FILED
United States Court of Appeals
Tenth Circuit

November 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY O. TWADDLE,

Defendant - Appellant.

No. 20-2128
(D.C. No. 5:17-CR-02690-RB-3)
(D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

In October of 2016, Jerry Twaddle sold a small packet of methamphetamine to a confidential informant. Unknown to Mr. Twaddle, the confidential informant captured the sale on video. But the government did not bring charges for this transaction—instead, it began to build a larger case against Twaddle.

Almost a year later, law enforcement intercepted texts between Twaddle and a coconspirator. The two agreed that Twaddle would purchase two pounds of methamphetamine that night. Police followed Twaddle to the site of the sale and

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

watched him pick up a package. As Twaddle drove away, police signaled for him to pull over. Twaddle fled, leading police on a high-speed car chase and only stopping when spike strips destroyed his tires. The officers arrested Twaddle and found the two pounds of methamphetamine he threw near the highway. They then searched Twaddle's home and found drug paraphernalia and firearms.

Twaddle was indicted for distribution of methamphetamine. He went to trial, and the jury found him guilty on all counts. At sentencing, the district court applied enhancements for reckless endangerment, possession of firearms, and an aggravating role in the conspiracy. Twaddle's minimum guideline sentence was 30 years. But the district court made a substantial downward deviation from the guideline range, sentencing Twaddle to 20 years.

Twaddle now appeals, arguing that the district court erred in admitting evidence of his prior drug transaction, the two pounds of methamphetamine, and the firearms found in his shed. He also appeals the application of the three sentencing enhancements. We affirm each of the district court's rulings.

I. Background

In October 2016, the government obtained the video of Twaddle distributing an ounce of methamphetamine. It did not charge this conduct, but it used the video to begin building a larger case against Twaddle. Over the next year, the government obtained wiretaps of Twaddle's phone and placed a

surveillance camera outside his residence.[1] The wiretaps revealed that Twaddle frequently discussed the purchase and sale of methamphetamine with co-defendant Marco Martinez. They used code, calling a pound of methamphetamine a "bag of dog food," "dog," or "biscuit."

On September 6, 2017, the night of Twaddle's arrest, he and Martinez agreed that Twaddle would go to Martinez's house in Roswell, New Mexico, pick up two pounds of methamphetamine, and leave $5,000. Supp. App., Vol. I at 23 (Martinez: "I'll put it in the glove compartment. . . Just go over there. . . open the door. . . put the cash in. [W]hat are we looking about two. . . (2) dogs?" Twaddle: "That'll work. . . I've got five (5) racks on me right now."). Just before midnight, Twaddle arrived at the house, circled it a few times, and then reached into a car parked outside to exchange the money for the drugs.

As Twaddle drove back to his residence in Carlsbad, New Mexico, police signaled that he should pull over. But Twaddle fled, reaching speeds of 140 mph. An officer positioned farther down the highway deployed a spike strip, which destroyed Twaddle's tire and forced him to a stop. Police then arrested Twaddle and removed his girlfriend, Jamie Moreno, from the vehicle. They did not find methamphetamine in the vehicle, but they knew Twaddle had just retrieved two pounds of the drug. Police searched along the path of Twaddle's flight down the highway and located the two pounds of methamphetamine. They detained

[1] Twaddle's driver's license listed his parent's house as his residence, but all evidence indicates that he lived in Carlsbad with his girlfriend and roommate.

Twaddle without mentioning the drugs, so their investigation could continue undisturbed.

The next morning, police observed Moreno and Twaddle's roommate walking along the highway where Twaddle had driven the night before. They appeared to be looking for the package of methamphetamine, unaware the police had already found it.

Later that day, Twaddle called Moreno from jail, asking about the drugs. Supp. App., Vol. I at 5157 (Twaddle: "Did you go find that?"; Moreno: "We couldn't find it."; T: "I'm just glad they didn't find it."). He also boasted about the high-speed car chase. Supp. App., Vol. I at 5157 (T: "I was smoking them, huh?"; M: "They said you was going one twenty. . . **laughs**."; T: "No, way, way faster than that."). Finally, he instructed Moreno to hide his firearms and other potential evidence. Supp. App., Vol. I at 5157 (M: "What about all your stuff[?] In the shed. . . or what?"; T: "No!... I don't have the key to the shed. . . They're keeping all my keys."; M: "What do you want me to do with all. . . your guns?"; T: "I don't know."). Moreno was worried that without Twaddle present at the house, his things would be stolen. Her first inclination was to hide the firearms in the shed outside their house, but Twaddle said the police had taken his key. The pair never settled on a hiding spot for the firearms.

