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United States Court of Appeals
Tenth Circuit

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Jane K. Castro
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SEAN ALEXANDER TENNISON,

Defendant - Appellant.

No. 20-3033

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:17-CR-20038-DDC-14)

Thomas D. Haney, Stevens & Brand, L.L.P., Topeka, Kansas, for Defendant-Appellant.

Michelle McFarlane (Tristram W. Hunt, on the brief), Office of the United States Attorney, District of Kansas, Kansas City, Kansas, for Plaintiff-Appellee.

Before **HARTZ, SEYMOUR,** and **MURPHY,** Circuit Judges.

SEYMOUR, Circuit Judge.

On January 31, 2017, Sean Tennison was caught buying a quarter of a kilogram of methamphetamine from a drug distribution network and was charged on September 20, 2017 with conspiracy to possess with intent to distribute and with possession with intent

to distribute more than fifty grams of meth. He was subsequently arrested about a year later with over a kilogram of meth and various drug distribution instruments. At trial, the government presented evidence of Mr. Tennison's initial purchase as well as Rule 404(b) evidence of the meth and the distribution apparatus in his possession when he was arrested. The jury convicted him on both counts and the district court sentenced him to 175 months of imprisonment. Mr. Tennison appeals, arguing that (1) the court erred by admitting Rule 404(b) evidence of his later arrest, (2) the evidence was insufficient to convict him, and (3) his sentence was disproportionate to his co-defendants. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I.

Factual background

Starting in July 2016, the Drug Enforcement Administration (DEA) and the Jackson County Drug Task Force joined forces to investigate and disrupt a meth supply network. The investigation, called Operation déjà vu, revealed an expansive conspiracy with the objective of obtaining high purity methamphetamine and distributing it across the Midwest. Transporters picked up meth from Mexico and the United States and transported it to cities in Kansas, Missouri, and Oklahoma. The organization then sold meth to local distributors by employing couriers who delivered the drugs and collected payments. By August 2017, Operation déjà vu had resulted in the arrest of twenty-one individuals and the seizure of roughly twenty kilograms of meth.

One of the conspiracy's participants was Cynthia Rodriguez, the wife of the conspiracy's leader-organizer. She spoke English better than her colleagues and

therefore assumed the role of translator and dispatcher. After receiving an order, she first contacted her spouse to check inventory. She then confirmed the amount and the price with the buyer and coordinated a meeting with couriers to complete the sale.

Katrina Job was one such buyer. She typically called Ms. Rodriguez to arrange a buy and met with couriers to pick up the drugs. As relevant here, she called Ms. Rodriguez on January 31, 2017, to broker a deal on behalf of Mr. Tennison. Ms. Job indicated that someone wanted to buy a kilo of meth for $11,000. After checking inventory with her husband, Ms. Rodriguez informed Ms. Job that the organization did not have the inventory to fulfill Mr. Tennison's entire order but offered to sell him a quarter kilo. Mr. Tennison accepted, and Ms. Job set up a meeting at the parking lot of Rio Bravo grocery store in Kansas City, Kansas.

Meanwhile, because Ms. Rodriguez's phones had been wiretapped, law enforcement learned of the pending sale and set up surveillance units to monitor the transaction. As Jackson County deputy sheriffs watched, Mr. Tennison and Ms. Job arrived in a white pickup truck and were met by two couriers in a maroon sedan. One of the couriers entered the backseat of the truck and sold 250 grams of meth to Mr. Tennison for $2,500. Once the courier exited the truck, Mr. Tennison and Ms. Job left the parking lot, with deputy sheriffs following. Minutes later the deputies pulled them over and ordered Mr. Tennison out of the truck. As he stepped out, the meth he had just purchased fell out of his pants. The officers seized the drug and some of Mr. Tennison's belongings. A later search of his cell phone revealed six phone calls to the phone Ms. Job had used to call Ms. Rodriguez earlier that day.

On September 20, 2017, the government indicted Mr. Tennison on two counts. Count One charged him and twenty others with conspiracy to distribute more than fifty grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), and 846. Count Twenty charged him with possession with the intent to distribute more than fifty grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), and 18 U.S.C. § 2. A federal warrant for his arrest was issued but he was not immediately arrested.

