FILED
United States Court of Appeals
Tenth Circuit

April 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER GUNN, a/k/a Gunz,

Defendant - Appellant.

No. 21-6168
(D.C. No. 5:18-CR-00260-SLP-43)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **KELLY**, and **PHILLIPS**, Circuit Judges.

Christopher Gunn was one of sixty defendants charged with federal drug crimes during a years-long investigation into the Oklahoma-based Irish Mob Gang (IMG). Fifty-eight of Gunn's confederates pleaded guilty; only he and Aaron Keith proceeded to trial. A jury then convicted Gunn of one count of drug conspiracy and one count each of possessing methamphetamine and heroin with intent to distribute.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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. After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

On appeal, Gunn raises five issues that touch nearly all aspects of the criminal proceedings, involving his speedy-trial rights, witnesses, jury instructions, the sufficiency of the evidence, and sentencing. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 3742(a), we affirm.

BACKGROUND

I. Factual Background

In 2004, while serving a life sentence in an Oklahoma prison, Gunn joined the IMG.[1] In 2012, Richard Potts became the IMG's leader. While at the helm, Potts created a leadership hierarchy of a high council and a low council and reoriented the IMG to focus on "making money and selling drugs"—methamphetamine, heroin, and marijuana. Practically speaking, the high council made final decisions and delegated day-to-day decision-making authority to the low council. Potts and Chad Hudson were on the high council; Gunn, John Newport, and several others were on the low council. Gunn's future codefendant Aaron Keith wasn't on the low council, but he still held some cachet within the gang.

As directed by the councils, imprisoned IMG members coordinated large drug transactions outside of prison. Using contraband cell phones, members acted as intermediaries between drug suppliers and buyers on the outside.

[1] The IMG also has an "outside" (non-prison) component. The IMG's "inside" (prison) component is called Sinn Féin, and the "outside" component is called Irish Mob Gangsters. For clarity and ease, we collectively call both components "IMG."

Nearly all the high-ranking IMG members participated in this scheme. One of Gunn's points of contact on the outside was Christine Matthews, who would sell drugs on his behalf. In 2015, through Matthews, Gunn was selling an ounce of methamphetamine per week to Anthony Smith. In early 2016, Matthews delivered several pounds of methamphetamine to Smith, and soon after, Smith also began selling drugs for Gunn—about a pound per week. Gunn would organize each transaction and have Smith either sell the drugs for cash or front the drugs on credit and record the transactions on a ledger.

Later, Smith also started working for Hudson. Three times over two weeks in 2016, Smith picked up three or four kilograms of methamphetamine for Gunn and Hudson. Finding this high-level drug trafficking unsustainable, Smith turned over his cash and ledger to Hudson's wife. (As discussed below, Smith later returned to the IMG drug trade.) Newport, who served as Hudson's bookkeeper, arranged to buy a kilogram of heroin to be split among Hudson and two others; Gunn took an ounce.[2] And to maximize his cut, Gunn taught Newport how to get heroin residue off the bag.

When the IMG ran into problems, or even when a member wanted to test a new drug-dealing setup, other members would assist. "[I]t was like a big group," Newport later testified, "that we assisted in helping these transactions

[2] According to Newport, Gunn is a heroin addict. Newport also testified that an inmate could smuggle in heroin by paying off each intermediary with a cut of the drug, so an original three ounces could be whittled down to half an ounce for the final recipient.

go on." True to this symbiosis, Gunn offered to supply other members with drugs, introduced IMG members to suppliers, and dealt drugs to other incarcerated members.

Unbeknownst to the IMG, another three-letter acronym was breathing down its neck: the FBI. In 2016, Hudson, Potts, and several others were arrested for drug trafficking and dispatched from the prison, creating a leadership void. Hudson and Potts appointed Gunn and David Postelle to succeed them on the high council. When correctional officers confiscated IMG member Dillan Hager's contraband phone in 2017, Gunn stepped up to run Hager's methamphetamine deals for a week. A year later, when one of Hager's couriers robbed Hager, Gunn and Postelle recommended killing the courier, but they allowed Hager to mete out whatever punishment he saw fit. Still, Gunn and Postelle sometimes took the reins on punishing misbehavior. They ordered an IMG member's pinkie fingers cut off after he came up short on drug money, demoted another member after he sold drugs to an undercover agent, and ordered another member stabbed after suspecting that he had cooperated with the government.

