

1
2 UNITED STATES COURT OF APPEALS
3 FOR THE SECOND CIRCUIT
4

5 August Term 2010

6 (Argued: November 2, 2010 Decided: February 4, 2011)

7 Docket No. 09-4362-cr

8 -----x
9 UNITED STATES OF AMERICA,

10
11 Appellee,

12
13 -- v. --

14
15 MICHAEL GREER,

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17 Defendant-Appellant.

18
19 -----x
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21 B e f o r e : WALKER and CABRANES, Circuit Judges, and KOELTL,*
22 District Judge.

23 Appeal from a judgment of conviction for possessing a
24 firearm and ammunition as a convicted felon, following a jury
25 trial in the Western District of New York (David G. Larimer,
26 Judge). Defendant-Appellant Michael Greer argues that the
27 government violated his right against self-incrimination by using
28 the name tattooed on his arm to link him to the car in which

1 * The Honorable John G. Koeltl, of the United States District
2 Court for the Southern District of New York, sitting by
3 designation.

1 ammunition was found. We hold that the nature of the
2 government's reliance on the content of Greer's tattoo made it
3 testimonial, but we conclude that no constitutional violation
4 occurred because the tattoo was not the product of government
5 compulsion. We reject Greer's remaining arguments as without
6 merit.

7 AFFIRMED.

8 ARZA FELDMAN, Feldman and Feldman,
9 Uniondale, New York, for Defendant-
10 Appellant.

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12 STEPHAN J. BACZYNSKI, Assistant
13 United States Attorney (William J.
14 Hochul, Jr., United States Attorney
15 for the Western District of New
16 York, on the brief), Buffalo, New
17 York, for Appellee.

18
19 JOHN M. WALKER, JR., Circuit Judge:

20 Defendant-Appellant Michael Greer appeals from a judgment of
21 conviction for possessing a firearm and ammunition as a convicted
22 felon, following a jury trial in the Western District of New York
23 (David G. Larimer, Judge). Greer argues that the government
24 violated his right against self-incrimination by using the name
25 tattooed on his arm to link him to the car in which ammunition
26 was found. We hold that, although the nature of the government's
27 reliance on the content of Greer's tattoo made it testimonial,
28 the Fifth Amendment was not offended because his tattoo was not
29 the product of government compulsion. We also reject Greer's
30 arguments that the evidence was insufficient to support the

1 conviction and that the district court improperly permitted the
2 jury to hear evidence of an uncharged crime.

3
4 **BACKGROUND**

5 Greer's arrest was precipitated by a tip from a confidential
6 informant, Aaron Stubbs, who had agreed in an unrelated plea
7 bargain to assist in police investigations. Greer had previously
8 been convicted of a felony, and federal law prohibits convicted
9 felons from possessing a firearm or ammunition. 18 U.S.C.
10 § 922(g)(1). Stubbs had once seen Greer with a gun, and on
11 August 17, 2007, as a ruse to turn him into police for gun
12 possession, Stubbs proposed that they rob a house. Stubbs told
13 Greer that they would need a gun, and Greer replied that he could
14 get one.

15 The pair drove to Greer's house. As Greer went inside,
16 Stubbs remained in the car and called Rochester, New York
17 Detective Tom Janus, who drove to the location in an unmarked
18 car. Detective Janus saw Stubbs sitting in the passenger seat of
19 a light blue Hyundai Sonata, and then watched Greer leave his
20 house and get into the driver's seat of the same car. When the
21 vehicle drove past him, Detective Janus contacted other officers
22 to continue surveillance as he remained in place.

23 Two other officers observed the car at different times later
24 that day. Officer Kevin Koehn watched the Sonata approach, made

1 eye contact with Greer as he drove past, and communicated Greer's
2 position over the radio. Sergeant Beth Laird later pulled the
3 Sonata over, but it sped away before she could see the driver.
4 Police next found the Sonata, now unoccupied, in a parking lot on
5 a residential street in Rochester, where it had struck an
6 adjacent car. Around the same time, nearby resident Ebony Gibson
7 saw a man come through the front door of her apartment, run
8 through the apartment, and, as she testified, leave by the back
9 door. She and her sister immediately fled through the front
10 door.

