UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT KWOK LEUNG KWAN,

Defendant.

CR06-305Z

ORDER

This matter comes before the Court on defendant's Motion for New Trial, docket no. 134. The Court GRANTED the motion after oral argument on August 3, 2007, and now enters this order further explaining its oral ruling.

Background

Prior to March 16, 2004, defendant Albert Kwok-Leung Kwan possessed *inter alia* two pistols and two shoulder stocks. One pistol, a Heckler & Koch VP70M, is capable of firing a three-round burst and therefore falls within the legal definition of a "machinegun." *See* 26 U.S.C. § 5845(b). The other pistol, a Heckler & Koch VP70Z,[1] is a semi-automatic, single-shot weapon, which alone does not constitute a firearm requiring registration under 26

[1] VP stands for Volkspistole ("the people's pistol") and the designation 70 is for the year the weapon was first produced (1970). Production of the weapon ceased in 1989. The letters "M" and "Z" were used to differentiate the Militär ("military") model from the Zivil ("civilian") version.

U.S.C. § 5861(d).[2] The two shoulder stocks are interchangeable and can be attached to either pistol. The stocks can also be used as a holster for either pistol. To enable the VP70M to fire three-round bursts, the shoulder stock must be attached; absent the stock, the VP70M will not operate in fully automatic (machinegun) mode. When combined with the VP70Z, however, the shoulder stock will not alter the firing mode, but the resulting weapon will constitute a single-shot rifle having a barrel of less than 16 inches in length, and will therefore qualify as a firearm requiring registration under § 5861(d). *See* 26 U.S.C. § 5845(a)(3) & (c).

On March 16, 2004, agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF") seized 19 weapons from defendant's home, operating under the impression that defendant was no longer permitted to possess the seized weapons because his dealer license had expired. Among the weapons confiscated was the VP70M machinegun, along with one of the two shoulder stocks. The VP70M, however, was a pre-1986 machinegun for which defendant was not required to have a dealer license. *See* 18 U.S.C. § 922(o) (prohibiting the possession of a machinegun except by or "under the authority of" governmental entities or if the machinegun was lawfully possessed before the effective date of the section, May 19, 1986); 27 C.F.R. § 479.105(d) (permitting a qualified dealer to possess sales samples of machineguns manufactured or imported on or after May 19, 1986).[3]

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[2] 26 U.S.C. § 5861(d) provides: "It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

[3] At oral argument, the Government conceded that defendant was legally entitled to possess the VP70M. In response to the Court's questions, the parties stipulated that defendant was required to have a license to possess the VP70M, that he (at one point) had the requisite license, that he was required to register the machinegun, and that he did so by paying the special (occupational) tax. The Court reaches the same conclusion as the parties, namely that defendant was legally entitled to possess the VP70M, based on both the parties' stipulation and the Court's review of the statutes and regulations at issue. The VP70M at issue falls within the "grandfather" exception to the ban on machineguns expressed in 18 U.S.C. § 922(o). As a result, defendant was never required to have a dealer license to possess the

On January 13, 2005, while executing a search warrant at defendant's home, ATF agents found the VP70Z, holstered inside the remaining shoulder stock. Although the VP70Z and shoulder stock were not assembled into a short-barreled rifle, due to the proximity of the parts, the Government proceeded against defendant on a charge of violating § 5861(d). After the presentation of evidence at trial, the Court instructed the jury that the Government must prove each of the following elements beyond a reasonable doubt:

> First, the defendant knowingly possessed a rifle having a barrel or barrels of less than 16 inches in length;
> Second, the defendant knew of the feature or features of the firearm that made it a short-barreled rifle; and
> Third, the rifle was not registered to the defendant in the National Firearms Registration and Transfer Record.

Instruction No. 18 (docket no. 131). The Court rejected defendant's proposed instruction, which would have added as a fourth element that "the defendant assembled the VP70Z into a short-barrel rifle." *See* Objections to Court's Proposed Instruction at 4 (docket no. 121). The jury found defendant guilty as charged in Count II.[4] Defendant subsequently filed a timely motion for a new trial.