But the jig would soon be up for Gunn. In August 2018, as part of its ongoing investigation into the IMG, the FBI wiretapped Gunn's cell phone. By recording Gunn's calls, agents witnessed two of Gunn's transactions play out over a week. The first deal began when Smith asked Gunn for a quarter pound of methamphetamine. Gunn looked for a source and used Hager as a

middleman. Ultimately, despite some setbacks, one of Hager's couriers successfully delivered the requested drugs to Smith on Gunn's behalf. The second deal began when Gunn asked "Doug" to help bring some heroin into the prison. Gunn sourced the drugs from two other incarcerated individuals and arranged for Smith to pick up the drugs. When Smith arrived at the first pickup location, someone dropped a Styrofoam cup of heroin in the back of his truck. But en route to the second location, Smith was arrested. The IMG apparatus was quickly collapsing.

II. Procedural Background

In October 2018, in the first of three indictments, a federal grand jury charged thirty-nine IMG members and affiliates with drug conspiracy and other drug and money-laundering offenses. Gunn wasn't among the indicted defendants. Given the conspiracy's reach and the extensive discovery involved, the government moved to declare the case complex and to continue the trial. The district court granted the unopposed motion after finding under the Speedy Trial Act (STA) that the "ends of justice" outweighed the public's and defendants' interests in a speedy trial. *See* 18 U.S.C. § 3161(h)(7)(A). In a separate scheduling order, the court set trial for February 11, 2020.

On December 12, 2018, the grand jury returned a superseding indictment, this time naming fifty-five defendants, including Gunn, Keith, Postelle, and Smith. Gunn was charged with one count of drug conspiracy, one count of possessing methamphetamine with intent to distribute, and one count of

possessing heroin with intent to distribute. He was arraigned on December 19, at which time the seventy-day STA clock began. According to the prior scheduling order, each newly indicted defendant had two weeks after being arraigned to object to the proposed schedule. "A failure to object," cautioned the district court, "will be deemed a Defendant's acknowledgement and approval of [the complex-case designation] and the scheduling deadlines." R. vol. 1, at 184. Gunn didn't object, tacitly consenting to the February 2020 trial date.

A. Pretrial Delays

A year passed without incident. But on January 6, 2020, with only six defendants remaining for trial, two of Gunn's codefendants moved to continue the trial to August 2020. Citing their newly appointed counsels' need to review discovery and prepare for trial, the two defendants informed the court that "[a]ll parties have conferred and are in agreement with this requested continuance." Suppl. R. at 93–94. Gunn didn't object, so the court made new "ends-of-justice" findings and continued the trial to August 11, 2020.

Though the parties didn't know it yet, a global pandemic was looming. Once COVID-19 made an August 2020 trial date uncertain, the government and the four remaining defendants submitted a joint status report. There, the parties detailed

> (1) that the defendants would be ready for trial in August but wanted it to be conducted "as 'normally' as possible";

> (2) that the U.S. Marshals Service might encounter problems serving defense subpoenas;
> (3) that there could be logistical challenges, such as the need for a Spanish-language interpreter for one defendant;
> (4) that COVID-19-related prison restrictions made it difficult for the government to prepare its several in-custody witnesses;
> (5) that the government proposed three separate trials but that two of Gunn's codefendants objected to being tried separately; and
> (6) that the government didn't think an August trial was possible.

A week after filing the status report, the government obtained a second superseding indictment against seven defendants, including the four from the status report. The second superseding indictment charged Gunn with one count of drug conspiracy in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), and one count each of possessing methamphetamine and heroin with intent to distribute, both in violation of § 841(a)(1), (b)(1)(A).

In July, the government moved to continue the trial from August to November 2020, citing COVID-19's effect on trial preparations and a need for extra time for plea negotiations. The government advised the court that Gunn objected to this continuance. Agreeing with the government's proffered reasons and making another ends-of-justice finding, the court granted the motion and reset trial for November 3, 2020.[3]

[3] Between July and November, three of the seven remaining defendants pleaded guilty. Of the last four defendants, two apparently were never arrested, making Gunn and Keith the last defendants remaining. Gunn and Keith would eventually be tried jointly.

On November 4,[4] the parties selected a twelve-member jury and four alternates. But the court did not swear in the jury. Several Deputy U.S. Marshals had been exposed to COVID-19, which hindered transport of the many in-custody witnesses, so the court told the jury to return on November 9 to be sworn. When two jurors noted that they had conflicts on November 9, the court pushed the trial date to November 10. At last, everything was in line for trial.

