09-0016-cr

To Be Argued By:
JOHN H. DURHAM

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-0016-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

KEVIN SHAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

NORA R. DANNEHY
United States Attorney
District of Connecticut

JOHN H. DURHAM
Counsel to the United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (*of counsel*)

TABLE OF CONTENTS

Table of Authorities iv

Statement of Jurisdiction. ix

Statement of the Issue Presented x

Preliminary Statement. 1

Statement of the Case 3

Statement of Facts 5

A. The defendant sells guns and cocaine to the cooperating witness. 5

B. The defendant repeatedly admits that he uses cocaine. 18

Summary of Argument 20

Argument. 23

I. The evidence was sufficient to prove beyond a reasonable doubt that the defendant had engaged in the business of dealing firearms without a license, where he sold two firearms to a cooperating witness he knew to be a convicted felon, offered to sell the cooperator other firearms, and was found in possession of firearms-related items. 23

A. Relevant facts. 23

B. Governing law and standard of review. 23

1. Sufficiency of the evidence. 23

2. Engaging in the business of dealing firearms. 24

C. Discussion. 27

II. The defendant waived any claim that the district court erred by failing to *sua sponte* strike a somewhat non-responsive portion of one answer to one question asked of the case agent about a background fact that gave rise to the investigation of the defendant, and in the alternative there was no plain error. 32

A. Relevant facts. 32

B. Governing law and standard of review. 38

C. Discussion. 40

1. The defendant waived any challenge to Agent Prather's testimony by questioning him about hearsay statements and choosing as a tactical matter not to ask the cooperating witness about them. 40

2. Even if the claim had not been waived, the defendant has not satisfied the stringent requirements for plain error review.. 42

III. The evidence was sufficient to prove beyond a reasonable doubt that the defendant was an unlawful user of controlled substances in possession of a firearm, where he admitted to law enforcement officers, a cooperating witness, and in consensually recorded conversations that he had been using cocaine, and where he made two monitored, hand-to-hand sales of firearms that had traveled in interstate commerce. 47

A. Relevant facts. 47

B. Governing law and standard of review. 47

C. Discussion.. 48

Conclusion. 55

Certification per Fed. R. App. P. 32(a)(7)(C)

Addendum

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Crawford v. Washington,
541 U.S. 36 (2004).. 43

United States v. Allah,
130 F.3d 33 (2d Cir 1997). 25, 29

United States v. Atkinson,
297 U.S. 157 (1936).. 45

United States v. Bernardine,
73 F.3d 1078 (11th Cir. 1996). 53

United States v. Berry,
644 F.2d 1034 (5th Cir.1981). 26

United States v. Carter,
801 F.2d 78 (2d Cir. 1986).. . . . . 26, 28

United States v. Cavera,
550 F.3d 180 (2d Cir. 2008) (en banc).. 31

United States v. Collins,
957 F.2d 72 (2d Cir. 1992).. 29

United States v. Coonan,
938 F.2d 1553 (2d Cir. 1991).. 41

United States v. Cotton,
535 U.S. 625 (2002).. 39

United States v. Day,
476 F.2d 562 (6th Cir.1973). 26

United States v. Goldberg,
756 F.2d 949 (2d Cir.1985). 26

United States v. Hamilton,
334 F.3d 170 (2d Cir. 2003).. 24

United States v. Jones,
299 F.3d 103 (2d Cir. 2002).. 38

United States v. Masters,
622 F.2d 83 (4th Cir.1980). 26

United States v. Morris,
350 F.3d 32 (2d Cir. 2003).. 38

United States v. Nevarez,
251 F.3d 28 (2d Cir. 2001) (per curiam). 53

United States v. Olano,
507 U.S. 725 (1993).. . . . . 38, 39, 44, 45

United States v. Payton,
159 F.3d 49 (2d Cir. 1998).. 24

United States v. Perkins,
633 F.2d 856 (8th Cir.1981). 26

United States v. Plitman,
194 F.3d 59 (2d Cir. 1999).. 39

United States v. Powell,
513 F.2d 1249 (8th Cir. 1975). 26

United States v. Quinones,
511 F.3d 289 (2d Cir. 2007), *cert. denied,*
129 S.Ct. 252 (2008). 38

United States v. Reifler,
446 F.3d 65 (2d Cir. 2006).. . . . . 23, 43

United States v. Reyes,
18 F.3d 65 (2d Cir. 1994). 46

United States v. Rosa,
17 F.3d 1531 (2d Cir. 1994).. 32

United States v. Solomon,
95 F.3d 33 (10th Cir. 1996). 53

United States v. Swinton,
521 F.2d 1255 (10th Cir.1975). 26

United States v. Walsh,
194 F.3d 37 (2d Cir. 1999).. 39

United States v. Weiss,
930 F.2d 185 (2d Cir. 1991).. 38

United States v. Wellington,
417 F.3d 284 (2d Cir. 2005).. 38

United States v. Wilkening,
485 F.2d 234 (8th Cir.1973) (per curiam). 26

United States v. Williams,
399 F.3d 450 (2d Cir. 2005).. 39

United States v. Wilmoth,
636 F.2d 123 (5th Cir.1981). 26

United States v. Yu-Leung,
51 F.3d 1116 (2d Cir. 1995).. . . . . 38, 42

STATUTES

18 U.S.C. § 921. . . . . 25, 27, 28, 54

18 U.S.C. § 922. . . . . 3, 24, 25, 47, 54

18 U.S.C. § 924. . . . . 3, 24, 25

18 U.S.C. § 3231. ix

21 U.S.C. § 802. . . . . 47, 48

21 U.S.C. § 841. 4

28 U.S.C. § 1291. ix

RULES

Fed. R. App. P. 4. ix

Fed. R. Crim. P. 52. . . . . 38, 45

Fed. R. Crim. P. 33. 38

Fed. R. Evid. 403. 43

REGULATIONS

31 C.F.R. 103.11. 26

Statement of Jurisdiction

This is an appeal from a judgment in a criminal case entered on December 29, 2008, in the District of Connecticut (Thompson, J.).[1] The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 5, 2009. This Court has jurisdiction over the defendant's appeal of his conviction pursuant to 28 U.S.C. § 1291.

---

[1] The defendant's appendix is referred to as "AA __." The Government's appendix is referred to as "GA __."

Statement of the Issue Presented

I. Whether the evidence was sufficient to prove beyond a reasonable doubt that the defendant had engaged in the business of dealing firearms without a license, where he sold two firearms to a cooperating witness he knew to be a convicted felon, offered to sell the cooperator other firearms, and was found in possession of firearms-related items.

II. Whether the defendant waived any claim that the district court erred by failing to *sua sponte* strike a somewhat non-responsive portion of one answer to one question asked of the case agent about a background fact that gave rise to the investigation of the defendant, and in the alternative there was no plain error.

III. Whether the evidence was sufficient to prove beyond a reasonable doubt that the defendant was an unlawful user of controlled substances in possession of a firearm, where he admitted to law enforcement officers, a cooperating witness, and in consensually recorded conversations that he had been using cocaine, and where he made two monitored, hand-to-hand sales of firearms that had traveled in interstate commerce.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-0016-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

KEVIN SHAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In April 2007, a cooperating witness advised Special Agents of the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF") that an individual known to him as "Low" was selling crack cocaine and cocaine. Further, Low was in possession of a number of firearms and had an alleged connection to someone who could provide AK-47s for sale. Based on that information, ATF began investigating Low's criminal activities. On April 27, 2007,

ATF had the cooperator make a controlled buy of crack cocaine from Low, who was subsequently identified as the defendant, Kevin Shan.

Following the recorded purchase of crack cocaine and some corroborative conversation concerning the possible sale of guns to a fictitious friend of the cooperating individual, a controlled purchase of a gun was attempted. On May 2, 2007, the same cooperating witness, whom Shan knew to be a convicted felon, drove to Shan's home and made a consensually recorded, hand-to-hand purchase of a Bushmaster .223 caliber rifle from Shan. In addition, Shan distributed a small quantity of powder cocaine to the cooperator for setting up the deal. Later, on May 14, 2007, the defendant made a consensually recorded, hand-to-hand sale of a Smith & Wesson .357 caliber handgun to the cooperator. At the time Shan sold the firearms (both of which had traveled in interstate commerce), he was an unlawful user of cocaine.

