

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

AARON WILSON

Defendant.

13-cr-326-WY

MEMORANDUM

YOHN, J.

July 23, 2014

On April 9, 2014, a federal jury convicted defendant Aaron Wilson of one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Wilson now files a motion for acquittal and a motion for a new trial on the basis that the government, in its rebuttal, relied on a theory of constructive possession unsupported by the evidence and not previously raised in argument. Because the evidence was sufficient to support a finding of actual possession and because the prosecutor's rebuttal argument does not violate the Due Process Clause, I deny Wilson's motions.

I. Background and Procedural History

On June 20, 2013, the government filed a sealed indictment against Wilson for violation of 18 U.S.C. § 922(g)(1). The indictment charged that:

Aaron Wilson having been convicted in a court of the Commonwealth of Pennsylvania of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed in and affecting interstate commerce a firearm, that is, a Beretta, model 92FS, 9mm Luger semi automatic pistol, serial number BER285314, loaded with fifteen 9mm Luger caliber cartridges.

Trial began on April 7, 2014. Three police officers who were at the scene of Wilson's arrest testified for the government: Clinton Cunningham, David Ewing, and Raymond Zukauskas. Cunningham testified that he removed a firearm matching the description in the indictment from Wilson's waistband, and Ewing and Zukauskas testified that they personally observed Cunningham remove such a firearm from Wilson's waistband.

On April 9, 2014, after the conclusion of testimony, Assistant U.S. Attorney Karen Fox delivered the government's summation. Arguing that Wilson possessed a firearm as charged, Fox pointed to Cunningham's, Ewing's, and Zukauskas's sworn statements that each observed such a weapon in Wilson's waistband. The remainder of her argument addressed challenges to Ewing's and Cunningham's credibility that had been raised in cross-examination.

Wilson's summation was delivered by Paul J. Hetznecker, Esq. Hetznecker argued at length that the officers' stories did not cohere. Hetznecker asserted that the weapon was, in fact, removed from a vehicle Wilson had been sitting in. According to Hetznecker, the officers falsely testified that the firearm was on Wilson's person because, were it known that the officers recovered the firearm from the car, the government could not have brought a successful prosecution. He summarized: "If they found the gun inside the car, how do you find him guilty of that gun? There's no evidence . . . If you don't have DNA and you don't have fingerprints, you have no evidence that my client ever possessed that gun. None."

Fox then delivered the government's rebuttal. The rebuttal focused on Hetznecker's contentions about the officers' motive to give false testimony. Fox stated:

Ladies and gentlemen, the defense would have you believe that the officers in this case lied—lied—to secure an arrest against the defendant. They'd have you believe that the defendant didn't possess the gun, it wasn't in his waistband, but instead it was in his car. And defense counsel asked you, if it was in the car, how were they going to arrest the defendant?

Well, ladies and gentlemen, the answer is clear. You don't—you don't—have to have a gun in your waistband to get arrested for possession of a gun. You don't have to have it right here, it doesn't have to be in your pocket or in your pants or in your hand. It can be in your car. You can possess something that's in your car. Think about it—you possess many things that are in your car, don't you?

Now, we're not, we're not arguing that the gun, in fact, was in the car. We've argued from the very beginning—and the testimony has shown—that the gun was in the defendant's waistband. But the insinuation here is that, unless the officers made up a lie and told you it was in his waistband as opposed to telling you they've alleged is the truth—that it was in the car—that somehow the defendant then couldn't be arrested, he wouldn't have committed a crime. The officers wouldn't have been able to do anything, so they had to concoct this lie.

That is simply not true. The court will instruct on the law—on what it means to possess something. You can possess something that's in your car. And if the defendant, previously convicted of a felony, possessed this gun—whether on his person or in his car—he is still guilty of the crime charged here. Why, then, if this was in the car would the officers need to make up a lie about him, it being in his waist? They could have arrested him, anyway. If it was in the car, they would have said so, the case would have been exactly the same.¹

On April 10, 2014, the jury returned a guilty verdict. On May 7, 2014, Wilson filed his motion for judgment of acquittal under Rule 29 and his motion for a new trial under Rule 33.

II. Discussion

A. Motion for Judgment of Acquittal

Rule 29 of the Federal Rules of Criminal Procedure authorizes a district court “to set aside [a guilty] verdict and enter an acquittal.” Fed. R. Crim. P. 29(c). “A motion for judgment of acquittal after a guilty verdict must be based on the ground that evidence presented at trial was insufficient as a matter of law to support conviction.” *United States v. Bellinger*, 461 F. Supp. 2d 339, 345 (E.D. Pa. 2006). “The critical inquiry on review of the sufficiency of the evidence to

¹ Indeed, the firearm need not have been on Wilson's person for him to possess it for purposes of 18 U.S.C. § 922. See Third Circuit Model Criminal Jury Instruction 6.18.922G-4 (“To ‘possess’ means to have something within a person's control. The government does not have to prove that [the defendant] physically held the firearm.”). See also Black's Law Dictionary 1351 (10th ed. 2014) (“Possession [is t]he fact of having or holding property in one's power; the exercise of dominion over property.”).

support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 424-25 (3d Cir. 2013) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307 (1979)). “A reviewing court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *McDaniel v. Brown*, 558 U.S. 120, 133 (2010).