Unfortunately, COVID-19 had other plans. On November 6, a juror notified the court of a positive test for the virus, prompting the court on November 9 to postpone trial until at least November 30 under public-health protocols. In response, on November 16, the government moved to excuse the jury and begin later with a separate jury panel. The government hypothesized that a 26-day delay risked the jury's being too distracted by COVID-19 and potentially having researched the case beforehand. Gunn objected to the proposal, calling the government's fears "highly speculative" and the delay "minor." R. vol. 1, at 668, 670. Ultimately, the court granted the government's motion on November 23. It cited the Western District of Oklahoma's latest General Order 20-26, which prospectively suspended jury trials throughout December. Based on this court-wide order, the court noted that the original

[4] Though the court's scheduling order had set trial for November 3, 2020, jury selection did not begin until November 4. The court had continued the trial to its "November 2020 trial docket," which ended up falling on November 4.

jury, if unexcused, would be held in limbo for over two months. Excusing the jury without declaring a mistrial, and making another ends-of-justice finding, the court continued the trial to January 12, 2021.

On January 5, 2021, the Chief District Judge issued General Order 21-1, suspending jury trials through February. The next day, concerned about these and future delays, the district court sua sponte continued Gunn's trial again after entering new ends-of-justice findings. "Given all of the logistical issues involved," the court announced, "a more realistic and 'firm' date for this trial is in May 2021." *Id.* at 677. So May 11, 2021, became the new trial date.

On January 21, Gunn and Keith jointly moved to dismiss the indictment on statutory and constitutional speedy-trial grounds. Despite the pandemic, they now took a view that "life goes on"—so too should the courts. *Id.* at 684. Arguing that the court could mitigate COVID-19 concerns by "implementing recommended safety protocols," Gunn and Keith contested the need for any of the three ends-of-justice continuances. *Id.* As for the Sixth Amendment, they maintained that all four factors under *Barker v. Wingo*, 407 U.S. 514 (1972), supported dismissal. The court denied their motion in a fifteen-page order.

B. Witness Subpoenas

Back in March 2020, Gunn had sought three ex parte subpoenas for James Howard, M.D., John Marlar, D.O., and Shawn Price to testify. Dr. Howard worked at the Oklahoma State Penitentiary and would testify about how Gunn's schizoaffective disorder and the drugs Gunn took would show that

it was unlikely that Gunn could manage or lead a conspiracy. Dr. Marlar also worked at the prison and had treated Gunn when he overdosed on heroin in 2018. His testimony would bolster the defense's theory that Gunn participated in a conspiracy to bring in drugs only for his personal use. Finally, Price, the prison's chief of security, would testify about the prison's gangs and the difficulty of smuggling drugs and cell phones into the prison. The court granted Gunn's applications and directed the clerk to issue the subpoenas.

Once the court continued the trial to November 2020, Gunn reapplied for the three subpoenas. The court denied the requests for Price and Dr. Howard but granted the request for Dr. Marlar. The court found that Price's testimony would not disprove any element of the charged offenses, nor would it support any defense; it was "more relevant to issues that may arise at sentencing," so a subpoena would have been premature. And the court found that Dr. Howard's testimony about Gunn's mental illness was also irrelevant to the charged crimes and could sway the jury to improperly excuse Gunn's alleged misconduct. But the court allowed Gunn to refile Dr. Howard's application with more detail. As for Dr. Marlar, the court found that Gunn had made a "*minimally* sufficient showing" to support a subpoena, but it reserved ruling on the testimony's admissibility. In March 2021, Gunn reapplied for the three subpoenas after the trial was continued again. Adopting its prior order, the court denied subpoenas for Price and Dr. Howard but ordered that one be issued to Dr. Marlar.

C. Trial

On May 11, 2021, trial finally began after a new jury was empaneled. Over five days, the government called 25 witnesses, including former IMG members Potts, Newport, Hager, and Smith. On the fifth trial day, Dr. Marlar advised the court that he was "electing to not honor his subpoena." R. vol. 3, at 831. Since leaving his job at the prison, Dr. Marlar was now the only doctor at a rural hospital's emergency room. He couldn't find anyone to cover his shift so he could testify.