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weapon. *See* 27 C.F.R. § 479.105(b). He was, however, obligated to register the weapon upon transfer to him, 26 U.S.C. § 5861(d), but he was exempt from the $200 transfer tax as a result of his status as a special (occupational) taxpayer, 26 U.S.C. § 5852(d). *See also* 26 U.S.C. § 5811; 26 U.S.C. § 5801 (special (occupational) tax for a dealer in firearms is $500 per year). With regard to the VP70M, defendant submitted the requisite ATF Form 3 titled "Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer (National Firearms Act)," which effectively registered the machinegun. Tr. Exh. A11. Thus, when defendant's dealer license expired, he was still legally entitled to possess the VP70M machinegun.

[4] The jury found defendant not guilty of Count I, which charged him with unlawful possession of a machinegun, namely a Winchester M-14 rifle. As a result of the jury verdict, Count I was dismissed.

Analysis

The Court may grant a new trial if "the interest of justice so requires." Fed. R. Crim. P. 33(a). The Court's power to grant a motion for new trial is much broader than its power to grant a motion for judgment of acquittal.[5] *United States v. Kellington*, 217 F.3d 1084, 1094-95 (9th Cir. 2000); *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992). In evaluating a motion for new trial, the Court need not view the evidence in the light most favorable to the verdict; rather, it may weigh the evidence and, in so doing, evaluate the credibility of the witnesses. *Kellington*, 217 F.3d at 1095; *Alston*, 974 F.2d at 1211. Moreover, if the Court concludes, despite the "abstract sufficiency of the evidence to sustain the verdict," that a serious miscarriage of justice might have occurred, it may set aside the verdict, grant a new trial, and submit the issues to another jury for determination. *Alston*, 974 F.2d at 1211-12 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)). Finally, the Court may grant a new trial to cure improper jury instructions. *United States v. Vicaria*, 12 F.3d 195 (11th Cir. 1994); *see United States v. Guthrie*, 814 F. Supp. 942, 947 (E.D. Wash. 1993) (citing 3 Charles Wright, Federal Practice and Procedure - Criminal § 556 (1982)), *aff'd*, 17 F.3d 397 (9th Cir. 1994). The Court need not be convinced that it committed reversible error, but rather simply that it could have exercised its broad discretion in crafting instructions in a manner more helpful to the jury. *Vicaria*, 12 F.3d at 198-99. The Court is now persuaded that Instruction No. 18 failed to provide adequate guidance to the jury concerning the central issue in the case and that a new trial is required in the interest of justice.[6]

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[5] During trial, the Court denied defendant's motion for judgment of acquittal.

[6] Defendant also argues that the Court erred in refusing to instruct the jury that wilfulness means "violation of a known legal duty." Defendant, however, never requested a wilfulness instruction and did not object to the absence of such instruction. *See* Proposed Instructions (docket nos. 103, 118, 121, & 125). Moreover, defendant provides no authority for the proposition that wilfulness is an element of the crime charged.

This case begins where previous cases interpreting the National Firearms Act (NFA) have ended, squarely raising the question whether § 5861(d) prohibits the possession of unregistered, unassembled parts of a firearm when the parts can serve a useful purpose other than aggregation into an unregistered firearm. In 1992, the United States Supreme Court addressed the related issue whether a manufacturer was required to pay a firearm tax when it packaged together a pistol, a 21-inch barrel, and a shoulder stock. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992). When assembled as intended, the pistol, the 21-inch barrel, and the shoulder stock formed an unregulated long-barreled rifle; however, if only the pistol and shoulder stock were combined, the resulting weapon would constitute a short-barreled rifle subject to the NFA. *Id.* at 507; *id.* at 523 (Scalia, J., concurring). The three-justice plurality, joined by the four dissenting justices, concluded that, when unassembled parts have no use in association with a gun other than converting it into a firearm, the parts constitute a firearm. *Id.* at 511-512, 512 n.5; *id.* at 523 (White, J., dissenting); *id.* at 525 (Stevens, J., dissenting). In *Thompson/Center Arms*, however, the manufacturer was providing an aggregation of parts that had an "obvious utility for those who want both a pistol and a regular rifle," *id.* at 513, and therefore, by packaging the kit of unassembled parts, the manufacturer had not "made" a firearm subject to the tax imposed under the NFA. *Id.* at 518; *see id.* at 519-20 (Scalia, J., concurring) (essentially concluding that "making" for purposes of the firearm tax at issue requires final assembly); *see also United States v. Zeidman*, 444 F.2d 1051 (7th Cir. 1971) (holding that a pistol and a detachable shoulder stock found in different drawers of the same dresser constituted a short-barreled rifle).

