

For Dockets See [08-4420](#)

United States Court of Appeals, Fourth Circuit.
 UNITED STATES OF AMERICA, Appellee,
 v.
 KINSEY CORY HERDER, Appellant.
 No. **08-4420**.
 August 18, 2008.

Appeal from the United States District Court for the
 Eastern District of Virginia at Alexandria The Ho-
 norable Claude M. Hilton, District Judge

Brief of the United States

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*1 JURISDICTIONAL STATEMENT

A federal grand jury charged the defendant in a two-count indictment with possession with the intent to distribute five grams or more of crack cocaine and

possession with the intent to distribute marijuana, both in violation of [Title 21 U.S.C. § 841\(a\)\(1\)](#). The district court had jurisdiction over this case pursuant to [18 U.S.C. § 3231](#). A jury convicted the defendant, and the district court sentenced the defendant *2 to 41 months of imprisonment. The court entered its judgment on March 24, 2008. The defendant filed a timely notice of appeal on April 4, 2008, and this Court has jurisdiction over the defendant's appeal pursuant to [18 U.S.C. § 3742\(a\)](#) and [28 U.S.C. § 1291](#).

STATEMENT OF THE ISSUES

1. Was the evidence presented at trial sufficient to demonstrate the defendant had constructive possession over the crack cocaine and marijuana found in the car he was driving where, considering the evidence in the light most favorable to the government, among other things, the defendant was arrested after midnight in a parking lot known for drug activity after driving alone in the car from another parking lot known for drug activity; the narcotics were secreted in containers easily accessible to the defendant; the defendant nervously gave an implausible account of his travel to the officer; and the defendant was found to be carrying a large amount of cash in small denominations that contained folds of bills that a drug expert stated are used in drug transactions?

2. Did the district court abuse its discretion by denying the defendant's requested jury instruction defining possession where the court's other instructions were legally correct and otherwise covered the defendant's proposal; the defendant was permitted to argue his theory in closing; and the court's failure to include the instruction did not materially impair the defense?

3. Was the district court's sentence, at the low end of the advisory guideline range, reasonable where the court gave careful consideration to the applicable sentencing factors, the defendant's criminal history, the presentence report, and the briefing and argument of counsel?

4. Did the district court err in ordering the forfeiture of the money found on the defendant where the court found that the money the defendant was carrying when he was arrested was intended to be used in the commission of the offense for which the defendant was convicted?

STATEMENT OF THE CASE

On October 18, 2007, a federal grand jury in the Eastern District of Virginia charged the defendant in a two-count indictment with possession with the intent to distribute five grams or more of crack cocaine and possession with the intent to distribute marijuana, both in violation of [Title 21 U.S.C. § 841\(a\)\(1\)](#). J.A. 9-10. A jury trial commenced on December 18, 2007, before the Honorable Claude M. Hilton, that resulted in a guilty verdict as to both counts on the same day. J.A. 155, 166. On March 24, 2008, the district court sentenced the defendant to 41 months of incarceration on each count, with the sentences to run concurrent and five years' supervised release. J.A. 218 - 219. The defendant filed a timely notice of appeal on April 4, 2008. J.A. 222.

STATEMENT OF FACTS

A. The Government's Evidence

On June 19, 2007, a few minutes before midnight, the defendant was driving one of two cars leaving a commuter parking lot in Fauquier County, Virginia. J.A. 45, 47. The lot is used specifically for commuters who car pool during rush hours. J.A. 45 - 47. The majority of commuters leave the lot by 8:30 p.m. J.A. 47. During the year prior the defendant's arrest, members of the Fauquier County Sheriffs Office and the Blue Ridge Narcotics Task Force conducted undercover drug purchases in the commuter lot in the evening hours leading up to midnight. J.A. 101. One month before the defendant's arrest, others were arrested for drug activity in that lot. J.A. 102.

A deputy sheriff followed the defendant, the sole occupant of the silver, four-door Buick, as he drove from the commuter lot in an overcautious manner by driving under the speed limit and signaling well in advance of turns. J.A. 48, 49. The defendant, on his own and without being stopped by police, eventually pulled into a combination gas station and convenience store and parked his car on the side of the store near the pay phones. J.A. 50. The defendant did not park in the available parking spaces in front of the store. J.A. 50.

The deputy sheriff pulled into the lot and deliberately parked on the opposite side so that the defendant would not believe he was being detained. J.A. 51. As

the defendant got out of his car the deputy sheriff approached him and asked the defendant if he would answer some questions. J.A. 52. In responding to these questions, the defendant stated he had just come from Ruby Tuesday's. J.A. 52. The deputy sheriff determined that response was not accurate since Ruby Tuesday's was directly across from the convenience store and over a mile from the commuter lot where the defendant had just been seen. J.A. 52 - 53. The defendant's answers did not make sense to the deputy sheriff who is familiar with that area. J.A. 53.

During the interaction with the deputy sheriff, the defendant's cell phone rang constantly and the defendant answered several of the calls. J.A. 52 - 53. Because the defendant had been seen coming from an area known for narcotics activity, the defendant was driving cautiously, the defendant was acting nervous, the defendant's cell phone was ringing constantly, and the implausible explanations of his activities that night, the deputy sheriff requested the assistance of a K-9 officer and drug dog. J.A. 54 - 55. The deputy sheriff asked the defendant's permission to allow the dog to search the car and the defendant complied, stating that he had nothing to hide. J.A. 71. The K-9 was deployed to the car the defendant was driving and positively alerted to the presence of the odor of narcotics. J.A. 56.