11 Witnesses in the parking lot directed police officers to
12 Gibson's apartment. Sergeant Laird spoke to Gibson and, with her
13 consent, a team of officers entered and searched the premises.
14 Separately, a police dog tracked a scent from the driver's side
15 of the Sonata into the apartment. Police discovered Greer on a
16 bed in an upstairs bedroom and took him into custody. Police
17 found a Glock Model 22 semi-automatic pistol and a set of car
18 keys in a white garbage can near the entrance to the apartment.

19 Detective Janus arrived at the scene and peered into the
20 Sonata, where he saw the magazine of a semi-automatic handgun in
21 the cup holder between the front seats. After obtaining a search
22 warrant, Detective Janus opened the Sonata's door using the key
23 found in the trash can. He retrieved the ammunition magazine,
24 which contained nine bullets and fit the Glock 22 from the

1 garbage can. He also found a pay stub and a receipt for a motor
2 vehicle fine, both with Greer's name on them, as well as a car
3 rental agreement in the name of "Tangela Hudson." Once Greer was
4 apprehended, Detective Janus observed that a tattoo on his left
5 arm said "Tangela."

6 On May 28, 2009, a jury found Greer guilty of one count of
7 possessing a firearm and ammunition as a convicted felon. Judge
8 Larimer entered the judgment on October 15, 2009, after
9 sentencing Greer to 120 months in prison on the weapons-
10 possession count and to a concurrent 18-month term for violating
11 his supervised release. This appeal followed.

12

13

DISCUSSION

14 On appeal, Greer makes three arguments for reversing his
15 conviction: first, that the government violated his Fifth
16 Amendment right against self-incrimination by relying on his
17 tattoo to connect him to the car in which the ammunition was
18 found; second, that the evidence was insufficient to prove his
19 constructive possession of the gun and ammunition; and, finally,
20 that he was unduly prejudiced by testimony regarding an uncharged
21 crime. We hold that, although the nature of the government's
22 reliance on the tattoo's content made it testimonial, the Fifth
23 Amendment was not offended because the tattoo was not the product
24 of compulsion. We also reject Greer's remaining arguments.

1 **I. Right Against Self-Incrimination**

2 At trial, the government asked Detective Janus on direct
3 examination to describe Greer's physical appearance on the date
4 of his arrest. When Detective Janus replied that he saw Greer
5 "had tattoos," the government inquired whether he remembered
6 "what, if anything, any of the tattoos said." Detective Janus
7 responded, "I recall a tattoo, I believe it was on his left arm,
8 that said 'Tangela.'" Detective Janus had earlier testified to
9 finding a rental car agreement in the name of "Tangela Hudson" in
10 the Sonata. At trial, Greer did not object to this colloquy.

11 On appeal, Greer argues for the first time that the
12 solicitation of testimony regarding his tattoo violated his right
13 against self-incrimination. A claim of error not raised before
14 the district court is subject to plain error review. United
15 States v. Morris, 350 F.3d 32, 36 (2d Cir. 2003). We will only
16 reverse for plain error if there was "1) an error; 2) that was
17 plain; 3) that affected defendant's substantial rights; and
18 4) that seriously affected the fairness, integrity or public
19 reputation of judicial proceedings." Id. (quotation marks and
20 alterations omitted).

21 The Fifth Amendment provides in part that no person "shall
22 be compelled in any criminal case to be a witness against
23 himself." U.S. Const. amend. V. The right against
24 self-incrimination bars only "compelled incriminating

1 communications . . . that are 'testimonial' in character."
2 United States v. Hubbell, 530 U.S. 27, 34 (2000). In other
3 words, to qualify for Fifth Amendment protection, a communication
4 must be (1) testimonial, (2) incriminating, and (3) compelled.
5 Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 189 (2004).

6 The government argues that the tattoo in this case was not
7 "testimonial." We disagree. Whether a communication is
8 testimonial for Fifth Amendment purposes "often depends on the
9 facts and circumstances of the particular case." Doe v. United
10 States, 487 U.S. 201, 214-15 (1988). "[I]n order to be
11 testimonial, an accused's communication must itself, explicitly
12 or implicitly, relate a factual assertion or disclose
13 information. Only then is a person compelled to be a 'witness'
14 against himself." Id. at 210.

