

05-0153-cr

To Be Argued By:
ANTHONY E. KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-0153-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

TYRON HAMMOND,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion when it permitted the Government to offer evidence pursuant to Fed.R.Evid. 404(b) that the defendant had possessed the charged firearm on September 7, 2003, to prove that he was the individual who possessed the firearm on November 9, 2003.
2. Whether the case should be remanded for resentencing in accordance with *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005).

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Preliminary Statement

On November 9, 2003, Tyron Hammond shot Reginald Smith with a .38 caliber revolver in a housing project in New Haven, Connecticut. He was apprehended shortly thereafter by police, who recovered the firearm nearby. Hammond was tried and convicted in federal court of being a felon in possession of a firearm, in violation of 18

U.S.C. § 922(g). At trial the Government introduced evidence that just two months before this incident, Hammond had used the very same gun in another shooting across town. This evidence tended to prove Hammond's identity as the man who shot Reginald Smith in November 2003, and who had therefore possessed the firearm recovered that day near the site of the shooting.

On appeal, Hammond makes two claims. First, he challenges the district court's admission of the evidence under Rule 404(b) of the Federal Rules of Evidence. Because the district court admitted this evidence for the proper purpose of establishing the identity of Smith's assailant; because the district court gave an appropriate limiting instruction; and because the case against Hammond was extremely strong even absent the 404(b) evidence, he cannot show that the district court acted irrationally or arbitrarily in admitting this evidence. Accordingly, this Court should affirm his conviction.

Second, Hammond asks this Court to remand his case pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), for sentencing purposes. Because the district court imposed sentence pursuant to a mandatory guidelines regime, and because the defendant in this case preserved a Sixth Amendment objection in this regard, the plain-error analysis of *Crosby* is inapplicable. Instead, the Government agrees that a full remand for resentencing is appropriate pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005).

Statement of the Case

On November 20, 2003, a federal grand jury returned a one-count indictment charging the defendant with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

On July 9, 2004, the grand jury returned a superseding indictment charging Hammond with the felon-in-possession count and adding special findings.¹ On August 16, 2004, a jury was selected for the trial. The evidence commenced on September 8, 2004, and the jury returned a verdict finding the defendant guilty on September 13, 2004.

On December 10, 2004, the district court imposed sentence of 120 months of imprisonment followed by 36 months of supervised release, and a \$100 special assessment. The Judgment was filed on December 15, 2004, and was entered on the docket December 22, 2004. On December 20, 2004, the defendant filed a timely notice of appeal.

In this appeal, the defendant claims that the district court abused its discretion in admitting into evidence evidence that two months earlier he had possessed the firearm he was charged with possessing in the superseding

¹ In the wake of *Blakely v. Washington*, 124 S.Ct 2531 (2004), the superseding indictment added a special finding section, alleging an enhancement under the United States Sentencing Guidelines.

indictment. Hammond also seeks a remand for resentencing.

The defendant is presently serving his federal sentence.

STATEMENT OF FACTS

On November 9, 2003, at approximately 1:00 p.m., Reginald Smith was in the Farnham Court housing complex on Franklin Avenue, in New Haven, Connecticut. (A 126, 129).² Smith saw the defendant exit the passenger-side door of a dark car with tinted windows. (A 129-130). As the defendant approached, Smith observed what appeared to be the silver barrel of a gun protruding from the defendant's sleeve. (A 132). The defendant was wearing a multi-colored baseball cap and a gold chain. (A 131).³

The defendant approached Smith and asked him where "the niggers" were. Smith understood the defendant to be asking the whereabouts of his cousin and a friend who was involved in a dispute over narcotics with "D-Russ," one of the defendant's associates. (A 128, 132-133). When

² Hammond has reproduced the entirety of the trial transcript in his appendix, and references to that transcript are to the Appendix.

