PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4433

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

QUINTIN LA PRIX DAVIS,

Defendant – Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Mary G. Lewis, District Judge. (4:18-cr-00821-MLG-1)

Argued: March 7, 2023 Decided: July 7, 2023

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

ARGUED: Jeremy A. Thompson, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Columbia, South Carolina, for Appellant. Justin William Holloway, OFFICE OF THE UNITED STATES ATTORNEY, Greenville, South Carolina, for Appellee. **ON BRIEF:** Corey F. Ellis, United States Attorney, Peter M. McCoy, Jr., United States Attorney, Robert F. Daley, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

KING, Circuit Judge:

Defendant Quintin La Prix Davis appeals from the judgment of conviction and sentence entered against him in August 2020 in the District of South Carolina. Two years earlier, in August 2018, Davis was indicted in that court for, as relevant here, possession with intent to distribute fentanyl and oxycodone, in contravention of 21 U.S.C. § 841(a)(1), (b)(1)(C) (the "distribution offense"), plus possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (the "firearm offense"). In December 2018, a jury convicted Davis on both those offenses.[1] During the sentencing proceedings, the court found Davis to be a "career offender" under Sentencing Guidelines section 4B1.1(a), in that Davis had seven prior South Carolina felony convictions supportive of such an enhancement (including, as relevant here, four South Carolina felony convictions for distribution of cocaine base). The court then sentenced Davis to 120 months in prison for the distribution offense — plus 60 consecutive months for the firearm offense — for an aggregate prison term totalling 180 months.

On appeal, Davis pursues four challenges to his convictions and sentence. First, as to the firearm offense, Davis contends that, pursuant to the "rule of completeness," *see* Fed. R. Evid. 106, the district court abused its discretion by excluding certain evidence from the jury. Second — and also concerning the firearm offense — Davis contends that the court

[1] Davis was also charged with — and convicted of — possession of a firearm by a convicted felon, in contravention of 18 U.S.C. § 924(g)(1). Consistent with the Supreme Court's 2019 decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the district court vacated the § 924(g)(1) conviction. The government does not challenge the *Rehaif* ruling on appeal, and we need not address it.

erred in denying a judgment of acquittal. Third, regarding the distribution offense, Davis contends that the court abused its discretion in declining to instruct the jury on a lesser-included offense of simple possession of fentanyl and oxycodone, in contravention of 21 U.S.C. § 844. Fourth and finally, Davis challenges his designation as a Guidelines career offender, primarily invoking our Court's 2022 decision in *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022). He contends that, under *Campbell*, none of his earlier South Carolina drug distribution convictions qualify as a "controlled substance offense" under the Guidelines. As explained herein, we reject each of Davis's contentions and affirm.

I.

A.

In the early morning hours of March 21, 2018, Deputy Dennis Cox of the Dillon County, South Carolina Sheriff's Office observed a red Cadillac veer over the center line of a local highway.[2] Cox promptly activated his cruiser's "blue lights" to effectuate a traffic stop. Davis — the driver and lone occupant of the Cadillac — initially slowed as if he was going to stop at a nearby grocery store. Instead of stopping, however, Davis accelerated and lead Cox on a two-mile vehicle chase. Eventually, Davis pulled the

[2] The facts spelled out herein are drawn from the record on appeal, and particularly from the trial record. To that end, we are obliged to recite and view the evidence in the light most favorable to the prosecution, as the prevailing party at trial. *See United States v. Bursey*, 416 F.3d 301, 304 n.1 (4th Cir. 2005).

Cadillac over near a commercial building, stopping halfway between the road and building. Davis then jumped out of the Cadillac and attempted to flee on foot.

Following a brief pursuit around the perimeter of the building, Deputy Cox apprehended Davis and placed him under arrest. Cox then began searching Davis and found 25 pills in his front right pocket. Those pills were "color coded" and separated into three small plastic bags — with blue pills in one bag, "grayish" pills in a second bag, and green pills in a third bag. Additionally, Cox discovered in Davis's front right pocket the sum of $509 in cash, primarily consisting of twenty-dollar bills.

Two other Dillon County law enforcement officers — Deputy McLellan and First Sergeant Barfield — soon appeared on the late night scene. Upon arrival, McLellan and Barfield started searching the red Cadillac. One of those officers immediately opened the vehicle's rear left side door and shined a flashlight inside. At that point, the officers observed that a firearm was lodged between the front passenger seat and the center console.

B.

In August 2018, a grand jury in the District of South Carolina indicted Davis for three offenses. As mentioned, those charges included, inter alia, the distribution offense and the firearm offense. Davis was thereafter arrested and ordered detained pending trial. While in pretrial custody, Davis placed a recorded call in November 2018 to a woman named Williams (his girlfriend). During his 14-minute recorded call with Williams, Davis made two comments about the firearm that had been discovered and seized from the red Cadillac. First, Davis remarked to Williams that, "I told them people that, shoot, that none of that ain't mine. If it was mine, I would claim it." *See* J.A. Vol. III, 4:25–4:30 (the

"exculpatory firearm comment").[3] Two minutes later, Davis related, "I ain't want to talk about how the gun got in the car." *Id.* at 6:23–6:26 (the "inculpatory firearm comment").

C.

1.