Twaddle remained in custody after his initial arrest. Moreno stayed at Twaddle's house, along with his roommate. About a month after his initial arrest, Twaddle was indicted in this case, and police executed a search warrant at the

house. They found drug paraphernalia, including a scale and a grinder, in the house, and several firearms in the shed outside.

Twaddle was indicted alongside several coconspirators, including Moreno and Martinez, but he was the only one to go to trial. At trial, Twaddle objected to the admission of three relevant pieces of evidence: the October 2016 recorded drug transaction, the two pounds of methamphetamine, and the firearms.

The district court admitted the drug transaction over Twaddle's objection that it was introduced for the improper purpose of showing his propensity to engage in crime. As for the methamphetamine, a police officer and a lab technician identified the evidence, but the two evidence technicians who transferred it did not testify. Nonetheless, the district court admitted the evidence over Twaddle's objection that the chain of custody was insufficient. Finally, it admitted the firearms over Twaddle's objection that they were irrelevant and prejudicial.

After a three-day trial, the jury found Twaddle guilty on all counts. At sentencing, over Twaddle's objections, the district court applied three relevant sentencing enhancements: an enhancement under U.S.S.G. § 3B1.1(c) for an aggravating role in the conspiracy, an enhancement under U.S.S.G. § 3C1.2 for reckless endangerment, and an enhancement under U.S.S.G. § 2D1.1(b) for possession of firearms. Twaddle's guideline sentencing range was 360 months to life, but the district court varied downwards and sentenced him to 240 months.

II. Analysis

Twaddle contends the district court erred in (1) admitting evidence of the drug transaction, methamphetamine, and firearms, and (2) applying the sentencing enhancements. For the reasons below, we affirm the district court's rulings.

The district court did not abuse its discretion when it admitted evidence of Twaddle's prior drug transaction, the two pounds of methamphetamine, and the firearms. Further, it correctly applied sentencing enhancements for Twaddle's reckless endangerment of others, aggravating role in the conspiracy, and possession of firearms.

A. Character Evidence

Twaddle objects to the admission of his October 2016 drug transaction with a confidential informant. He argues that this prior bad act was used to show his criminal character, in violation of Federal Rule of Evidence 404(b). The government argues that the transaction was admitted to prove Twaddle's intent to distribute, not his bad character. The district court admitted the evidence over Twaddle's objection.

Federal Rule of Evidence 404(b) provides that evidence of prior bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." Prior bad acts may, however, be admitted to prove "intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b).

There is a presumption that Rule 404(b) evidence will be admissible if four requirements are met:

> (1) the government offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made a Fed. R. Evid. 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the district court submitted a limiting instruction.

United States v. Wacker, 72 F.3d 1453, 1468 (10th Cir. 1995) (quoting *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988)). Twaddle argues that the first and fourth prong of the *Huddleston* test were not met: there was no proper purpose for the evidence and the district court's limiting instruction was not sufficient.

As for the purpose, the government introduced the prior transaction to show Twaddle's intent to distribute. *See Wacker*, 72 F.2d at 1496 (prior drug transaction admissible to show intent through "pattern of drug activity"). Twaddle disputes this, contending that because "the amount [of methamphetamine] involved in this case was two pounds, there could be no factual dispute regarding intent to distribute." App. Br. at 27. It is true that intent to distribute *may* be inferred from the possession of a large amount of contraband. *See United States v. King*, 485 F.2d 353, 357 (10th Cir. 1973). But a jury is still free to find that a defendant did not distribute even a large amount. Thus, the government still bears the burden to prove intent. Of course, a defendant may stipulate to intent and thus prevent the admission of a prior drug

transaction for that purpose. But Twaddle explicitly refused to do so at trial. App., Vol. II at 588 ("[We] don't want to stipulate that he had the intent."). He also affirmatively argued that he did not have an intent to distribute at trial, arguing that the texts regarding "dogs" and "dog food" could have been about his pet dog. Thus, the government still had the burden to rebut Twaddle's arguments regarding intent. The evidence was admitted for that proper and relevant purpose.

As for the limiting instruction, the district court stated that the prior drug transaction could be used "only as it bears on the defendant's intent to distribute narcotics and for no other purpose." App., Vol. II at 886. It went on to say, "Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the acts charged in this case." App., Vol. II at 886. Twaddle argues that this instruction meant "[i]n simple language, 'use this prior bad conduct to decide whether he intended to commit this crime.'" App. Br. at 29. It is unclear why Twaddle objects to this meaning, since showing intent is a proper purpose for the introduction of prior bad acts. *See* Fed. R. Evid. 404(b). Nonetheless, the district court's limiting instruction was not plainly erroneous. It clearly stated that the jury should use Twaddle's prior bad act only for the proper purpose of proving intent.

