

United States of America  
First Circuit Court of Appeals

NO. 10-2178

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL VERDIN,

Defendant/Appellant

BRIEF OF APPELLANT

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## STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Michael Verdin was found guilty by a jury in the United States District Court for the District of Massachusetts, of being a felon in possession of a firearm and ammunition, contrary to 18 U.S.C. § 922(g).

The court (*Joseph L. Tauro, J.*), sentenced him to 180 months (15 years), committed.

A notice of appeal was filed on July 1, 2010.

## **STATEMENT OF ISSUES**

- I. Was there sufficient evidence to convict Michael Verdin of possessing a firearm or ammunition?
  
- II. Did the court err by allowing government a witness to testify regarding his supposed knowledge that Mr. Verdin used a weapon when the only evidence on the point was that someone else was its shooter, and did that testimony unlawfully prejudice the jury?

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

Two Massachusetts state troopers working in Brockton suspected unlawful activity connected with a black Lincoln. *1Trn.* at 79. On September 3, 2009 at about 10 P.M. they encountered it, followed it to Exchange Street, drove a short distance beyond where it parked, and discretely stationed their unmarked cruiser nearby. *1Trn.* at 32, 35, 125.<sup>1</sup> Exchange Street is a mixed commercial and residential area which has some street lighting but is generally dark. *1Trn.* at 34, 37-38, 44; *2Trn.* at 52. The two officers stayed in their car which they kept running, but attempted to avoid attention by facing forward away from the black Lincoln behind them. *2Trn.* at 56-57.

Separately, Michael Verdin had arrived on Exchange Street around 8 P.M. He had bought and shared some marijuana among the seven or eight others who were congregated near where the black Lincoln later parked, and was showing off his new motor scooter. *4Trn.* at 111-12, 117, 136-37.

Shortly after 10 P.M. someone fired three or five gunshots into the black Lincoln. At the time Mr. Verdin was talking on his cell phone on a porch slightly away from the group. *4Trn.* at 134, 148. The two unharmed occupants of the black Lincoln did not identify the person who shot into their car. *1Trn.* at 64-65, 74, 77,

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<sup>1</sup>There are five volumes of transcripts. They are cited *1Trn.*, *2Trn.*, etc., with the leading numerals referring to the day of trial as noted on the cover of each.

134. There were no other eyewitnesses to the shooting, but one of the congregants testified. He provided a description of a person, who approached the group with a gun just prior to the shooting, that did not match Mr. Verdin. He said the shooter wore a jacket and had a ponytail, and testified the shooter was someone other than Mr. Verdin. *4Trn.* at 137-140, 148, 165. The witness testified he heard rather than saw the shots, and that everyone immediately dispersed in different directions. *4Trn.* at 142, 150-51, 165.

When the two parked police officers heard the shots behind them, they instinctively ducked. *1Trn.* at 35-36, 89-91, 164. An instant later one saw a man jog backward along the side of their cruiser, and then turn and sprint forward and away from them. When the man was turned toward the police his face was unlit, and when he was in their headlight beams he had turned and faced away. Consequently neither officer saw the runner's face. *1Trn.* at 36, 51-52, 95, 98, 100-01, 164, 173; *2Trn.* at 6-7, 61-63, 71. The man had what the officers described as a small "gray metallic or silver color" automatic pistol in his grip. *1Trn.* at 170.

The runner then entered an alley, and the police drove along side of him with their blue lights on. At the end of the short drive, the police parked, got out, and chased on foot. *1Trn.* at 39-40, 165.

Although the police maintained sight of the man as he ran down the alley,

*ITrn.* at 166, they lost sight of him for a crucial three or four seconds as he went around the corner into the yard behind. *ITrn.* at 40-42, 109, 167. One of the officers saw a man in the backyard completing a throwing motion, and heard a thud on the roof of the building bordering the alley. *ITrn.* at 167, 175, 178-80; *2Trn.* at 8, 82-83, 105-06. But nobody observed a gun fly through the air from the man's hands to the roof. *2Trn.* at 105-06.

Neither officer could provide a useful description of the man they saw jogging, running, or throwing. Sergeant Lopes, who had been in the passenger seat, could not estimate the man's height, weight, build, hair color, hair length, or age, and could describe nothing about the man's clothing, its color, or whether he was wearing a jacket. *2Trn.* at 64-66, 81-82.

Beyond believing he was a "white male," Officer Connolly, who had been in the driver's seat, also could not estimate the man's height, weight, build, age, or hair-length, and remembered nothing about his clothes or what color they were. *ITrn.* at 38, 95-96. Officer Connolly did recall that the man had "reddish hair that was spiked up," but after he was arrested nobody gave any description of Mr. Verdin's coiffure, whether spiked or ponytailed.

A few moments later the two officers cornered and arrested Mr. Verdin, who was standing in a garden in the middle of the yard. *ITrn.* at 41-42, 115, 117, 166-69;



*2Trn.* at 7-8, 16, 30, 107, 144. The officers testified that the incident lasted perhaps 20 seconds. *1Trn.* at 42. Later, a gun was found on top of the roof adjacent to the alley. *1Trn.* at 124, 171; *2Trn.* at 13, 72, 178-79, 184, 189-90.

When he was arrested Mr. Verdin had nothing in his possession or nearby related to guns, ammunition, or firearms. *1Trn.* at 57, 118; *2Trn.* at 108; *3Trn.* at 73-74, 78. He did have \$180 and a small amount of marijuana wrapped in paper, which matched his explanation that he was in the vicinity for the purposes of “buying weed.” *1Trn.* at 120; *2Trn.* at 112-13; *3Trn.* at 52-53, 75; *4Trn.* at 117. The police found three shell casings in the street near where the shooting had occurred, *1Trn.* at 125, 170-71, and later retrieved bullets from the black Lincoln which matched the gun on the roof. *1Trn.* at 62, *3Trn.* at 102, 105; *4Trn.* at 51.

