BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-668

DEMANN SHELTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2019-CF2-16024

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II. Whether the jury's general verdict of guilt should be upheld, even assuming the trial court erred when giving the jury a supplemental instruction regarding joint constructive possession, where the evidence also sufficiently established that Shelton solely constructively possessed the firearm.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-0668

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APPEAL FROM THE SUPERIOR COURT
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 11, 2020, a grand jury charged appellant Demann Shelton with two counts of unlawful possession with intent to distribute a controlled substance while armed (PWIDWA) (D.C. Code §§ 48-904.01(a)(2), 22-4502); two counts of possession of a firearm during a crime of violence or dangerous offense (PFCV) (D.C. Code § 22-4504(b)); unlawful possession of a firearm (prior conviction) (FIP) (D.C. Code § 22-4503); carrying a pistol without a license (CPWL) (D.C. Code § 22-

4504(a)(1)); possession of a large-capacity ammunition-feeding device (PLCFD) (D.C. Code § 7-2506.01(b)); possession of an unregistered firearm (UF) (D.C. Code § 2502.01(a)); unlawful possession of ammunition (UA) (D.C. Code § 7-2506.01(a)(3)); and possession of drug paraphernalia (PDP) (D.C. Code § 48-1103(a)) (Record on Appeal (R.) 13 (Docket)); R.197 (Indictment)). The government subsequently dismissed the "while armed" components of both PWIDWA charges, proceeded under two counts of attempted PWID, and dismissed the PFCV and PLCFD charges (4/12/24 Transcript (Tr.) 6-7; R.52 (Docket)). On May 1, 2024, following a jury trial before the Honorable Lynn Leibovitz, Shelton was acquitted of both attempted PWID counts and convicted of the remaining charges (R.841 (Verdict Form)). On July 12, 2024, the trial court sentenced Shelton to an aggregate sentence of 14 months' incarceration (7/12/24 Tr. 16-17; R.866 (Judgment)). Shelton timely appealed (R.873 (Notice of Appeal)).

The Trial

On December 18, 2019, Metropolitan Police Department (MPD) officers in the area surrounding 90 L Street, Northwest, approached an illegally parked black Honda, in which Shelton was in the driver-side,

rear-passenger seat (4/24/24 Tr. 28-33, 96-97; Government's Exhibit (GX.) 201). Marquis Payne—the vehicle's owner—was in the driver's seat, and Antonio Smith was in the front-passenger seat (4/24/24 Tr. 33, 98). As officers arrived, Smith behaved in a suspicious, panicked, and frantic manner that officers recognized as common characteristics of an armed gunman (*id.* at 99-100, 105-06). It appeared he was attempting to hide something illegal below and around himself, but officers did not see Smith put anything in the glove box or into his pants (*id.* at 105-06, 160-61).

Police officers approached Smith's window and ordered the Smith to roll down the window or open the door (4/24/24 Tr. 106-07). Smith ignored a total of five orders to comply (*id.* at 99-100, 107). After those orders, Smith opened the car-door, pushed an officer, and fled at a full sprint (*id.* at 107-09). Some of the officers pursued Smith, and he attempted to impede their path with a shopping cart (*id.* at 110). Ultimately, the officers apprehended Smith more than 100 meters away from the car and recovered from him small, yellow zips containing a white, rock-like substance that was narcotics (*id.* at 110, 155).

The pursuing officers returned to the car and saw a black jacket recovered by the remaining officers from the back seat of the vehicle with a firearm visible in an open pocket (4/24/24 Tr. 40-42, 112; GX.304 at 17:56:34-:57:30).[1] Smith was the only suspect wearing a jacket at the time of the arrest, and Shelton—being jacketless—remarked to the officers he was cold (*id.* at 50, 116, 166).[2]

The firearm—recovered from within the right jacket pocket—was a tan and black 40-caliber Glock with a laser attachment and extended magazine (4/24/24 Tr. 168-69, 171, 173; GXs.202, 209, 210; GX.304 17:56:44-:57:19). Body-worn camera footage showed an officer reach into the pocket down to his wrist, secure the end of the extended magazine, and pull the firearm out of the pocket by the magazine (GX.304 17:56:44-:57:19). A photograph of the firearm within the jacket pocket before recovery showed the extended magazine was not visible due to the firearm's depth within the pocket (GX.202). The firearm had a round in the chamber and the extended magazine contained 14 rounds of 40-

[1] Citations to GX.304 refer to the internal timestamp.

[2] Shelton has never disputed (at 4, 28) that the jacket belongs to him (4/29/24 Tr. 43).

caliber ammunition (4/24/24 Tr. 172; GXs.211, 212). The firearm was not registered to Shelton, and Shelton did not have a concealed carry permit (4/25/24 Tr. 157-60; GX.401).

