

No. _____

In the
Supreme Court of the United States

Gail Manney,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Appendix

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Appendix A

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Appendix A

United States v. Manney,

114 F.4th 1048 (9th Cir. 2024)

Published Opinion Affirming Conviction

114 F.4th 1048

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Gail MANNEY, Defendant - Appellant.

No. 23-716

|

Argued and Submitted May 13, 2024 Phoenix, Arizona

|

Filed August 19, 2024

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Nevada, Howard D. McKibben, Senior District Judge, of making false statements on firearms transaction record, and she appealed.

Holdings: The Court of Appeals, de Alba, Circuit Judge, held that:

[1] Second Amendment did not bar defendant's conviction, and

[2] defendant's false statement that she was actual purchaser of firearms was "material" under statute of conviction.

Affirmed.

Procedural Posture(s): Appellate Review.

West Headnotes (9)

- [1] **Criminal Law** 🔑 Review De Novo
Court of Appeals reviews statute's constitutionality as matter of law de novo.
- [2] **Criminal Law** 🔑 Constitutional questions
Constitutional issues not originally raised at trial are reviewed for plain error.

[3] **Weapons** 🔑 Right to bear arms in general
Second Amendment guarantees individual right to possess and carry weapons in case of confrontation. U.S. Const. Amend. 2.

[4] **Weapons** 🔑 Violation of right to bear arms
Weapons 🔑 Right to bear arms in general
When Second Amendment's plain text covers individual's conduct, Constitution presumptively protects that conduct, and government must then justify its regulation by demonstrating that it is consistent with Nation's historical tradition of firearm regulation. U.S. Const. Amend. 2.

2 Cases that cite this headnote

[5] **Weapons** 🔑 Right to bear arms in general
Right secured by Second Amendment is not unlimited. U.S. Const. Amend. 2.

[6] **Weapons** 🔑 What guns are allowed
Weapons 🔑 Pistols and handguns
Handguns qualify as "arms" under Second Amendment. U.S. Const. Amend. 2.

1 Case that cites this headnote

[7] **Weapons** 🔑 Violation of right to bear arms
Whether regulation is covered by Second Amendment's plain text must be tied to conduct that regulation prevents individual from engaging in. U.S. Const. Amend. 2.

1 Case that cites this headnote

[8] **Weapons** 🔑 Violation of right to bear arms
Weapons 🔑 False statements to dealers
Federal statute prohibiting making of false statements in connection with firearm acquisitions was not statute regulating possession of firearms, and thus Second Amendment did not bar defendant's conviction for making false statements on firearms transaction record, even though information that

purchaser provided might trigger separate statute that might bar purchase of firearm; statute did not prohibit defendant from possessing firearms or from transferring those firearms to another individual. U.S. Const. Amend. 2; 18 U.S.C.A. § 922(a)(6).

1 Case that cites this headnote

[9] **Weapons** 🔑 False statements to dealers

Defendant's false statement that she was actual purchaser of firearms was "material" under federal statute prohibiting making of false statements material to lawfulness of firearm sale, even if actual purchaser could legally possess firearm. 18 U.S.C.A. § 922(a)(6).

1 Case that cites this headnote

***1049** Appeal from the United States District Court for the District of Nevada, Howard D. McKibben, District Judge, Presiding, D.C. No. 3:21-cr-00019-HDM-CSD-1

Attorneys and Law Firms

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Wendi L. Overmyer (argued) and Aarin E. Kevorkian, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender; Federal Public Defender for the District of Nevada, Las Vegas, Nevada; for Defendant-Appellant.

Before: Roopali H. Desai and Ana de Alba, Circuit Judges, and Philip S. Gutierrez, District Judge. *

OPINION

DE ALBA, Circuit Judge:

***1050** Gail Manney challenges her conviction under 18 U.S.C. §§ 922(a)(6) and 924(a)(2).¹ One of Manney's claims is that, as applied to the facts of her case, 18 U.S.C. §

922(a)(6) violates the Second Amendment.² We affirm her conviction.³

I. Factual and Procedural Background

18 U.S.C. § 922(a)(6) makes it a crime "for any person in connection with the acquisition or attempted acquisition of any firearm ... knowingly to make any false or fictitious oral or written statement ... with respect to any fact material to the lawfulness of the sale ... of such firearm."

