IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11-1951

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORY L. GRIFFIN,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER OF
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WISCONSIN
THE HONORABLE RUDOLPH T. RANDA, DISTRICT JUDGE, PRESIDING
CASE NO. 08-Cr-195

RESPONSIVE BRIEF OF THE PLAINTIFF-APPELLEE

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STATEMENT OF THE CASE

On July 22, 2008, a federal grand jury sitting in the Eastern District of Wisconsin returned an indictment against defendant Cory L. Griffin ("Griffin"), charging him with two counts of possession of a firearm as a convicted felon. R. 1.[1] On July 21, 2009, the grand jury returned a superseding indictment charging Griffin with three counts of the same violation. R. 46. Griffin's motion to dismiss the indictment for multiplicity was granted on August 18, 2009. R. 52. Thereafter, the grand jury returned a one-count second superseding indictment that consolidated all the conduct previously charged in multiple counts into one count. R. 52, 56.

On November 9 and 10, 2009, the case was heard by a jury which returned a verdict of guilty, with the special verdict form indicating that Griffin was found to have possessed one firearm and two batches of ammunition. R. 82. Griffin's motion for judgment of acquittal was denied, and his further motion for a judgment of acquittal notwithstanding the verdict was deferred pending further briefing. R. Tr. 186-88, 295-96. On September 24, 2010, Griffin moved for acquittal and a new trial, which was denied. R. 95, 100.

On April 20, 2011, Griffin was sentenced to 60 months' imprisonment and three years' supervised release. R. 105. The court entered the judgment the same day. R. 106. Griffin filed a timely notice of appeal on April 25, 2011. R. 107.

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[1]In this brief, numbers preceded by an "R" refer to the corresponding entry in the docket sheet in the Eastern District of Wisconsin.

STATEMENT OF FACTS

In April 2008 defendant Griffin, then 27 years old, was released from prison and lived with his parents in their single family home in Milwaukee. Tr. 231. In preparation for Griffin's move home, in March 2008, defendant Griffin's state probation officer Latasha Perry contacted Griffin's father by telephone about the suitability of Griffin moving into his parents' home. Tr. 144-45. During this call, Perry told Griffin's father that there could be no firearms in the home if Griffin lived there, which Griffin's father said he understood. Tr. 145. Defendant Griffin's father possessed various long firearms for hunting, as well as two handguns for protection, and had been on notice that defendant could not live in the home with firearms since the Milwaukee police had confiscated several of those firearms in 2004 due to defendant Griffin's felony status. Tr. 203-04, 208-09, 216, 232.

Griffin met probation officer Perry in her office on April 8, 2008 and reviewed each of the rules for his community supervision. Tr. 138, 140, 146, 148, Ex. 43. He then signed a copy of those rules, which included a prohibition against possessing firearms. Tr. 137, 140-41, 150, 156; Ex. 43. Griffin did not dispute these rules. Tr. 139. Although Griffin was to notify Perry immediately if he became aware of firearms in his residence so that he could go elsewhere, he failed to tell Perry of the firearms at his parent's home either at the initial meeting on April 8 or at a subsequent meeting at Perry's office on April 16, 2008. Tr. 141-42.

On April 25, 2008, Perry did a scheduled monthly home visit to Griffin at his parent's Milwaukee residence. Tr. 143. Perry, who was unaccompanied, believed Griffin

was the only person there, so she did not venture beyond the front and dining rooms, even though ideally she would have wanted to inspect the home for contraband. Tr. 143-44, 151. Had Perry known of the firearms in the residence, she would have had the police recover them. Tr. 144.