Police also recovered 52 zips of a white, rock-like substance physically consistent with crack cocaine; a sandwich bag that contained approximately 7.8 grams of white, rock-like substance physically consistent with crack cocaine; and 20 suboxone strips from the inside, right jacket pocket (4/24/24 Tr. 173; 4/25/24 Tr. 105-06). From another jacket pocket police recovered: mail in Shelton's name dated May 13, 2020; an expired bank card in Shelton's name with his photo; a photo identification of Shelton with his name, date of birth, and an expiration date of December 23, 2019; and a digital scale typically used to weigh narcotics (4/24/24 Tr. 178; 4/25/24 Tr. 10-13; GXs.205-08).[3] A second firearm was also recovered from the glove box (4/24/24 Tr. 154).[4]

[3] The digital scale did not contain batteries when recovered (4/25/24 Tr. 144).

[4] The Court instructed the jury there was no evidence the second firearm was Shelton's or was possessed by Shelton (*id.* at 14-16).

Police recovered from one of Shelton's pockets cash in the amount of $2,442.00 in varying denominations (4/24/24 Tr. 48-49; GX.214).[5] Testimony from an expert in narcotics established that a person selling drugs ordinarily has a large amount of cash in differing denominations; that the amount, variety, and apportionment of drugs recovered from the jacket was inconsistent with personal use; and that a person selling drugs ordinarily has a firearm nearby or on her person—something that "[MPD] often see[s]" (4/25/24 Tr. 105-09, 116, 137-38, 142-43, 147-48). Moreover, drug dealers working in concert often have distinct roles where one person holds the money, another the drugs, and another the firearm (*id.* at 117-18).[6]

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by instructing the jury on joint constructive possession in response to a jury note. The government was entitled to the instruction because the evidence, viewed

[5] A photograph appeared to show the recovered cash was $2,443.00 in value (GX.214).

[6] The trial court cut off the government's line of questioning concerning multiple drug dealers or conspiracy on relevance grounds (4/25/24 Tr. 118).

in the light most favorable to the government as movant, sufficiently established Shelton and Smith jointly constructively possessed the firearm—either because they were engaged in drug dealing together or because Shelton aided Smith in stashing the firearm in Shelton's jacket. Additionally, even assuming the trial court erred by instructing the jury on joint constructive possession, Shelton's convictions should still be affirmed because there was sufficient evidence he had sole constructive possession of the firearm.

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion.

A. Additional Background

The government in closing argued Shelton solely possessed the firearm (4/29/24 Tr. 27-42). Conversely, Shelton argued the jury could infer the firearm recovered from Shelton's jacket was possessed by either Smith or Payne (*id.* at 42-43, 50). The trial court instructed the jury on actual and sole constructive possession (R.838 (Final Jury Instruction)). The jury deliberated for approximately eight hours until submitting a note asking: "Can two or more people have joint possession of an item? We have a verdict on count seven but are dead locked on all other counts."

(R.843 (Juror's Note).) The government requested the court instruct the jury on joint constructive possession (4/30/24 Tr. 6). Shelton objected, arguing there was insufficient evidence for the jury to find joint constructive possession (*id.* at 3-6; R.845 (Defense's Requested Jury Instruction)).

The court agreed with Shelton that "[i]f there were no basis in the record to support a finding of joint constructive possession . . . [the trial court] couldn't allow [the jury] to find it, even if they were asking to" (5/1/24 Tr. 21). Even so, the trial court concluded the jury could have reasonably inferred joint constructive possession and therefore should be instructed on that theory (*id.* at 16). Although the government had proceeded on a theory of sole possession, the trial court noted Shelton had offered evidence, during cross-examination, of Smith's actions to argue Smith was the source of the firearm in Shelton's jacket (*id.* at 14-15). Video evidence showed the firearm "was deep in the pocket, that it was difficult to get things in and out of the pockets of the jacket; that the paperwork was in one pocket, that the narcotics were in another pocket, [and] that the items were in different pockets throughout the jacket" (*id.* at 15). Thus, the firearm was not "just loosely wrapped up or concealed

in the jacket" (*id.* at 15). Rather, the location of the firearm deep within the jacket pocket "was not . . . consistent with its having been solely deposited there by the front-seat passenger," and therefore the jury could reasonably infer that if Smith had initially possessed the firearm, Shelton "played a role in accepting the firearm, in placing it in the back in the jacket pocket" (*id.* at 15-16). The court distinguished *Thomas v. United States*, 806 A.2d 626 (D.C. 2002), reasoning that unlike *Thomas*, the facts of Shelton's case did not preclude a finding of joint possession (*id.* at 16).

The court therefore instructed the jury:

> The law recognizes the possibility that two or more individuals can jointly have property in their constructive possession. Two or more persons have property in their joint constructive possession when they each have both the power and the intent at a given time to control the property.
>
> I instruct you that, if you consider joint constructive possession, in order for you to find the defendant possessed an item, notwithstanding the role of the front seat passenger, the government must still prove beyond a reasonable doubt all of the elements of each offense and that the defendant, voluntarily and on purpose, intended to exercise dominion and control over the item.
>
> Mere presence near something or mere knowledge of its location, however, is not enough to show possession. To prove possession of an item against the defendant in this case, the

> government must prove beyond a reasonable doubt that s/he had either actual or constructive possession of it.
>
> You must consider this instruction along with all of the other instructions I have given you, and you must not give greater weight to this instruction than to the other instructions you have been given.