On April 21, 2021, Manney and another individual went to Hi-Cap Firearms ("Hi-Cap"), a federal firearms licensee located in Reno, Nevada, to purchase firearms. Manney bought her first firearm from Hi-Cap earlier that week. While in the store, Manney was on her cell phone, talking and taking photographs of various firearms. She eventually chose seven handguns to purchase. A Hi-Cap employee provided her with copies of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Form 4473 for each of the seven handguns, which she needed to fill out and Hi-Cap needed to process before Manney could take the handguns. When Manney signed ATF Form 4473, she certified that she was the actual purchaser of the firearms.

After Manney left the shop, the Hi-Cap employee contacted the ATF on suspicion that Manney was a straw purchaser.⁴ ATF assigned the case to Special Agent Joshua Caron who then requested Hi-Cap provide the ATF Form 4473 Manney signed and surveillance footage from her purchase. After reviewing the footage, Agent Caron asked Hi-Cap to schedule Manney's pickup time so that he could conduct an interdiction.

Manney returned to Hi-Cap on May 6, 2021, and paid for the firearms. When she left the store with her purchase, Agent Caron approached her and informed Manney that he was concerned that she purchased the firearms for someone else. Manney denied the allegation but eventually agreed to accompany Agent Caron to the ATF Reno office to discuss the issue further. While at the office, Manney continued to deny that she purchased the firearms for someone else. She even consented to let Agent Caron look through her phone.

Agent Caron searched the phone and found numerous incriminating WhatsApp messages between Manney and her son, Razaaq, discussing the purchase of firearms.⁵ Razaaq is

a convicted felon who is prohibited from possessing firearms. On May 27, 2021, the government indicted Manney for a violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2) for making false *1051 statements on ATF Form 4473. She was convicted of the charges after a jury trial.

II. Legal Standard

[1] [2] “We review the constitutionality of a statute as a matter of law de novo However, constitutional issues not originally raised at trial are reviewed for plain error.” *United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012) (citations omitted). The parties disagree on the appropriate standard of review. We assume, without deciding, that de novo review applies as Manney's challenge fails under either standard.

III. Discussion

[3] The Second Amendment states that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Amendment guarantees an individual the “right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

[4] In *New York Rifle and Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022), the Supreme Court articulated the proper framework for analyzing Second Amendment challenges. “When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.” *Id.* at 24, 142 S.Ct. 2111. “The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.” *Id.* “Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.” *Id.* (quotation marks omitted). The Court used this framework to strike down New York's proper cause requirement, holding that the regulation burdened conduct the Second Amendment's plain text protects. *Id.* at 32, 142 S.Ct. 2111. It then concluded that the government failed to meet its “burden to identify an American tradition justifying the State's proper-cause requirement.” *Id.* at 70, 142 S.Ct. 2111.

Most recently, the Supreme Court applied the *Bruen* framework in *United States v. Rahimi*, 602 U.S. —, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024), and held that “[w]hen a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect.” *Id.* at 1896. The Court reiterated that “the right to keep and bear arms is among the fundamental rights necessary to our system of ordered liberty. Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense.” *Id.* at 1897 (internal citation and quotation marks omitted). The Court did not purport to “undertake an exhaustive historical analysis ... of the full scope of the Second Amendment.” *Id.* at 1903 (citing *Bruen*, 597 U.S. at 31, 142 S.Ct. 2111). And of note, it did not elaborate further on the conduct the Second Amendment's plain text covers. *See id.* at 1929 (Jackson, J., concurring) (“And the unresolved questions hardly end there. Who is protected by the Second Amendment, from a historical perspective? To what conduct does the Second Amendment's plain text apply?”).