On April 30, 2008, officers of the Milwaukee Police Department executed a state-issued search warrant to seize contraband associated with the defendant's brother Chauncy at this same residence. Tr. 30-32, 68-72, 99. Since the defendant was present and living there with a felony record, officers seized all firearms found, including two loaded handguns behind the headboard of the bed in his parents' bedroom, three long guns in the closet of that bedroom, and numerous rounds of ammunition on the night stand in that bedroom. Tr. 32-49, 93, 98, 100; Exs. 1-4, 6-18. Officers further recovered both a bag and a box of shotgun shells at the bottom of the staircase off of the kitchen – the only staircase that led to the second floor. Tr. 49-52, 67; Ex. 19-23. Officers also recovered a shotgun propped up behind the door in the kitchen leading to that staircase. Tr. 53; Ex. 23- 25. The jury later found that the defendant illegally possessed this firearm, and the ammunition on the stairs. Tr. 299.

Officers also recovered four long guns between the wall and the refrigerator in the kitchen, and shotgun shells on a basement pool table and on top of a basement television set. Tr. 55- 61; Ex. 26-35. Finally, officers recovered the defendant's mail, some of his personal papers, and a photograph album containing photographs of the defendant from a ground floor bedroom. Tr. 61-65, 78, 158; Ex. 36-39.

The second superseding indictment charged Griffin with possession of all 10 firearms and all the ammunition recovered from his parents' home during the execution of the search warrant. R. 57.

While in the Milwaukee County House of Correction following his arrest in 2008, Griffin told fellow inmate/acquaintance Mario Walker, whom he had first met in about 2001, that: (1) the police had come into his house and found 10 guns – 8 shotguns and two hand pistols; (2) his father had purchased some of the shotguns for him; and (3) that the two handguns belonged to him – the defendant. Tr. 165-168.

The parties stipulated that the firearms and ammunition charged had moved in interstate commerce, and that the defendant had been convicted of a felony prior to April 30, 2008. Tr. 28-29; 181-183; Ex. 41.

At the close of the government's case, which included Walker's testimony, Griffin moved for acquittal under Rule 29. Tr. 186-188.

Griffin's father testified that he – the father – kept each of the recovered firearms in the home, and that seven of those ten guns had been previously taken by the Milwaukee Police on October 25, 2004 due to the defendant's arrest at the time on a felony offense for which he was later convicted. Tr. 201, 208-09, 216, 232. Police returned those guns about two months later. Tr. 216. Griffin's father further testified that three of the long guns and one of the handguns belonged to non-family members. Tr. 203-04. Griffin's mother testified that she did not know of the two loaded handguns behind their headboard, or the ammunition on the staircase. Tr. 219, 233. She further testified that the defendant had

lived at the residence for about three weeks prior to the execution of the search warrant, and that during that time, he used both the kitchen and the staircase off the kitchen. Tr. 223. She testified that their home was located in a rough area. Tr. 220.

The defendant, who testified at his trial, admitted that he was convicted of felony offenses in 1999 and 2005, and that he talked to Mario Walker about his case. Tr. 230, 235, 238. He claimed no knowledge of the guns seized during the search warrant, and asserted that he wanted to do everything right after release from prison. Tr. 230, 232, 235, 236, 238. He further testified that he knew that his father had recovered the guns which the police seized in October 2004 in connection with one of his prior arrests. Tr. 232, 242. He further claimed that he spent most nights prior to the search warrant execution at his girlfriend's house, but did not tell his probation officer because it was not a violation of the rules – "I lived there, but I didn't stay there." Tr. 239-40. He further claimed that he did not know about the firearms, because he never "went on a search for firearms in this house." Tr. 240. He admitted that he used the refrigerator in the kitchen where many of the firearms were recovered, and the steps where ammunition was recovered, but could not recall if he saw the ammunition there, noting that seeing it did not mean he possessed it, and that his rules of supervision did not forbid him to live in a home that contained ammunition or firearms. Tr. 241-45.

The jury's guilty verdict included a special verdict indicating that the defendant possessed the firearm behind the kitchen door leading to the staircase, and the ammunition that had been recovered from that staircase. R. 82, Tr. 49-53; Ex. 19-25.