Once the government rested later that day, the court asked Gunn's attorney for an offer of proof about Dr. Marlar's proposed testimony. The court wanted to confirm whether Dr. Marlar's testimony would even be admissible before having to issue a bench warrant and enlist the Marshals to pick up Dr. Marlar. Gunn's attorney argued that Dr. Marlar could explain terminology in Gunn's medical records about his mental conditions and addictions; recount an event on October 23, 2018, in which Gunn was unresponsive and required Dr. Marlar's medical attention; and describe the features of drug addiction and schizoaffective disorder. All of this, he argued, would help show that Gunn wasn't ambitious enough to help create a drug empire; rather, it would show his "single-minded ambition to try to obtain heroin" for himself. *Id.* at 963–64. The court expressed concern that some of that proposed testimony would be cumulative, irrelevant, or unqualified expert testimony.

In turn, the government objected to Dr. Marlar's testimony under Federal Rules of Evidence 401 and 403. It argued that Dr. Marlar had seen Gunn only twice, that as an emergency-room physician he wasn't an expert on mental health or addiction, that much of his opinion testimony wouldn't even pertain to Gunn, and that the October 23 event was isolated and happened four years after the conspiracy allegedly began. Ultimately, the court sided with the government and found Dr. Marlar's proposed testimony inadmissible. The court reasoned that his expert testimony was inadmissible because he wasn't qualified in those subjects and that his fact testimony was inadmissible because the October 23 event was irrelevant and testimony about it was cumulative. And at the government's request, the court ruled under Rule 403 that the risk of confusing the jury and prejudice outweighed the testimony's probative value. So it chose to not enforce the subpoena.[5]

Despite the court's pretrial ruling that it would not issue subpoenas for Price and Dr. Howard, Gunn's attorney also made offers of proof about their testimony. As for Price, he could testify about the Oklahoma State Penitentiary's prison cells and architecture, the difficulty of getting drugs into prison, and how an inmate could bribe a guard to smuggle in items. As for Dr. Howard, Gunn argued that he could testify about schizoaffective disorder and how the condition and drugs could have affected Gunn. And Gunn's attorney

[5] The district court later held Dr. Marlar in civil contempt for ignoring the subpoena.

also made a proffer about Gunn's medical records, which the government objected was backdoor expert evidence without context. Reaffirming its earlier rulings, the court denied subpoenas for Price and Dr. Howard on relevance and cumulativeness grounds. The court also disallowed the medical records "largely for the same reasons" that it barred Dr. Marlar's testimony and because the records weren't relevant to the charges. *Id.* at 981–82. In the court's words, "[T]his is not a mental health case." *Id.* at 982. After these rulings, Gunn rested.

Before closing arguments, Gunn objected to the proposed jury instructions for not including a multiple-conspiracies instruction. Citing *United States v. Davis*, 995 F.3d 1161 (10th Cir. 2021), the court overruled his objection. In the end, the jury convicted Gunn on all counts. On a special-verdict form for the drug conspiracy, the jury attributed between 50 and 500 grams of methamphetamine to Gunn. And on a form for the methamphetamine-possession count, the jury attributed over 50 grams of methamphetamine to Gunn.

D. Sentencing

Gunn's presentence report (PSR) recommended holding him accountable for 39,782.55 kilograms of converted drug weight, which included 19,541.8 grams of methamphetamine. Based on this amount, Gunn's base-offense level was 36. The PSR also recommended a four-level increase under U.S.S.G. § 3B1.1(a) for Gunn's role as a leader of the IMG conspiracy. Gunn objected to

both recommendations. He argued that he couldn't be liable for over 19,000 grams of methamphetamine when the jury found he was responsible for only 50 to 500 grams. And as for the leader–organizer enhancement, Gunn contended that his leadership in the IMG was being wrongly conflated with leadership in the drug conspiracy. The court overruled these objections at sentencing. First, the court noted that under *United States v. Magallanez*, 408 F.3d 672 (10th Cir. 2005), it could hold Gunn accountable for more drug weight than the jury did on the special-verdict form. Finding that the trial testimony supported the PSR's higher drug-weight calculation, the court overruled the objection. Second, the court overruled the leader–organizer objection after finding that all the relevant Guideline factors weighed against Gunn.[6]

From a total offense level 43 and a criminal-history category V, Gunn faced an advisory guideline of 1,200 months in prison. Varying downward, the court sentenced him to 456 months' imprisonment. Gunn's timely appeal followed.

DISCUSSION

Gunn raises five appellate issues, which we discuss in turn.

I. Did the 29-month delay in bringing the case to trial violate Gunn's (A) statutory and (B) constitutional rights to a speedy trial?