[5] It is important to remember that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626, 128 S.Ct. 2783. Justice Kavanaugh emphasized this point in his concurrence in *Bruen*: “[T]he Second Amendment is neither a regulatory straitjacket nor a regulatory blank check. Properly interpreted, the Second Amendment *1052 allows a variety of gun regulations.” *Bruen*, 597 U.S. at 80, 142 S.Ct. 2111 (Kavanaugh, J., concurring) (citation and quotation marks omitted). In his *Bruen* concurrence, Justice Alito discussed the limited sweep of the Court's holding. “Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.” *Id.* at 72, 142 S.Ct. 2111 (Alito, J., concurring); *see also id.* at 76, 142 S.Ct. 2111 (“All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional.” (Alito, J., concurring)). And in *Rahimi*, Justice Kavanaugh discussed the ongoing validity of “traditional exceptions to the right.” *See* 144 S.Ct. at 1923 (Kavanaugh, J., concurring) (“[L]ongstanding ... laws imposing conditions and qualifications on the commercial sale of arms are presumptively constitutional.” (quoting *Heller*, 554 U.S. at 626–27, 128 S.Ct. 2783) (quotation

marks omitted)). We keep these words in mind as we review Manney's claim.

[6] Manney argues that § 922(a)(6), as applied to the facts of her case, violates the Second Amendment. To analyze her claim, we must first determine if the plain text of the Second Amendment covers Manney's conduct. Precedent has taught us that handguns qualify as “arms” under the Second Amendment. *Bruen*, 597 U.S. at 32, 142 S.Ct. 2111. Further, Manney is a member of “the people” the Second Amendment protects. The question then becomes what conduct does § 922(a)(6) regulate? Manney first argues that § 922(a)(6) regulates a purchaser's possessory interest by imposing information requirements for future transferees. Then, she frames the conduct more broadly by arguing that the statute inhibited her ability to acquire arms by regulating the purchase of firearms. Neither argument is persuasive.

Although the Supreme Court has yet to expound on all conduct the Second Amendment's plain text covers, it has not held that an individual can invoke the Second Amendment's constitutional protection by describing the conduct in question at such a high level of generality. Nor has the Court held that every requirement making it slightly more difficult to possess a firearm demands a full historical inquiry into its origin. Both *Bruen* and *Rahimi* dealt with prohibitions, or near prohibitions, on the ability to possess firearms. 597 U.S. at 11–13, 142 S.Ct. 2111; 144 S. Ct. at 1895–97. By prohibiting individuals from possessing firearms outside of the home absent some special need (*Bruen*) or when subject to a restraining order (*Rahimi*), the statutory provisions in each case directly implicated the right to bear and carry arms for self-defense. Accordingly, Manney's reading of the Court's recent decisions is too broad.

[7] Under Manney's characterizations of § 922(a)(6), any regulation related to the process of purchasing firearms would be covered by the Second Amendment's plain text, regardless of the conduct the statute regulates. For instance, even asking an individual to fill out the ATF 4473 form or making them wait a short time while their application is processed would come under Second Amendment's plain text. But whether a regulation is covered by the Second Amendment's plain text must be tied to “the conduct the regulation prevents [the individual] from engaging in.” *Doe v. Bonta*, 101 F.4th 633, 639 (9th Cir. 2024) (citing *Bruen*, 597 U.S. at 32, 142 S.Ct. 2111). We thus decline to stretch the holding of *Bruen* beyond its limits by adopting Manney's proposed view of § 922(a)(6).

*1053 [8] Instead, we find that § 922(a)(6) prohibits making false statements. The statute only relates to firearms insofar as it regulates statements made in connection with firearm acquisitions and information “material to the lawfulness of the sale.” But the regulated *conduct* is unrelated to the possession of a firearm. In other words, the statute regulates statements made by the individual purchasing a firearm to ensure that a purchaser is not lying to a firearms dealer about who is purchasing the firearm. The fact that the information a purchaser provides may trigger a separate statute that may bar the purchase of a firearm does not transform § 922(a)(6) into a statute regulating the possession of firearms.⁶

Taking all of this into consideration, as applied to the facts of her case, § 922(a)(6) did not violate Manney's Second Amendment right. The statute did not prohibit Manney from possessing firearms as evidenced by her ability to purchase a firearm shortly before her interaction with Agent Caron. Nor did it prohibit Manney from transferring those firearms to another individual. All the statute did was prohibit Manney from lying about the actual purchaser of the firearms.⁷ Because the Second Amendment does not protect an individual's false statements, the conduct § 922(a)(6) regulates falls outside the scope of the Second Amendment's plain text, and our analysis ends here.

