IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 06-30535

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NYRON JONES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE DEFENDANT-APPELLANT NYRON JONES

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AUGUST, 2006

CERTIFICATE OF INTERESTED PERSONS
United States v. Nyron Jones
No. 06-30535

In compliance with Fifth Circuit Local Rule 28.2.1, undersigned counsel for appellant certifies that he knows of no persons, associations of persons, firms, partnerships, or corporations which have an interest in the outcome of this particular case other than the parties noted in the style of the case.

_____
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

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STATEMENT OF JURISDICTION

A. The district court had jurisdiction of this criminal proceeding under 18 U.S.C. § 3231.

B. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

C. Judgment was entered on May 12, 2006. Notice of appeal was filed on May 18, 2006.

D. This appeal is from a final judgment in a criminal proceeding.

STATEMENT OF THE ISSUE

Whether the district court erred by admitting evidence of similar conduct to prove knowledge in a § 922(g)(1) prosecution where lack of knowledge was not a plausible defense to the government's case.

STATEMENT OF THE CASE

(I) Course of the Proceedings and Disposition in the Court Below.[1]

The government charged Nyron Jones by indictment with possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1).[2] The case was tried to a jury.[3] Jones stipulated to a prior conviction pursuant to *Old Chief v. United States*, 519 U.S. 172 (1997).[4] Nevertheless, over Jones's objection,[5] the district court admitted the factual basis for Jones's 2002 conviction under Fed. R. Evid. 404(b).[6] The jury returned a guilty verdict.[7] The district court sentenced Jones to 78 months' imprisonment, an upward variance from the Sentencing Guideline range of 33 to 41 months.[8]

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[1]References to the Record on Appeal in this matter are designated as R.A. Vol. ___, p. ____. Where possible, there also is a parallel reference to the Record Document ("Rec. Doc. ___").

[2]R.A. Vol. 1, pp. 8-9, Rec. Doc. 1.

[3]R.A. Vol. 1, pp. 168-69, Rec. Doc. 43.

[4]R.A. Vol. 2, p. 317, Rec. Doc. 50, p. 85.

[5]R.A. Vol. 1, pp. 148-51, Rec. Doc. 34; Vol. 2, pp. 392, 394, 398, Rec. Doc. 50, pp. 160, 162, 166.

[6]R.A. Vol. 1, pp. 190-98, Rec. Doc. 39; Vol. 2, p. 394, Rec. Doc. 50, p. 162.

[7]R.A. Vol. 2, p. 460, Rec. Doc. 50, p. 228.

[8]R.A. Vol. 2, pp. 472-75, Rec. Doc. 54, pp. 4-7.

Judgment was entered on May 12, 2006.[9] Jones filed notice of appeal on May 18, 2006.[10]

(ii) Statement of Facts.

New Orleans Detective Brian Pollard testified at trial that he and his partner came upon Jones standing on a New Orleans street at 10:30 p.m. on March 5, 2005. He said Jones adjusted his waistband, revealing the outline of an object under his tee-shirt, and then ran down an alley between two houses. Pollard gave chase. When he caught up, he said he saw Jones tossing an object under one of the houses. After detaining Jones, he found a handgun under the house.[11]

Jones had pleaded guilty to unlawful possession of a firearm in 2002. As part of its case in chief in the instant case, the government read the factual basis of his guilty plea. In that instance, Jones admitted to placing a handgun under a house immediately before he was apprehended,[12] just as the government claimed he did in the current prosecution.

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[9]R.A. Vol. 1, p. 223, Rec. Doc. 48 and Docket Sheet entry for Rec. Doc. 48.

[10]R.A. Vol. 1, pp. 228-29, Rec. Doc. 49.

[11]R.A. Vol. 2, pp. 328-43, Rec. Doc. 50, pp. 96-112.

[12]R.A. Vol. 2, p. 395, Rec. Doc. 50, p. 163.

Jones presented the testimony of Keva Peters, Jones's cousin. Peters said he was with Jones that evening and did not see him with a gun. He also denied that Jones ran when the police approached.[13]

[13]R.A. Vol. 2, pp. 400-407, 426, Rec. Doc. 50, pp. 168-75, 194.

