No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE LEE WILSON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

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

PETITION FOR WRIT OF CERTIORARI

Dated: January 20, 2021

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QUESTION PRESENTED

At Wilson's jury trial the district court allowed testimony that Wilson sold drugs the day before the charged offenses as background evidence that was inextricably intertwined with and intrinsic to the charged offenses. Should the Court grant certiorari to make clear that Federal Rule of Evidence 404(b) now controls the use of other acts evidence, and that there is no "complete the story" or "inextricably intertwined" exception to the rule?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit:

- *United States of America v. Wilson*, No. 20-1191, 2020 U.S. App. LEXIS 39474 (6th Cir. December 16, 2020)
- *United States of America v. Wilson*, No. 1:19-cr-126 (W.D. Mich. Judgment entered February 25, 2020)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Freddie Lee Wilson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not published. It was released on December 16, 2020. It appears at *United States v. Wilson*, No. 20-1191, 2020 U.S. App. LEXIS 39474 (Dec. 16, 2020). (Pet. App. 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on December 16, 2020. There was no petition for rehearing. The Sixth Circuit's mandate issued on January7, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Evidence 404(b), which reads as follows:

> **(b) Crimes, Wrongs, or Other Acts.**
>
> (1) **Prohibited Uses.** Evidence of a crime, wrong or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted n accordance with the character.
>
> (2) **Permitted Uses; Notice in a Criminal Case.** The

> evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request . . . the prosecutor must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Federal Rule of Evidence 404(b).[1]

STATEMENT OF THE CASE

Following a series of controlled drug buys from Wilson, officers executed a search warrant at the home of Wilson's daughter and her mother where Wilson sometimes stayed. Inside kitchen cabinets they found drugs and a loaded stolen firearm.

A jury convicted Wilson of three charges: (1) possession with intent to distribute 28 grams or more of cocaine base, cocaine, heroin, and fentanyl, (2) possession of a firearm in furtherance of a drug trafficking crime, and (3) knowingly being a felon-in-possession of a firearm.

Before the trial Wilson filed a motion objecting to the admission of evidence of the drug buys. The district court said that the government could submit evidence of one buy that took place the day before the charged

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[1]The rule was amended effective December 1, 2020. The amended rule requires the prosecutor to identify the permitted purposes for the evidence.

offenses. The district court reasoned that the evidence was admissible as intrinsic or background evidence or, in the alternative, as other acts evidence under Rule 404(b) as identity evidence and to show control of the premises. (Motion Tr., R. 68, Page ID # 427–28).

Wilson appealed. On appeal he argued that the evidence at trial was insufficient to prove that he possessed the drugs and firearm found at the home and that the district court should not have admitted the evidence relating to the drug sale.

The Sixth Circuit rejected Wilson's arguments. The Court said Wilson's ties to the home supported his convictions:

> All things considered, the evidence was sufficient to prove Wilson's constructive possession of the drugs and firearm at 902 Smith . . . . Wilson "stayed" at 902 Smith, had a key to the house, had mail addressed to him there (which was discovered in the kitchen near the drugs and firearm), and sold the same type of drug found in the home to a confidential informant.

United States v. Wilson, 2020 App. LEXIS 39474 at * 3.[2]

In rejecting Wilson's objections to the admission of evidence of the drug sale the court followed its precedent and held that the evidence was intrinsic act evidence and properly admitted as an exception to Federal Rule of

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[2]The court noted that when arrested, Wilson had a large amount of cash and multiple cell phones which, according to an officer's testimony are tools of drug dealers and show drug distribution. Items found at the home showed drug distribution, too. These included a scale, packaging materials, a firearm, and the amount of drugs. *Id.*, at *6.

Evidence 404(b). The court said intrinsic act evidence includes background or res gestae evidence. *Id.*, at *8. The court also said the evidence had a temporal and causal proximity to the charged offenses because it suggested "that the uncharged sale was part of a pattern of illegal activity probative of Wilson's connection to 902 Smith." *Id.*, at * 9–10. The court added that the evidence need not prove an element of the charged offenses so long as it was probative of them and that it was for the jury to decide what weight to give it. The court did not address if the evidence was admissible under Rule 404(b). *Id.*, at *10–11.

