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In The
Supreme Court of the United States

MICHAEL MATTHEW PHILLIPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

1. Whether evidence that a defendant walked with a person to a public place where the other person retrieved a firearm is sufficient to show that the defendant exercised dominion and control over the firearm such that he constructively possessed it.
2. Whether, in a prosecution for being a felon in possession of a firearm, evidence that a witness testifying against a defendant had used drugs with that defendant in the past was intrinsic evidence such that it was not subject to the restrictions of Rule 404(b) of the Rules of Evidence.

II. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Phillips*, No. 2:18-cr-00107-1, U.S. District Court for the Southern District of West Virginia. Judgment entered March 4, 2019.
- *United States v. Phillips*, No. 19-4154, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on May 1, 2020.

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V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Phillips*, 809 F. App'x 144 (4th Cir. 2020), is an unpublished opinion and is attached to this Petition as Appendix A. The district court's resolution of the first issue came in a written opinion after trial. A copy of that opinion is attached to this Petition as Appendix B. The second issue was resolved by the district court at trial. The relevant portion of the trial transcript is attached to this Petition as Appendix C. The final judgment order of the district court is unreported and is attached to this Petition as Appendix D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on May 1, 2020. This Petition is filed within 150 days of the date the court's judgment, pursuant to this Court's order of March 19, 2020. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 922, which provides, in pertinent part:

- (g)** It shall be unlawful for any person –
 - (1)** who has been convicted in any court of, a crime punishable for a term exceeding one year

As well as Rule 404 of the Rules of Evidence, which provides, in pertinent part:

(b) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On May 22, 2018, an indictment was filed in the Southern District of West Virginia charging Michael Matthew Phillips ("Phillips") with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). J.A. 8-9.¹ Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Phillips was convicted by a jury of the charge in the indictment. J.A. 287. A judgment order was entered on March 4, 2019. J.A. 380-387. Phillips timely filed a notice of appeal on March 6, 2019. J.A. 388. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case involves a firearm that was stolen by Jeremy Hyer ("Hyer") then subsequently recovered by him while working with local law enforcement. Hyer, a confessed drug addict and thief, recovered the gun from a public place in the company of Phillips. Phillips was charged with and convicted by a jury of being a felon in possession of a firearm based on that incident.

¹ "J.A." refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

1. Hyer steals a firearm from his uncle, trades it for heroin, then comes up with a plan to recover it.

On January 18, 2017, Hyer was a heroin addict who had been shooting up four to six times a day for the past five years. He was looking for a way to get more heroin, without which he would begin to experience withdrawal symptoms. J.A. 158-161. Hyer went to his home of his uncle, James Monk (“Monk”) in Sissonville, West Virginia, where the garage was unlocked, to find something to steal. J.A. 161. Hyer stole a Ruger pistol, its holster, and several tubes of coins. J.A. 162. He then traded the firearm and some of the coins for heroin from an African-American man known only as “K.” J.A. 169-170.

Monk reported the theft of his gun and coins and Hyer was questioned as a suspect several days later by the Kanawha County Sheriff’s Office. Hyer admitted to a deputy that he stole the gun and traded it for drugs, thus putting it in the hands of a drug dealer. J.A. 122, 140, 170. Hyer was told it was in his best interest to try and help get the gun back. J.A. 170. Hyer agreed because he thought he might avoid criminal charges for the theft, it might help him return to the good graces of his uncle, and he might avoid going to jail and being cut off from using heroin. J.A. 170-171.

2. Hyer works with local law enforcement to recover the gun.

On January 24, 2017, Hyer met with Corporal Jeremy Hatfield (“Hatfield”) of the Kanawha County Sheriff’s Office and proposed a plan to recover Monk’s firearm. Before meeting Hatfield, Hyer had called K. J.A. 123, 131. Hatfield was not privy to the details of the discussion between Hyer and K. J.A. 132. Hyer agreed to work with

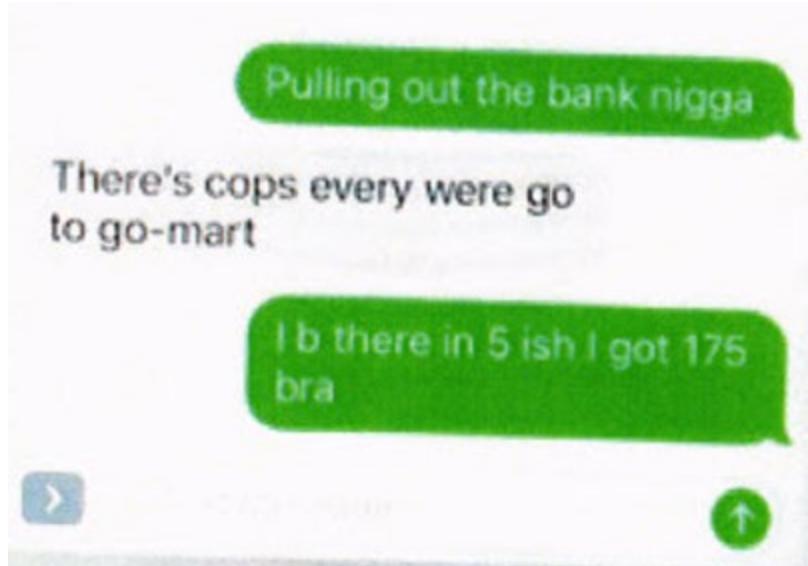
officers to set up a controlled buy to return the gun, presumably from K. J.A. 123. Hyer never mentioned Phillips during the meeting and did not indicate that he was involved in the transaction. Hyer was given money to buy back the gun, as well as additional funds to purchase a small amount of heroin. He was also given a device to record the transaction on audio and video. J.A. 124-125.²

As part of arranging the deal, Hyer engaged in a series of text messages with K, who was a listed contact in Hyer's cell phone:³



² A copy of the video was introduced into evidence at Phillips' trial. J.A. 146, 359

³ The texts are taken from exhibits introduced at trial. J.A. 135, 282-283.



Although there are several Go-Mart locations in Charleston, Hyer knew that K was referring to a particular store in North Charleston because of his previous conversation with K. J.A. 174. Hyer admitted he was troubled by the idea of setting up K, because he could lose a source of heroin if K was incarcerated and Hyer did not want to be labeled a snitch. J.A. 171.

Hatfield drove Hyer to a location near the North Charleston Go-Mart, to which Hyer walked with the intent to meet “one of K’s friends.” J.A. 144. After talking to several different people at Go-Mart, Hyer finally “ran into” Phillips at the store’s front door. *Ibid.*

Hyer and Phillips then walked across the street and entered a house. Hyer admitted that he did not know who owned the house or who lived there. J.A. 144. They went upstairs and talked briefly in a room where a woman was present. J.A. 150-151. While they were there, Hyer would testify, he “believe[d] I dropped [the

money] in the house." J.A. 155. Hyer never said that the money was given to, or left in the home for, Phillips or K.⁴

Hyer and Phillips then left the home and walked down the street. At some point during their walk, Phillips raised his right arm. J.A. 151, 359 at 15:38:28. Hyer could not explain the significance of that gesture. J.A. 151-152. A few minutes later they arrived at the end of the street, where Hyer recovered the gun from tall grass near the base of a utility pole. J.A. 153, 359 at 15:41:45. Hyer admitted that he could not say how he came to know where the gun was. He stated that someone had told him where it was, but could not recall who that person was. He denied that Phillips "led" him to that location, but he was unsure whether he could have found the gun otherwise. J.A. 153.

Hyer returned to Hatfield with the firearm and \$30 leftover because he was unable to purchase heroin. J.A. 127, 132. According to Hatfield that was because the man he met had "ate" the heroin because there were so many police officers in the area. J.A. 128. At trial, Hyer would not explain why he failed to purchase heroin, nor was any forensic evidence presented to tie the gun to anyone. J.A. 133.

3. Phillips is charged with being a felon in possession of a firearm and is convicted by a jury.

Sixteen months after the firearm was recovered, Phillips was charged with being a felon in possession of a firearm. J.A. 8-9. Phillips pleaded not guilty and proceeded to a jury trial. J.A. 10-287. In its opening statement the Government

⁴ There was no testimony that the marked bills used to buy back the firearm were ever recovered.

emphasized that the only issue for the jury was whether Phillips constructively possessed the firearm, never promising to show that Phillips ever actually possessed it. J.A. 109-110.⁵ The Government's primary witness at trial was Hyer, who testified about his theft of the firearm and its recovery. J.A. 138-185. Hatfield and a second officer, Corporal James Vernon, also testified about the investigation. J.A. 120-137, 186-198.

On cross examination, Hyer admitted that he did not want to setup K during the operation to get the gun back because K was one of Hyer's sources of heroin. J.A. 171. On redirect, the Government asked whether Phillips was also a source of heroin for Hyer. Phillips objected, arguing that the question was soliciting improper evidence of other bad acts under Federal Rule of Evidence 404(b). The Government argued that Phillips had "opened the door." J.A. 184. The district court overruled the objection. *Ibid.* Hyer then testified that he and Phillips got high together and that "[h]e got me high; I got him high." J.A. 185. At the conclusion of Hyer's testimony the district court instructed the jury that Phillips was not on trial for any drug charge. *Ibid.*

Phillips presented testimony from Monk about Hyer's theft of his firearm and coins and Hyer's admission of taking them. J.A. 200. Monk also testified that, in his opinion, Hyer was not a truthful person. J.A. 207.

Following the close of evidence and the arguments of the parties, the jury convicted Phillips of the charge in the indictment. J.A. 381-382.

⁵ The other elements of the offense were either stipulated to or not contested.