SUMMARY OF ARGUMENT

The factual basis admitted under Fed. R. Evid. 404(b) stated that Jones placed a gun under a house immediately before he was apprehended, the same conduct alleged by the government in the instant case. The similarity invites a prohibited inference that Jones more likely committed the current offense because he did it before, and the government tacitly encouraged that inference by rereading the factual basis during its rebuttal argument and then repeating the conduct alleged in this case. In fact, the district court admitted the evidence to prove knowledge. But knowledge is an element of § 922(g)(1) only insofar as the defendant must know that he is in possession of an object and the object is a gun. Knowledge so defined was not at issue in this case because the government alleged actual possession, not constructive possession. Knowledge becomes an issue in constructive possession cases if the defendant claims he did not know the contraband was located in a place over which he exercised dominion. But here, there was no evidence that Jones exercised dominion over the house under which the gun was found.

The district court's limiting instruction did not cure the prejudice because it did not tell the jury to limit its use of the 404(b) evidence to knowledge. To the contrary, by telling the jury it could use the 404(b) evidence to find "knowing possession" and then defining the only contested element of the offense as "knowing possession," the

district court improperly allowed the jury to use the 404(b) evidence to find both possession and knowledge.

ARGUMENT

The district court erred by admitting the 404(b) evidence to prove knowledge because knowledge was not in dispute. As a result, the probative value of the evidence was substantially less than the risk of undue prejudice.

A. Standard of review.

This Court reviews evidentiary rulings for abuse of discretion. However, review is heightened in criminal cases because the evidence must be "strictly relevant to the particular offense charged." *United States v. Jackson*, 339 F.3d 349, 354 (5th Cir. 2003) (internal quotation omitted).

B. Argument

"Evidence of other crimes . . . is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). "It may, however, be admissible for other purposes . . . ." *Id.* In *United States v. Beechum*, the *en banc* Court established a two-part test of admissibility:

> First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403.

582 F.2d 898, 911 (5th Cir. 1978) (*en banc*). In the instant case, the district court admitted the factual basis of Jones's 2002 conviction for unlawful firearm possession

as evidence of knowledge. But knowledge was not at issue so the probative value of the prior conviction was virtually nil.

The only *mens rea* required for a § 922(g)(1) conviction is the defendant's knowledge that he possesses a gun. *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir. 1988). He must know the nature of the item he possesses, and he must know that he possesses it. The dispute in the present case, however, concerned possession, not knowledge. Jones claimed that the gun which Pollard found under the house was not his. The jury had to decide whether to believe Pollard, who testified that he saw Jones toss away an object that turned out to be a gun, or Keva Peters, who testified that Jones did not have a gun and never left his side. The government's case was one of actual possession, and the defense was that the government's witness was mistaken or lying.

The district court admitted the 404(b) evidence to support a constructive possession theory and to rebut a mere presence defense.[14] This was not, however, a constructive possession case because it involved direct physical control of the contraband. *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998). In constructive possession cases, the police find contraband in a place over which the

[14]R.A. Vol. 1, pp. 194-94, Rec. Doc. 39, pp. 5-6.

defendant exercises dominion.[15] The issue becomes whether the defendant knew it was there. For example, in *United States v. Fuller,* 453 F.3d 274 (5th Cir. 2006), Border Patrol agents found a pistol concealed under the passenger seat of the car the defendant drove across the border. The defendant claimed he did not know the gun was in the car. This Court held a prior conviction for unlawful gun possession was admissible to prove that he knew. *Id.* at 277; see also *United States v. Jones*, 185 F.3d 459, 464 (5th Cir. 1999) (evidence of knowledge needed where contraband hidden in vehicle driven by defendant). By contrast here, there was no evidence that Jones exercised dominion or control over the house under which the gun was found, or over the crawl space underneath. Absent control over the place where the gun was found, he lacked the power to exercise dominion over the gun. Hence, even if Jones knew there was a gun under the house, he could not have been convicted on a constructive possession theory. If the jury disbelieved that Jones tossed the gun under the house, it would have had to acquit.