(5/1/24 Tr. 27-28; R.851 (Supplemental Instruction)).[7] Approximately one hour after the jury resumed deliberations the jury returned a verdict on the remaining counts (5/1/24 Tr. 29; R.841 (Verdict Form)).

B. Standard of Review and Applicable Legal Principles

Where, as here, "the jury has made known its specific difficulties understanding the law, the trial court should clear them away with concrete accuracy." *Colbert v. United States*, 125 A.3d 326, 334 (D.C. 2015) (cleaned up); *see also Jordan v. United States*, 18 A.3d 703, 707 n.11 (D.C. 2011) (citation omitted) ("[W]hen a jury sends a note indicating

[7] The jury convicted Shelton of PDP prior to the supplemental instruction (5/1/24 Tr. 25-27). Shelton does not challenge that conviction, and therefore it should be affirmed even assuming any error in the trial court's supplemental instruction. *See Tuckson v. United States*, 77 A.3d 357, 366 (D.C. 2013) (quoting *Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993)) ("It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived."); *Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993) (noting points not raised with sufficient particularity are considered waived).

its confusion with the law governing its deliberations, the trial court must not allow that confusion to persist; it must respond appropriately."). "[This Court] reviews the trial court's decision to give a requested jury instruction for abuse of discretion, viewing the instructions as a whole, and considering the record in the light most favorable to the requesting party." *Binion v. United States*, 319 A.3d 953, 970 (D.C. 2024) (citation omitted). "[A]bsent abuse of that discretion[, this Court] will not reverse." *Whitaker v. United States*, 617 A.2d 499, 501 (D.C. 1992) (citation omitted) (internal quotation marks omitted).

"The central question for this court is whether [the instruction] is an adequate statement of the law, and whether it is supported by evidence in the case." *Lucas v. United States*, 240 A.3d 328, 342-43 (D.C. 2020) (citation omitted) (internal quotation marks omitted).[8] A party is "entitled to a jury instruction . . . for which there exists evidence sufficient

[8] Shelton (at 24-37) does not dispute that the instruction was an adequate statement of the law. Thus, he has waived any such claim. *See Tuckson*, 77 A.3d at 366; *Rose*, 629 A.2d at 535.

for a reasonable jury to find in his favor." *Binion*, 319 A.3d at 967 (citation omitted).[9]

"To prove constructive possession of contraband the evidence must show that the accused (1) had knowledge of its presence and (2) had both the ability and the intent to exercise dominion and control over it." *Bruce v. United States*, 305 A.3d 381, 393 (D.C. 2023) (citation omitted). "Constructive possession may be sole or joint and may be proven by direct or circumstantial evidence." *Id.* (quoting *Rivas v. United States*, 783 A.2d 125, 129 (D.C. 2001) (en banc)).

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[9] *Binion* described a second, perhaps different formulation of the standard—"if the instruction is supported by any evidence, however weak." 319 A.3d at 967 (cleaned up). When that discrepancy has been directly addressed, however, this Court has consistently said that "[i]t is not correct that any evidence, however weak, entitles the [party] to an instruction; rather, there must exist *evidence sufficient to find in the* [*party's*] *favor*[.]" *Lilakha v. United States*, 123 A.3d 167, 169 n.14 (D.C. 2015) (emphasis in original) (cleaned up); *see also McCrae v. United States*, 980 A.2d 1082, 1086 n.4 (D.C. 2009) (same). That standard aligns with Supreme Court precedent. *See Holloway v. United States*, 25 A.3d 898, 902 n.6 (D.C. 2011) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)) ("The words 'however weak' may be misleading. Perhaps it would be more precise to say that 'a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.'"). But even assuming the "however weak" formulation is correct, the evidence in this case also satisfied that standard as explained below.

C. Discussion

1. Sufficient Evidence Supported the Joint Constructive Possession Instruction.

The evidence—viewed in the light most favorable to the government—sufficiently established Shelton and Smith jointly constructively possessed the firearm found in Shelton's jacket. As Shelton contended in closing argument, the jury could reasonably infer Smith originally had the firearm and attempted to stash it in the backseat (4/29/24 Tr. 42-43). That inference was supported by Smith's response to the police. As officers approached, Smith frantically reached below and around himself—appearing to hide something illegal (4/24/24 Tr. 103-07). *See Rivas*, 783 A.2d at 137 (cleaned up) (evidence proving constructive possession "could be a furtive gesture indicating an attempt to access, hide, or dispose of the object"). He also continually disobeyed officers' directions, assaulted an officer, fled headlong from the scene, and attempted to impede the officers in chase (4/24/24 Tr. 99-100, 105-10). *See Rivas*, 783 A.2d at 136 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)) (internal alterations omitted) ("'Headlong flight' may be 'the consummate action of evasion: not necessarily indicative of wrongdoing, but certainly suggestive of such.'"). The evidence also sufficiently

established the firearm belonged to Shelton. After all, police recovered mail, a bank card, and an identification card in Shelton's name from one of the jacket pockets (4/25/24 Tr. 10-12; GXs.205-07). *See Johnson v. United States*, 290 A.3d 500, 516 (D.C. 2023) (quoting *(Jamel) Evans v. United States*, 122 A.3d 876, 890-91 (D.C. 2015)) (finding evidence of constructive possession where items are found "in proximity to the defendant's personal items such as mail or personal papers, photographs, and identification cards").