Manney separately argues that her false statement was not “material” under § 922(a)(6) because 18 U.S.C. § 922(g)(1), which prohibits individuals with felony convictions from possessing firearms, is unconstitutional. The government argued at trial that Manney's statement that she was the actual purchaser of the firearms was false because she was purchasing them on behalf of her son, Razaaq. The government also presented evidence that Razaaq was convicted of a felony, and thus unable to purchase the firearms himself. Manney contends that because Razaaq can legally possess firearms, her statement falsely claiming to be the actual purchaser of the guns is not “material.”

[9] There are numerous issues with Manney's argument. We address only the most salient issue, which is that this argument *1054 is foreclosed by the Supreme Court's decision in *Abramski v. United States*, 573 U.S. 169, 134 S.Ct. 2259, 189 L.Ed.2d 262 (2014). In *Abramski*, the Court held that a false statement regarding the actual purchaser of a firearm was “material” under § 922(a)(6) even if the actual purchaser could legally possess a firearm.⁸ 573 U.S. at 171–72, 134

S.Ct. 2259. We are bound by precedent. As such, Manney's challenge of her conviction fails.

We conclude that Manney cannot establish that § 922(a)(6) violates her Second Amendment right under the facts of this case. Therefore, we **AFFIRM** Manney's conviction.

IV. Conclusion

All Citations

114 F.4th 1048, 2024 Daily Journal D.A.R. 7861

Footnotes

- * The Honorable Philip S. Gutierrez, United States District Judge for the Central District of California, sitting by designation.
- 1 18 U.S.C. § 924(a)(2) outlines the punishment for a violation of 18 U.S.C. § 922(a)(6).
- 2 Manney's other claims are disposed of in a concurrently filed memorandum disposition.
- 3 We vacate part of Manney's sentence as outlined in the memorandum disposition.
- 4 A "straw purchaser" is an individual who purchases a gun on another's behalf while falsely claiming that it is for herself. *Abramski v. United States*, 573 U.S. 169, 171, 134 S.Ct. 2259, 189 L.Ed.2d 262 (2014).
- 5 In the messages, Razaaq sent Manney a picture of a firearm, stating "[o]r any 4 you can get for the money." They then discussed different firearms to purchase. Razaaq also sent Manney another picture of a firearm, after which Manney asked "[s]o you want me to get that if they have it." In the messages, Manney and Razaaq referenced a future meeting between Manney and a friend of Razaaq's for some sort of exchange; they also show that Razaaq provided money to Manney.
- 6 The only other circuit to address a prosecution under § 922(a)(6) after *Bruen* came to a similar conclusion, albeit under different circumstances. In *United States v. Holden*, 70 F.4th 1015 (7th Cir. 2023), the Seventh Circuit addressed an as applied challenge to § 922(a)(6); there, the appellee argued that his false statement was not "material" because the statute that precluded him from possessing a firearm was unconstitutional. 70 F.4th at 1016–18. The Seventh Circuit disagreed, finding that Congress is entitled to seek certain information from would-be purchasers. *Id.* at 1017 ("The power to collect accurate information is of a different character—and stands on a firmer footing—than the power to prohibit particular people from owning guns."). It also concluded that the government may punish false statements even when it is not entitled to demand answers. *Id.* ("The word 'material' in § 922(a)(6) does not create a privilege to lie, when the answer is material to a statute, whether or not that statute has an independent constitutional problem."); see also *United States v. Scheidt*, 103 F.4th 1281, 1284 (7th Cir. 2024) ("Completing ATF Form 4473, and adhering to its attendant truth-telling requirement, is conduct that is outside the scope of the Second Amendment's protections, not requiring application of *Bruen's* historical analysis framework."). We agree.
- 7 And the Supreme Court has long held that defendants cannot avoid punishment for providing false information "in feigned compliance with a statutory requirement" by "challenging the validity of the requirement itself." See, e.g., *United States v. Knox*, 396 U.S. 77, 79, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969); *Kay v. United States*, 303 U.S. 1, 7, 58 S.Ct. 468, 82 L.Ed. 607 (1938); *LaChance v. Erickson*, 522 U.S. 262, 267–68, 118 S.Ct. 753, 139 L.Ed.2d 695 (1998); *Dennis v. United States*, 384 U.S. 855, 867, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).

