

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 8 2022

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 21-30278

Plaintiff-Appellee,

D.C. No.

v.

1:21-cr-00016-SPW-1

LONNIE BURDETTE PORTER,

MEMORANDUM*

Defendant-Appellant.

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

Submitted December 6, 2022**
Seattle, Washington

Before: McKEOWN, MILLER, and MENDOZA, Circuit Judges.

Lonnie Porter appeals the district court's denial of his pre-verdict motion for judgment of acquittal, as well as his sentence for one count of being a 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. Because we find that sufficient evidence supports the

* 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).

guilty verdict and that the district court correctly applied U.S.S.G. § 2K2.1(a)(6), we affirm.

I.

We review de novo the district court's denial of Porter's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(a). *United States v. Thongsy*, 577 F.3d 1036, 1040 (9th Cir. 2009). Porter argues the Government failed to present sufficient evidence that he knowingly possessed a firearm because it did not prove beyond a reasonable doubt that he had the power and intent to control the firearms. We disagree and affirm the district court.

When reviewing the sufficiency of the evidence, we must determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc). To prove possession of a firearm in shared premises, a showing of constructive possession is sufficient. *United States v. Carrasco*, 257 F.3d 1045, 1049 (9th Cir. 2001). This Court “has found that if a party has knowledge of the weapon and both the power and the intention to exercise dominion and control over it, then he has constructive possession.” *Id.* The Government introduced evidence establishing that Porter owns the home where the firearms were located, and that he himself reported four of them stolen. It would make little sense to

report the weapons as stolen if Porter did not intend to exercise dominion and control over them. When law enforcement arrived, Porter was alone in the home with unfettered access to the firearms and showed the responding officers where they were located. Porter also acknowledged to law enforcement that the firearms were his, and he apologized for having them in his home. Taking these facts together and viewing the evidence in the light most favorable to the Government, there was ample evidence for a reasonable trier of fact to find that Porter had both knowledge of the firearms and the power and intent to exercise dominion and control over them.

Porter also briefly alleges prosecutorial misconduct, arguing that the Government improperly instructed the jury to ignore the intent element and improperly attacked Porter's credibility. Porter proffers that absent this alleged misconduct, the Government would not have been able to prove its case. We disagree. Because these issues were not raised at trial, Porter must show that the district court plainly erred when it did not intervene to address the Government's argument. *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2000).

"When prosecutorial misconduct is alleged, the issue is whether, considered in the context of the entire trial, that conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly." *Id.* (internal quotation marks omitted). Because there was overwhelming evidence of Porter's guilt, and

because the jury was given proper jury instructions with the elements required to convict Porter under Section 922(g)(1), there is no reasonable possibility that the alleged prosecutorial misconduct affected the verdict. Thus, the district court did not plainly err by failing to intervene.

II.

We next turn to Porter's argument that the district court erred in applying U.S.S.G. § 2K2.1(a)(6) rather than U.S.S.G. § 2K2.1(b)(2) to determine Porter's base offense level. We review a district court's application of the sentencing guidelines for abuse of discretion and a district court's factual findings for clear error. *United States v. Ellis*, 241 F.3d 1096, 1099 (9th Cir. 2001); *United States v. Uzelac*, 921 F.2d 204, 205 (9th Cir. 1990) (per curiam). We now affirm.

Under Section 2K2.1(b)(2), a defendant can receive a reduction in his advisory guideline calculation to level 6 where the defendant "possessed all ammunition and firearms *solely* for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition." U.S.S.G. § 2K2.1(b)(2) (emphasis added). A defendant seeking this downward adjustment "bears the burden of proving, by a preponderance of the evidence, that he is entitled to the reduction." *Uzelac*, 921 F.2d at 205.

The district court found that Porter failed to meet this burden because two revolvers, at least one of which was loaded, were kept in the kitchen and away

from the other firearms. This positioning indicated to the district court that the revolvers were being used for personal protection and not *solely* for lawful sporting purposes or collection. Given this, as well as Porter's criminal history involving firearms, we affirm the district court's finding that Porter did not make the affirmative showing required for a downward adjustment under Section 2K2.1(b)(2). The district court therefore properly applied U.S.S.G. § 2K2.1(a)(6).

AFFIRMED.