Additionally, as the trial court noted, the firearm was ultimately recovered deep inside the outside pocket of Shelton's jacket (4/24/24 Tr. 168-73; 5/1/24 Tr. 15; GXs.202; GX.304 17:56:44-:57:19). Just as finding a stashed firearm resting in an awkward position "would allow the jury to reasonably infer that [a defendant] hastily stashed the gun," *see Bruce*, 305 A.3d at 395, the firearm's location deep in the jacket pocket in this case suggested Shelton aided in placing the firearm there. Thus, when viewing the evidence in total, the jury could have reasonably inferred—using evidence introduced by Shelton during cross-examination and by the government in its case-in-chief—that Smith originally had the firearm but had aid from Shelton in attempting to hide the firearm in

Shelton's jacket. *See Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (cleaned up) ("The evidence supporting a requested instruction may be an amalgam of portions of the government's evidence and portions of the defense evidence."); *cf. Abed v. United States*, 278 A.3d 114, 122-23 (D.C. 2022) (citation omitted) (holding defendant's testimony can establish sufficiency of the evidence, and rejecting the "perception of the criminal trial as a sporting event in which the rules of the game trump the search for truth"); *Hooker v. United States*, 70 A.3d 1197, 1205 (D.C. 2013) (omission in original) (citation omitted) ("Since appellant . . . introduced evidence in his defense after the denial of his motion at the close of the government's case, he assumed the risk that his evidence will bolster the government's case to support a conviction.").

Shelton argues (at 34-35) there was no evidence for the court's finding that the firearm was deep in the pocket, evidencing joint constructive possession. But body-worn camera footage showed an officer reach into the pocket down to his wrist, secure the end of the extended magazine, and pull the firearm out of the pocket by the magazine (GX.304 17:56:44-:57:19). A photograph also showed the firearm deep within the jacket pocket before recovery, with the extended magazine not even

visible. That showed that if Smith indeed initially had the firearm, he did not "hastily stash" it. *See Bruce*, 305 A.3d at 395. Rather, the jury could reasonably infer from this evidence the firearm was deposited in the jacket by Shelton or with Shelton's aid (5/1/24 Tr. 15).

Moreover, the evidence of drug dealing was also sufficient to allow the jury to reasonably infer Shelton and Smith jointly possessed the firearm. *See Bruce*, 305 A.3d at 394 ("[E]vidence linking a defendant to an ongoing drug operation is but one way to prove constructive possession of a weapon.").[10] Although Shelton claims (at 24-32, 35-37) there was no such evidence, narcotics expert testimony established drug dealers typically have large amounts of cash in varying denominations and firearms on their person or nearby (4/25/24 Tr. 108-09, 148). Further,

[10] It is no matter that Shelton was acquitted on the attempted PWID counts because this Court reviews for abuse of discretion in giving a jury instruction by determining if "it is supported by evidence in the case[,]" *Lucas*, 240 A.3d at 342-43, "considering the record in the light most favorable to the [government]," *Binion*, 319 A.3d at 970. In addition, "inconsistent verdicts are permissible; 'a not guilty verdict as to one count of an indictment that is inconsistent with a guilty verdict to another count cannot invalidate the guilty verdict so long as the guilty verdict is based upon sufficient evidence.'" *Mitchell v. United States*, 64 A.3d 154, 158 (D.C. 2013) (quoting *Ransom v. United States*, 630 A.2d 170, 172 (D.C. 1993)).

multiple drug dealers working together often perform roles, where one person handles the money, another handles the firearm, and another the drugs (*id.* at 117-18). Here, officers recovered from Smith zip lock bags containing drugs (4/24/24 Tr. 110, 155). Shelton's jacket contained 52 zips containing drugs, a sandwich bag containing 7.8 grams of drugs, 20 suboxone strips—an amount, variety, and apportionment consistent with drug dealing according to the expert—and a digital scale typically used in drug dealing (*id.* at 173; 4/25/24 Tr. 105-09, 147-48). And Shelton was found with $2,442.00 in cash of varying denominations, also consistent with drug dealing (4/24/24 Tr. 48-49; 4/25/24 Tr. 116, 148). *See Bruce*, 305 A.3d at 400 (quoting *United States v. Farrell*, 921 F.3d 116, 137 n.24 (4th Cir. 2019)) ("[D]rug trafficking and large sums of cash go together.").[11]

The cash, drugs, and digital drug scale were all near the firearm recovered from Shelton's jacket. A rational jury could infer from this evidence—viewed in the light most favorable to the government—

[11] Although Shelton points out (at 30) the trial court cut off testimony about multiple drug dealers, the court was concerned about prejudice that might inhere from focus on the firearm in the glove compartment and the drugs recovered from Smith's person, contraband Shelton was not charged with possessing (*see* 4/25/24 Tr. 118 (discussing "the gun in the glove box" and "the narcotics on Smith")).