Thereafter, on May 17, 2007, Shan was recorded trying to sell two ounces of cocaine to the cooperator's fictitious friend. In the course of that recording, AK-47s were mentioned. Finally, on June 12, 2007, Shan offered to sell the cooperating witness yet another firearm. Shan wanted $950 for the gun, which he described as being brand new, unfired, and sold in stores for $750.

Despite the fact that law enforcement authorities had the Bushmaster rifle and Smith & Wesson revolver in their custody, as well as the audio and audio-visual recordings of Shan making those sales and distributing controlled

substances, on August 3, 2007, he denied to investigating officers that he had sold any guns or drugs. Shan did allow, however, that he had been "doing some bumps" – that is, using cocaine. Like the sales of the firearms, the fact of Shan's ongoing use of cocaine was captured on several of the consensual recordings.

In this appeal, Shan claims that the evidence was insufficient to prove beyond a reasonable doubt that he had engaged in the business of dealing firearms without a license (Count One) or that he was an unlawful user of a controlled substance who had been in possession of a firearm (Count Two). Finally, despite not objecting at trial, Shan claims for the first time on appeal that the district court committed error in allowing an ATF agent to testify about certain background information he had received from the cooperating witness in the case prior to initiation of the investigation of Shan.

For the reasons that follow, Shan's claims should be rejected, and his conviction on all counts of the superseding indictment affirmed.

Statement of the Case

On October 12, 2007, a federal grand jury in Connecticut returned an indictment charging the defendant-appellant, Kevin Shan, with engaging in the business of dealing firearms without a license, in violation of 18 U.S.C. §§ 922(a)(1) and 924(a)(1)(D), possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2), and

distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). On October 19, 2007, a Superceding Indictment was returned that added a fourth count charging the defendant with distribution of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). The case was assigned to the Hon. Alvin W. Thompson.

On April 29, 2008, the defendant moved to suppress the evidence seized from his home during an August 3, 2007, search conducted by state and federal authorities. On July 7, 2008, the district court issued an order denying the motion based on its finding that the search warrant established probable cause to justify the search of the defendant's residence.

On July 10, 2008, jury selection in the defendant's case was conducted.

On July 15, 2008, trial commenced in the case. After the Government rested on July 16, 2008, the defendant moved for a judgment of acquittal on all counts of the superseding indictment, which the district court denied. GA376-379. On July 17, 2008, the jury returned guilty verdicts on all counts of the superseding indictment. GA532-533.

On December 29, 2008, the district court sentenced the defendant to concurrent terms of 27 months of imprisonment on each count.

On January 5, 2009, the defendant filed a timely notice of appeal. The defendant has been incarcerated since his

initial arrest and is currently serving his sentence.

Statement of Facts

Based on the evidence presented by the Government at trial, the jury reasonably could have found the following facts:[2]

A. The defendant sells guns and cocaine to the cooperating witness

In the Spring of 2007, a cooperating witness ("CW") provided information about the sale of cocaine, crack cocaine and firearms in New London, Connecticut, to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). GA100. In one such matter, the CW stated that he had been to the home of an individual going by the name of "Low" who was in possession of three firearms (two handguns – one being a .380 caliber pistol – and a rifle that the CW believed was an AK-47) and had access to several AK-47 type firearms. GA 196, 200, 318. The CW had known "Low," who, through subsequent investigative efforts, law enforcement officials were able to identify as the defendant, Kevin Shan, GA 53-54, 73-76, for a couple of years. In the past, the CW had both

[2] At trial, the Government presented the testimony of the following witnesses: New London Police Officers George Potts and Brian Laurie, ATF Special Agents Daniel Prather and Kurt Wheeler, Connecticut State Police Firearms Examiner James Stephenson, and a cooperating witness whose name and background are set out in the trial transcripts.

purchased cocaine from and used cocaine with Shan. GA 311.

Based on the information provided by the CW, ATF began investigating Shan. GA 102. As part of the initial investigation, the CW agreed to make consensually recorded purchases of narcotics and firearms from the defendant. GA 103. On the afternoon of April 27, 2007, investigators sent the CW to Shan's home to see if he could purchase a small quantity of narcotics and engage the defendant in conversation so that the investigators could evaluate the reliability of the CW's information. The CW was outfitted with a recording device and provided with $50 in government funds. GA 112-14. In accordance with standard law enforcement protocol, the CW was searched carefully for contraband both before and after making a consensually recorded controlled buy of crack cocaine on April 27, 2007, and before and after each of the other controlled purchases charged in the superseding indictment. GA 52-55, 60-61, 103-05, 321-23.

The CW was dropped off near Shan's home and then surveilled going directly to 49 Connecticut Avenue in New London, where he entered the front door. Several minutes later he exited the front door and went directly to a pre-arranged location to meet with law enforcement officers. At the meeting site, the informant handed over to Special Agent Daniel Prather the white rock-like substance he had purchased from "Low" for $50. GX 6. DEA Lab analysis established and Shan stipulated to the fact that the substance was in fact cocaine base. GA 185; GX 19.

The consensual recording made by the CW confirmed that the defendant had made a $50 sale of "hard" (that is, crack cocaine) to the CW. Further, the recording established that the defendant had an interest in selling guns to a purported friend that the CW said he had on the Mashantucket Pequot Indian Reservation who was interested in purchasing firearms.[3] GA 77, 126, 258; GX 22, GX 22-A.

As to the distribution of the crack cocaine, the taped conversation established the following corroborative exchange:

CI: You got hard [crack cocaine]?

Shan: I got hard.

CI: Give me a fifty.

AA 5-6.

With respect to confirmation of the fact that Shan had expressed an interest in the CW's brokering the sale of firearms to someone the CW knew on the Mashantucket Reservation, the recording reflected the following:

---

[3] The various consensually recorded conversations between the CW and the defendant were included in a single government exhibit, namely GX 22. The transcripts of the portions of conversation admitted into evidence by the district court were marked as for identification as GX 22A - 22E. GA 309.

CI: Alright, here's the deal. I got to wait for him to come back from the vet; something happened he got two pit bulls.

Shan: Um, hmm.

CI: Somebody killed one of 'em, and the other one is just . . . he thinks, he got in an argument with one of his cousins from the Narragansett side . . . .

Shan: Umm, hmmm.

CI: . . . and he found his dog. He said the whole larynx was crushed, so he thinks his cousin choked his dog. He took the other one to the vet.

Shan: Umm hum.

CI: I only came by cuz. I tried to call you and I ain't want you, I'm not frontin'. He's for real.

Shan: Yeah.

CI: The money's good. He just said he, he'll call me as soon as he gets done with the Vet.

Shan: Alright. What's good with you?

AA 5.

The defendant stipulated at trial that he was not a federally licensed firearms dealer. GA 186-87; GX 20.

After this initial consensually recorded transaction, the CW contacted Special Agent Prather and advised that Shan was willing to sell the CW, who Shan knew to be a convicted felon, GA 334, an AR-15 type rifle he had, GA 120. Shan first wanted $2,000 for the weapon, which ATF was not willing to pay. Shan subsequently agreed to sell it to the CW for $1,700. GA 120, 319-20.[4] In response to this information, on May 2, 2007, Agent Prather put into motion a plan for the CW to make a second controlled purchase from Shan, this time of a firearm. GA 120. To effectuate this second purchase, the CW was provided with an undercover ATF vehicle equipped with an audio-video recorder, and the CW also wore an audio recording device. GA 121, 125-35.

While on his way to buy the weapon, and with the case agent present, the CW called ahead to let Shan know he was on his way. The CW asked Shan if he had what in context was a reference to narcotics that Shan could give him for brokering the gun sale. The brief exchange was as follows:

CI: Yo. What up baby. Yo I'm on my way, so

---

[4] Testimony at trial established that if the weapon purchased from Shan had been brand new, it would have retailed for approximately $1,195. The market value of a used firearm of the type sold to the CW was approximately $800. GA 372.

uhm be ready, alright?

