

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

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4 August Term, 2009

5 (Argued: September 25, 2009 Decided: October 27, 2009)

6 Docket No. 08-5151-cr

7 -----X
8 UNITED STATES OF AMERICA,

9
10 Appellee,

11
12 - v. -

13
14 DURRELL WILLIAMS,

15
16 Defendant,

17
18 RORY JACKSON, also known as Roy Jackson,

19
20 Defendant-Appellant.

21 -----X
22 Before: McLAUGHLIN, KATZMANN, Circuit Judges, and KORMAN,
23 District Judge.*

24
25 We vacate the defendant's conviction for possession of a
26 firearm because the district court admitted evidence that the
27 defendant had been in an apartment from which weapons and drugs
28 were later recovered. The evidence was not admitted for a proper
29 purpose, and the error was not harmless.

30 VACATED AND REMANDED.
31

* The Honorable Edward R. Korman of the United States District Court for the Eastern District of New York, sitting by designation.

1 JUSTIN D. LERER, Assistant United States
2 Attorney (Jo Ann M. Navickas, Assistant
3 United States Attorney, of counsel), for
4 Benton J. Campbell, United States
5 Attorney for the Eastern District of New
6 York, Brooklyn, New York, for Appellee.

7
8 DONALD YANELLA, New York, New York, for
9 Defendant-Appellant.

10 McLAUGHLIN, Circuit Judge:

11 Rory Jackson appeals his conviction after trial in the
12 United States District Court for the Eastern District of New York
13 (Dearie, C.J.) for possessing a firearm as a convicted felon in
14 violation of 18 U.S.C. § 922(g)(1). We vacate the conviction
15 because the district court improperly admitted evidence that
16 Jackson had been present in an apartment where police later found
17 a cache of weapons and other contraband.

18 **BACKGROUND**

19 On November 1, 2006, New York City police officers responded
20 to a 911 call reporting a gunshot in an apartment building in
21 Queens. The shot was fired from Apartment B36 on the third floor
22 into Apartment B26 below. Police officers William Sommer and
23 Jonathan Jordan arrived at the building shortly after the call
24 and saw Durrell Williams, Rory Jackson, and Zanika Arnold
25 outside. The officers identified themselves and asked the three
26 to stop. Williams fled, and Officer Sommer pursued him.

27 As Sommer chased Williams, Officer Jordan approached Jackson
28 and told him to show his hands. Jackson took a can of juice out

1 of his pocket, threw it at Jordan, and turned to flee. As
2 Jackson turned, Officer Jordan spotted what he believed to be the
3 butt of a gun in Jackson's jacket pocket. Jordan radioed a
4 description of Jackson and chased him for approximately 50 to 100
5 feet before giving up the chase.

6 Officer Scott Ferrari arrived at the scene to help establish
7 a police perimeter. He saw Jackson exit a nearby building
8 looking "disheveled" and wearing his pants inside-out. Jackson
9 refused Ferrari's and other officers' commands to stop and
10 instead crouched behind a parked car. Ferrari then apprehended
11 Jackson at gunpoint. Jordan arrived approximately 40 minutes
12 later and identified Jackson.

13 Ferrari and other officers searched the area for the gun
14 that Jordan believed he had seen in Jackson's pocket. Ferrari
15 found a gun in a garbage can in a courtyard between the locations
16 where Jordan had chased Jackson and where Ferrari later
17 apprehended Jackson. There were no fingerprints on the gun.

18 The day after Jackson's arrest, New York City police
19 officers executed a search warrant on Apartment B36, from which
20 the shot had been fired. Among other things, they found
21 firearms, other weapons, bullet-proof vests, drugs, and cash.
22 Jackson was indicted in the Eastern District for violating 18
23 U.S.C. § 922(g)(1), which prohibits a person previously convicted

1 of a crime punishable by imprisonment for more than one year from
2 possessing a firearm.

3 Jackson's trial was scheduled to begin on Monday, June 25,
4 2007. At approximately 11:15 p.m. on Sunday, June 24, the
5 Government moved to admit evidence of the contraband that police
6 recovered from Apartment B36. The Government proffered that "eye
7 witness testimony" would establish that, shortly before the shot
8 was fired, Jackson "was in possession of the items recovered
9 from" Apartment B36:

10 four loaded firearms, including a revolver with an
11 attached laser pointer, two bullet proof vests, at
12 least 150 rounds of live ammunition of various types, a
13 metal knuckle knife and machete, quantities of cocaine
14 and marihuana, empty ziplock bags, several scales and
15 over \$4,000 in United States currency.