REASONS FOR GRANTING THE WRIT

1. The Court should grant the writ to settle a circuit split and make clear that there is no res gestae or background evidence exception to Federal Rule of Evidence 404(b).

When deciding if it will grant a petition for certiorari the Court considers if the petition presents an important issue "that has not been, but should be, settled by [the] Court" or if the decision conflicts with the decision of another circuit court "on the same important matter." Sup. Ct. R. 10(a). Both grounds apply here.

Some courts say that background evidence, also known as res gestae evidence, is an exception to Rule 404(b). It consists of two types of evidence–(1) statements about what happened leading up to the charged

crime and (2) other acts that are "inextricably intertwined" with the charged crime or that "complete the story" of the charged crime. *State v. Rose*, 206 N.J. 141, 174, 19 A.3d 985, 1006 (2011) (collecting cases). This case concerns evidence of other acts, not statements.

Like many other courts, the Sixth Circuit's definition of res gestae or background evidence combines several different concepts that seemingly could cover almost all relevant evidence. The court says that it consists of:

> . . . those acts that are inextricably intertwined with the charged offense or those acts, the telling of which is necessary to complete the story of the charged offense.
>
> . . .
>
> Proper background evidence has a causal, temporal or spatial connection with the charged offense. Typically such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense.

United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000).

This formulation permits the admission of a great deal of evidence. Courts struggle in deciding when, or if, Rule 404(b) applies when dealing with background evidence. The Second, Fourth, Fifth, and Eleventh Circuits follow the Sixth Circuit, while the Third, Seventh, and the D.C. Circuit have criticized or done away with the "completes the story" or "inextricably intertwined" theories of background evidence. *United States v. Brizuela*, 962

F.3d 784, 794, n. 8 (4th Cir. 2020) (noting the differing views).

As the D.C. Circuit observed, these theories of background evidence obscure analysis: "There is . . . a danger that finding evidence "inextricably intertwined" may too easily slip from analysis to mere conclusion. . . . The "complete the story" definition of "inextricably intertwined" threatens to override Rule 404(b)." *United States v. Bowie*, 232 F.3d at 927–29). *See United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010) (abandoning the inextricably intertwined test because it has "become overused, vague, and quite unhelpful"), *United States v. Green*, 617 F.3d 233, 248 (3rd Cir. 2010) (holding that "the inextricably intertwined test is vague, over-broad, and prone to abuse"). These courts say that Rule 404(b) replaces the use of res gestae or background evidence. [3]

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[3]Some states have followed suit. *State v. Fetelee*, 117 Haw. 53, 63–81, 175 P.3d 709 (2008)(collecting cases and holding that the res gestae doctrine is no longer viable in Hawaii and may not be used as an independent basis for the admission of evidence), *State v. Rose*, 206 N.J. 141, 19 A.3d 985 (2011) (noting the difficulty of determining what evidence is intrinsic and requiring trial courts to analyze all other acts evidence using Rule 404(b), unless it directly proves the charged offense or takes place at the same time). *People v. Jackson*, 498 Mich. 246, 268–69 (2015) (holding that there is no res gestae exception to MRE 404(b)).

Scholars also criticize the res gestae doctrine as vague and say that its vagueness invites abuse. Edward J. Imwinkelreid, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory For Admitting Evidence of An Acused's Uncharged Misconduct.* 59 Cath. U.L. Rev. 719, 729–30 (2010).

Rule 404(b) guards against the improper use of propensity evidence. The rule requires the prosecution to give pretrial notice of its intent to use the evidence and requires the trial court to balance the probative value of the evidence against its prejudicial effect. And the trial court, if asked, must give the jury a cautionary instruction about the use of the evidence. *United States v. Bowie,* 232 F.3d at 927–28.

This Court should hold that the Federal Rules of Evidence codified and replaced the res gestae doctrine and that Rule 404(b) now governs evidence of other crimes, wrongs, or acts.