Shan: Alright.

CI: Hey, yo, uhm, matter of fact to, yo, uhm you got anything?

Shan: Yeah.

CI: Alright, uhm, you toss me something for doing it?

Shan: Yeah (Unintelligible) come on man. Don't worry about it.

AA 14.

The CW continued on to Shan's residence driving the ATF undercover vehicle and was surveilled as he walked up onto the porch of the residence. While standing in the doorway, the CW gave the defendant $1,700 in government funds, GA 78, 120-21, 125-26, 327, for the AR-15-type rifle they had discussed. The delivery of the cash was captured by the body recorder the CW was wearing. AA 17B.

Mr. Shan then walked inside the residence and returned with what the surveillance officers thought looked like a green cloth bag and handed it to the CW in the doorway. GA 81, 130, 285, 326. Shan told the CW to "[t]ake this shit outside," AA 18, at which point the CW brought the object Shan had given him to the ATF undercover vehicle

and placed it on the rear seat, GA 81, 130, 285, 326. The CW then returned to the porch and engaged in brief additional conversation with the defendant, at which point the CW obtained a small quantity of cocaine from Shan. GA 132. The recording of the distribution of cocaine reflects the following:

> Shan: That's all I got. And the little bit that I was playing with last night. I'm gonna get some more though. Alright? I'm gonna get that (Unintelligible).

AA 19.

The CW left the area in the ATF undercover vehicle and proceeded to a pre-determined location to meet with law enforcement authorities. The CW handed Special Agent Prather a plastic bag containing a white powdery substance which the informant believed to be cocaine, GA 132-33, 286; GX 4, that he had received from the defendant for having set up the gun deal when he (the CW) had walked back to the porch after he had brought the gun he had purchased to the car. Agent Prather then removed from the rear seat of the vehicle what was determined to be a green sweatshirt, GX 5, that was wrapped around a Bushmaster.223 caliber rifle, GA 83, 132; GX 6, a magazine, GA 141; GX 7, and 20 rounds of ammunition, GA142; GX 8. GA 132, 135-36, 138-42.[5]

---

[5]The government introduced testimony that the Bushmaster rifle, the AR-15, and the AK-47 are all .223 caliber (continued...)

It was uncontroverted at trial that the firearm had traveled in interstate commerce, GA 369, and the parties stipulated to this fact, GA 370; GX 23. Further, there appeared to be no dispute about the fact that no paperwork had been completed for the sale of the weapon to the CW. GA 143, 333.

With respect to the white powdery substance that was provided to the CW by the defendant and subsequently turned over to Special Agent Prather and then Officer Laurie, DEA Lab analysis established that the substance was in fact cocaine hydrochloride. The defense stipulated to this fact. GA 185; GX 19.

Following the May 2, 2007, controlled purchase of the Bushmaster AR-15 from Shan, the CW continued to discuss the purchase of firearms with Shan. The CW informed Agent Prather that he had reached an agreement to purchase a handgun from Shan during one of these conversations. GA 144. Specifically, the CW had arranged to purchase a .357 caliber pistol from Shan for $500. GA 144. Thereafter, Agent Prather again put into action plans for the CW to conduct a controlled purchase of the .357 from the defendant. GA 144-45.

On May 14, 2007, the same general procedures employed during the May 2, 2007, controlled buy were followed in connection with the CW's anticipated purchase of the .357 revolver from Shan. The CW was

---

[5](...continued)
firearms that look very similar. GA 95-96.

thoroughly searched before and after meeting with the defendant, he was given the same undercover ATF vehicle which was set up for audio-video recording, provided with a separate body recorder for his person, and given $500 in government funds to make the handgun purchase.GA 150. Before meeting with Shan, the CW placed a monitored call to him, and Shan told the CW where to pick him up to buy the gun.

As on the prior occasion, the audio-visual equipment and body recorder were engaged and the CW traveled to the location in New London where Shan asked to be picked up. Surveillance officers were not able to keep the ATF vehicle in their sight for a period of time, but the transmitter was providing sporadic audio, which meant the officers were close to the undercover vehicle despite the fact they had lost sight of it for a short while. GA 148-49. Although the officers had difficulties conducting their surveillance, as heard and seen on the audio-visual recording made by the CW while he and Shan were in the car, the CW gave Shan the buy money for the handgun purchase shortly after Shan got in the car. GA 149; AA 26. Later, after the CW had dropped Shan off to run into his residence to retrieve the gun, Shan is seen placing the handgun on the floor of the vehicle. At Shan's suggestion, the CW put the weapon in the console of the car. GA 163; AA 39. Separate and apart from the audio-visual recordings, the surveillance officers succeeded in regaining sight of the undercover car, and they saw it parked in front of Shan's residence. They also were able to see Shan get out of the car, enter the front door of his residence, come back out with something in his hand, and

get back in the passenger side of the car. GA 88-89, 155. The officers eventually saw the CW drop the defendant off at a location other than his home, and the CW and the surveillance officers then proceeded directly to a pre-arranged meeting site. GA 89, 163.

At the meeting location, Special Agent Prather immediately searched the area of the vehicle where the CW said he had placed the handgun and which was depicted on the audio-visual recording played at trial for the jury. GA 164. Special Agent Prather recovered what proved to be a Smith and Wesson .357 caliber revolver. GA 164; GX 9. It was uncontroverted at trial that the firearm had traveled in interstate commerce, GA 370, and the parties stipulated to this fact, GA 370-71, GX 23. Further, there was no challenge to the operability of the weapon. GA 364-66. It was also undisputed that Shan generated no paperwork relating to the sale of the revolver to the CW for $500.[6] GA 143, 333.

In addition to corroborating the sale of the .357 caliber revolver, the recordings also established that Shan had offered the CW a choice between the .357 he actually purchased and a .380 caliber pistol Shan was prepared to sell. Specifically, the defendant had the following exchange with the CW while riding around in the undercover car:

---

[6]Testimony at trial established that if the Smith & Wessen were purchased new, it would have retailed for approximately $614. The market value of a used firearm of the type sold to the CW was approximately $250. GA 372-73.

Shan: (Unintelligible) you made up, (Unintelligible), which one you want?

CI: The tre.[7]

Shan: The tre, the .380?

CI: Naw, naw, naw. The other one. The other one is (Unintelligible). That's, that's the one, and we need bullets (Unintelligible).

Shan: Yeah, the other one got one bullet.

(Pause)

CI: I don't like...know why I don't like the .380? Cuz they really don't back a mother [expletive] down.

Shan: (Unintelligible), nigga (Unintelligible), which one you want?

CI: The tre pound.

AA 31-32.

After these three controlled purchases of controlled substances and firearms, the CW continued to discuss the purchase of other firearms from the defendant. On May 17,

---

[7]The street jargon used when referring to the .357 was "tre" or "tre pound." GA 145.

2007, the CW recorded a telephone conversation with the defendant to discusse the possible purchase of AK-47 type firearms. GA 166-67; GX 22. In context, Shan wanted to know if the CW's friend was interested in buying a couple of ounces of cocaine for a good price. The CW tried to put the defendant off on the cocaine, and asked about the purchase of AK-47s instead. The relevant conversation was as follows:

> CI: Alright, and uhm, if, if, if, if we, uhm, if we, if we can't get rid of that [in context the cocaine] what about the A[K]'s? What, can we make a move on that?
>
> Shan: Yeah, yeah (Unintelligible). Go knock on the nigga's door. What I'm saying is, we'll see what we can do with the right. (Unintelligible) this is the come up, man. (Unintelligible) I'm gonna throw the two of them in for a nice price man. Tell him he'll get two of them for eighteen right now. That's 9 a piece.

AA 42.

