

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

08-1069 and 08-1089

UNITED STATES OF AMERICA,)	Appeal from the
)	United States District Court
Plaintiff-Appellee,)	for the Northern District of Indiana,
)	South Bend Division.
)	
v.)	
)	No. 3:04 CR 138
RICKY L. FINES)	
and LEROY F. MILLER,)	The Honorable Judge Allen Sharp
)	
Defendants-Appellants.)	

**CONSOLIDATED BRIEF AND APPENDIX OF THE
PLAINTIFF-APPELLEE**

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**UNITED STATES COURT OF APPEALS
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Nos. 08-1069 and 08-1089

**UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
RICKY L. FINES and LEROY F. MILLER,
Defendants-Appellants**

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF INDIANA**

BRIEF OF THE APPELLEE

JURISDICTIONAL STATEMENT

The jurisdictional statements of Defendant-Appellants are complete and correct.

ISSUES PRESENTED FOR REVIEW¹

- I. Whether the district court erred in denying Appellant Miller’s Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29.
- II. Whether the trial court erred in finding Appellant Miller was not a “collector” and therefore not entitled to the benefit of U.S.S.G. § 2K2.1(b)(2).
- III. Whether the district court abused its discretion by admitting into evidence a folder of receipts for gun parts.

¹Miller’s issues on appeal will be addressed first (I and II), followed by Fines’s issues (III, IV, and V).

- IV. Whether the district court abused its discretion by admitting into evidence a photograph of Fines.
- V. Whether the district court erred in denying Appellant Fines's Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29.

STATEMENT OF THE CASE²

On December 9, 2004, a four count Indictment was filed against Ricky L. Fines (“Fines”) and Leroy F. Miller (“Miller”). On April 13, 2006, the government filed a two count superseding Indictment against the same defendants. Count 1 alleged that between April 8, 2003 and April 8, 2004, Fines, a felon, possessed one or more firearms in violation 18 U.S.C. § 922(g)(1). Count 2 alleged that between April 8, 2003 and April 8, 2004, Miller aided Fines in his illegal possession of firearms in violation of 18 U.S.C. §§ 2 and 922(g)(1). R. 27.

After a mistrial on March 6, 2007, the joint trial began on April 10, 2007. R. 54, 67. On April 12, 2007, the jury found both Fines and Miller guilty. R. 72, 73. On January 2, 2008, the district court sentenced Fines to 48 months imprisonment, 2 years supervised release, and a \$100 special assessment, and Miller to 10 months imprisonment, 2 years supervised release, and a \$100 special assessment. R. 95.

On January 8, 2008 Miller filed his notice of appeal and on January 10, 2008, Fines filed his notice of appeal. R. 105, 108.

STATEMENT OF FACTS

In March 2004, Agent Jeffrey Emmons began an investigation based on a tip that federal firearms violations were occurring at the home of Leroy F. Miller located in rural farmland in Cass County Indiana. Tr. Vol. I at 25 - 26. Emmons learned that Ricky

² Citations to the trial transcript are abbreviated “Tr. ” Any citation to the documents listed on the district court’s final docket sheet is denoted by “R.”

Fines, who lived with Leroy Miller and his family at the farmhouse had been convicted of a felony prior to April 8, 2003. *Id.* at 33. On March 9, 2004, Agent Emmons visited the farmhouse, located at 857 West 350 South, in Cass County, Indiana, along with a local police officer for purposes of serving process that was unrelated to this case. *Id.* at 29-30. Agent Emmons saw a firearm in the limited part of the farmhouse which he saw that day. *Id.* at 30-31. Based on this and other information from the investigations, Agents later returned with a search warrant for the residence on April 8, 2004 that authorized them to search for firearms on the premises. *Id.* at 31. Agent Emmons was not present when the search was initially conducted, but instead was involved in interviewing Fines and Miller at the Cass County Sheriff's office, where the two had been requested to meet with deputies as a pretext for having them out of the farmhouse when the search was conducted. *Id.* at 31-32.

At Miller's farmhouse, agents and police officers assisting in the search found 34 operational firearms and thousands of rounds of ammunition. *Tr.* Vol. I at 45, 106. Inside the farmhouse, agents found a loaded Mossberg 12 gauge shotgun on the first floor behind a hallway door, and a Romanian .22 caliber rifle and Remington 870 12 gauge shotgun upstairs. *Id.* at 79-80. Outside, in a shed, the agents found an additional 31 firearms wrapped in blankets. *Id.* at 106. Agent Emmons conducted an examination of the firearms for latent fingerprints and found none. *Id.* at 48. He said they appeared to be very clean, to the point of being wiped down, and were rust-free. *Id.* at 48-49. According to Emmons, the shed they were found in, however, was not a good location for

storing firearms:

[I]t has no controlled environment. If you look at the building, especially from the side angle, you can see that the boards are actually apart and loose, and its not a weatherproofed building; so if you were to keep firearms in that building for any period of time, you would have a degree of oxidation or rust appearing on the firearms because it is not a controlled environment. That building, if I remember right, was basically falling apart. So if you kept firearms out there, it would be a very high moisture area that wouldn't be a good place to keep firearms.