SUMMARY OF THE ARGUMENT

The evidence was sufficient to convict Griffin of possession of a firearm and ammunition by a convicted felon. In particular, the evidence showed that Griffin both had knowledge of, and intended to possess, the firearm and ammunition of which he was convicted. The district court properly instructed the jury regarding intent, and the arguments of counsel further explained the need to find intent to possess in order to find the defendant guilty. The prosecutor's comments were not improper, and did not deprive the defendant of a fair trial.

ARGUMENT

1. The evidence was sufficient to convict Griffin.

Defendant complains that the evidence was insufficient to convict him. Def. Brf. at 14-28. Defendant asserts that "[t]he evidence established *only* that [he] was an occupant in a home where several other firearms were found ... [and where] several other adults lived ..." *Id*. at 2. (Emphasis added).

To contest the sufficiency of the evidence, a defendant "'faces a nearly insurmountable hurdle.'" *United States v. Morris*, 576 F.3d 661, 666 (7th Cir. 2009) (quoting *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995)). Griffin must be able to show that "based on the evidence presented at trial, no rational juror could find guilt beyond a reasonable doubt." *Id.* "Both the evidence and all of the reasonable inferences that can be drawn from it are viewed in the light most favorable to the government." *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995). This means that on appeal the evidence will not be weighed, and the jury's credibility determination will not be second-guessed. *United States v. Gardner*, 238 F.3d 878, 879 (7th Cir. 2001). "Only if the record is devoid of evidence from which a jury could find guilt will we reverse." *United States v. Richardson*, 208 F.3d 626, 631 (7th Cir. 2000).

Defendant asserts that the government failed to show a nexus between himself and the firearm and ammunition he was convicted of possessing – the shotgun behind the kitchen door leading to the stairs, and the ammunition on those stairs. In particular, he

argues that in a joint-residency context, there must be evidence of both proximity and intent to exercise control. Def Brf. at 15-20.

"Constructive possession exists when, although an individual does not have immediate, physical control of the object, he 'knowingly has the power and intention at a given time to exercise dominion and control over the object.'" *United States v. Harris*, 587 F.3d 861, 866 (7th Cir. 2009) (quoting *United States v. Kelly*, 519 F.3d 355, 361 (7th Cir. 2008). The exercise of dominion and control can either be directly or through others. *United States v. Hampton*, 585 F.3d 1033, 1041 (7th Cir. 2009). "The government must 'establish a nexus between the accused and the contraband, in order to distinguish the accused from a mere bystander.'" *Id*. (quoting *United States v. Quilling*, 261 F.3d 707, 712 (7th Cir. 2001)). Constructive possession can be proved by direct or circumstantial evidence. *United States v. Morris*, 349 F.3d 1009, 1014 (7th Cir. 2003). Constructive possession of firearms has been based in part on the gun being recovered in areas over which the defendant exercised control. *United States v. Thomas*, 321 F.3d 627, 636 (7th Cir. 2003).

Here, the evidence proved the required nexus, showing that the defendant knew the guns and ammunition were present in the home and, despite also knowing he was prohibited from being around them, did nothing to separate himself from them.

Regarding proximity and knowledge, the evidence showed that the defendant lived for three weeks at the home where the firearm and ammunition were recovered, and had easy access to these items, all of which were openly kept or barely concealed, and none locked away. The firearm and ammunition that the jury found the defendant possessed

were those most readily at hand: the firearm was barely concealed behind a kitchen door leading to the stairway, and the ammunition was openly kept at the bottom of that stairway; a stairway and kitchen the defendant admitted that he used. Tr. 111-113; 226-231. The defendant allowed that he may have known of the ammunition on the stairs, but contended that he did not thereby possess it. Tr. 241-43. The clearly visible ammunition, and barely concealed firearm, in locations he frequented during his three week residency, show that Griffin knew of these items. Tellingly, his lawyer emphasized that Griffin did not intend to possess the firearms and ammunition, like an ex-smoker who could be around cigarettes without ever picking one up, but allowed that Griffin knew of the firearms: "he assumed that there were guns somewhere but he actually didn't know that they were there." Tr. 273-74. The jury could readily conclude that Griffin knew he was living among firearms and ammunition.