Still further, and despite the fact that in mid-May 2007, the investigators in the Shan case had been pulled off to work on a wiretap, GA 91, 168, the CW advised the investigators of a conversation in which Shan had offered to sell another handgun for $1,100, AA 44. In response, on June 12, 2007, the CW made another recorded telephone call to the defendant concerning any firearms he had for

sale. GA 169. During the call, Shan discussed the sale of what he described as a brand new firearm, but the CW advised him that his friend was unwilling to pay the $1,100 asking price. Shan then offered to sell it for $950. GA 170. Relevant portions of the conversation included the following:

> Shan: (Unintelligible) what he willing to pay for it?
>
> CI: Alright. Let me, find out. He's, he, a, he's somewhere around between four and six, and I know that's way off from where your at so, ah, ah, ah, let me talk to him some more and I'll see what else I can get out of him.
>
> Shan: Ah no, not for that thing. That shit is in the stores going for seven fifty. You know what I mean (Unintelligible)? The lowest I'll go to for that is nine-fifty.
>
> CI: You said nine-fifty?
>
> Shan: Yeah.
>
> CI: It's brand new. Never been fired or nothin', right?
>
> Shan: (Unintelligible) been fired. This will be it.

AA 44-45.

Later, on August 3, 2007, state and federal authorities executed a search warrant at the defendant's residence. GA 171-72. Officers recovered a number of items that were subsequently admitted into evidence at trial. The officers seized two magazines (or clips) for use in an AR-15 style rifle. GA 174; GX 10. They also seized two boxes of .380 caliber ammunition, one of which was empty and the other partially full. GA 176-77; GX 13, 14. In addition, a gun case was seized. GA 178; GX 15. In connection with drug activity, the searching officers seized two scales used for weighing small quantities of drugs, GA 174-76; GX 11, 12, as well as a plastic bag with trace amounts of a white powder substance that the defense stipulated was cocaine residue. GA 180, 185; GX 18, 19.

Shan was arrested during the search of his home. After having been advised of his constitutional rights and signing a waiver of rights form, he was asked a number of questions. Shan denied selling either drugs or guns to anyone. GA 191.

B. The defendant repeatedly admits that he uses cocaine

As noted, the CW testified at trial that he had used cocaine with the defendant as recently as 90 days prior to the instigation of the investigation targeting Shan's criminal activities. He also testified that the defendant admitted using drugs at the time this investigation was being conducted. GA 311-12.

During the investigation into the defendant's unlawful

dealings in firearms, evidence also surfaced that the defendant was unlawfully using controlled substances while in possession of the firearms he was selling. In this regard, during the controlled purchase of the Bushmaster .223 caliber rifle on May 2, 2007 – when Shan gave the CW cocaineas consideration for brokering the gun deal – Shan stated that "[t]hat's all I got. *And the little bit that I was playing with last night*." AA 19 (emphasis added).

During the CW's purchase of the Smith & Wesson .357 caliber revolver on May 14, 2007, the defendant again admitted having just used cocaine:

> CI: . . . why the [expletive] did you go to the uhm, strip bar with . . .
>
> Shan: I wasn't even spending no money dog. On some G shit I wasn't even spending no money, though. Cause we, we left the bar and we didn't want to go in the joint *and I was coked up*. (Unintelligible) I wasn't even spending no money. *We, we left the bar and (Unintelligible) coked up*. We gotta find somewhere to hang out at. And that shit stay open to five o'clock in the morning now. You know that right?
>
> CI: Yeah.
>
> Shan: Right. So we just go in there and bust some twenties and ones real quick. Know what I'm saying? *Do a couple bumps in the*

> *bathroom and chill. You know what I mean?* Next thing you know, next thing you know...

AA 35 (emphasis added).

In addition, on May 17, 2007 – as part of the recorded conversation relating to the defendant having three ounces of cocaine, two of which he was trying to sell to the CW's friend – the CW asked Shan about the quality of the cocaine. The CW asked, ". . . Uhm, you tried it right? It, it, it's pretty good?" Shan responded, "Yeah." AA 41.

Shan also made incriminating admissions when he was arrested. After waiving his rights, he was asked questions about his drug use. Although he denied selling any drugs or guns, he admitted that he occasionally "did some bumps [and] pointed at his nose." GA 191. Consistent with this fact was the recovery of a plastic baggie with trace amounts of cocaine at the time of the search of the defendant's residence.

Summary of Argument

1. There was more than sufficient trial evidence for a rational jury to conclude beyond a reasonable doubt that the defendant had engaged in the business of dealing firearms. The testimony and recordings demonstrated that the defendant made two hand-to-hand sales of firearms to a cooperating witness. In one instance, the defendant gave the cooperator a choice of weapons to buy. Moreover, the defendant offered to sell the CW at least one other firearm

and affirmed he had a connection for AK-47 rifles. Such a well established pattern of gun sales was more than sufficient to demonstrate that the defendant was in the gun business.

2. The defendant waived any challenge to a single sentence of testimony by the case agent, which went beyond the question asked by the government on direct examination. The government had asked the agent what his understanding was, when the investigation was initiated, concerning firearms that were available for sale. The agent responded by reporting the cooperating witness's statements that he had seen three guns at the defendant's home, and that Shan had told the cooperator that he "also had access to several AK-47 type firearms or AKs, as he referred to them." GA 102. Rather than object to this testimony or ask for a limiting instruction, defense counsel made a tactical decision on cross-examination to ask the agent about what the cooperator had told him, and thereby to depict the defendant as a low-level drug dealer who simply "had guns," and was not "dealing guns." GA 196. Defense counsel explains in his appellate brief that he made a tactical decision not to object, knowing that the cooperator was going to testify, and expecting him to repeat all of those statements. When the cooperator covered most, but not all, of the things he had told the ATF, defense counsel then made another tactical decision not to pursue the matter for fear that the witness would reiterate that Shan had said he had access to AK-47s. Having made that tactical decision not to object or inquire further, the defense has waived any objection on this score.

Even assuming that the error was not completely waived, the defendant still cannot satisfy his burden of demonstrating plain error. First, there was no error, plain or otherwise. The agent's testimony would have been admissible as background evidence, albeit not for the truth, because it provided relevant background information as to why an investigation into Shan's activities was initiated. Second, even assuming there were error, it certainly was not "plain" in the sense of obvious or clear – as evidenced by the fact that the defense did not object at trial. Third, the defendant has failed to carry his burden of proving that he was prejudiced by the challenged testimony, since the same subject matter of the defendant's ability to sell AK-47 type rifles was referred to on the consensual recordings and even by defense counsel during the course of his questioning the cooperating witness at trial. Any error was therefore harmless by any measure.

3. There was ample evidence presented at the defendant's trial to convince a reasonable juror beyond a reasonable doubt that he was an unlawful user of cocaine at the time he was in possession of the firearms that he sold to the cooperating witness. By the defendant's own admissions, as contained on his surreptitiously recorded conversations with the cooperating witness and when questioned by authorities following his arrest, he was using cocaine at times relevant to the instant case.

In sum, there is no basis to upset the guilty verdicts returned against by the defendant in this case.

Argument

I. The evidence was sufficient to prove beyond a reasonable doubt that the defendant had engaged in the business of dealing firearms without a license, where he sold two firearms to a cooperating witness he knew to be a convicted felon, offered to sell the cooperator other firearms, and was found in possession of firearms-related items.

A. Relevant Facts

The relevant facts are set forth in Part A of the Statement of Facts above.

B. Governing law and standard of review

1. Sufficiency of the evidence

In *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), the Court explained the "heavy burden" faced by a defendant challenging his or her conviction based upon a claim of insufficient evidence:

> In considering such a challenge, we must credit every inference that could have been drawn in the government's favor, and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt[.] We defer to the jury's determination of the weight of the evidence and the

> credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence. Pieces of evidence must be viewed not in isolation but in conjunction, and the conviction must be upheld if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt[.]

Id. at 94-95 (internal citations and quotation marks omitted).

If there are conflicts in the testimony or evidence, the reviewing court "must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003) (internal citations and quotation marks omitted).

As this Court has explained, "[t]he ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find.*" *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

2. Engaging in the business of dealing firearms

Count One of the indictment charged that the defendant engaged in the business of dealing in firearms without a license. Specifically, Count One charged a violation of 18 U.S.C. §§ 922(a)(1) and 924(a)(2), which provide in relevant part as follows:

> It shall be unlawful for any person . . . except a . . . licensed dealer, to engage in the business of . . . dealing in firearms . . . .