Id. at 49. The agent also found evidence that the firearms had previously been stored in Fines's room, as several witnesses stated at the subsequent trial. *See below.*

Primary issues at the trial were when Miller became aware of Fines's felony conviction, and when the guns were moved to the shed. During his interview at the sheriff's office, Fines admitted to Agent Emmons that he slept in a room on the lower east floor of the farmhouse, and that he had moved into the residence in 2000 or 2001. Tr. Vol. I at 37-38. In a portion of his recorded interview played at trial, Miller himself stated that Fines had originally moved into his house in November 2001, and that Fines had told him about his arson conviction about a year later, or November of 2002. Exh. 29 excerpt 1, Tr. Vol. I at 66. However, Miller told police officers during his interview that the firearms had been moved out of the farmhouse and to the shed two weeks before Fines moved into the farmhouse. Tr. Vol. I at 68. This would have meant that the guns had been stored in the outbuilding from October or November of 2001 to April, 2004, or nearly two and a half years.

At the subsequent trial, several witnesses contradicted Miller's statement, and

testified that Fines's room in the farmhouse was filled with guns even after Miller admitted that he became aware of Fines's felony conviction. Glenn Hissong, a minister at Miller's church testified that he had been out to the Miller farmhouse on several occasions to go shooting during the period that Fines lived at the farmhouse. Tr. Vol. I at 130-32. On ten to twelve of these occasions he visited Fines's room, which he described as the room in which Fines slept and where the guns were kept. *Id.* at 132.¹ The last occasion on which he went to the house to go shooting he described as "either in 2003 or early 2004," and he again was in Fines's room. *Id.* at 133. Hissong testified that on all occasions the guns to be used for shooting were taken from Fines's room and none were ever taken out of the shed. *Id.* at 134. Hissong also testified that Fines and Miller told him that they had a hobby or business related to guns in that "they would collect the guns that were valuable to collectors, but that might not be in the condition that a collector would pay money for, and clean them and then try to sell them to other collectors." *Id.* at 137.

Leroy F. ("Ike") Miller IV, the son of defendant Miller, also contradicted his father's statements to Emmons about where the guns were stored during Fines's residency at the farmhouse. Ike lived in the farmhouse with his mother and father from the age of three to the age of 18. Tr. Vol. II at 5-6.² From the age of 15 Ike was home-schooled,

¹Mr. Hissong described the room by location in the house, and also being the room that contained a recliner in which Mr. Fines slept. *Id.* at 132, 140.

²Ike was 20 at the time of the trial, which occurred in 2007, so he lived in the farmhouse throughout the period covered by the indictment. *Id.* at 5.

and was therefore home “all the time.” *Id.* at 9. Ike testified that both his father and Fines were on disability during this period, and he therefore spent a lot of time at home with them. *Id.* at 10. He stated that Fines slept in a recliner in the room where the guns were stored and that in late 2003 and early 2004 there were approximately 30 guns in Fines’s room. *Id.* at 14, 16. Ike testified that he helped Fines cleaning and working on the guns in his room:

Q. You would help Mr. Fines clean the guns?

A. Yes.

Q. Did Mr. Fines work on the guns -- only on the stocks of the guns, with the stocks detached, or with the stocks still attached to the metal part of the gun?

A. It would depend on what he was doing, but a lot of the times the stocks were detached.

Q. But sometimes they weren't?

A. Yes.

Q. Did Mr. Fines know a lot about the guns in the room?

A. Yes, he did.

Q. How do you know that?

A. Because sometimes I would cross-check what he had to say and it would come out right; and he knew what he was doing working on them, and he was very familiar with them. There was no uncertainty whatsoever in what he was doing.

Q. Did you learn a lot from Mr. Fines about the guns in the room?

A. Yes, I did.

Q. What kinds were in the room? What kinds of rifles were in Mr. Fines’s room?

A. They had AK-47s. They had a couple M1-A1s. They had a number of Lee Enfields. A number of the Mosin Nagants.

Id. at 16-17. Ike also testified that Fines and his father bought and resold guns at both guns shows and gunshops. *Id.* at 25, 39-40.

Ike testified that about “two to three weeks, possibly a month” before the search

warrant was executed at his home, the guns and ammunition were moved from Fines's room to the shed where the agents found them on April 8, 2004. Tr. Vol. II at 22.³ He said he was gone that day, and that when he returned home, some of the guns had been moved to the shed, and that his father instructed him to wrap the rest in blankets and move them into the shed. *Id.* at 22-24.