15 The privilege does not protect a criminal suspect from being
16 compelled to exhibit physical characteristics, for example, "to
17 put on a shirt, to provide a blood sample or handwriting
18 exemplar, or to make a recording of his voice." Hubbell, 530
19 U.S. at 35 (footnotes omitted). Such acts are not testimonial.
20 It is "the contents of [the defendant's] own mind . . . that
21 implicate[] the Self-Incrimination Clause." Doe, 487 U.S. at 211
22 (citations and quotation marks omitted). Because the exhibition
23 of physical traits is not a "communication by a witness that
24 relates either express or implied assertions of fact or belief,"

1 it does not enjoy constitutional protection. Hubbell, 530 U.S.
2 at 35; see also Schmerber v. California, 384 U.S. 757, 764 (1966)
3 (“[C]ompulsion which makes a suspect or accused the source of
4 ‘real or physical evidence’ does not violate [the Fifth
5 Amendment].”). For that reason, the Fifth Amendment is not
6 offended where a witness relies on a tattoo to identify a
7 defendant. See, e.g., United States v. McCarthy, 473 F.2d 300,
8 304-05 n.3 (2d Cir. 1972). In that context the tattoo is a
9 physical feature, no different from a handwriting or blood
10 sample, or a scar. “A mere handwriting exemplar, in contrast to
11 the content of what is written, like the voice or body itself, is
12 an identifying physical characteristic outside [Fifth Amendment]
13 protection.” Gilbert v. California, 388 U.S. 263, 266-67 (1967).

14 Here, the tattoo was used to a very different end.
15 Detective Janus did not describe Greer’s tattoo to identify
16 Greer. Rather, the content of Greer’s tattoo, the name
17 “Tangela,” was elicited because Greer’s statement of the name on
18 his skin tended to prove that Greer had a relationship with a
19 person of that name. That fact, in combination with other
20 evidence, allowed jurors to infer that Greer had constructive
21 possession of the ammunition found in the Sonata rented by a
22 Tangela Hudson. See United States v. Gaines, 295 F.3d 293, 300
23 (2d Cir. 2002). The government relied on the tattoo not as an
24 “identifying physical characteristic” but for the “content of

1 what [was] written." Gilbert, 388 U.S. at 266-67. The tattoo
2 was therefore testimonial and, because it linked Greer to the
3 ammunition, incriminating. See Hiibel, 542 U.S. at 190
4 (characterizing as incriminating only those "disclosures that the
5 witness reasonably believes could be used in a criminal
6 prosecution or could lead to other evidence that might be so
7 used").

8 The tattoo, however, was not compelled by the government.
9 Detective Janus testified that he observed the tattoo on Greer's
10 arm after his arrest. No evidence supports Greer's contention on
11 appeal that officers were able to read the tattoo only by
12 applying physical force during his arrest. And, even if that
13 were true, it would still not amount to compulsion for Fifth
14 Amendment purposes. The Supreme Court has held that, where the
15 IRS compelled production of voluntarily prepared papers via
16 summons, the taxpayer could not avoid compliance "by asserting
17 that the item of evidence which he is required to produce
18 contains incriminating writing." Fisher v. United States, 425
19 U.S. 391, 410 (1976). Since "the preparation of all of the
20 papers . . . was wholly voluntary," they could not "be said to
21 contain compelled testimonial evidence." Id. at 409-10. The
22 voluntary tattooing of an incriminating word to Greer's arm was,
23 like the voluntary preparation of documents, not the product of
24 government compulsion. In the absence of compulsion, Greer's

1 Fifth Amendment claim fails. The admission of the testimony of
2 Detective Janus regarding Greer's tattoo was not error, much less
3 plain error.
4

5 **II. Sufficiency of the Evidence**

6 Greer argues that his conviction for weapon possession
7 should be overturned because the evidence was insufficient to
8 support it. The district court denied Greer's motion for
9 acquittal under Federal Rule of Criminal Procedure 29, a decision
10 that we review de novo. United States v. Bullock, 550 F.3d 247,
11 251 (2d Cir. 2008). We will not disturb the conviction if,
12 viewing the evidence in the light most favorable to the
13 government, "any rational trier of fact could have found the
14 essential elements of the crime beyond a reasonable doubt."
15 United States v. Xiao Qin Zhou, 428 F.3d 361, 370 (2d Cir. 2005)
16 (quoting United States v. Bruno, 383 F.3d 65, 82 (2d Cir. 2004)).

