FILED
United States Court of Appeals
Tenth Circuit

November 20, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. PROPHET KELLY LAMAR CLARK, Defendant - Appellant.	No. 25-5141

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:24-CR-00382-JDR-1)

Submitted on the briefs:*

Julia L. O'Connell, Federal Public Defender; Barry L. Derryberry, First Assistant Federal Public Defender; and Brynn N. Barton, Assistant Federal Public Defender, Office of the Federal Public Defender, Northern District of Oklahoma, Tulsa, Oklahoma, for Defendant-Appellant.

Clinton J. Johnson, United States Attorney and Elliot P. Anderson, Assistant United States Attorney, Office of the United States Attorney, Northern District of Oklahoma, Tulsa, Oklahoma, for Plaintiff-Appellee.

Before **HARTZ**, **MATHESON**, and **FEDERICO**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

FEDERICO, Circuit Judge.

Prophet Kelly Lamar Clark was prohibited from lawfully possessing a firearm by virtue of a prior state felony conviction. This appeal centers on whether Clark knew of his prohibited status.

On October 8, 2024, law enforcement responded to reports of a domestic disturbance at the Savannah Landing Apartments in Tulsa, Oklahoma. At the scene, officers approached Clark and asked if he had a gun. Clark responded that he did. Officers then asked Clark if he had any prior felony convictions, which he denied. Thereafter, Clark was charged with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). Clark was convicted after a jury trial.

On appeal, Clark challenges: (1) the exclusion of statements he made at the time of his arrest on hearsay grounds; (2) the sufficiency of the evidence to support his conviction for felon in possession; and (3) the constitutionality of 18 U.S.C. § 922(g)(1) based on the Second Amendment, for preservation purposes only. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we reverse.

I

On October 8, 2024, Officer Robertson, along with other officers, reported to Savannah Landing Apartments after receiving an emergency call.[1] At the scene, a neighbor informed officers that Clark's girlfriend asked for help because Clark had physically assaulted her and Clark threatened them. The neighbors assisted Officer Robertson in identifying Clark. Officer Robertson then approached Clark and noticed a gun magazine in Clark's hand. Officer Robertson asked Clark if he had a gun. Clark stated that there was a gun in his right pocket, and Officer Robertson then retrieved an unloaded purple 9mm SCCY model CX1 pistol.

At that point, Officer Watkins ran a records check, which revealed that Clark had a previous conviction in Oklahoma state court, but there was some confusion on whether the conviction was a felony. The officers asked Clark if he had any prior felony convictions. Clark vehemently denied having a felony conviction and made the following statements: (1) "I ain't got no drugs felony possession"; (2) "They dropped that, I have the proof on

[1] "Because this appeal is before this court following a jury verdict, we state the facts in the light most favorable to the jury's decision." *Little v. Budd Co., Inc.*, 955 F.3d 816, 818 (10th Cir. 2020). The facts are derived from the appellate record.

my phone. It was dismissed"; (3) "That case was dismissed . . . . That's not the case." R. I at 142; R. III at 72–73.

Ultimately, Clark was indicted for unlawful possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). The underlying state felony conviction was for unlawful possession of a controlled drug for which he received a suspended sentence in 2011.[2] After a jury trial, Clark was found guilty and thereafter sentenced to fifteen months of imprisonment and three years of supervised release.

Before trial, the district court held a pretrial conference, at which time it addressed several evidentiary issues raised by the parties.[3] Particularly, the Government objected to the admission into evidence the three statements Clark made at the time he was arrested and argued the statements were hearsay. Clark argued the statements were not hearsay because they were not being offered for their truth – that Clark was not a convicted felon. Instead, the statements were being offered to show what

[2] Clark was convicted for possessing marijuana. Because he had a prior misdemeanor conviction for possession of marijuana, this second offense was considered a felony in Oklahoma.

[3] The district court also addressed Clark's hearsay objections to the officer's testimony that he was called to the scene for a domestic violence dispute based on his girlfriend and the neighbor's statements. The district court restricted the officer's testimony to say that he was dispatched on complaints there was somebody with a gun.

Clark knew or thought at the time the statements were made. The district court deferred a ruling and instructed Clark's counsel to approach the bench before engaging in that line of questioning. But the court also noted: "[t]hat sure seems to me to be self-serving hearsay, that this – then not subject to any kind of cross-examination. It allows Mr. Clark to testify without testifying. . . . I don't think it goes to the non-hearsay issue." R. III at 26–27.

At a subsequent pretrial conference, the district court revisited the hearsay issue. Clark once again argued the statements were not hearsay because they were being offered to show lack of knowledge and not their truth. He also argued that the statements were critical to the defense's theory of the case – that Clark did not *know* he was a convicted felon. The district court rejected this argument and ruled:

> I think that's the purpose of it being offered. And there's obviously – the reason for it is because it's an out-of-court statement for which there is no possibility to do cross-examination on. I mean, that's the whole point of this and why it's self-serving hearsay. I mean, the – because it allows him to put on this defense through a hearsay statement for which nobody can cross-examine him on.
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> ***
>
> It's self-serving hearsay. And without an exception[.]

R. III at 77–78.

At trial, the Government presented three witnesses. First, Officer Robertson testified to the circumstances leading to Clark's arrest. Relevant

here, Officer Robertson testified that he asked Clark if he was a felon at the time of his arrest. Clark's counsel then asked Officer Robertson how Clark responded. The Government objected, and the district court sustained the objection based on its prior ruling. Therefore, the jury never heard Clark's statements where he denied having any felony convictions. Officer Robertson also testified that from his review of the records, he did not see any record to indicate that Clark had been to prison.

Clark offered to stipulate that he in fact had an underlying felony conviction. But he contested having any knowledge of a prior felony conviction at the time he possessed the firearm and ammunition in question. The case then hinged on the state court records. So, the Government called Marc Dreyer, the third deputy clerk in the Tulsa County Clerk's office. Dreyer testified about the various case documents and orders from Clark's state case. Dreyer's testimony included: (1) that Clark's case number began with "CF" indicating the case concerned a felony, (2) that Clark waived his preliminary hearing, which only applies to felony charges, and (3) that Clark was represented by counsel and attended several hearings.