James Ford, a gunshop owner in Logansport also testified at the trial that Fines and Miller had spoken to him on more than one occasion about refurbishing guns and reselling them:

- Q. Now, did you have any conversation with them, Mr. Fines and Mr. Miller, about refinishing guns -- refurbishing guns?
- A. They talked about it, to refinish them and resell them.
- Q. And was this a conversation that both were involved in?
- A. Yes.
- Q. And what did they tell you about what they did with guns?
- A. They were going to redo the stocks and reglue [reblue] the barrels.
- Q. And then do what with the guns?
- A. Sell them.
- Q. Did you have this conversation -- did they talk about that business, I guess, or hobby -- whatever -- on more than one occasion with you?
- A. Yes.

Id. at 57.

SUMMARY OF THE ARGUMENT

The evidence with regard to Fines and Miller, taken in the light most favorable to the government, was sufficient for a jury to find all the elements of the case beyond a

³Therefore, Fines and Miller would have moved the guns from Fines's room to the shed after Agent Emmons visited the farmhouse with a local officer. Their visit occurred on March 9, 2004, Tr. Vol. I at 30, and the search warrant was executed on April 8, 2004. *Id.* at 31. This would explain why the guns were in such good condition even though they were stored in a shed.

reasonable doubt. The government's case showed that Fines was convicted of a felony offense, that he moved into Miller's farmhouse in November of 2001, and that Miller learned of his felony conviction a year later, in November 2002. The evidence also showed that even after that time, Miller permitted Fines to live in a room in his house literally filled with firearms, and that Miller and Fines even had a business or hobby of refurbishing and reselling firearms. Finally, the evidence also showed that Miller and Fines moved the firearms out of Fines's room sometime after Agent Emmons visited the farmhouse on March 9, 2004, in an apparent effort to avoid discovery.

With regard to Miller's argument that he was a "collector" and was thus entitled to the benefit of U.S.S.G. § 2K2.1(b)(2), the evidence showed that Miller and Fines were engaged in a business of refurbishing firearms, which would make this guideline inapplicable. Furthermore, one shotgun which belonged to Miller, and to which Fines had access, was fully loaded and found in the hallway outside Fines's room. This was apparently used for home defense, which would also not qualify under this guideline.

Fines argues that two government exhibits, a file containing receipts and bills of sale for guns and gun parts, and a photograph of him seated in his room under a rack containing four rifles, should not have been introduced into evidence. However, the district court did not abuse its discretion in admitting either of these exhibits.

ARGUMENT

I. The Jury's Guilty Verdict Against Miller Should be Upheld Because the Evidence, Considered in a Light Most Favorable to the Government, was

Sufficient to Allow a Rational Trier of Fact to Find all of the Elements of the Offense Beyond a Reasonable Doubt.

Appellant Miller's first issue for appeal is that the evidence was not sufficient to find him guilty. When reviewing a jury's conviction for sufficiency of the evidence, all evidence must be considered in a light most favorable to the government. *United States v. Thompson*, 523 F.3d 806 (7th Cir. 2008). The jury's decision may only be overturned if the evidence, when viewed in such a way, is not sufficient to allow a rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *United States v. Powell*, 469 U.S. 57, 67 (1984); *United States v. Van Allen*, 524 F.3d 814, 819 (7th Cir. 2008). To satisfy this difficult task the defense "carries a heavy burden" and faces "an uphill battle." *United States v. Leahy*, 464 F.3d 773, 794 (7th Cir. 2006); *United States v. Fleischli*, 305 F.3d 643, 657 (7th Cir. 2002). The appellant "faces a nearly insurmountable hurdle ... [in that] we consider the evidence in the light most favorable to the Government, defer to the credibility determination of the jury, and overturn a verdict only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Moore*, 115 F.3d 1348, 1363 (7th Cir.1997) (internal quotation marks and citations omitted). This difficult burden is not met here.

The evidence presented against Miller was sufficient to sustain a guilty verdict. The elements of the offense, as instructed by the district court, were: first, that prior to April 8, 2003, Ricky Fines had been convicted of a crime that was punishable by a term of

imprisonment of more than one year; second, that on or around April 8, 2003 to April 8, 2004 Fines knowingly possessed a firearm; third, that the firearm possessed by Fines had traveled in interstate commerce prior to Fines's possession of it; and fourth, that Leroy Miller knowingly aided Fines in that offense. Tr. Vol. III at 134-135. To aid in an activity is to be knowingly associated with the criminal activity, participate in it, and try to make it succeed. Tr. Vol. III at 137. The evidence presented at trial was sufficient to allow a reasonable trier of fact to find all four of these elements.

With regard to the first and third elements, all parties stipulated that Fines was a convicted felon prior to April 8, 2003 and that all the firearms found at Miller's farmhouse on April 8, 2004, had traveled in interstate commerce. Tr. Vol I at 34, 47. This left the prosecution to show only the second and fourth elements: that Fines was in possession of a firearm during some time between April 8, 2003 and April 8, 2004, and that Miller had aided him in that possession.