Evidence that proves an element of the crime, often called intrinsic evidence, will always satisfy the requirements of Rule 404(b), because it is not another bad act. Evidence of other bad acts, often called extrinsic evidence, poses the risk that the jury will convict for crimes other than those charged, or if uncertain of guilt, will convict because the defendant is a bad person deserving punishment. *Old Chief v. United States*, 519 U.S. 172, 180–82 (1997).

It can be hard to distinguish between "intrinsic" and "extrinsic" evidence. Courts tend to call any relevant evidence intrinsic. Yet not all relevant evidence is intrinsic to the charged crime. After all, "it cannot be that all evidence tending to prove the crime is part of the crime. If that were so,

Rule 404(b) would be a nullity." *United States v. Bowie*, 232 F.3d at 929. "[T]he distinction between intrinsic and extrinsic evidence is unclear and confusing, and can lead to substituting conclusions for analysis." *United States v. Irving*, 665 F.3d 1184, 1215 (10th Cir. 2011) (Hartz, J., concurring).

The D.C. Circuit uses the "inextricably intertwined" test to distinguish intrinsic evidence from extrinsic evidence, but has never defined the term. Other definitions of inextricably intertwined do not help define the term because they are circular and over-broad. *United States v. Bowie*, 232 F.3d at 928–29.

The definitions are circular because courts say that inextricably intertwined evidence is intrinsic and that evidence is intrinsic if it is inextricably intertwined. They are over-broad because a bad act could be only tangentially relevant to the charged crime, but still "complete the story" or "explain the circumstances." *United States v. Bowie*, 232 F.3d at 928. After all, any relevant evidence explains the crime or completes the story. But just because omitting some evidence would render a story slightly less complete cannot justify circumventing Rule 404(b). *Id.*, at 929.

The Third Circuit uses the concept of intrinsic evidence more narrowly. It considers that two types of evidence could properly be considered "intrinsic" and thus not subject to Rule 404(b): (1) evidence of acts that are part of the

charged offense and (2) evidence of acts performed at the same time as the charged crime and that facilitate the commission of the charged crime. *United States v. Green*, 617 F.3d at 248–49.

Using that narrower approach here, evidence that Wilson sold drugs one day was not an element of the charges that he possessed drugs and a firearm at a different location the next day, nor did it take place at the same time. There was no gun involved in the drug sale, nor was there was proof that the drugs sold away from the home were part of the same stash that was found in the home.

The concept of background evidence leads to sloppy analysis and allows the prosecution to end-run Rule 404(b). It increases the danger of a conviction based on an inference of propensity, not based on the facts of the case. *Cf. United States v. Miller*, 673 F.3d 688, 696–97 (7th Cir. 2012) (describing the tendency of all other acts evidence to show bad character).

Here, although Wilson's intent to distribute drugs was at issue, the government had little need for the evidence. The amount and the variety of drugs found in the home showed an intent to distribute. The heart of the dispute in the case was possession. And the proof about the sale of drugs the day before did not add to the proof about possession. The district court should not have admitted the evidence.

Bowie and other courts have rejected the "complete the story" or "explain the circumstances" exception to Rule 404(b). *United States v. Bowie*, 232 F.3d at 929. This Court should grant certiorari to do the same.

2. **This case is a good vehicle to resolve the circuit split.**

The circuits differ in how they approach res gestae or background evidence. The Court need not defer deciding the issue to allow the lower courts to address it. They have spoken. For this Court to leave the split unresolved would mean that how the rules of evidence are applied would vary from circuit to circuit. That cannot promote one of the purposes of the Federal Rules of Evidence—to ensure uniform treatment of evidence throughout the federal courts.

Here, the district court and the court of appeals have passed on the issue. It is preserved and ready for this Court to review.

CONCLUSION

The Court should grant the petition for writ of certiorari. The Court should vacate Wilson's convictions and order a new trial.

Dated: January 20, 2021

Respectfully submitted,

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APPENDIX CONTENTS

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0702n.06

Case No. 20-1191

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
FREDDIE LEE WILSON,	)	MICHIGAN
	)	
Defendant-Appellant.	)	
	)	

BEFORE: COLE, Chief Judge; DONALD and READLER, Circuit Judges.