In order to sustain its burden of proof on this charge, the government had to prove beyond a reasonable doubt three essential elements: *first*, that on or about the dates set forth in the indictment, the defendant engaged in the business of dealing in firearms; *second*, that the defendant did not have a license as an importer, manufacturer or dealer in firearms, and *third*, that the defendant acted willfully. Sand, *Modern Federal Jury Instructions*, Form Instruction 35-3; *see also United States v. Allah*, 130 F.3d 33, 37-45 (2d Cir 1997) (reviewing various elements of charge of being an unlawful dealer in firearms).

With respect to the first essential element of the offense, the term "firearm" is defined under 18 U.S.C. § 921(a)(3) as "(A) any weapon . . . which will or is designed to or may be readily converted to expel a projectile by the action of an explosive; or (B) the frame or receiver of any such weapon." The term "engaged in the business," as relevant in the defendant's case, means "a person who devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms . . . ." 18 U.S.C. § 921(a)(21)(C).

As explained by this Court, to prove a violation of 18 U.S.C. §§ 922(a)(1) and 924(a)(1)(D):

> The government need not prove that dealing in

> firearms was the defendant's "primary business." *United States v. Wilmoth*, 636 F.2d 123, 125 (5th Cir.1981); *accord United States v. Powell*, 513 F.2d 1249, 1250 [(8th Cir. 1975)]; *cf. United States v. Goldberg*, 756 F.2d 949, 956 (2d Cir.1985) (defendant can be "engaged in dealing in" currency within meaning of 31 C.F.R. 103.11 even if only "as a sideline"). Nor is there a "magic number" of sales that need be specifically proven. *See United States v. Perkins*, 633 F.2d 856, 860 (8th Cir.1981). Rather, the statute reaches "those who hold themselves out as a source of firearms." *Wilmoth*, 636 F.2d at 125; *see also United States v. Masters*, 622 F.2d 83, 88 (4th Cir.1980); *United States v. Swinton*, 521 F.2d 1255, 1259 (10th Cir.[1975)]; *United States v. Day*, 476 F.2d 562, 567 (6th Cir.1973) (four sales over two months, other guns found in search of house, and agent's testimony that defendant said he could obtain guns provided sufficient evidence that defendant was engaged in dealing firearms). Consequently, the government need only prove that the defendant "has guns on hand or is ready and able to procure them for the purpose of selling them from to time to such persons as might be accepted as customers." *United States v. Berry*, 644 F.2d 1034, 1037 (5th Cir.1981); *accord United States v. Wilkening*, 485 F.2d 234, 235 (8th Cir.1973) (per curiam).

United States v. Carter, 801 F.2d 78, 81-82 (2d Cir. 1986).

C. Discussion

Based on the evidence presented at trial, a reasonable jury could have determined that the government had proven the defendant's guilt beyond a reasonable doubt on all three elements of Count One.

As to the first element, there was clear and unequivocal evidence that the items sold by the defendant were "firearms" within the statutory meaning of that term. The expert testimony presented at trial through James Stephenson of the State of Connecticut, Department of Public Safety Forensic Science Laboratory established with certainty that the Bushmaster .223 caliber rifle, GX 6, and the Smith & Wesson .357 caliber handgun, GX 9, were firearms as defined under 18 U.S.C. § 921(a) (3). As explained by Stephenson, who was qualified as an expert firearms examiner without objection, GA 362, he test fired both weapons, and each discharged a shot and operated without malfunction. GA 363-64, 366.

There was also strong evidence that the defendant was "engaged in the business of" dealing in firearms, in the sense that he was a person who "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms . . . . " 18 U.S.C. § 921(a)(21)(C). Taken in the light most favorable to the government, the evidence shows that the defendant was selling multiple guns at retail. Within little over a month, the defendant sold the cooperating witness a Bushmaster .223 rifle for $1,700

(5/2/07) and a Smith & Wesson revolver for $500 (5/14/07), GX 6 and 9, and had offered to sell a .380 caliber handgun rather than the "tre" (.357 caliber) (5/14/07), AA 27, 31-32. He also acknowledged on tape that he had a source of supply for what were generically being referred to as AK-47s. AA 42. And he was able to procure brand new guns for sale as established by the recording the CW made with the defendant on June 12, 2007. AA 45. In short, even if the evidence did not prove that the defendant had a thriving business in the sales of guns, the government proved that the defendant "ha[d] guns on hand and [was] ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers." *Carter*, 801 F.2d at 82.

There is no dispute that the government proved the second element, that the defendant did not have a license as an importer, manufacturer or dealer in firearms. The term "dealer," as relevant here, is defined as ". . . any person engaged in the business of selling firearms at wholesale or retail . . . ." 18 U.S.C. § 921(a)(11). The term "licensed dealer" means any dealer who is licensed under the provisions of the Gun Control Act of 1968. *Id*. The jury was presented with uncontested evidence that the defendant was not federally licensed, and indeed he stipulated to this fact. GA 186-87; GX 20.

The third element the government had to prove beyond a reasonable doubt was that the defendant acted willfully. In order to satisfy this element, the government needed to establish that "the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act

which the law forbids," but "the government was not required to prove 'more than just the defendant's general knowledge that he or she [was] violating the law.'"*United States v. Allah*, 130 F.3d 33, 38 (2d Cir. 1997) (quoting *United States v. Collins*, 957 F.2d 72, 76 (2d Cir. 1992)).

The testimony and recordings presented to the jury by the government more than adequately established the fact that the defendant knew he was engaging in conduct the law forbids. For example, Shan knew that the person to whom he was delivering weapons – that is, the cooperating witness – was a previously convicted felon. GA 335. Further, on May 2, 2007, when the cooperating witness went to the defendant's residence for the purpose of purchasing the AR-15 type rifle, Shan refused to come outside to make the deal or to deliver the weapon to the cooperator. As reflected on GX 22, the law enforcement officers did not want the cooperating witness to go inside for fear he might be robbed of the $1,700 that was to be used to purchase the weapon. To avoid this possibility, the cooperating witness called ahead and had the following exchange with Shan:

CI: Alright, I'm on my way, uhm, I'll pull up and I'll beep for you.

Shan: No, you gotta come inside.

AA 14. When the cooperator arrived at the residence, he asked a then-unidentified female outside the house to have Shan come outside, but he refused to do so.

CI: Tell him, tell him I said come down here cuz he got a . . .

UF: Huh?

CI: Tell him I said to come down.

UF: He said to come down.

UF: He said he can't.

AA 17.

After the cooperator gave the $1,700 purchase price to the defendant, the defendant left the doorway and then returned with what turned out to be the Bushmaster .223 rifle, magazine and 20 rounds of ammunition wrapped up in a green sweatshirt. In telling the cooperator to come inside the doorway, the following exchange occurred:

Shan: Yo, come here yo.

CI: Okay, man.

Shan: (Unintelligible) Take this shit outside.

AA 18. Shan handed the wrapped weapon to the cooperator, and the cooperator then immediately took the gun to the undercover vehicle and placed it in the back seat.

Similarly, when Shan sold the cooperating witness the Smith & Wesson revolver on May 14, 2007, the defendant

was very wary of being seen with the gun or making the sale. As the jury saw and heard, when Shan eventually made the delivery of the gun to the cooperator, he did so only in a parking lot while inside the undercover ATF vehicle and by furtively placing it on the floor of the car. In doing so, Shan said to the cooperator:

> Shan: (Unintelligilbe) I don't want Ty [a person in the area where they had parked] to see me doing anything so I'm gonna lay that [the gun] right there, you put it in there [the console], alright?

AA 39. This was not the conduct of a person simply engaging in the lawful sale of his property to another individual.

Moreover, it is evident that the defendant knew that he was engaging in unlawful conduct by the very fact that he was charging well above market value for these weapons. The best example of this is the price that he was asking for a new gun he had for sale. Specifically, during the recorded call on June 12, 2007, the defendant was asking first $1,100 and then $950 for the gun he was proposing to sell to the cooperator. Shan made it clear that the gun was "brand new" and sold in stores for $750. AA 45. Similarly, the Bushmaster and Smith & Wesson, which were used firearms, were sold for significantly more than market value. GA 372-73. *Cf. United States v. Cavera*, 550 F.3d 180, 196 (2d Cir. 2008) (en banc) (affirming district judge's decision to impose above-guidelines sentence for gun trafficking into areas with strict gun laws such as

northeastern cities, because "the cost of getting a gun into that jurisdiction [is relatively] higher," thereby "increas[ing] the profits to be had from trafficking guns into the strong-enforcement jurisdiction").