The government presented overwhelming evidence that Fines had access to firearms after April 8, 2003 at Miller's farmhouse. In a shed behind the farmhouse agents found 31 firearms and thousands of rounds of ammunition. Tr. Vol. I at 106. Agents found four⁴ more firearms inside the farmhouse. Tr. Vol. I at 79-80. Furthermore, Agent Emmons told the court that while no rifles were found in Fines's room, during his interview Fines admitted to agent Emmons that his fingerprints might be found on the firearms in the shed

⁴Agents found three additional long guns in the house, and a receiver/frame for a pistol in Fines's room on the workbench. Tr. Vol. I at 79-80.

because he had handled them. Tr. Vol. I at 39, 52. Agents also found a loaded Mossberg shotgun behind the door in the hallway outside Fines's room, where it would have been easily accessible to Fines. Tr. Vol. I at 82-85.

Although Miller told Agent Emmons that he moved the guns to the shed before Fines moved into the farmhouse in November 2001, evidence showed that the guns actually were not moved until after Agent Emmons had visited the house on March 9, 2004, just a few weeks prior to the ATF search on April 8, 2004. Tr. Vol II. at 68. Agent Emmons testified that the guns were clean had no rust, but that the shed was not a good place to store firearms. Tr. Vol. I at 48-49. Glen Hissong testified that on each of his many visits to the Miller farmhouse to shoot with Miller, the guns were stored in Fines's room, and that his last such visit was in 2003 or early 2004. Tr. Vol. I at 132-33. Furthermore, Ike Miller stated that in late 2003 and early 2004, close to 30 firearms were stored in Fines's room and that they were only moved to the shed in the weeks immediately prior to the ATF's search. Tr. Vol. II at 16, 22. This testimony is consistent with the condition in which the firearms were found. Two photographs, exhibits 12 and 13, were introduced as evidence as well, the first depicting Fines in his room at the Miller house, with firearms stored on the walls on a gun rack. Tr. Vol II. at 11-14.⁵ The other photograph depicted Miller in the same room, with guns in a gun cabinet visible on another wall. Tr. Vol. II at 14-15. Both Ike Miller and Hissong testified that these photographs were accurate representations of Fines's room

⁵See Exhibits 12 and 13 in Appendix. Also see two exhibits matched together, which supports Ike Miller's testimony that they were taken at the same time.

as it was in late 2003 or early 2004. Tr. Vol. I at 136, Vol II at 15. Because it was stipulated that Fines was a convicted felon prior to April 8th 2003, this evidence shows that firearms were stored in Fines's room at a time when he was a convicted felon, and when Miller knew of the conviction.

There was also substantial evidence presented to show Fines had been in actual possession of a firearm after April 8th, 2003. Ike Miller testified that Fines worked on gun stocks, sometimes while they were still attached to the firearm, that he occasionally fired guns with Ike and Leroy Miller when Hissong was visiting the house, and that Fines cleaned and rebuilt Hissong's gun and repaired Ike's gun as well. Tr. Vol II. at 16-17, 20, 21. Ike also testified that he helped Fines cleaning the guns in his room:

Q. You would help Mr. Fines clean the guns?

A. Yes.

Q. Did Mr. Fines work on the guns -- only on the stocks of the guns, with the stocks detached, or with the stocks still attached to the metal part of the gun?

A. It would depend on what he was doing, but a lot of the times the stocks were detached.

Id. at 16-17. Ford testified that Fines actually took and handled a gun in his store while visiting there with Miller. Tr. Vol II. at 56. This is sufficient evidence for a reasonable trier fact to conclude that, after his felony conviction, Fines was in possession of a firearm.

More evidence was presented to show how Miller knowingly aided Fines in the commission of his offense. Fines lived with Miller from November, 2001 up to the time of the search in April, 2004, during which he was a convicted felon. Tr. Vol. II at 6, Vol I. at

30-31. Miller himself admitted that Fines had moved into his house in late 2001 and had told him about his conviction about a year later. Exh. 29 excerpt 1, Tr. Vol. I at 66-67. John Graf testified that he helped Fines move into the Miller house and that Fines did not bring any guns with him. Tr. Vol. III at 5-6. Finally, the photographs of Fines's room, full of guns, along with the testimony of Ike Miller, Hissong, and Graf established that Miller stored his guns in Fines room, giving him unrestricted access to them at anytime.

Further evidence showed that Miller purchased guns with the intention of refinishing them and reselling them. Hissong testified that Fines and Miller told him that "they would collect guns that were valuable to collectors, but that might not be in the condition that a collector would pay money for, and clean them and then try to sell them to other collectors." Tr. Vol. I at 137. James Ford also testified that the two men represented to him that together they had a business or hobby of refinishing and reselling guns. Tr. Vol II at 57. This testimony was further supported by Government Exhibit 11, see discussion in part II below, and the reference books found in Fines's room depicted in the search warrant video:

Q. You're zooming in on some of the titles of these books. Could you tell the jury if any of these books pertain to guns?