As a result of the positive alert, the deputy sheriff did a probable-cause search of the car and found three containers disguised to look like household products which contained false bottoms concealing narcotics and coffee grounds. J.A. 56-62. A container made to look like Ajax Bleach was found on the back seat of the car in plain view and had a removable bottom which concealed a plastic bag containing smaller plastic bags of crack and another plastic bag containing coffee grounds. J.A. 57, 62. A container made to look like Old Spice shaving cream was found on the floor board of the back seat directly behind the driver's seat. J.A. 62. It also had a removable bottom and contained three bags of marijuana and another plastic bag containing coffee grounds. J.A. 59. The third container, appearing to hold Cheetos cheese curls, in fact held a large plastic bag containing smaller plastic bags of crack cocaine. J.A. 59-60. This container was found inside a plastic shopping bag, near the middle of the back seat of the car. J.A. 60, 62. All of the containers were found in a location that were within reach of the driver's seat of the vehicle. J.A. 62.

A total of 21 bags of crack cocaine and three bags of marijuana were recovered from the defendant's car. J.A. 66. A prescription pill bottle bearing the name Tiffany Stokes was also recovered from the car. J.A. 60. The pills in the bottle were not consistent with the prescription on the label. J.A. 82. There were no t-shirts, or items relating to a t-shirt business, located anywhere in the car. J.A. 66-67. When the defendant was arrested, he had \$1,223 in multiple denominations recovered from "his body." J.A. 64.

A police lieutenant with 18 years experience testified as a drug expert that there was a recent rash of the use of false-bottom containers to conceal crack and marijuana. J.A. 96. The drug expert also testified that "folds" are bills of money that are folded over for use in drug purchases. J.A. 96. The drug expert identified at least 6 "folds" depicted in a photograph of the money recovered from the defendant's person when he was arrested. J.A. 97. Both the drug expert and the deputy sheriff explained that coffee grounds are used to keep a dog or an officer from alerting to the odor of drugs. J.A. 57, 99.

The drug expert testified further that the gas station/convenience store where the defendant was arrested is a location known for illegal drug activity and where undercover drug purchases have recently occurred. J.A. 99. The drug expert concluded that, based on the denominations of money, the canisters and the coffee grounds, the 21 bags of crack and the bags of marijuana were consistent with distribution.^[FN1] J.A. 100.

FN1. At the close of the government's case the defendant moved for judgment of acquittal orally and by written motion arguing, among other things, that there was insufficient evidence for a reasonable fact-finder to find that the defendant knew about the drugs in the car. J.A. 108. The district court denied the motion and stated that "[t]he drugs are in the back seat. People are generally aware of what's in the back of their car. Maybe he wasn't, but there's evidence that there is." J.A. 108. The defendant renewed the motion at the conclusion of trial and the district court denied it for reasons previously stated and further reasoned that there was "ample evidence to go forward on both of these

charges.” J.A. 125.

B. The Defense Evidence

The defense called two witnesses in its case-in-chief. Stephanie Umble, one of the defendant's girlfriends who saw the defendant approximately three times a week, testified that she met the defendant in the commuter parking lot that evening and left her car at the lot so that she would not have to drink and drive to her home which was a couple miles down the road. J.A. 110. Umble testified that they went to Ruby Tuesday's where she had something to eat and consumed two or three drinks. J.A. 112. Immediately thereafter, the defendant drove her in his car and dropped her at her car in the commuter lot. J.A. 112. Umble did not leave the bags of crack cocaine or the bags of marijuana in the car. J.A. 114. Umble did not give the defendant \$1,200 in cash. Tiffany Stokes testified that she has children with the defendant who she considers to be her boyfriend/fiancé. J.A. 116. Stokes and the defendant have a t-shirt business with a third person. J.A. 117. All three partners use the Buick for business. Stokes did not leave crack cocaine or marijuana in the car. J.A. 123.

SUMMARY OF ARGUMENT

The defendant raises four main issues on appeal. The defendant claims that the evidence was insufficient to convict him of possessing the drugs found in the false-bottom canisters in the car the defendant drove the evening he was arrested. The defendant also argues that the district court erred in denying his request to give a specific instruction on possession. The defendant further argues that his sentence was unreasonable and that the court erred in ordering the forfeiture of \$1,223 found on the defendant when he was arrested. These arguments are all without merit.

At trial, the government presented substantial evidence that the defendant, as the driver and sole occupant of the car, exercised dominion and control over the drugs found within his reach in the car and that he intended to sell those drugs. On the night he was arrested, the defendant drove to two areas known for illegal drug activity in and around midnight while carrying a large amount of cash and receiving constant cell phone calls. The defendant further demonstrated his knowledge of the drugs through his nervous behavior and misrepresentations to the police about his travels.

The district court did not abuse its discretion by denying the defendant's requested jury instruction defining possession. The court's instruction was legally correct; the district court invited the defense to argue its theory; and the court's failure to instruct as requested by the defendant did not materially impair the defense.