[6] Apart from the four-level leader–organizer enhancement, Gunn received four two-level increases under U.S.S.G. § 2D1.1(b)(1), (b)(2), (b)(4), and (b)(5), for an adjusted offense level 48. Under the Guidelines, this off-the-charts offense level was reduced to 43. U.S.S.G. ch. 5, pt. A cmt. n.2.

II. Did the district court abuse its discretion by (A) denying two of Gunn's requested witness subpoenas and (B) ruling that a third witness's testimony and Gunn's medical records were inadmissible?
III. Did the district court abuse its discretion by not giving a multiple-conspiracies jury instruction?
IV. Was the evidence sufficient to convict Gunn of the charged drug conspiracy?
V. Did the district court abuse its discretion by (A) finding Gunn responsible for more drug weight than the jury did and (B) applying a sentencing enhancement for conspiracy leaders?

I. Speedy-Trial Rights

Gunn claims that the district court's five continuances of his trial date violated his speedy-trial rights under the STA and the Sixth Amendment. Our standard of review for the denial of a speedy-trial motion to dismiss is twofold. We review STA issues (including a district court's decision to grant an ends-of-justice continuance) for abuse of discretion, and we review constitutional speedy-trial issues de novo. *United States v. Banks*, 761 F.3d 1163, 1174–75 (10th Cir. 2014) (citations omitted). Within the STA abuse-of-discretion framework, we review the district court's compliance with the STA's legal requirements de novo and its factual findings for clear error. *Id.* (citing *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009)).

A. Speedy Trial Act

Gunn first argues that the district court's ends-of-justice continuances violated the STA. We have addressed this identical issue on identical facts in an appeal taken by Gunn's codefendant, Keith. *See generally United States v. Keith*, 61 F.4th 839 (10th Cir. 2023). There, we held that (1) Keith waived any

objection to the district court's first and second continuances by failing to object to them in the motion to dismiss, *see United States v. Loughrin*, 710 F.3d 1111, 1121 (10th Cir. 2013); (2) Keith waived any objection to most of the fifth continuance by not moving to dismiss again after the delay occurred, *see United States v. Nevarez*, 55 F.4th 1261, 1264 (10th Cir. 2022); and (3) under 18 U.S.C. § 3161(h)(7)(A), the court's third continuance from August to November 2020 was justified for COVID-19 reasons. *Keith*, 61 F.4th at 846–51. Thus, "[b]ecause more than 70 unexcludable days had not elapsed between Keith's arraignment and his motion to dismiss, he [could not] show an STA violation." *Id.* at 852.

At the district court, Gunn and Keith were in the same speedy-trial boat. They were arraigned on the same day, they jointly moved to dismiss, and they were ultimately tried on the same day. On appeal, Gunn raises only the same STA arguments that we rejected in *Keith*. We thus consider the STA issue resolved. *See United States v. Parada*, 577 F.3d 1275, 1280 (10th Cir. 2009) ("[W]hen a rule of law has been decided adversely to one or more codefendants, the law of the case doctrine precludes all other codefendants from relitigating the legal issue." (quoting *United States v. LaHue*, 261 F.3d 993, 1010 (10th Cir. 2001))). For the reasons discussed in *Keith*, we affirm the denial of Gunn's motion to dismiss on statutory speedy-trial grounds.

B. Sixth Amendment

Gunn also argues that the district court's ends-of-justice continuances violated his constitutional speedy-trial right. Though we also addressed this subject in *Keith*, Gunn raises some distinct arguments on appeal, which alters our analysis (though not our conclusion). So we take up the constitutional issue again.

The Sixth Amendment guarantees the "right to a speedy and public trial" for all criminal defendants. U.S. Const. amend. VI. We assess constitutional speedy-trial claims by balancing the four *Barker* factors: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *United States v. Medina*, 918 F.3d 774, 780 (10th Cir. 2019) (discussing *Barker*, 407 U.S. at 530–32). No single factor controls our analysis. *See id.* (quoting *United States v. Seltzer*, 595 F.3d 1170, 1176 (10th Cir. 2010)). We discuss each factor in turn.

Length of delay. To trigger a *Barker* analysis, there must be "'presumptively prejudicial' delay," meaning delay approaching a year. *Id.* (citations omitted). The government concedes that the twenty-nine-month delay in bringing Gunn to trial is presumptively prejudicial. We find that this first factor favors Gunn.