Shelton and Smith were engaged in drug dealing of which the firearm was a part. *See Bruce*, 305 A.3d at 400 (citation omitted); *Peay v. United States*, 597 A.2d 1318, 1321 (D.C. 1991) (en banc) ("[T]he small denominations of cash and the presence of the firearm were indicative of a drug-dealing operation, [an] observation that [this Court] [has] shared."); *Smith v. United States*, 899 A.2d 119, 122 (D.C. 2006) (citation omitted) (conduct linking a defendant to "contraband may include . . . 'evidence linking the accused to an ongoing criminal operation of which the possession is a part, attempts to hide or destroy evidence, other acts evincing consciousness of guilt such as flight, and evidence of prior possession of contraband'").

Shelton's arguments to the contrary are without merit. He argues (at 32-34) that "[t]he defense's articulated reasons to doubt, provided no evidence—let alone proof beyond a reasonable doubt—that Mr. Shelton and Mr. Smith were working in concert." This incorrectly states the standard by which a supplemental instruction may properly be given. A party is "entitled to a jury instruction . . . for which there exists evidence sufficient for a reasonable jury to find in his favor . . . when viewing the instruction as a whole, and considering the record in the light most

favorable to the requesting party." *Binion*, 319 A.3d at 967, 970. Here, as argued above, a reasonable jury could infer—when viewing the evidence in the light most favorable to the government as movant—that Shelton and Smith jointly constructively possessed the firearm; thus, the joint constructive possession was properly given. *See Lucas*, 240 A.3d at 342-43. Additionally, the trial court did not base its decision on the arguments Shelton made. Instead, the trial court looked at the evidence Shelton had adduced of Smith's conduct and determined that the jury could reasonably make the inference that Smith initially possessed the firearm (5/1/24 Tr. 14-15). But, as the trial court reasoned, the jury was free to make the additional inference that Smith was not the sole constructive possessor of the firearm based on where the firearm was located inside Shelton's jacket (*id.*). The court correctly weighed the evidence and reasonable inferences when determining that a reasonably jury could find that Shelton and Smith jointly constructively possessed the firearm. *See Henry*, 94 A.3d at 757; *cf. Hooker*, 70 A.3d at 1205.

Finally, Shelton's reliance on *Thomas* is misplaced. In that case, Keith Thomas and Anton Parker were standing outside with "two other men located five to ten feet behind Mr. Thomas." 806 A.2d at 628. Parker

threw down "an unknown small object," and Thomas threw down a "silver metal object" later confirmed to be a firearm. *Id.* The government proceeded against Thomas under an actual or sole constructive possession theory. *Id.* at 629. After final instructions on actual and constructive possession, the jury submitted a note asking: "Can more than one person have constructive possession?" *Id.* The trial court instructed the jury that "the answer to that question is yes." *Id.* Thomas was convicted of carrying a pistol without a license, possession of an unregistered firearm, and unlawful possession of ammunition. *Id.* at 627.

This Court reversed, finding that there was insufficient evidence to support the joint constructive possession instruction on a theory that Thomas constructively possessed a firearm in the actual possession of Parker or someone else. *Thomas*, 806 A.2d at 628-29. There was no evidence whatsoever supporting the joint constructive possession theory and "no evidence indicating how long Mr. Thomas and Mr. Parker were together before the police arrived or what they had been doing." *Id.* at 629. It found there were "none of the requisite 'circumstances indicating a concert of illegal action [that] obviously tend[s] to dispel the natural fear that the doctrine of constructive possession is casting too wide a

net.'" *Id.* (quoting *Brown v. United States*, 546 A.2d 390, 397 (D.C. 1987), *abrogated by Rivas*, 783 A.2d at 130-31).

Here, unlike *Thomas*, there was evidence supporting a joint constructive possession theory. In *Thomas*, the only connection between the firearm and other individuals was proximity. *See Thomas,* 806 A.2d at 627-28. In addition, the evidence in that case clearly established Thomas and Parker each threw one object apiece, excluding them from possessing the other thrown object. *Id.* at 628. Here, the evidence did not exclude—and the jury could reasonably infer—a scenario where Smith and Shelton both had constructive possession of the firearm. Instructing the jury on a theory of joint constructive possession was not error, and Shelton's convictions should be affirmed.

II. Even Assuming the Supplemental Instruction Was Given In Error, Reversal Is Not Required.

Even if the trial court erred in giving a supplemental instruction to the jury on joint constructive possession, Shelton's convictions should be upheld as there was undisputedly sufficient evidence he himself possessed the firearm.