At sentencing, the district court's careful consideration of the [18 U.S.C. § 3553](#) factors, the advisory guideline range and the argument and briefing of the parties resulted in a reasonable sentence. Further, there is nothing in the record to suggest that the court did not understand its authority or that it refused to consider the defendant's crack/powder disparity argument, as the defendant now claims. The district court also found a substantial nexus between the money seized from the defendant at the time of his arrest and the defendant's distribution conviction and, consequently, correctly forfeited the defendant's money as property that he intended to use to commit, or to facilitate the commission of, the offense for which he was convicted.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO PERMIT A REASONABLE JURY TO FIND THAT THE DEFENDANT KNOWINGLY POSSESSED THE DRUGS IN THE CAR IN WHICH HE WAS THE SOLE OCCUPANT AND DRIVER

A. Standard of Review

On a sufficiency-of-the-evidence claim, this Court, viewing the evidence in the light most favorable to the government, decides whether any rational fact-finder could have found the appellant guilty beyond a reasonable doubt. *[11](#) [Jackson v. Virginia](#), 443 U.S. 307, 319 (1979); [United States v. Butner](#), 277 F.3d 481, 487 (4th Cir. 2002); [United States v. Wilson](#), 198 F.3d 467, 470 (4th Cir. 1999). If there is substantial evidence to support a verdict, viewing the evidence in the light most favorable to the government, the verdict must be sustained. [Glasser v. United States](#), 315 U.S. 60, 80 (1942). In evaluating the sufficiency of the evidence, this Court assumes that the jury resolved all contradictions in the testimony in favor of the government. [United States v. Move](#), 454 F.3d 390, 394 (4th Cir. 2006) (*en banc*). Finally, where the evidence supports

differing reasonable interpretations, the jury decides which interpretation to accept. [Moye, 454 F.3d at 394-95.](#)

B. Analysis of the Issue

Possession may be actual or constructive. See [United States v. Blue, 957 F.2d 106, 107 \(4th Cir. 1992\).](#) Actual possession is not necessary to sustain a conviction for possession with the intent to distribute; constructive possession is sufficient. [United States v. Rusher, 966 F.2d 868, 878 \(4th Cir.\), cert denied, 506 U.S. 926 \(1992\).](#) “A person has constructive possession over contraband when he has ownership, dominion, or control over the contraband itself or over the premises or vehicle in which it was concealed.” [United States v. Armstrong, 187 F.3d 392, 396 \(4th Cir. 1999\).](#) “Knowledge of the presence of the controlled substance is essential to an assertion of constructive possession.” *[12United States v. Bell, 954 F.2d 232, 235 \(4th Cir. 1992\).](#) “Constructive possession may be proved by either circumstantial or direct evidence.” [United States v. Nelson, 6 F.3d 1049, 1053 \(4th Cir. 1993\).](#)

Relevant to a determination of a defendant's knowledge is a consideration of the totality of the circumstances of the defendant's arrest and his alleged possession. [Bell, 954 F.2d at 235.](#) As the Fourth Circuit noted in *Bell*, the driver's (Bell) familiarity with the car was sufficient to show his knowing possession of the narcotics in the car. *Id.* Likewise, the passenger's (Cruz) presence in the car, his relationship with Bell, and his “nervous” response to the search were sufficient to prove his knowledge. *Id.* In [United States v. Burgos, 94 F.3d 849, 868 \(4th Cir. 1996\),](#) this Court noted that a defendant's implausible explanation “may constitute positive evidence in support of a jury verdict.” *Id.* (citation omitted). Again, the Fourth Circuit reiterated that nervous behavior is circumstantial evidence of guilt. *Id.* at 872. Finally, in [United States v. Grubbs, 773 F.2d 599 \(4th Cir. 1985\),](#) in a case involving the concealment of a large quantity of drugs on a boat, this Court held “that clever concealment of illegal substances will not preclude a finding that defendants knew of their cargo when circumstances surrounding the incident suggest their awareness of illegal activity.” *Id.* at 600.

In this case, the jury had ample evidence to conclude that the defendant knowingly possessed the narcotics

in his car. First, it is undisputed that the defendant *[13](#) was the driver and the sole occupant of the car that held three drug-concealing canisters that were within the defendant's reach. In [United States v. Richardson, 229 F.3d 1145 \(4th Cir. 2000\)](#) (unpublished), this Court found that the evidence that Richardson was the registered owner, driver, and sole occupant of the truck, in which the crack, powder cocaine, and marijuana were secreted, was sufficient to establish possession beyond a reasonable doubt.

The defendant cites to two gun cases, [United States v. Blue, 957 F.2d 106,](#) and [United States v. Daley, 107 Fed. Appx. 334 \(4th Cir. 2004\),](#) in support of his argument that his “mere proximity” to the drugs was insufficient to convict him. Brief of Defendant at 17. Unlike the defendants in both of those cases, the defendant in this case was the driver and the sole occupant of the car where the drugs were found.^[FN2] In [United States v. Armstrong, 187 F.3d at 396,](#) this Court affirmed the district court's conclusion that the defendant was in constructive possession of a gun concealed in the *[14](#) car where the defendant owned the car and was the sole occupant when he was stopped. Although there is no direct evidence in the record of the defendant's ownership of the car,^[FN3] the fact that the defendant was the only one in the car and was driving the car demonstrated a greater degree of dominion or control over the contraband. See [United States v. Thornton, 209 Fed.Appx. 297 \(4th Cir. 2006\)](#) (unpublished)(distinguishing *Blue* in that Thornton, as the non-owner and driver of the vehicle in which the firearm was found, had a greater degree of dominion or control over the contraband itself or the premises or the vehicle than the defendant in *Blue*, who was a mere passenger). The Fifth Circuit, in [United States v. Perez, 897 F.2d 751, 754 \(5th Cir. 1990\),](#) also noted that constructive possession may be shown by dominion over the vehicle in which the item is located.