The procedural history leading to Clark's conviction was somewhat convoluted. For instance, Clark pled guilty in 2010, and the state court

entered an Order of Deferred Sentence.[4] Therefore, Clark was not yet convicted. Then, on June 6, 2011, Clark failed to report to the District Attorney's Office as required by his probation terms. But his probation was reimposed, and he was still not convicted. Clark had several more violations, which required numerous court appearances. But it was not until a hearing on a violation of his conditions that occurred on September 30, 2011, that the state court imposed a suspended five-year sentence. At this point Clark became a convicted felon. Then, on December 15, 2011, he violated the terms of his supervision again, and he was sentenced to ninety days in custody for the violation. His supervision was also transferred to the Oklahoma Department of Corrections. At no point did the state court inform Clark that he was convicted of a felony. In all, he served ninety days in custody following his probation violations.

To explain the legal intricacies of these proceedings, and to prove Clark knew he was a felon, the Government relied on the state court docket sheet and case documents. But the paperwork underlying the conviction was riddled with mistakes.

[4] Dreyer explained: "[a] deferred sentence is, in effect, a pause in the middle of the prosecution that allows the defendant, if he completes the terms of the deferment, to avoid being convicted of a felony." R. III at 192. Thus, although Oklahoma refers to a "deferred sentence," no conviction or sentence, in the traditional sense, has been imposed.

For instance, the guilty plea form, also known as a Lumpkin form in Oklahoma, which explains the charges against a defendant and the consequences of entering a guilty plea, had a blank page and no mention of "felony." Of note, the question "what is the charges to which the defendant is entering a plea today?" was blank. R. III at 241. And the section delineating the range of punishment was not filled out. The Order of Deferred Sentence, which also identified the charge but was not yet a conviction, could only be viewed at the court clerk's office. There was no evidence that Clark saw this document. Lastly, the state court Judgment and Sentence, which finalized the felony conviction, was also only accessible at the clerk's office. As the Judgment and Sentence was created days after the hearing, there is no record that Clark received that document. And at the hearing, the state court judge did not announce in open court that Clark was convicted and thus became a felon.

The Government's third and final witness was Jason Taylor, an assistant regional supervisor in the Oklahoma Department of Corrections. Although Taylor was not responsible for Clark's supervision, he testified that after Clark's release in 2011, Clark signed probation documents acknowledging that he was under the supervision of the Oklahoma Department of Corrections.

At the close of the Government's case, Clark moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a) based on insufficient evidence. The district court denied the motion finding that there was "substantial evidence from which a rational trier of fact could find the essential elements of the offense beyond a reasonable doubt." R. III at 333.

Clark then called three witnesses of his own. First, Brian Rayl, the chief of the criminal division of the Tulsa County Public Defender's Office. Rayl testified about the plea infirmities and that Clark's state defense counsel had a poor reputation. Next, Casey Reynolds and Yvonne House, secretaries of the Tulsa and Washington county election boards, testified that Clark registered to vote in Tulsa in 2020, was previously registered in 2009, and that he ran for office in Washington county in 2014. In doing so, he attested that he was not a convicted felon. That concluded the presentation of evidence, and Clark renewed his motion for judgment of acquittal, which the district court denied.

During its closing argument, the Government highlighted the importance of the circumstantial evidence presented and the lack of direct evidence:

> Now, the judge just instructed you there are two ways to prove a defendant's knowledge. You can prove it with direct evidence or you can prove it with circumstantial evidence. Now, direct evidence would be, for example, if when Officer Robertson pulled the gun out of the defendant's pocket, the defendant said, "I am

> a felon. I have a prior felony." Of course, we don't have a statement like that in this case.
>
> R. III at 446.

The jury found Clark guilty. He was sentenced to fifteen months in custody and three years of supervised release. He timely appealed.

II

Clark brings three claims of error on appeal. He contends that the district court erred by excluding the three statements he made at the time of his arrest on hearsay grounds. Clark argues this error was not harmless because it prevented the jury from considering direct evidence of his knowledge and understanding of his criminal history. He also contends that the Government's evidence was insufficient to support his conviction for felon in possession. And, finally, he challenges the constitutionality of the criminal statute as applied to him, for preservation purposes only. We address each claim of error in turn.

A

Clark first challenges the district court's evidentiary ruling excluding three statements, recorded on video by a bodycam, where he denied having any felony convictions at the time of his arrest. The district court excluded the statements reasoning that they were "self-serving hearsay" because they were made out of court and thus did not provide a possibility of cross

examination of Clark regarding his statements. R. III at 78. Clark argues the statements were not hearsay because they were not offered to prove the truth of the matter asserted but instead were offered to show Clark's subjective belief or knowledge of his status (or not) as a felon. And, he argues, whether a statement is "self-serving" does not influence the hearsay analysis.

"[W]e review district court determinations on the admissibility of evidence for an abuse of discretion[.]" *United States v. Channon*, 881 F.3d 806, 810 (10th Cir. 2018). Hearsay determinations are afforded an even "more deferential review." *Id.* "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (citation omitted). When a successful challenge to a hearsay ruling rests solely on the Federal Rules of Evidence, the court applies a harmless error standard of review. *United States v. Collins*, 575 F.3d 1069, 1073 (10th Cir. 2009) (citation omitted). "A harmless error is one that does not have a substantial influence on the outcome of the trial; nor does it leave one in grave doubt as to whether it had such effect." *United States v. Jones*, 44 F.3d 860, 873 (10th Cir. 1995) (citation omitted).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Collins*, 575 F.3d at 1073 (quoting Fed. R. Evid.

801(c)). The matter asserted "is the fact being asserted by the declarant in uttering the statement[,]" and may not be "the matter that the party offering the statement into evidence is trying to prove with the statement." *United States v. Lewis*, 594 F.3d 1270, 1282 (10th Cir. 2010). Statements not offered for their truth are thus not hearsay, and do not require an inquiry into hearsay exceptions. *See* Kenneth S. Broun, Jasmine E. Harris, Edward J. Imwinkelried, David H. Kaye & Kit Kinports, 2 McCormick On Evidence § 246 (Robert P. Mosteller ed., 9th ed. 2025).