Although *Thompson/Center Arms* concerns the tax implications as opposed to the potential criminal liability associated with firearms, it provides substantial guidance regarding the proper analysis of unassembled components. At issue in *Thompson/Center Arms* was the $200 tax imposed "upon the making of a firearm." 26 U.S.C. § 5821.

Thompson/Center Arms Company produced a single-shot pistol called the "Contender," which included a removable barrel and handle. 504 U.S. at 508. Thompson/Center Arms also manufactured a "carbine-conversion kit," which contained a 21-inch barrel and a rifle (shoulder) stock. *Id.* When used as intended, the conversion kit parts could be exchanged with the Contender's 10-inch barrel and handle, respectively, to form an unregulated long-barrel rifle. *See id.* A consumer, however, could attach the rifle stock while the 10-inch barrel was still in place and thereby create a short-barreled rifle, which falls within the definition of a firearm. *See id.* If sold alone, the Contender did not constitute a firearm requiring payment of the $200 tax. Likewise, by itself, the conversion kit did not qualify as a firearm. The question presented was whether, when the Contender was sold with the conversion kit, did Thompson/Center Arms, in effect, "make" a firearm subject to the $200 tax.

In addressing the issue, Justice Souter, writing for the three-judge plurality, examined the legislative definition of "make," which includes "manufacturing," "putting together," "altering," "any combination" of these acts, or "otherwise producing a firearm." 26 U.S.C. § 5845(i). Justice Souter rejected Thompson/Center Arm's contention that the legislative definition required final assembly, concluding that such interpretation would render superfluous the catch-all phrase "otherwise producing a firearm." 504 U.S. at 510 ("Congress must, then, have understood 'making' to cover more than final assembly, and some disassembled aggregation of parts must be included."). He likewise disagreed with the Government's view that the Contender and conversion kit were analogous to a partially assembled bicycle, observing that "the crated bicycle parts can be assembled into nothing but a bicycle, whereas the contents of Thompson/Center's package can constitute a pistol, a long-barreled rifle, or a short-barreled version." *Id.*

The plurality opinion ultimately settled upon the following test for the "otherwise producing" means of make or making:[7] "an aggregation of parts that can serve no useful purpose except the assembly of a firearm" or "an aggregation having no ostensible utility except to convert a gun into such a weapon." *Id.* at 512-13. Because the Contender and conversion kit had an "obvious utility" as both a pistol and long-barreled rifle, Thompson/Center Arms was itself not making a firearm; however, the question remained whether the taxing provision covered the "mere possibility" that the consumer would assemble a regulated firearm. *Id.* at 513. Justice Souter answered in the negative, concluding that the statute was ambiguous, and applied the rule of lenity to resolve the issue in favor of Thompson/Center Arms. *Id.* at 517-18.