Davis's two-day jury trial was conducted in Florence in December 2018, where the prosecution presented its evidence of Davis's offense conduct. With respect to the firearm offense, the prosecutors offered testimony from Deputy Cox, who said that, when one of the officers shined his flashlight into the red Cadillac, they promptly observed "a firearm sticking out . . . between the right seat and the center console." *See* J.A. 80. Cox testified that the firearm — "a Ruger, SRC, .40 caliber firearm" — had been reported stolen from Augusta, Georgia, and was found loaded in the Cadillac with "eight rounds in the magazine and one round in the chamber." *Id.* at 84-85. Cox further testified that the officers saw "the reflection of the weapon," and observed that the "butt of the gun was facing out." *Id.* at 100, 105. Deputy McLellan also took the witness stand, confirming that the Ruger firearm was "within arm's reach of the driver" of the vehicle. *Id.* at 121.

To further prove that Davis knew that the stolen and loaded Ruger firearm was inside the red Cadillac, the prosecution offered part of the recording of the November 2018 jail phone call between Davis and Williams. More specifically, pursuant to Federal Rule of Evidence 801(d)(2) — which permits the introduction of an out-of-court "statement . . .

[3] Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.

offered against an opposing party" — the prosecutors offered the inculpatory firearm comment. The prosecution then requested that, if Davis sought admission of the exculpatory firearm comment, the presiding judge rule that it was inadmissible hearsay and could not be admitted into evidence, pursuant to Rule 106's "rule of completeness."[4] For his part, Davis argued that the exculpatory firearm comment also had to be introduced, in order to properly contextualize the inculpatory firearm comment.

Ruling from the bench, the district court agreed with the prosecution and rejected Davis's effort to have the exculpatory firearm comment admitted into evidence. In support of its ruling, the court explained,

> I am not going to allow . . . [the defense] to read the [exculpatory firearm comment]. I think it is self-serving hearsay. I don't think there's any question about that and even though it certainly contains things that you could argue are exculpatory and might give some more explanation to it, I don't think there is anything misleading or unclear about the section that the [prosecution] wants to offer and I don't think that it's necessary to clarify or give context to [the inculpatory firearm comment], so I am not going to require the [prosecution] to read in . . . the portion that the defense suggests.

See J.A. 142.

In addition, the prosecution presented evidence that established Davis as the true owner of the red Cadillac. More specifically, the prosecutors introduced documentary evidence reflecting that, on two occasions in 2016 and 2017, Davis had been stopped by the police while driving the Cadillac. The prosecutors also presented testimony from a

[4] Federal Rule of Evidence 106 embodies the "rule of completeness" and provides, in relevant part, that, "[i]f a party introduces all or part of a . . . recorded statement, an adverse party may require the introduction, at that time, of any other part . . . that in fairness ought to be considered at the same time."

woman named Murray (the mother of Davis's cousin's child). Murray confirmed that, although the Cadillac was titled in Davis's mother's name in 2016 — and in Murray's name in 2017 and 2018 — Davis was always its true owner. Murray said that she had titled the Cadillac in her name in 2017 and 2018 as a favor to Davis and his family. Murray also testified that she had "never, never been in [the Cadillac], never in my life," and that it had "never [been] in [her] possession." *See* J.A. 189, 193. And she confirmed that Davis had always paid for insurance coverage on the Cadillac.

Turning to the distribution offense, the prosecution presented the evidence of an expert named Mitchell Hansen, a forensic chemist with the Florence County Sheriff's Office. Hansen testified to the results of the forensic examination and testing that had been conducted on the pills found in Davis's front right pocket. To that end, Hansen opined that the first plastic bag — which contained 13 blue pills — "scored" as "A-215." *See* J.A. 176-77.[5] According to Hansen, such a notation indicated that the blue pills contained 30 milligrams of oxycodone. Hansen explained, however, that after those 13 pills had been tested, they were identified as fentanyl. As to the plastic bag of four green pills, Hansen testified that each scored as 30 milligrams of oxycodone. And Hansen confirmed that the third plastic bag — which contained eight "grayish" pills — scored as 30 milligrams of

[5] Hansen explained that a pill's "score" is denoted by the imprint — i.e., "A-215" — that is reflected on the outside of the pill. Hansen related that the "score" on the pill can be utilized to identify the drug type, strength, and manufacturer of a pill. Hansen said that, in general, such pills that are obtained from a pharmacy are scored correctly.

oxycodone. Unlike the 13 blue pills, however, Hansen testified that the green and "grayish" pills had been correctly scored as oxycodone — not fentanyl.[6]

2.

Following the prosecution's case-in-chief, Davis moved for judgment of acquittal on the firearm offense, pursuant to Federal Rule of Criminal Procedure 29 (specifying that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction").[7] Davis argued that the prosecutors had failed to sufficiently prove that he had possessed (either actually or constructively) the stolen and loaded Ruger firearm discovered inside the red Cadillac. The court orally denied Davis's Rule 29 motion, explaining that — although the prosecution's evidence on the firearm offense was not "overwhelming" — a "reasonable jury" could yet "find guilt on [the firearm offense] beyond a reasonable doubt." *See* J.A. 226.

Moving to the defense case, Davis opted not to testify, and he presented only the testimony of his girlfriend. Concerning the distribution offense, Williams testified that Davis had arthritis, which caused him to suffer temporary pain and discomfort. Her

[6] In support of the distribution offense, the prosecution also presented evidence from an agent named Townsend, who had conducted multiple controlled buys of illicit substances (including fentanyl and oxycodone pills). Townsend explained that, based upon his experience, such pills as those seized from Davis would generally sell on the "drug market" for $20 to $30 per tablet.