Nor was the evidence admissible to rebut a mere presence defense. The district court did not give a mere presence instruction and Jones did not request one as mere presence was *not* his defense. Mere presence is a defense to constructive possession,

[15]Alternatively, the contraband could be in the direct physical possession of a person over whom the defendant exercises control. See , e.g., *United States v. Willis*, 6 F.3d 257, 259, 262 (5th Cir. 1993), overruled on other grounds by *Bailey v. United States*, 516 U.S. 137 (1995). The instant case does not present that fact pattern.

not actual possession. It challenges the defendant's power and intention to exercise dominion over the contraband. *United States v. Prudhome*, 13 F.3d 147, 150 (5th Cir. 1994). A defendant who has direct physical control over a gun cannot claim lack of power or intention to exercise dominion. The instant case is one of actual possession. The government claimed Jones removed the gun from his waistband and tossed it under a house. Jones denied it. Jones's knowledge and intent was not relevant to which version of events the jury believed. Therefore, the 404(b) evidence was not admissible to rebut Jones's defense. The district court suggested that the 404(b) evidence would have negated a defense of "accidental possession" if the jury disbelieved that Jones removed the gun from his waistband and tossed it under a house.[16] But without evidence that Jones exercised dominion or control over the house, the jury could not find possession, accidental or otherwise. The 404(b) evidence simply does not fit the facts of the case.

The absence of probative value is evident in the government's attempt to argue the 2002 offense in closing:

> Now the Judge just instructed you on what you can use for [sic] a factual basis that we read into the record a while back. Use that to think about the defendant's knowledge of this action. What was he thinking? What was he thinking when he was in that area, when he was running down the street, when he was kneeling under a house and throwing the gun? What

[16]R.A. Vol. 1, p. 195, Rec. Doc. 39, p. 6.

> was he thinking? Go back to what he was thinking before. The factual basis will tell you what his knowledge was that day.[17]

Jones's thoughts, however, were irrelevant. If Jones in fact tossed the gun under the house, for all practical purposes it did not matter what he was thinking. The only "thought" that could have saved him was ignorance that the object he tossed was a gun, an implausible proposition that Jones did not assert.

On the other side of the scale, the 404(b) evidence was extremely prejudicial. In the prior incident, Jones put the gun under the house when faced with the risk of apprehension, just as the government claimed he did in the current incident. Extrinsic evidence is excluded for fear that it will lead a jury to conclude "that, having committed a crime of the type charged, [the defendant] is likely to repeat it." *Beechum*, 582 F.2d at 914 (internal quotation omitted). The government tacitly encouraged exactly this inference with its rebuttal argument. After a *pro forma* allusion to knowledge, the prosecutor re-read the portion of the factual basis in which a police officer reported seeing Jones place a gun under a house. Then he repeated Pollard's testimony that he saw Jones throw a gun under a house.[18] The unspoken inference from the consecutive accounts was clear: Pollard must be telling the truth

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[17]R.A. Vol. 2, p. 435, Rec. Doc. 50, p. 203.

[18]R.A. Vol. 2, p. 443, Rec. Doc. 50, p. 211.

because Jones did exactly the same thing before. This is the inference that Rule 404 forbids.

The district court's limiting instructions did not foreclose the improper inference because they did not limit the use of the 404(b) evidence to knowledge. The court should have told the jury that it could consider the 404(b) evidence only to determine whether Jones knew the object was a gun and whether he knew he possessed it. It did not. Instead, it told the jury three times that it could use the factual basis of the 2002 conviction to determine whether "the defendant knowingly possessed the firearm charged in the indictment in this case."[19] Immediately after the last such instruction, the court defined the first element of the offense as whether "the defendant knowingly possessed a firearm."[20] As a result, the jury was free to infer both possession and knowledge from the 404(b) evidence. Although the court also told the jury that it could not use the extrinsic evidence as proof that the defendant "acted in conformity with the similar act,"[21] its failure to tie the factual basis to knowledge made its limiting instructions confusing at best.

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[19]R.A. Vol. 2, p. 396, Rec. Doc. 50, p. 164 (when 404(b) evidence was admitted); Vol. 2, p. 427, Rec. Doc. 50, p. 195 (during pause in proceedings); Vol. 2, p. 455, Rec. Doc. 50, p. 223 (final instructions).

[20]R.A. Vol. 2, p. 456, Rec. Doc. 50, p. 224.

[21]R.A. Vol. 2, p. 455, Rec. Doc. 223.

CONCLUSION

The district court improperly admitted extrinsic act evidence with no relevance to any issue in dispute. The government's rebuttal argument implicitly invited the jury to use the evidence improperly. The court's limiting instructions were confusing at best. Therefore, the conviction should be vacated and the case remanded for a new trial.

Respectfully submitted this ___ day of August, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a photocopy and an electronic copy of the foregoing brief has been served on Christopher Cox, III and Stephen Higginson, Assistant United States Attorneys, 500 Poydras Street, 2nd Floor, New Orleans, Louisiana 70130, by hand-delivering same, this ___day of August, 2006.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. Rules 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7).

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