FN2. In addressing the defendant's argument about his preferred jury instruction, the district court properly recognized that the government's evidence in this case went well beyond the “shoulder dip” of the defendant in *Blue*:

that's not the situation we've got here. We've got somebody in a car with drugs and a lot of other evidence that goes along with it. I'm not going to start directing a verdict. I would have done that on your motion [for judgment

of acquittal] if I thought that was the only thing that they had, but there's far more evidence than just simply somebody being in the car with the drugs in this case.

J.A. 152.

FN3. The district court sustained the defendant's objection when the government asked the deputy sheriff what information he obtained when he ran the license plate of the car the defendant was driving. J.A. 49. Stephanie Umble testified for the defendant and described going to Ruby Tuesday's on the evening the defendant was arrested in his car which was a gray Buick. J.A. 111. Tiffany Stokes, another of the defendant's girlfriend and purported business partner, testified that she, the defendant and another individual designated the Buick as the vehicle they used for the t-shirt business and that all three used the car. J.A. 118. Stokes never, however, testified that anyone other than the defendant owned the car.

Second, the jurors heard testimony that the defendant was first seen minutes before midnight in a commuter parking known by law enforcement as an area used for drug dealing. The deputy testified that the defendant's presence at the lot at that time *15 of the evening was unusual since the lot is specifically used for commuters and the lot is an area of high narcotics activity. J.A. 47. Further, Lieutenant Andersen testified that he had recently directed undercover drug purchases in that lot at the same time in the evening and early morning hours that the defendant was seen. J.A. 101. See [Grubbs, 773 F.2d at 602](#) (appellants discovered in the middle of the night approaching a coastline that provided a "tempting target for smugglers"). Based on these facts, the jury was certainly free to infer that the deputy had likely just witnessed the defendant engaged in a drug transaction. As such, the jury was also free to conclude that the defendant's participation in a drug transaction meant that he was aware of the drugs concealed in the canisters that were within his reach in the car he was driving by himself.

Third, the incriminating actions by the defendant show his consciousness of the narcotics. See [Burgos, 94 F.3d at 868](#) (defendant's implausible explanation was evidence of guilt). Contrary to the defendant's closing argument that "everything he did and everything in

this case is consistent with one thing, innocence," (J.A. 133), the defendant's actions actually indicated his consciousness of guilt and knowledge of the narcotics. Specifically, when questioned by the deputy sheriff about his whereabouts, the defendant falsely stated that he was coming from Ruby Tuesday's and not the parking lot from which the officer had followed him. J.A. 52; see *16 [Grubbs, 773 F.2d at 602](#) (appellants provided a false explanation about their destination). While the defendant made no express statements indicating he was engaged in drug sales, his actions in using his cell phone to answer constant calls, his nervous demeanor, cautious driving and implausible explanation of his activities spoke to his involvement and permissibly led an experienced officer to believe the defendant was indeed engaged in a drug crime.

Finally, the money the defendant had on his body was a factor that contributed to the drug expert's conclusion that the drugs were possessed for distribution. J.A. 100. The expert testified that within the defendant's money were at least 6 bills folded in a way that was similar to "folds" he had used when purchasing drugs in an undercover capacity. J.A. 96. Contrary to the defendant's claim that the indicia of distribution does not inform the analysis of whether he had knowledge of the drugs, the money found on his person did just that. Because this money was found on the defendant, it is fair to assume that he was selling something and there was nothing found in the car to support his claim that he had just sold t-shirts. J.A. 66-67. Thus, the jury was free to conclude that the defendant knew of the drugs contained in the canisters in the car in which he was the driver and sole occupant.

Despite this abundant evidence showing knowing possession, the defendant repeats many of the arguments he presented to the jury, including, that others had *17 access to the car and that the defendant's behavior during his encounter with the police was consistent with innocence. Defendant's Brief at 9, 19-20. These claims are unpersuasive. First, both defense witnesses denied that the drugs found in the car were theirs. J.A. 111, 114, 123. The defendant claims the prescription pill bottle in the name of Tiffany Stokes, that was found in the car, is corroboration that other people drove the car and infers, therefore, that the drugs were left by her; however, Stokes clearly testified the she did not leave the crack or

marijuana in the car. Defendant's Brief at 19. *See also* J.A. 123. Second, the defendant's consent to have the car sniffed by the drug dog could have been a factor that the jurors deemed consistent with the behavior of a drug dealer who is confident that his use of coffee grounds in the containers with the drugs will prevent a dog or an officer from detecting the odor.^[FN4] Moreover, it is not a "prerequisite of conviction that the prosecution adduce evidence to preclude every reasonable hypothesis of innocence." *United States v. Montas*, 41 F.3d 775, 779 (1st Cir. 1994) (citing *United States v Gonzalez-Torres*, 980 F.2d 788, 790 (1st Cir. 1992))

FN4. Two officers testified that coffee grounds are used to attempt to conceal the odor of narcotics. J.A. 57, 99.

Because there was sufficient evidence to reasonably find the defendant guilty, the jury was entitled to discredit his theory of innocence.

***18 II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY**

A. Standard of Review

The standard of review for a district court's refusal to give a requested instruction is abuse of discretion. *United States v. Brooks*, 928 F.2d 1403, 1408 (4th Cir. 1991). When jury instructions are challenged on appeal, the key issue is "whether, taken as a whole, the instruction fairly states the controlling law." *United States v. Cobb*, 905 F.2d 784, 788-89 (4th Cir. 1990); accord *Henderson v Kibe*, 431 U.S. 145, 153 (1977). "A district court's refusal to provide an instruction requested by a defendant constitutes reversible error only if the instruction: (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Lewis*, 53 F.3d 29, 32 (4th Cir. 1995).