A. Most of them do. Gun Digest 2004, Shooter's Bible, for example, Smith & Wesson, Gun Values, Gunsmithing Guide, Firearms Assembly & Disassembly.

Tr. Vol. I at 79. Although Miller purchased the firearms, Ike Miller testified that Fines often refinished the stocks of the guns, sometimes with the firearm still attached. Tr. Vol II at 16-17. By allowing Fines to live in a room filled with guns, and work on those guns,

Miller provided Fines with the firearms which he illegally possessed, thereby acting in such a way as to participate in Fines's possession of a firearm and try to make it succeed. This satisfies the aiding element of Miller's offense.

Based on the above, when viewed in the light most favorable to the government, the evidence presented was more than sufficient to allow the jury to determine both that Fines was in possession of a firearm while he was a convicted felon, and that Miller knowingly aided him in that offense.

II. The Trial Court Did not err in Finding that Miller was not a "Collector" for purposes of U.S.S.G. § 2K2.1(b)(2).

Appellant Miller's second issue for appeal is that the district court erred when it held that he did not qualify as a collector for purposes of U.S.S.G. § 2K2.1(b)(2). This provision states that:

2. If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

Questions of law that relate to the interpretation of the Sentencing Guidelines are reviewed *de novo*. *United States v. Parolin*, 239 F.3d 922, 928 (7th Cir. 2001); *United States v. Purchess*, 107 F.3d 1261, 1265-66 (7th Cir. 1997). Where the district court bases the application of a sentencing guideline on factual findings, the standard of review is clear error. *United States v. Patterson*, 97 F.3d 192, 195 (7th Cir. 1996). "A factual determination is clearly erroneous only if, after considering

all of the evidence, the reviewing court is left the the definite and firm conviction that a mistake has been committed.” *United States v. Messino*, 55 F.3d 1241, 1247 (7th Cir. 1995)(internal quotation marks omitted). Furthermore, a district court’s choice between two permissible inferences from the evidence cannot be clearly erroneous. *United States v. Bush*, 79 F3d 64, 67 (7th Cir. 1996).

In its sentencing memorandum, the district court stated its findings regarding this guideline as:

The guideline requires that all the firearms be held for collection or sporting purposes, and Mr. Miller did not possess all of the firearms for those purposes. Although Mr. Miller possessed many of the firearms for collection purposes, Mr. Fines and he refinished and refurbished several others for resale. That they did so is borne out by the Government's Sentencing Exhibit C, which shows that the police raid found 17 receipts for guns that were not found in the outbuilding.

Mr. Miller argues that all the firearms are (entry level) collectibles, and selling duplicates and later models to be able to buy other collectibles is precisely what a collector does. Perhaps so, but the court does not read § 2K2.1(b)(2) as protecting such activity. That provision speaks of an offender having "possessed all . . . firearms solely for . . . collection[.]" Once Mr. Miller sold a firearm, even if he did so as a step toward improving the collection, he no longer possessed it for collection. The guideline reduction does not contemplate sales for collection, as distinct from acquisition, or simple continued possession. This case shows why. Two witnesses — Glenn Hisson and James Ford — testified that Mr. Miller and Mr. Fines said they were refurbishing and reselling guns, and the evidence at the sentencing hearing corroborates that Mr. Miller and Mr. Fines were doing so. The line between doing so to improve a collection, and doing so as a side business, is an exceedingly hazy one, and the court sees no basis to think the Sentencing Commission intended sentencing courts to make such ephemeral findings.

The reselling of the firearms is inconsistent, factually and legally, with the conduct described in U.S.S.G. § 2K2.1(b)(2). The court overrules Mr. Miller's objection that the presentence report

recommends against application of U.S.S.G. § 2K2.1(b)(2).

Sentencing Memorandum at 4-5, R. 101.

At the sentencing hearing on December 17, 2007, Government Exhibit. C was admitted, see appendix at 4, which was a listing of gun receipts contained in Government Exhibit 11. Sent. Tr. at 9. Of the 28 receipts, only 11 of the guns were found on the Miller property, which means 17 were sold or otherwise disposed of. Id. Because no records were found of how they were disposed of, it cannot be determined if the defendants made a profit on their resale. Nevertheless, this number of missing firearms certainly supports the defendants' statements to Hissong and Ford that they were purchasing, refurbishing, and reselling firearms to collectors. See Tr. Vol. I at 137 (Hissong) and Tr. Vol. II at 57 (Ford). As the district court found, this does not comply with the provisions of U.S.S.G. § 2K2.1(b)(2) and that the firearms be used "solely for collection":

The guideline requires that all the firearms be held for collection or sporting purposes. Mr. Miller did not possess all of the firearms for those purposes. He possessed many of the firearms for collection purposes, but he and Mr. Fines refurbished and refinished several others for resale. That they did so is borne out by the Government's Sentencing Exhibit C, which shows that the police raid found 17 receipts for guns that were not found in the outbuilding.