Subsequently on February 14, 2018, Jackson County sheriff detective Logan Waterworth received a tip about Mr. Tennison's whereabouts at a particular time and arranged for the surveillance of the subject house. Mr. Tennison arrived at the expected location in a silver Mercedes and was apprehended. Following his arrest, officers saw hypodermic needles, digital scales, and packaging material in plain view inside the car. A search of the car revealed a total of 1,214.8 grams of methamphetamine packaged separately in baggies weighing 3.7 grams, 4.5 grams, 112.8 grams, 451.6 grams, and 288.3 grams.

On September 11, 2019, Mr. Tennison filed a motion *in limine* to exclude evidence of his February 14, 2018 arrest, arguing the government wanted only to prove that he "is a druggie, has always been a druggie, and is always going to be a druggie." Rec., vol. I at 196-98. The government then filed a Notice of Intent to Introduce Rule 404(b) Evidence of the February arrest, arguing it "tends to show Tennison's intent to distribute methamphetamine in January 2017, his knowledge of the methamphetamine on his person in January 2017, and that the methamphetamine's presence was not due to an

accident or mistake." *Id.* at 203. The district court held a hearing on the fourth day of Mr. Tennison's trial and ruled the evidence admissible.

The trial commenced on October 31, 2019. DEA Agent Burkhart, a veteran investigator who had overseen Operation déjà vu, testified about the drug distribution conspiracy and about the January 31, 2017 enforcement action. He explained that based on his training at the DEA academy, his eleven years of experience, and interviews with meth users he considered 250 grams of meth to be a large quantity. Rec., vol. II at 255. Ms. Job also testified about the January 2017 transaction as well as her experience as a methamphetamine user. She explained that her daily usage was "anywhere from a quarter gram to one, one-and-a-half grams." *Id.* at 457-58. She further testified that she had formerly bought a kilo of meth for resale and explained that in her opinion someone would not buy that quantity for personal use. *Id.* at 462.

Detective Waterworth testified next, focusing on the evidence of Mr. Tennison's arrest on February 14, 2018. *See id.* at 551-56. He commented on a series of photographs depicting the contents of the Mercedes Mr. Tennison was driving, including pictures of hypodermic needles, digital scales, packaging material, and several baggies of a crystal-like substance. A lab report was introduced into evidence showing that the substance had tested positive for methamphetamine.

Once the government rested, Mr. Tennison submitted a Motion for a Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, contending the evidence was insufficient to convict him on either count. As to Count One, he argued that he did not know there was a conspiracy and that nobody in the conspiracy knew him.

As to Count Twenty, he argued that he had bought the meth for personal use and that the government had not presented evidence of his intent to sell. *Id.* at 887.

The government countered that it had presented evidence on both counts and that whether it had met its burden of proof beyond a reasonable doubt was "solely within the province of the jury." *Id.* at 888-89. The government's evidence consisted of (1) multiple testimonies that a kilo of meth would amount to about 500 days of usage; (2) Ms. Job's testimony about her personal experience using meth; (3) the recordings of Ms. Job's negotiations with Ms. Rodriguez to purchase a kilo for $11,000; (4) the January 31, 2017 meeting in which Mr. Tennison purchased a quarter of a kilo for $2,500; and (6) Rule 404(b) evidence of the meth and drug distribution apparatus in the Mercedes Mr. Tennison was driving on February 14, 2018. *See id.* at 890-93. The government argued the evidence supported conviction and asked the court to "deny the Rule 29, and allow the government to submit this case to the jury on those two counts." *Id.* at 899.

The district court agreed with the government and denied Mr. Tennison's motion. As to Count One, the court did not "think the decision on a Rule 29 basis is close" because "there [was] plenty of room on all the elements of the conspiracy charge in Count 1 for a reasonable jury to view the evidence that's been adduced to satisfy each of the elements of the conspiracy charge." *Id.* at 900. As to Count Twenty, the court said the evidence showed that Mr. Tennison intentionally possessed a controlled substance, that the substance was methamphetamine, and that the amount he possessed was at least fifty grams. The court also found that there was enough evidence for the jury to

determine Mr. Tennison's intent. Ultimately, the case was submitted to the jury which found Mr. Tennison guilty on both counts.