[7] Davis also unsuccessfully moved for judgment of acquittal on the distribution offense, but he does not now challenge the propriety of that ruling.

testimony was brief, however, and she did not assert that Davis ever took prescription medications or over-the-counter medications for his arthritis. Nor did Williams say that Davis used drugs, either recreationally or to self-medicate his arthritis pain.

After the parties rested, Davis requested the district court to instruct the jury on the lesser-included offense of simple possession with respect to the distribution offense. More specifically, Davis asked for an instruction that the misdemeanor offense of simple possession of fentanyl and oxycodone — in contravention of 21 U.S.C. § 844 — could be considered as a lesser charge in the distribution offense.[8] The court denied that request, stating only that it had "to follow up what the defendant was indicted for." *See* J.A. 241.

3.

After the closing arguments and jury instructions, the jury retired and deliberated for about an hour. Rendering its verdict in favor of the prosecution on each count, Davis was adjudged guilty of all three charged offenses.

D.

The probation office prepared Davis's presentence investigation report (the "PSR") in early 2019, and it recommended that Davis be designated as a Guidelines career offender. *See* USSG § 4B1.1(a) (providing career offender designation if, inter alia, "the defendant has at least two prior felony convictions of . . . a controlled substance offense").

[8] 21 U.S.C. § 844 provides, in relevant part, that "[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner." That statute provides, inter alia, for "a term of imprisonment of not more than 1 year."

The PSR recommendation was predicated on the fact that Davis had seven prior South Carolina felony convictions that supported such an enhancement: one for strong armed robbery, in violation of South Carolina Code section 16-11-330(A); four for distribution of cocaine base, in contravention of South Carolina Code section 44-53-375(B); and two for distribution of cocaine, in violation of South Carolina Code section 44-53-370(a)-(b). Davis timely objected to the PSR's career offender designation, asserting that his prior distribution convictions do not qualify as Guidelines controlled substance offenses.

At the sentencing hearing conducted in August 2020, Davis renewed — and argued — his objection to being a Guidelines career offender, which the district court overruled. As a result of being a Guidelines career offender, Davis's criminal history category was VI, and his Guidelines range of imprisonment was 360 months to life. Agreeing with Davis's assertion that a downward sentence was warranted, however, the court imposed a prison sentence of 120 months for the distribution offense, followed by a consecutive sentence of 60 months for the firearm offense. Davis timely noted this appeal later that same month, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

E.

During the pendency of this appeal, our Court decided — in January 2022 — a case called *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022), wherein we evaluated, inter alia, whether an "attempt" offense can qualify as a "controlled substance offense" under Guidelines section 4B1.2(b)'s definition of that term. Davis failed to raise that type of argument in his initial appellate briefs, however, perhaps in light of *United States v. Furlow*, 928 F.3d 311, 322 (4th Cir. 2019) (recognizing that South Carolina felony

conviction for distribution of crack cocaine "is a career offender predicate" under Guidelines), *vacated on other grounds*, *Furlow v. United States*, 140 S. Ct. 2824 (2020). By order of April 2022, we granted leave for Davis to file supplemental appellate briefs addressing the impact, if any, of the *Campbell* decision on this appeal. Davis now argues that *Campbell* provides support for his appeal on the Guidelines career offender issue.

II.

On appeal, Davis challenges his convictions and sentences on the firearm offense and the distribution offense, plus his designation as a Guidelines career offender. As explained below, we are satisfied to reject each of those challenges and affirm.

A.

In challenging his conviction on the firearm offense, Davis first contends that the trial court abused its discretion in refusing to admit the exculpatory firearm comment — that is, the recorded statement from the November 2018 jail phone call in which Davis said that he "ain't want to talk about how the gun got in the car." Separate from that contention, Davis maintains that the court erred in denying his Rule 29 judgment of acquittal motion on the firearm offense. We address those contentions in turn.

1.

Starting with Davis's contention that the district court erred in rejecting the introduction of the exculpatory firearm comment into evidence, we review that question for an abuse of discretion. *See United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996).

And "an error of law by a district court is by definition an abuse of discretion." *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 150 (4th Cir. 2002).

a.

Federal Rule of Evidence 106 — commonly referred to as the "rule of completeness" — provides, in relevant part, that "[i]f a party introduces all or part of a . . . recorded statement, an adverse party may require the introduction, at that time, of any other part . . . that in fairness ought to be considered at the same time." To that end, a trial court may allow into the record "relevant portions of excluded testimony which clarify or explain the part already received." *See United States v. Bollin*, 264 F.3d 391, 414 (4th Cir. 2001). And that remedy "prevent[s] a party from misleading the jury" by failing to introduce the aspects of a recording that "in fairness ought to be considered at the same time." *Id.*

Of importance here, our Court has recognized that Rule 106 "does not . . . render admissible the evidence which is otherwise inadmissible under the hearsay rules." *See United States v. Lentz*, 524 F.3d 501, 526 (4th Cir. 2008) (internal quotation marks omitted); *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014). Nor, for that matter, does Rule 106 "require the admission of self-serving, exculpatory statements made by a party which are being sought for admission by that same party." *Id.*; *see also Bollin*, 264 F.3d at 414 (recognizing that "[t]he fact that some of the omitted testimony arguably was exculpatory does not, without more, make it admissible under the rule of completeness").

b.