Sent. Tr., Dec. 17, 2007 at 3. Furthermore, there was at least one firearm in the house, a loaded shotgun, that was not used for collection purposes, but for home security. Tr. Vol. II at 69. The district court found that Fines had constructive possession of this firearms, along with another fully loaded Mossberg shotgun kept

in the hallway outside Fines's room. Sent. Tr., Dec. 14, 2007 at 7, 74.

Miller relies upon *United States v. Collins*, 313 F.3d 1251 (10th Cir. 2002), and *United States v. Shell*, 972 F.2d 548 (5th Cir. 1992), for authority that the firearms need not be held "solely" for purposes of collecting. However, neither case stands for that exact proposition. In *Collins*, the Tenth Circuit overturned a district court decision that denied *Collins* benefit of U.S.S.G. § 2K2.1(b)(2) because the defendant had used a hunting rifle for collateral for two auto repairs. The Tenth Circuit held that the district court should have examined the surrounding circumstances, which indicated that the guideline applied: "Momentary exploitation of a rifle's inherent monetary value or physical properties within the broader context of possession for lawful sporting purposes should not, *ipso facto*, preclude application of the provision" *Collins*, 313 F.3d at 1255. However, an examination of the surrounding circumstances indicates that, as the district court found, that Miller did not possess the guns "solely for collecting purposes." Sent. Tr., Dec. 17, 2007 at 3. The court found that the evidence showed that Miller and Fines were refurbishing and selling guns. *Id.* This activity would not be the "momentary exploitation" of a rifle's monetary value as in *Collins*.

In *Shell*, the Fifth Circuit upheld the district court's rejection of the possession of a rifle and a 9mm pistol being used for sporting purposes. *Shell*, 972 F.2d at 553. One of the factors that the Fifth Circuit relied upon was the fact that the rifle and pistol were found in the defendants apartment loaded: "None but the most negligent

of target shooters would keep legitimate sporting firearms loaded in the home. Moreover, it is not sufficient that one among several intended uses might be lawful recreation or collection; one of those must be the sole intended uses." *Id.* (Italics in original). Once again, two loaded shotguns were found in Miller's home and used for home defense. Sent Tr. December 14, 2007 at 7. The district court found that Fines had constructive possession of this gun. *Id.* at 47.

Other cases support the district court's holding that the defendant was not entitled to the benefit of U.S.S.G. § 2K2.1 (b)(2) because Miller's possession of the firearms was not solely for purposes of collecting. In *United States v. Clingan*, 254 F.3d 624, 626 (6th Cir. 2001), for example, the court looked to the surrounding circumstances and concluded that defendant's overall purpose was financial. Because the defendant acquired thirteen firearms in a three-month period and sold six of them to pawnshops, it was clear that his purpose in possessing the firearms was to use them as bartering tools. *Id.* at 626. In another case, a defendant did not possess firearms "solely" for collection purposes where it was shown that the felon used one of the guns from his collection for perceived self-defense purposes. *United States v. Kissinger*, 986 F. 2d 1244, 1246 (8th Cir. 1993). See also *United States v. Bertling*, 510 F. 3d 804, 811 (8th Cir. 2007)(possession of handgun, otherwise used for target practice, also used for self-defense purposes was not within U.S.S.G. § 2K2.1(b)(2)), *United States v. Baker*, 501 F.3d 627, 629-30(6th Cir.2007) (shotgun not stored in a manner showing it was valuable, nor was it treated as one would treat

something that was part of a collection), *United States v. Sanders*, 449 F.3d 1087, 1090 (10th Cir. 2006) ("thus, although it was uncontroverted that [the defendant] had obtained the rifles for hunting and that had been their sole prior use, the court could properly find that in addition to this sporting purpose [the defendant] had acquired the new purpose for possessing the firearms of using them to coerce and inquire people.).

Here the evidence showed, and the court found, that Miller and Fines "refurbished and refinished several others [firearms] for resale." Sent Tr., Dec. 17, 2007 at 3. The evidence also showed that at least one firearm, the Mossberg shotgun, was used for home protection. See Sent. Tr. at 7.

Finally, in order for Miller to benefit from U.S.S.G. § 2K2.1(b)(2), he must show that he did not "otherwise unlawfully use such firearms." However, Miller did use the firearms illegally, by providing them to Fines, an unlawful activity for which the jury found Miller guilty. For this simple reason alone Miller is not entitled to the benefit of § 2K2.1(b)(2).