To obtain a conviction under the felon in possession statute, the Government must prove beyond a reasonable doubt that Clark knew that he was prohibited from lawfully possessing a firearm due to his status as a felon. *See Rehaif v. United States*, 588 U.S. 225, 230–31 (2019). With that in mind, Clark sought to introduce the statements to illustrate what he knew and believed – regarding his felon status – at the time he possessed a firearm and ammunition.

We first apply the hearsay definition to Clark's statements. *See* Fed. R. Evid. 801(c). Clark made three statements: (1) "I ain't got no drugs felony possession," (2) "They dropped that, I have the proof on my phone. It was dismissed," and (3) "The case was dismissed. . . . That's not the case." R. I at 142; R. III at 72–73. To be offered for their truth, Clark must have sought to use the statements to prove that he did not have a felony drug possession

conviction, that his state charges were dropped or dismissed, or that he had proof on his phone. But Clark did not offer the statements for those purposes. Rather, Clark offered the statements to support his belief that he did not know he was a convicted felon prohibited from possessing firearms. To that end, Clark did not dispute at trial that he was in fact a convicted felon. Instead, Clark disputed having knowledge of his status as a felon.

Nevertheless, the district court excluded these statements because they were "self-serving hearsay . . . without an exception" and "for which nobody can cross-examine [Clark] on." R. III at 77–78. This conclusion was erroneous. Certain statements, even when made or uttered out of court, can be admissible if they are not hearsay. This is a distinct inquiry from whether a statement is hearsay but still admissible under a hearsay exception. Here, there was no need to search for hearsay exceptions because the statements were not offered to prove the truth of the matter asserted and therefore did not fit the definition of hearsay from the outset. And whether a statement is "self-serving" is not part of the hearsay calculus at all.

Statements that go directly to a person's knowledge or belief are not hearsay when they are not offered for their truth. *United States v. Ibisevic*, 675 F.3d 342, 349 (4th Cir. 2012); *see also Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1090 (10th Cir. 2001) ("It is

true that an out-of-court statement may be admitted over a hearsay objection if the statement is offered not for the truth of the matter asserted in the statement but merely to show that a party had knowledge of a material fact or issue." (citations omitted)).

By way of example, in *United States v. Ibisevic*, the defendant appealed his convictions arising from his attempt to travel internationally without reporting the correct amount of cash in his possession to customs authorities. 675 F.3d at 344. Ibisevic argued that his initial failure to report the correct amount of cash stemmed from his difficulty understanding English. *Id.* at 347–48. Ibisevic challenged the district court's exclusion of his mother's testimony. *Id.* at 349. His mother was present when he was stopped by customs and would have testified that at the time Ibisevic was questioned by officers, he told her that the agents asked for the insurance value of their checked luggage. *Id.* at 347. The Fourth Circuit concluded that the district court's evidentiary ruling was erroneous because the excluded statement was not offered "'to prove the truth of the matter asserted,' i.e., that he was actually being asked the value of his checked luggage. Rather, he offered it 'merely to prove that he expressed his belief' that he was being asked about the value of his luggage." *Id.* at 349 (citation modified). Under the circumstances, the statement was not hearsay.

Similarly, Clark did not seek to admit his statements into evidence to prove that he was not a convicted felon. Instead, he offered the statements to show that he believed he was not a felon when he possessed a firearm and ammunition. In other words, he did not know of his prohibited status. Because Clark's statements were not offered to prove the truth of the matter asserted, but instead to show his knowledge or lack thereof, the statements were not hearsay. *Cf. United States v. Webster*, 750 F.2d 307, 330–31 (5th Cir. 1984) (statement offered to infer knowledge rather than for its truth was not hearsay); *United States v. Parry*, 649 F.2d 292, 294–95 (5th Cir. 1981) (same); *Prude v. Meli*, 76 F.4th 648, 661 (7th Cir. 2023) (statement offered to show belief was not hearsay). The district court erred in excluding Clark's proffered testimony.

B

Having found error in the exclusion of Clark's three statements, we must now determine whether the district court's error was harmless. "A non-constitutional error, such as a decision whether to admit or exclude evidence, is considered harmless 'unless a substantial right of [a] party is affected.'" *United States v. Charley*, 189 F.3d 1251, 1270 (10th Cir. 1999) (alteration in original) (quoting Fed. R. Evid. 103(a)); Fed. R. Crim. P. 52(a). A party's substantial rights are affected when the error "had a substantial influence on the outcome or leaves one in grave doubt as to whether it had

such effect." *United States v. Roach*, 582 F.3d 1192, 1207 (10th Cir. 2009) (quotation omitted). In making this determination, we review "the record as a whole de novo to evaluate whether the error was harmless, examining the context, timing, and use of the erroneously admitted [or excluded] evidence at trial and how it compares to properly admitted evidence." *United States v. Blechman*, 657 F.3d 1052, 1067 (10th Cir. 2011) (citation modified); *see also United States v. Chavez*, 976 F.3d 1178, 1204 (10th Cir. 2020). "The burden is on the government to establish the harmlessness of any error." *United States v. Washington*, 653 F.3d 1251, 1270 (10th Cir. 2011) (citation omitted).

The Government made no harmless error argument in this appeal, as it wholly failed to include any mention of this analysis in its brief to this court. Accordingly, it has failed to carry its burden. *See United States v. Yarbrough*, 527 F.3d 1092, 1102 (10th Cir. 2008).

Even if this court were to exercise its discretion to proceed with harmless error review,[5] the district court's error was not harmless. The excluded statements were direct evidence of the only element of the charged offense that was at issue during trial. The importance of these statements

[5] This court has discretion to engage in harmless error review in appropriate cases, even if the government waives the argument. *United States v. McFadden*, 116 F.4th 1069, 1094 (10th Cir. 2024).

is underscored by the Government's closing statement. In closing, the Government highlighted the lack of direct evidence, pointing out that there were no statements by Clark speaking to the knowledge-of-status element. Although it is undisputed that Clark was a felon, whether he knew of his status at the relevant time is heavily contested. This left the excluded statements that expressed his belief he did not know of his felon status on the one hand, and the state court documents from which to infer knowledge on the other. Given the centrality of the statements to the ultimate question of guilt, and in light of the series of inferences required to find guilt through the remaining documentary evidence, we cannot say Clark's substantial rights were not affected. *Cf. Yarbrough*, 527 F.3d at 1100–03 (substantial rights were affected when district court excluded "important evidence relevant to a sharply controverted question going to the heart of [defendant's] defense[.]"); *Ibisevic*, 675 F.3d at 354. At the very least, it leaves us "in grave doubt as to whether it had such effect." *Roach*, 582 F.3d at 1207 (quotation omitted).