CHAD A. READLER, Circuit Judge. After orchestrating a series of controlled drug buys from Freddie Wilson, officers executed a search warrant at 902 Smith Avenue, the home of Wilson's daughter and her mother, where Wilson regularly stayed. Inside the home, detectives found a significant quantity of drugs and a firearm. A jury later convicted Wilson of three counts related to the drugs and firearm. On appeal, Wilson argues that the government did not present sufficient evidence to prove he possessed the drugs and firearm, and that the district court improperly admitted evidence of an uncharged controlled buy. Neither argument is persuasive. Accordingly, we affirm.

BACKGROUND

Over the course of several weeks, officers executed a number of controlled drug buys from Wilson. In setting up the fourth and final buy, officers observed Wilson drive from 902 Smith Avenue to a nearby store parking lot. When he arrived, Wilson sold a confidential informant an ounce of crack cocaine, which the informant purchased with $1,200 in pre-recorded bills.

As officers prepared to execute a search warrant at 902 Smith the following day, they observed Wilson leave the home in the same vehicle he had driven to the earlier controlled buys. Officers arrested Wilson approximately a half-mile from the home. A search of Wilson and the vehicle uncovered $9,864 in cash—including $980 of pre-recorded bills from the previous day's sale—and two cell phones.

Returning with Wilson to 902 Smith, officers used Wilson's key to enter the home. A search of the home revealed 187.46 grams of cocaine, 31.10 grams of cocaine base (crack cocaine), and 28.11 grams of a heroin/fentanyl mixture. The drugs, as well as a digital scale, were in a cabinet to the left of the kitchen sink. In a cabinet to the right of the sink, officers discovered a loaded handgun, which had been stolen. Officers also found mail on the kitchen table addressed to Wilson at the 902 Smith address and discovered male clothing and hygiene products in the home. During the search, Wilson told the officers that he "stayed" at 902 Smith with his daughter and her mother, Maylynn Garza.

A federal grand jury indicted Wilson on three counts: (1) possession with intent to distribute 28 grams or more of cocaine base, cocaine, heroin, and fentanyl, in violation of 18 U.S.C. §§ 841(a)(1), (b)(1)(B)(iii), and (b)(1)(C); (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i); and (3) knowingly being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). Before trial, the district

court ruled that the government could admit evidence related to the officers' final controlled drug buy from Wilson, for which Wilson was not charged. The court determined that the evidence was admissible as intrinsic background evidence, *see, e.g.*, *United States v. Chalmers*, 554 F. App'x 440, 450–51 (6th Cir. 2014), or, alternatively, as other-act evidence under Federal Rule of Evidence 404(b). During trial, the government offered the testimony of six law enforcement officials involved in the final controlled buy and in executing the search warrant. The jury returned a guilty verdict on all three counts.

On appeal, Wilson argues that the government's evidence was insufficient to prove he possessed the drugs and firearm found at 902 Smith, requiring that we vacate his convictions and enter a judgment of acquittal. At the very least, he argues, he is entitled to a new trial because the district court improperly admitted evidence related to the uncharged drug sale.

ANALYSIS

Evidence of Guilt. Wilson begins with the contention that the government's evidence was insufficient to support the jury's verdict. Because Wilson failed to move for judgment of acquittal at the close of the government's case-in-chief or at the close of evidence, we consider his argument only in the context of "whether the trial resulted in a 'manifest miscarriage of justice,'" *United States v. Williams*, 612 F.3d 417, 423 (6th Cir. 2010) (citation omitted); *United States v. Jordan*, 544 F.3d 656, 670 (6th Cir. 2008); *see also* Fed. R. Crim. P. 29(a), in other words, whether "the record is 'devoid' of evidence of guilt," *Williams*, 612 F.3d at 423 (quoting *United States v. Price*, 134 F.3d 340, 350 (6th Cir. 1998)).