8 For this reason, we do not address the constitutionality of § 922(g)(1).

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Appendix B

United States v. Manney,
No. 23-716, 2024 WL 3858826 (9th Cir. Aug. 19, 2024)
Memorandum Disposition Affirming Conviction,
Affirming Sentence in Part, Vacating Sentence in Part,
and Remanding

2024 WL 3858826

Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Gail MANNEY, Defendant - Appellant.

No. 23-716

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Argued and Submitted May 13, 2024 Phoenix, Arizona

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FILED AUGUST 19, 2024

Appeal from the United States District Court for the District
of Nevada Howard D. McKibben, District Judge, Presiding,
D.C. No. 3:21-cr-00019-HDM-CSD-1

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Before: DESAI and DE ALBA, Circuit Judges, and
GUTIERREZ, District Judge. *

MEMORANDUM **

*1 Gail Manney appeals her conviction and sentence under
18 U.S.C. §§ 922(a)(6) and 924(a)(2) on numerous grounds.
We have jurisdiction pursuant to 18 U.S.C. § 3231. We
address the majority of Manney's claims in this memorandum
disposition and affirm her conviction.¹ We also partially
vacate her sentence and remand the matter to the district
court for further proceedings consistent with *United States v.*
Montoya, 82 F.4th 640 (9th Cir. 2023) (en banc).

1. Manney argues that the district court improperly denied
her motion to suppress statements obtained in violation of her
Miranda rights. We review the denial of a motion to suppress
and whether an individual is constitutionally entitled to a
Miranda warning de novo. *United States v. Patayan Soriano*,

361 F.3d 494, 501 (9th Cir. 2004); *United States v. Craighead*,
539 F.3d 1073, 1082 (9th Cir. 2008). “An officer's obligation
to give a suspect *Miranda* warnings before interrogation
extends only to those instances where the individual is in
custody.” *United States v. Kim*, 292 F.3d 969, 973 (9th Cir.
2002) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495
(1977)) (internal quotation marks omitted).

Here, the totality of circumstances show that Manney was
not in custody at any point during her interaction with the
ATF agents. *See Craighead*, 539 F.3d at 1082 (holding that
an individual is in custody if a reasonable person in her shoes
would feel she is not at liberty to terminate an interrogation
and leave). The initial contact occurred in a public place. She
was told multiple times that she could terminate the encounter,
and she was never handcuffed or physically restrained. At the
ATF office, the agents conducted the interrogation in a calm
manner and left the door open if Manney wanted to leave. The
district court correctly denied Manney's motion.

2. Manney also argues that the district court improperly
denied her motion to suppress the contents of her cell phone.
“An individual may waive his Fourth Amendment rights
by giving voluntary and intelligent consent to a warrantless
search of his person, property, or premises.” *United States v.*
Torres-Sanchez, 83 F.3d 1123, 1129 (9th Cir. 1996). A district
court's finding that an individual voluntarily consented to a
search is reviewed for clear error. *Patayan Soriano*, 361 F.3d
at 501. Manney repeatedly told ATF agents that they could
search her phone. She also signed a written form consenting to
the search of her phone. Under the totality of circumstances,
the district court did not clearly err when it denied her motion
to suppress on this ground. *See United States v. Cormier*, 220
F.3d 1103, 1112 (9th Cir. 2000).

3. Manney challenges the district court's denial of her *Batson*
motion based on the prosecution's strike of one woman juror.
“The Constitution forbids striking even a single prospective
juror for a discriminatory purpose.” *Flowers v. Mississippi*,
588 U.S. 284, 303 (2019). “The issue comes down to whether
the trial court finds the prosecutor's race-neutral explanations
to be credible.” *Miller-El v. Cockrell*, 537 U.S. 322, 324
(2003).

*2 Here, the record supports the government's reasons
for the strike and there is no evidence that the prosecutors
lacked credibility. The government also did not misrepresent
the record or disproportionately question women jurors. *See*
Flowers, 588 U.S. at 302. Ultimately, Manney failed to

carry her burden to show that the juror was struck for a discriminatory purpose. See *United States v. Hernandez-Garcia*, 44 F.4th 1157, 1167 (9th Cir. 2022).