In this situation, Davis contends that the exculpatory firearm comment should have been presented to the jury — under the rule of completeness — when the government

introduced the inculpatory firearm comment. According to Davis, introduction of the exculpatory firearm comment "was necessary to put the portion admitted by the government into context because the government utilized [the inculpatory firearm comment] to repeatedly argue to the jury that Davis knew that the firearm was in the vehicle." *See* Br. of Appellant 19. Davis claims that the exculpatory firearm comment "directly dispute[s]" the fundamental assertion of the inculpatory firearm comment — more specifically, "if the gun did not belong to [Davis], then the obvious inference to be drawn is that he didn't know how the firearm got in the vehicle." *Id.*

For its part, the government maintains that the district court properly ruled that the exculpatory firearm comment is inadmissible hearsay, in that it is an out-of-court statement offered for the truth of the matter asserted, and it is not otherwise subject to any hearsay exceptions or exclusions. As the government argues, "the district court followed this Court's clear direction that 'the rule of completeness does not render admissible . . . evidence which is otherwise inadmissible under the hearsay rules.'" *See* Br. of Appellee 26 (quoting *Hassan*, 742 F.3d at 134). The government also claims that the rule of completeness does not "require the admission of self-serving, exculpatory statements made by a party which are being sought for admission." *Id.* (quoting *Hassan*, 742 F.3d at 134).

In these circumstances, we need not decide whether the exculpatory firearm comment constitutes hearsay under the applicable rules. Rather, we simply conclude, pursuant to our *Lentz* precedent, that the trial court was not required to compel — or permit

— introduction of the exculpatory firearm comment.[9] That is, Rule 106 does not "require the admission of self-serving, exculpatory statements made by a party which are being sought for admission by that same party." *See Lentz*, 524 F.3d at 526. It was Davis who asked the court to require the admission of the exculpatory firearm comment (which is, in the words of the trial judge, "self-serving"). *See* J.A. 142. And in this situation, we are satisfied that the judge did not abuse her discretion in excluding the exculpatory firearm comment, in that its admission was not necessary to avoid misleading the jury, and it was not needed to place the inculpatory firearm comment in proper context.

2.

Davis next contends that the district court erred in denying his motion for judgment of acquittal on the firearm offense. More specifically, Davis contends that the prosecution failed to present sufficient evidence for the jury to convict him on that offense. We review de novo a district court's denial of a motion for judgment of acquittal, made pursuant to Rule 29. *See United States v. Alerre*, 430 F.3d 681, 693 (4th Cir. 2005).

a.

Our Court has recognized that a defendant seeking to challenge the sufficiency of evidence — pursuant to Rule 29 — faces a "heavy burden." *See United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997). In that sense, we have emphasized that "[r]eversal

[9] To be sure, had the exculpatory firearm comment been introduced by the government at trial, it would not be hearsay under Rule 801(d)(2) (providing that statement by party-opponent is not hearsay). On the other hand, if Davis had sought to introduce the comment in the defense case, it would be hearsay and Rule 801(d)(2) would not apply.

for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *Id.* (internal quotation marks omitted). In conducting a sufficiency of evidence review, a court of appeals is obliged to sustain a guilty verdict if — viewing the evidence in the light "most favorable to the prosecution," *see United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003) — the verdict is supported by "substantial evidence," *see United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc). "Substantial evidence" has been defined as "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*

In relevant part, 18 U.S.C. § 924(c)(1)(A) criminalizes the conduct of any person who, "in furtherance of [a drug trafficking crime] crime, possesses a firearm." To that end, the prosecution was entitled to prove the firearm offense by establishing either actual or constructive possession. To establish actual possession, the prosecution simply had to prove that Davis "voluntarily and intentionally had physical possession of the firearm." *See United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005). To establish constructive possession, however, the prosecution was only obliged to show that Davis "intentionally exercised dominion and control over the firearm, or had the power and intention to exercise dominion and control over the firearm." *Id.* at 436. As we have observed, "constructive possession" can be proven by way of either direct or circumstantial evidence. *See United States v. Laughman*, 618 F.2d 1067, 1077 (4th Cir. 1980). And a jury can "consider proximity [of an object] as part of [its] analysis of a defendant's constructive possession." *See United States v. Shrader*, 675 F.3d 300, 308-09 (4th Cir. 2012).

b.

In light of the foregoing, Davis contends that the prosecution failed to establish that he was in either actual or constructive possession of the stolen and loaded Ruger firearm found in the red Cadillac. Davis maintains that the prosecution "did not present any evidence that [he] actually possessed the firearm because the only evidence presented at trial was that the firearm was found in the vehicle." *See* Br. of Appellant 10. Davis also asserts that the prosecutors failed to establish that he had constructively possessed the firearm, in that "[t]he government did not present any evidence that Davis knew that the firearm was in the vehicle." *Id.* at 11. In support of his constructive possession argument, Davis relies on a Sixth Circuit decision called *United States v. Bailey*, where the court of appeals ruled that "[w]ere we to hold that driving the car as its lone occupant sufficed to establish constructive possession of a firearm found underneath the driver's seat, then we would . . . institute an untenable strict liability regime for constructive possession under . . . § 924(c)(1)(A)(i)." *See* 553 F.3d 940, 948 (6th Cir. 2009).

In response to that proposition, the government asserts that sufficient evidence was presented for the jury to conclude — beyond a reasonable doubt — that Davis constructively possessed the Ruger firearm that was discovered in the red Cadillac. And the government emphasizes that Davis's reliance on the Sixth Circuit's precedent is misplaced. Unlike the *Bailey* case, the government argues that "the present case presents additional evidence beyond proximity" — which the Sixth Circuit had suggested would be sufficient to demonstrate constructive possession. *See* Br. of Appellee 18 n.9.

c.