The police admitted, with reference to photographs offered at trial, that there were gaps in the fence surrounding the yard-and-alley which were known, thus creating an alternative entrance Mr. Verdin might have accessed upon everyone scattering from the gunshots. *1Trn.* at 110-12; 153-57; *4Trn.* at 157-59.

Mr. Verdin was charged with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). Mr. Verdin stipulated he had previously been convicted of a felony, and also that the gun and ammunition here had traveled in interstate commerce. GOVT.EXH 12A & 12B. He maintained however, that

he was innocent of possessing the weapon. After a 4-day trial in the Massachusetts District Court (*Joseph L. Tauro*, J.) a jury found him guilty. He was sentenced to 15 years committed.

## **SUMMARY OF ARGUMENT**

Michael Verdin first argues that the evidence to convict him was insufficient because no witness conclusively connected him with possession of a firearm. He then argues his trial was tainted by government testimony regarding its witness's supposed knowledge that Mr. Verdin used a weapon when the only evidence on the point was that someone else was the shooter.

## **ARGUMENT**

### **I. The Evidence is Insufficient to Convict Michael Virden of Possessing a Firearm**

Michael Verdin was in the vicinity of Exchange Street when somebody fired shots into the black Lincoln. The only eyewitness did not describe Mr. Virden as having a gun or firing the shots.

Fearing for his safety, Mr. Virden naturally fled along with everyone else when the shots were fired. Through the back fence, he may have unfortunately run into the same yard as somebody who had thrown the gun onto the alley roof.

The officers lost sight of the runner for a few crucial seconds. Their observations of the runner did not match Mr. Verdin on that evening, particularly the two possible distinctive hair styles. Thus it cannot be proven beyond a reasonable doubt he was ever in possession of a firearm.

Accordingly the Government has not proved guilt beyond a reasonable doubt, and Mr. Virden should be freed.

## II. Police Statements About Knowing Who the Shooter Was Prejudiced the Jury

Michael Virden was not charged with shooting the black Lincoln. Rather he was charged only with being in possession of a firearm. Nonetheless, during trial the lead witness – the State Trooper who was parked on Exchange Street – clearly expressed his conclusion that Mr. Verdin had been the shooter.

It is undisputed that the troopers did not see the shooting. *2Trn.* at 60.

Nonetheless, Trooper Connolly testified:

Q. Were you looking for information about the identity of the shooter or not?

A. No.

Q. Why is that?

A. That was *clear* the night of September, in September 2009 –

MR. CLIFFORD: Objection.

THE COURT: I am going to allow the motion to strike, that was clear.

MR. CLIFFORD: Thank you.

THE COURT: The rest can stand.

BY MR. BRAUNSTEIN

Q. So why were you not looking for information about the shooter?

A. Why was I not looking for? Because I *knew* who it was.

Q. Did you have any *doubt* as to who the shooter was?

A. No, I did not.

*1Trn.* at 63 (emphasis added). Later, when Trooper Connolly was being asked about his follow-up investigation concerning the occupants of the black Lincoln, he testified:

- Q. And you don't think it's relevant to show them photos of the alleged suspect?
- A. What you're not telling them is that we didn't have the Lincoln that night.
- Q. I'm asking you a question –
- A. I didn't think it was relevant, you're correct. *I knew who the shooter was.*

*ITrn.* at 139 (emphasis added).

There is no evidence whatsoever that Mr. Verdin was the shooter. The *only* evidence regarding the matter is that he was not. Defense witness Phiniess Macklin described the shooter's appearance and testified he had a ponytail. That does not match Mr. Verdin. The trooper's testimony, however, is definite and unambiguous, expressing that it was "clear," he "knew" and had no "doubt" that the shooter was Mr. Verdin.

The characterization was objected to by the defense lawyer and the issue was thus preserved.

The rules of evidence provide: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues [or] misleading the jury...." FED. R. EVID. 403. This court reviews error for abuse of discretion. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008); *Rodriguez v. Señor Frog's De La Isla, Inc.*, 642 F.3d 28, 36 (1st Cir. 2011).

Although commentary on collateral issues is not prejudicial when the collateral issues are related and therefore probative for the jury's determination, *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007), there is no such relation here. Who did the shooting here is not probative of anything – Mr. Verdin was not charged with that act.

The neighborhood was at least partially residential, and there were occupants of the car into which the gun was allegedly shot. Thus the statement merely misled and inflamed the jury against Mr. Verdin, and confused the jury because the charges pertain only to possessing a weapon, not shooting or threatening any motorists or residents.

Accordingly, Mr. Verdin's trial was tainted and his conviction should be reversed.

## CONCLUSION

For the foregoing reasons, Mr. Verdin's conviction should be reversed.

Respectfully submitted,

Michael Virden  
By his Attorney,

**Law Office of Joshua L. Gordon**

/s

Dated: February 28, 2012

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I hereby certify that on February 28, 2012, a copy of the foregoing will be forwarded to Dina Chaitowitz, Esq. United States Attorney's Office, District of Massachusetts.

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Dated: February 28, 2012

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I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X4, and that it contains no more than 2,251, exclusive of those portions of the brief which are exempted.

/s

Dated: February 28, 2012

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Joshua L. Gordon, Esq.



**ADDENDUM**

1. JUDGMENT IN A CRIMINAL CASE (Sept. 30, 2010) ..... 15