The Government relies heavily on two cases from the Eleventh Circuit that post-date *Thompson/ Center Arms*: *United States v. Kent*, 175 F.3d 870 (11th Cir. 1999), and *United*

[7] Justice Scalia, with whom Justice Thomas joined in concurrence, while agreeing with the conclusion that Thompson/Center Arms was not subject to the firearm tax for selling as a set the Contender and conversion kit, expressed significant concerns with the plurality's analysis. Justice Scalia would not have assigned an interpretation to the phrase "otherwise producing" that was in any way different from the terms preceding it in the statutory definition, namely "manufacturing," "putting together," or "altering." 504 U.S. at 520-21 (Scalia, J., concurring) ("I do not think that if 'making' requires 'putting together,' other language . . . becomes redundant. . . . As for the phrase 'otherwise producing,' that may well be redundant, but such residual provisions often are. . . . [A]n inflexible rule of avoiding redundancy will produce disaster."). In reaching his conclusion, Justice Scalia noted that, in the definition of "make," the term "manufacturing" is qualified by the clause "other than by one qualified to engage in such business under this chapter"; the phrase "putting together" is not likewise limited. *See* 26 U.S.C. § 5845(i). Thus, under Justice Scalia's reading of the statute, "one who assembles a firearm *and also engages in the prior activity of producing the component parts* can be immunized from being considered to be making firearms by demonstrating the relevant qualification, whereas one who merely assembles parts manufactured by others cannot." 504 U.S. at 520 (emphasis in original).

States v. Owens, 103 F.3d 953 (11th Cir. 1997).[8] Both cases, however, are distinguishable from the case before the Court. In *Kent*, the defendant possessed 16 firearms, including a short-barreled rifle discovered in two pieces. 175 F.3d at 871-72. The weapon had one lower receiver unit, and two interchangeable upper receiver units. *Id.* at 872. One upper receiver unit had a barrel longer than 16 inches and, when attached to the lower unit, the combination did not qualify as a firearm. *Id.* The other upper receiver unit, however, had a shorter barrel, and if assembled with the lower unit, would constitute a firearm. *Id.* When seized from the defendant's home, the lower receiver unit was attached to the longer upper receiver unit, and the shorter upper receiver unit was separate. *Id.* The defendant asserted that he possessed the short-barreled upper receiver unit only for the purpose of stripping it for parts, but the record contained no evidence that he had taken steps to do so. *Id.* at 872-73. Because the parts were located in the same small apartment and could be quickly exchanged, the Eleventh Circuit concluded that the defendant was appropriately convicted of violating § 5861(d). *Id.* at 877 ("The short-barreled upper receiver unit here clearly and easily can be used to convert the Colt AR-15 into a 'firearm' and has no other ostensible purpose aside from making such a conversion.").

In *Owens*, the defendant, while working at a consignment shop and in the presence of an undercover ATF agent posing as a potential customer, connected an Uzi mini-carbine to a seven-inch barrel, thereby forming an unregistered short-barreled rifle. 103 F.3d at 954-55. On appeal, the defendant argued that § 5861(d) suffers from ambiguity and that his due process rights were thereby violated. *Id.* at 955. The Eleventh Circuit left for another day the issue "whether the effect of the statute is uncertain with respect to other litigants"

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[8] *See also* *United States v. Santoro*, 2007 WL 1720474 (11th Cir.) (a recent unpublished opinion holding that a disassembled Cobray semi-automatic pistol and shoulder stock had no other "ostensible purpose" aside from conversion to a prohibited short-barreled rifle and therefore constituted a firearm).

because the defendant actually assembled a firearm in the presence of a government witness. *Id.*

The case before the Court picks up where *Kent* and *Owens* ended. In contrast to *Kent*, defendant here had two pistols that both fit the shoulder stocks at issue.[9] Defendant testified at trial that the shoulder stocks are easy to break and that he purchased the second stock as a spare. Because both stocks could be used in connection with the VP70M, and indeed were required to transform the weapon into a machinegun, which was its classification for registration purposes, the potpourri of parts in defendant's possession had an "obvious utility" aside from forming an unregistered short-barreled rifle. Moreover, unlike in *Owens*, defendant here did not assemble the VP70Z and shoulder stock; rather, he was using the shoulder stock as a holster. The Court agrees with the Government that serving as a holster does not constitute an "ostensible purpose," *see Zeidman*, 444 F.2d at 1053, but because defendant had another legal use for the shoulder stock, namely as a means for converting the VP70M into the machinegun it was registered to be, the Court concludes that, as to this defendant, § 5861(d) is ambiguous and that defendant is entitled under the rule of lenity to an instruction that in substance would require the Government to prove defendant had no ostensible legal purpose for possessing the VP70Z and shoulder stock. *See Thompson/Center Arms*, 504 U.S. at 518 (applying rule of lenity to resolve ambiguity).

