretrial diversion program. (439: 5-25;440:1-22).

The agent testified that there was no DNA or fingerprint analysis available to link the weapon in question to Parsons. (444:12-19; 445:11-15).

After the government rested a Motion for a Judgment of Acquittal was made pursuant to Federal Rule of Criminal Procedure 29 in that the government had failed to make a prima facie case as to each and every material element of each and every charge of the Superseding Indictment. The trial court denied the motion. (571:12-25;572:1-25; 573:1-22).

Parsons testified on his behalf and told the jury that he is an Ambassador for the Tsilhqot'in Nation, country of Chilcotin. (628:15-20). Parsons outlined in detail his educational and employment history for the jury. (630:9-25; 631:1-20). Parsons also told the jury about his radio show Voice of Truth which exposes the corruption in government. (632:7-12). Parsons testified that he was on official business for the Tsilhqot'in Nation in January 2017. (635:10-15; 637:21-25).

Parsons was asked directly if he had put the gun in the plane or if he knew that the gun was in the plane. To both he answered in the negative. (644:4-10).

When the defense rested the Defendant renewed his Rule 29 Motion which the Court denied once again. (680:16-25; 681:1-7).

Parsons was convicted pursuant to the jury verdict on August 30, 2018 to the Count contained in the Indictment (722:3-8).

Various versions/updates of the presentence report were prepared (hereinafter called “PSR”) which ultimately recommended that the Defendant be found to be in an offense level of 28 and a criminal history category III. The Defendant filed numerous objections to the PSR and subsequent Revised PSR complaining of various matters, including the sufficiency of the evidence as it related to the evidence to support the conviction of the Defendant and ultimately to the calculation by U.S. Probation as to the sentencing options available to the trial court and other conclusions and opinions tendered by the Probation Office. The sentencing hearing was held on December 7, 2018. Certain objections to the PSR by the Defendant were discussed as they related to essentially whether or not the government had produced sufficient evidence to support the guilty verdicts and the admissibility of certain evidence. The Court overruled all objections to the PSR and determined that the Defendant was at an offense level 28 with a criminal history of III with a resultant guideline range of 97-120 months. (Sent. Trans:

772:3-9). After allocution the Court sentenced the Defendant to 84 months. (Sent.
Trans:808:2-24).

SUMMARY OF THE ARGUMENT

I. WHETHER OR NOT SUFFICIENT EVIDENCE EXISTED TO CONVICT THE DEFENDANT AS IT RELATES TO THE COUNT OF THE INDICTMENT. WHETHER OR NOT THE DISTRICT COURT SHOULD HAVE SUSTAINED THE DEFENDANT’S MOTION OF JUDGMENT OF ACQUITTAL MADE AFTER THE GOVERNMENT RESTED. INSUFFICIENT EVIDENCE EXISTED AS TO THE ESSENTIAL ELEMENTS AS REQUIRED IN THE CRIME CHARGED. THE TRIAL COURT SHOULD HAVE AS A MATTER OF LAW SUSTAINED THE RULE 29 MOTION.

ARGUMENT

I. WHETHER OR NOT SUFFICIENT EVIDENCE EXISTED TO CONVICT THE DEFENDANT AS IT RELATES TO THE COUNT OF THE INDICTMENT. WHETHER OR NOT THE DISTRICT COURT SHOULD HAVE SUSTAINED THE DEFENDANT’S MOTION OF JUDGMENT OF ACQUITTAL MADE AFTER THE GOVERNMENT RESTED. INSUFFICIENT EVIDENCE EXISTED AS TO THE ESSENTIAL ELEMENTS NECESSARY AND AS REQUIRED IN THE RIME CHARGED. THE TRIAL COURT SHOULD HAVE AS A MATTER OF LAW SUSTAINED THE RULE 29 MOTION.

ARGUMENT

The appellate court reviews the sufficiency of the evidence to support a guilty verdict in a light most favorable to the government and accepts as established all reasonable inferences supporting the verdict. The appellate court will then uphold the conviction only if it is supported by substantial evidence. It was not in this case and the court should have ruled in the Defendant's favor pursuant to the Rule 29 Motion as it related to the Count of the Indictment.

The evidence adduced by the government during their case in chief was wholly insufficient to find the Appellant guilty beyond a reasonable doubt as to the count of the Indictment. There was insufficient evidence as it relates to the requirement to prove beyond a reasonable doubt that Parsons "knowingly possessed" the gun or ammunition.

After the government rested a Motion for a Judgment of Acquittal was made pursuant to Federal Rule of Criminal Procedure 29 in that the government had failed to make a prima facie case as to each and every material element of each and every charge of the Indictment. The trial court denied the motion.

The appellate court reviews the sufficiency of the evidence to support a guilty verdict in the light most favorable to the verdict and accepts as established all reasonable inferences supporting the verdict. The appellate court will then uphold

the conviction only if it is supported by substantial evidence. United States v. Padilla-Pena, 129 F.3d 457,464 (8th Cir. 1997), cert. denied, ____ U.S. ____, 141 L.Ed. 2d 141, 118 S.Ct. 2063 (1998). “We will uphold the conviction unless no reasonable jury could have found the Defendant guilty beyond a reasonable doubt. United States v. Barrios-Perez, 317 F. 3rd 777 (8th Cir. 2003).