B. Background

Prior to the commencement of the trial, the defendant filed proposed jury instructions. J.A. 14-17. Jury Instruction 17 defined "to possess" and included:

Presence in a car from which the police recover contraband does not establish possession. In other words, the mere proximity of contraband to an occupant is insufficient to establish possession. *19 J.A. 18. At the conclusion of the evidence, the court advised the parties that it intended to provide the jury with his general instructions, describe the counts, the statute, the essential elements of the offense, and to define possession with intent to distribute, distribute, and controlled substance. The court stated the he would tell the jury "how they may find proof of knowledge" and that "precise knowledge of a controlled substance need not be proved." J.A. 125, 126.

The defendant offered that there was no need for a joint possession or actual possession instruction as there was no claim of joint possession. J.A. 128. The court, however, responded that it wanted to give a complete definition of possession: "I don't know either but it makes it complete, it makes complete the definition of possession. If I'm defining it, it seems to me I ought to go about defining it." J.A. 128. The court also heard the defendant's request to include "mere proximity of contraband to an occupant is insufficient to establish constructive possession." The court denied the request because in the court's view the request was not an accurate definition of possession. The judge permitted the defendant to argue the point in closing. J.A. 129.

Thereafter, the district court instructed the jury on possession as follows:

Now, the term possess means to exercise control or authority over something in a given time. This possession may be actual or constructive, joint or sole. The possession is considered to be actual possession when a person knowingly has direct physical control or authority over the controlled substances. The *20 possession is called constructive possession when a person does not have the direct and physical control over the substances but can knowingly control it and intends to control it, sometimes through another person. The possession may be knowingly exercised by one person exclusively, which is sole possession, or the possession may be exercised jointly when it is shared by two or more persons.

J.A. 140-141. During deliberations the jurors asked the following questions:

Does regarding the intent to distribute, does that have to be intent that right [night]^[FN5]? What is the timing

of intent? Is it at some future period?

FN5. The judge questioned whether the note's reference to "right" was meant to read "night." J.A. 148.

Does possession mean knowing possession? Can the drugs be in the car and not be possessed?

J.A. 147-148, 151.

As to the first question, the judge after hearing argument, instructed the jury that the government had to prove that on the night charged the defendant had the intent to distribute at some time. J.A. 151. The second group of questions prompted the defendant to repeat his request for a proximity instruction, stating that "the drugs can be in the car without there being possession." J.A. 152. The judge distinguished the evidence from the cases cited by the defense because there was far more evidence than simply somebody being in a car with drugs. The judge also expressed his desire *21 to avoid directing a verdict. J.A. 152. The judge decided to respond to the question by writing on the note that "possession must be knowing possession." J.A. 153.

C. Analysis of the Issue

The defendant asserts that the district court abused its discretion in denying his proposed jury instruction. This record reveals anything but an abuse of discretion and rather clearly shows careful consideration by the district court. Specifically, the district court reviewed instructions submitted by the parties and heard argument regarding those instructions. J.A. 128-129. After argument, the court rejected the instruction and informed the defendant that he could argue his proximity point in his closing argument. J.A. 129.

Here, the defendant fails to meet the requirements for showing abuse of discretion. The proposed defense language was substantially covered by the court's legally correct charge to the jury and the failure to add the qualifying "mere proximity" language did not impair the defendant's ability to conduct a defense. The defendant's challenge which goes solely to the district court's failure to add the qualifying language addressing "mere proximity" has been considered and rejected by other circuits. In [United States v. Rojas](#),

[537 F.2d 216, 219-220 \(5th Cir. 1976\)](#), the Fifth Circuit affirmed a similar jury instruction that defined possession without the "mere proximity" language. Because "the jury must find that the defendant had either *22 direct physical control or the power and intention to exercise dominion or control over the cocaine" the instruction given was sufficient to preclude a conviction for mere proximity or presence to the cocaine. Accord [United States v. Prudhome](#), [13 F.3d 147, 149-150 \(5th Cir. 1994\)](#). Similarly, the Second Circuit has held that the need for a "mere proximity" instruction was obviated where possession was properly defined as requiring the intent to exercise dominion or control over contraband. [United States v. Vasquez](#), [82 F.3d 574, 577 \(2d Cir. 1996\)](#). The Seventh Circuit has rejected similar challenges to the district court's failure to include the "mere proximity" qualifier in its possession instruction, where the district court clearly instructed that possession must be knowing and intentional and permitted the defense to argue his "mere proximity" theory before the jury. See [United States v. Hendricks](#), [319 F.3d 993, 1006 \(7th Cir. 2003\)](#); [United States v. Rice](#), [995 F.2d 719, 725 \(7th Cir. 1993\)](#); [United States v. Saunders](#), [973 F.2d 1354, 1361 \(7th Cir. 1992\)](#); see also [United States v. Rice](#), [36 Fed. Appx. 509, 510 \(4th Cir. 2002\)](#) (unpublished) (affirming trial court's instruction on constructive possession and its denial of defense instruction on "mere proximity," as the court's instruction encompassed more than "mere proximity" by requiring a finding of intent to exercise dominion and control).