Reasons for delay. This second factor is "[t]he flag all litigants seek to capture." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). We must evaluate the government's reasons "for not bringing the defendant to trial in a

timely fashion." *Margheim*, 770 F.3d at 1326. In evaluating the government's reasons, we weigh different justifications differently. *Barker*, 407 U.S. at 531. For example, intentional government tactics to delay the trial weigh heavily against the government; "neutral" reasons (such as "overcrowded courts") weigh against the government but less so; and "valid" reasons (such as a "missing witness") justify the delay. *Id.* But a defendant's actions that delay his own trial weigh heavily against him. *Margheim*, 770 F.3d at 1326 (quoting *United States v. Larson*, 627 F.3d 1198, 1208 (10th Cir. 2010)).

In its order denying Gunn's motion to dismiss, the district court identified two reasons for the delay: "the massive amount of discovery in this complex case and the COVID-19 pandemic." R. vol. 1, at 724. It placed the "pandemic-driven reasons" in the "valid" category and found that this factor did not support Gunn. *Id.* at 725. On appeal, Gunn blames all the delay—owing to the case's complexity, codefendants obtaining new counsel, COVID-19, and the first jury's being dismissed—on the government.

The first delay, spanning 418 days, came from the district court's scheduling order and designation that the case was complex. Delays owing to the nature of large, multidefendant conspiracies with vast discovery are justifiable. *Margheim*, 770 F.3d at 1327. This reason slightly favors the government. The second delay, spanning 182 days, occurred because two of Gunn's codefendants needed more time for their newly appointed counsel to

review discovery and prepare for trial. This, too, is a valid reason (prompted by codefendants) that does not support Gunn's constitutional claim. *See id.*

The third, fourth, and fifth delays, comprising 85, 50, and 119 days, resulted from COVID-19-related challenges. These delays cannot fairly be attributed to the government or to Gunn. As we did in *Keith*, we treat COVID-19 as a truly neutral justification—not favoring either side. *See Keith*, 61 F.4th at 853. The extenuating circumstances brought about by the pandemic prevented the government from trying Gunn in a speedy fashion.

We conclude that the second factor slightly favors the government.

Gunn's assertions of his right. For this factor, we assess "whether the defendant 'actively' asserted his right, which requires more than merely 'moving to dismiss after the delay has already occurred.'" *United States v. Koerber*, 10 F.4th 1083, 1110 (10th Cir. 2021) (quoting *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006)), *cert. denied*, 143 S. Ct. 326 (2022). At bottom, we must measure "whether the defendant's behavior during the course of litigation evinces a desire to go to trial." *Id.* (quoting *Batie*, 433 F.3d at 1291). We can evaluate Gunn's behavior by "'weigh[ing] the frequency and force of [his] objections' to the delay." *Margheim*, 770 F.3d at 1328 (second alteration in original) (citations omitted). We have called this factor the "most important" one, *Batie*, 433 F.3d at 1291, entitled to "strong evidentiary weight," *Toombs*, 574 F.3d at 1274 (quoting *United States v. Dirden*, 38 F.3d 1131, 1138 (10th Cir. 1994)).

The district court found that Gunn raised his speedy-trial right only once: in the motion to dismiss, which wasn't enough under the third factor. On appeal, Gunn's response is terse; he vaguely identifies that he "objected to the Court's continuances related to the COVID-19 pandemic" and that he moved to dismiss.

Gunn's "behavior during the course of litigation" did not show that he wanted a speedy trial. *Koerber*, 10 F.4th at 1110. He did not object to the district court's first scheduling order, allowing it to go into effect. He agreed to the continuance that his codefendants sought in January 2020. The first time Gunn objected to a continuance was in July 2020, but he didn't invoke his speedy-trial right or give any reason for objecting. Gunn also objected to excusing the jury in November, though not on speedy-trial grounds. His objection instead highlighted the inconvenience of selecting a new jury and downplayed the government's concerns about jurors conducting outside research and being distracted by COVID-19. Only after the district court sua sponte continued the trial from January to May 2021 did Gunn move to dismiss on speedy-trial grounds. As the district court found, Gunn never invoked his Sixth Amendment right before moving to dismiss in January 2021.