4. The district court denies Phillips' motion for a judgment of acquittal and sentences Phillips to 30 months in prison.

At the close of the Government's evidence, and then again at the close of all evidence, Phillips moved for a judgment of acquittal under Rule 29 of the Rules of Criminal Procedure. J.A. 193-195, 210-211. The district court denied the first motion. J.A. 197. After considering the second motion overnight, the district court announced that it was "going to reserve ruling on the Rule 29 motion as made at the conclusion of all the evidence pursuant to Rule 29." J.A. 269.

After the verdict, Phillips renewed his motion for a judgment of acquittal and filed an accompanying memorandum in support. J.A. 288-358. Phillips argued that there was insufficient evidence to prove that he constructively possessed the firearm Hyer stole and then recovered. He argued that there was no evidence that Hyer gave the buy money for the gun to Phillips. J.A. 348-353. He also argued that walking alongside Hyer to where the gun was located did not show that Phillips exercised dominion and control over the gun. J.A. 353-356. Finally, Phillips argued that there was no evidence that Phillips was acting as an agent of K, with whom Hyer arranged the buy-back of the gun. J.A. 356-358.

The district court denied Phillips' motion in a written memorandum opinion. J.A. 365-379. The district court held that there was sufficient circumstantial evidence to support the jury's verdict that Phillips constructively possessed the firearm. J.A. 374. The district court also found that Phillips being at the North Charleston Go-Mart was circumstantial evidence from which the jury could infer that "Phillips was the

person who Hyer planned to meet.” J.A. 375. The district court rejected the argument that Phillips was “merely a fall guy for Hyer” because “there is nothing to suggest that Hyer *needed* a fall guy” because if Hyer knew where the gun was located “he could simply have retrieved the gun.” *Ibid.* “Therefore,” the district court concluded, “it is reasonable . . . to infer that Hyer did not know where the gun was until Phillips showed him.” *Ibid.* The district court also concluded that the Government was not required to prove that the buy money went to Phillips, that the verdict was not based on Phillips’ mere proximity to the gun, but rather that he led Hyer to it, and that the Government was not required to prove any particular relationship existed between K and Phillips. J.A. 374-377.

Following the denial of Phillips’ motion for a judgment of acquittal, the district court sentenced him to a term of 30 months in prison, followed by a three-year term of supervised release. J.A. 381-382.

5. The Fourth Circuit affirms Phillips’ conviction.

Phillips appealed his conviction to the Fourth Circuit Court of Appeals, which affirmed in an unpublished opinion. *United States v. Phillips*, 809 F. App’x 144 (4th Cir. 2020). Phillips argued that the evidence was insufficient to sustain his conviction and that the district court erred by allowing the Government to elicit testimony from Hyer about how he and Phillips would get “high” together. As to sufficiency, the court concluded that, from the evidence presented at trial, “Phillips discussed the gun deal with Hyer at the Go-Mart, took the money for the gun, led Hyer to it, and signaled to Hyer its location.” *Id.* at 147. “This is sufficient evidence,” the court held, “that

Phillips exercised dominion and control over and thus constructively possessed the firearm.” *Ibid.* That was true in spite of the fact that Hyer “testified that Phillips did not lead him to the gun,” as “a reasonable jury was free to reject Hyer’s testimony and Phillips’ argument.” *Ibid.* As to the evidentiary issue, the court concluded that Rule 404(b) was not implicated, as the evidence “explained the relationship between Hyer and Phillips and the context of Phillips’ decisions and actions.” *Id.* at 148. Such evidence was not prohibited because it “addressed issues relevant at trial.” *Ibid.* The court also held that even if the evidence was improperly admitted that error was harmless, as the “testimony of Phillips’ conduct on the day Hyer recovered the gun was more than sufficient to independently support his conviction.” *Ibid.*

IX. REASONS FOR GRANTING THE WRIT

- I. The writ should be granted to determine whether evidence that a defendant walked with a person to a public place where the other person retrieved a firearm is sufficient to show that the defendant exercised dominion and control over the firearm such that he constructively possessed it.**

The Government never argued that Phillips had a firearm in his hands. Nor did it show that Phillips lived in a home where a firearm was present, raising the inference that he exercised dominion and control over it. The only evidence presented to show constructive possession was that Phillips walked with Hyer to the public place where Hyer retrieved the firearm. Whether such evidence is sufficient to demonstrate constructive possession, and support a conviction for being a felon in possession of a firearm, is an important question of federal law that has not been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

A. Constructive possession requires proof that a person exercised dominion and control over the item in question.

In order to obtain a conviction under § 922(g)(1), the Government must prove that (1) the defendant was previously convicted of a crime punishable by imprisonment or more than one year; (2) that the defendant was aware of that statute (3) after that conviction he voluntarily and intentionally possessed a firearm; and (4) the firearm had been shipped or transported in interstate commerce. *United States v. Langley*, 62 F.3d 602, 604 (4th Cir. 1995)(*en banc*); *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Possession was the only element that was contested in this case. Possession “can be actual or constructive.” *United States v. Moye*, 454 F.3d 390, 395 (4th Cir. 2006). “Constructive” possession occurs “if it is shown ‘that the defendant exercised, or had the power to exercise, dominion and control over the item.’” *Id.* quoting *United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992). Because the Government presented no evidence that placed the gun Hyer stole in Phillips’ hands, it could only secure a conviction by proving that he constructively possessed the gun.

A defendant’s mere proximity to contraband is not a sufficient basis for concluding that he constructively possessed that contraband. *United States v. Shrader*, 675 F.3d 300, 308-309 (4th Cir. 2012). In *United States v. Blue*, 957 F.2d 106 (4th Cir. 1992), the defendant was a front-seat passenger in a car stopped due to seatbelt violations. A search of the car uncovered a revolver underneath the passenger seat where Blue was sitting. Both he and the driver denied knowing

anything about the gun. Nonetheless, Blue was convicted of being a felon in possession of that firearm. *Id.* at 107.

The court reversed the conviction, holding that the Government had failed to present sufficient evidence that Blue possessed the weapon. As in Phillips' case, the Government's case in *Blue* relied entirely on constructive possession. The two factors cited by the Government as proof of that possession was an officer seeing Blue's shoulder dip as he approached the car and Blue's proximity to the gun. *Blue*, 957 F.2d at 107-108. The court concluded those were insufficient because the Government lacked any other evidence that Blue had previously been seen in possession of the gun or any forensic evidence linking him to the gun. Nor was there any evidence that Blue was the owner of the car or had even previously been in that vehicle. *Id.* at 108; *see also Shrader*, 675 F.3d at 308-309 (approving of jury instruction that proximity, while not enough on its own to show constructive possession, can be pertinent to the amount of additional evidence required); *Rusher*, 966 F.2d at 878 ("[m]ere presence on the premises where the drugs were found . . . is insufficient to establish possession"); *United States v. Bailey*, 553 F.3d 940 (6th Cir. 2009)(finding evidence insufficient to show constructive possession of firearm found in car defendant was driving, where Government provided no other evidence).

B. There was no evidence that Hyer gave money, or anything else of value, to Phillips in exchange for Phillips leading him to the gun.

Courts have held that the Government can prove constructive possession by showing that the defendant became a broker in negotiating the terms of sale of a

firearm with a third party. *See United States v. Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012); *United States v. Wells*, 721 F.2d 1160, 1162 (8th Cir. 1983); *United States v. Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971); *United States v. Jordan*, 622 F.App’x 345, 347 (5th Cir. 2015).⁶ One of the key factors in such cases is whether the defendant accepted payment in return for delivering the firearm. For example, in *Wells* the defendant both negotiated the terms of sale (including demanding payment) of a sawed-off shotgun and connected the undercover agent with the person who delivered the gun to the agent. *Wells*, 721 F.2d at 1162. Similarly, in *Jordan* the defendant’s conviction was affirmed based on his constructive possession of a handgun for which he had found a buyer, established the sale price, and accepted the payment for delivery of the gun. *Jordan*, 622 F.App’x at 347. By contrast, in this case the Government failed to prove that Phillips had any role in negotiating the terms of the sale of the gun to Hyer or that he accepted payment in return for leading Hyer to the gun.

In *Virciglio*, the defendant was convicted for possessing an unregistered machine gun because of his extensive participation in negotiating the terms for delivery of the gun to an undercover agent. The agent had contacted the defendant with an interest in purchasing a machine gun. Days later the defendant contacted the agent and said he had located a gun and asked the agent to be at his home the next night with \$800. The defendant took the \$800 and split it with a third party.

⁶ Courts have recognized a similar standard in cases involving the possession of drugs. *See United States v. Martinez*, 937 F.2d 299, 305-306 (7th Cir. 1991); *United States v. Molinaro*, 877 F.2d 1341, 1348 (7th Cir. 1989).

Virciglio, 441 F.2d at 1297. The court found that was an ample basis for the jury's finding of constructive possession because the sale would not have happened without the defendant's role as a broker, including his acceptance of payment. *Id.* at 1298.

The defendant in *Nungaray* faced an enhancement for possessing multiple firearms under the Sentencing Guidelines based on a similar fact pattern. *Nungaray*, 697 F.3d at 1115-1117. In that case the defendant made initial contact with an informant about selling four guns. He then negotiated a price with the informant then met with the informant and an undercover officer to deliver the guns. After using a third party to make the actual delivery, the defendant accepted payment for the guns. *Id.* at 1115. The court concluded that it was proper to attribute the guns to the defendant because his acceptance of payment and arranging delivery of them showed that he maintained constructive possession of those guns. *Id.* at 1116.