17 Greer contends that the government's case relied on nothing
18 more than a "series of hunches" insufficient to sustain the
19 jury's verdict. We disagree. Drawing the reasonable inferences
20 in the government's favor, as we must, we find the evidence more
21 than sufficient to sustain the conviction. The ammunition clip
22 was left next to the driver's seat of a Sonata that Greer had
23 been seen driving. The car was rented by Greer's girlfriend,
24 contained a pay stub and receipt in Greer's name, and was found

1 outside the apartment into which he fled. In a trash can by the
2 entrance to the same apartment, police recovered keys to the
3 Sonata along with a gun that matched the ammunition clip.
4 Furthermore, Stubbs testified to having seen Greer with the gun,
5 and explained that Greer had armed himself on that day at
6 Stubbs's suggestion. This evidence could easily convince a
7 rational jury, beyond a reasonable doubt, that Greer had "the
8 power and intention to exercise dominion and control over" the
9 gun and the ammunition. United States v. Gaines, 295 F.3d 293,
10 300 (2d Cir. 2002) (quoting United States v. Payton, 159 F.3d 49,
11 56 (2d Cir. 1998)).

13 **III. Evidence of Uncharged Crime**

14 Greer challenges the district court's denial of his motion
15 to exclude testimony regarding the robbery he planned with
16 Stubbs. Although evidence of other crimes "is not admissible to
17 prove the character of a person in order to show action in
18 conformity therewith," it can be used "for other purposes, such
19 as proof of motive, opportunity, intent, preparation, plan,
20 knowledge, identity, or absence of mistake or accident." Fed. R.
21 Evid. 404(b). The Second Circuit's "inclusionary rule" allows
22 the admission of such evidence "for any purpose other than to
23 show a defendant's criminal propensity, as long as the evidence
24 is relevant and satisfies the probative-prejudice balancing test

1 of Rule 403 of the Federal Rules of Evidence." United States v.
2 Inserra, 34 F.3d 83, 89 (2d Cir. 1994). The district court
3 acknowledged the possibility of prejudice to Greer but allowed
4 the evidence after concluding that it "does show motive, intent,
5 absence of mistake, and some plan."

6 We review a decision on admission of evidence for abuse of
7 discretion, id., which we will only find if the district court
8 "acted arbitrarily and irrationally," United States v. Garcia,
9 291 F.3d 127, 136 (2d Cir. 2002) (quoting United States v. Pitre,
10 960 F.2d 1112, 1119 (2d Cir. 1992)). If the district court
11 abused its discretion, we apply harmless error analysis. United
12 States v. Rea, 958 F.2d 1206, 1219-20 (2d Cir. 1992). Greer
13 argues that the district court erred in allowing Stubbs to
14 testify about their intended robbery, asserting that the
15 testimony showed neither motive nor intent and that, if it did,
16 its probative value was outweighed by unfair prejudice.

17 The district court did not abuse its discretion. Evidence
18 of the proposed robbery was not constrained by Rule 404(b)
19 because it was "necessary to complete the story of the crime on
20 trial." United States v. Kaiser, 609 F.3d 556, 570 (2d Cir.
21 2010) (quoting United States v. Carboni, 204 F.3d 39, 44 (2d Cir.
22 2000)). Moreover, Stubbs's testimony fits easily within the
23 Second Circuit's Rule 404(b) inclusionary rule because it
24 explains why Greer procured the firearm. And the district court

1 acted well within its "broad discretion" in finding that the
2 probative value of the evidence outweighed whatever threat of
3 unfair prejudice Greer may have faced. See United States v.
4 Birney, 686 F.2d 102, 106 (2d Cir. 1982).

5

6

CONCLUSION

7

For the foregoing reasons, the judgment of the district
8 court is AFFIRMED.