18 U.S.C. § 922(g)(1) provides that “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 possess in or affecting commerce, any firearm or ammunition.” 18 U.S.C. § 922(g)(1). In his motion, Wilson contends that the evidence adduced against him was insufficient to demonstrate that he possessed a firearm as required for conviction. *See id.* According to Wilson, “the police officer’s assertion that the defendant was in actual possession of the weapon was discredited” and the evidence was not sufficient to support “the government’s argument of an alternative theory that he was in constructive possession of the weapon.”

Contrary to Wilson’s assertions, the record shows that the government did not switch from arguing actual possession to arguing constructive possession. *See Gov’t Rebuttal* (“We’re not arguing that the gun, in fact, was in the car. We’ve argued from the very beginning—and the testimony has shown—that the gun was in the defendant’s waistband.”). Although the government discussed the theory of constructive possession, it did so only to rebut Wilson’s contention that the law of possession motivated police to give false testimony regarding the location of the firearm. *See id.* (“[T]he insinuation here is that, unless the officers made up a lie

and told you it was in his waistband as opposed to telling you they've alleged is the truth—that it was in the car—that somehow the defendant then couldn't be arrested, he wouldn't have committed a crime. . . . That is simply not true.”).

As to actual possession, Wilson does not dispute that Officers Cunningham, Ewing, and Zukauskas each testified that they observed the charged firearm in Wilson's waistband. With three eyewitness accounts placing a firearm on Wilson's person, and, “viewing the evidence in the light most favorable to the prosecution,” as I must on a motion for acquittal, I cannot say that no “rational trier of fact could have found [possession] beyond a reasonable doubt.” *Caraballo-Rodriguez*, 726 F.3d at 424-25. Accordingly, I reject Wilson's challenge to the sufficiency of the evidence, and I will not vacate his conviction on that basis.

B. Motion for a New Trial

Independent of the sufficiency of the evidence, the Federal Rules of Criminal Procedure states that, “upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. Wilson contends that “the government's argument in rebuttal in complete contrast to the evidence presented at trial, that Mr. Wilson was in actual possession of the firearm, constitutes a variance which caused such prejudice to the defendant that it violated his rights under the Due Process Clause.” According to Wilson, “this improper variance warrants a new trial.”

A variance occurs “when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment.” *United States v. Daraio*, 445 F.3d 253, 261-62 (3d Cir. 2006). “The concerns raised by a variance argument are the fairness of the trial and the protection of the defendant's right to notice of the charges against her and her opportunity to be heard.” *Id.* Consequently, “a variance can result in

a reversible error only if it is likely to have surprised or otherwise has prejudiced the defense.”

Id. “A variance does not prejudice a defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, [or] (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense.” *Id.*

In this case, the indictment charged that Wilson “knowingly possessed . . . a Beretta, model 92FS, 9mm Luger semi automatic pistol, serial number BER285314, loaded with fifteen 9mm Luger caliber cartridges,” and, at trial, three police officers testified that they observed such a weapon in Wilson’s waistband. Accordingly, it cannot be said that “the evidence at trial prove[d] facts materially different from those alleged in the indictment.” *See id.* In any event, there is no prejudice: the government’s rebuttal presented no danger that Wilson would be prosecuted a second time for the same offense, and Wilson could not have been “misled or surprised at trial” by the defendant’s rebuttal when it was Wilson’s attorney—not the government’s²—who argued the firearm was recovered from the car. *See id.*

Wilson cannot show a variance in the government’s rebuttal, let alone a variance that casts doubt on “the fairness of the trial and the protection of the defendant's right to notice of the charges against her and her opportunity to be heard.” *See id.* The rebuttal does not, in the interest of justice, require a new trial. The statement by the prosecution was not an alternative theory of liability, but merely an appropriate response to the defendant’s argument that the officers had a motive to lie.

An appropriate order follows.

² Wilson’s attorney did not object to the rebuttal at trial, nor did he ask permission to make further argument in response to the government’s rebuttal argument.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

AARON WILSON

Defendant.

13-cr-326-WY

ORDER

AND NOW, this 23rd day of July, 2014, upon careful consideration of the motions filed by the defendant, Aaron Wilson, for judgment of acquittal and a new trial (doc. 59) and the government's opposition thereto, **IT IS HEREBY ORDERED** that the motions are **DENIED**.

s/William H. Yohn Jr.

William H. Yohn Jr., Judge.