A. Applicable Legal Principles

In *Griffin v. United States*, 502 U.S. 46, 47-48 (1991), the Supreme Court considered a challenge to a general verdict of guilt where the government alleged two objects of a conspiracy, and there was insufficient evidence as to one of those objectives. The Court considered *Yates v. United States*, 354 U.S. 298, 304-11 (1957), which held that a general verdict of guilty must be set aside where it is supported on one ground, but where a second legally deficient theory of liability was submitted to the jury. *Griffin*, 502 U.S. at 52-54. The Court rejected Griffin's attempt to extend *Yates* to "set aside a general verdict because one of the possible bases of conviction was neither unconstitutional . . . nor even illegal[,] . . . but merely unsupported by sufficient evidence." *Id.* at 56.

> It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance – remote, it seems to us – that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

Id. at 59-60 (quoting *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991)). The Court continued:

> What we have said today does not mean that a district court cannot, in its discretion, give an instruction of the sort petitioner requested here, eliminating from the jury's consideration an alternative basis of liability that does not have adequate evidentiary support. Indeed, if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction.

Id. at 60; *accord Sochor v. Florida*, 504 U.S. 527, 538 (1992) (relying on *Griffin* to reject an attack on a death sentence where one of the four aggravating circumstances submitted to the jury for consideration was not supported by sufficient evidence).

Thus,

> [i]n criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.

Griffin, 502 U.S. at 50 (quoting *Claassen v. United States*, 142 U.S. 140, 146 (1891)). "This common-law rule . . . is also applied to . . . a general

jury verdict under a *single* count charging the commission of offense by two or more means." *Id.* (emphasis in original). "[W]hen parallel theories are submitted to a criminal jury antecedent to a general verdict of guilty, the verdict should be upheld as long as there is sufficient evidence to validate either of the theories presented." *Inyamah v. United States*, 956 A.2d 58, 62 (D.C. 2008) (quoting *Leftwich v. Maloney*, 532 F.3d 20, 24 (1st Cir. 2008) (citing *Griffin*, 502 U.S. at 60)).

B. Discussion

Shelton does not contend the evidence was insufficient to establish that he constructively possessed the firearm in his jacket. Nor could he. Shelton was the only rear passenger, and Shelton's jacket was observed in the rear of the vehicle within arm's reach (4/24/24 Tr. 33, 40-42). The jacket contained the firearm; the ammunition; the extended magazine; mail addressed to Shelton; a bank card in Shelton's name with his photo; and a photo identification of Shelton with his name and date of birth (4/24/24 Tr. 168-73, 177-78). The presence of identifying documents such as mail or personal papers, bank cards, and identification cards in proximity to the firearm inside Shelton's jacket sufficiently established his constructive possession of the firearm. *See Sanders v. United States*,

330 A.3d 1013, 1034 (D.C. 2025) ("[T]his court has previously held that evidence may establish constructive possession where the contraband is found among the accused's personal items even though it was not in plain view."); *see also Johnson*, 290 A.3d at 516; *(Jamel) Evans*, 122 A.3d at 890-91. Thus, *Griffin* requires affirmance of Shelton's convictions.

In *Griffin*, the defendant had been convicted of an unlawful conspiracy in violation of 18 U.S.C. § 371. *See Griffin*, 502 U.S. at 47. A single count in the indictment charged that conspiracy had two unlawful objects: (1) impeding efforts of the Internal Revenue Service to ascertain income taxes and (2) impeding efforts of the Drug Enforcement Administration to ascertain forfeitable income. *See id.* The evidence at trial failed to establish the defendant's guilt with respect to the second object. *See id.* at 47-48. The trial court's instructions to the jury permitted them to return a guilty verdict if they found the defendant participated in either of the two objects of the conspiracy. *See id.* at 48. The jury returned a general verdict of guilty. *See id.* The Supreme Court affirmed the verdict, citing the rule that when a jury returns a general verdict of guilty on a single count charging more than one criminal act, the verdict

stands if they evidence sufficiently supports any of the acts charged. *See id.* at 56-57 (citing *Turner v. United States*, 396 U.S. 398, 420 (1970)).

As the Sixth Circuit has recognized, *Griffin* "held that a jury verdict is valid if sufficient evidence supports one of the grounds for conviction, so long as the other submitted grounds are neither illegal nor unconstitutional, but merely unsupported by the evidence." *United States v. Mari*, 47 F.3d 782, 786 (6th Cir. 1995) (citing *Griffin*, 502 U.S. at 55-56). Thus, "the giving of the instruction on the unsupported ground is harmless as a matter of law." *Id.* (citing *Griffin*, 502 U.S. at 55-56); *see also United States v. Gonzales*, 906 F.3d 784, 791 (9th Cir. 2018) (affirming conspiracy convictions "regardless of whether there was sufficient evidence to support the first object of the charged conspiracy, since it is undisputed that sufficient evidence exists to support the second object"); *United States v. Mehanna*, 735 F.3d 32, 48 (1st Cir. 2013) (if "'a mistake concerning the weight or the factual import of the evidence' underlies the argument, the verdict must be upheld as long as the evidence is adequate to support one of the government's alternative theories of guilt") (quoting *Griffin*, 502 U.S. at 59); *United States v. Ayon Corrales*, 608 F.3d 654, 658 (10th Cir. 2010) (cleaned up) ("[A] district

court does not commit reversible error where it submits a properly-defined, although factually unsupported, legal theory to the jury along with a properly supported basis of liability."); *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002) ("Because [the defendant] leaves unchallenged at least one of the fraud theories charged in each fraud and False Claims Act count for which he was convicted, we must uphold the jury verdict on each of these counts."); *United States v. Dreamer*, 88 F.3d 655, 658 (8th Cir. 1996) ("As long as there is sufficient evidence to support at least one of the grounds for conviction, we must affirm the jury's general verdict.").[12]