16 The Government suggested two reasons for admissibility: (1)
17 necessary background to the charged crime; and (2) to show
18 Jackson's "opportunity, plan and lack of mistake in possessing"
19 the gun.

20 The district court admitted the evidence, stating that
21 "[y]our party is put in that apartment with that kind of armament
22 moments before the shot occurs. It is prejudicial, but not
23 unduly prejudicial. It is highly relevant."

24 During the trial, the Government called Zanika Arnold to
25 testify, apparently as the "eye witness" who would establish
26 Jackson's "possession" of the contraband in Apartment B36.

1 Arnold testified that, at about 9:20 p.m. on the night Jackson
2 was arrested, she went to visit her boyfriend Durrell Williams at
3 the third-floor Queens apartment in which he was staying.
4 Although the record is unclear as to the apartment number, the
5 Government argued to the jury during its closing statement that
6 it was Apartment B36. When Arnold entered the building, she saw
7 Jackson downstairs. Jackson escorted her upstairs to Apartment
8 B36 so that she could use the bathroom. The Government offered
9 nothing further to link Jackson to the apartment or,
10 significantly, to the weapons and drugs found in it.

11 Testifying for the Government, Officer Jordan stated that he
12 "saw what [he] thought was the butt of a black gun in [the] left
13 [pocket]" of Jackson's black leather jacket. It was dark out,
14 but a spotlight lit the area outside the building. On cross-
15 examination, Jordan admitted that he was not sure that Jackson
16 had a gun and that he did not see Jackson throw a gun away while
17 running.

18 Through testimony from Jordan and Officer Philip Mathew, who
19 helped execute the search warrant, the Government showed the jury
20 four guns recovered from the apartment and a series of
21 photographs depicting the weapons, cash, and drug paraphernalia
22 found in Apartment B36. During Officer Jordan's testimony, the
23 district court instructed the jury that the case "ha[d] nothing

1 to do with a narcotics charge," adding that the jury should not
2 consider the evidence of drugs "for any reason whatsoever." The
3 court explained that the jury was receiving the evidence merely
4 because "these are the materials that were found in the
5 apartment."

6 After the Government rested its case, Jackson moved for a
7 judgment of acquittal. The district court denied the motion.

8 During its summation, the Government specifically focused on
9 the contraband found in Apartment B36, telling the jury:

10 [Y]ou heard a lot of evidence about things that
11 were recovered in that apartment. You saw guns and you
12 saw scales and a knife and things.

13 And I want to remind you . . . the defendant is
14 not charged with any of those things.

15 The reason . . . the Government presented you with
16 that evidence is just so that you know the whole story,
17 that you know exactly what was going on that day
18 . . . , and that you know who the defendant really is
19 (Emphasis added.)

20 In the Government's rebuttal summation, it argued that
21 Jackson had access to the apartment and that "drug dealers don't
22 let you just walk into their apartments." According to the
23 prosecutor, the fact that Jackson had access to the apartment
24 allowed the jury "to make a reasonable conclusion about the
25 defendant and whether he had a gun . . . that night."

26 The jury found Jackson guilty.

1 After trial, Jackson retained new counsel who sought
2 reconsideration of the motion for acquittal and moved for a new
3 trial. Jackson renewed his challenge to the admissibility of the
4 evidence that weapons and drugs had been found in the apartment.
5 He also contended that he had received ineffective assistance of
6 counsel and that newly discovered evidence undermined the
7 verdict.

8 In April 2008, the district court denied Jackson's motions.
9 Carefully explaining its reasoning, the court remarked that "the
10 critical part of this case, given the circumstantial nature of
11 the specific charge, has to do with the contents of the
12 apartment." The district court added, "I did not admit [the guns
13 and photographs] as 404(b) evidence. . . ."

14 The district court subsequently sentenced Jackson to 60
15 months' imprisonment.

16 Jackson now appeals.

17 **DISCUSSION**

18 We conclude that Jackson's conviction must be vacated
19 because the evidence recovered from Apartment B36 the day after
20 his arrest was not admissible for any proper purpose. We also
21 hold that admission of the evidence was not harmless error. We
22 need not address Jackson's other challenges to his conviction and
23 sentence.

1 **I. Standard of Review**

2 We review admissibility of evidence at trial for abuse of
3 discretion. United States v. Mercado, 573 F.3d 138, 141 (2d Cir.
4 2009).

5 **II. Background to the Crime**

6 “To be relevant, evidence need only tend to prove the
7 government’s case, and evidence that adds context and dimension
8 to the government’s proof of the charges can have that tendency.”
9 United States v. Gonzalez, 110 F.3d 936, 941 (2d Cir. 1997).

