

DEC 26 2007

CATHY A. CATTERSON, 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NOT FOR PUBLICATION  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.

DENYS RAY HUGHES,

Defendant - Appellant.

No. 06-10615

D.C. No. CR-05-00759-EHC

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
Earl H. Carroll, District Judge, Presiding

Argued and Submitted October 19, 2007  
San Francisco, California

Before: HUG, W. FLETCHER, and CLIFTON, Circuit Judges.

Denys Ray Hughes appeals his conviction for possession of an unregistered silencer, possession of an unregistered destructive device, and attempted production of a biological toxin. We affirm the judgment of the district court.

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

First, Hughes argues that the district court erred in denying his motion to suppress evidence obtained pursuant to a warrant that was issued based on observations during a search of his car on July 7, 2005. Hughes contends that he did not freely and voluntarily give consent for the search, relying on *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326-28 (9th Cir. 1997). In considering the five voluntariness factors set forth in *Chan-Jimenez*, 125 F.3d at 1327, we conclude that the district court did not clearly err when it found that, at the time Hughes gave consent, the encounter was consensual and Hughes was not in custody. *See United States v. Washington*, 490 F.3d 765, 771-72 (9th Cir. 2007); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007); *United States v. Cormier*, 220 F.3d 1103, 1110-11 (9th Cir. 2000); *United States v. Del Vizo*, 918 F.2d 821, 824-25 (9th Cir. 1990). We further conclude that the district court did not clearly err when it determined that, viewing the voluntariness factors under the totality of the circumstances, Hughes's consent was free and voluntary. *See Washington*, 490 F.3d at 775-76; *United States v. Rodriguez*, 464 F.3d 1072, 1077-78 (9th Cir. 2006).

Second, Hughes contends that the district court erred in denying his motion to suppress the evidence from the initial entry into his Phoenix apartment on July 13, 2005. He argues that he withdrew his consent prior to the initial search. We

conclude that the district court did not clearly err when it found that his intent to withdraw consent to search the apartment was not objectively clear and unequivocal when it was communicated to officers who had no reason to know that he had granted such consent. *See Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991); *United States v. Gutierrez-Mederos*, 965 F.2d 800, 803-04 (9th Cir. 1992); *United States v. Brown*, 884 F.2d 1309, 1311-12 (9th Cir. 1989); *see also United States v. Sanders*, 424 F.3d 768, 774-75 (8th Cir. 2005).

Third, Hughes challenges the sufficiency of the evidence to support his convictions. Viewing the evidence in the light most favorable to the prosecution, we conclude that the trial record contains sufficient evidence to permit a rational trier of fact to find the essential elements of each crime beyond a reasonable doubt. *See United States v. Naghani*, 361 F.3d 1255, 1261 (9th Cir. 2004); *United States v. Johnson*, 229 F.3d 891, 894-95 (9th Cir. 2000). The prosecution presented evidence that Hughes brought the silencer devices into his home, and that Hughes was familiar with silencers and their components. This evidence would allow a rational juror to conclude beyond a reasonable doubt that Hughes knowingly possessed unregistered silencers. The prosecution presented evidence that all of the components necessary to assemble a pipe bomb were in Hughes's apartment, with the exception of a fuse. The prosecution also presented evidence that Hughes

knew how to use paper as a substitute for a traditional fuse. Therefore, a rational juror could conclude beyond a reasonable doubt that Hughes knowingly possessed an unregistered destructive device in the form of components that could readily be assembled into a pipe bomb.

With respect to the third count, attempted production of a biological toxin for use as a weapon, the prosecution presented evidence that Hughes possessed instructions for the manufacture of ricin and all of the necessary equipment and materials to follow those instructions. The prosecution presented further evidence that Hughes's mortar and pestle and food dehydrator tested positive for castor bean DNA. Based on this evidence, a rational juror could find beyond a reasonable doubt that Hughes had taken a substantial step toward the production of ricin. The prosecution also presented evidence of books in Hughes's possession as well as internet searches on Hughes's computer which, combined with Hughes's own statements and other physical evidence, would permit a rational juror to find beyond a reasonable doubt that Hughes intended to use the ricin as a weapon. *Naghani*, 361 F.3d at 1261; *cf. United States v. Baker*, 98 F.3d 330, 337-38 (8th Cir. 1996).

Fourth, Hughes claims that the district court erred in denying his request for a special verdict on the count of attempted production of a biological toxin.

Considering the instructions as a whole, we note that the court mitigated any risk of juror confusion by providing an explicit unanimity instruction for the substantial step element of the third count. We conclude that the court did not abuse its discretion in denying the request for a special verdict on that count. *See United States v. Reed*, 147 F.3d 1178, 1180-81 (9th Cir. 1998); *United States v. Jessee*, 605 F.2d 430, 431 (9th Cir. 1979) (per curiam) (as amended).

Fifth, Hughes argues that the district court erred in its response to a jury inquiry. “The necessity, extent and character of additional [jury] instructions are matters within the sound discretion of the trial court.” *United States v. Southwell*, 432 F.3d 1050, 1052 (9th Cir. 2005) (internal quotation marks omitted; alteration in *Southwell*) (quoting *Wilson v. United States*, 422 F.2d 1303, 1304 (9th Cir. 1970) (per curiam)).

The question posed by the jury was expressly answered in the jury instructions. The jury asked: “What is the definition of a weapon under law?” The district court responded to the jury inquiry: “This definition is not an issue in the case. Please refer to the Court’s instructions.” The jury instructions spoke directly to the issue that the jury had to decide:

To attempt to produce a toxin with the intent to “use as a weapon” means to attempt to produce a toxin with the intent to use it to injure or harm another person or persons. The government does not have to prove an intent

to kill another person or persons. Furthermore, intent to use as a weapon does not require the government to prove actual or attempted use of ricin.

The term “use as a weapon” does not include the attempted production of toxin for a peaceful purpose.

Hughes does not contend that this instruction was an improper statement of the law. At trial, defense counsel agreed that the inquiry should be answered by referring the jury back to the instruction already given. The disagreement as to the response was limited to the court’s additional statement that “[t]his definition is not an issue in the case.” It appears that the district court may have understood the jury’s question to concern the phrase “weapon under law,” rather than the single word “weapon.” The district court may have been mistaken in that understanding, but even if so, the court’s response was not misleading. The charge against Hughes was attempted production of a toxin “for use as a weapon” under 18 U.S.C. § 175(a). The jury did not have to find that the ricin was a weapon, but rather whether the intent was to use it as a weapon. It was the phrase “for use as a weapon” that was at issue, and the jury instruction provided all the information necessary to fully understand that phrase, so the court’s response, which explicitly referred the jury back to the instructions, was not erroneous. The charge, taken as a whole, was not “such as to confuse or leave an erroneous impression in the minds of the jurors.” *United States v. Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975)

(internal quotation marks omitted) (quoting *Powell v. United States*, 347 F.2d 156, 158 (9th Cir. 1965)); *cf. Southwell*, 432 F.3d at 1053. The district court did not abuse its discretion in responding to the jury inquiry.

Sixth, Hughes contends that his sentence was excessive. We conclude that the sentence was reasonable and that the sentencing judge sufficiently considered the factors listed in 18 U.S.C. § 3553(a) in applying the Sentencing Guidelines to Hughes's case. *See Rita v. United States*, 127 S. Ct. 2456, 2468 (2007); *United States v. Mix*, 457 F.3d 906, 912-13 (9th Cir. 2006); *United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006).

**AFFIRMED.**