On this record, we have no trouble agreeing with the government that there was substantial evidence — viewed in the light most favorable to the prosecution — to support the guilty verdict on the firearm offense. Put differently, substantial evidence demonstrates that Davis was in constructive possession of the stolen and loaded Ruger firearm found in the red Cadillac, such that the guilty verdict on the firearm offense must be sustained.[10]

To begin, the prosecution offered uncontroverted testimony from Murray that Davis was the "driver and sole occupant" of the red Cadillac, which proves that Davis had dominion and control over the vehicle. *See United States v. Herder*, 594 F.3d 352, 358-59 (4th Cir. 2010) (recognizing that defendant — who "was the driver and sole occupant" of automobile — was in constructive possession of illegal drugs). Furthermore, after the vehicle pursuit by Deputy Cox, Davis jumped out of the Cadillac and attempted to flee on foot. As the courts have consistently emphasized, flight has the "tendency to establish [a defendant's] guilt." *See Allen v. United States*, 164 U.S. 492, 499 (1896); *see also United States v. Ballard*, 423 F.2d 127, 133 (5th Cir. 1970) (recognizing "the universally accepted rule . . . that evidence of flight is admissible to prove a consciousness of guilt"); *United States v. Rowan*, 518 F.2d 685, 691 (6th Cir.), *cert. denied*, 423 U.S. 949 (1975) (same).

[10] Although Davis also contends that there was insufficient evidence for the jury to conclude — beyond a reasonable doubt — that he actually possessed the Ruger firearm, the government does not contest that point on appeal. We thus focus solely on whether Davis constructively possessed the Ruger firearm.

Moreover, two Dillon County law officers confirmed that the Ruger firearm was in "plain view," wedged in between the center console and the front passenger seat. *See United States v. Bodie*, 983 F.2d 1058 (4th Cir. 1992) (recognizing that firearm discovered in "plain view" creates strong inference that defendant knew firearm was in vehicle). The stolen Ruger firearm — fully loaded — was also within arm's reach of Davis. *See United States v. Harris*, 46 F.3d 1127 (4th Cir. 1995) (finding constructive possession where defendant was driver and owner of car, and "the Glock pistol, which was fully loaded, was well within [the defendant's] reach"). And finally, the inculpatory firearm comment — i.e., Davis's statement on the phone that he "ain't want to talk about how the gun got in the car" — convincingly reveals that Davis knew that the firearm was inside the red Cadillac.

Resisting our straightforward conclusion that substantial evidence supports the guilty verdict on the firearm offense, Davis argues that the Sixth Circuit's *Bailey* decision compels a different outcome. *Bailey*, however, is readily distinguishable. Perhaps most important, the *Bailey* defendant was not the sole occupant of the vehicle (in fact, a woman was sitting in the passenger seat thereof at the time of Bailey's arrest). That is a critical fact, and the Sixth Circuit concluded that, absent "additional evidence beyond proximity," the *Bailey* defendant was not in constructive possession of a firearm found underneath the driver's seat. *See* 553 F.3d at 948. In this situation, however, there is "additional evidence beyond proximity," and it demonstrates that Davis constructively possessed the Ruger firearm. *Id.* Davis was the sole occupant of the red Cadillac, and the stolen and loaded Ruger firearm — in plain view — was well within arm's reach of Davis.

At bottom, substantial evidence supports a finding that Davis constructively possessed the Ruger firearm found inside the red Cadillac. The district court thus did not err in denying Davis's motion for judgment of acquittal on the firearm offense.

B.

Turning to the distribution offense, Davis contends only that the district court was obliged — but failed — to give the jury an instruction on the lesser-included misdemeanor offense of simple possession of fentanyl and oxycodone, pursuant to 21 U.S.C. § 844. We review "a district court's decision to give a particular jury instruction for abuse of discretion." *See United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018).

1.

As relevant here, our Court has recognized that a "defendant is not entitled to a lesser-included offense instruction as a matter of course." *See United States v. Wright*, 131 F.3d 1111, 1112 (4th Cir. 1997). Rather, a defendant is entitled to such an instruction only when he offers "*considerable affirmative evidence* unrelated to drug quantity from which the jury could have reasonably inferred that the defendant possessed the drugs solely for personal use." *Id.* at 1115-16 (emphasis added). That is, a defendant is required to demonstrate that "the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *See Keeble v. United States*, 412 U.S. 205, 208 (1973). And that is because, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* at 212-13.

2.

