**14.23** **Firearms—Possession in Furtherance of Crime of Violence**

**or Drug Trafficking Crime (18 U.S.C. § 924(c))**

 The defendant is charged in [Count \_\_\_\_\_\_ of] the indictment with possessing a firearm in furtherance of [*specify applicable crime of violence or drug trafficking crime*] in violation of Section 924(c) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

 First, the defendant committed the crime of [*specify crime*] [as charged in Count \_\_\_\_\_\_ of] the indictment, which I instruct you is a [crime of violence] [drug trafficking crime];

 Second, the defendant knowingly possessed the [*specify firearm*]; and

 Third, the defendant possessed the firearm in furtherance of the crime of [*specify crime*].

 A person “possesses” a firearm if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

The phrase “in furtherance of” means that the defendant possessed the firearm with the

subjective intent of promoting or facilitating the crime of [*specify crime*].

**Comment**

 In *United States v. Thongsy*, 577 F.3d 1036, 1043 n.5 (9th Cir. 2009), the Ninth Circuit held that the former version of this instruction “should be revised to clarify there are two ways to prove an offense under § 924(c): the defendant either (1) used or carried a firearm ‘during and in relation to’ a crime or (2) possessed a firearm ‘in furtherance of’ a crime’.” Use this instruction when the defendant is charged with possessing a firearm in furtherance of a crime. When the defendant is charged with using or carrying a firearm during and in relation to a crime, use Instruction 14.22 (Firearms—Using or Carrying in Commission of Crime of Violence or Drug Trafficking Crime).

 The definition of possession comes from Instruction 6.15 (Possession—Defined). *See also Thongsy*, 577 F.3d at 1041 (defining constructive possession). The joint possession language from Instruction 6.15 may be used if appropriate to the circumstances of the case.

 A district court does not err in failing separately to define “in furtherance of” in its instruction to the jury on possession of a firearm in furtherance of a drug trafficking crime. *United States v. Lopez*, 477 F.3d 1110, 1115-16 (9th Cir.), *cert. denied*, 552 U.S. 855 (2007) (instruction that separately listed requirements of possession and possession in furtherance of the crime eliminated the possibility that rational juror would convict defendant upon finding mere possession). “The question whether possession of a firearm is ‘in furtherance of’ a crime is a ‘fact-based inquiry into the nexus between possession of the firearm and the drug crime.’” *Thongsy*, 577 F.3d at 1041 (citation omitted); *see* *United States v. Mahan*, 586 F.3d 1185, 1187-89 n.3 (9th Cir. 2009) (holding that defendant who receives guns in exchange for drugs possesses those guns “in furtherance of” his drug trafficking offense).

 If the crime of violence or drug trafficking crime is not charged in the same indictment, the elements of the crime must also be listed, and the jury must be instructed that each element must be proved beyond a reasonable doubt.  *See United States v. Mendoza*, 11 F.3d 126 (9th Cir. 1993).

When the crime of violence or drug trafficking crime is charged in the same indictment, the government’s failure to prove the elements underlying the crime of violence or drug trafficking crime beyond a reasonable doubt will mean that the government has failed to prove the underlying crime element of § 924(c). *See United States v. Mendoza*, 25 F.4th 730, 740-742 (9th Cir. 2022). This does not mean the government must separately charge and convict the defendant of any underlying crime of violence or drug trafficking crime, but when a jury acquits the defendant of any underlying crime of violence or drug trafficking crime or when the government’s evidence of the underlying offense is insufficient as a matter of law, that offense cannot serve as a § 924(c) predicate. *See id.*

Neither attempt nor conspiracy to commit Hobbs Act robbery is a predicate crime of violence for a § 924(c) offense. *See United States v. Taylor*, 142 S. Ct. 2015, 2020-21 (2022) (attempt); *United States v. Reed*, 48 F.4th 1082 (9th Cir. 2022) (conspiracy).

 In appropriate cases, a special interrogatory may be used to determine the jury’s findings as to whether the defendant possessed the particular firearm types listed in 18 U.S.C. § 924(c)(1). *See Castillo v. United States*, 530 U.S. 120, 128 (2000); *United States v. O’Brien*, 560 U.S. 218, 231-33 (2010) (fact that firearm is machinegun is element of offense to be proved to jury beyond reasonable doubt); *United States v. Woodberry*, 987 F.3d 1231, 1236 (9th Cir. 2021) (stating that fact that firearm is short-barrel rifle is element of offense). With respect to 18 U.S.C. § 924(c)(1)(B)(i), there is no mens rea requirement that the defendant knew the rifle barrel’s length. *See* *Woodberry*, 987 F.3d at 1239 (holding “§ 924(c)(1)(B)(i) requires no showing of mens rea as to the rifle barrel’s length to sustain a conviction”).

To convict under § 924(c), the government must prove the firearm was real. *United States v. Baker*, 58 F.4th 1109, 1123 (9th Cir. 2023); *see also* *United States v. Garrido*, 596 F.3d 613, 617 (9th Cir. 2010) (“‘Possession of a toy or replica gun cannot sustain a conviction under § 924(c).’”). A real firearm under § 924(c), “is a weapon that ‘expel[s] a projectile by the action of an explosive,’ and ‘[t]oys, replicas, antiques,’ and ‘blank firing prop gun[s]’ do not qualify.” *Baker*, 58 F.4th at 1123.

 Whether a particular crime is a crime of violence is a question of law. *See United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995) (crime of violence).

 *See United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011) (defendant charged under § 924(c)(1)(A) not entitled to “Second Amendment defense” instruction).

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