Because the prior bad act, Twaddle's October 2016 drug transaction, was introduced for a proper purpose and with an appropriate limiting instruction, we affirm the district court's decision to admit the evidence.

B. Chain of Custody

Twaddle next argues that the district court erred in admitting evidence of the two pounds of methamphetamine when there was not a sufficiently reliable chain of custody. The government counters that its witness, the officer who bagged the methamphetamine, did establish a sufficient—though imperfect—chain of custody.

Because drug evidence is "not readily identifiable and is susceptible to alteration by tampering," the party seeking admission must establish a chain of custody "with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989) (quoting E. Cleary, McCormick on Evidence § 212 at 667 (3d ed. 1984)). But the chain of custody "need not be perfect." *Id.* at 1531. As long as the chain of custody is sufficient, any deficiencies go to the weight of the evidence, not its admissibility. *Id.* The trial court "need only find that the reasonable probability is that the evidence has not been altered in any material aspect." *Id.* at 1532. Further, "[t]here is no rule that the prosecution must produce *all* persons who had custody of the evidence to testify at trial." *Id.*

Officer Matthews testified at trial to establish a chain of custody for the two pounds of methamphetamine. He had picked up the drugs from the side of the highway after Twaddle's flight and placed them into a sealed evidence bag. He took that evidence bag and placed it into a secure storage locker, only accessible to evidence technicians. An evidence technician took the bag to a lab in Las Cruces, New Mexico, for testing. It was returned to Officer Matthews shortly before trial. The bag was marked by Officer Matthews and by the Las Cruces lab technician who tested its contents.

Officer Matthews testified that the bag was in the same condition as when he first saw it, and that there were no signs that anyone had tampered with its contents. But the evidence technician who took the bag from the secure locker to the Las Cruces lab was not available to testify, and the government did not present any paperwork about that transfer.

Next, the Las Cruces lab technician testified. He stated that the bag was in the same condition as when he tested its contents, and that the drugs inside were in fact methamphetamine. He explained that an evidence technician had transported the drugs from a vault at the lab into the lab itself for testing, and he provided paperwork regarding that transfer. The second evidence technician was not called to testify.

Twaddle argues that because the two evidence technicians did not testify, and there was no paperwork to document the first transfer of the evidence, the chain of custody is insufficient. But he presents no evidence that the drugs were

tampered with, and he does not address that the evidence bag was properly labeled and had only been unsealed twice—once by Officer Matthews and once by the lab technician. There was no sign that anyone had improperly interfered with the evidence, and both witnesses testified that it was in the same condition as when they first saw it. Thus, the district court did not abuse its discretion when it found the chain of custody sufficient. *See United States v. Thomas*, 749 F.3d 1302, 1311 (10th Cir. 2014) (affirming a finding that a chain of custody was sufficient even where the testifying officer could not provide an explanation as to how the drugs were transported, because the bag was labeled and there was no evidence of tampering).

Because the chain of custody was sufficiently established, we affirm the district court's decision to admit the methamphetamine evidence.

C. Relevance of Firearms in Shed

When police executed a search warrant for Twaddle's residence, they found firearms in a shed outside. The district court admitted evidence of the firearms over Twaddle's objection that it was both irrelevant and unduly prejudicial. Because the firearms are sufficiently connected to Twaddle and probative of drug distribution, the district court correctly admitted the evidence.

The threshold for determining whether evidence is relevant, as provided by Federal Rule of Evidence 401, is "not a high one." *United States v. Cerno*, 529 F.3d 926, 934 n.5 (10th Cir. 2008). If the evidence makes any consequential fact more or less probable, it is relevant. Fed. R. Evid. 401. Relevant evidence may

be excluded only where "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403.

Twaddle argues that the firearms were not relevant evidence and that they fail a Rule 403 analysis. As for relevance, his argument fails. He argues that the guns were not relevant to the charges because he had already been in custody for a month at the time of the search and they were in a storage shed outside of his house. But he discussed the guns in relation to the methamphetamine on a recorded jail call to his girlfriend, and her first inclination was to put them in the outdoor shed. This is sufficient to make the evidence relevant and probative of drug trafficking. *See United States v. Hall*, 473 F.3d 1295, 1304 (10th Cir. 2007) ("The Government is not required to prove that the firearms or ammunition were used for a particular transaction in order for the evidence to be probative. That the police did not uncover the items until after the charged conspiracy was alleged to have ended does not mean that they were not involved in the ongoing conspiracy before it ended.").