With possession being an element of all three counts, Wilson disputes whether the record contains evidence that he constructively possessed the drugs and firearm found at 902 Smith. Constructive possession, which may be proven by direct or circumstantial evidence, *United States*

v. Walker, 734 F.3d 451, 455 (6th Cir. 2013), "exists when a person . . . knowingly has the power and the intention at a given time to exercise dominion and control over an object," *United States v. Raymore*, 965 F.3d 475, 483 (6th Cir. 2020) (citation omitted). While physical proximity alone is insufficient to prove constructive possession of drugs or a firearm, *see id.*; *United States v. Smith*, 20 F. App'x 258, 267 (6th Cir. 2001), that proximity combined with other incriminating evidence can "tip the scale in favor of constructive possession," *Raymore*, 965 F.3d at 484 (quoting *United States v. Curruthers*, 511 F. App'x 456, 459 (6th Cir. 2013)).

All things considered, the evidence was sufficient to prove Wilson's constructive possession of the drugs and firearm at 902 Smith, especially when measured against the manifest miscarriage of justice standard. Wilson "stayed" at 902 Smith, had a key to the home, had mail addressed to him there (which was discovered in the kitchen near the drugs and firearm), and sold the same type of drug found in the home to a confidential informant. Compare this record to that in *United States v. Michael*, 576 F.3d 323 (6th Cir. 2009). Michael sold crack cocaine to undercover officers near his girlfriend's apartment, where Michael resided. *Id.* at 325. Officers later seized 19 grams of crack cocaine, a digital scale, and a firearm from the apartment. *Id.* Because Michael stayed at the apartment three nights a week, kept clothing there, and sold the same type of drug found in the apartment to undercover officers, he was deemed to have constructively possessed the drugs and firearm found there. *Id.* at 326. If the record in *Michael* was not devoid of evidence of Michael's constructive possession, the same must be true here.

We acknowledge, as Wilson emphasizes, that simply being near contraband typically would not be enough to find constructive possession. That proximity, rather, must be coupled with other incriminating evidence. *Raymore*, 965 F.3d at 484. But consider the incriminating evidence present here. Wilson left a residence at which he regularly stayed to make a drug sale (which,

unbeknownst to him, was to a confidential informant). There, he sold the same type of drug officers later found in the residence. Those facts, coupled with the large quantity of drugs stashed near a stolen firearm in the home as well as the significant amount of cash in Wilson's possession when he was arrested, strongly suggest that Wilson possessed those drugs with the intent to distribute. *See, e.g.*, *United States v. Ham*, 628 F.3d 801, 808 (6th Cir. 2011). More than "mere proximity," in other words, connected Wilson to the seized contraband.

Wilson next contends that because he stayed at 902 Smith with Garza, proof of his occupancy alone cannot establish constructive possession without additional evidence. On this point, Wilson cites *United States v. Griffin*, 684 F.3d 691, 696–97 (7th Cir. 2012), where the Seventh Circuit held that constructive possession occurs only when "facts demonstrate[] not just a substantial connection between the defendant and the location, but also a substantial connection between the defendant and the contraband itself." Setting aside the fact that this "substantial connection" standard comes from another circuit, even measured by that standard, the evidence here fairly links Wilson not just to 902 Smith, but also to the contraband. Officers observed Wilson sell cocaine base, a drug also found in the home. When detectives arrested Wilson, he had with him a large amount of cash (including pre-marked bills from the previous day's sale) as well as multiple cell phones, all of which, according to expert testimony, are tools of drug dealers and indicative of drug distribution. So too, according to the trial testimony, are the quantity of drugs, the scale and packaging materials, and the firearm found at 902 Smith. Collectively, this evidence permits the inference that Wilson possessed the drugs and firearm at 902 Smith—and not just because he frequently stayed there. Wilson thus fails to show that his convictions amount to a manifest miscarriage of justice. *See Raymore*, 965 F.3d at 484 (finding no miscarriage of justice

when the record contained at least "some" evidence of the defendant's guilt); *United States v. Clemons*, 427 F. App'x 457, 461 (6th Cir. 2011) (same).