As stated, moving to dismiss alone doesn't count as "actively" asserting one's speedy-trial right. *See Koerber*, 10 F.4th at 1110. And Gunn's one-sentence objection to the government's requested continuance in July 2020 was hardly forceful. Even charitably interpreting this unsupported objection as

being for speedy-trial reasons, Gunn still waited 568 days to raise his speedy-trial right. Gunn's two objections to the July 2020 continuance and to excusing the jury are best characterized as "[in]frequent" and "[un]forceful." *Id.* (quoting *United States v. Latimer*, 511 F.2d 498, 501 (10th Cir. 1975)). Because the third factor may indeed be the "most important" one, *Batie*, 433 F.3d at 1291, it weighs heavily against Gunn.

Prejudice. Finally, "[w]e assess prejudice in light of the particular evils the speedy trial right is intended to avert: pretrial incarceration; anxiety and concern of the accused; and the possibility that the defense will be impaired." *Koerber*, 10 F.4th at 1110 (alteration in original) (quoting *Batie*, 433 F.3d at 1292). Showing prejudice is the defendant's burden. *Medina*, 918 F.3d at 781 (quoting *Seltzer*, 595 F.3d at 1179). We can presume prejudice when there has been "extreme" delay, meaning a six-year-or-greater delay. *Id.* (citations omitted). Ordinarily, however, a defendant must offer specific evidence of how the delay prejudiced him; failure to do so will "eviscerate" his claim. *Margheim*, 770 F.3d at 1329 (citations omitted).

Gunn identifies four reasons that he was prejudiced: anxiety from pretrial detention, a generally hindered defense from "[d]imming memories," a witness's death during the delay, and the loss of personal possessions due to "multiple transfers" to federal custody. Opening Br. 29–30. Gunn also asks us to presume prejudice because of the length of the delay and because the other *Barker* factors supposedly weigh in his favor.

The district court rejected these proffered prejudices, and we do too. First, there can be no automatic prejudice here. Gunn's trial was delayed twenty-nine months, but the benchmark for extreme, prejudicial delay is six years. *Medina*, 918 F.3d at 781. Next, the district court rightly rebuffed Gunn's arguments about oppressive pretrial detention, anxiety, and losing personal possessions. When Gunn was arrested, he was already serving a state life sentence. *See United States v. Frias*, 893 F.3d 1268, 1273 (10th Cir. 2018) (finding "no oppressive pretrial incarceration" when the defendant would have still been in custody regardless of the new charges). By failing to "show some special harm suffered which distinguishes his case," Gunn's generalized claim of anxiety fares no better. *United States v. Hicks*, 779 F.3d 1163, 1169 (10th Cir. 2015) (citation omitted). And losing personal possessions, even if prejudicial under *Barker*, is of low probative value. *Cf. Perez v. Sullivan*, 793 F.2d 249, 257 (10th Cir. 1986) ("We decline to attach Sixth Amendment speedy trial dimensions to amenities and benefits a convicted felon might receive in one prison but not another."). As for his last reason, a hindered defense, all Gunn can provide are "hazy descriptions of prejudice." *Margheim*, 770 F.3d at 1331 (citation omitted). Though he claims that witness memories had faded, exculpatory evidence had been lost, and a witness had died, Gunn doesn't show "in what specific manner [the] missing witness[] would have aided the defense" or "with particularity what exculpatory testimony would have been offered." *Medina*, 918 F.3d at 782 (citations omitted).

Because Gunn cannot point to any prejudice stemming from the delays in his case, the fourth factor weighs against him.

* * *

The first factor favors Gunn. The second factor slightly favors the government. The third factor strongly favors the government. And the fourth factor also favors the government. On balance, Gunn has failed to show that the delays violated the Constitution. This case isn't the "unusual" one where "the Speedy Trial Act has been satisfied" yet the Sixth Amendment was violated. *Koerber*, 10 F.4th at 1109 (quoting *United States v. Abdush-Shakur*, 465 F.3d 458, 464–65 (10th Cir. 2006)).

We affirm on constitutional speedy-trial grounds.

II. Evidentiary Issues

Gunn next argues that the district court erred by refusing to issue subpoenas for Dr. James Howard and Shawn Price, by excluding Dr. John Marlar's testimony, and by excluding Gunn's medical records.[7] We review a district court's refusal to issue a Rule 17(b) subpoena for abuse of discretion. *United States v. Pursley*, 577 F.3d 1204, 1229 (10th Cir. 2009) (citing *United States v. Greschner*, 802 F.2d 373, 378 (10th Cir. 1986)). We apply the same

[7] Gunn devotes just two sentences to his medical records. He argues that the records would have "demonstrated the extent of his mental health issues," "supported Dr. Howard's testimony," and "supported Gunn's argument that he was not a ring-leader of the overarching conspiracy." Opening Br. 19–20. Because the district court excluded the records for the same reasons it excluded Dr. Marlar's testimony, we analyze those issues together.

abuse-of-discretion standard when reviewing a district court's ruling on evidentiary matters. *United States v. Palms*, 21 F.4th 689, 702 (10th Cir. 2021) (citing *United States v. A.S.*, 939 F.3d 1063, 1071 (10th Cir. 2019)).