Twaddle's Rule 403 argument also fails. He first argues that firearms are not probative of drug distribution. But firearms are "tools of the trade" in drug trafficking, an industry in which violence and large cash transactions abound. *United States v. Martinez*, 938 F.2d 1078, 1083 (10th Cir. 1991). They may be used to guard a valuable stock of contraband or cash, or to ward off attacks from other criminals. Thus, they are probative of a defendant's participation in

distribution offenses, just as a scale or small baggies would be. *Id.* This is true even where no firearm-related offense is charged. *Id.*

Twaddle then argues that the firearms were not sufficiently connected to him to be probative. But they were sufficiently connected, for several reasons. First, and most importantly, Twaddle admitted to possession of the firearms in a recorded jail call. Second, the firearms were found on the property where Twaddle conducted drug transactions, and where he was headed on the night of his arrest. *See id.* (finding relevant that a defendant "returned to his residence after negotiating drug transactions"). It is true that the firearms were in a locked shed apart from the main house. But they were easily accessible from the house, and Twaddle admitted on his recorded jail call that he normally had a key to the shed. Finally, they were found along with other "tools of the trade"—a scale and a grinder—in the search of Twaddle's home. *See id.* (finding relevant that the police "recovered other 'tools of the trade' in their search").

The district court did not abuse its discretion in admitting evidence of the firearms found in Twaddle's shed, and we affirm its ruling.

D. Sentencing Enhancements

Twaddle objects to the district court's application of three enhancements at sentencing: aggravating role in the conspiracy, reckless endangerment, and possession of a firearm. But Twaddle gave orders to others in the conspiracy, endangered police when he fled at 140 mph, and possessed the firearms seized

from the shed outside his home to further his drug distribution. Thus, the district court did not abuse its discretion in applying the three sentencing enhancements.

The enhancements for an aggravating role and reckless endangerment plainly apply. As for the firearm enhancement, we agree with the district court that it was a close call. But we do not find that the decision to apply the enhancement was unreasonable, and we must give due deference to the district court's application of the guidelines to the facts. *See United States v. Duque*, 182 F.3d 933 (10th Cir. 1999). Thus, we affirm the district court's application of each sentencing enhancement.

1. Aggravating Role

The sentencing guidelines provide that a defendant who acts as an "organizer, leader, manager, or supervisor in any criminal activity" qualifies for a two-level enhancement for his aggravating role. U.S.S.G. § 3B1.1(c). A defendant qualifies for an aggravating role sentencing enhancement when he "exercised some degree of control over others involved in the commission of the offense." *United States v. Reid*, 911 F.2d 1456, 1464 (10th Cir. 1990).

Twaddle argues that he did not direct Moreno to retrieve the methamphetamine, "other than to give [her directions]." App. Br. at 36. First, his directions certainly aided Moreno in attempting to conceal evidence of the conspiracy. *See* U.S.S.G. § 1B1.3(a)(1)(A). Further, the district court could have reasonably found that he did direct Moreno to retrieve the drugs at the time he threw them, before the recorded jail call.

Twaddle claims this was unrelated to the conspiracy, and he is correct that the efforts to retrieve the methamphetamine were not charged. But uncharged attempts "to avoid detection" for the charged offense must also be considered, according to the guidelines. *See* U.S.S.G. § 1B1.3(a)(1)(B). The attempted retrieval was more likely than not an effort to avoid detection for the crime. *See* Supp. App., Vol. I at 51¬57 (Twaddle: "Did you go find that?"; Moreno: "We couldn't find it."; T: "I'm just glad they didn't find it."). Thus, the district court did not err when it applied the aggravating role sentencing enhancement.

2. Reckless Endangerment

As for the reckless endangerment sentencing enhancement, the sentencing guidelines state that "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by 2 levels." U.S.S.G. § 3C1.2. A defendant qualifies when his conduct places another at a substantial risk of serious bodily injury and he is aware of the risk created by his conduct. *See United States v. Conley*, 131 F.3d 1387, 138990 (10th Cir. 1997).

