

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER MICHAEL EMTER,

Defendant-Appellant.

No. 15-30364

D.C. No.

1:14-cr-00089-SPW-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

Submitted April 4, 2017**
Seattle, Washington

Before: **KOZINSKI** and **W. FLETCHER**, Circuit Judges, and
TUNHEIM,*** Chief District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

1. Evidence is admissible if the officers lawfully searched the area where the evidence was found and had probable cause to believe it was associated with criminal activity. See United States v. Stafford, 416 F.3d 1068, 1076 (9th Cir. 2005). Here, the officers had probable cause to believe the firearm was incriminating because they knew Emter was on probation, found Emter near where the gun was located and found the gun in a bin with men's clothing. The district court did not err in denying Emter's motion to suppress.

2. A district court has discretion to reject a defendant's proposed jury instruction when "other instructions given in their entirety cover the defense theory." United States v. Tucker, 641 F.3d 1110, 1122 (9th Cir. 2011). A "mere presence" instruction is not required when the government's case rests on "more than just a defendant's presence." Id. (internal quotation marks omitted). Because the government's case against Emter rested on more than his mere presence and the Ninth Circuit's model instruction for possession did not prevent Emter from arguing his defense theory, the district court did not err in rejecting Emter's alternate instructions as confusing or inapplicable.

3. There's no evidence that the district court misunderstood its discretion to depart from the sentencing guidelines, which the court expressly described as

“advisory.” Nor is there evidence that the court misunderstood the role of the Bureau of Prisons. The district court adequately considered all the evidence and arguments presented, and Emter’s sentence was reasonable.

AFFIRMED.