³ That hat was recovered from the defendant when he was arrested shortly after the shooting. (A 214-215). While the chain was not recovered, in calls recorded by the Connecticut Department of Corrections, and introduced at trial, the defendant stated that the chain had fallen off his neck when he had jumped the fence. (A 184-187; Gov't Exh. 12A)

Smith said that he did not know where his cousin and friend were and that he (Smith) was not involved in the dispute with D-Russ, the defendant asked what was in Smith's pockets and began reaching for Smith's pocket. Smith pulled back and heard a click which he believed to be the hammer of the gun being drawn back and, as he turned, he was shot once by the defendant. The bullet entered and exited Smith's right thigh and then entered and exited his left thigh. Smith fell to the ground, and then heard a second shot. (A 134-135, 151-152).⁴

On that same day, at approximately 1:00 p.m., Sgt. David Taft of the New Haven Police Department was traveling on Grand Street adjoining the Farnham Court projects, when he heard two gunshots. (A 199-201). Within approximately 25 seconds, he observed a black male wearing a multi-colored hat standing over Smith. (A 201-204). Apparently alerted that Sgt. Taft had arrived, the man ran down the street, and Sgt. Taft gave chase in his car. The man made the first turn down the alley on the other side of the courtyard, and Sgt. Taft saw the man jump the fence into the courtyard. Sgt. Taft, assuming that he had lost the man, went back to assist Smith. (A 204-208).

As he was attending to Smith, Sgt. Taft observed movement in the interior of the courtyard through a gated area at the corner of the courtyard nearest to him. Sgt. Taft

⁴ A gun was also recovered from Smith, who pleaded guilty to possessing a firearm with an obliterated serial number. (A 126-128).

investigated and followed the sound of a person moving along the wall. At the next gated area, he saw the same man he had seen standing over Smith wearing the multi-colored hat and who had run away upon Sgt. Taft's arrival at the scene of the shooting. Sgt. Taft ordered that person (the defendant) over the fence and placed him under arrest. When he patted the defendant down, he found that the defendant was wearing a bullet-proof vest. (A 211-216).

Sgt. Taft then directed New Haven Police Officer William Hurley to search the area for a firearm. As Officer Hurley searched the street side near the wall, an unidentified person called out to him that the item he was searching for was on the other side of the wall in the courtyard. (A 219-221, 270-272). Officer Hurley jumped the wall and found a Smith & Wesson Model 629, .44 caliber magnum revolver (Serial Number BBW4235). Officer Hurley located that firearm in the area where Sgt. Taft had first seen the movement which caused him to investigate, and a matter of feet from where the defendant was arrested. (A 219-224, 270-273). Neither Sgt. Taft nor Officer Hurley observed anyone else in the courtyard from where the gun was recovered. (A 213, 275, 280-282).

A crime scene detective arrived at the scene of the shooting, which by then had been secured. She photographed the gun in place and placed it into evidence. She also processed the crime scene and recovered no shell casings (A 292-295), a fact consistent with the gun having been used to shoot Smith being a revolver rather than an automatic or semi-automatic pistol from which the cartridge cases would have been ejected. (A 239-240, 244-245). She was also unable to locate the bullets. The gun

was processed at the NHPD laboratory and found to contain two live rounds of ammunition and two spent casings, consistent with the firearm having been shot twice.⁵ The gun was also sent to the State Police Laboratory for additional analysis. (A 238-240).

The State Police Laboratory examined the gun and determined that it had been used in a prior shooting on September 7, 2003. (A 341-345). In making that analysis, the ballistics examiner compared the gun with two spent projectiles that had been recovered from another shooting crime scene at the Cardinal's Club in New Haven, Connecticut – one from a car parked on Henry Street and the other from the vicinity of the shooting. (A 312-319),

With respect to evidence relating to the Cardinal's Club shooting, Joseph Houser testified at trial that he had been present at the Club during the evening of September 7, 2003. (A 336). While in the bar, he saw the defendant get into an verbal altercation with three men wearing "50 Cent" T-shirts (which have a picture of a bullet-proof vest on the front). (A 341-349). Following the altercation, Houser saw the defendant leave the bar followed by the three men. (A 349-53). The defendant walked up Henry Street toward Dixwell Avenue, then turned toward the three men wearing the 50 Cent shirts who had just exited the bar, and assumed a shooting stance. Houser then saw a muzzle flash coming from the defendant's hands and heard shots. (A 350-361). Another witness, Yolán Heard,

⁵ No fingerprints were recovered from the firearm. (A 244)

who had seen the defendant in the bar prior to the shooting, also observed the defendant leave, followed by the three men wearing the 50 Cent T-shirts, and then heard shots. (A 419-422).

The defendant stipulated that, prior to November 9, 2003, the gun located at the scene had been transported in and affecting interstate commerce. (A 176). The parties also stipulated that, as of November 9, 2003, the defendant was a convicted felon. (A 452).