Finally, the fact that he lied to the police about his having sold any guns demonstrates consciousness of guilt, which likewise shows that he knew his conduct was unlawful. *See, e.g., United States v. Rosa*, 17 F.3d 1531, 1547 (2d Cir. 1994) (holding that, where defendant made post-arrest statement falsely denying having done any business with co-defendant, jury could infer that the statement "bespoke consciousness of guilt" and supported the inference that the defendant "knew he was dealing with stolen goods").

II. The defendant waived any claim that the district court erred by failing to *sua sponte* strike a somewhat non-responsive portion of one answer to one question asked of the case agent about a background fact that gave rise to the investigation of the defendant, and in the alternative there was no plain error.

A. Relevant facts

On the first day of trial, the government called ATF Special Agent Daniel Prather, who had served as the case agent. At the outset of his testimony, the government elicited some background testimony to explain to the jury how the investigation into Shan came about. Agent Prather testified that the State's Attorney's Office had put him in

touch with a cooperating witness (whose name appears in the transcript), who had information regarding firearms possession in New London. GA 99-101. The following exchange occurred:

> Q. After having met with [the CW], did he provide some information to you relating to an individual who he said was in possession of drugs and guns and selling them at a location on Connecticut Avenue?
>
> A. Yes, he did.
>
> Q. As the result of acquiring that information, what, if anything, did you do, sir?
>
> A. I debriefed him regarding that information, documented it, and contacted the New London Police Department with the information I obtained from [the CW].
>
> Q. And was an investigation then initiated at that point in time?
>
> A. Yes, it was.
>
> Q. When the investigation was initiated, what was your understanding concerning firearms that were available for sale?
>
> A. The initial point of the investigation, my understanding was that [the CW] had been to

the defendant's residence and seen him in possession of three firearms. I believe what [the CW] described was a baby 9-millimeter, .357 revolver, and a rifle, I believe he described it as an AR-type rifle.

The cooperator also told me that Mr. Shan, or at that time he knew him as Low, told him that he had also had access to several AK-47 type firearms or AKs, as he referred to them.

Q. As a special agent with the Bureau of Alcohol, Tobacco and Firearms, would you be interested in seeing about acquiring some of those weapons?

A. Yes, that's correct.

Q. Was an investigative plan then put in place?

A. Yes, it was.

GA 101-02.

Defense counsel did not object to any of this exchange. Instead, defense counsel chose to explore Agent Prather's conversations with the CW on cross-examination:

Q. And [the CW], I think you had testified to this, he had said something along the lines that Mr. Shan was a low level, or sold small quantities of cocaine?

A. That was my interpretation of the information he provided me, yes.

Q. He also said that Mr. Shan had guns, is that correct?

A. Yes.

Q. Now, he didn't say Mr. Shan was dealing guns, did he?

A. No, not at that time.

Q. He said Mr. Shan had guns?

A. Yes, initial information was that he had the guns, yes.

GA 195-96. Defense counsel returned to the question of AK-47s on cross-examination. Specifically, counsel asked Agent Prather about the recorded call on April 27, 2007, when the CW asked whether they could "make a move" on the AKs if the drug deal fell through, to which the defendant responded "Yeah, yeah." (AA 42):

Q. Now, there was also some discussions, I believe, about the availability of AKs?

A. Correct.

Q. Did those AKs ever materialize?

A. No.

GA 200.

The next day, the government called the CW as a witness. In his first few minutes on the stand, the government inquired about his relationship with the defendant. The CW explained that he had known the defendant as "Low" for a couple of years, and had purchased small quantities of powder cocaine from him. GA 310-11. The CW then testified about how Shan had shown him guns, which he reported to the ATF:

> Q. Now, you've indicated that you participated or assisted in an investigation of Mr. Shan; is that correct?
>
> A. Correct.
>
> Q. Would you indicate to the jurors how it was that that came about? That is, how it was you came about working with the Bureau of Alcohol, Tobacco & Firearms in connection with Mr. Shan?
>
> A. I was hanging out with Mr. Shan. I was purchasing some powder from him. And he showed me some guns. And I brought that information back to ATF.

GA 313. The government returned to this topic several minutes later:

Q. . . . . How did it come about that you knew the defendant had guns?

A. One day I was over the defendant's house. And he showed me three guns.

Q. And do you remember what the guns were, what types of weapons, firearms?

A. One was a long gun that I thought was an AK. One was a .380. And – I just knew there was two handguns and one long gun. I can't remember what the third gun was.

Q. Separate and apart from having seen guns, did you see any other contraband?

A. Cocaine.

Q. And did you then report that information to ATF?

A. Yes.

GA 318. Defense counsel did not cross-examine the CW about what he had seen or discussed with the defendant prior to working with ATF.

At no point – whether before or after the CW's testimony – did counsel object to Agent Prather's testimony, or seek a limiting instruction in that regard. In fact, counsel never moved for a new trial pursuant to Rule

33 of the Federal Rules of Criminal Procedure.

B. Governing law and standard of review

When a defendant chooses for tactical reasons not to lodge an objection, he completely waives any claim of error on appeal. *See, e.g., United States v. Olano*, 507 U.S. 725, 733 (1993) (defining waiver)*; United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007) (defendant soliciting certain result constitutes "true waiver"), *cert. denied,* 129 S.Ct. 252 (2008); *United States v. Wellington*, 417 F.3d 284, 289-90 (2d Cir. 2005) (deliberate choice to take a position constitutes waiver of challenging the position later); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995) (If a party refrains from objecting as a "tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review"); *United States v. Weiss*, 930 F.2d 185, 198 (2d Cir. 1991) (holding that defendant waived his right to appeal a matter on which he withdrew his objection).

Where a challenge to an evidentiary ruling has not been affirmatively waived by a defendant's tactical choices at trial, it is ordinarily reviewed for abuse of discretion. *See United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002). Where, as here, a party has failed to object at trial, however, this Court reviews such an evidentiary claim only for plain error. *See United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003). Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the

fairness, integrity, or public reputation of judicial proceedings. *United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review, with one important distinction: in plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.* "In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Id.* (citation omitted).

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "the error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

1. The defendant waived any challenge to Agent Prather's testimony by questioning him about hearsay statements and choosing as a tactical matter not to ask the cooperating witness about them.

The defendant complains that the district court should not have admitted a portion of one answer given by the case agent in the matter to one question. Specifically, he complains about certain non-responsive hearsay testimony given by the case agent. In this regard, he asserts that the case agent testified that the cooperator "had told him that Mr. Shan had access to other 'AK's'.(T.T. 7/15/07 p. 102-03.) [GA 102]," which testimony "was not a direct answer to the U.S. Attorney's question and went beyond what was called for in the U.S. Attorney's question." Def. Br. at 19. Even though he never objected or sought a limiting instruction at trial, the defendant claims that this one statement warrants granting him a new trial. His claim fails for a variety of reasons.

First, defense counsel waived appellate review of any claim that the background information provided by the agent was impermissible hearsay, because he made the tactical choice to ask the agent about the CW's statements on cross-examination. Defense counsel attempted to turn those statements to his client's advantage, for example eliciting from the agent that the CW characterized the defendants as "a low level, or sold small quantities of cocaine," and that the CW "didn't say Mr. Shan was

dealing guns." GA 195-96. Defense counsel also returned to the question of AK-47s on cross-examination. Specifically, counsel asked Agent Prather about the recorded call on April 27, 2007, when the CW asked whether they could "make a move" on the AKs if the drug deal fell through, to which the defendant responded "Yeah, yeah." (AA 42):

> Q. Now, there was also some discussions, I believe, about the availability of AKs?
>
> A. Correct.
>
> Q. Did those AKs ever materialize?
>
> A. No.