On November 26, 2019, Mr. Tennison filed a motion for a new trial arguing, among other things, that the verdict was contrary to the evidence and that the court erred in admitting the Rule 404(b) evidence. The district court denied his motion because, as relevant here, "the government presented evidence sufficient for a rational juror to find Mr. Tennison guilty beyond a reasonable doubt and Mr. Tennison has failed to show that the ends of justice require a new trial." Rec., vol. I at 781.

On February 13, 2020, the district court held a sentencing hearing. Mr. Tennison's presentence investigation report indicated a total offense level of thirty-four which, together with his category five criminal history, yielded a guideline range of 235-293 months. The court sustained Mr. Tennison's minor role objection, which reduced his total offense level to twenty-nine and resulted in the guideline range of 140-175 months. The court then sentenced him to 175 months of imprisonment, finding it "sufficient but not greater than necessary to comply with the purposes of sentencing as Congress expressed them in federal statute." *Id.* at 1049.

II.

A. 404(b) Evidence

Federal Rule of Evidence 404(b) bars admission of "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b). However, extrinsic evidence may be admitted to prove intent, plan, knowledge, or absence of mistake. *Id.* The Supreme

Court's decision in *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988), set out a four-factor test to evaluate the admissibility of Rule 404(b) evidence:

> (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed. R. Evid. 105, the trial court shall, upon request, instruct the jury that evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

United States v. Davis, 636 F.3d 1281, 1297 (10th Cir. 2011) (*quoting United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000)).

Mr. Tennison challenges the admission of his February 14, 2018 arrest, contending it was offered for an improper purpose, it was not relevant, and it was highly prejudicial. Aplt. Br. at 13. "We review a district court's admission of evidence under Rule 404(b) for an abuse of discretion," meaning we will not reverse "if its decision falls within the bounds of permissible choice in the circumstances and is not arbitrary, capricious or whimsical." *Davis*, 636 F.3d at 1297 (citation and quotation marks omitted).

i.

Mr. Tennison suggests the evidence of his February 14, 2018 arrest was offered for an improper purpose, arguing he "should be convicted upon the evidence he was indicted for not innuendos of [his] propensity to commit a crime." Aplt. Br. at 7 (*citing United States v. Richards*, 719 F.3d 746, 764 (7th Cir. 2013)). "Rule 404(b) admissibility is a permissive standard and if the other act evidence is relevant and tends to prove a material fact other than the defendant's criminal disposition, it is offered for a proper purpose under Rule 404(b)." *Davis*, 636 F.3d at 1298 (*quoting United States v. Parker*,

553 F.3d 1309, 1314 (10th Cir. 2009)); *see also United States v. Henthorn*, 864 F.3d 1241, 1248 (10th Cir. 2017) ("Rule 404(b) is considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition.") (*citing United States v. Brooks*, 736 F.3d 921, 939 (10th Cir. 2013)).

We agree with the district court and the government that the evidence of Mr. Tennison's arrest in 2018 was offered to prove Mr. Tennison's intent regarding the quarter of a kilo of meth he possessed on January 31, 2017. As the district court put it:

> [Based on] Mr. Tennison's conduct and the surrounding circumstances on February 14th of 2018, a reasonable jury [could] conclude that his conduct on that date and the evidence about that conduct helps [illuminate] his intentions on January 31st, 2017 when, according to the government's view of the evidence, he purchased methamphetamine from this drug trafficking conspiracy and intended to redistribute it.

Rec., vol. II at 802. Moreover, the district court issued Jury Instruction No. 27 to emphasize to the jury that it "may consider [the February 14, 2018] evidence only as it bears on the defendant's intent, and for no other purpose." Rec., vol. I at 337. Because the evidence of Mr. Tennison's February 14 arrest was introduced to prove his intent, it was offered for a proper purpose.

ii.