On September 13, 2004, following two days of trial on September 8, 9, the jury returned a guilty verdict as to count one of the superseding indictment, finding that the defendant possessed the Smith & Wesson Model 629, .44 caliber magnum revolver (Serial Number BBW4235) on or about November 9, 2003. The jury also returned a special finding pursuant to U.S.S.G. § (b)(5), that Hammond used or possessed that firearm in connection with another felony offense (the State of Connecticut assault of Reginald Smith on November 9, 2003).

SUMMARY OF ARGUMENT

The sole contested issue on appeal is whether the district court abused its discretion in admitting evidence that on a prior occasion the defendant had fired the same gun with which he was charged a month later.

The court did not abuse its broad discretion in admitting this evidence after determining that the probative value of the evidence outweighed its undue prejudicial effect, circumscribing the testimony to reduce

the prejudicial effect, and instructing the jury as to the limited use for which they could consider the evidence.

In light of the fact that the defendant properly preserved a Sixth Amendment challenge to his sentencing, the Government does not oppose a limited remand pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), so that the district court may resentence the defendant.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED THE GOVERNMENT TO OFFER EVIDENCE THAT THE DEFENDANT POSSESSED THE CHARGED FIREARM ON SEPTEMBER 7, 2003, TO PROVE HIS IDENTITY AS THE INDIVIDUAL WHO POSSESSED THE FIREARM ON NOVEMBER 9, 2003

A. Relevant Facts

On February 3, 2004, Hammond filed a “Request for Notice of Intention to Use Evidence” (A 14-15), with an attached memorandum (A 16-17), and a Motion in Limine Re: Prior Midconduct (A 18-20), with an attached memorandum (A 21-24). The Government responded to all of the defendant’s motions on March 9, 2004. (A 25-42) As part of its response, the Government gave notice that it intended

to introduce evidence of shootings committed by Hammond with the firearm charged in the indictment prior to the shooting of Reginald Smith for the purpose of establishing that Hammond possessed the charged firearm on November 9, 2003, as well as proof of continuing possession of that firearm. In particular, at this time, the Government intends to offer evidence that Hammond used the Smith and Wesson revolver (Serial Number BBW4235) in connection with a shooting on September 7, 2003, at approximately 11:45 p.m., in the vicinity of 320 Ashmun Street, in New Haven, Connecticut.

(A 32). In that connection, the Government opposed Hammond's motion in limine regarding evidence of the prior possession, on the grounds that the evidence was admissible because possession of a firearm by a convicted felon was a continuing offense and, alternatively, pursuant to Fed. R. Evid. 404(b). (A 37-39).

On April 28, 2004, the trial court held a hearing on Hammond's motion in limine. (A 44-68). At the conclusion of the hearing, the court ruled that the evidence of the September 7, 2003, shooting would be admitted, with the proviso -- intended to limit the prejudicial effect of the evidence -- that the Government would not be permitted to offer evidence that anybody was shot in that incident. (A 57-58). The court ruled that, "if I were doing a balancing, with the limiting instruction and with the restriction on the victim evidence that it is much more probative in this case based on my knowledge of the evidence than it would be prejudicial." (A 62-63).

At trial, in accordance with the court's instructions, the Government offered evidence that the Smith & Wesson Model 629, .44 caliber magnum revolver, found a short distance from Hammond on November 9, 2003, had been used a little over two months earlier. Specifically, the Government offered the testimony from Joseph Houser and Yolanda Heard, described *supra* at 7-8, that the defendant got into an argument with three men at the Cardinal's Club on September 7, 2003, that he left the bar and was followed by the men, and that he turned and shot a gun. Two spent projectiles were recovered from the scene of the Cardinal's Club shooting. Those projectiles were ballistically matched to the Smith and Wesson revolver that Hammond was charged with possessing on November 9, 2003.

At the close of evidence, the trial judge instructed the jury:

There's been evidence received during the trial that the defendant engaged in conduct that was similar in nature to the conduct charged in the superseding indictment. That is[,] he possessed a firearm charged in the superseding indictment on an earlier occasion. The evidence of similar conduct is to be considered by you only on the issue of identity. It may not be considered by you for any other purpose and specifically you may not consider it as evidence that the defendant is of bad character or has a propensity to commit a crime.