Stated simply, Davis failed to present what we have characterized as "considerable affirmative evidence *unrelated to drug quantity* from which the jury could have reasonably inferred that the defendant possessed the drugs solely for personal use." *See Wright*, 131 F.3d at 1115-16 (emphasis added). Although Davis argues that the small number of seized pills (i.e., 25) supported a finding of "personal use," Davis was nevertheless obliged to present — at trial — "*considerable affirmative evidence* [of] . . . personal use." *Id.* (emphasis added). On that score, the only evidence presented by Davis to remotely indicate that he was carrying the 25 pills for personal use came from his girlfriend, Williams. And her testimony was only that Davis had arthritis and suffered from temporary pain or discomfort as a result of that condition. Williams offered no testimony that Davis took drugs for pain, nor did she say that Davis was a recreational user of drugs or narcotics.[11]

Coupled with the fact that Davis failed to present considerable affirmative evidence of personal use, the prosecution presented substantial evidence to the contrary. For starters, the 25 pills — which were discovered in three plastic bags in Davis's front right pocket — were found with $509 in cash, primarily twenty-dollar bills. *See, e.g.*, *United States v. Collins*, 412 F.3d 515, 519 (4th Cir. 2005) (recognizing that intent to distribute can be inferred from drug packaging); *United States v. Davis*, 383 F. App'x 269, 277 (4th Cir. 2010) (recognizing that "plastic bags with the corners torn off, $320 in $20 bills, and two

[11] To the extent that Davis references sections of the PSR as constituting considerable affirmative evidence of personal use, those facts were not *trial* evidence.

guns" supported finding of possession with intent to distribute). And not only were the 25 seized pills color-coded by separate plastic bags, 13 of the pills were actually fentanyl, despite being "scored" as oxycodone. In addition to the seized pills and large sum of cash, the Dillon County authorities discovered — in plain sight — the stolen and loaded Ruger firearm inside the red Cadillac that belonged to Davis. *See United States v. Ward*, 171 F.3d 188, 195 (4th Cir. 1999) (recognizing that "guns are tools of the drug trade").

Lastly, although we agree with Davis that the trial court may have ruled against his request for a lesser-included offense instruction on a flawed basis — i.e., that the court needed "to follow up what the defendant was indicted for," *see* J.A. 241 — "[w]e are not limited to evaluation of the grounds offered by the district court to support its decision," *see United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005). That is, we are readily permitted to affirm on any ground "apparent from the record." *Id.* Put succinctly, Davis failed to produce at trial the required "considerable affirmative evidence" from which the jury could reasonably infer that he possessed the seized pills for personal use. *See Wright*, 131 F.3d at 1115. In the circumstances, the court did not abuse its discretion in denying Davis's request for the lesser-included misdemeanor offense instruction.

C.

Finally, Davis contends that the district court improperly designated him as a career offender, pursuant to Sentencing Guidelines section 4B1.1(a). In support thereof, Davis asserts that none of his earlier South Carolina drug distribution convictions qualify as

controlled substance offenses, such that he cannot be deemed as a career offender.[12] We review de novo the issue of whether a prior conviction is a "controlled substance offense." *See United States v. Dozier*, 848 F.3d 180, 182-83 (4th Cir. 2017). As explained below, at least four of Davis's prior South Carolina drug distribution convictions — each in violation of South Carolina Code section 44-53-375(B) — qualify as controlled substance offenses. The district court thus did not err by deeming Davis to be a Guidelines career offender.

1.

a.

Pursuant to Guidelines section 4B1.1(a), a defendant is a "career offender" if, in pertinent part, "[he] has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *See* USSG § 4B1.1(a).[13] That guideline provision incorporates the definition of a "controlled substance offense" provided in Guidelines

[12] The PSR identified three other South Carolina felony offenses that could support Davis's designation as a Guidelines career offender — that is, one count of strong armed robbery, in contravention of South Carolina Code section 16-11-330(A), plus two counts of distribution of cocaine, in violation of South Carolina Code section 44-53-370(a)-(b). Davis does not contest that his strong armed robbery conviction in South Carolina qualifies as a "crime of violence" under the Guidelines, such that it supports his designation as a career offender. Thus, in order for the career offender designation to be proper in this situation, Davis must have at least one earlier state drug distribution conviction that qualifies as a "controlled substance offense." As explained herein, we are satisfied that Davis has at least four earlier state drug distribution convictions that so qualify.

[13] Guidelines section 4B1.1(a) also requires that a defendant "was at least eighteen years old at the time [he] committed the instant offense of conviction," and that "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense." *See* USSG § 4B1.1(a). Davis does not dispute that those two elements are satisfied here. As a result, we only assess whether Davis "has at least two prior felony convictions of . . . a controlled substance offense." *Id.*

section 4B1.2(b), as well as the commentary thereto. *Id.* cmt. n.1. Meanwhile, Guidelines section 4B1.2(b) defines the phrase "controlled substance offense" as

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Id. § 4B1.2(b). To that end, the relevant commentary — set forth in Application Note 1 of Guidelines section 4B1.2(b) — provides that a "controlled substance offense" in that guideline "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* § 4B1.2 cmt. n.1.

Last year, in *United States v. Campbell*, our Court evaluated whether Application Note 1 had expanded Guidelines section 4B1.2(b)'s definition of a "controlled substance offense" to include an attempt to commit such an offense. *See* 22 F.4th 438, 441-49 (4th Cir. 2022). In *Campbell*, we ruled that Application Note 1 could not do that, and thus did not do that. In so ruling, *Campbell* emphasized the "crucial" textual difference between Guidelines section 4B1.2(b) — which "does not mention attempt offenses" — and Application Note 1, which expressly mentions such offenses. *Id.* at 442, 444. And as a result of that linguistic variance, *Campbell* resolved that an attempt offense cannot be a "controlled substance offense," as defined in Guidelines section 4B1.2(b).

b.