Because the district court's error prevented the jury from considering the only direct evidence supporting Clark's defense, his substantial rights were affected, and the error was not harmless. Accordingly, we reverse Clark's conviction.

C

Although we have reversed Clark's conviction, we must still consider his sufficiency-of-the-evidence challenge. That is because "[i]f the evidence [was] insufficient to convict, the government could not retry" him. *See United States v. Spradley*, 146 F.4th 949, 962–63 (10th Cir. 2025) (citation omitted).

In the district court, Clark twice moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, which was denied. Clark argues that the Government did not present sufficient evidence to prove beyond a reasonable doubt that Clark knew he was a felon when he possessed the firearm and ammunition.

"We review legal sufficiency of evidence de novo, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences from the evidence in favor of the verdict." *United States v. Kaspereit*, 994 F.3d 1202, 1207 (10th Cir. 2021) (citing *United States v. Wagner*, 951 F.3d 1232, 1255 (10th Cir. 2020)). "[W]e may reverse only if *no* rational trier of fact" could have found the government met its burden of proof. *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011) (quoting *United States v. Ramos-Arenas*, 596 F.3d 783, 786 (10th Cir. 2010)) (emphasis added).

Clark was indicted for unlawful possession of a firearm and ammunition as a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). Again, and in relevant part, the Government had to prove beyond a reasonable doubt that Clark knew of his status as a felon.[6] *Rehaif*, 588 U.S. at 227–231. Put another way, the Government had to establish that Clark knew he was convicted of a crime punishable by more than one year in custody at the time he possessed the gun. *Greer v. United States*, 593 U.S. 503, 505–06 (2021).

To prove that Clark had knowledge of his felony conviction, the Government primarily relied on the testimony of Marc Dreyer, the third deputy in the Tulsa County Clerk's Office. Dreyer's testimony purported to explain what Clark should have known from (1) the state court docket sheet, (2) the state court guilty plea form, and (3) the state court orders.

First, Clark entered a guilty plea in 2010, at which time the state court withheld a finding of guilt, placed Clark under the district attorney's supervision, and deferred sentencing for five years. Clark did not become a convicted felon when he entered his guilty plea. Clark then had several

[6] The parties stipulated to the interstate commerce element, and Clark conceded that his prior conviction was for an underlying felony and that he did knowingly possess the firearm and ammunition. Thus, only one element – whether Clark had knowledge of his felon status – was contested at trial.

hearings over multiple dates to accelerate his sentence for failing to comply with his conditions of supervision. But it was not until a hearing in September 2011 that Clark was officially convicted, and the state court imposed a suspended five-year sentence.

As best we can tell, there was no pronouncement by the court at that hearing that Clark was at that point convicted of a felony offense.[7] Indeed, nothing changed when Clark became a convicted felon; he was not immediately required to serve any time in custody, and his conditions of supervision remained the same. Later, in December 2011, after Clark violated the conditions of his supervision, the state court ordered Clark to serve ninety days in the Tulsa County jail.

[7] The dissent points to a statement made by the prosecutor in open court with Clark and his counsel present that, "[i]t's the State's position that unfortunately Mr. Clark is the only one refusing to help keep us from making him a convicted felon at this time" and requesting Clark's conviction be accelerated. Dissent at 6–7 (citing Supp. R. I at 76). In the dissent's view, this supports a reasonable inference that Clark knew he became a felon. *Id.* at 7. But the statement was the prosecutor's request, not a pronouncement by the court. Indeed, in "adopt[ing] the prosecutor's recommendation" the court did not mirror the prosecution's language, nor did it state Clark was now a felon. *Id.* at 7; Supp. R. I at 80. Our point remains that the court never pronounced Clark to be a convicted felon at any point during the multitude of court hearings.

The documentary evidence had many flaws varying in importance.[8] For instance, the "Order of Deferred Sentence," misstated the offense: "Possession of Controlled Frug." R. III at 223, 225; Supp. R. I at 32. The Order of Deferred Sentence, which was entered days after Clark's first court appearance, did identify the charge as a felony. But the document was only accessible at the county clerk's office, and in any event, Clark was not convicted when this order was entered. More importantly, the Lumpkin form had a blank page and no mention of "felony." The question "what is the charges to which the defendant is entering a plea today?" was blank. R. III at 241. And the section delineating the range of punishment was not filled out. As for the Judgment and Sentence, which accurately reflected the

[8] The dissent takes issue with our characterization that the documentary evidence had many mistakes, while we only point to two as examples. Dissent at 8. The two mistakes are highlighted because they represent the range of the collective errors – small ("frug") and big (critical blank page) – and undermine the reliability of the case documents in the totality. But other mistakes existed too. The preliminary hearing form and the Order of Deferred Sentence had different variations of Clark's name. R. III at 220–21 (Kelly Lamar Clark versus Prophet Kelly Clark). The guilty plea form also appeared to incorrectly answer questions beyond the blank second page. On the first page, the question "[d]oes the State move to dismiss or amend any case(s) or count(s) in the information or on page 2 of the information?" was marked "yes" but the follow up, "[i]f so, set forth the cases/counts dismissed or amended" was not filled out. R. III at 239–40; Supp. R. I at 37. Similarly, the third page had a question about the defendant's understanding of the plea agreement, which was hard to read and understand based on the handwriting and abbreviations used. And question thirty-one on the third page, which was to be answered "if [] entering a plea to a felony offense," was also left blank. Supp. R. I at 39.

conviction, it was similarly inaccessible to Clark, and there is no evidence that he ever saw or possessed the judgment.

In all, the Government's evidence required the jury to draw inferences about whether Clark knew that he became a felon at some point in the process. In our analysis, "we do not give the government the benefit of every potential inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial." *United States v. Santistevan*, 39 F.3d 250, 258 (10th Cir. 1994) (emphasis omitted) (citation omitted). In Clark's case, there was no other evidence.