No similar evidence was presented in this case to show that Phillips was any kind of a broker of the sale of the gun back to Hyer. There is no evidence that Phillips accepted payment from Hyer for any reason. The only evidence is that Hyer dropped money on the floor at the home where he and Phillips went, an unfamiliar home in which a person was present that Hyer did not know. J.A. 144, 155. There was no evidence that Hyer had talked to Phillips previously about the gun. Instead, the evidence was that Hyer negotiated the return of the gun with the person to whom he sold it after he first stole it – K. J.A. 139-140.

It was K whom Hyer called to retrieve the gun. J.A. 172-174. That call took place before Hyer met with Hatfield on the day the gun was retrieved. J.A. 171. By

the time Hyer was equipped with a recording device to make the controlled buy, he had already negotiated the purchase price with K. It was then K with whom Hyer conversed over text messages to agree on a location to meet. J.A. 282-283. Hyer testified that he thought he was going to meet up with one of K's friends, but never testified that Phillips was one of them. J.A. 144. There was simply no evidence that Phillips brokered the deal for Hyer to recover the firearm he stole.

As to the buy money itself, nothing in the video recorded during Hyer's undercover operation shows him giving any money to Phillips. There are no scenes where Phillips shows any acknowledgment of Hyer handing over money. Nor was there any evidence that the prerecorded buy money was found on Phillips sometime after the gun was recovered. Hyer's explanation for what happened to the money was that "I believe[d] I dropped it in the house." J.A. 155. He did not say where in the house he dropped it or who, if anyone, retrieved it. There was no evidence that Phillips lived in that house or had any other interest in it and, in fact, Hyer did not know who owned the house. J.A. 144. What Hyer said happened to the money does not lead to any reasonable inference that Phillips accepted payment for the firearm.

Finally, there was no evidence that Phillips told Hyer where the gun was. When asked by the Government how he learned "of the location of the gun?", Hyer answered that "[s]omeone told me at some point." J.A. 153. When the Government asked him who that someone was, he testified "I don't – I can't recall a hundred percent." *Ibid.* When the Government asked "who led you to that place?", Hyer explained that he and Phillips "just walked together. He didn't really lead me." *Ibid.*

Hyer's testimony does not show that Phillips was the person who told him where the gun was.

C. That Phillips walked with Hyer to where the gun was retrieved does not establish that he exercised dominion and control over the firearm.

Courts have consistently held that a defendant's mere presence in a location where contraband is present does not establish proof of constructive possession. *See Blue*, 957 F.2d at 107-108; *United States v. Ways*, 832 F.3d 887, 897 (8th Cir. 2016); *United States v. Grubbs*, 506 F.3d 434, 439 (6th Cir. 2007); *United States v. White*, 932 F.2d 588, 589-590 (6th Cir. 1991). At most, the Government's evidence in this case showed that Phillips was in proximity to the firearm when Hyer retrieved it. That is not enough to sustain a conviction.

In *Ways* the defendant was convicted of being a felon in possession of ammunition found in a storage area of the basement of the home where his girlfriend and daughter lived. Evidence showed that the defendant occasionally stayed in the home and some of his belongings were found there. In spite of that connection, the court found that the defendant neither owned the home nor was it his primary residence. As a result, his connection to the home was not sufficient to prove he knew that there was ammunition stored in the basement. *Ways*, 832 F.2d at 897; *see also White*, 932 F.2d at 589 (reversing possession of marijuana conviction where "the only evidence linking White to the marijuana was the fact that he lived three feet from the patch"); *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996)(defendant's presence in friend's apartment where nearly two ounces of cocaine and two revolvers

were found on top of a coffee table did not establish constructive possession of the contraband items); *United States v. Behanna*, 814 F.3d 1318, 1320 (9th Cir. 1987) (passenger in car did not constructively possess machine gun located in a bag on the floorboard in front of driver's seat); *United States v. Pahulu*, 274 F. Supp. 1235, 1240-1242 (D. Utah 2003)(judgment of acquittal granted to defendant where Government could not demonstrate that defendant had constructive possession of shotgun found in closed case in the back of a minivan which he had been driving).

Similarly, there are no incriminating inferences that can be drawn from Hyer's testimony that he and Phillips walked together from Go-Mart to a nearby house and then on to the end of the street where Hyer retrieved the gun. Hyer never testified that he expected to meet Phillips at Go-Mart. He thought he was going to meet one of K's associates. While at Go-Mart Hyer "ran into a few people," including Phillips. J.A. 144. Hyer did not testify that while he and Phillips walked together to a nearby home they talked about getting the stolen gun back. There was no testimony that they spoke of it while inside the house. More important, he disputed the Government's inference during his questioning that Phillips led him to the firearm. When the Government asked "[w]ho were you following?" after he left the house, Hyer answered "I was walking with Matt." J.A. 151. Then when asked who "led you to that place?", he answered that he and Phillips "just walked together. He didn't really lead me." J.A. 153. When asked if he could have found the gun without Phillips, Hyer testified that "I'm not sure. I don't know. Probably not, but I can't say a hundred

percent." *Ibid.* Thus even when the Government was leading Hyer in its questioning to implicate Phillips, he would not do so.

In its opinion, the Fourth Circuit held that while Hyer testified that Phillips did not lead him to the gun, the jury was free to reject his testimony. *Phillips*, 809 F.App'x at 147. No reasonable juror could have reached the conclusion that Hyer should be disbelieved as to that part of his testimony and believed as to the rest, to the extent it implicated Phillips. The video of the journey to retrieve the firearm shows why. First, the scene where Phillips points to something on the video occurs at timestamp 15:38:28,⁷ as evidenced from the still picture of that moment introduced by the Government. J.A. 281. But Hyer did not recover the gun for several more minutes, at approximately 15:41:30. Furthermore, when Hyer recovers the gun the video does not show Phillips assisting him in any way, nor does it show him pointing out where the gun was. Because the video does not show what Phillips was pointing toward (if anything), it is not a reasonable inference that Phillips was pointing toward something that was recovered several minutes later. It is a particularly unreasonable inference given that the video in question was made by the Government's star witness solely for the purpose of documenting the operation. Hyer could have recorded to what Phillips was pointing, but he did not. Second, Hyer never testified about what Phillips was pointing toward. It is notable that while the Government tried to lead Hyer to its preferred testimony in several other instances, when it came to this image the only

⁷ The video is part of the Joint Appendix at page 389.

questions of Hyer were to the identity of the person depicted, which was never at issue. J.A. 151-152.

Finally, the location where the gun was found does not support an inference that Phillips exercised dominion and control over it. Hyer retrieved the gun from a public area, as opposed to any private place that Phillips had control over. Someone put the gun at the base of a utility pole in tall grass at the end of a public street where anyone could have discovered it. There was no evidence that Phillips is the one who put it there or had ever handled the gun. That Phillips was in close proximity to the pistol when Hyer recovered it is not sufficient to support a conclusion that he possessed the gun.

II. The writ should be granted to determine whether, in a prosecution for being a felon in possession of a firearm, evidence that a witness testifying against a defendant had used drugs with that defendant in the past was intrinsic evidence such that it was not subject to the restrictions of Rule 404(b) of the Rules of Evidence.

Phillips was on trial for being a felon in possession of a firearm. He was not charged with any drug offense. Regardless, after Hyer was questioned on cross-examination about his sources for heroin, the Government was allowed to question him about Phillips and drugs, with the result being that the jury learned that Phillips and Hyer “got high” together. Whether evidence like this falls within the ambit of Rule 404(b), or is intrinsic to the offense charged, is an important question of federal law that has not been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

A. Evidence that Phillips and Hyer got high together was not intrinsic to the charge that Phillips was a felon in possession of a firearm.

Federal Rule of Evidence 404(b) provides the authority for excluding evidence which would serve to improperly taint the defendant's character where the Government cannot establish all of the requirements for admitting evidence of other bad acts allegedly committed by the defendant. *United States v. McBride*, 676 F.3d 385, 395 (4th Cir. 2012); *United States v. Johnson*, 617 F.3d 286, 296 (4th Cir. 2010); *United States v. Siegel*, 536 F.3d 306, 314 (4th Cir. 2008). Evidence of "uncharged conduct is not considered 'other crimes' evidence if it 'arose out of the same . . . series of transactions of the charged offense . . . or if it is necessary to complete the story of the crime (on) trial.'" *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994), quoting *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989); *see also United States v. Masters*, 622 F.2d 83, 87 (4th Cir. 1980). In other words, such evidence is relevant if it is "intrinsic" to the crime charged and "is necessary to 'provide context relevant to the criminal charges.'" *United States v. Basham*, 561 F.3d 302, 326 (4th Cir. 2009), quoting *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007); *see also United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996) ("[o]ther criminal acts are intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged") (internal quotation mark omitted). Cases where courts have found evidence that would otherwise fall within the confines of Rule 404(b) was admissible because it was intrinsic to the charged offense are easily distinguished from this case.

For example, the defendant in *Kennedy* was charged with a drug conspiracy and objected to testimony by a police officer about his investigation of the defendant's drug activities prior to the dates alleged in the indictment. *Kennedy*, 32 F.3d at 885. The district court admitted the evidence because it provided context to the charged drug distribution scheme. *Id.* at 885-886. The court determined that the evidence of the defendant's uncharged conduct was admissible because it "served to complete the story of the crime on trial" by providing background information and that the defendant erroneously assumed that "all evidence falling outside of the charged conspiracy period necessarily involves a separate, unrelated offense." *Id.* at 885.

Similarly, in *Masters*, the defendant was charged with dealing in firearms or ammunition without a valid license. *Masters*, 622 F.2d at 83. Evidence of conversations with other undercover officers about selling firearms that occurred outside the dates alleged in the indictment was admitted by the trial court over the defendant's objection. *Id.* at 84-85. The court affirmed the admission of that evidence in order "to complete the story of the crime on trial" and to provide "context" to show the defendant's status as a gun dealer. *Id.* at 86-87. In order to prove its case, the Government had to show that the defendant had a "willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist." *Id.* at 88.