Admission of Uncharged Drug Sale Evidence. Wilson also challenges the district court's decision to admit evidence related to his uncharged drug sale. According to Wilson, that evidence was neither background evidence nor other-act evidence admissible under Federal Rule of Evidence 404(b). We review the district court's evidentiary rulings for an abuse of discretion. *United States v. Dunnican*, 961 F.3d 859, 873–74 (6th Cir. 2020). An abuse of discretion occurs when the district court "(1) misunderstood the law . . . , (2) relied on clearly erroneous factual findings, or (3) made a clear error of judgment." *United States v. Chavez*, 951 F.3d 349, 358 (6th Cir. 2020).

As a starting point, Rule 404(b) instructs that "[e]vidence of any other crime, wrong, or 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 the character." Fed. R. Evid. 404(b). A notable exception to this rule is for "intrinsic act[]" evidence, which includes "background" or "*res gestae*" evidence. *United States v. Sumlin*, 956 F.3d 879, 889–90 (6th Cir. 2020); *United States v. Churn*, 800 F.3d 768, 779 (6th Cir. 2015). We allow admission of background acts that are "inextricably intertwined with evidence of the crime charged," making them part of "a single criminal episode," *Sumlin*, 956 F.3d at 889 (quoting *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995) (cleaned up)), or "part of a continuing pattern of illegal activity," *Barnes*, 49 F.3d at 1149. "Proper background evidence," we have explained, "has a causal, temporal or spatial connection with the charged offense," and usually "is a prelude to the charged offense, is directly probative of the charged offense, [or] arises from the same events as the charged offense." *Sumlin*, 956 F.3d at 890 (quoting *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000)).

Measured against this standard, evidence of Wilson's uncharged drug sale was admissible background evidence. Consider the temporal and causal proximity between Wilson's uncharged drug sale and his charged offenses. The uncharged sale occurred just a day before Wilson's arrest. Officers observed him travel directly from 902 Smith to the deal location. And Wilson sold the same type of drug that officers discovered in the home. That near proximity is not unlike the facts of *United States v. Chalmers*, where testimony about Chalmers's uncharged prior marijuana sales was deemed to be admissible background evidence that was probative of his charge of possession with intent to distribute. 554 F. App'x at 451. Notable there was the fact that Chalmers's marijuana sales occurred within two weeks of his arrest, were made in the home where the drugs leading to his arrest were found, and involved the same type of drug seized from the home. *Id.* at 451 (finding the defendant's prior marijuana sales "shed[] light on [his] relationship to the residence and to the drugs found there"). As the evidence here likewise suggested that the uncharged sale was part of a pattern of illegal activity probative of Wilson's connection to 902 Smith, the district court did not abuse its discretion in admitting evidence of the uncharged sale.

Wilson responds that "[a] drug sale at one location . . . does not prove anything about the defendant's possession of drugs at a different location." But this is the wrong lens through which to view the issue. For background evidence, the district court considers only whether the evidence is *probative* of the charged offense, not whether it *proves* an element of the offense. *See Sumlin*, 956 F.3d at 889 (explaining that Rule 404(b) "does not apply to evidence that itself is *probative* of the crime charged" (emphasis added) (quoting *United States v. Price*, 329 F.3d 903, 906 (6th Cir. 2003))); *United States v. Stafford*, 232 F. App'x 522, 527 (6th Cir. 2007) (finding background evidence admissible because it was "directly *probative* of the charged offense" (emphasis added)). The jury, on the other hand, is responsible for weighing the evidence and deciding whether it

proves the existence of a fact. *Cf. United States v. Munnerlyn*, 202 F. App'x 91, 95 (6th Cir. 2006) (finding evidence admissible despite reduced probative value and explaining that "what weight to give the statement was for the jury to decide"); David L. Faigman, *Evidence: Admissibility vs. Weight in Scientific Testimony*, 1 Judges' Book 45, 45 (2017) ("Fundamental to all evidence codes is the distinction between admissibility and weight. Judges decide admissibility, and, if the evidence is admitted, jurors decide what weight to give it."). What the district court had to decide, in other words, was whether the evidence was probative of Wilson's charged crimes. As we have explained, it was. And because the district court properly admitted the evidence at issue as background evidence, we need not address whether the evidence was also admissible under Rule 404(b). *See Sumlin*, 956 F.3d at 891.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.