III. The Trial Court did not Abuse its Discretion When it Admitted a Folder of Receipts for Guns and Gun Parts.

Fines's first issue on appeal asserts that the district court abused its discretion in admitting Government Exhibit 11, which was a folder found by Agent Eric Ellis in Fines's room at the farmhouse. The folder contained "receipts for firearms, parts, purchases, and other firearm related information in the names of Fines and Miller,"

and was found “on top of the workbench” in Fines’s room. Tr. Vol. I at 90. The district court admitted Exhibit 11 after carefully considering the application of *United States v. Serrano*, 434 F.3d 1003 (7th Cir. 2006). Tr. Vol. I at 96-101.

Questions involving evidentiary rulings by the district court are reviewed for an abuse of discretion and will not be reversed unless there is no evidence in the record upon which the trial judge could have rationally based his decision. *United States v. White*, 519 F.3d 342, 346 (7th Cir. 2008). *United States v. Savage*, 505 F.3d 754, 760 (7th Cir. 2007). As this court has memorably described the standard of review for evidentiary questions: "We review the district court's determination for abuse of discretion, noting that [a]ppellants who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom: their prospects compare with those of camels who wish to pass through the eye of the needle." *United States v. Coleman*, 179 F.3d 1056, 1061 (7th Cir.1999) (citations and internal quotations omitted) (brackets in original). No such abuse of discretion was present here.

Merchandise receipts and similar documents are not hearsay when they are offered as circumstantial evidence to link a defendant to other defendants or to an illegal item. *United States v. Serrano*, 434 F.3d 1003, 1005 (7th Cir. 2006); *United States v. Thornton*, 197 F3d 241, 251 (7th Cir. 1999); *United States v. McIntyre*, 997 F2d. 687, 702-03 (10th Cir. 1993). While not introduced for the truth of the matter asserted, such evidence can be probative of some other aspect of the government’s

case. Serrano at 1005. In Serrano, the district court admitted into evidence “Serrano’s driver’s license, state ID, . . . automobile insurance cards, insurance declarations, and related correspondence, all bearing the name Eddie Roncone and the address 4506 Spatz Avenue.” *Id.* at 1004. In upholding the district court, this court held that such documents are not hearsay “when they are offered as circumstantial evidence to link a defendant . . . to other defendants or to an illegal item.” *Id.* At 1005. That is the basis for which Government Exhibit 11 was offered in this case. As the government argued, the receipts link Miller to Fines and both to the guns found in the farmhouse. Tr. Vol. I at 98.

In Thornton, the district court admitted 51 documents over objections of hearsay and authentication, including utility bills, merchandise receipts, and business cards. *Thornton*, 197 F.3d at 251. These documents were seized by law enforcement personnel from the person, residence or vehicle of a co-conspirator. *Id.* This court found that the documents, including merchandise receipts, were sufficiently distinctive to authenticate themselves and that the actual authors of the documents need not testify, holding: “The location of the documents and their substance, along with additional testimony in some instances, provided an adequate foundation for their admission.” *Thornton* at 251.

Fines argues that Exhibit 11's contents was hearsay and had no foundational witness to support its admission. However, the evidence was used to link Fines and Miller together in a gun re-sale business, and several other witnesses established a

sufficient foundation for the evidence. As mentioned above, Agent Ellis, one of the ATF agents who searched the Miller home, testified that he found the folder of receipts on the workbench in Fines's bedroom. Tr. Vol I at 90. He identified the contents of the folder and that it was in substantially the same condition as when he seized it on April 8, 2004. Tr. Vol I at 90. Also, after the receipts had been admitted, Ike Miller identified Fines's signatures on some of the receipts. Tr. Vol II at 26-28.

Finally, Fines himself testified that his name was on the receipts and admitted to purchasing several of the items documented in the receipts. Tr. Vol III at 34-36. He also discussed at length the purpose and use of several of the pieces that the receipts showed he had purchased. *Id.* at 36-41.

Therefore, the district court did not abuse its discretion in admitting Government Exhibit 11.⁶

IV. The Trial Court did not Abuse its Discretion When it Admitted a Photograph of Fines Because it was Sufficiently Authenticated.

Fines's second issue on appeal asserts that the district court abused its discretion in admitting Government Exhibit 12, which was a photograph taken of Fines in his room at Miller's farmhouse in late 2003 or early 2004. The exhibit,

⁶Even if the district court erred by admitting Exhibit 11, the result was harmless in light of the overwhelming evidence presented by the government at trial. This court will reverse a jury's decision based on an erroneous evidentiary decision when the decision "had a substantial influence over the jury and the result reached was inconsistent with substantial justice." *United States v. Seals*, 419 F.3d 600, 607 (7th Cir. 2005). As discussed under section I above, substantial evidence existed beyond Exhibit 11 to find Fines guilty.

showed Fines seated in a chair in his room, underneath a gun rack containing four rifles. Tr. Vol. II at 14. The photograph was authenticated by the person who took the photograph, Ike Miller. *Id.* at 12.