Griffin tried to bolster his claim of ignorance by distancing himself from this residence, telling the jury that "in the course of the three weeks that I was there ...it was not many nights ... or not many days that I spent there." Tr. 239. "But the jury was under no obligation to accept his testimony on this point." *Kitchen*, 57 F.3d at 520. (defendant constructively possessed firearms at residence that defendant testified he visited only occasionally, and lived elsewhere, but other evidence showed he shared). In fact, the residence was the defendant's residence during those three weeks, as both he and his father reported to his probation officer, and his probation officer found him alone there during a home visit on April 25, 2009, days before the search warrant execution, when the police

also found him there. Tr. 128, 130. Defendant's mail and personal effects were found there, and at trial he admitted that he lived there, at least some times. Tr. 47-50; 216. Lacking *exclusive* control of the residence, Griffin nonetheless had a *substantial connection* to it. Constructive possession over the guns and/or ammunition has been found in similar circumstances. *Richardson*, 208 F.3d at 626-32 (residence where defendant kept clothes and medicine and received mail and admitted he was landlord and caretaker had a "substantial connection" to defendant sufficient to find defendant constructively possessed contraband); *Kitchen*, 57 F.3d at 520 (residence where defendant's clothing, jewelry, and mail were found, and where he had received calls, said he lived, had been seen numerous times, and spent substantial amounts of money to repair was substantially connected to defendant sufficient to find defendant constructively possessed contraband, even though another person also had access to it); *Morris*, 576 F.3d at 667-69 (defendant's admissions that he lived at residence where he was frequently seen and kept mail and parked an automobile and fled from showed defendant had "substantial connection" to residence sufficient to find defendant constructively possessed contraband); *United States v. Caldwell*, 423 F.3d 754, 758 (7th Cir. 2005) (evidence that defendant lived at the residence where the firearms were seized and had been seen with one of the seized guns sufficient evidence for constructive possession); *United States v. Alanis*, 265 F.3d 576, 592 (7th Cir. 2001) ("We have repeatedly held that 'constructive possession may be established by a showing that the firearm was seized at the defendant's residence.'") (citing cases).

The defendant's intent to possess the firearm and ammunition of which he was convicted is best shown by his failure to separate himself from them despite his practical knowledge that this was necessary. This knowledge was demonstrated at trial in several ways. First, there was testimony that his probation officer reminded him in the weeks prior to the execution of the search warrant that he could not possess a firearm, and that he signed a paper in her office indicating he understood this condition. Tr. 123-126, 230; Ex. 43. The defendant signed this paperwork knowing that several firearms were kept at his parents' residence where he was to live, as he admitted to fellow inmate Mario Walker. Tr. 152-153. The defendant also told Walker that his father had bought some of the recovered guns for him. Tr. 152-153. Lastly, the defendant admitted at trial that he knew the police had returned his hunter-father's guns previously relinquished in 2004 due to the same firearm prohibition Griffin was subject to at the time of the search warrant. Tr. 217, 227-228.

This history showed the jury two significant things going to Griffin's intent to possess: (1) he knew there were multiple firearms in his parent's house; and (2) he knew that as a prohibited person he was not supposed to live in a residence where those guns were kept, and that the police took this prohibition seriously enough to confiscate his father's guns in 2004. The jury could readily infer from this evidence that Griffin failed to separate himself from these firearms because he *wanted* to have them available, and thus intended to possess them. This inference was supported by how openly guns and

ammunition were kept at the residence, and how recently and explicitly Griffin's parole officer reminded him of the prohibition.

Defendant implausibly claimed he thought that to possess something meant solely to have it on his person, Tr. 228, but this previous experience of having firearms confiscated due to his own firearms prohibition exposed this claim as being self-serving and false. Griffin's failure even to attempt to distance himself from the items he knew to be readily and unlawfully at hand enabled the jury to conclude that, in fact, he intended to possess them.

