

NO. 08-1089
Consolidated with 08-1069

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RICKY L. FINES and
LEROY F. MILLER,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
CASE NO. 3:04-cr 138
THE HONORABLE ALLEN SHARP, U.S. DISTRICT COURT JUDGE

BRIEF AND REQUIRED SHORT APPENDIX
OF DEFENDANT-APPELLANT, RICKY L. FINES

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DISCLOSURE STATEMENT

Appellant Court No: **08-1089**

Short Caption: **Ricky L. Fines, Appellant vs. United States of America, Appellee**

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1 .

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information.

The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Ricky L. Fines

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

**Matthew D. Soliday, Attorney at Law, 205 East Jefferson Street,
Valparaiso, Indiana 46383**

(3) If the party or amicus is a corporation:

- i) Identify all its parent corporations, if any; **N/A**
- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: **N/A**

Date: _____

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in a criminal case entered by the United States District Court, Northern District of Indiana, South Bend Division. The District Court had jurisdiction of this criminal prosecution under 18 U.S.C. § 3231. Following a jury trial, the Defendant was found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. §922 (g)(1). A final judgment in a criminal case was entered by the District Court on January 2, 2008. Appellant Fines filed his timely notice of appeal on the 10th day of January, 2008. He then filed a docketing statement on January 18, 2008. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

- I. Did the trial court err by admitting a folder of receipts for gun parts over objections?
- II. Did the trial court err by admitting a photograph of Fines saluting, sitting under a gun rack?
- III. Whether there was insufficient to support the jury verdict if Government's exhibits 11 and 12 were not admitted?

This Court has ordered this appeal consolidated with the appeal of co-defendant Leroy F. Miller, Appeal no. 08-1069. In accordance with this Court's order of consolidation, the Appellant Fines hereby adopts the issue of insufficiency of the evidence made by appellant Miller in his brief, as more fully set forth therein.

STATEMENT OF THE CASE

Appellant Fines hereby adopts and incorporates by reference Appellant Miller's statement of the case, pursuant to the Court's consolidation Order.

STATEMENT OF THE FACTS

Appellant Fines hereby adopts and incorporates by reference Appellant Miller's statement of the facts, pursuant to the Court's consolidation Order.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion by admitting a photograph of Fines saluting under a gun rack when the date of the photograph was in question, and the timing of when the photograph taken was questionable. Also, the trial court abused its discretion by admitting a folder containing receipts for guns and gun parts over objections. Without this inadmissible evidence, there would have been insufficient evidence to support a jury verdict of guilty. The photograph of Fines was admitted into evidence only after a leading question by the government for when the photograph was taken. The receipts were admitted into evidence based on the Government's purpose of domain, which was not in dispute. The receipts were hearsay, lacked sufficient foundation and should not have been admitted into evidence. Both the receipts and photograph were highly prejudicial to Fines, which resulted in an unfair trial.

ARGUMENT

Standard of Review: A trial court's evidentiary rulings are treated with deference and will be upheld, unless it is clear that the trial judge has abused his discretion. *United States vs. Bonty*, 383 F.3d 575, 579 (7th Cir. 2004).

During the government's case in chief, Agent Ellis testified as to certain exhibits that the defense objected to. (Tr. Vol. I, pg. 90) Government exhibit 11 contained receipts for firearms, parts, purchases and other firearms - related information in the names of Fines and Miller. (Tr. Vol I, pg. 90) Government's exhibit 12 and 13 were photographs of Fines and Miller.

ISSUE I: THE TRIAL COURT ERRED BY ADMITTING A FOLDER OF RECEIPTS FOR GUNS AND GUN PARTS.

Regarding government's exhibit 11, an objection was made on the grounds of hearsay and foundation. (Tr. Vol I, pg. 96) Exhibit 11 contained receipts that the defense believed were being offered for their truth concerning who purchased what guns or parts of guns. (Tr. Vol I, pg. 96) The Government claimed that they were offering the documents as admissions in the same way that evidence of domain are admissions and cited *United States vs. Serrano*, 434 F.3d 1003 (7th Cir.). The government argued that the documents contained in exhibit 11 showed the connection between Mr. Fines and Mr. Miller in their collection of firearms. (Tr. Vol I, pg. 98) The Trial Court found that it was a close call and was determining whether Federal Rule of Evidence 403 presented enough reasons not to admit the documents. (Tr. Vol I, pg. 101) The judge even told the government "You may regret it. You may wish that you hadn't done it, but I am going to admit government's exhibit 11 in its entirety over its objection." (Tr. Vol I, pg. 101). The Judge was reluctant to admit government's exhibit 11. Fines submits that the

trial court did abuse his discretion by admitting this exhibit, as a violation of the Federal Rules of Evidence.

While a close evidentiary decision, exhibit 11, the exhibit should not have been admitted into evidence. That evidence was highly prejudicial and was objected to on hearsay grounds, foundation grounds, and Federal Rule of Evidence 403. (Tr. Vol I, pg. 96). The Government's reliance on *U.S. vs. Serrano* 434 F.3d 1003 (7th Cir. 2006) was misplaced. There was plenty of other evidence introduced at the trial, that Fines actually lived in Mr. Miller's house.