A 532-33.

B. Governing Law and Standard of Review

This Court reviews the district court's evidentiary rulings for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-43 (1997); *accord United States v. Downing*, 297 F.3d 52, 58 (2d Cir. 2002); *United States v. Tubol*, 191 F.3d 88, 95 (2d Cir.1999); *United States v. Ramirez*, 894 F.2d 565, 569 (2d Cir.1990). An abuse of discretion requires that "the district court acted arbitrarily and irrationally." *United States v. Pitre*, 960 F.2d 1112, 1118 (2d Cir.1992); *United States v. Robinson*, 560 F.2d 507, 514 (2d Cir. 1977) (en banc).

Rule 404(b) of the Federal Rules of Evidence prohibits the use of evidence of "other crimes, wrongs, or acts" committed by the defendant "to prove the character of a person in order to show action in conformity therewith." Prior "bad-acts" evidence is admissible for other purposes, however, for example to prove "motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake or accident." *Id.* (emphasis added).

This Court evaluates Rule 404(b) evidence under an "inclusionary approach" and allows evidence "for any purpose other than to show a defendant's criminal propensity." *Pitre*, 960 F.2d at 1118 (internal quotation marks omitted); *see also Tubol*, 191 F.3d at 95. Courts may admit evidence of prior bad acts if the evidence "is relevant to an issue at trial other than the defendant's character, and if the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice."

Tubol, 191 F.3d at 95 (quoting *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir.1998)).

In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court articulated a four-part test to guide judicial discretion under Rule 404(b). Prior bad-acts evidence must be (1) offered for a proper purpose, (2) relevant, and (3) substantially more probative than prejudicial. In addition, (4) at the defendant's request, the district court should give the jury an appropriate limiting instruction that the evidence may be considered only for the purpose for which it was admitted. *Id.* at 691-92; *see also United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004) (per curiam).

C. Discussion

The district court did not abuse its discretion in permitting the Government to offer evidence that the defendant possessed the firearm with which he was charged on a prior occasion just two months earlier. The issue at trial was whether the defendant possessed the Smith & Wesson firearm on November 9, 2003. The firearm was not recovered directly from the defendant on that date and, therefore, that he possessed that gun on a prior occasion was relevant and probative to prove the identity of the person who possessed the gun on November 9. Evidence that the defendant had possessed the same gun in September 2003 tended to show that he was the one in possession of the gun on November 9, and that it was not merely an accident that the gun was recovered a short distance from him on that date.

Indeed, during oral argument, the district court noted that the defendant was not found by the police in possession of the gun, and that defense counsel might argue that the fact that the gun was in close proximity to Hammond on November 9 was an accident. As the court noted:

I could hear your closing argument that the defendant saw some police running around. He has a record. He doesn't want to be hassled. . . . [I]t is his bad fortune that whoever shot this victim happened to toss the gun near him. That's bad luck. That's an accident.

A 61. In point of fact, defense counsel argued precisely that to the jury -- noting that, in order to convict his client, the jury would have to believe Smith as the only person who placed the firearm in his client's hands (A-483), and suggesting that "perhaps someone else shot Mr. Smith and Mr. Hammond happened upon the area[.] He's in the area when the police come along. Well, that's when the great chase starts. There's no dispute he fled. If you are a convicted felon with a vest standing next to someone who has been shot, stand to reason that you would leave." (A-389).

This Court has held that "[e]vidence of other similar crimes by a defendant is admissible under Fed. R. Evid. 404(b) to prove the identity of the defendant as the person who committed the offense being prosecuted, and the decision whether to admit or exclude such evidence is committed to the discretion of the trial court." *United*

States v. Campbell, 300 F.3d 202, 215 (2d Cir. 2002), *cert. denied*, 538 U.S. 1049 (2003).