In the instant case, the district court provided the jury with clear instructions requiring an evidentiary showing of more than "mere proximity," that is, knowing *23 and intentional control. J.A. 140. The critical phrases used by the court, "knowingly control" and "intends to control," accomplished that which the defendant intended with his proposed instruction since there is a vast difference in knowing control and mere proximity. Put another way, based on these legally correct instructions, the jury could only have convicted the defendant if the jury had unanimously decided that the defendant had "know [ledge]" of the "substances" and "intend[ed] to control" the "substances." J.A. 1401-141. They, the jury, could not have convicted the defendant if they believed he was merely present in the car and simply proximate to the canisters.

The defendant claims further that the court's refusal to grant the defendant's renewed request for a mere-presence instruction after the jury issued a second question was erroneous. Defendant's Brief at 23. The district court denied the defendant's request in its cautious efforts to avoid answering fact-specific questions and focused instead on providing correct propositions of the law, which is precisely the judge's role. J.A. 152. The court appropriately instructed the jurors that possession had to be knowing possession, which again, in substance, reiterated the law that mere proximity to the contraband is not sufficient. J.A. 153-154. In sum, the court did not abuse its discretion in concluding that the defendant's proffered instruction was otherwise covered by the court's instructions.

***24** The defendant's argument is without merit because, as is clear from all of the court's instructions, the district court sufficiently addressed the substance of the defendant's proposed instruction in its charge to the jury. Therefore, there was no error in refusing it. [Lewis, 53 F.3d at 32](#). Moreover, the defendant had ample opportunity to argue "mere proximity" to the jury and instead put forth a theory of innocence based on "absolutely no knowledge of the drugs hidden in the back of the car." J.A. 133. The defendant's assertion that his specific instruction was central to the defendant's defense is not supported by his own closing argument where counsel did not even mention "mere proximity." J.A. 131-138. The district court's instruction included all the necessary legal elements of possession which the jury needed to find before moving on to the question of distribution. J.A. 140-141. The question by the jury in no way impugned the adequacy of the court's original instruction and was answered properly. The court considered the defendant's request for a specific instruction twice and offered sound reasoning in rejecting it both times. J.A. 129, 152-153. The defendant was never prevented from arguing that the defendant's mere presence in the car did not establish possession. Rather, the defendant argued extensively that the defendant had no knowledge that the containers in the car contained drugs.

***25** Because the court's instruction adequately informed the jurors of the law of possession and their duty in evaluating the evidence of knowing possession and the defendant was not impaired in presenting his defense, there was, consequently, no abuse of discretion in the district court's failure to provide the "mere proximity" instruction.

III. THE SENTENCING OF THE DEFENDANT WAS PROCEDURALLY REASONABLE

A. Standard of Review

Appellate review of federal sentences is only for "unreasonableness." [United States v. Booker, 543 U.S. 220, 260-63 \(2005\)](#). "[A] sentence within the proper advisory Guidelines range is presumptively reasonable." [United States v. Johnson, 445 F.3d 339, 341 \(4th Cir. 2006\)](#); accord [Rita v. United States, 127 S. Ct. 2456, 2462 \(2006\)](#). As the Supreme Court has recently instructed in [Kimbrough v. United States, 128 S. Ct. 558 \(2007\)](#), and [Gall v. United States, 128 S. Ct. 586 \(2007\)](#), the sentencing guidelines are advisory and an appellate court must defer to the trial court if the sentence is reasonable. [United States v. Evans, 526 F.3d 155, 160 \(4th Cir. 2008\)](#).

B. Analysis of the Issue

In this case, the defendant received a "presumptively reasonable" sentence of 41 months, at the low end of the advisory guideline range. ***26** [United States v. Wallace, 515 F.3d 327, 334 \(4th Cir. 2008\)](#) (a sentence within the guideline range is "presumptively reasonable"). The district court considered the guidelines, the presentence report, the defendant's criminal history, the offense, and the defendant's arguments and allocution. After satisfying the requirements of [18 U.S.C. § 3553](#), the court properly imposed the sentence. Nonetheless, the defendant now complains, essentially, that his sentence was procedurally unreasonable because the district court refused to consider the disparity between powder cocaine and crack cocaine. Although the [United States Supreme Court in Kimbrough, 128 S. Ct. 558 \(2007\)](#), concluded that a district court may consider the disparity between guideline sentences for crack and powder cocaine, the sentencing court is not required to do so. See [United States v. Johnson, 517 F.3d 1020, 1024 \(8th Cir. 2008\)](#).

The defendant inaccurately characterizes the court's decision to sentence the defendant to the low end of the guideline range, claiming that the court "refused to consider the disparity," failed "to independently evaluate the guideline range," and "misperceived its authority to vary." Defendant's Brief at 2, 14, 25, 28, 29. Unlike the picture the defendant has painted of the

court erring by repeatedly refusing to consider his argument, the record reveals careful consideration by the district court in imposing a presumptively reasonable sentence at the low end of the advisory guideline range. Moreover, there is no evidence in this record that the court did not *27 understand its authority. See [United States v. Bosah](#), 26 Fed. Appx. 122 (4th Cir. 2001) (unpublished) (“When the district court is silent as to its reason for not departing, this Court will not infer that the district court believed that it lacked authority.”); [United States v. Bailey](#), 975 F.2d 1028, 1035 (4th Cir. 1992). Indeed, as the Fourth Circuit recently noted, this Court lacks “the authority to review a sentencing court’s denial of a downward departure unless the court failed to understand its authority to do so.” [United States v. Brewer](#), 520 F.3d 367, 371 (4th Cir. 2008).