The evidence the Government elicited from Hyer during redirect examination does not share the characteristics of the evidence at issue in *Kennedy* or *Masters*. Where the evidence in those cases involved other instances of the same crime for which the defendant was on trial, the evidence here had nothing to do with the issue

at hand – did Phillips constructively possess the firearm that was only ever in Hyer’s hands, first when he stole it and then when he recovered it from a public place? That Hyer and Phillips had shared drugs before has no bearing on that issue. This is, yet again, an example of the Government not being able to get out of Hyer the evidence it really wanted. All evidence at trial showed that K, to whom Hyer had sold the stolen firearm in return for heroin, was a drug dealer, someone involved in the commercial distribution of drugs.⁸ Indeed, part of the intended controlled buy operation was for Hyer to buy heroin while getting the gun back. J.A. 124-125.⁹ Try as it may, the Government could not get Hyer to label Phillips a drug dealer. When asked if Phillips was “one of those sources?”, Hyer only said that he and Phillips “got high together.” J.A. 185. When asked directly “[d]id you get heroin from him?”, he answered, “[h]e got me high; I got him high.” *Ibid.* Even if evidence that Phillips was a commercial drug dealer was intrinsic to the issue of his possession of the gun, Hyer’s actual testimony was not.

That Hyer’s testimony about he and Phillips getting high together is not intrinsic evidence to the charged crime is evident from the Government’s own presentation of it to the jury. If the fact that Hyer and Phillips got high together was truly intrinsic and therefore “**necessary** to complete the story of the crime (on) trial,” *Kennedy*, 32 F.3d at 885 (emphasis added), then the Government would have

⁸ According to Hyer, K was “someone I **bought** heroin from,” not a friend with whom he shared drugs. J.A. 141 (emphasis added)

⁹ He did not purchase heroin because, according to the officer who ran the controlled buy, the man Hyer met “ate” the heroin because there were so many police officers in the area. J.A. 128.

presented it during its case-in-chief. Instead it waited until after Hyer had been cross examined and argued that Phillips had “opened the door” to the evidence of drug use. If the evidence was intrinsic, the Government did not have to wait for Phillips to open the door – it would have opened it in the first place.

In addition to not trying to rebut Phillips’ argument about the scope of the “opening the door” doctrine, the Government does not argue that the admission of the evidence that Phillips and Hyer got high together, if erroneous, was harmless. *See United States v. Lovern*, 293 F.3d 695, 701 (4th Cir. 2002) (“[t]he government bears the burden of demonstrating that the error was harmless”). The Government could not meet the burden of showing that the error was harmless in this case because it relied on the evidence in arguing its case to the jury. In its closing argument, the Government argued that Phillips was Hyer’s “heroin buddy” and that Hyer would be reluctant to testify against him unless he was telling the truth. J.A. 232. It then argued that when Hyer was trying to escape prosecution for the gun theft that he “didn’t fully realize that his heroin-sharing buddy was also going to face charges.” J.A. 233.

The evidence that the Government solicited regarding Hyer and Phillips sharing drugs was not intrinsic to the crime charged – Phillips’ alleged possession of a firearm as a convicted felon. It did not meet the requirements for admissibility under Rule 404(b) as a prior bad act. *Basham*, 561 F.3d at 326. Nor did Phillips “open the door” for its presentation. Phillips Brief at 22-26. For those reasons, the district court abused its discretion by allowing the Government to present that evidence.

The Fourth Circuit itself recently discussed the limits of intrinsic evidence in *United States v. Brizuela*, 962 F.3d 784 (4th Cir. 2020). Brizuela was a physician who was convicted on fifteen counts of unlawfully distributing controlled substances. At trial, the Government presented testimony not only from patients to whom these distributions took place, but also presented testimony from four other patients “although none of Brizuela’s charges related to their treatment.” *Id.* at 789. The Government argued that such evidence was admissible because it was “necessary to complete the story of the crime on trial.” *Id.* at 791. The court disagreed and reversed the convictions. Such evidence, to be admissible without meeting the requirements of Rule 404(b), “must be probative of an integral component of the crime on trial or provide information without which the factfinder would have an incomplete or inaccurate view of other evidence or of the story of the crime itself.” *Id.* at 795. Furthermore, “that evidence must be necessary to complete the story of ***the charged offense.***” *Ibid* (internal quotation marks omitted, emphasis added). Importantly, close attention is required to the nexus between the evidence at issue and the offense of conviction, or else “the ‘complete the story’ doctrine might be used to disguise the type of propensity evidence that Rule 404(b) is meant to exclude.” *Ibid.* That is what occurred in this case – Hyer’s testimony that he and Phillips got high together was not necessary to complete the story of the offense of conviction, but was a way for the Government to place before the jury evidence of Phillips’ character that had no place at trial.

B. Hyer's testimony that Phillips "got me high," implying that Phillips was a drug dealer, was irrelevant character evidence.

Rule 404(b) prohibits evidence of other crimes or bad acts to show bad character or the propensity to break the law. *Siegel*, 536 F.3d at 317. In order to be considered to be admissible under Rule 404(b), evidence must be (1) relevant to an issue other than character; (2) necessary in the sense that it is probative of an essential claim or element of the offense; (3) and reliable. *Basham*, 561 F.3d at 326. In addition, any such evidence must pass the Rule 403 balancing test to determine whether its probative value is substantially outweighed by the danger of confusion or unfair prejudice. *McBride*, 676 F.3d at 396. Finally, the Government must provide "reasonable notice" that it intends to present such evidence at trial if the defendant requests such notice. Fed. R. Evid. 404(b)(2).

Evidence that Phillips shared drugs with Hyer does not meet the requirements for admissibility under Rule 404(b). First, the Government not only provided no notice it would introduce such evidence, but stated specifically that it planned not to do so in a pretrial discovery disclosure. J.A. 2 at Dkt. No. 18. Second, it is not relevant to an issue other than character because it had no relation to the crime charged, being a felon in possession of a firearm. While Hyer was a heroin addict and traded the gun he stole for heroin, he did not get the heroin from Phillips and, when he was to purchase heroin as part of the operation to retrieve the stolen firearm, he was unable to do so. *See United States v. Smith*, 725 F.3d 340, 345-348 (3d Cir. 2013)(evidence of prior drug sale by defendant charged with later assault with a firearm "did not have

a proper Rule 404(b) purpose" and was not admissible). Third, it was not probative of an essential claim or element of the offense, as the charged offense involved only the possession of a firearm by a convicted felon. Finally, it would be hard to call the evidence provided by Hyer reliable. When asked about Phillips being a source of heroin for him, Hyer refused to label Phillips a drug dealer, saying only that they got high together. J.A. Tr. 176. Without even considering Monk's uncontested opinion that Hyer was not a truthful person, J.A. Tr. 198, his testimony is of dubious reliability. Even if those conditions were met, the evidence would still be inadmissible under Rule 403 because it would be more prejudicial to Phillips than probative.

C. Phillips did not "open the door" to the introduction of improper 404(b) evidence by asking Hyer whether K was a supplier of his heroin.

The Government's basis for questioning Hyer about whether Phillips supplied him with drugs was that Phillips "opened the door." J.A. 184. The Government did not explain how Phillips did this, but the district court nonetheless immediately (and without hearing argument from Phillips) concluded that "I think you did, [defense counsel]. I'll overrule the objection." *Ibid.* The district court was incorrect because evidence is not allowed under the doctrine of "opening the door" in situations like this, where the initial evidence presented was not improper.

One theme of Phillips' cross-examination of Hyer was that he was reluctant to testify against K, with whom he set up the arrangement to retrieve the stolen firearm. At the time of the theft and retrieval of the firearm Hyer was a heroin addict, having used up to six times a day for the previous five years. J.A. 158. Indeed, the reason he

stole the gun in the first place was to sell it to be able to obtain more heroin. J.A. 161. He sold the gun to K and obtained heroin. Thus, Hyer was asked whether it was “fair to say that you didn’t like the idea of setting K up to send him to jail?” J.A. 171. Hyer agreed that he did not. That was, he agreed, because he would lose a source of heroin if K went to jail, although he admitted having “a few sources.” *Ibid.* Phillips was probing Hyer’s bias as to how it might shape his testimony.

This Court has “recognized that the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Davis v. Alaska*, 514 U.S. 308, 316-317 (1974). It has also recognized that even before the Rules of Evidence, which “do not by their terms deal with impeachment for ‘bias,’” it had held that “a trial court must allow some cross-examination of a witness to show bias.” *United States v. Abel*, 469 U.S. 45, 49, 50 (1984), citing *Alford v. United States*, 282 U.S. 687 (1931). As one commentator put it, “[m]odern evidentiary doctrine highly esteems impeachment by bias.” Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 Buff. L. Rev. 357, 385 (2010). It was thus perfectly proper (and required) for Phillips to probe any potential bias on Hyer’s part.

That Phillips brought up the subject of Hyer’s sources for heroin does not mean that it opened the door to further questioning on that matter. The doctrine of “opening the door,” also known as curative admissibility, is directed at a particular situation where one party introduces otherwise inadmissible evidence by allowing the other party to respond. Thus it “gives the trial court discretion to permit a party to

introduce otherwise inadmissible evidence.” *United States v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993). Such evidence is allowed “(a) when the opposing party has introduced inadmissible evidence on the same issue, and (b) when it is needed to rebut a false impression that may have resulted from the opposing party’s evidence.” *Ibid.* Therefore, “[p]roperly admitted evidence does not open the door to inadmissible evidence.” *United States v. Rea*, 958 F.2d 1206, 1225 (2d Cir. 1992); *see also United States v. Kaiser*, 609 F.3d 556, 572, n.4 (2d Cir. 2010)(evidence not admissible under doctrine because “the government has not argued that Kesler’s testimony was in any way inadmissible”); *Gov’t of Virgin Islands v. Archibald*, 987 F.2d 180, 187 (3d Cir. 1993); (where “the government did not argue that Williams’ testimony on cross-examination was inadmissible . . . her testimony did not ‘open the door’ to the admission of hearsay on redirect”). The evidence of potential bias Phillips elicited from Hyer was not improper, therefore there was no basis to introduce other evidence to counter it. Notably, the Government did not object when Phillips asked Hyer about K being a source of the heroin he used.