10 Thus, evidence is often admissible “to provide background for the
11 events alleged in the indictment” or “to enable the jury to
12 understand the complete story of the crimes charged.” United
13 States v. Reifler, 446 F.3d 65, 91-92 (2d Cir. 2006) (internal
14 quotation marks omitted). We disagree that the contraband
15 evidence was relevant as background to the crime.

16 The physical evidence from the apartment was not
17 particularly helpful to explain the crime. The Government’s
18 version of the facts was simple and complete: the police
19 responded to a report of a shooting in the building; they
20 approached a group of people outside the building; Jackson fled;
21 Officer Jordan saw a gun in Jackson’s pocket; the police later
22 apprehended Jackson; and an officer found the gun near where
23 Jackson had run.

1 The Government did not need the contraband to explain why
2 the police were at the building, why Officer Jordan pursued
3 Jackson, why Jackson was arrested, or why Jackson was charged
4 with possessing a firearm. Failing to detail the contents of the
5 apartment would not have left any gaps in the Government's case,
6 nor have left the jury wondering about missing pieces of the
7 story. Cf. Old Chief v. United States, 519 U.S. 172, 188-89
8 (1997) (holding that the prosecution is entitled to present a
9 complete narrative of the crime that "satisf[ies] jurors'
10 expectations about what proper proof should be").

11 We think the evidence more likely confused the jury than
12 assisted its understanding of the case. Indeed, the district
13 court wisely interrupted Jordan's testimony about the photographs
14 to explain that the case "ha[d] nothing to do with a narcotics
15 charge," and admonished the jury not to consider the evidence of
16 drugs "for any reason whatsoever." A jury might fairly puzzle
17 over how evidence that it should not consider "for any reason" is
18 relevant to the issues it has to decide.

19 The Government's brief on appeal hardly seems convinced that
20 the evidence was background to the crime. The few sentences it
21 devotes to that argument assert merely that the evidence
22 completed the narrative and was "inextricably intertwined with
23 proof of the charged offense" without any explanation as to why

1 this is so. We are compelled to conclude that the district court
2 abused its discretion in admitting the guns and photographs of
3 the weapons, drugs, and related contraband as background
4 evidence.

5 **III. Opportunity or Motive**

6 The Government asks us to affirm admission of the evidence
7 on the alternative ground that, under Federal Rule of Evidence
8 404(b), it was relevant to prove that Jackson "had the
9 opportunity and motive" to possess a gun.

10 Rule 404(b) renders inadmissible evidence "of other crimes,
11 wrongs, or acts . . . to prove the character of a person in order
12 to show action in conformity therewith." Fed. R. Evid. 404(b).
13 Under the Rule, however, a court may admit prior-act evidence to
14 show, among other things, "proof of motive, opportunity, intent .
15 . . or absence of mistake." Id. The Government's argument that
16 the evidence was admissible under a Rule 404(b) analysis fails
17 for at least two reasons.

18 First, whether Jackson had the opportunity or motive to
19 possess a gun was not put in issue during the trial. See Hynes
20 v. Coughlin, 79 F.3d 285, 291-92 (2d Cir. 1996) (holding that a
21 prior act was not admissible to show intent when intent was not
22 contested at trial). Jackson's defense was that there was simply
23 insufficient evidence to prove that he possessed a gun at all,

1 not, for example, that he would have been unable to procure a gun
2 or that he lacked a reason to have one.

3 Second, while the evidence that Jackson had ready and
4 contemporaneous access to an apartment in which firearms were
5 recovered constituted a relevant piece of circumstantial evidence
6 tending to prove that he possessed the weapon at issue, the
7 evidence offered at trial went far beyond what was necessary for
8 this purpose. Its admission ignored a "common sense precaution
9 which should clearly be taken . . . to limit the prosecutor's
10 presentation to such facts . . . as are reasonably necessary to
11 prove the point for which the evidence is admitted, and to
12 exclude unsavory details which go beyond what is necessary to
13 make the point." David W. Louisell & Christopher B. Mueller,
14 Federal Evidence § 140, at 209 (rev. ed. 1985); see also United
15 States v. Bradwell, 388 F.2d 619, 622 (2d Cir. 1968) (discussing
16 the undue prejudice that can result when the "minute peg of
17 relevancy [is] entirely obscured by the dirty linen hung upon it"
18 (citation omitted)).