Of course, there are some cases in which the fact of the conviction may be sufficient to prove the knowledge-of-status element. This is because a person "ordinarily knows he is a felon." *Greer*, 593 U.S. at 508. But records establishing a prior conviction are sufficient evidence only when supported by something more. *See id.* at 518 (Sotomayor, J., concurring in part and dissenting in part) ("Standing alone, the fact of a prior felony conviction is hardly enough[.]").

Take *United States v. Sjodin*, for example. There, Sjodin served a prior sentence of eight years, stipulated that the underlying conviction was a felony, and the government presented records of the prior conviction. 139 F.4th 1188, 1201 (10th Cir. 2025). On appeal, Sjodin also challenged the knowledge-of-status element. *Id.* We held that this evidence was "more than

enough for a factfinder to find beyond a reasonable doubt that Mr. Sjodin knew of his prohibited status at the time he possessed the rifle." *Id.* That is because, since Sjodin was imprisoned for eight years in relation to his crime, it logically followed that he knew the prior conviction led to a prison term exceeding one year. *Id.*

But that is not Clark's situation. At the onset of his state court criminal process, he entered a guilty plea with the understanding that he was not yet convicted. The records surrounding the guilty plea process were riddled with mistakes and left critical information blank. Ultimately, Clark served ninety days total in custody. Ninety days is well short of a year, and unlike *Sjodin*, the length of incarceration here cannot support the knowledge-of-status element. Thus, the jury had to infer that Clark obtained this knowledge at some other point in the proceedings through records.

"An inference is unreasonable if it requires the jury 'to engage in a degree of speculation and conjecture that renders its findings a guess or mere possibility.'" *United States v. Goldesberry*, 128 F.4th 1183, 1192 (10th Cir. 2025) (quotation omitted). Here, the jury had to assume that after Clark entered his guilty plea in 2010, where he was told he was not convicted, he was then at some point told his deferred sentence became a conviction. There was no direct evidence presented to the jury that this fact

was ever communicated to Clark. To reach this conclusion, the jury had to draw a series of inferences. First, the jury had to rely on the possibility that Clark saw the Judgment and Sentence, entered days after his court appearance. Second, the possibility that he understood that although the state court reimposed his probation in September 2011 and all conditions remained the same, he was now a felon. Third, the possibility that he understood his ninety-day sentence, imposed at a different time from his conviction, was for the underlying conviction rather than for violating his supervision conditions, as he was told. Finally, although his sentence was for ninety days, the possibility he knew his sentence could have exceeded one year.

The dissent correctly reminds us that "we must draw inferences in favor of the Government." Dissent at 9. The dissent concludes that "the inferences here are reasonable and derive from statements made . . . and documents considered at multiple court proceedings" and are unaffected by the "imperfections" in the state court records. *Id.* at 8–9. But to be reasonable, such inferences cannot require the jury to engage in pure speculation. *Goldesberry*, 128 F.4th at 1192. Again, the documentary evidence was the Government's key to establishing Clark's knowledge. When critical parts of the documentary evidence do not provide information as to Clark's knowledge and understanding at the time, even when

prompted to do so by standardized forms, the universe of reasonable inferences that can be drawn from this evidence is significantly reduced. Especially when, as here, the Government does not point to any part of the record indicating the state court informed Clark he was charged with or convicted of a felony at any point in his criminal process. In our view, the totality of the evidence could not lead a reasonable jury to infer Clark knew he was a convicted felon. As mentioned above, to do so the jury would have to draw a series of unsupported inferences, all of which require some degree of speculation.[9]

Such a series of assumptions, without documentary or testimonial evidence supporting them, are mere possibilities insufficient to establish knowledge-of-status. *See, e.g., Greer*, 593 U.S. at 519 (Sotomayor, J., concurring in part and dissenting in part) ("a person who was convicted of

[9] The dissent lays out some of the inferences that could be drawn from the evidence. Dissent at 4–6. For example, that a jury could infer Clark knew he was a convicted felon given the many times he appeared for violating the terms of his supervised release, both before and after he was officially convicted. This inference relies upon an assumption that Clark gained this knowledge either through a "signed document, the court, or his lawyer." *Id.* at 6. The inference that at some point Clark must have been informed, by someone with authority, of his felon status at these hearings is mere guesswork. This defeats the reasonableness of any inferences the dissent draws from the evidence. The dissent is correct that we must "consider[] the collective inferences to be drawn from the evidence as a whole." Dissent at 9 (citation omitted). In doing just that, we see a pile of inferences that amount to unsupported possibilities.

a prior crime but sentenced only to probation may not know that the crime was punishable by imprisonment for a term exceeding one year." (citation modified) (quoting *Rehaif*, 588 U.S. at 233)).

Of course, had Clark served a sentence over one year, this case would be much different. But, because he did not, and the only other evidence supporting the conviction requires a series of unsupported assumptions, the Government did not meet its burden beyond a reasonable doubt. We are mindful of the deference that is reasonably afforded to the validity of jury verdicts. However, given the totality of the evidence in this case, we conclude that the Government did not introduce sufficient evidence to support the knowledge of status element in the felon in possession statute. Accordingly, Clark may not be retried for this charge. *See Bravo-Fernandez v. United States*, 580 U.S. 5, 20 (2016).

D

Clark also challenges the district court's denial of a motion to dismiss the charge on the grounds that 18 U.S.C. § 922(g)(1) is unconstitutional as applied under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024). As Clark acknowledges, this argument is foreclosed by circuit precedent. *See Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025).

* * *

In conclusion, the district court committed error when it excluded three statements Clark made at the time of his arrest on hearsay grounds. This error was not harmless. And the Government failed to present sufficient evidence to support a conviction for felon in possession beyond a reasonable doubt. Accordingly, Clark's conviction must be reversed and he may not be retried.

III

For the foregoing reasons, we REVERSE the conviction and REMAND with instructions to the district court to vacate the judgment and conduct any necessary further proceedings consistent with our decision.

25-5141, *United States v. Clark*
MATHESON, Circuit Judge, dissenting.

Because under our standard of review a rational jury could find the Government presented sufficient evidence to convict Prophet Kelly Lamar Clark of being a felon in possession under 18 U.S.C. § 922(g)(1), I respectfully dissent.