The defendant claims that the court failed to understand its authority based on two cryptic comments made by the court during the sentencing hearing. Defendant’s Brief at 28-30. Those two brief, off-hand comments do not suggest that the Court did not understand its authority. Rather, the comments indicate that the court was not persuaded that the defendant should receive a lower sentence. After hearing the defendant’s argument, the court was not willing to grant the request and ruled accordingly. The defendant focuses on two judicial comments when the defendant raised the crack/powder disparity: (a) the “new guidelines” have “modified the discrepancy”; and (b) “Congress has decided that that’s an appropriate ratio to establish.” J.A. 210. The defendant now claims these two comments mean the district court “refuse[d]” to consider “a variance based on the crack/powder disparity” and further contends that the court “misperceived its authority to vary from the advisory *28 guideline range.” Defendant’s Brief at 28, 29. The court’s comments do not support the weight the defendant assigns them. The court’s comments simply reflect the court’s understanding that Congress had recently altered the guidelines to account for the crack/powder disparity. The court’s comments, additionally reflect the court’s belief that Congress’ judgment on this issue was, in the court’s opinion “appropriate.” In this regard, the court’s comments were entirely proper since the court had to be mindful of the applicable guidelines and the congressional judgment inherent in those guidelines. Nowhere did the court state that it would never consider a disparity based variance. Rather, properly construed, the court’s comments essentially reflect the

court’s conclusion that the amended guidelines, in the present case, adequately accounted for any crack/powder disparity. Such was the court’s discretionary prerogative. Thus, there is no evidence in this record to suggest that the court did not understand its authority.

The district court was required to calculate the sentencing guideline range, to consider the sentencing factors outlined in [18 U.S.C. § 3553\(a\)](#), and to articulate the reasons for the particular sentence. See, e.g., [United States v. Green](#), 436 F.3d 449, 455-56 (4th Cir. 2006). The court had available to it a wealth of information regarding the sentencing factors. First, the presentence report described certain [§ 3553](#) factors such as the history and characteristics of the defendant, the nature and *29 circumstances of the criminal conduct of the defendant, and the appropriate sentencing range. J.A. 225 - 273. At the sentencing hearing, the defendant offered no changes to the presentence report and put on no evidence. J.A. 208. Second, the court received filings by the defendant and the government. J.A. 167, 172. The defendant’s position with respect to sentencing, filed seven days before the defendant’s hearing, put forth the exact argument that the defendant now insists was not considered by the court. J.A. 173. Defendant’s Brief at 28. Finally, the court heard argument by the defendant. J.A. 210. At the outset of the hearing, the court noted that it found the guideline factors to be properly assessed. J.A. 209. At the conclusion of the defendant’s argument, the court denied the defendant’s request for a variance, concluding that the disparity was taken into consideration by the new sentencing guidelines and considered by Congress. J.A. 210. Accordingly, the court properly sentenced the defendant to the low end of the advisory range.

IV. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FORFEITURE OF THE \$1,223 FOUND ON THE DEFENDANT’S PERSON AT THE TIME OF HIS ARREST.

A. Standard of Review

The district court’s findings of fact are reviewed under a clearly erroneous standard, and its conclusion that those facts constituted a legally proper forfeiture is *30 reviewed de novo. [United States v. Bowe](#), 257 F.3d 336, 342 (4th Cir. 2001); [United States v. Marmolejo](#), 89 F.3d 1185 (5th Cir. 1996).

B. Analysis of the Issue

The indictment put the defendant on notice that, upon his conviction, the Government would seek the forfeiture of \$1,223 in currency under two theories: that the money was “the proceeds the defendant obtained” as a result of the crime for which he was convicted, or that it was “used, or intended to be used, in any manner or part, to commit, or to facilitate the commission” of that offense. J.A. 11. These are two of the three grounds for forfeiture in a criminal drug case, set forth in [21 U.S.C. § 853\(a\)](#).

Following his conviction, the defendant waived his right to have the forfeiture determined by a jury. See [Fed.R.Crim.P. 32.2\(b\)\(4\)](#). Accordingly, the Government submitted a proposed order of forfeiture to the court, and the court, upon making findings of fact, entered the order and made it part of the judgment in the criminal case. J.A. 214. The order relied on the Government's second theory of forfeiture; that is, that the money was subject to forfeiture because it was “found upon the defendant” and was property that “he intended to use in the commission of the offenses for which *31 he was convicted.” *Id.*^{FN6}

FN6. At the sentencing hearing, the court stated that “there's ample evidence to find that this money was the proceeds of drug trafficking and the forfeiture should be granted” (J.A. 212), but it is clear from the order of forfeiture itself that the court was relying on the facilitation theory, not the proceeds theory, in ordering the forfeiture of the money.

In a criminal case, the burden is on the Government to establish the forfeitability of the property by a preponderance of the evidence. [United States v. Cherry](#), 330 F.3d 658, 669-70 (4th Cir. 2003); [United States v. Tanner](#), 61 F.3d 231, 234-35 (4th Cir. 1995).

Where the Government's theory is that the property was used to commit, or to facilitate the commission of, the offense of conviction, the Government must establish that there was a “substantial connection” between the property to be forfeited and the offense. To establish a substantial connection, the Government need not show that the property was integral, essential or indispensable to the offense, but only that it made

“the prohibited conduct less difficult or more or less free from obstruction or hindrance.” [United States v. Schifferli](#), 895 F.2d 987, 990 (4th Cir. 1990). See [United States v. Santoro](#), 866 F.2d 1538, 1542 (4th Cir. 1989) (property used as the site for four cocaine sales satisfies the substantial connection test; in fact, a single sale would have been sufficient); [United States v. 475 Cottage Drive](#), 433 F. Supp. 2d 647, 654-55 (M.D.N.C. 2006) (applying the Fourth Circuit's definition of “substantial *32 connection”; the Government need only show that the connection was more than incidental or fortuitous).