The Government argues that the statute cannot be considered ambiguous because the meaning ascribed to it by defendant leads to absurd results. The Government uses as an example a situation in which a person possesses ten pistols, one of which is registered, and

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[9] Because the VP70M was improperly seized from defendant, the Court treats defendant as having constructive possession on the alleged date of offense of both the VP70M and the VP70Z, along with both shoulder stocks. *Cf. United States v. Miller*, 156 Fed. Appx. 281 (11th Cir. 2005) (holding that the defendant had constructive possession of ammunition inside an evidence bag on the edge of a police precinct loading dock because, although defendant had not yet retrieved the items, he had the power and intention to exercise dominion and control, which could be accomplished either directly or through others), *cert. denied*, 547 U.S. 1060 (2006).

ten stocks, and argues that, to allow the person to claim all ten stocks are associated with the one registered pistol is not consistent with the legislative intent underlying § 5861(d). Although Congress's purpose in enacting § 5861(d) was undoubtedly to require the registration of firearms, the Court cannot discern from the statutory language whether Congress meant to criminalize the possession of a spare stock for a registered firearm when the stock also happens to fit an unregistered pistol, converting it into a short-barreled rifle. Moreover, the Government's analogy differs in a fundamental way from the facts of this case. Defendant does not own identical pistols. The VP70M and VP70Z are sufficiently distinct that one required registration even absent the shoulder stock[10] while the other did not, and the one needed a shoulder stock just to make it function in the manner for which it is registered. Finally, the Court finds little cause for alarm in the Government's hypothetical because, to the extent a shoulder stock is combined with an unregistered pistol, final assembly would bring the person squarely within the parameters of § 5861(d).

The Court's analysis is consistent with written advice issued by the ATF in 2001. In a letter to a dealer in Missouri, the ATF opined:

> [S]ale of the [shoulder] stock and 16.25" barrel, even to persons who own Glock handguns, requires no NFA registration. Since the stock and barrel can be used to assemble a rifle that is not subject to the NFA, the "making" of a short-barrel rifle will occur only if the stock and the Glock handgun are actually assembled into a short-barrel rifle or are otherwise combined to make a short-barrel rifle.

Letter to Dennis M. Foutch dated Oct. 5, 2001 (Tr. Exh. A-13). Although describing a different type of weapon than the one at issue here, the ATF letter ruling is relevant in assessing whether the statute provided sufficient notice concerning what conduct was required or prohibited. A fundamental precept of our justice system is that citizens may not be "required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (quoting *Lanzetta v. New*

[10] Because the VP70M could be "readily restored to shoot" automatically, it required registration even without the shoulder stock. 26 U.S.C. § 5845(b).

Jersey, 306 U.S. 451, 453 (1939)). The ATF's interpretation of the NFA lends credence to defendant's contention that the jury instructions failed to adequately allow defendant to argue his theory of the case. *See Vicaria*, 12 F.3d at 198. The principles of due process require, in this case, some additional instruction, regarding defendant's right to possess both shoulder stocks as accessories for his VP70M machinegun. Rather than lacking a purpose other than converting the VP70Z into a firearm, the shoulder stocks had possible ostensible utility in connection with another weapon that defendant was legally entitled to possess.

For the foregoing reasons, the Court has GRANTED defendant's motion for a new trial.

IT IS SO ORDERED.

DATED this 15th day of August, 2007.

Thomas S. Zilly
United States District Judge