Mr. Tennison also contends the dissimilarities between his February 14, 2018 arrest and his January 31, 2017 act makes the former irrelevant for the purposes of Rule 404(b). Aplt. Br. at 13-14. He concedes that "[t]he events were related in time by 13 months and geographical area," but says "this is where any arguable similarity ends." Aplt. Br. at 14.

For its part, the district court found the relevance analysis to be "somewhat mixed." Rec., vol. II at 803. Although on both dates Mr. Tennison possessed methamphetamine in quantities that a reasonable juror could find to be a distribution quantity, the court acknowledged that while the February 2018 arrest involved instruments that "a jury reasonably could use as indicia of an intent to distribute (such as scales, unused baggies, individually bagged smaller quantities of methamphetamine) [t]he January 2017 arrest . . . just involved methamphetamine and no other indicia." *Id.* at 804. The court stopped short of specifying how this factor impacted its ultimate decision.

Evidence is relevant if it has any tendency to make a consequential fact more or less probable. FED. R. EVID. 401. In the context of Rule 404(b) relevance, an extrinsic act's similarity to the charged offense is the lynchpin of the analysis. *Henthorn*, 864 F.3d at 1249; *Zamora*, 222 F.3d at 762 (emphasizing the probative value of uncharged acts to show intent "as long as the uncharged acts are similar to the charged crime and sufficiently close in time.") (citations omitted). Courts have assessed similarity through factors like temporal and geographical proximity and physical resemblance. *Davis*, 636 F.3d at 1298; *Zamora*, 222 F.3d at 762.

The similarity requirement does not mandate identicality. *United States v. Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982). If the acts "share elements that possess

'signature quality,' evidence of the 'other crime' may be admitted." *Id.* As the Fifth Circuit explained,

> similarity means more than that the extrinsic and charged offense have a common characteristic. For the purposes of determining relevancy, a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand.

United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (citation and quotation marks omitted).

As Mr. Tennison concedes, the two acts are temporally and geographically close. In addition, the acts share two signature qualities that make them relevant for the purposes of Rule 404(b). First, the government presented evidence of Mr. Tennison trying to buy a kilogram of methamphetamine on January 31, 2017: Ms. Job asked for that amount and indicated Mr. Tennison had $11,000 to pay for it. Just because the organization lacked the inventory to sell him a kilo does not render that amount immaterial for the purposes of the Rule 404(b) relevance analysis. Similarly, Mr. Tennison had over a kilo of meth at the time of his February 2018 arrest. A kilo is enough to satisfy a heavy user's daily consumption for about 500 days. The common characteristics between the two acts, therefore, are the meth that Mr. Tennison possessed and the amount he sought to obtain in January 2017 compared to the amount he had in February 2018. Based on this evidence, the jury could consider whether Mr. Tennison intended to use all the meth himself or whether he intended to sell some to others.

Moreover, when the extrinsic act is offered to show "intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging

himself in the same state of mind in the perpetration of both the extrinsic and charged offenses." *Beechum*, 582 F.2d at 911. The question of similarity turns on whether the district court could find it more likely than not that Mr. Tennison had the same state of mind with respect to the drugs he possessed on January 31, 2017 as he did on February 14, 2018. If the answer is no, then the similarity requirement is not satisfied. If, however, the district court finds that his state of mind is more likely to have been the same on both dates, the relevance requirement is satisfied and the extrinsic evidence can be presented to the jury. It is for the jury to decide whether the extrinsic evidence proves beyond a reasonable doubt the intent element of the crime. In January 2017, Mr. Tennison had tried to buy a kilo of meth but could obtain only 245.7 grams, which the district court found to be a distribution quantity. In February 2018, he possessed digital scales, packaging material, and 1,214.8 grams of meth in assorted baggies. The extrinsic evidence of Mr. Tennison's February 2018 arrest is probative of his intent regarding the meth he possessed on January 31, 2017, and therefore it is relevant for the purposes of Rule 404(b). For these reasons, the district court did not err in admitting the evidence.

iii.