Similarly, the defendant's practical knowledge that his prohibition meant that he could not live in a home where such items were kept allowed the jury to reject his claim that he was trying to obey the supervision rules, and instead to conclude that if sincere he would have separated himself from firearms and ammunition. The jury's verdict rejected the defendant's implausible assertion that he did not know of the existence of *any* of the firearms at the residence, despite their near-open display in the kitchen area, and credited Mario Walker's contrary testimony.

Viewing this evidence in the light most favorable to the government, the jury could rationally conclude that the defendant possessed the gun and ammunition of which they convicted him, and had the ability and intent to exercise direction and control over them. Had he not intended to exercise such control, and sincerely meant to follow his conditions of supervision, he could have readily arranged to have the firearms removed from the residence, as had occurred in the past, and due to the same prohibition.

Griffin alleges that Walker's testimony only tied Griffin to the handguns found behind his parent's headboard and the guns next to the refrigerator, and that the jury's verdict that Griffin did not possess any of these firearms shows that they discredited Walker's testimony. Def. Brf. at 26. However, the jury could have readily inferred from Walker's testimony about Griffin's connection to *some* of the guns seized from the residence that, at a minimum, Griffin intended to exercise control over the firearm most readily at hand, which is the one he was convicted of possessing. The jury's finding that Griffin did not possess the particular firearms that Walker said Griffin owned does not mean that the jury rejected Walker's testimony wholesale. Griffin could own a gun without possessing it; he could also live among firearms and have nothing to do with them, which would be more plausible if he had *never* had anything to do with firearms. Walker's testimony that Griffin was no stranger to firearms enabled the jury to conclude, along with Griffin's failure to separate himself from the firearms, that he intended to control the firearm most readily at hand.

2. The district court properly instructed the jury about intent

Griffin further complains that "[t]he jury instructions failed to *adequately* apprise the jury of its need to separately find Griffin's intent." Def Brf. at 28. (Emphasis added). Griffin acknowledges that because this issue was not raised below, he must show plain error to prevail. *Id*. at 28. "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The error must be such that it probably

changed the outcome of the trial. *United States v. Peters*, 435 F.3d 746, 754 (7th Cir. 2006).

There was no error in the instructions, much less one that changed the outcome of the trial. Griffin argues that the district court's jury instruction caused plain error because it emphasized knowledge "while simultaneously omitting the intent requirement" and lowered the *mens rea* burden of proof. Def. Brf. at 29. Griffin claims that by expressly defining knowledge, but not separately defining intent, jurors could have been left thinking that knowledge alone of the firearms or ammunition was sufficient to convict. *Id*. at 30-31. Griffin acknowledges that his argument on appeal is a novel one in this circuit. *Id*.

Griffin erroneously assumes that because the jury convicted him of the most readily available firearm and ammunition, it must have convicted him only for those items of which he had knowledge – "[i]t did not convict him based on a separate finding of intent." Def. Brf. at 32. However, as explained above, the jury's verdict could readily be interpreted as a rational finding that Griffin, by being both familiar with guns and cavalierly disregarding his prohibition against being around them, intended to exercise control over the firearm and ammunition most readily at hand.

There was no error at all in the instructions, much less plain error, because the jury was properly instructed as to possession from this Circuit's pattern instructions:

> Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

Tr. 290.

The district court also gave this Circuit's pattern instruction about the definition of "knowingly":

> When the word knowingly, or the phrase the Defendant knew is used in these instructions, it means that the Defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident. Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding this case.

Tr. 291.

Jury decisions are affirmed if "the jury instructions fairly and accurately summarize[d] the law and [had] support in the record." *United States v. Graham*, 431 F.3d 585, 589 (7th Cir. 2005) (quoting *United States v. Aldaco*, 201 F.3d 979, 989 (7th Cir. 2000).