GA 200. Again, defense counsel made a tactical choice not to dispute the notion that the defendant had discussed AK-47s with the CW, but rather to suggest simply that any such discussions were mere puffery because the guns never "materialize[d]." *See United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) (holding that defendant waived his right to appeal an evidentiary claim because he welcomed such evidence at trial).

The defense brief reinforces the conclusion that defense counsel made a deliberate (albeit now regretted) decision not to object to Agent Prather's testimony. The brief asserts that defense counsel did not object to Agent Prather's testimony about the AK-47s because he assumed that the CW would repeat all of that testimony in his direct

examination. When the CW's direct testimony covered nearly all of the statements reported by Agent Prather (for example, that the defendant showed him three guns), but not quite all of them (namely, that the defendant stated he could get additional guns), the defense was in a position to cross-examine the CW if they believed this to be a discrepancy. Yet counsel represents that "*[a]s a trial tactic it was an extreme risk*, and highly likely ineffective assistance of counsel, to ask [the CW] this question as there is no possible way to know the answer." Def. Br. at 23. Because defense counsel made a tactical decision not to object to the now-challenged portion of Agent Prather's testimony, and not to ask the CW about the statement in question, any claim in that regard is now waived. *See Yu-Leung*, 51 F.3d at 1122 (holding that when a party refrains from objecting as a "tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review").

2. Even if the claim had not been waived, the defendant has not satisfied the stringent requirements for plain error review.

Even if the Court were to conclude that this claim was not waived, it has still been forfeited. As the defendant concedes, he did not object to the answer given by Agent Prather. Further, while it is true that the district court did not give any limiting instruction on the matter to the jury, it is also true that the defendant asked for no such instruction. Having forfeited review of this claim by failing to object in the district court, the defendant fails to meet the stringent standard of plain error review.

First, the case agent's testimony would have been admissible so long as it was not offered for the purpose of establishing the truth of the matters asserted. So, for example, the testimony could have been admitted to explain why the case agent opened an investigation into the defendant's activities and subsequently took certain actions. *United States v. Reifler*, 446 F.3d 65, 92 (2d Cir. 2006) ("Background evidence may be admitted to . . . furnish an explanation of the understanding or intent with which certain acts were performed.") (internal quotation marks omitted). While the defendant could have asked the court below to conduct a balancing test of the probative value of such testimony against any potential prejudice, pursuant to Rule 403 of the Federal Rules of Evidence, the defense never raised the matter with the trial court so that such a balancing test could have been undertaken. Moreover, had the question been raised below, the prosecution could have been sure to have asked the cooperating witness about all of the defendant's statements to him about the availability of AK-47s – though even then, judging from defense counsel's deliberate choice not to ask the question of the witness himself, it is unlikely that he would have wanted the government to have done so.[8]

---

[8]The defendant does not claim that the district court's failure to *sua sponte* preclude the challenged sentence in Agent Prather's testimony violated his rights under the Sixth Amendment's Confrontation Clause. Such a claim would be foreclosed by the fact that the CW, who was the declarant, testified at trial. *See generally Crawford v. Washington*, 541 U.S. 36 (2004) (prohibiting admission of out-of-court (continued...)

Second, because the complained-of testimony would not even constitute hearsay if the defendant had raised the issue before the trial court and ultimately the court were to have allowed it to explain why the case agent pursued the course of action he did – especially if the admission of the testimony were accompanied by a limiting instruction – the error is certainly not *plain* error, in the sense of being clear or obvious.

Third, the defendant has not borne his burden of establishing that admission of this single piece of testimony violated his substantial rights, in the sense that it affected the outcome of the proceedings. It bears reminding that when a claim of error has not been preserved in the district court, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Olano*, 507 U.S. at 732, 734. The Supreme Court, as well as the Courts of Appeals, have consistently held that defendants must show the plain error had a prejudicial affect on the jury deliberations and that hypothetical suspicion of prejudice is not sufficient. *Id.* In this case, defense counsel not only failed to bring to the court's attention this complained-of snippet of testimony, but himself twice asked questions of the case agent that elicited information concerning what the cooperating witness had told him. In one instance, the elicited response

---

[8](...continued)
testimonial statements by witnesses *unless the declarant is available for cross-examination*).

was that the CW had told him "that Mr. Shan in addition to the firearms he'd seen him with was offering to sell AK-47 or AK type firearm[ ]." GA 196. Later, during the continued cross-examination of the witness, the defense wanted to bring out that no AK-47s were actually produced by the defendant, and in doing so asked, "Now, there was also some discussions, I believe, about the availability of AKs?" The case agent responded, "Correct." GA 200. Moreover, at no point did the prosecutor mention Agent Prather's testimony on this point, at closing or otherwise. On these facts, the defendant has not made the requisite showing of prejudice under the plain error analysis.

Fourth, even if the defendant were able to meet his burden under the first three prongs of *Olano*'s plain error standard, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735; *see* Fed. R. Crim. P. 52(b) (plain errors "may be noticed" by the reviewing court). In exercising this discretionary power, this Court "should correct a plain forfeited error affecting substantial rights" only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The Supreme Court has further cautioned that "a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, 507 U.S. at 737.

The one statement the defendant complains of in no way undermined the fairness, integrity or public reputation of

the proceedings. Indeed, as the defendant correctly points out, "'[t]he principal vice of hearsay evidence is that it offers the opponent no opportunity to cross examine the declarant on the statement that establishes the declared fact.'" Def. Br. at 21 (quoting *United States v. Reyes*, 18 F.3d 65, 72 (2d Cir. 1994)). Here, of course, the defense had an opportunity to cross-examine the declarant at length, and indeed took advantage of that opportunity. Defense counsel concluded, probably wisely, that it would be counterproductive to ask the cooperating witness to repeat what the defendant had told him about having additional guns – specifically AK-47s – available for sale. But the fact remains that the defendant had, and declined, that opportunity. In light of this fact, the claim that one portion of one answer given toward the beginning of the evidence – especially in the context of the other evidence which included the defendant having been recorded discussing guns he had for sale, drugs he had for sale, and his strip bar activities – falls far short of establishing the requisite threat to the fairness, integrity and reputation of the judicial system.

III. The evidence was sufficient to prove beyond a reasonable doubt that the defendant was an unlawful user of controlled substances in possession of a firearm, where he admitted to law enforcement officers, a cooperating witness, and in consensually recorded conversations that he had been using cocaine, and where he made two monitored, hand-to-hand sales of firearms that had traveled in interstate commerce

A. Relevant Facts

The relevant facts are set forth in Part B of the Statement of Facts above.

B. Governing law and standard of review

Count Two of the indictment charged that the defendant was an unlawful user of a controlled substance who had been in possession of a firearm in violation of 18 U.S.C. § 922(g)(3). That statute provides:

> It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . to . . . possess in or affecting commerce, any firearm . . . .

In order to sustain its burden of proving the defendant guilty on Count Two, the government was required to prove each of the following elements beyond a reasonable doubt:

first, that, at or about the time of the possession, the defendant was an unlawful user of or addicted to a controlled substance as defined in section 102 of the Controlled substances Act (21 U.S.C. § 802); *second*, that the defendant knowingly possessed the firearm as charged; and *third*, that, prior to the date of possession, the firearm traveled in interstate commerce. Sand, *Modern Federal Jury Instructions*, Form Instruction 35-47 (Modified).

The relevant governing law and standard of review regarding sufficiency of the evidence claims is set forth in Part I.B above.

C. Discussion

The government provided ample proof of the first element of Count Two, that the defendant was an unlawful user of a controlled substance. Here the controlled substance involved was cocaine. The government presented evidence at trial that Shan was not only involved in the sale and distribution of cocaine and crack cocaine, but that he himself was a user of the substance. That evidence included the direct testimony of the CW who had bought cocaine from the defendant and used cocaine with him. As explained to the jury, the cooperator had known Shan for a couple of years, and over that period he bought from and used cocaine with him. GA 311-13. Further, while the last time the cooperator had used cocaine with the defendant was approximately 90 days prior to the events charged in

the superseding indictment,[9] the evidence before the jury was that the defendant told the cooperator that he continued to use cocaine. *Id.*

The testimony of the cooperating witness on this subject was corroborated by Shan's own recorded statements and his admission that he was doing "bumps" to the police. While the defendant suggests that little or no such evidence was presented, Def. Br. at 17, the record establishes otherwise. Most particularly, the defendant's recorded statements refute the defendant's assertion.