Mr. Tennison next suggests that Federal Rule of Evidence 403 should bar the admission of his February 2018 arrest. He does not specify how that evidence is unfairly prejudicial but argues broadly against admission of any prejudicial evidence. Rule 403 excludes evidence if "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." FED. R. EVID. 403. We have emphasized that even though trial courts have "considerable discretion in performing the Rule 403 balancing test,"

exclusion of otherwise admissible evidence under Rule 403 "'is an extraordinary remedy and should be used sparingly.'" *United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001) (*quoting United States v. Rodriguez*, 192 F.3d 946, 949 (10th Cir. 1999)).

The probity of Rule 404(b) evidence is not absolute; it depends on the extent of the overall evidence the government offers to establish a contested fact. *See id.* at 1210 ("If malice could be inferred from evidence other than prior drunk driving convictions, then the probative value of those prior convictions was greatly reduced. . . . [Here the] probative value is high due to the lack of other evidence of malice."). In this sense, the probative value of extrinsic evidence fluctuates depending on whether a material fact is contested and the extent to which other evidence is offered to prove that fact. Mr. Tennison's position that he purchased meth on January 31 for personal consumption forced the government to produce evidence of his intent to distribute. The government offered evidence from DEA Agent Burkhart that a kilo of meth Mr. Tennison wanted to buy on January 31 was a large quantity. Rec., vol. II at 255. Ms. Job testified that a kilo of meth was a distribution quantity. *Id.* at 462. The government also offered Rule 404(b) evidence of syringes, digital scales, and baggies, as well as 1,214.8 grams of meth recovered at the time of Mr. Tennison's subsequent arrest, which was highly probative because the government presented little additional evidence to prove his intent on January 31.

As to prejudice, Mr. Tennison invites us to adopt the rule that any "prejudicial evidence should not be admitted and, more particularly, unduly and unfair prejudicial evidence should never be admitted." Aplt. Br. at 5. He predicates this proposed rule on

Wikipedia's definition of "prejudicial" as "preconceived opinion that is not based on reason or actual experience." *Id.* We must decline his invitation, however, because the advisory committee notes to Rule 403 define "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." We have explained that:

> unfair prejudice does more than damage the Defendant's position at trial. Indeed, relevant evidence of a crime which the government must introduce to prove its case is by its nature detrimental to a defendant who asserts that he is not guilty of the charged offense. In the Rule 403 context, however, "[e]vidence is unfairly prejudicial if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged." Even if this type of prejudice is found, it must substantially outweigh the probative value of the evidence in order to be excluded under Rule 403.

Tan, 254 F.3d at 1211-12 (citations omitted).

The extrinsic evidence here is not of the nature that tends to subordinate a juror's reason to his or her emotions and Mr. Tennison offers no other specific reason as to why the evidence of his February 2018 arrest is unfairly prejudicial. Rule 403, therefore, does not exclude admission. To conclude, the district court did not abuse its discretion in ruling that the evidence of Mr. Tennison's February 14 arrest was offered for a proper purpose, that it was relevant to his charged conduct, and that it was not unfairly prejudicial.

B. Sufficiency of Evidence

Mr. Tennison next argues the "evidence was insufficient for a reasonable jury to find beyond a reasonable doubt that [he] was a member of the conspiracy as charged in

the indictment and that he had the specific intent to possess methamphetamine with the intent to distribute [it]." Aplt. Br. at 16. "We review the record de novo in sufficiency-of-the-evidence challenges to criminal jury verdicts, asking if, 'viewing the evidence in the light most favorable to the government, a reasonable jury could have found the defendant guilty beyond a reasonable doubt.'" *United States v. Cornelius*, 696 F.3d 1307, 1316 (10th Cir. 2012) (*quoting United States v. Dobbs*, 629 F.3d 1199, 1203 (10th Cir. 2011)). "We consider both direct and circumstantial evidence, together with the reasonable inferences to be drawn therefrom [and] . . . reverse a conviction only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citations and quotation marks omitted).