4. Manney claims that the district court erred by admitting evidence showing that her boyfriend and her son were prohibited from possessing firearms. Unpreserved evidentiary challenges are reviewed for plain error. See *United States v. Perez*, 962 F.3d 420, 447 (9th Cir. 2020). “Plain error is (1) error, (2) that is plain, and (3) that affects substantial rights.” *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc) (citation and internal quotation marks omitted).

Manney admits that she did not contemporaneously object to the admission of her son's (Razaq) and her boyfriend's (Brown) prohibited status. The government's theory below was that Manney was acting as a straw purchaser for her son. The evidence of Razaq's prohibited status was thus relevant to Manney's motive for the purchasing the firearms on his behalf and her false statements. See Fed R. Evid. 401. And while further testimony stating that Razaq was a “multi-convicted felon” with “several outstanding warrants” was likely erroneously admitted, see Fed. R. Evid. 403, its inclusion was harmless because of the strength of other evidence against her. See *United States v. Liera*, 585 F.3d 1237, 1244 (9th Cir. 2009). Similarly, Manney also fails to show that the inclusion of Brown's prohibited status affected her substantial rights. While Brown's status was discussed by the government, the government did not fixate on this piece of evidence at any point during the trial. Instead, the government repeatedly highlighted its strongest evidence: the messages between Manney and Razaq discussing the purchase of firearms.

5. Manney maintains that there is insufficient evidence to support her conviction. The sufficiency of the evidence to support a conviction is reviewed de novo. *United States v. Ruiz*, 462 F.3d 1082, 1087–88 (9th Cir. 2006). Reviewing the evidence in the light most favorable to the prosecution, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc) (internal quotation omitted). The messages between Manney and her son strongly suggested that Manney was purchasing the guns on her son's behalf. In the messages, they discuss the types of firearms to purchase; her son also mentions providing money to Manney for the purchase. Based on this evidence and other evidence adduced at trial, a rational trier of fact could find that

Manney's statement claiming to be the true purchaser of the firearms violated § 922(a)(6) beyond a reasonable doubt.

6. Manney contends that the district court erred by denying her motion for a new trial based on juror misconduct. “A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is a reasonable possibility that the extrinsic material *could* have affected the verdict.” *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (internal quotation omitted). However, “[n]ot every incident of juror misconduct or bias requires a new trial.” *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986) (quoting *United States v. Hendrix*, 549 F.2d 1225, 1229 (9th Cir. 1977)). Here, given the evidence in this case, the nature and brief discussion of the extrinsic material, the limited relevance of the extrinsic material, and the short time it took the jury to deliberate, the introduction of the material was harmless beyond a reasonable doubt. *Id.* (listing the factors relevant to assessing a motion for new trial based on the introduction of extrinsic evidence).

*3 7. Manney additionally argues that the district court erred by imposing a sentence on a clearly erroneous factual finding, imposing a substantively unreasonable sentence, and failing to orally pronounce or incorporate by reference thirteen discretionary standard conditions for supervised release.

The district court did not abuse its discretion when it imposed an 18-month sentence. See *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010) (holding that the district court abuses its discretion when its sentence is based on clearly erroneous fact); *United States v. Laurenti*, 731 F.3d 967, 976 (9th Cir. 2013) (holding that a sentence is substantively unreasonable when the decision not to impose a lesser sentence was, “illogical, implausible, or without support in inferences that may be drawn from the facts of the record” (internal quotation omitted)). It granted Manney a downward variance although it was not obligated to. The district court also stated its basis for the sentence while referencing 18 U.S.C. § 3553. Overall, the district court's sentence was well-reasoned and based on the evidence provided by both parties, as well as the evidence adduced at trial.

However, the district court erred by failing to orally pronounce the standard conditions of supervised release it intended to impose or provide Manney with a document containing these conditions prior to sentencing. See *Montoya*, 82 F.4th at 651. We vacate the imposition of the standard conditions of supervised release and remand this matter to

the district court so it can impose these conditions, if it so chooses, in a manner consistent with *Montoya. Id.* at 656 (requiring remand when district court fails to orally pronounce discretionary conditions of supervised release or incorporate them by reference during its pronouncement of judgment).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 3858826

Footnotes

- * The Honorable Philip S. Gutierrez, United States District Judge for the Central District of California, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
- 1 We address Manney's constitutional challenge to 18 U.S.C. § 922(a)(6) in a concurrently filed opinion.