To determine whether an offense falls within the ambit of Guidelines section 4B1.2(b), we apply the categorical approach. *See United States v. Ward*, 972 F.3d 364, 368 (4th Cir. 2020). That approach requires us to "focus[] on the elements of the prior

offense rather than [on] the conduct underlying the conviction." *See Dozier*, 848 F.3d at 183 (internal quotation marks omitted). In that regard, "[i]f the 'least culpable' conduct criminalized by the predicate offense statute does not qualify as a 'controlled substance offense,' the prior conviction cannot support a [Guidelines] enhancement." *See Campbell*, 22 F.4th at 441 (quoting *United States v. King*, 673 F.3d 274, 278 (4th Cir. 2012)).

In this situation, four of the predicate convictions identified in Davis's PSR were for distribution of cocaine base, in contravention of South Carolina Code section 44-53-375(B). That state statute makes it a state felony for any person who "manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver . . . cocaine base." *See* S.C. Code Ann. § 44-53-375(B). Our 2019 decision in *United States v. Furlow* explicitly recognized that section 44-53-375(B) is a "divisible" provision, *see* 928 F.3d at 320, such that we apply the "modified categorical approach" and assess whether the South Carolina offense under which Davis was convicted in those four instances is a Guidelines-defined "controlled substance offense," *see United States v. Allred*, 942 F.3d 641, 648 (4th Cir. 2019).[14]

[14] Davis's PSR specified two additional convictions that could support a Guidelines career offender designation — that is, two convictions for distribution of cocaine, in violation of South Carolina Code section 44-53-370(a)-(b). Although we have not had occasion to determine whether that specific statutory provision is "divisible" — such that the modified categorical approach would apply — we need not decide that question today. As discussed *infra*, Davis's four South Carolina drug distribution convictions under section 44-53-375(B) are each for a "controlled substance offense" under the Guidelines.

2.

a.

Against this backdrop of legal principles, we agree with the parties that the modified categorical approach applies and that Davis was convicted on four separate occasions of "distribution" of crack cocaine, in violation of South Carolina Code section 44-53-375(B). *See Furlow*, 928 F.3d at 322 (specifying that section 44-53-375(B) is divisible). Relying on our *Campbell* decision, Davis argues that a "distribution" of crack cocaine — under South Carolina law — can be committed by an "attempted transfer." In *Campbell*, we concluded that the least culpable conduct criminalized by the predicate offense statute at issue there — a West Virginia drug distribution statute — was "an attempt to deliver a controlled substance." *See* 22 F.4th at 442. More specifically, we interpreted the West Virginia statute to criminalize the attempt offense of attempted delivery. As a result, *Campbell* ruled that a conviction under that West Virginia statute was an invalid basis for a Guidelines career offender designation, inasmuch as an attempt offense cannot constitute a "controlled substance offense" under Guidelines section 4B1.2(b). *Id.* at 442, 449.

As Davis would have it, the South Carolina drug distribution statute that is relevant here — section 44-53-375(B) of the South Carolina Code — also criminalizes the attempt offense of "attempted distribution," such that his four state convictions pursued as "distributions" cannot support a Guidelines career offender designation under *Campbell*. As previously mentioned, section 44-53-375(B) covers, in pertinent part, any person who "*distributes* . . . cocaine base." *See* S.C. Code Ann. § 44-53-375(B) (emphasis added). Meanwhile, the term "distribute" means "to deliver (other than by administering or

dispensing) a controlled substance." *Id.* § 44-53-110(17). In turn, the word "deliver" is defined under South Carolina law as "the actual, constructive, or *attempted transfer*" of a controlled substance. *Id.* § 44-53-110(10) (emphasis added). In arguing that section 44-53-375(B) criminalizes the attempt offense of "attempted distribution," Davis equates an "attempted transfer" with an "attempted distribution."

Put simply, we disagree with and reject Davis's contention. A "distribution" under section 44-53-375(B) of the South Carolina Code is a completed offense, not an attempt offense. And that is so because South Carolina law codifies the offense of attempted distribution separately from a completed distribution offense. Indeed, within the same statutory provision, a person may be charged under South Carolina law with "distribut[ing] . . . cocaine base . . . *or* . . . attempt[ing] . . . to distribute . . . cocaine base." *See* S.C. Code Ann. § 44-53-375(B). Although the definition of "distribute" includes the "delivery" act of "attempted transfer," accepting Davis's position would render the word "attempt" — as otherwise utilized in South Carolina Code section 44-53-375(B) — wholly superfluous. And to avoid that superfluity, an "attempted transfer" under South Carolina law must constitute a completed distribution. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (recognizing that courts must "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof").

Our conclusion that an "attempted transfer" is a completed distribution offense finds support in South Carolina decisional law. For example, in a decision called *State v. Brown*, the South Carolina Court of Appeals recognized that the definition of "distribute" means "to deliver," and that "deliver" is defined as the "actual, constructive, or attempted transfer

of a controlled drug." *See* 461 S.E.2d 828, 831 (S.C. Ct. App. 1995) (quoting S.C. Code Ann. § 44-53-110)). To that end, *Brown* recognized that "the legislature intended to punish one who distributes crack cocaine" — including "the 'culprit' who falls short of accomplishing his or her purpose" — and that "*no completed sale is required* to constitute a distribution." *Id.* (emphasis added). *Brown* thus confirms that, under the Palmetto State's applicable definition of the term "distribute," an "attempted transfer" is not an "attempted distribution," but is a completed distribution.