1. Standard of Review

"We review de novo whether the government presented sufficient evidence to support a conviction." *United States v. Sells*, 477 F.3d 1226, 1235 (10th Cir. 2007) (quotations omitted). In so doing, we "view[] the evidence in the light most favorable to the government and draw[] all reasonable inferences from the evidence in favor of the verdict." *United States v. Kaspereit*, 994 F.3d 1202, 1207 (10th Cir. 2021) (citing *United States v. Wagner*, 951 F.3d 1232, 1255 (10th Cir. 2020)). "[W]e owe considerable deference to the jury's verdict." *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011) (quotations omitted). "[O]ur 'restrictive standard of review for a sufficiency of the evidence question provides us with very little leeway.'" *Sells*, 477 F.3d at 1235 (quoting *United States v. Evans*, 970 F.2d 663, 671 (10th Cir. 1992)).

As the majority states, "'[W]e may reverse only if *no* rational trier of fact' could have found the government met its burden of proof." Maj. Op. at 18 (quoting *King*, 662 F.3d at 650 (emphasis added)). We must "assess[] the totality of the circumstances in the individual case." *United States v. Rufai*, 732 F.3d 1175, 1194 (10th Cir. 2013) (quotations omitted). "[R]ather than examining the evidence in bits and pieces, we evaluate the sufficiency of the evidence by considering the collective inferences to be drawn from the

evidence as a whole." *United States v. Brooks*, 438 F.3d 1231, 1236 (10th Cir. 2006) (alterations and quotations omitted). "We do not consider 'potential' evidence," *Abrams v. Williams*, 430 F. App'x 685, 689 (10th Cir. 2011) (unpublished),[1] only evidence actually admitted at trial.

2. Legal Background

"To prove a § 922(g)(1) violation, the government had to establish three elements beyond a reasonable doubt": (1) "a court previously convicted the defendant of a felony," (2) "the defendant knowingly possessed ammunition" and the firearm, and (3) "the possession of ammunition [and the firearm] was in or affecting interstate commerce." *United States v. Mayfield*, 134 F.4th 1101, 1107-08 (10th Cir. 2025) (alterations and quotations omitted).

In *Rehaif v. United States*, 588 U.S. 225 (2019), the Supreme Court held that the word "knowingly" in § 922(g)(1) "applie[s] to both the defendant's conduct as well as his prohibited status." *United States v. Sjodin*, 139 F.4th 1188, 1193 (10th Cir. 2025) (citing *Rehaif*, 588 U.S. at 237). "Thus, to obtain a felon-in-possession conviction after *Rehaif*, the government must prove not only that the defendant knew he possessed a firearm, but also that he knew he was a felon when he possessed it." *Id.* (quotations omitted).

At trial, Mr. Clark did not contest his felony drug conviction under Okla. Stat. tit. 63, § 2-402. He disputed instead that he knew he was a felon when police later

[1] *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

arrested him in possession of a firearm and ammunition. On appeal, he argues only that the evidence was insufficient for a rational jury to find he had such knowledge.

3. Felon-in-Possession Trial

As is often necessary to prove the knowledge element of an offense, the Government presented circumstantial evidence from which it asked the jury to infer that Mr. Clark knew he was a convicted felon when he was arrested. *See Buscho v. Shurtleff*, 729 F.3d 1294, 1308 (10th Cir. 2013) ("[T]his court has held that a showing of mens rea may and often is inferred from circumstantial evidence." (quotations omitted)).

In this case, no single piece of evidence could prove the Government's case, and the evidence overall was not overwhelming. But "viewing the evidence in the light most favorable to the government and drawing all reasonable inferences from the evidence in favor of the verdict," *Kaspereit*, 994 F.3d at 1207, we should conclude that a rational jury could find Mr. Clark knew he was a felon.

During the trial, the prosecution presented testimony and documentary evidence through Tulsa County Deputy Clerk Marc Dreyer and Oklahoma Department of Corrections Assistant Regional Supervisor Jason Taylor as follows:

(1) In 2009, the Tulsa County District Attorney charged Mr. Clark, by an information, with "UNLAWFUL POSSESSION OF CONTROLLED DRUG, a Felony." Suppl. ROA, Vol. I at 25 (Exhibit 6); ROA, Vol. III at 184-85.[2] Deputy Clerk Dreyer testified that defendants are "[a]lways" "provided with the Information." ROA, Vol. III at 185. A rational jury could infer Mr. Clark saw the information, which informed him he had been charged with a felony drug offense.

[2] The exhibits cited in this recounting of the evidence were all admitted at trial.

(2) In May 2010, Mr. Clark appeared in Tulsa County District Court, "represented by a lawyer" at his arraignment on that felony information. *Id.* at 185-86. A rational jury could infer that both his lawyer and the judge advised Mr. Clark that he had been charged with a felony. [3]

(3) In October 2010, Mr. Clark waived his right to a preliminary hearing. *Id.* at 189-90. He confirmed his waiver by signing a document stating, "I understand the nature of the charge against me and understand it is a felony offense . . . ." Suppl. ROA, Vol. I at 31 (Exhibit 7). A rational jury could infer that signing a waiver stating Mr. Clark had been charged with a felony informed him that he had been charged with a felony.

(4) Later that October, Mr. Clark appeared in court with his lawyer and pled guilty to the felony. ROA, Vol. III at 190-91. He did not plead to a reduced charge. Mr. Clark also signed a plea agreement form. Suppl. ROA, Vol. I at 37-43 (Exhibit 9). The court advised him of the maximum penalty provided by law for that felony drug charge. ROA, Vol. III at 190-91; *see* Suppl. ROA, Vol. I at 32 (Exhibit 8). A rational jury could infer that Mr. Clark understood the court's advisement.

(5) When Mr. Clark pled guilty, the court sentenced him to a deferred five-year sentence, so he would serve supervised probation. ROA, Vol. III at 192. If he successfully completed the terms of the deferred sentence, his "conviction would not have been finalized" and his "criminal record . . . would have been expunged." *Id.* at 192-93. If he did not successfully complete the deferred sentence, then he would officially become a convicted felon and subject to the originally imposed term of incarceration. *Id.* at 193.