To this end, courts have admitted evidence that the defendant possessed or used a firearm at some other time, in order to prove the identity of the person possessing that firearm in the charged offense. For example, in *United States v. Robinson*, 560 F.2d 507, 509 (2d Cir. 1977) (en banc), this Court held that “upon a charge of armed robbery evidence of the defendant’s possession at the time of arrest of a weapon similar to that shown by independent proof to have been possessed by him at the time of his participation in the alleged crime may be introduced” under Rules 401, 403 and 404 of the Federal Rules of Evidence. First, the Court reasoned, the defendant’s possession of a .38 caliber gun at the time of his arrest some weeks after commission of a bank robbery tended to corroborate a cooperating witness’s testimony that the defendant was given such a gun after the robbery. Evidence of the defendant’s gun possession therefore tended to establish his identity as one of the robbers, and hence it was relevant and admissible under Rule 401. *Id.* at 511-12. Second, the Court explained that the defendant’s possession of the .38 caliber gun demonstrated that he had an opportunity to commit the crime, “since he had access to an instrument similar to that used to commit it.” *Id.* at 512. In reviewing the district judge’s weighing of the evidence’s probative value against its prejudicial effect, the Court relied on its traditional rule that “uphold[s] the trial judge’s exercise of discretion unless he acts arbitrarily or irrationally.” *Id.* at 514. There is no logical reason to distinguish between evidence that a defendant possessed the charged firearm shortly before or

after the offense, and so *Robinson* clearly supports the court's admission of evidence in the present case

Other circuit courts have reached similar conclusions. For example, in *United States v. Higgs*, 353 F.3d 281, 311-312 (4th Cir. 2003), the district court admitted evidence that the defendant had used a particular firearm in a prior shooting as evidence to prove that the defendant possessed and used that firearm in a murder. The Fourth Circuit upheld the admission of the evidence that the defendant participated in the prior shooting incident to link the defendant to the same caliber weapon used in a subsequent murder and, pursuant to Fed. R. Evid. 404(b), to prove the defendant's identity as the person who possessed and used that firearm in connection with charged murder. *See id.*; *see also United States v. Grimmond*, 137 F.3d 823, 831-32 (4th Cir. 1998) (upholding admission of prior shooting incidents to establish the defendant's possession of a firearm); *United States v. Bonds*, 12 F.3d 540, 572 (6th Cir. 1993) (holding that machine gun which had been stolen at same time as murder weapon, and which shared common characteristics with murder weapon, was admissible as relevant to issue of identity); *United States v. Hamilton*, 992 F.2d 1126, 1131 (10th Cir. 1993) (holding, in prosecution for carrying firearm, that it was permissible to offer evidence that defendant had committed burglary the day before, in which he had stolen that firearm).

Contrary to Hammond's claim at pages 17-18 of his brief, the district court conducted a "conscientious assessment" in balancing the probative value of the evidence against any unfair prejudice from its admission.

See A 59-64. In its ruling, the court noted that “[g]iven that the defendant was not found by the police in possession of the gun, it seems to me that the probative effect . . . is quite significant to tie the defendant to another occasion with the gun.” *Id.* at 60.

Indeed, the court carefully “carve[ed] out [evidence that persons were shot in the September 7 shooting] and minimize[d] the prejudicial effect but nonetheless [gave] the government its proof that I think under the rules they are entitled to introduce.” *Id.* at A 61. As noted by the district court, there was no undue prejudice attending admission of the challenged evidence since that evidence did not involve conduct more serious or inflammatory than the charged crime. *See United States v. Baez*, 349 F.3d 90, 94 (2d Cir. 2003); *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999).

Hammond also claims at page 17 of his brief that the prejudice was exacerbated by the “court’s failure to give a limiting instruction upon the introduction of [the 404(b)] evidence.” While the court did not give a limiting instruction at the time the evidence relating to the Cardinal’s Club was introduced, Hammond never requested that such a limiting instruction be given, and neither party reminded the court that it had indicated in its ruling admitting that evidence that it would give a limiting instruction when the evidence was first introduced. (A 62).

Having failed to object to the court’s failure to give a simultaneous limiting instruction, the defendant’s claim is reviewable only for “plain error” under Fed. R. Crim. P.

52(b). See *United States v. Cotton*, 535 U.S. 625 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was “plain” (which is “synonymous with ‘clear’ or equivalently ‘obvious’”), see *Olano*, 507 U.S. at 734; and (3) that affected the defendant’s substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.

