

OCT 18 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KARUNA MANOTHAM,

Defendant - Appellant.

No. 09-30419

D.C. No. 3:08-cr-00506-HA-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, Senior District Judge, Presiding

Argued and Submitted October 4, 2010
Portland, Oregon

Before: TASHIMA, PAEZ and CLIFTON, Circuit Judges.

Karuna Manotham appeals his 37-month sentence imposed after his conviction for Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Manotham argues that the district court erred when it applied a four-level sentencing enhancement under U.S.S.G. § 2K2.1(b)(6) for the use of a firearm in connection with another felony. Although Oregon dismissed the state charges against Manotham, the district court properly found that his conduct constituted the Oregon felony offense of unlawful use of a weapon, in violation of Or. Rev. Stat. § 166.220, when he pointed a gun at another person during a road rage incident. Manotham contends, however, that unlawful use of a weapon is not “another felony offense” under § 2K2.1(b)(6) because it is a firearms possession offense that is expressly exempted by § 2K2.1, Application Note 14(C).

Focusing on the second part of the three-part test adopted by this court in *United States v. Valenzuela*, 495 F.3d 1127, 1134 (9th Cir. 2007), Manotham argues that unlawful use of a weapon is categorically a firearms possession offense because it contains as an element the possession of a firearm. We disagree. Although possession of a weapon is implicit where a person uses a weapon unlawfully, possession of a weapon is not an element of the offense. *See Oregon Criminal Jury Instruction No. 2403* (stating that elements of unlawful use of a weapon are [1] that the act occurred in the proper jurisdiction, [2] that the act occurred on or about a particular date, and [3] that the defendant intentionally attempted to use unlawfully against the victim any dangerous or deadly weapon).

Unlawful use of a weapon under Oregon law criminalizes unlawful *use* of a weapon, not mere possession. Accordingly, unlawful use of a weapon is not a firearms possession offense under the second prong of the *Valenzuela* test, and the district court's application of the § 2K2.1(b)(6) four-level enhancement was proper.

AFFIRMED.