In order to convict the Defendant of the count of the Indictment the government had to prove each and every essential element of the crimes charged to the jury beyond a reasonable doubt. The government alleged that the Defendant had committed a certain crime. All of the essential elements have to be proved beyond a reasonable doubt as to the Defendant, and if not, the Defendant must be found not guilty of the crime charged.

The government had failed to prove all of the essential elements beyond a reasonable doubt. The Jury Instructions clearly, and without ambiguity, charge the jury with finding beyond a reasonable doubt that all essential elements of the crimes charged have been met by the government before a guilty verdict can be reached. One of the essential elements of the crime charged was that the government must prove that Parsons knowingly possessed the gun and ammunition in question.

Sufficiency of the evidence is highly fact intensive. United States v. Patton, 899 F.3d 560 (8th Cir. 2018). This Court reviews the sufficiency of the evidence de

novo. See: *United States v. Grimes*, 825 F.3d 899 (8th Cir. 2016). The Court will only reverse if there is no construction of the evidence that supports the verdict. *United States v. Provost*, 237 F.3d 934 (8th Cir. 2001).

In this case no witnesses testified that they observed Parsons put the gun or ammunition in the plane, nor did any witness testify that Parsons possessed either the gun or ammunition while at the Arapahoe Airport. In fact, the evidence clearly showed that the plane sat unattended for almost 3 months. The plane had been moved a number of times, and the door was found ajar by the local sheriff after he had locked it a number of months beforehand.

The government must prove that Parsons knew he had possession of the gun and ammunition. *United States v. Dukes*, 432 F.3d 910 (8th Cir. 2006). No witnesses could testify as to this essential element.

The government may argue that knowing possession may be actual or constructive. *United States v. Hamilton*, 332 F.3d 1144 (8th Cir. 2003). However, constructive possession requires that Parsons had dominion over the place where the gun and ammunition were located (the airplane). The problem with this argument is that the plane sat unattended for months, was moved numerous times by others and the door was unlocked after it had been locked earlier by law enforcement. Parsons had no access to this airplane after January 2017. It was searched by law

enforcement in March 2017. Parsons exercised no dominion over the plane during this very extended period of time. Even constructive possession of the firearm or ammunition requires knowledge of their presence. *United States v. White*, 816 F.3d 976 (8th Cir. 2016). No evidence was presented that Parsons placed the gun or ammunition in the airplane. It is unknown how and when the gun and ammunition got into the plane.

The review of a denial of a Motion pursuant to Rule 29 is de novo. *United States v. Hively*, 437 F. 3rd 752 (8th Cir. 2006). On a claim for insufficiency of the evidence, the court will review the evidence in the light most favorable to the verdict. The court will reverse only if no reasonable jury could have found the Defendant guilty beyond a reasonable doubt. *United States v. Plenty Chief*, 561 F. 3rd 846 (8th Cir. 2009). Given the insufficient evidence as to the essential element of “knowingly possessed” contained in the count of the Indictment no reasonable jury could have found the Defendant guilty.

A conviction is affirmed only where the evidence was “sufficient to convince the trier of fact beyond a reasonable doubt that the Defendant is guilty.” *United States v. Costanzo*, 4 F.3d 658 (8th Cir. 1993). Even viewing the evidence in the light most favorable to the Government and giving all reasonable inferences, the District Court clearly erred in finding the evidence sufficient to support the jury’s

verdict. Accordingly, the trial court should of sustained the Defendant's Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29. In ruling on a Motion for Judgment of Acquittal, the role of the District Court is not to weigh evidence or consider the credibility of the witnesses, but rather to determine whether the government has presented evidence on each element sufficient to support a jury verdict. United States v. Chavez, 230 F.3d 1089 (8th Cir. 2000). Where the government's evidence is equally strong to infer innocence as to infer guilt, the verdict must be one of not guilty and the court has a duty to direct an acquittal. United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971). A judgment of acquittal must be entered when "a reasonable fact finder must have entertained a reasonable doubt about the government's proof of one of the offense's essential elements." United States v. Teitloff, 55 F3d 391,393 (8th Cir. 1995).

Clearly, the Rule 29 Motion should have been sustained.

CONCLUSION

For the reasons stated herein, the Defendant-Appellant respectfully requests this Court to reverse the verdict and sentence of the Defendant for the reasons stated above, and remand the matter back to the District Court with instructions granting the Appellant a new trial.

Respectfully Submitted,

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Defendant-Appellant,

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CERTIFICATION OF COMPLIANCE/E-FILING

Pursuant to Rules 28A(d), 28(a)(10) and 32(a)(7)(C) of the Eighth Circuit Rules of Appellate Procedure, I hereby certify that the E-FILING containing the full text of the Appellant's Brief has been scanned for viruses and is virus-free. The brief was created using Corel WordPerfect Suite 9 and is e-filed in a PDF format.

Dated this 31st day of March, 2019.

/S/ DONALD L. SCHENSE_

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following by electronically filing the same, this 31st day of March, 2019:

U.S. Attorney's Office
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/S/ DONALD L. SCHENSE