Appendix C

United States v. Manney,

No. 23-716, Dkt. 55 (9th Cir. Sept. 25, 2024)

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 25 2024

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GAIL MANNEY,

Defendant - Appellant.

No. 23-716

D.C. No.

3:21-cr-00019-HDM-CSD-1

District of Nevada,

Reno

ORDER

Before: DESAI and DE ALBA, Circuit Judges, and GUTIERREZ, District Judge.*

The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable Philip S. Gutierrez, United States District Judge for the Central District of California, sitting by designation.

Appendix D

United States v. Manney,

No. 3:21-cr-00019-HDM-CSD, Dkt. 120

(D. Nev. Mar. 28, 2023)

Judgment of Conviction

UNITED STATES DISTRICT COURT
District of Nevada

UNITED STATES OF AMERICA)	JUDGMENT IN A CRIMINAL CASE
)	
v.)	
)	Case Number: 3:21-cr-00019-HDM-CSD
GAIL MANNEY,)	
)	USM Number: 49090-509
)	
)	<u>Kate Berry, AFPD</u>
)	Defendant's Attorney

THE DEFENDANT:
 pleaded guilty to count(s) _____
 pleaded nolo contendere to count(s) _____
 which was accepted by the court.

X was found guilty as to Count One of the single count Indictment filed 5/27/2021 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(a)(6) and 924(a)(2)	Illegal Acquisition of Firearms	4/21/2021	One

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

_ Count(s) _____ is/are dismissed on motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 28, 2023

Date of Imposition of Judgment

Howard D McKibben

Signature of Judge

HOWARD D. McKIBBEN, Senior U.S. District Judge

Name and Title of Judge

March 28, 2023

Date

DEFENDANT: GAIL MANNEY
CASE NUMBER: 3:21-cr-00019-HDM-CSD

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **Eighteen (18) months with credit for time served on federal charges.**

X The court makes the following recommendations to the Bureau of Prisons:
Recommendation for placement of defendant in a safe U.S. Bureau of Prisons facility as close to Reno, Nevada, as possible.

 The defendant is remanded to the custody of the United States Marshal.
The defendant shall surrender to the United States Marshal for this district:
at _____ a.m. _____ p.m. on _____
as notified by the United States Marshal.

X **The defendant shall surrender for service of sentence at the institution designated by the U.S. Bureau of Prisons:**
at 12:00 p.m. on Thursday, April 27, 2023.
as notified by the United States Marshal.
as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: GAIL MANNEY
CASE NUMBER: 3:21-cr-00019-HDM-CSD

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **Three (3) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 104 tests annually.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, or are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: GAIL MANNEY
CASE NUMBER: 3:21-cr-00019-HDM-CSD

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchukus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the specific risks posed by your criminal record and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the specific risks posed by your criminal record.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office User Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's signature _____

Date _____

APP 14a

DEFENDANT: GAIL MANNEY

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SPECIAL CONDITIONS OF SUPERVISION

1. **Residential Reentry Center** – If you do not have an approved residence for release, you must reside in a residential reentry center for a term of 120 days. You must follow the rules and regulations of the center.
2. **Search and Seizure** - You shall submit to the search of your person, property, residence, or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release, based upon reasonable suspicion of evidence of a crime or contraband or a violation of supervision.

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 CASE NUMBER: 3:21-cr-00019-HDM-CSD

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
\$100.00	N/A	None	N/A	N/A
Due and payable immediately.				

The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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Clerk, U.S. District Court
 Attn: Financial Officer
 Case No. 3:21-cr-00019-HDM-CSD
 333 Las Vegas Boulevard, South
 Las Vegas, NV 89101

TOTALS \$ _____ \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the ___ fine ___ restitution.

the interest requirement for the ___ fine ___ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant’s ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$100.00 due immediately, balance due
 not later than _____, or
 in accordance with _____ C, _____ D, _____ E, or _____ F below; or
- B Payment to begin immediately (may be combined with _____ C, _____ D, or _____ F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant’s ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons’ Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number	Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant’s interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.