In addition, even if the evidence Phillips elicited had been improper, the open door only opens wide enough for the other party to “rebut any false impression that may have been created by the earlier admission of evidence.” *United States v. Chance*, 306 F.3d 356, 385 (6th Cir. 2002). That is because the purpose of the doctrine “is to prevent prejudice” and evidence is admissible only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.” *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971)(internal citations

omitted); *United States v. McLaurin*, 764 F.3d 372, n.4 (4th Cir. 2014)(doctrine applied because defendant’s “line of questioning left the jury with the misimpression that there was no proof the McLaurin had previously committed a robbery”); *US v. Osazuwa*, 564 F.3d 1169, 1175-1176 (9th Cir. 2009)(door opens when defendant “introducing potentially misleading information” and rebuttal evidence only introduced “to rebut any false impression that might have resulted from the earlier admission”)(internal citation omitted). However, Phillips’ questioning of Hyer did not result in any false impressions – K was one of Hyer’s sources for heroin. The entire reason Hyer was able to work to get the gun he stole back was because he sold it to K for heroin. Questioning Hyer about other sources of heroin could not clarify or correct anything related to that issue. That is particularly true because Hyer’s testimony elicited on re-direct examination did not go where the Government was trying to lead him. The Government was trying to draw a comparison between K – a drug dealer who trades in stolen firearms – and Phillips, but Hyer would not agree to the equivalence. When asked if Phillips was “one of those sources?”, Hyer only said that he and Phillips “got high together.” J.A. 185. When asked directly “[d]id you get heroin from him?”, he answered, “[h]e got me high; I got him high.” *Ibid.* Those answers could not clarify anything. Rather than clarifying or rectifying otherwise misleading and inadmissible evidence, injecting character evidence that Phillips used and shared drugs was highly prejudicial.

D. The admission of Hyer's testimony about his drug use was not harmless error.

The Fourth Circuit concluded that even if Hyer's testimony about his drug use with Phillips should have been excluded, any error was harmless, because the "testimony of Phillips' conduct on the day Hyer recovered the gun was more than sufficient to independently support his conviction." *Phillips*, 809 F.App'x at 148. As set forth above, however, the evidence was far from sufficient to support Phillips' conviction. Moreover, the admission of evidence that Hyer and Phillips got high together was profoundly prejudicial. Hyer did not just steal a firearm, he traded it for drugs to a known drug dealer, adding to, and consistent with, the well-known connection between firearms and drugs. *United States v. Manigan*, 592 F.3d 621, 629 (4th Cir. 2010). By allowing him to insinuate that Phillips was also a drug dealer, it prejudiced the jury against Phillips on an issue of character that bore no relation to the central issue of whether he constructively possessed the firearm.

That is particularly true in light of the question the Government actually asked Hyer on redirect examination. On cross examination Hyer admitted that he was troubled by the idea of setting up K, partly because he was afraid of losing a source of heroin. J.A. 171. At this point Hyer had been addicted to heroin for years and was using it four to six times per day. J.A. 158. Indeed, one of the reasons he agreed to work with police to recover the firearm he stole was that he did not want to go to jail and be cut off from heroin. J.A. 170-171. It is with that context that the Government asked "[w]as the defendant one of those?." meaning one of Hyer's sources for heroin. J.A. 184. Thus the question was not whether Phillips and Hyer got high together, it

was whether Phillips dealt drugs. That evidence had no relevance to the issue the jury was required to decide.

X. CONCLUSION

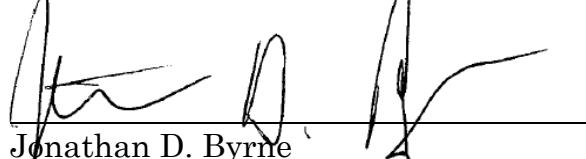
For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

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XI. APPENDIX

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APPENDIX A

809 Fed.Appx. 144

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff – Appellee,

v.

Michael Matthew PHILLIPS, Defendant – Appellant.

No. 19-4154

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Submitted: March 18, 2020

|

Decided: May 1, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of West Virginia, David A. Faber, Senior District Judge, of possessing a firearm as a felon. Defendant appealed.

Holdings: The Court of Appeals, [Quattlebaum](#), Circuit Judge, held that:

[\[1\]](#) evidence supported conviction, and

[\[2\]](#) testimony regarding relationship and prior drug use between defendant and buyer of firearm was admissible.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (3)

[\[1\]](#) [Weapons](#)  [Possession](#)

Sufficient evidence supported conviction for possession of firearm by felon, despite claim that there was insufficient evidence to show that defendant had constructive possession of firearm; jury could have found that defendant discussed gun deal with buyer, took money for gun, led buyer to gun, and signaled buyer to its location, as buyer met defendant and entered house, buyer dropped money in house to buy back gun, buyer then left house with defendant and walked with him towards location of gun, defendant raised arm and made hand gesture, buyer then grabbed gun from specific place at end of street, and buyer admitted that he probably would not have found gun without defendant.  [18 U.S.C.A. §§ 922\(g\)\(1\),](#)  [924\(a\)\(2\).](#)

[2] [Criminal Law](#) [Weapons and explosives](#)

Testimony regarding relationship and prior drug use between defendant and buyer of firearm was admissible in prosecution for possession of firearm by felon; nature of drug buy, gun recovery effort, and interrelation between defendant, buyer, and person with whom buyer originally traded gun for drugs were pertinent issues at trial, testimony explained relationship between defendant and buyer and context of defendant's decisions and actions, and district court took further and swift step of instructing jury that defendant was not on trial for any drug offense, controlling any associated risk of unfair prejudice.

 [18 U.S.C.A. §§ 922\(g\)\(1\),](#)  [924\(a\)\(2\); Fed. R. Evid. 404\(b\).](#)

[3] [Criminal Law](#) [Evidence of other offenses and misconduct](#)

Any error in trial court's admission of testimony regarding relationship and prior drug use between defendant and buyer of firearm was harmless in prosecution for possession of firearm by felon; testimony of defendant's conduct on day buyer recovered gun was more than sufficient to independently support conviction.  [18 U.S.C.A. §§ 922\(g\)\(1\),](#)  [924\(a\)\(2\); Fed. R. Crim. P. 52\(a\).](#)

***145** Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. [David A. Faber](#), Senior District Judge. (2:18-cr-00107-1)

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PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. [Michael B. Stuart](#), United States Attorney, Charleston, West Virginia, [R. Gregory McVey](#), Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Huntington, West Virginia, for Appellee.

Before [NIEMEYER](#), [DIAZ](#), and [QUATTLEBAUM](#), Circuit Judges.

Opinion

Affirmed by unpublished opinion. Judge [Quattlebaum](#) wrote the opinion, in which Judge [Niemeyer](#) and Judge [Diaz](#) joined.

Unpublished opinions are not binding precedent in this circuit.

[QUATTLEBAUM](#), Circuit Judge:

Michael Matthew Phillips appeals the final judgment entered on his conviction of possessing a firearm under [18 U.S.C. §§ 922\(g\)\(1\)](#) and [924\(a\)\(2\)](#). Phillips contends the government did not produce sufficient evidence to support the jury's verdict that Phillips exercised dominion and control over a firearm. He also argues the district court abused its discretion by allowing the government to question its witness, Jeremy Hyer, about his drug relationship with Phillips. Having reviewed and considered the record, we affirm.

I.

We begin by summarizing the relevant facts. Jeremy Hyer, an admitted heroin addict, stole several rolls of coins and a 9mm pistol from a garage at his uncle's house in West Virginia. He traded the firearm and some of the coins for heroin from a man known as "K." After Hyer's uncle reported the firearm as stolen, Hyer, when questioned by local authorities, admitted stealing it. He then began working with law enforcement to recover the firearm. More specifically, Hyer met with Corporal Jeremy Hatfield of the Kanawha County Sheriff's Department to set up a controlled buy back of the firearm and the purchase of \$30.00 worth of heroin. Hyer arranged the buy-back deal through a series of text messages with "K." After law enforcement officials drove Hyer to a location near a Go-Mart convenience store, Hyer exited the vehicle to meet "one of K's friends" to buy back the firearm. (J.A. 125-126, 144.)

Hyer "ran into" a few people in the parking lot of the Go-Mart, including Phillips. (J.A. 126, 144.) After a conversation, Hyer and Phillips walked together to a house across the street from the store. *146 Hyer left money in the house for the gun. Hyer and Phillips then left the house and walked down the street. After walking some distance together down the street, Phillips raised his arm and

made a hand motion. Hyer then recovered the firearm from some tall weeds near a utility pole. Hyer returned to Hatfield with the firearm and \$30.00 leftover cash because he was not able to buy heroin.

Several months after the firearm was recovered, Phillips was charged with possessing a firearm as a felon.¹ After pleading not guilty, Phillips proceeded to a jury trial. The sole question for the jury was whether Phillips constructively possessed the firearm, as the other elements of the offense were stipulated by Phillips and the government. The jury found Phillips guilty. Phillips moved for a judgment of acquittal, arguing there was insufficient evidence to support the jury's verdict that Phillips constructively possessed the firearm at issue. The district court denied Phillips' motion and sentenced him to a term of 30 months in prison followed by three years of supervised release.