There was no error, plain or otherwise, in the instructions. In both closing argument and rebuttal, the prosecutor emphasized the jury's need to find that the defendant intended to possess the firearms and/or ammunition, and explained how the evidence showed such intent. Tr. 262-267, 281. No part of the prosecutor's argument hinted that the burden of proof was anything less than proving intent to possess, nor was there suggestion that mere knowledge of firearms and/or ammunition was sufficient to convict. Griffin's lawyer also spoke of the jury's need to find intent to possess the firearm and/or ammunition. Tr. 272. As such, the district court properly instructed the jury about intent, which was reinforced by both the prosecutor and defense lawyer's closing arguments. On such a record, the jury was not misled about the need to find intent to possess in order to convict. There was no plain error in the district court's jury instructions.

3. The prosecutor's closing argument and rebuttal were not improper

a. References to the defendant's record

Griffin complains that the prosecutor twice improperly called attention to his prior record – both in closing argument and rebuttal – and that "[t]his was nothing more than a propensity argument." Def. Brf. at 34. The defendant further asserts that this was prejudicial. *Id*. Griffin further claims that five of the six factors to analyze possible prejudice from prosecutorial misconduct from *Darden v. Wainwright*, 477 U.S. 168, 180-81 (1986), weigh in Griffin's favor. *Id*. at 34. Those factors are: (1) whether the prosecutor misstated the evidence; (2) whether the remarks implicated specific rights of the accused; (3) whether the defense invited the response; (4) the trial court's instructions; (5) the weight of the evidence against the defendant; and (6) the defendant's opportunity to rebut. *United States v. Gilbertson*, 435 F.3d 790, 796-97 (7th Cir. 2006).

To carry his burden, the defendant must show that "it is at least as likely that the misconduct complained of affected the outcome of the trial - *i.e.*, caused the jury to reach a verdict of guilty when otherwise it might have reached a verdict of not guilty." *United States v. Harris*, 271 F.3d 690, 699 (7th Cir. 2001) (quoting *United States v. Morgan*, 113 F.3d 85, 89 (7th Cir. 1997)).

In closing argument, the prosecutor said:

> ... What does your common sense tell you about a person with a serious criminal record, who knows he's not supposed to be around firearms or ammunition, who knows that his father has firearms that have been returned to him, but who nonetheless chooses to be around not just one or two of them –

Tr. at 250. Defense counsel objected that this argument "mis-instructed the jury as to the law" by arguing that the jury "should consider his serious prior record as to whether he's guilty of the offense." *Id*. The district court denied the motion for a mistrial, and added a curative instruction: "The Court will advise the jury that the subject of prior criminal record will be brought up in the instruction relative to the credibility and weight you should give to the testimony of any witness who has been previously convicted of a crime." *Id*.

In rebuttal argument, the prosecutor said:

> He wasn't aware of where the guns and ammunition was *[sic]*? Come on. Again, you get to use your common sense. He went to the basement every now and then. He saw the ammunition on top of the T.V., and on top of the pool table. An ex-smoker who doesn't want anything to do with cigarettes? Fair enough. We all know such people. Perhaps we ourselves are such a person. But that's not what we're talking about here. We're talking about a person who's been in trouble, who wants to walk by the straight and narrow by his own admission, who knows the conditions of his release –

Tr. at 267. Defense counsel objected to this argument – "the same objection [as] before ... [p]erson who's been in trouble." *Id*. The district court overruled the objection, giving no additional instruction. Tr. 282.

Neither reference to Griffin's record was improper. In the closing argument, the reference to the defendant as one with "a serious criminal record" was not in the context of arguing that Griffin should be found guilty *due to his record*. Instead, the context was an argument about the significance of Griffin's willful blindness to, or nonchalance about, the fact that he was living in a residence with many barely concealed firearms and much

unconcealed ammunition even though he knew from prior experience that this was forbidden. Such an argument is not improper.

In rebuttal, the reference to "a person who's been in trouble" was not an argument that Griffin should be found guilty due to his record. Instead, it went to the credibility of Griffin's claim of ignorance about both the guns and ammunition at his residence and the contours of his firearm prohibition. Tr. 232, 236, 240-243, 245. Such an argument was not improper, particularly in light of Griffin's having told the jury that he was being particularly careful at the time to behave properly during his supervision. Tr. 238-39.