As discussed above with regard to Fines's first issue on appeal, issues involving the admissibility of evidence are reviewed for an abuse of discretion and will not be reversed unless there is no evidence in the record upon which the trial judge could have rationally based his decision. *United States v. White*, 519 F.3d 342, 346 (7th Cir. 2008). *United States v. Savage*, 505 F.3d 754, 760 (7th Cir. 2007). "[T]o authenticate a photograph, testimony of a witness who observed the events or is familiar with the person, place, or object depicted in it [is required] (it is not necessary that the photographer testify)." Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, Vol. 5, § 9:3, at 341 (3d Ed. Thomson 2007). "To meet the threshold requirements of authentication, the government need only adduce 'evidence sufficient to support a finding' that the photograph is what the government claims." *United States v. Dumbrowski*, 877 F.2d 520, 525 (7th Cir. 1989) (citing cases). Furthermore, trial courts are given wide discretion on questions relating to the admissibility of photographs: "[I]t is well settled that the admission or rejection of photographs lies largely within the discretion of the trial court" *United States v. Fleming*, 594 F.2d 598, 607-08 (7th Cir. 1979). See also, *United States v. Tirrell*, 120 F.3d 670, 678-79 (7th Cir. 1997) (photographs of evidence items admitted although they had been moved to photograph); *Dumbrowski*, 877 F.2d at

524-25 (photograph of crime scene at different time with different lighting still depicted scene with sufficient accuracy to be admitted).

During trial, Fines objected to the photograph on the grounds that it did not accurately depict the room as it appeared on the date of the search. Tr. Vol I at 91. He argues this based on the differences between the room's appearance in the photograph and its appearance on the videotape recording of the search. *Id.* at 93. Fines points out that the gun rack on the wall in the photograph does not appear in that room at all in the videotape. *Id.* at 94. However, it is not necessary that the photograph accurately depict the room as it appeared on the day of the search. The indictment charges Fines with knowing possession of a firearm "on or around April 8, 2003 to April 8, 2004." Tr. Vol III at 100. Because Fines stipulated he was a convicted felon before April 8, 2003, the photograph need only accurately depict the room during the period specified in the indictment, when Fines was living in that room as a convicted felon. Ike Miller, the photographer, testified that the photograph accurately depicted Fines's room as it was in late 2003 or early 2004. Tr. Vol. II at 12. Glen Hissong was also shown the photograph and testified that the layout of the room with the firearms, as shown in the photograph, matched the layout of the room the last time he saw it in late 2003, or early 2004. Tr. Vol. 1 at 136.

Fines claims that Ike Miller would not have remembered the date of the photograph without prompting from the prosecution. Tr. Vol. II at 13. However,

Ike Miller testified that he took the photograph using his camera after a trip in order to finish off a roll of film. Tr. Vol II, 12. This shows he recalled the circumstances surrounding the situation in which the photograph was taken as well as the reasons for taking the photograph. Hissong's testimony also corroborated the time frame depicted in the photograph. Tr. Vol. I at 136.

Fines also argues that admission of the photograph was highly prejudicial to him, although he does not explain exactly how it is prejudicial. Of course, as this court has explained: “All evidence offered by the prosecutor is prejudicial to the defendant; there would be no point in offering it if it were not. . . . The real focus should be on whether the evidence is ‘unduly prejudicial.’” *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) (citations omitted). The photograph is not prejudicial from any standpoint but that it showed Fines in close proximity to firearms hanging on the wall in his room, and therefore tended to show his guilt. This type of prejudice is not “unfair”. See *id.*

The district court did not abuse its discretion in admitting the photograph of Fines because a sufficient foundation had been laid. The government produced evidence which showed that the photograph depicted the room during the period of the indictment, and upon which the trial judge could have rationally based his decision, thereby satisfying the standard of review in this case. *White*, 519 F.3d at 346.

V. The Jury's Guilty Verdict Against Fines Should be Upheld Because the

Evidence, Considered in a Light Most Favorable to the Government, was Sufficient to Allow a Rational Trier of Fact to Find all of the Elements of the Offense Beyond a Reasonable Doubt.

Fines's final issue on appeal incorporates Miller's argument that there was insufficient evidence for a jury to convict. For the reasons stated under issue I above, this issue should be rejected with regard to Fines as well.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

Circuit Rule 31(e) Certification

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief that are available in non-scanned PDF format.

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Certificate of Compliance with Fed. R. App. P. 32(a)(7)

This brief complies with the type-volume limitations of Fed.R.App.P.

32(a)(7)(B) because this brief contains 5,487 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirement of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect word processing program, version 12, with thirteen point Times New Roman.

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I hereby certify that on June 13, 2008 an original and fifteen copies and one virus free electronic media copy of the Brief of Plaintiff-Appellee were dispatched to a third-party commercial carrier for delivery to the clerk and two copies of the Brief of the Appellee and one virus free disk containing the brief in its entirety were sent via the United States mail, properly addressed to:

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