Twaddle argues that the district court's finding that he endangered others was clearly erroneous, since only his girlfriend and coconspirator Jamie Moreno was endangered by his high-speed flight. But this is plainly untrue, as the police who were pursuing Twaddle also had to drive at his dangerous speed of 140 mph. Further, the officer who placed the spike strip that destroyed Twaddle's tire was in danger, as Twaddle could have easily lost control of his vehicle and hit the

officer, who was standing just off the highway. Finally, Twaddle nearly crashed into a truck driver in his attempt to escape police, putting the other driver at substantial risk. Thus, it was not error, much less clear error, for the district court to find that Twaddle's 140 mph flight endangered others.

3. Possession of Firearms

Finally, as for the firearm possession enhancement, the guidelines state that if a defendant possessed a firearm, he qualifies for a two-level enhancement. U.S.S.G. § 2D1.1(b)(1). This provision requires "mere proximity to the weapon," rather than active possession. *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1187 (10th Cir. 2004). The guidelines commentary provides: "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), comment.

The initial burden to show possession is on the government. *Zavalza-Rodriguez*, 379 F.3d at 1184. It may do so by proving a temporal and spatial proximity between the defendant, the firearm, and a drug offense. *Id.* The drug offense need not be the exact conduct charged, as long as it constitutes "relevant conduct." *See United States v. Clark*, 415 F.3d 1234, 1241 (10th Cir. 2005). Here, the government has met that initial burden. This is especially so considering that Twaddle admitted to actually possessing the firearms on his recorded jail call.

At trial, the government presented evidence establishing that Twaddle conducted drug transactions from his home. It showed that Twaddle conducted the October 2016 drug transaction at the home, that he mentioned the home in text messages and calls setting up drug transactions, and that drug distribution paraphernalia was found in the home. The government showed that the firearms were also in proximity through the recorded jail call. In the jail call, just hours after Twaddle's methamphetamine-related arrest, Moreno is worried that Twaddle's things, including weapons, would be stolen from their home. She then asks him if she should move his guns to the shed. A reasonable factfinder could put these statements together to determine that, more likely than not, the guns were in the home at the time of the call and at the time of the drug activity.

Thus, the district court found that there was a "mere proximity" between Twaddle, the offense, and the firearms. We review this factual finding for clear error. *See United States v. Pompey*, 264 F.3d 1176, 1180 (10th Cir. 2001). Again, as the district court acknowledged, this finding was a "close call." But we cannot find that it was error, much less clear error. Other circuits have agreed that presence of a defendant's firearm near drug paraphernalia at a site known for drug distribution is sufficient to establish possession for the purposes of U.S.S.G. § 2D1.1(b)(1). *See, e.g.*, *United States v. Mondragon*, 860 F.3d 227, 232 (4th Cir. 2017) (defendant's "display of a revolver pistol while at the house of his closest drug-trafficking associate" sufficient to establish nexus); *United States v. Darwich*, 337 F.3d 645, 665 (6th Cir. 2003) (firearms' location in home where

defendants prepared drugs for sale sufficient to establish nexus); *United States v. Bothun*, 424 F.3d 582, 585 (7th Cir. 2005) (firearm's location in storage unit near drug paraphernalia sufficient to establish nexus); *United States v. Carillo-Ayala*, 713 F.3d 82, 90 (11th Cir. 2013) ("[A] firearm, if present—just present, not present in proximity to drugs—is 'connected with the offense.'"); *United States v. Trujillo*, 146 F.3d 838, 847 (11th Cir. 1998) (gun found in warehouse office on property with known drug activity established nexus). Thus, we agree that the government satisfied this initial burden.

The burden then shifts to Twaddle to show that it was "clearly improbable the weapon was connected with the offense." *Zavalza-Rodriguez*, 379 F.3d at 1185 (quoting *Pompey*, 264 F.3d at 1181). Twaddle argues that the firearms seized were not sufficiently connected to him. But he directed Moreno to hide them after his methamphetamine-related arrest. She suggested hiding them in the shed, and a month later they were found in the shed. The shed was directly outside the home where Twaddle distributed methamphetamine, and the district court could reasonably infer the guns were linked to Twaddle and his crimes. Twaddle presented no other argument as to why the firearms were not connected with the offense. Thus, it is not "clearly improbable" that the weapons were involved in the charged drug conspiracy. *See* U.S.S.G. § 2D1.1(b)(1), comment.

The government met its burden to show possession under section 2D1.1(b)(1), and Twaddle failed to rebut the government's assertions. Thus, the district court correctly applied this enhancement.

III. Conclusion

For the reasons above, we AFFIRM each of the district court's rulings.

Entered for the Court

Timothy M. Tymkovich
Chief Judge