¹ It is undisputed that he had been previously convicted of crimes punishable by terms of imprisonment exceeding one year as defined in  [18 U.S.C. § 921\(a\)\(20\)](#).

Phillips filed a timely notice of appeal of his conviction. We have jurisdiction over the appeal pursuant to [28 U.S.C. § 1291](#) and  [18 U.S.C. § 3742](#).

II.

[1] We turn to Phillips' first argument on appeal. Phillips maintains that his conviction under  [18 U.S.C. §§ 922\(g\)\(1\)](#) and  [924\(a\)\(2\)](#) should be reversed because the district court erred in denying his motion for acquittal. He argues that there was insufficient evidence from which a reasonable jury could conclude, beyond a reasonable doubt, that he possessed the firearm Hyer stole and then recovered.

 [Section 922\(g\)\(1\)](#) makes it unlawful for a defendant previously convicted of a crime punishable by a term of imprisonment exceeding one year to ship, transport, receive, or possess a firearm or ammunition which has been shipped or transported in interstate or foreign commerce.  [18 U.S.C. § 922\(g\)\(1\)](#). The possession element is at issue in this case. Possession can be actual, which means physical control over property, or constructive, which means a "defendant exercised, or had the power to exercise, dominion and control over the item."  [United States v. Moye, 454 F.3d 390, 395 \(4th Cir. 2006\)](#) (internal quotation marks and citation omitted). Here, the pertinent issue is whether Phillips constructively possessed the gun. Phillips argues there was no evidence from which a jury could reasonably conclude he maintained constructive possession. In support of that argument, he insists a defendant's mere proximity to contraband or awareness of a gun's position is not a sufficient basis for concluding constructive possession.

As the district court denied Phillips' motion for acquittal, we review de novo and employ the same standards applied by the district court.  [United States v. Wolf, 860 F.3d 175, 194 \(4th Cir. 2017\)](#). "Any defendant who contends that there was insufficient evidence to sustain a guilty verdict against him 'must overcome a heavy burden.' "  *Id.* (quoting [United States v. Hoyte, 51 F.3d 1239, 1245 \(4th Cir. 1995\)](#)). Viewing the evidence in the light most favorable to the government, the court must uphold the jury's verdict if it is supported by substantial evidence. [United States v. Kiza, 855 F.3d 596, 601 \(4th Cir. 2017\)](#). And by "substantial evidence," we mean, evidence "that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt *147 beyond a reasonable doubt."  [United States v. Cornell, 780 F.3d 616, 630 \(4th Cir. 2015\)](#) (internal quotation marks omitted). Thus, "[r]eversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." [United States v. Ashley, 606 F.3d 135, 138 \(4th Cir. 2010\)](#) (internal quotation marks omitted). "A reviewing court, therefore, may not overturn a substantially supported verdict merely because it finds the verdict unpalatable or determines that another, reasonable verdict would be preferable."  [United States v. Burgos, 94 F.3d 849, 862 \(4th Cir. 1996\)](#).

Having reviewed the record, we affirm the district court and the jury's verdict. The record contains evidence that Hyer went to the Go-Mart to retrieve the gun from one of K's friends and then met Phillips. After meeting Phillips, the two men walked to and entered the house across the street. Hyer dropped some money in the house to buy back the gun. He then left the house with Phillips and walked with him to the end of the street. As they approached the location of the gun, Phillips raised his arm and made a hand gesture. Hyer then "grabbed the gun from a specific place at the end of the street." (J.A. 153.) He admitted that he probably would not have found the gun without Phillips. From this evidence a reasonable jury could have found, beyond a reasonable doubt, that Phillips discussed the gun deal with Hyer at the Go-Mart, took the money for the gun, led Hyer to it, and signaled to Hyer its location. This is sufficient evidence that Phillips exercised dominion and control over and thus constructively possessed the firearm.

To be sure, the record contained support for Phillips' argument that he was not guilty. Hyer did not specifically identify who told him the location of the gun. And he testified that Phillips did not lead him to the gun. The two men, Hyer suggests, simply walked together down the street. But a reasonable jury was entitled to reject Hyer's testimony and Phillips' arguments. *See*  [Burgos, 94 F.3d at 862](#) (citation omitted) ("[T]he jury, not the reviewing court, weighs the credibility of the evidence and resolves any conflicts in the evidence presented, and if the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe.").

Here, the evidence reveals more than an unexplained proximity to the weapon on the part of Phillips. Because the record provides a sufficient connection between Phillips and the weapon,

the jury's finding of constructive possession is supported by sufficient evidence, and Phillips' conviction must be sustained. *See generally*  [United States v. Branch, 537 F.3d 328, 343 \(4th Cir. 2008\)](#) (affirming conviction and finding facts taken together would allow a reasonable jury to conclude the defendant constructively possessed the firearm concealed in the vehicle).

III.

[2] We now turn to Phillips' second argument. Phillips argues the district court abused its discretion in allowing the government to elicit certain testimony regarding the relationship and prior drug use between Phillips and Hyer. During cross-examination by Phillips' counsel, Hyer revealed that he had several sources for heroin. In response, on re-direct examination, the government asked Hyer if Phillips was one of those sources. Phillips objected, arguing the question and testimony sought was inadmissible based on [Federal Rule of Evidence 404\(b\)](#). The government responded that the defense "opened the door" to the line of questioning by asking about Hyer's drug use and sources. (J.A. 184.) After the district court overruled the *148 objection, Hyer testified that he and Phillips "got high together." (J.A. 185.)

The standard of review for such evidentiary rulings is abuse of discretion.  [United States v. Basham, 561 F.3d 302, 325 \(4th Cir. 2009\)](#). "We will not vacate a conviction unless we find that the district court judge acted arbitrarily or irrationally in admitting evidence."  [Id. at 326](#) (internal quotation marks and citation omitted). "Judgments of evidentiary relevance and prejudice are fundamentally a matter of trial management, for [t]rial judges are much closer to the pulse of a trial than we can ever be and broad discretion is necessarily accorded them." [United States v. Benkahla, 530 F.3d 300, 309 \(4th Cir. 2008\)](#) (internal citations and quotation marks omitted).

The district court did not abuse its discretion in allowing the government to present evidence concerning the relationship between Hyer and Phillips, including their prior drug use. [Rule 404\(b\)\(1\)](#) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character." [Fed. R. Evid. 404\(b\)\(1\)](#). But, importantly, it "does not bar evidence that completes the story of the crime or explains the relationship of parties or the circumstances surrounding a particular event."  [Basham, 561 F.3d at 327](#) (citation omitted). Here, the nature of the drug buy, the gun recovery effort and the interrelation between Hyer, Phillips and "K" were all pertinent issues at trial. The challenged testimony explained the relationship between Hyer and Phillips and the context of Phillips' decisions and actions. Since the challenged testimony addressed issues relevant at trial and was not prohibited by [Rule 404\(b\)](#), the district court did not abuse its discretion in determining the testimony was relevant and reasonable.

[3] Further, to the extent the decision by the district court to allow the line of questioning about Phillips and Hyer related to prior drug use constituted error, any abuse of discretion in admitting such testimony was harmless. *See Fed. R. Crim. P. 52(a)* (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”). “Erroneously admitted evidence is harmless if a reviewing court is able to say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.”  *Basham, 561 F.3d at 327* (internal citation and quotation marks omitted). The testimony of Phillips’ conduct on the day Hyer recovered the gun was more than sufficient to independently support his conviction.

What's more, the district court took the further and swift step of instructing the jury that Phillips was not on trial for any drug offense. In doing so, the district court substantially controlled any associated risk of unfair prejudice and we find no abuse of discretion in the district court's evidentiary ruling.

IV.

For the foregoing reasons, we affirm Phillips' conviction under  [18 U.S.C. §§ 922\(g\)\(1\)](#) and  [924\(a\)\(2\)](#). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

All Citations

809 Fed.Appx. 144

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 2:18-00107

MICHAEL MATTHEW PHILLIPS

MEMORANDUM OPINION AND ORDER

Pending before the court is the defendant's motion for judgment of acquittal. (ECF No. 67). The government has responded to the motion. (ECF No. 70). For the reasons expressed below, that motion is **DENIED**.

I. Background

After a jury trial, Michael Matthew Phillips ("Phillips" or "defendant") was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Phillips moved for a judgment of acquittal at the close of all the evidence and, after the verdict, filed the instant written motion. In his motion, Phillips argues that the evidence presented at trial was insufficient to sustain his conviction. Specifically, Phillips contends that the government's evidence fell short of establishing his constructive possession of the firearm at issue in this case.

II. Standard of Review

In evaluating a defendant's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(c), the court must

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view the evidence in the light most favorable to the government to determine if any rational trier of fact could have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. See United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997). Accordingly, defendant's conviction must be sustained if, viewed in the light most favorable to the United States, there is substantial evidence to support it. See Glasser v. United States, 315 U.S. 60, 80 (1942). In reviewing the sufficiency of the evidence, a court does not weigh the evidence or assess the credibility of witnesses. United States v. Arrington, 719 F.2d 701, 704 (4th Cir. 1983). The court "must assume that the jury resolved all contradictions in testimony in favor of the Government." United States v. United Med. & Surgical Supply Corp., 989 F.2d 1390, 1402 (4th Cir. 1993).