19 More significantly, during the trial the Government did not
20 argue or even assert that Jackson had the opportunity or motive
21 to possess a gun. Instead, it maintained that the contraband
22 showed "exactly what was going on that day," adding delphically
23 that it established "who the defendant really is." It also

1 suggested that the evidence allowed the jury "to make a
2 reasonable conclusion about the defendant." Thus, the
3 Government's only use of the evidence was to argue that it
4 illuminated Jackson's character. Rule 404(b) prohibits such
5 tactics. See Hynes, 79 F.3d at 292 (holding that despite
6 defendants' "lip service to the proper principle" for admitting
7 evidence under Rule 404(b), defendants actually used prior-act
8 evidence to establish plaintiff's propensity for violence).

9 **IV. Harmless Error**

10 We might affirm Jackson's conviction if the district court's
11 error were harmless. See Mercado, 573 F.3d at 141
12 ("[E]videntiary rulings are subject to harmless error
13 analysis."). However, we cannot "conclude with fair assurance
14 that the evidence did not substantially influence the jury." Id.
15 (internal quotation marks omitted).

16 The Government's case was by no means overwhelming. The
17 jury heard evidence of Jackson's flight, and Officer Jordan's
18 testimony that, as Jackson was running from him at night (though
19 with the aid of a spotlight), he saw what looked like a black gun
20 handle protruding from Jackson's black leather jacket. Cross-
21 examination established that Jordan was not sure that he saw a
22 gun. Although the Government also proved that Officer Ferrari
23 found a gun near where Jackson had run, the Government did not

1 recover any fingerprints from the gun, and no witnesses saw
2 Jackson place the gun in the garbage can or even run past the
3 garbage can.

4 We note that the district court believed that the evidence
5 from the apartment was "critical" to the Government's case.
6 Given the borderline evidence, there is a substantial risk that
7 the jury was nudged from reasonable doubt to conviction by the
8 suggestion that Jackson possessed, or associated with those who
9 possessed, laser-scoped firearms, bullet-proof vests, machetes,
10 and more mundane materials of the drug trade.

11 Finally, we do not believe that the district court's
12 limiting instruction can salvage the conviction. The court
13 instructed the jury essentially to ignore the evidence of drug
14 dealing, noting that the evidence was admitted simply because
15 "these are the materials that were found in the apartment."
16 Although we ordinarily presume that the jury followed the court's
17 instructions, "this presumption is dropped where there is an
18 overwhelming probability that the jury will be unable to follow
19 the court's instructions and the evidence is devastating to the
20 defense." United States v. Colombo, 909 F.2d 711, 715 (2d Cir.
21 1990) (internal quotation marks omitted). We find such
22 probability and prejudice here.

1 The instruction was too general and vague to ensure that the
2 error in admitting the evidence was harmless. “[I]t is
3 imperative that [limiting] instructions be clear and
4 unequivocal.” United States v. Becker, 502 F.3d 122, 133 (2d
5 Cir. 2007). The instruction did not expressly advert to the
6 weapons found in the apartment, only to the drugs. Thus, the
7 jury might have believed that the weapons found in the apartment
8 could contribute to a finding that Jackson possessed the gun.
9 See id. (holding that “a reasonable juror might have assumed that
10 she was permitted to consider” evidence for a purpose not
11 expressly prohibited by a limiting instruction).

12 Moreover, we have held that a jury will likely disregard an
13 instruction that evidence is merely background in the face of
14 “shocking” evidence that the Government puts at the center of the
15 trial. See Colombo, 909 F.2d at 715. Although the evidence here
16 may not have been as inflammatory as the rape and sodomy in
17 Colombo, see id., it is likely that the jury could not have
18 ignored the parade of guns and photographs that the Government
19 put before it, which was a major focus of the prosecutor’s
20 closing arguments.

21 The evidence was also devastating to Jackson. Without this
22 evidence, the Government’s case was that Jackson was a convicted
23 felon with a gun who ran from the police. With the evidence, the

1 Government invited the jury to infer that Jackson at least
2 associated with dangerous drug dealers equipped with an array of
3 weapons who operated a narcotics business out of a residential
4 apartment building. In light of such evidence, Jackson had
5 little chance to prevail on his argument that he did not possess
6 a single handgun. Cf. United States v. Farmer, ___ F.3d ___,
7 2009 U.S. App. LEXIS 22157, at *39 (2d Cir. Oct. 8, 2009)
8 (vacating attempted murder conviction where gratuitous references
9 to defendant's nickname, "Murder," "short-circuited the jury's
10 fact-finding" regarding a plausible defense).

10 Admitting the evidence cannot be viewed as harmless error.
11 Accordingly, Jackson's conviction cannot stand.

12 **CONCLUSION**

13 For the foregoing reasons, we VACATE the judgment of
14 conviction and REMAND for further proceedings consistent with
15 this opinion.