"Rather than examining the evidence in 'bits and pieces,' we evaluate the sufficiency of the evidence by 'considering the collective inferences to be drawn from the evidence as a whole.'" *United States v. Nelson*, 383 F.3d 1227, 1229 (10th Cir. 2004) (*quoting United States v. Wilson*, 107 F.3d 774, 778 (10th Cir. 1997))). Our analysis does not intrude into domains that are exclusively the province of the jury, like the weight of conflicting evidence or the credibility of witnesses. *See United States v. Pappert*, 112 F.3d 1073, 1077 (10th Cir. 1997); *see also United States v. Dewberry*, 790 F.3d 1022, 1029 (10th Cir. 2015) ("It is not our function to assess the credibility of the witnesses on appeal; that task is reserved for the jury.").

Mr. Tennison contends that because he was a one-time customer of Ms. Job, he could not have been found to be a member of the larger conspiracy. "To obtain a conspiracy conviction, the government must prove: '(1) an agreement by two or more

persons to violate the law; (2) knowledge of the objectives of the conspiracy; (3) knowing and voluntary involvement in the conspiracy; and (4) interdependence among co-conspirators.'" *Cornelius*, 696 F.3d at 1203. Mr. Tennison objects to the second and third prongs, saying he "could not possibly know the essential objectives of the conspiracy" and he did not "knowingly and voluntarily involve[] himself with the conspiracy." Aplt. Br. at 21. But to be convicted of conspiracy a "defendant need not know all the details or all the members of a conspiracy." *United States v. Caro*, 965 F.2d 1548, 1556 (10th Cir. 1992). "[A] defendant's participation in the conspiracy may be slight and may be inferred from the defendant's actions so long as the evidence establishes a connection to the conspiracy beyond a reasonable doubt." *Id.* (*citing United States v. Saviano*, 843 F2d 1280, 1294 (10th Cir. 1988)).

Indeed, we have long held that under the right circumstances a single transaction can prove a defendant's participation in a conspiracy. *See, e.g.*, *United States v. Pack*, 773 F.2d 261, 266 (10th Cir. 1985) ("[e]ven a single overt act by the defendant can be sufficient to connect him to the conspiracy if that act leads to a reasonable inference of intent to participate in an unlawful agreement or criminal enterprise." (*citing United States v. Pilling*, 721 F.2d 286, 292-293 (10th Cir. 1983)). Our decision in *United States v. Johnston*, 146 F. 3rd 785, 788 (10th Cir. 1998), is instructive. The defendant in *Johnston* was a defense attorney who had represented a drug dealer on various matters. When two men started looking for the drug dealer to collect a debt, the attorney and the dealer concocted a story about the latter's arrest to keep the two men from contacting the dealer. Their plan worked; the drug dealer was never bothered again and continued to

deal drugs. For his lies, the attorney was convicted of, among other things, conspiracy to distribute marijuana. On appeal, we rejected the attorney's argument that his one-time lie was insufficient evidence from which the jury could convict him of conspiracy. We concluded a rational jury could find that the attorney knew the dealer was still selling drugs and that the purpose of his lie was to keep the creditors from interrupting the dealer's nefarious activities. *Id.* at 790-91.

In another example, the defendant in *United States v. Hamilton*, 587 F.3d 1199 (10th Cir. 2009), had accompanied two other members of a drug distribution conspiracy on a trip to Cleveland, Ohio to collect certain drug debts. Despite his history with the conspiracy, the evidence showed he had dissociated from the conspiracy about seven years before traveling to Cleveland. *Id.* at 1209. He argued that "his 'one-time agreement to assist in a one-time collection of money' [did] not constitute 'rejoin[ing] the pre-existing conspiracy for the common purpose of distributing marijuana.'" *Id.* We disagreed and upheld his conviction, explaining that even if his trip was a one-time incident, the focus of our analysis was on "the nature and objectives of Mr. Hamilton's conduct in that one-time incident." *Id.*