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[12] This Court has suggested that it is an open question as to whether *Griffin* provides a presumption that may be rebutted rather than mandating affirmance. *See Dickens v. United States*, 163 A.3d 804, 811 (D.C. 2017) (quoting *Inyamah*, 956 A.2d at 63, as referring to "the *Griffin* presumption"). But even though *Griffin* based its reasoning on a common-law presumption, its holding was clear: submission of a factually insufficient theory to the jury "does not provide an independent basis for reversing an otherwise valid conviction" so long as a factually sufficient alternative theory is presented to the jury. 502 U.S. at 60. The federal courts of appeal have largely adhered to that plain language. *See, e.g.*, *Gonzalez*, 906 F.3d at 791 (Ninth Circuit); *Mehanna*, 735 F.2d at 48 (First Circuit); *Ayon Corrales*, 608 F.3d at 658 (Tenth Circuit); *Syme*, 276 F.3d at 148 (Third Circuit); *Dreamer*, 88 F.3d at 658 (Eighth Circuit); *Mari*, 47 F.3d at 786 (Sixth Circuit); *but see United States v. Bouchard*, 828 F.3d 116, 128 (2d Cir. 2016) (holding that acquittal on substantive count did not rebut *Griffin* presumption on conspiracy conviction); *United*

(continued . . .)

In this case, even assuming the theory of joint constructive possession was improperly submitted to the jury because it had insufficient factual support, *Griffin* mandates affirmance of the jury's general verdict. *See White v. United States*, 714 A.2d 115, 118 & n.5 (D.C. 1998) ("Since the jury returned a general verdict of guilty on the charge of CPWL, the conviction may be affirmed if the evidence was sufficient to support either theory" of "carrying" a pistol—actual possession or constructive possession); *see also United States v. Hill*, 659 F. App'x 707, 710 (3d Cir. 2016) ("While Hill did object to the District Court's first supplemental instruction, he provides no specific objection beyond a general complaint as to the appropriateness of the constructive possession instruction in the first place. That complaint is foreclosed by *Griffin*, and we discern no abuse of discretion in the District Court's decision to respond to the jury's questions in a way consistent with its initial instructions.").

States v. Henning, 286 F.3d 914, 922 (6th Cir. 2002) (describing "presumption that jurors convicted on the factually sufficient theory"); *United States v. Briscoe*, 65 F.3d 576, 585 (7th Cir. 1995) (under *Griffin*, court is "allowed to presume that the jury rejected the factually inadequate theory"); *United States v. Stone*, 9 F.3d 934, 941-42 (11th Cir. 1993) (applying "presumption" in harmless error analysis).

Shelton's continued reliance (at 26-30) on *Thomas*, an outlier in its analysis of *Griffin*, is misplaced. *Thomas* reasoned that "the trial court erred in response to a jury note requesting clarification of a constructive possession jury instruction because the judge implicitly told the jury it could consider a theory of joint a theory of joint constructive possession that was not supported by legally sufficient evidence." *Thomas*, 806 A.2d at 627, 630-31. *Thomas* described this as a "legal error" meriting reversal under *Griffin* because "[t]he judge's response to the jury's inquiry left the jury to assume that joint constructive possession was a proper theory upon which to convict." *Id.* at 630. That analysis, however, was squarely rejected by *Griffin*. As the Supreme Court reasoned:

> [P]etitioner asserts that the distinction between legal error and insufficiency of proof is illusory, since judgments that are not supported by the requisite minimum of proof are invalid *as a matter of law*—and indeed, in the criminal law field at least, are *constitutionally required* to be set aside. Insufficiency of proof, in other words, *is* legal error. This represents a purely semantical dispute. In one sense "legal error" includes inadequacy of evidence—namely, when the phrase is used as a term of art to designate those mistakes that it is the business of judges (in jury cases) and of appellate courts to identify and correct. In this sense "legal error" occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient. But in another sense—a more natural and less artful sense—the term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or the

> factual import of the evidence. The answer to petitioner's objection is simply that we are using "legal error" in the latter sense.

Griffin, 502 U.S. at 58-59 (emphasis in original) (citations omitted).