As this Court has explained, when a defendant does not make a request for a particular limiting instruction, “the trial judge’s failure to give such an instruction is a ground for reversal only if it constitutes an error that is ‘egregious and obvious’ and if reversal is ‘necessary to redress a miscarriage of justice.’” *United States v. Tracy*, 12 F.3d 1186, 1195 (2d Cir. 1993) (quoting *United States v. Tillem*, 906 F.2d 814, 825 (2d Cir. 1990), and citing *United States v. Katz*, 601 F.2d 66, 67 (2d Cir. 1979) (per curiam)). In *Tracy*, for example, this Court concluded that there was no reversible error where the district court had carefully balanced the probative nature of the evidence, had restricted the amount of evidence the Government could admit (there, by redacting a document), but failed to give any limiting instruction. In the present case, the district judge likewise engaged in a careful balancing analysis, limited the Government’s evidence to eliminate the most prejudicial information (here, witness testimony that people were hit by Hammond’s shots outside the

Cardinal's Club), and went further than the district court in *Tracy* by giving a limiting instruction at the end of trial. For the same reasons outlined in *Tracy*, there was no plain error here in the district court's failure to give an immediate limiting instruction regarding the evidence of the September 2003 shooting.

In any event, the district court gave an emphatic limiting instruction at the conclusion of the case. That instruction specifically referenced the nature of that evidence and the limited use to which it could be put. (A 532-33). Particularly given the brief duration of the trial, there is no reason to believe that the jury would have been unable to understand and follow the court's instruction with respect to the Cardinal's Club shooting.

Finally, even if the Court were to conclude that the admission of evidence regarding the September 7, 2003, shooting was erroneous, any such error would be harmless. A district court's erroneous decision to admit evidence at trial does not require reversal of the judgment if that error is harmless. *See* Fed. R. Crim. P. 52(a); *United States v. Edwards*, 342 F.3d 168, 178 (2d Cir. 2003); *United States v. Garcia*, 291 F.3d 127, 143 (2d Cir. 2002). An error in admitting evidence is harmless if "the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *Id.* (quoting *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992)).

Here, the remaining evidence of the defendant's guilt was overwhelming. Reginald Smith identified Hammond as the person who shot him, and Sgt. Taft identified the defendant as the same person whom he saw standing over

Smith moments after he heard the shots. When Hammond was arrested, he was a short distance from where the gun was recovered. Moreover, that gun had two expended cartridge casings, consistent with it having been fired the same number of times heard by Smith and Sgt. Taft. The jury heard tape recordings of Hammond's prison calls, which corroborated the fact that he had been the one to shoot Smith -- in the calls, he explained that the necklace Smith had seen him wearing when he was shot had fallen off as Hammond fled, which explained why it had not been recovered by police at the time. Finally, the fact that Hammond was arrested wearing a bullet proof vest provided additional corroboration that it was he who had shot Smith and who possessed the firearm recovered at the scene, since it was much more likely that a person who feels the need to wear a bullet proof vest is also a person who carries a gun.

Thus, even if the Court were to conclude that it was error to admit evidence of the September 7 shooting, the error would have been harmless in light of the overwhelming evidence of the defendant's guilt. Accordingly, the conviction should be affirmed.

**II. THE MATTER SHOULD BE REMANDED TO
THE DISTRICT COURT FOR RESENTENCING
IN ACCORDANCE WITH *UNITED STATES V.
FAGANS***

Hammond seeks a remand for a determination of whether he should be resentenced, claiming that the district court should be given the opportunity to reconsider his sentence in light of *United States v. Booker*, 125 S. Ct.

738 (2005). In particular, Hammond challenges the district court's application of the Sentencing Guidelines, which was based in part on the fact that the defendant had shot Smith in the course of his illegal gun possession.

Hammond was sentenced on December 10, 2004, prior to the Supreme Court's decision in *Booker*, and the district court followed the Guidelines as a mandatory sentencing regime. Moreover, the defendant objected to his sentencing in light of the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). This Court has held that where the defendant's objection was properly preserved, *Crosby's* plain-error analysis does not apply. *United States v. Fagans*, 406 F.3d 1389 (2d Cir. 2005). The Government therefore does not oppose a full remand for resentencing in this case.

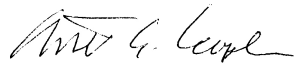
CONCLUSION

For the foregoing reasons, the defendant's conviction should be affirmed, and the matter should be remanded for resentencing.

Dated: July 19, 2005

Respectfully submitted,

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ADDENDUM OF RULES

Fed. R. Evid. 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally.--Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused.--Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of Alleged Victim.--Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness.--Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.