"'[S]ubstantial evidence,' in the context of a criminal action, [is] that evidence which 'a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" United States v. Newsome, 322 F.3d 328, 333 (4th Cir. 2003) (quoting United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996)). "The jury, not the reviewing court, weighs the credibility of the evidence and resolves any conflicts in the evidence presented." United States v. Murphy, 35 F.3d 143, 148 (4th Cir. 1994); see also United States v. Saunders, 886 F.2d 56, 60 (4th Cir. 1989)

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("[T]his court is bound by the credibility choices of the jury.") (internal citations and quotations omitted). Furthermore, "if the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe." Murphy, 35 F.3d at 148. Therefore, a defendant challenging the sufficiency of the evidence "must overcome a heavy burden." United States v. Palomino-Coronado, 805 F.3d 127, 130 (4th Cir. 2015) (quoting United States v. Hoyte, 51 F.3d 1239, 1245 (4th Cir. 1995)).

The Court "may not overturn a substantially supported verdict merely because it finds the verdict unpalatable or determines that another, reasonable verdict would be preferable," United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996); instead reversal for insufficiency must "be confined to cases where the prosecution's failure is clear," Burks v. United States, 437 U.S. 1, 17, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

Id.

III. Analysis

Where, as here, a defendant argues that a jury's verdict was based on insufficient evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942). The indictment in this case charges that, on or about January 24, 2017, defendant did knowingly possess a firearm, a HI-Point, Model C9, 9mm pistol, after having been convicted of a crime punishable by a term of imprisonment exceeding one year. "To show a § 922(g)(1) violation, the government must prove three elements: (i) that

the defendant was a convicted felon at the time of the offense; (ii) that he voluntarily and intentionally possessed a firearm; and (iii) that the firearm traveled in interstate commerce at some point." United States v. Adams, 814 F.3d 178, 183 (4th Cir. 2016) (quoting United States v. Gallimore, 247 F.3d 134, 136 (4th Cir. 2001)). Phillips stipulated that he was a convicted felon and that the firearm at issue was manufactured in Ohio. See Government's Exhibit 1 (ECF No. 60-1). Therefore, the only disputed element was whether Phillips possessed the firearm at issue in this case.

Of the government's burden in proving possession, the United States Court of Appeals for the Fourth Circuit has explained:

Under our possession jurisprudence, possession can be actual or constructive. United States v. Rusher, 966 F.2d 868, 878 (4th Cir. 1992). "Actual possession" is defined as "[p]hysical . . . control over property." Black's Law Dictionary 1201 (8th ed. 2004). Constructive possession is established if it is shown "that the defendant exercised, or had the power to exercise, dominion and control over the item." Rusher, 966 F.2d at 878.

United States v. Moyer, 454 F.3d 390, 395 (4th Cir. 2006) (en banc). "Notably, dominion and control cannot be established by mere proximity to [] contraband, by mere presence on the property where the contraband is found, or by mere association with the person who does control the contraband." United States v. Blue, 808 F.3d 226, 232 (4th Cir. 2015); see also United States v. Pardo, 636 F.2d 535, 549 (D.C. Cir. 1980) ("There must

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be some action, some word, or some conduct that links the individual to the [contraband] and indicates that he had some stake in them, some power over them. There must be something to prove that the individual was not merely an innocent bystander."). Furthermore, possession can be shared with others. United States v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996); see also United States v. Jones, No. 17-4480, 742 F. App'x 710, 713 (4th Cir. July 18, 2018) ("Possession can be actual, exclusive, constructive, or joint."). ``Possession, whether actual or constructive, can be extremely brief: a minute of possession is as much an offense as a year of possession.'' Jones, 742 F. App'x at 713 (quoting United States v. Torres-Colon, 790 F.3d 26, 32 (1st Cir. 2015)).

The relevant facts adduced at trial are as follows. On January 18, 2017, Jeremy Hyer* stole the firearm named in the indictment from his uncle, James Monk. Trial Testimony of Jeremy Hyer, September 12, 2018, at 4-6 (hereinafter "Hyer Test. at ____") (ECF No. 67-1). Hyer, a self-described drug addict, testified that he stole the firearm in order to trade it for heroin. See id. at 5. According to Hyer, he traded the gun and some stolen coins with "K" for one gram of heroin. See id. at 35. After being "caught" by the Kanawha County Sheriff's

* At various times in the record, Hyer's last name is spelled "Hyre". The court uses "Hyer" herein.

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Department, Hyer admitted to having stolen the gun and agreed to “[g]et the gun back.” See id. at 5. On cross-examination, Hyer also conceded that he thought getting the gun back would help him avoid being charged with the theft of the gun. See id. at 36.

To that end, on January 24, 2017, the Kanawha County Sheriff’s Department provided Hyer with money to purchase the gun back in a controlled buy. See id. at 6. Hyer was also given money to purchase heroin. See id. According to Hyer, law enforcement equipped him with a camera in order to videotape the transaction. See id. at 8-10. Hyer testified that he contacted “K” to get the gun back. See id. at 7.

Hyer and “K” exchanged text messages and Hyer got a message from “K” to go to Go Mart. See id. at 38-40; see also Defendant’s Exhibits 1 and 2 (ECF Nos. 60-5 and 60-6). Hyer testified that he believed that he had talked to “K” prior to exchange of the text messages. See id. at 39. The following text messages were exchanged between Hyer and “K”:

Hyer: She had to go to bank I’m tryin to hurry her ass up lol

K: Ok I’m back here

Hyer: Fast as I can bro I’m comin tho for sure

K: K

Hyer: Pulling out the bank nigga

K: There’s cops every were [sic] go to go-mart

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Hyer: I b there in 5ish I got 175 bra
Defendant's Exhibits 1 and 2.

After meeting with law enforcement, Hyer went to the Go Mart in North Charleston "[t]o try to get - - retrieve the gun." Hyer Test. at 9. In doing so, Hyer testified that "I thought I was meeting one of K's friends." Id. Eventually, Hyer encountered defendant at the Go Mart. See id. at 9, 12.

After meeting up at the Go Mart, Hyer and Phillips left the Go Mart together and went to a house "across the street." Id. at 10. Hyer testified that he did not know "whose house" it was and that he left the money in the house "to get the weapon back." Id. at 10, 20. There was some discussion regarding money on the recording. A short time later, both Hyer and Phillips left the house and went to the "end of the street." Id. at 18. The videorecording of the incident shows Phillips pointing in the video. See id. at 17. Shortly thereafter, Hyer retrieved the gun from some weeds. See id. at 18, 20.

Of his retrieval of the gun, Hyer testified:

Q: Now, at that point, did you retrieve the gun?

A: I believe so.

Q: Well, you retrieved a gun that afternoon, did you not?

A: Yes.

Q: And was it that location that you retrieved the gun?

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A: Yes. I'm pretty sure.

Q: Before you got that gun, tell us what you knew about the location of it on that date.

A: That's -- that's all I knew.

Q: What do you mean that's all you knew?

A: I didn't know the location of it.

Q: And how did you learn the location of the gun?

A: Someone told me at some point.

Q: And who was that someone?

A: I don't -- I can't recall a hundred percent.

Q: Well, who led you to that place?

A: We just walked together. He didn't really lead me.

Q: Could you have found that gun without Matt?

A: I'm not sure. I don't know. Probably not, but I can't say a hundred percent.

Q: Mr. Hyre, did you place that gun there that afternoon?

A: Did I?

Q: Yes.

A: I don't believe so.

Q: Well, did you, or didn't you?

A: No.

Q: Prior to meeting Matt, did you know where that gun was?

A: Not exactly, no.

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Q: Well, had anybody else told you?

A: I don't -- I don't believe so. I don't -- I don't recall.

Id. at 18-19.

Hyer was a reluctant witness for the government.

Q: You don't want to be here testifying today, do you?

A: No, I don't.

Q: Why?

A: I -- I just don't.

Q: Well, is there a particular reason?

A: No. I just want to go home.

Id. at 19-20.

Hyer also testified that he was troubled by the idea of implicating "K".

Q: Is it fair to say you didn't like the idea of setting K up to send him to jail?

A: Yeah. No, I didn't.

Q: Because you agree there would be a lot of negatives to that, such as, you would lose a source of heroin if he went to jail?

A: I had -- I had a few sources but, yeah, that was --

Q: But you would lose him if he went to jail, right?

A: Right.

Q: And you also risked getting labeled as a snitch on the streets, correct?

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A: Right.

Q: And, if you're labeled as a snitch, people might not sell drugs to you?

A: Right.

Id. at 36-37. Hyer testified that he was unsure of the exact nature of defendant's relationship with "K" although he stated that he was "[s]omewhat" sure there was one because he had "seen" both "K" and "Matt . . . around." Id. at 7.

Viewing the evidence in the light most favorable to the government, the court finds there was sufficient circumstantial evidence to support the jury's verdict that, on January 24, 2017, Phillips constructively possessed the firearm at issue in this case. Hyer was certainly a reluctant witness. But, on certain points, his testimony was clear. Hyer testified that he stole the firearm from his uncle and then traded it for heroin. A week or so later, Hyer admits to the Kanawha County Sheriff's Department that he had stolen the gun. Believing it in his best interest to do so, Hyer agrees to work with law enforcement to recover the gun. Hyer's testimony on these points was corroborated by Corporal Jeremy Hatfield who also testified at the trial.

Hyer communicates with "K" to see about buying back the gun. Although Hyer's testimony on this point was somewhat cagey, screenshots confirm the communication and the agreement. See Defendant's Exhibits 1 and 2 (ECF Nos. 60-5 and 60-6).

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Whereupon, the Kanawha County Sheriff's Office arranged for Hyer to purchase the firearm in a controlled buy.

Although the text messages setting up the transaction were between Hyer and "K", Phillips, not "K", is the person who shows up at the Go Mart. Furthermore, Hyer leaves the Go Mart with Phillips. This is certainly circumstantial evidence from which a reasonable jury could infer that Phillips was the person who Hyer planned to meet.