For example, on May 2, 2007, after the defendant had sold the cooperator the Bushmaster rifle for $1,700, he gave the cooperator a small quantity of powder cocaine for setting up the deal. In doing so, Shan was recorded stating, "[t]hat's all I got. *And the little bit that I was playing with last night*." AA 19 (emphasis added).

Along these same lines, the jury had before it the recording of the May 14, 2007, sale of the Smith & Wesson .357 caliber revolver by the defendant to the cooperating witness. As noted, part of the conversation between the two men was as follows:

CI: . . . why the [expletive] did you go to the

---

[9]At the time of the events charged in the Indictment, of course, the cooperator had just gotten out of jail and had started working with federal and state law enforcement authorities. GA 312 The fact that the cooperator avoided cocaine use with Shan during that period is hardly surprising.

uhm, strip bar with . . .

Shan: I wasn't even spending no money dog. On some G shit I wasn't even spending no money, though. Cause we, we left the bar and we didn't want to go in the joint *and I was coked up*. (Unintelligible) I wasn't even spending no money. *We, we left the bar and (Unintelligible) coked up*. We gotta find somewhere to hang out at. And that shit stay open to five o'clock in the morning now. You know that right?

CI: Yeah.

Shan: Right. So we just go in there and bust some twenties and ones real quick. Know what I'm saying? *Do a couple bumps in the bathroom and chill. You know what I mean?* Next thing you know, next thing you know . . . .

AA 35 (emphasis added).

The defense argument that a fair reading of this portion of the recording would be that the referenced activity occurred some time in the past when Shan had money, Def. Br. at 18, is simply unavailing. In context – and taken in the light most favorable to the government, as required when evaluating the sufficiency of the evidence – the jury clearly could have concluded that Shan was discussing a recent event. In fact, Shan being out running around late at night

was not a thing of the past. As reflected in the recording of the April 27, 2007, crack sale to the cooperator, the deal took place at approximately 3:45 p.m. AA 1. When the cooperator first encountered Shan inside the house, the defendant was still in bed and the following exchange occurred:

CI: (Unintelligible) in the bed?

CI: What is wrong with you? What's wrong?

Shan: (Unintelligible) I ain't got in 'til this morning man.

CI: Are you serious?

Shan: (Unintelligible).

CI: You better stop that shit, yo.

Shan: What? Coming in early?

CI: Coming in so late man.

Shan: (Unintelligible).

CI: That girl in there loves you man, and she goes, she goes through it with you man.

Shan: I know, (Unintelligible) I can't deal with no bitches or nothing, know? I'm saying. . . .

AA 4.

The jury also heard the conversation between the cooperator and Shan that occurred on May 17, 2007, when the defendant was trying to sell three ounces of cocaine to the cooperator's "friend." In that conversation the CW asked the defendant Shan about the quality of the cocaine, and the defendant gave the following response to the cooperator's question:

CI: Yo, what up man? Yo, I just got through talking to my boy. Uhm, his thinking is he says he don't, he don't really want to buy that much cuz he, cuz he uses. So he said he got a, he got a friend that got some pretty decent shit, but I, I told him that this shit is better. Uhm, you tried it right? It, it, it's pretty good?

Shan: Yeah.

AA 41.

Certainly the jury could infer from this and the prior recorded conversations that the defendant Shan was using cocaine in May 2007.

Finally, as noted above, at the time of Shan's arrest, and the search of his home, he admitted to the officers that he

occasionally "did some bumps [and] pointed at his nose." GA 191. Consistent with this fact was the recovery of a plastic baggie with trace amounts of cocaine at the time of the search of the defendant's residence.

As this Court has explained, "the defendant's unlawful use of a controlled substance need not be simultaneous with the actual sale of the firearm as long as it occurs 'during the time period charged as part of the indictment.'" *United States v. Nevarez*, 251 F.3d 28, 31 (2d Cir. 2001) (per curiam) (quoting *United States v. Bernardine*, 73 F.3d 1078, 1082 (11th Cir. 1996)); *see also United States v. Solomon*, 95 F.3d 33, 35 (10th Cir. 1996). Here, the evidence before the jury showed that for a couple of years prior to the events charged in the indictment the cooperator had been buying cocaine from the defendant and using cocaine with him. Further, the recorded conversations made in April and May 2007 reflect that the defendant was continuing to use cocaine. And, finally, in early August 2007, the defendant admitted to investigators that he occasionally was "doing bumps." From this evidence a reasonable juror clearly could find beyond a reasonable doubt that the defendant was an unlawful user of a controlled substance at the times relevant to the indictment.

With regard to the second element of the offense charged in Count Two, that is, that the defendant knowingly possessed a firearm described in that count, the defendant concedes in his brief that there is no dispute about the fact that he transferred the two firearms to the cooperating witness. Def. Br. at 8. Indeed, the defendant does not dispute any of the essential facts surrounding the actual

possession and delivery of the firearms by Shan to the cooperating witness. That said, the evidence clearly showed that the defendant was in possession of a firearm. As noted above, a "firearm" is any weapon which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive or the frame or receiver of any such weapon. 18 U.S.C. § 921(a)(3). Here, the prosecution's expert witness, James Stephenson, test fired both of the weapons identified in Count Two, and each discharged a shot and operated without malfunction. GA 363-64, 366. Further, the audio-visual recordings admitted into evidence, taken together with the testimony of the surveillance officers, clearly proved beyond a reasonable doubt that the defendant was knowingly in possession of firearms in May of 2007.

The third and final element of Count Two that the government was required to prove beyond a reasonable doubt in order to sustain a conviction was that one or more of the firearms that the defendant was charged with possessing was in or affecting interstate commerce. This element was not contested by the defense and in fact was conceded by way of a stipulation entered into evidence at trial as Government's Exhibit 23.

Based on the evidence produced at trial, a reasonable juror could conclude that the prosecution had proven each of the three essential elements of 18 U.S.C. § 922(g)(3) beyond a reasonable doubt and therefore the defendant was guilty of being an unlawful user of a controlled substance who had been in possession of firearms.

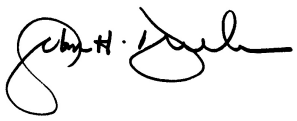
Conclusion

For the foregoing reasons, the defendant's conviction on all counts should be affirmed.

Dated: October 22, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

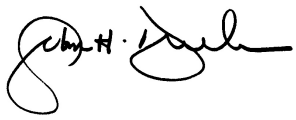


JOHN H. DURHAM
COUNSEL TO THE
UNITED STATES ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately12, 337 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



JOHN H. DURHAM
COUNSEL TO THE
UNITED STATES ATTORNEY

Addendum

18 U.S.C. § 922(a)(1). Unlawful acts

(a) It shall be unlawful –

(1) for any person –

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce . . . .

18 U.S.C. § 922(g)(3). Unlawful acts

(g) It shall be unlawful for any person –

. . .

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

. . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

. . .

18 U.S.C. § 924(a)(1)(D) and (a)(2). Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever –

. . .

(D) willfully violates any other provision of this chapter, shall be fined under this title, imprisoned not more than five years, or both.

. . .

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

. . .

21 U.S.C. § 841(a) and (b)(1)(C). Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) . . .

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance

shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

. . . .

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Shan

Docket Number: 09-0016-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/22/2009) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: October 22, 2009

CERTIFICATE OF SERVICE

09-0016-cr USA v. Shan

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First Class Mail to:

Sebastian O. DeSantis, Esq.
Sabilia & DeSantis, LLC
345 State Street
New London, CT 06320

Attorneys for Defendant-Appellant

I also certify that the original and nine copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 22nd day of October 2009.

Notary Public:

_____

Sworn to me this

October 22, 2009

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

_____

SAMANTHA COLLINS
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949