Here, similarly, the infrequency of Mr. Tennison's purchase from the conspiracy is not determinative; instead, the analysis centers on the circumstances of his purchase. It is undisputed that Ms. Job and Ms. Rodriguez were members of the drug distribution conspiracy. Evidence presented at trial shows that Mr. Tennison asked Ms. Job to leverage her connections with the conspiracy to help him purchase a kilo of meth. Rec., vol. II at 414-15. He agreed to purchase a quarter of a kilo only after Ms. Rodriguez

indicated that the organization did not have his requested amount. *Id.* at 416. He then met with additional members of the conspiracy after Mr. Rodriguez arranged the meeting so that he could obtain the methamphetamine. *Id.* at 464-67. When one of the couriers entered Ms. Job's truck, Mr. Tennison actively participated in the transaction by handing over $2,500 in cash in exchange for about a quarter of a kilo of meth. *Id.* at 466-68. He benefited from Ms. Rodriguez's translation services during the deal. *Id.* at 466-67. Viewing this evidence in the light most favorable to the government, as we must, we are persuaded that a reasonable trier of fact could infer Mr. Tennison's knowledge of the conspiracy's objective to distribute meth as well as his voluntary participation in the conspiracy.

Mr. Tennison invokes the buyer-seller rule that precludes convicting a buyer of participating in a conspiracy when the evidence shows only purchase of a small amount of drug for personal use. Aplt. Br. at 18. It is true that proof of a buyer-seller relationship alone is not enough to tie the buyer to a larger conspiracy. *United States v. Evans*, 970 F.2d 663, 673 (10th Cir. 1992). However, this rule is inapplicable when the buyer shares the conspiracy's objective. As we explained in *Evans*,

> [t]he objective of the conspiracy becomes especially important when the government attempts to establish a conspiracy on the basis of purchases and sales. Evidence that an intermediate distributor bought from a supplier might be sufficient to link that buyer to a conspiracy to distribute drugs because both buyer and seller share the distribution objective.

Id. at 669. Indeed, "the purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors, who do intend to redistribute drugs for profit, thereby furthering the

objective of the conspiracy." *United States v. Flores*, 149 F.3d 1272, 1277 (10th Cir. 1998) (*quoting United States v. Ivy*, 83 F.3d 1266, 1285 (10th Cir. 1996)). As such, a defendant's intent to distribute is the focal point of the inquiry.

Mr. Tennison insists that the kilo of methamphetamine he tried to buy and the quarter he actually bought were for personal use only and that the government failed to provide sufficient evidence to prove beyond a reasonable doubt that he intended to distribute the methamphetamine he possessed on January 31, 2017. He contends that the government did not provide evidence as to what amount of meth constituted a distribution quantity, or that the amount he possessed was inconsistent with personal use. *See* Aplt. Br. at 18-19. But Agent Burkhart and Ms. Job's testimonies, together with the evidence of Mr. Tennison's February 14 arrest, form a sufficient basis from which a rational factfinder could draw inferences about his intent to distribute.

Agent Burkhart testified based on his training at the DEA academy, his eleven years of experience, and his interviews with meth addicts, that most users consumed one to two grams per day depending on their tolerance. He told the jury that an amount of meth that is more than a user quantity is a large quantity. Rec., vol. II at 608. Ms. Job also testified, explaining that she used up to two grams of meth per day and that a quarter of a kilo would have lasted her for several months. *Id.* at 481. She added that Mr. Tennison initially tried to buy a kilo, which would sustain his personal usage for roughly 500 days. She further opined that someone would not buy a kilogram of methamphetamine for personal use, explaining she had previously bought that quantity for distribution purposes. *Id.* at 462.

"Beginning with *United States v. Hooks*, 780 F.2d 1526, 1532 (10th Cir. 1986), we have repeatedly stated that possession of a large quantity of narcotics is sufficient to establish the element of intent to distribute. *Accord United States v. McIntyre*, 997 F.2d 687, 708 (10th Cir. 1993); *United States v. Ray*, 973 F.2d 840, 842 (10th Cir. 1992)." *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 n.4 (10th Cir. 2000). In *Hooks*, we held that "the large quantity of PCP contained in the truck is clearly sufficient to support a judgment that appellant intended to distribute PCP." 780 F.2d at 1533. In *McIntyre*, we explained that a "large quantity of cocaine found in the motel room is sufficient to support a judgment that the defendant intended to distribute cocaine." 997 F.2d at 708. As such, the evidence here regarding the quantity of meth Mr. Tennison attempted to buy, and the quantity he did buy, supported the jury's finding that Mr. Tennison shared the conspiracy's objective to distribute methamphetamine, which renders the buyer-seller rule inapplicable.