Thomas did exactly what the Supreme Court rejected in *Griffin* by conflating "a theory unsupported by the evidence" with "legal error" requiring reversal. *See Thomas*, 806 A.2d at 629-30. The Supreme Court expressly foreclosed this. *See Griffin*, 502 U.S. at 58-60; *see also United States v. Nieves-Burgos*, 62 F.3d 431, 436 (1st Cir. 1995) ("Prior to *Griffin*, we cited authority relying on *Yates* in support of the proposition that a general verdict returned on a charge asserting numerous grounds for conviction must be vacated where one or more of the grounds is insufficiently supported by the evidence and it is unclear whether the jury relied on the insufficient ground. *Griffin* renders this proposition unsound."). Moreover, this Court's cases before and after *Thomas* apply *Griffin*'s reasoning. *See Dickens v. United States*, 163 A.3d 804, 811-12 (D.C. 2017) (acknowledging the principle articulated in *Griffin*); *Inyamah*, 956 A.2d at 62 (cleaned up) ("A conviction generally is sustained under the circumstances where two correct theories of illegality are presented in the instructions and there is sufficient

evidence to convict only on one."); *White*, 714 A.2d at 118 n.5 (conviction affirmed if either theory of liability had sufficient evidence); *Roy v. United States*, 652 A.2d 1098, 1103 (D.C. 1995) (explaining that this Court "must affirm [the] relevant convictions if the evidence was sufficient to support either [alternative] theory").

Finally, Shelton argues (at 37-41) the government cannot show harmless error if the trial court erroneously instructed the jury on joint constructive possession, as "it is impossible to find, 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). As argued above, *Griffin* forecloses a harmlessness analysis. *See, e.g.*, *Mari*, 47 F.3d at 786 (citing *Griffin*, 502 U.S. at 55-56) ("[W]here a jury is charged that a defendant may be found guilty on a factual theory that is not supported by the evidence and is charged on factual theory that is so supported, and the only claimed error is the lack of evidence to support the first theory, the error is harmless as a matter of law.").

However, even assuming that *Thomas* was conducting—without saying—a harmlessness analysis as Shelton suggests (at 40-41), the trial

court in this case did what *Thomas* required. *Thomas* distinguished *Griffin* by explaining that "the jury's note to the trial court suggested that it was considering a verdict based on joint constructive possession, and the court's response did not disabuse them of the availability of that theory on the facts of this case" when merely answering "yes" to the jury question, "Can more than one person have constructive possession of a thing?" 806 A.2d at 630. Here, in contrast, the trial court told the jury that "the law recognizes the possibility that two or more individuals can jointly have property in their constructive possession," but that if it considered joint constructive possession, "to find the defendant possessed an item, *notwithstanding the role of the front seat passenger*, the government must still prove beyond a reasonable doubt all of the elements of each offense and that the defendant, voluntarily and on purpose, intended to exercise dominion and control over the item" (R.851 (Supplemental Instruction) (emphasis added)). The court also reiterated that "[m]ere presence near something or mere knowledge of its location . . . is not enough to show possession" (R.851 (Supplemental Instruction)). Accordingly, even assuming there was insufficient evidence to support a theory of joint constructive possession, the trial court *did* "disabuse [the

jury] of the availability of that theory on the facts of this case," *Thomas*, 806 A.2d at 630, by ensuring that the jury was instructed that it must find, "notwithstanding the role of the front passenger" (R.851 (Supplemental Instruction)), that Shelton had the intent to exercise dominion and control over the firearm in his jacket. Thus, the trial court directly addressed Shelton's concern (at 38) that the jury would convict him on a factually insufficient theory of joint constructive possession, as the jury had to have at the very least found Shelton himself constructively possessed the firearm to convict according to the supplemental instruction. *Cf. Atkins v. United States*, 290 A.3d 474, 485 (D.C. 2023) (quoting *Holloway v. United States*, 25 A.3d 898, 903 (D.C. 2011)) ("We ordinarily presume that the jury understands and obeys the trial judge's instructions.").[13] Shelton's convictions should be affirmed.

[13] Shelton's reliance (at 38) on *(Saeve) Evans v. United States*, 304 A.3d 211 (D.C. 2023), and *Gray v. United States*, 79 A.3d 326 (D.C. 2013), is misplaced. In both of those cases, unlike this one, the trial court gave a legally incorrect or inadequate instruction. *See (Saeve) Evans*, 304 A.3d at 214 ("[T]he trial court erred in failing to explain to the jury that one who possesses a firearm in lawful self-defense is permitted some time to, with reasonable promptness, relinquish the firearm."); *Gray*, 79 A.3d at 338 (simply re-reading instructions constituted legal error because it did

(continued . . .)

not provide necessary clarification regarding aiding-and-abetting instruction).

Shelton also argues (at 41) that the prosecution's request for the joint constructive possession instruction establishes harm. But the government should not be faulted for requesting a legally correct instruction to a jury note because a trial court must adequately respond to confusion embodied in a jury note, *see Colbert*, 125 A.3d at 334, and Shelton's proposed instruction did not actually answer the jury's question (R.845 (Defense's Requested Jury Instruction)).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Areeba Jibril, Esq., ajibril@pdsdc.org, on this 28th day of October, 2025.

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