In *Serrano*, the defendant was convicted under the aiding and abetting statute, 18 U.S.C. §2 for a drug transaction. The Court states that many documents, merchandise receipts, utility bills and similar documents, are not introduced for the truth of the matters they assert, but are introduced for the inferences that may be drawn circumstantially from their existence or from where they are found, regardless of whether the assertions contained therein are true or not. *Id.*

In this case, the evidence was hearsay and had no foundational witness to support the admission of the evidence. Also, the evidence was highly prejudicial to the defendants as it contained receipts for guns and gun parts. There was plenty of other evidence by other witnesses that Fines resided in Miller's home. In *Serrano*, the issue was whether the owners of the papers were in some way affiliated with the premises. That is not the case with the Fines and Miller, as the evidence was that they both lived in the home.

ISSUE II: THE TRIAL COURT ERRED BY ADMITTING A PHOTOGRAPH OF FINES WITH NO LEGITIMATE TIME FRAME AND HIGHLY PREJUDICIAL TO FINES.

The defense objected to Government's exhibit 12 and 13, in that the photographs depicted scenes that were not in the same time frame when they were found on April 8, 2004. Also, they did not truly and accurately depict the room as it appeared on the date of the search on April 8, 2004. (Tr. Vol I, pg. 91) An additional objection was made that there was an insufficient foundation for exhibits 12 and 13. The photograph in government's exhibit 12, as set forth in the appendix, depicts Fines sitting beneath a gun rack in a chair saluting. When the authorities searched the home on April 8, 2004, the room was not in the same condition as when the photograph was taken. (Tr. Vol I, pg. 93) In the pre-search video, the gun rack was found empty in another room. (Tr. Vol I, pg. 93, 114) A relevancy objection was also made regarding both photographs. (Tr. Vol I, pg. 94).

Mr. Fines slept in a recliner the room depicted in exhibit 12. The picture shows Fines in a chair, not a recliner. Therefore, it was not the same time frame when Fines lived there. (Tr. Vol II, pg. 7) Ike Miller first testified that he did not know when the photographs were taken. (Tr. Vol II, page 12 lines 3-5) Ike Miller testified that he took the pictures, governments exhibit's 12 and 13. (Tr. Vol II, pg. 12). Defense counsel objected to the question of "What's in the photograph?". (Tr. Vol II, pg. 11). The Government asked Ike Miller "Do the photographs depict Fines' room as it appeared in late 2003 or early 2004?". Answer: "Yes." The Government continued, "Did you take the two photographs at or near the same time?". Answer: "Yes I did". (Tr. Vol II, pg. 12). The Government then offered exhibits 12 and 13 into evidence which were objected to by the defense. (Tr. Vol II, pg. 13). The objection was on a foundational basis due to the fact that the

witness said he did not know approximately when these photographs were taken. (Tr. Vol II, pg. 12, lines 3-5). There was a question of whether Fines was a convicted felon at the time the photograph was taken as Fines and Miller had been friends for many years. Ike Miller only testified to the date of the photograph pursuant to a leading question with the date contained therein. Ike would not have recalled the date of the photograph without leading by the Government. Therefore, the photograph should not have been admitted. It was highly prejudicial to both defendants as it depicted guns in a rack.

ISSUE III: THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT.

Defendant/Appellant Fines hereby adopts Appellant Miller's facts and arguments for appellant Miller's issue no. I: Whether there was insufficient evidence to sustain a verdict of guilty. Fines did move for a judgment of acquittal at the close of the Government's case. (Tr. Vol II, pg. 79). Fines also renewed his motion for judgment of acquittal at the close of the Government's rebuttal. (Tr. Vol III, pg. 78). If Government's exhibits 11, 12 and 13 had not been admitted over objections, the outcome of this case would have been different. Without that evidence, there was insufficient other evidence to sustain a finding of guilty.

CONCLUSION

There was insufficient evidence to support the jury verdict if the receipts and photographs were not admitted into evidence. The trial court abused its discretion by admitting receipts and photographs of the Defendants, and therefore the conviction of appellant Fines should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The Defendant-Appellant's principal brief does not exceed 30 pages in length. Accordingly, no Certificate of Compliance with Fed R. App. P. 32(a)(7) is required.

Dated _____.

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PROOF OF SERVICE

The undersigned, counsel for the Defendant-Appellant Ricky L. Fines, hereby certifies that on today's date, a copy of the Brief and Required Short Appendix, Separate Appendix, as well as a digital version containing the brief, were delivered by U.S. Mail to:

H. Jay Stevens, Federal Defender's Office 227 S. Main Street South Bend, IN 46601

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Dated:_____

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

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CIRCUIT RULE 31 (e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31 (e), the brief. The contents of the Required Short Appendix were not available for electronic format at the time of the filing of the Appellant's Brief.

Date: _____

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