Griffin's review of the *Darden* factors in an attempt to give these references to his record an unfairly prejudicial slant is not convincing.

Griffin himself told jurors details of his prior record during his own testimony – that he had been convicted of a felony in 1999, and another one in "about 2004." Tr. 230. In light of this testimony, Griffin's accusation that the prosecutors bolstered an anticipated propensity argument by eliciting inadmissible testimony is particularly strained, and assumes an improbable chain of events – that the prosecutor planned to make such an argument, and so deliberately tried to get testimony tailored to it whenever possible. Def. Brf. at 35-36. Griffin's juxtaposition of brief testimony of a police officer and a probation officer, which in context were mere details to complete the narrative, distorts rather than clarifies. *Id*. It did not show, in reference to the first *Darden* factor, that the prosecutor asked the jury to draw improper inferences from the evidence.

Regarding the second *Darden* factor, Griffin admits that none of the prosecutor's comments implicated any of his specific trial rights. *Id*. at 36. Regarding the third factor, Griffin inaccurately states that "the defense never invited any of these remarks." *Id*. at 36-37. In fact, as noted above, both references to Griffin's record were in the context of rebuttals to Griffin's own implausible claims of ignorance. As to the fourth factor, the district court gave an immediate curative instruction after defense counsel objected to the reference to Griffin's record in the closing argument, and further instructed the jury in detail about the proper use of such information immediately following the prosecutor's short rebuttal. Tr. 280-283, 287.

Regarding the fifth factor, the weight of the evidence is strong: Griffin was found living in a residence for 3 weeks that had many barely concealed firearms – none of them locked up -- and much openly-kept ammunition, despite his having learned that he could not be around guns, both from his past experience of his father's guns having been confiscated in connection with both his legal problems, and more recent express instructions from his probation officer that he remained subject to the prohibition. Despite his contention that he was trying to follow the rules, the jury could readily infer from Griffin's passivity about separating himself from these prohibited items that he intended to have a firearm and ammunition available. The weight of the evidence argues against the references to Griffin's record having been prejudicial.

Regarding the sixth *Darden* factor, defense counsel made contemporaneous objections to the references to Griffin's record during both the prosecutor's closing

argument and rebuttal, and then made extended remarks about the initial reference in his own closing argument. Tr. 265, 277-78. If anything, these objections underscored that the jury should not convict the defendant because of his record, but only if they found that the charged offense had been proved.

In short, these references to Griffin's record were in the context of arguments that were reasonable inferences, having a logical connection to the evidence on which they were based. Neither reference was an improper "propensity" argument. *United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978). Rather, "the prosecution was commenting on the defendants' legal position in light of the evidence." *United States v. Turk*, 870 F.2d 1304, 1309 (7th Cir. 1989). "Prosecutors are entitled to comment on inconsistencies in the defense." *United States v. Kelly*, 991 F.2d 1308, 1314 (7th Cir. 1993). "'[T]he government should not be restricted to a sterile recitation of uncontroverted facts,' and counsel certainly can '*make arguments reasonably inferred from the evidence presented.*'" *Harris*, 271 F.3d at 701 (quoting *United States v. Rose*, 12 F.3d 1414, 1424 (7th Cir. 1994)) (emphasis added in quotation).

As such, the prosecutor's references to the defendant's record during both closing and rebuttal were not improper.

b. Rebuttal reference to protecting the community

Griffin further complains that the prosecutor "improperly encouraged the jury to convict Griffin in order to protect the community." Def. Brf. at 39. Griffin claims that this

argument was plain error. *Id*. In fact, the comments were clearly an invited response, and were not improper.

In his closing argument, Griffin's lawyer stated that "you sitting jurors are here to protect the community from a danger of the Government, which we recognized through our forefathers was something that we needed this kind of protection." Tr. 269. In rebuttal, the prosecutor stated:

> we the people, we are the Government. ... We, the people, make the laws through our representatives. We, the people, help enforce the law. And that's part of what you're doing right now. So your jury service – it's true that it can protect the community from overreach by the Government. It can also, however, protect the community from people who refuse to abide by the laws that we, the people, make. And that's what I'm asking you to do this afternoon, is to protect the community from someone who refuses to obey the laws that everybody, all of us, have to abide by."