The substantial connection requirement refers to the quality of the nexus between the property and the offense, not to the quantity of evidence adduced to establish the connection. The Government's burden remains, at all times, to prove the connection by a preponderance of the evidence. Accordingly, circumstantial evidence may be used to establish the forfeitability of the property. See [United States v. One Parcel... 7715 Betsy Bruce Lane](#), 906 F.2d 110, 113 (4th Cir. 1990) (circumstantial evidence that the house was used to possess cocaine with intent to distribute is sufficient, even if only trace amounts are found); [United States v. Pierre](#), 484 F.3d 75, 86 (1st Cir. 2007) (the Government may satisfy its burden of proof as to the property to be forfeited in a criminal forfeiture case with circumstantial evidence); [United States v. \\$124,700 in US Currency](#), 458 F.3d 822, 826 (8th Cir. 2006) (circumstantial evidence sufficient to establish substantial connection between currency seized during highway stop and drug trafficking); [United States v. One Lot of US Currency \(\\$36,634\)](#), 103 F.3d 1048, 1054 (1st Cir. 1997) (circumstantial evidence that money was involved in drug trafficking sufficient); [United States v. Parcels of Land](#), 903 F.2d 36, 42 (1st Cir. 1990) (accepting circumstantial evidence and rejecting the requirement that the Government must link seized properties with particular drug *33 transactions).

If the court finds that the Government has established the forfeitability of the property by a preponderance of the evidence, it must order the forfeiture of the property. See [United States v. Monsanto](#), 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied...”). As the defendant acknowledges in his brief, the trial court's findings of fact regarding the forfeitability of the property

are reviewed for “clear error.” Defendant's Brief at 34.

This court has affirmed the forfeiture of real property used to facilitate a drug offense on multiple occasions. See [Schifferli](#), 895 F.2d at 990-91 (forfeiture of office where dentist wrote illegal prescriptions); [Santoro](#), 866 F.2d at 1542 (property defendant used for cocaine sales); [Betsy Bruce Lane](#), 906 F.2d at 114 (house used to store, prepare, package, and consume cocaine). The district courts in this circuit have applied the facilitation theory to personal property, including sums of money in the possession of a drug dealer that may be used by him to facilitate his drug transactions. See [United States v. \\$890,718.00 in US. Currency](#), 433 F. Supp. 2d 635, 645-46 (M.D.N.C. 2006) (hoard of cash that drug dealer keeps in his house, which allows him to get a better deal from his suppliers by offering an immediate payment of cash, is subject to forfeiture under [section 881\(a\)\(6\)](#) as facilitating property because it makes *34 the drug offense easier to commit); [United States v. One 1993 Cadillac Seville STS](#), 2004 WL 1462243, at *5 (D. Md. 2004) (vehicles used as decoys, but not used to transport drugs themselves, are forfeitable as facilitating property under [section 881\(a\)\(4\)](#)). See also [United States v. Gaskin](#), 364 F.3d 438, 463 (2d Cir. 2004) (vehicle drug dealer used to drive to the location where he was to take delivery of drugs, and cash that he intended to use to pay for the drugs and other expenses related to their distribution, are forfeitable as facilitating property under [sections 881\(a\)](#) and [853\(a\)\(2\)](#)); [United States v. Thompson](#), 2002 WL 31667859 (N.D.N.Y. 2002) (vehicle and cash found on defendant's person are forfeitable under [section 853\(a\)\(2\)](#) as property used to facilitate an incomplete conspiracy to distribute marijuana).

Here, the district court found that the circumstances surrounding the seizure of the \$1,223 were sufficient to establish a substantial connection between the money and the defendant's drug trafficking offense. The money was seized from the defendant at the time of his arrest; it was folded and held in a manner that - according to an expert witness - was indicative of its use in a drug deal; and at the time of the seizure, the defendant was in possession of a quantity of drugs that he was subsequently convicted of possessing with the intent to distribute. Moreover, the amount of money in question, while not large by the standards of federal drug trafficking cases, was nevertheless substantially more than a person would normally *35 carry to the scene of a drug transaction if he did not intend to avail

himself of the money if necessary to make the transaction go more smoothly. See [\\$890,718.00 in US Currency](#), 433 F. Supp. 2d at 646.

Accordingly, the district court did not “clearly err” in finding that the defendant intended to use the \$1,223 to commit, or to facilitate the commission, of the offense for which he was convicted.^[FN7]

FN7. The defendant additionally notes that the Judgment incorrectly listed the greater offense of Possession with the Intent to Distribute 5 Grams or More of Cocaine Base where the defendant was convicted of Possession with the Intent to Distribute Cocaine Base (no amount specified). Defendant's Brief at 36-37. Based on an independent review of the record, the government agrees that the Judgment appears to reflect a clerical error. Accordingly, the government respectfully suggests that this Court remand this matter to the district court for the limited purpose of correcting this clerical error.

***36 CONCLUSION**

For the reasons stated, except with respect to the clerical error noted, *see n. 7 supra*, this Court should affirm the defendant's conviction and sentence.

***37 STATEMENT WITH RESPECT TO ORAL ARGUMENT**

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid the Court in reaching its decision.

UNITED STATES OF AMERICA, Appellee, v.
KINSEY CORY HERDER, Appellant.
2008 WL 4106858 (C.A.4) (Appellate Brief)

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