And, of course, the government introduced Rule 404(b) evidence showing Mr. Tennison was subsequently arrested with about 1,200 grams of meth, amounting to approximately 600 daily uses. The drug was in baggies of assorted quantities, suggesting Mr. Tennison's intent to distribute. Other evidence included distribution apparatus like packaging material and multiple digital scales. Considering the totality of the evidence and viewing the evidence in light most favorable to the government, we conclude that a reasonable juror could find beyond a reasonable doubt that Mr. Tennison was a member of the subject conspiracy as charged in Count One and that he possessed more than fifty grams of methamphetamine with intent to distribute as charged in Count Twenty.

C. Sentence

Mr. Tennison next compares his 175-month prison sentence with Ms. Job's 21-month sentence and claims this discrepancy amounts to "improper sentencing disparity between defendants in this case." Aplt. Br. at 23. He argues, without citing authority, that "[i]ndividuals who play similar roles in the same criminal scheme should receive similar sentences or have similar offense conduct scores." *Id.* at 25.

"[W]e review a district court's sentencing decisions solely for abuse of discretion." *United States v. Smart*, 518 F.3d 800, 805 (10th Cir. 2008) (*citing Rita v. United States*, 551 U.S. 338, 351 (2007)). "In assessing a sentence, '[a] district court may consider sentencing disparities between co-defendants, but the purpose of the Guidelines is not to eliminate disparities among co-defendants, but rather to eliminate disparities among sentences nationwide.'" *United States v. Peña*, 963 F.3d 1016, 1027 (10th Cir. 2020) (*quoting United States v. Zapata*, 546 F.3d 1179, 1194 (10th Cir. 2008)). We also note that "'[18 U.S.C.] § 3553(a)(6)'s consideration of unwarranted sentence disparities is but one factor that a district court must balance against the other § 3553(a) factors in arriving at an appropriate sentence.'" *Id.* (*citing United States v. Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010)).

The district court, after considering extensive arguments and filings, imposed the maximum guideline sentence of 175 months. The court explained that Mr. Tennison's history of "incredibly poor decision-making and his continued determination to use and possess large quantities of methamphetamine" even after he was apprehended with 250 grams of meth justified his sentence. Rec., vol. II at 1050. The court also believed that

the sentence was necessary to provide adequate deterrence and to protect the public from crimes that he might otherwise commit. *Id.*

That the district court considered the guideline range shows "it necessarily consider[ed] whether there [was] a disparity between [Mr. Tennison's] sentence and the sentences imposed on others for the same offense." *United States v. Gantt*, 679 F.3d 1240, 1249 (10th Cir. 2012). Because Mr. Tennison's sentence is within the guideline range of 140-175 months, it is "entitled to a presumption of reasonableness on appeal." *Zapata*, 546 F.3d at 1194.

That his sentence is longer than Ms. Job's does not surmount that presumption. Unlike Mr. Tennison, Ms. Job accepted responsibility for her actions and cooperated with the government. "Her decision to accept responsibility and assist the government does not create an unwarranted disparity under § 3553(a)(6)." *United States v. Haley*, 529 F.3d 1308, 1312 (10th Cir. 2008) (*citing United States v. Shrake*, 515 F.3d 743, 748 (7th Cir. 2008)). Unlike Ms. Job, Mr. Tennison went to trial and was convicted of conspiracy to possess with intent to distribute and possession of more than fifty grams of methamphetamine. Accordingly, Mr. Tennison and Ms. Job are "not similarly situated and any disparity in their sentences is explicable." *United States v. Gallegos*, 129 F.3d 1140, 1144 (10th Cir. 1997). The court did not abuse its discretion by sentencing Mr. Tennison to 175 months.

We AFFIRM.