Mr. Clark and his lawyer signed a form agreeing to all these "rules and conditions of supervised probation" on his deferred sentence. Suppl. ROA, Vol. I at 35 (Exhibit 8); *see also* ROA, Vol. III at 194.[4] A rational jury could infer that Mr. Clark understood that if he violated the terms of his supervised probation, he would be a convicted felon.

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[3] Under Oklahoma law, "The arraignment must be made by the court, or by the clerk or district attorney, under its discretion, and consists in reading the indictment or information to the defendant, and asking him whether he pleads guilty or not guilty thereto." Okla. Stat. tit. 22, § 465 (2009).

[4] The majority notes the Order of Deferred Sentence, *see* Suppl. ROA, Vol. I at 32-34, was available only at the county clerk's office, Maj. Op. at 21. But Mr. Clark and his lawyer appeared in court and signed a form to carry out the terms of the sentence. A rational jury could infer Mr. Clark was informed of these terms.

(6) In March 2011, the District Attorney's Office, which was supervising his probation, applied to accelerate the felony judgment and sentence because Mr. Clark violated the terms of his supervised probation by "failing . . . to sign up for community service" and "fail[ing] to appear at the District Attorney's Office to sign up for supervision." Suppl. ROA, Vol. I at 45 (Exhibit 10); *see* ROA, Vol. III at 195.

Mr. Clark confessed to the violations in the application to accelerate, and he signed a form saying so. Suppl. ROA, Vol. I at 50 (Exhibit 12); *see* ROA, Vol. III at 195-96. On June 6, 2011, the Tulsa County District Court ordered Mr. Clark to comply with the original terms of supervised probation. Suppl. ROA, Vol. I at 68-69 (Exhibit 18); *see* ROA, Vol. III at 196-97.

A rational jury could infer from this evidence that Mr. Clark knew he violated the terms of his supervised probation and therefore would soon become a convicted felon.

(7) On September 30, 2011, Mr. Clark and his lawyer appeared in Tulsa County District Court for a hearing on the application to accelerate his sentence. *See* Suppl. ROA, Vol. I at 73-80 (Exhibit 19).

At this hearing, the prosecutor stated, "Mr. Clark is the only one refusing to help keep us from making him a convicted felon at this time," and requested the court to "accelerate him to a conviction of a five-year suspended sentence and order him to once again attempt to get back into compliance to avoid any time in prison." *Id.* at 76 (Exhibit 19).

The court, accepting the prosecutor's recommendation, "accelerate[d] the Defendant's five-year deferred sentence to a five-year suspended sentence," *id.* at 80, and imposed a suspended five-year probation sentence "under the custody and control" of the Oklahoma Department of Corrections, *id.* at 53-54 (Exhibit 14). *See* ROA, Vol. III at 199. The court then entered Mr. Clark's guilty plea as a "judgment and sentence" for the "Felony" of "Unlawful Possession of Controlled Drug." Suppl. ROA, Vol. I at 53-54 (title formatting omitted); *see* ROA, Vol. III at 198-200. At this point, Mr. Clark became a convicted felon. ROA, Vol. III at 200.

A rational jury could infer that Mr. Clark knew he was a convicted felon.[5]

[5] A rational jury could infer that Mr. Clark's lawyer informed him that a critical consequence of confessing to a felony charge would lead to Mr. Clark's becoming a convicted felon. *See* Okla. Stat. tit. 5, ch. 1, app. 3-A, r. 1.4 (2009) (requiring attorneys to promptly inform and reasonably consult with clients).

(8) Within the next month, October 2011, Mr. Clark violated the terms of his suspended sentence, so the District Attorney applied to revoke Mr. Clark's suspended sentence. ROA, Vol. III at 200-01; Suppl. ROA, Vol. I at 56 (Exhibit 15).

On December 15, 2011, Mr. Clark, appearing with his lawyer in the Tulsa County District Court, confessed to the violations orally and in a signed writing. ROA, Vol. III at 201-02; *see* Suppl. ROA, Vol. I at 61, 82-90 (Exhibits 17 and 20). The court ordered Mr. Clark to serve 90 days in jail and reimposed the original term of probation. Suppl. ROA, Vol. I at 88-89 (Exhibit 20).

A rational jury could infer that Mr. Clark again learned he was a convicted felon in this proceeding, whether from the signed document, the court, or his lawyer.

(9) In November 2012, Mr. Clark signed a "Notice of Termination of Active Probation Supervision," Suppl. ROA, Vol. I at 95, which the Government introduced as Exhibit 23 and which Assistant Regional Supervisor Taylor explained. *See* ROA, Vol. III at 321. Mr. Clark was placed on inactive supervision. *Id.* at 321-23; *see* Suppl. ROA, Vol. I at 95 (Exhibit 23). A rational jury could infer that Mr. Clark was reminded of his felony conviction.

(10) The Government in its closing argument again referred the jury to the docket sheet that Deputy Clerk Dreyer explained earlier in the trial. It pointed out that in June 2016, Mr. Clark appeared in court to address court costs and fines in the case. ROA, Vol. III at 451; Suppl. ROA, Vol. I at 3-4 (Exhibit 5). In September 2016, Mr. Clark formally completed his sentence. ROA, Vol. III at 451. A rational jury could infer that these events provided him continued knowledge of his felony conviction.

The evidence showed that Mr. Clark appeared in court about 20 times over seven years on the 2009 felony drug charge and at all times was represented by counsel. ROA, Vol. III at 444. On at least one appearance, Mr. Clark signed a form acknowledging the felony charge. Suppl. ROA, Vol. I at 31. No evidence suggested that anyone advised Mr. Clark that the charge had been reduced to a misdemeanor or had been dismissed. At the hearing on September 30, 2011, something changed—Mr. Clark formally became a

felon. The prosecutor said in open court with Mr. Clark and his counsel present that "Mr. Clark is the only one refusing to help keep us from making him a convicted felon at this time," and requested the court to "accelerate him to a conviction of a five-year suspended sentence and order him to once again attempt to get back into compliance to avoid any time in prison." *Id.* at 76. The court then adopted the prosecutor's recommendation. *Id.* at 80.