Hyer and Phillips then walk to a house. Hyer leaves the money for the weapon at that house. Afterwards, Hyer and defendant walk to a lot where defendant is shown pointing. See Government's Exhibit 3. Shortly thereafter, Hyer retrieves the weapon from the weeds. Most of this can be seen on the videorecording that was shown at trial.

With respect to defendant's argument that he was merely a fall guy for Hyer, there is nothing to suggest that Hyer needed a fall guy. Indeed, Hyer admitted to stealing the gun. According to him, he thought that he would get off easier if he helped recover the gun. If, on January 23, 2017, Hyer had possession of the gun, actual or constructive, he could simply have retrieved the gun. Therefore, it is reasonable to infer that Hyer did not know where the gun was until Phillips showed him. Indeed, he testifies as much:

Q: Could you have found that gun without Matt?

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A: I'm not sure. I don't know. Probably not, but I can't say a hundred percent.

Q: Mr. Hyre, did you place that gun there that afternoon?

A: Did I?

Q: Yes.

A: I don't believe so.

Q: Well, did you, or didn't you?

A: No.

Q: Prior to meeting Matt, did you know where that gun was?

A: Not exactly, no.

Q: Well, had anybody else told you?

A: I don't -- I don't believe so. I don't -- I don't recall.

Hyer Test. at 18-19.

Phillips argues that the government failed to prove his constructive possession of the firearm because there was no evidence that Hyer gave the buy money to him or that he had any ownership interest or lived in the house where Hyer "dropped" the money. However, this point is immaterial to whether Phillips is guilty of being a felon in possession of a firearm. The government was not required to prove that any money changed hands.

Defendant also argues that his mere presence in proximity to the gun was insufficient to prove his constructive possession of

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the weapon. However, the government did not solely rely on Phillips' proximity to the gun but, instead, showed that defendant exercised dominion and control over the firearm. The government's evidence on this point was shown by Hyer's testimony that he could not find the firearm without Phillips' assistance. The evidence was sufficient to prove defendant's constructive possession of the firearm. See, e.g., United States v. Clark, 48No. 01-4839, F. App'x 57, 61 (4th Cir. 2002), ("The Government's evidence that Clark knew the location of the weapons prior to the search is sufficient to establish constructive possession of the weapons.").

Nor was the government required to prove that Phillips was the one who placed the gun by the utility pole or that he maintained exclusive control over the gun. As noted above, possession may be joint and it may be brief. See United States v. Escobar-de Jesus, 187 F.3d 148, 176 (1st Cir. 1999) ("[D]uration of possession is not an element of the statute.").

Finally, the court finds no merit in defendant's argument that his Rule 29 motion must be granted because of the government's alleged failure to prove an agency or conspiratorial relationship between "K" and Phillips. The government was not required to prove the exact nature of the relationship between defendant and "K" or that one existed at all. As discussed above, the evidence showed that Hyer arranged the recovery of the

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gun with "K". "K" did not show up; Phillips did. And Phillips was with Hyer when the weapon was recovered. It was certainly reasonable for the jury to infer that either Phillips was actually "K" or that Phillips constructively possessed the firearm in combination with "K".

The court is mindful that a jury could have concluded that Phillips was not in possession of the firearm but was merely present when the firearm was recovered. "However, it was for the jury, not this court, to decide which version of the events—the government's or [defendant]'s—was more credible." United States v. Moye, 454 F.3d 390, 396 (4th Cir. 2006) (en banc). As the Fourth Circuit explained:

To be sure, as appellate judges, we enjoy no greater vantage point on appeal than did the jury at trial and we have no right to usurp the jury's role to find facts. . . . If we did otherwise, we would be substituting our judgment for that of the jury. In this case, the jury was entitled to reach the reasonable and quite unremarkable conclusion that [defendant] possessed the firearms. . . ."

Id. at 396-97.

IV. Conclusion

For the foregoing reasons, defendant's motion for judgment of acquittal is **DENIED**.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record, to the United States Marshal for the Southern District of West Virginia, and to the Probation Office of this court.

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IT IS SO ORDERED this 28th day of February, 2019.

ENTER:

David A. Faber

David A. Faber

Senior United States District Judge

APPENDIX C

1 **Q.** Okay. Any other time than last week?

2 **A.** Just last week.

3 **Q.** Okay. Have you ever been charged with any violations
4 of federal firearms laws for stealing your uncle's pistol?

5 **A.** No.

6 MR. BUNGARD: Your Honor, could I have a minute,
7 please?

8 THE COURT: Yes.

9 (Pause)

10 MR. BUNGARD: No further questions at this time.

11 THE COURT: Any redirect, Mr. McVey?

12 MR. MCVEY: A couple, Your Honor.

13 **REDIRECT EXAMINATION**

14 **BY MR. MCVEY:**

15 **Q.** Mr. Hyre, you have no plea agreement with the United
16 States; is that correct?

17 **A.** No.

18 **Q.** Okay. And you said you had several sources for heroin?

19 **A.** Yes.

20 **Q.** Was the defendant one of those?

21 MR. BUNGARD: Objection, Your Honor. This is
22 404(b).

23 MR. MCVEY: Your Honor, they opened the door.

24 THE COURT: I think you did, Mr. Bungard. I'll
25 overrule the objection.

1 BY MR. MCVEY:

2 Q. Was the defendant one of those sources?

3 A. We got high together.

4 Q. Did you get heroin from him?

5 A. He got me high; I got him high.

6 MR. MCVEY: That's all I have, Your Honor.

7 MR. BUNGARD: Nothing further, Your Honor.

8 THE COURT: All right. Mr. Hyre, your testimony
9 is concluded. Do not discuss your testimony with anyone
10 until after this trial is over. And I'm returning you to
11 the custody of the marshal at this time.

12 THE WITNESS: Thank you.

13 THE COURT: I caution you, ladies and gentlemen of
14 the jury, the defendant is not on trial in this case for any
15 -- any drug charge. The charge against him is being a felon
16 in possession of a firearm and I just wish to remind you of
17 that.

18 MR. MCVEY: The United States calls Deputy Vernon.

19 COURTROOM DEPUTY CLERK: Would you please state
20 your name?

21 THE WITNESS: Corporal James Vernon.

22 COURTROOM DEPUTY CLERK: Thank you. Please raise
23 your right hand.

24 **CORPORAL JAMES VERNON, GOVERNMENT WITNESS, SWORN**

25 COURTROOM DEPUTY CLERK: Thank you. Please take a

APPENDIX D

UNITED STATES DISTRICT COURT

Southern District of West Virginia

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
 v.)
 MICHAEL MATTHEW PHILLIPS) Case Number: 2:18CR00107-001
) USM Number: 12565-087
) David R. Bungard, AFPD
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

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

was found guilty on count(s) one of the one-count indictment 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(g)(1) and 924(a)(2)	Felon in possession of a firearm	1/24/2017	1

The defendant is sentenced as provided in pages 2 through 8 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 the 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.

3/1/2019
Date of Imposition of Judgment



Signature of Judge

David A. Faber, Senior United States District Judge
Name and Title of Judge

3/4/2019
Date

DEFENDANT: MICHAEL MATTHEW PHILLIPS
CASE NUMBER: 2:18CR00107-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

thirty (30) months

The court makes the following recommendations to the Bureau of Prisons:

The court recommended that defendant be incarcerated at a facility where he can receive medication for his serious heart condition. The court further recommended that defendant receive drug counseling and treatment while incarcerated.

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.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

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 _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL MATTHEW PHILLIPS

CASE NUMBER: 2:18CR00107-001

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.
 - 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 a 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, 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: MICHAEL MATTHEW PHILLIPS
CASE NUMBER: 2:18CR00107-001

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 nunchakus 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 risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use 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 _____

DEFENDANT: MICHAEL MATTHEW PHILLIPS
CASE NUMBER: 2:18CR00107-001

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the Standard Conditions of Supervision adopted by the Southern District of West Virginia as contained in Local Rule of Criminal Procedure 32.3 as follows:

- 1) If the offender is unemployed, the probation officer may direct the offender to register and remain active with Workforce West Virginia.
- 2) Offenders shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program as directed by the probation officer. Offenders shall not use any method or device to evade a drug screen.
- 3) As directed by the probation officer, the defendant will make copayments for drug testing and drug treatment services at rates determined by the probation officer in accordance with a court-approved schedule based on ability to pay and availability of third-party payments.
- 4) A term of community service is imposed on every offender on supervised release or probation. Fifty hours of community service is imposed on every offender for each year the offender is on supervised release or probation. The obligation for community service is waived if the offender remains fully employed or actively seeks such employment throughout the year.
- 5) The defendant shall not possess a firearm, ammunition, destructive device, or any other 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 nunchakus or tasers), and shall reside in a residence free from such items.
- 6) The defendant shall not purchase, possess, or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids, or other designer stimulants.

DEFENDANT: MICHAEL MATTHEW PHILLIPS
CASE NUMBER: 2:18CR00107-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 7 of 8

DEFENDANT: MICHAEL MATTHEW PHILLIPS
CASE NUMBER: 2:18CR00107-001

CRIMINAL MONETARY PENALTIES

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

TOTALS \$ Assessment \$ JVTA Assessment* \$ Fine \$ Restitution

- 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.

- 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:

* 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.

DEFENDANT: MICHAEL MATTHEW PHILLIPS
CASE NUMBER: 2:18CR00107-001

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:

If not paid immediately, the defendant shall pay the special assessment during his term of incarceration in installments of not less than \$25 per quarter through participation in the Bureau of Prisons' Inmate Financial Responsibility Program. Any remaining balance shall be paid during the term of supervised release at a rate of \$25 per month commencing 30 days after his release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

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) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.