Tr. 280-81.

In context, this rebuttal directly responded to defense counsel's argument that the jury was "here to protect the community from a danger of the Government." As such, the comments were not to argue to convict the defendant to protect the community, but to clarify that jury service could be to enforce the law as well as to protect citizens from government overreaching. There was no error here, constitutional or otherwise.

Analyzing these comments in light of the *Darden* factors: (1) the statement was a simple comment on the nature of jury service and was not serious, inflammatory, or a misstatement of the evidence, as Griffin conceded, Def. Brf. at 40; (2) the statement did not implicate any of Griffin's specific rights; (3) the statement was directly invited by the statements of defense counsel, and thus aimed at "righting the scale" *United States v. Young*,

470 U.S. 1, 13 (1985); indeed, Griffin concedes that "the second and third factors do not weigh heavily in [his] favor" Def. Brf. at 40; (4) the district court's instructions, given shortly after the comments, told to the jury that passion should have no part in its deliberations, and the statements of the lawyers were not evidence; (5) as noted, the weight of the evidence strongly pointed to Griffin's intent to possess firearms and ammunition because although he well knew he could not be around them, he made no efforts to rid his dwelling of them; and (6) the defendant had no opportunity to rebut this reference, but since the reference itself was a direct comment on defense counsel's statement, and since it was a truthful comment on the function of the jury, there was nothing to rebut.

As such, the prosecutor's comments in rebuttal concerning the function of the jury was an invited response and was not improper.

c. Any error was harmless

Since the comments were not improper, the analysis can end there. *Harris*, 271 F.3d at 699. However, even if the remarks were improper, they did not impact the fairness of the trial based on the entire trial record, and were thus harmless error. *Id*. "When harmless error analysis is applied, a new trial may be warranted when the error has a '*substantial and injurious effect or influence on determining the jury's verdict.*'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)) (emphasis added in quotation). "'The issue is whether the error was harmless beyond a reasonable doubt. The question of whether the error was harmless in turn depends upon the strength of the evidence against the defendant.'" *Id*. (quoting *United States v. Ashford*, 924 F.2d 1416, 1425 (7th Cir. 1991)).

However, even when a prosecutor's comments are found to be improper, jury verdicts are not lightly overturned. See, *United States v. Pirovolos*, 844 F.2d 415, 424-427 (7th Cir. 1988) (rebuttal argument about defendant's prior convictions was "serious misconduct ... particularly prejudicial ... overkill and out of proportion to the invitation" but did not deny defendant a fair trial); *Morgan*, 113 F.3d at 85, 89-91 (rebuttal appeals to emotions and social consequences improper but did not deprive defendant of a fair trial when not inflammatory and evidence of guilt compelling).

Here, the evidence against the defendant was strong. The two references to defendant's prior record were brief portions of sentences making a larger point, and were comparatively insignificant. Defense counsel rebutted the first reference in his closing argument. Tr. 262. Moreover, the district court's curative jury instruction following the first of the two comments, and the complete jury instructions that followed soon after the second comment, mitigated any unfairness. "Cautionary instructions minimize the risk of potential prejudice from improper remarks." *Kelly*, 991 F.2d at 1314.

The fact that the jury used the special verdict form to agree that the defendant possessed just one of the particular firearms, and two groups of ammunition charged in the indictment, suggests that the jury properly and carefully considered the evidence, and did not simply endorse the prosecution's argument that the defendant had possessed all of the guns and ammunition as alleged in the indictment. Tr. 284; R. 82. Such deliberate choosing showed the jury to be "a rational trier of fact." Any error in the prosecutor's rebuttal was harmless.

CONCLUSION

Based on the foregoing, the United States respectfully requests that the defendant's conviction be affirmed.

Dated this 29th day of November 2011, at Milwaukee, Wisconsin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2011, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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