Reasonable inferences supported that Mr. Clark knew that (1) Oklahoma had charged him with a felony; (2) he pled to a felony; (3) if he violated the terms of his deferred sentence of supervised probation, he would become a convicted felon; (4) he violated his deferred sentence terms; and (5) the court entered judgment and sentence for a felony after the probation violation. The formal termination of his active probation supervision and his court appearance to address costs and fines further reminded him of his felony.[6]

Viewing the evidence in the light most favorable to the Government, we should conclude that "a reasonable jury could find guilt beyond a reasonable doubt, based on the direct and circumstantial evidence, together with the reasonable inferences to be drawn

[6] Mr. Clark points to his registering to vote in 2014 and 2020 and running for office in 2014. Aplt. Br. at 22-23; ROA, Vol. III at 379-80, 402-03. To vote, he signed a form stating he was not a convicted felon or had served his entire sentence. *Id.* at 23. To run for mayor, he signed a declaration that he was not a convicted felon. *Id.* The jury heard testimony that because Mr. Clark completed his sentence by 2020, he could register to vote then despite being a convicted felon. ROA, Vol. III at 383. And the jury could reasonably have determined that in 2014 he knew he was a convicted felon but registered to vote and ran for office anyway.

therefrom." *Sells*, 477 F.3d at 1235 (quotations omitted). A rational jury could infer that he knew he was a convicted felon when he was arrested in this case.

4. The Majority

The majority points to the "flaw[ed]" "documentary evidence," Maj. Op. at 21, characterizing the state court records as "riddled with mistakes," *id.* at 7. But it notes only two documents. First, the Order of Deferred Sentence said "POSSESSION OF CONTROLLED FRUG" instead of "DRUG," *id.* at 21; *see* Suppl. ROA, Vol. I at 32, a relatively innocuous typo.[7] Second, one page in the guilty plea form was blank, including the charge and the possible range of punishment, and other parts of the form were left blank. Maj. Op. at 21 & n.8, 22; *see* Suppl. ROA, Vol. I at 38. These imperfections, when viewed in context with all the evidence rather than in isolation, should not materially affect the sufficiency analysis.[8]

The majority also notes the complicated procedural history that resulted in Mr. Clark's not "serv[ing] a sentence over one year." Maj. Op. at 20, 26. The defense argued that the jury could infer that this history created confusion and uncertainty in Mr.

[7] This typo did not appear on the charging document and other documents in Mr. Clark's case—all of which showed a drug charge. *See* Suppl. ROA, Vol. I at 25, 31. The evidence strongly showed he was aware of the felony drug charge.

[8] Based on the evidence at the federal trial recounting the state court proceedings presented up to the point of his entering the plea agreement, as explained above, the jury could find that Mr. Clark (1) was provided a felony information charging him with drug possession, (2) was arraigned on that charge, (3) signed a preliminary hearing waiver acknowledging he was charged with a felony, (4) pled guilty, (5) was advised by the court that the maximum penalty was more than one year, and (6) signed a plea agreement form with poor handwriting indicating his knowledge of the felony drug offense.

Clark's mind. Maybe so. But as the Government contends, the jury could infer that Mr. Clark understood from his many interactions with the state court that he was convicted of a felony.

To infer in favor of Mr. Clark that he did not know he was a felon, the majority states that "[a]t no point did the state court inform Clark that he was convicted of a felony." Maj. Op. at 7. But we must draw inferences in favor of the Government and "evaluate the sufficiency of the evidence by considering the collective inferences to be drawn from the evidence as a whole." *United States v. Tennison*, 13 F.4th 1049, 1059 (10th Cir. 2021) (quotations omitted).[9] From the totality of the evidence, a reasonable jury could infer that he did know he was a convicted felon when he was arrested with a gun in this case.[10]

Far from "mere possibilities" or "guesswork," Maj. Op. at 25 & n.9, the inferences here are reasonable and derive from statements made at, transcripts from, and documents considered at multiple court proceedings in Mr. Clark's felony drug prosecution. They

[9] If the standard of review were different—that inferences should be drawn on appeal in favor of the defendant—we might be able to say the jury could infer that (1) neither the state court nor defense counsel fulfilled their legal responsibilities to inform Mr. Clark he was a convicted felon; (2) Mr. Clark did not understand what he wrote on his plea agreement regarding the felony charge, the details of his plea, or his admitted guilt; (3) he was not listening or did not understand the prosecutor's statement at the September 2011 hearing; and (4) Mr. Clark did not see or read the documents he could access that he had been charged and convicted of a felony.

[10] "[O]ur review asks only whether the record contains enough evidence that a rational jury could find guilt beyond a reasonable doubt, not whether the government presented any particular evidence or form of proof." *United States v. Hernandez*, No. 25-2086, 2026 WL 1265680, at *2 (10th Cir. May 8, 2026) (unpublished).

reasonably "flow[] from logical and probabilistic reasoning." *United States v. Lacy*, 904 F.3d 889, 900 (10th Cir. 2018) (quotations omitted). As we said in *Lacy*, "[W]ith experience serving as the touchstone, a jury's inference is permissible where there is a reasonable probability that the conclusion flows from the facts in evidence." *Id.*

Mr. Clark's "jury was not required to pile inference upon inference but, rather, was only asked to consider multiple pieces of indirect evidence in the aggregate." *United States v. Morales*, 758 F.3d 1232, 1239 n.2 (10th Cir. 2014). The district court properly instructed the jury that it was "permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in light of common experience." ROA, Vol. I at 188.

5. Conclusion

Perhaps a rational jury could have acquitted Mr. Clark, but under our standard of review of the totality of the evidence, a rational jury also could have convicted him. And that means we should deny Mr. Clark's sufficiency challenge.

I respectfully dissent.[11]

[11] I agree with the majority that the district court reversibly erred in excluding Mr. Clark's statements to the police, but I would not address this issue if the conviction should be vacated due to insufficient evidence—the defendant may not be retried under that circumstance. *See Burks v. United States*, 437 U.S. 1, 18 (1978) ("[W]e hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient . . . ."); *United States v. Hooks*, 551 F.3d 1205, 1215 (10th Cir. 2009) ("We conclude that [the] conviction is not supported by evidence and must be reversed. In light of this conclusion, we need not address his other grounds for reversal of his conviction or sentence.").