Furthermore, that the "distribution" offense of South Carolina Code section 44-53-375(B) constitutes a "controlled substance offense" under the Guidelines is consistent with our recent decision in *United States v. Groves*, 65 F.4th 166 (4th Cir. 2023). In *Groves*, we concluded that 21 U.S.C. § 841(a)(1) — the primary federal drug distribution statute which contains similar definitions as the South Carolina statute at issue here — constitutes a "controlled substance offense" under the Guidelines. In so ruling, we recognized that "an 'attempted transfer' is not an 'attempted delivery' under § 841(a)(1), and that § 841(a)(1) . . . does not criminalize the attempt offense of attempted delivery." *Id.* at 173. And that is so, we emphasized, "because construing § 841(a)(1) to criminalize an attempt offense would render [21 U.S.C.] § 846" — the federal law that separately criminalizes attempt offenses — wholly "superfluous." *Id.* Thus, just as the "attempted transfer" of

drugs constitutes a completed distribution under federal law, the "attempted transfer" of drugs is a completed distribution under South Carolina law.[15]

Importantly, and in similar circumstances, three of our sister courts of appeals — the Third, the Sixth, and the Eleventh Circuits — have concluded that an "attempted transfer" is not an attempted distribution under § 841(a)(1) and analogous state drug distribution statutes. *See United States v. Booker*, 994 F.3d 591, 595-96 (6th Cir. 2021) (interpreting § 841(a)(1)); *see also United States v. Penn*, 63 F.4th 1305, 1316-17 (11th Cir. 2023) (§ 841(a)(1) and Florida statute); *United States v. Dawson*, 32 F.4th 254, 259 (3d Cir. 2022) (Pennsylvania statute); *United States v. Thomas*, 969 F.3d 583, 584-85 (6th Cir. 2020) (Michigan statute); *United States v. Garth*, 965 F.3d 493, 496-98 (6th Cir. 2020) (Tennessee statute). Like the position taken by our Court in *Groves*, those courts view an "attempted transfer" as "a completed [distribution] rather than an attempt crime." *See Booker*, 994 F.3d at 596 (internal quotation marks omitted); *see also Penn*, 63 F.4th at 1317 (recognizing that "the attempted transfer of drugs constitutes a completed distribution offense"); *Dawson*, 32 F.4th at 259 (ruling that a "drug 'delivery' is a complete[d] offense, whether it is committed via actual or attempted transfer of drugs").

[15] In a recent unpublished decision rendered without argument, a separate panel of our Court — shorn of the benefit of the *Groves* precedent — ruled that South Carolina Code section 44-53-375(B) is categorically not a "controlled substance offense" under the Guidelines. *See United States v. Jackson*, No. 22-4179, 2023 WL 2852624 (4th Cir. Apr. 10, 2023). Being unpublished, however, that decision "do[es] not constitute binding precedent in this Circuit." *See Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 545 n.4 (4th Cir. 2019); *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (en banc) (same).

b.

Davis nevertheless argues that we are bound by *Campbell* to conclude that a South Carolina Code section 44-53-375(B) "distribution" offense criminalizes the attempt offense of attempted distribution. Like the defendant in *Groves*, Davis maintains that the pertinent language of section 44-53-375(B) is materially indistinguishable from the West Virginia drug distribution statute that was at issue in *Campbell*. And because we interpreted the West Virginia statute to criminalize the act of attempted delivery, Davis says that we are obliged to construe section 44-53-375(B) the same way.

The West Virginia statute underlying *Campbell* "makes it 'unlawful for any person to . . . deliver . . . a controlled substance.'" *See* 22 F.4th at 441-42 (emphasis omitted) (quoting W. Va. Code § 60A-4-401(a)). And that Mountain State statute defines the term "deliver" as "'the actual, constructive or attempted transfer from one person to another of' controlled substances." *Id.* at 442 (quoting W. Va. Code § 60A-1-101(h)). Predicated on that statutory language, *Campbell* presumed that "the least culpable conduct criminalized by the West Virginia statute is an attempt to deliver a controlled substance." *Id.*

To be sure, although the terminology of the West Virginia drug distribution statute is similar to section 44-53-375(B), we recognized in *Groves* that "the West Virginia scheme — at least as it was presented in *Campbell* — does not criminalize attempt offenses separately from completed drug distribution offenses." *See* 65 F.4th at 174. And that fact ultimately renders the West Virginia scheme materially distinguishable from the South

Carolina statutory scheme at issue here, wherein completed drug distribution offenses are defined separately from attempt offenses.[16]

* * *

At the end of the day, the "distribution" offense of South Carolina Code section 44-53-375(B) does not criminalize the attempt offense of "attempted distribution," but rather the completed offense of "attempted transfer" *See Brown*, 461 S.E.2d at 831. Accordingly, we rule today that a section 44-53-375(B) distribution offense is not categorically disqualified from being treated as a Guidelines "controlled substance offense." As a result of that ruling, Davis's contention that four of his prior drug distribution convictions — as punished by section 44-53-375(B) of the South Carolina Code — is without merit. The district court thus did not err by deeming Davis to be a Guidelines career offender.

III.

Pursuant to the foregoing, we reject the various contentions of error pursued by Davis in this appeal and affirm the judgment of the district court.

AFFIRMED

[16] As we recognized in *Groves*, "the government did not dispute in the *Campbell* proceedings that the West Virginia drug distribution statute criminalizes the attempt offense of attempted delivery." *See* 65 F.4th at 174 n.5. Accordingly, to the extent that "attempt offenses are actually criminalized separately (in West Virginia Code section 61-11-8) from completed distribution offenses," that point does not impact our interpretation of South Carolina law. *Id.* at 174.