A. Subpoenas for Price & Dr. Howard

Gunn first faults the district court for not issuing subpoenas to Price (the prison's chief of security) and Dr. Howard (a prison physician).

Before a court will grant an indigent defendant's request for a subpoena to compel testimony, the defendant must show "the necessity of the witness's presence for an adequate defense." Fed. R. Crim. P. 17(b). Because Rule 17(b) permits these defendants to subpoena witnesses at the government's expense, showing necessity is "not [a] light" burden. *See Pursley*, 577 F.3d at 1230. A witness's testimony is necessary when it is "relevant, material, and useful," and the defendant must show his "particularized need" for the testimony. *Id.* (quoting *United States v. Hernandez-Urista*, 9 F.3d 82, 84 (10th Cir. 1993)). A defendant fails this test if he provides only "mere allegations of materiality and necessity" or if he doesn't describe the witness's expected testimony. *Id.* (citations omitted). Another acceptable ground to reject a requested subpoena: if the witness's testimony would be cumulative of other testimony. *Id.* (citing *Hernandez-Urista*, 9 F.3d at 84).

Gunn revives his district-court arguments on appeal. He argues that Price's testimony about the prison's cells and about smuggling drugs into prison would have shown that he wasn't part of the charged conspiracy; rather,

he was importing drugs only to feed his own habit. Gunn argues that Dr. Howard would have testified about his schizoaffective disorder and how Gunn's drug use—street and prescription—would have affected him. These witnesses' testimony, Gunn contends, would have revealed that he didn't have the psychological capacity or desire to lead a large drug conspiracy. And Gunn points out that the district court couldn't have known that Price's testimony would be cumulative when it denied a subpoena before trial. In any event, he argues that Price's testimony wouldn't have been cumulative because Gunn had elicited only "extremely limited testimony" about the prison cells and smuggling, so Price's "different perspective" was necessary to Gunn's defense.

Yet the district court didn't rely on expected cumulativeness when denying Gunn's pretrial subpoena requests. Rather, the court found that Price's testimony would not disprove any element of the charged offenses, nor would it support any defense. And the court found that Dr. Howard's testimony about Gunn's mental illness was irrelevant to the charged crimes and could sway the jury to improperly excuse Gunn's alleged misconduct. These were relevance-based (Rule 401) grounds. Only after hearing the government's evidence at trial did the court also conclude that the testimony would be cumulative.

There's nothing amiss about this alternative ruling. Because cumulativeness "undercut[s]" a witness's necessity, *Hernandez-Urista*, 9 F.3d at 84, cumulativeness is an appropriate reason to deny a Rule 17(b) subpoena, *see United States v. Gallagher*, 620 F.2d 797, 800 (10th Cir. 1980) (affirming

district-court rationale for denying a pretrial subpoena when "other witnesses apparently would testify to the same effect" as the proposed witness). If after hearing the government's evidence the court decided that the testimony was relevant and not cumulative, it could have issued subpoenas; the court was not bound by its pretrial ruling and was free to supplement it. And in any event, if the relevance ruling were erroneous, the fact that the testimony turned out to be cumulative confirms that the error was harmless. *See United States v. Sarracino*, 340 F.3d 1148, 1171 (10th Cir. 2003) (reviewing exclusion of expert testimony for harmless error).

On the merits, we conclude that the district court's ruling that Price's testimony would be cumulative wasn't an abuse of discretion. In his proffer, Gunn identified three subjects about which Price could testify: the Oklahoma State Penitentiary's prison cells and architecture, the difficulty of getting drugs into prison, and how an inmate could bribe a guard to smuggle in items.[8] Yet other witnesses had testified before about these subjects. Charles Gibson testified about Gunn's cell, including authenticating photographs of it; Travis Richards described its dimensions. Newport also reported the difficult and expensive process of smuggling drugs into prison. Price's proposed testimony would have only "tend[ed] to prove the same thing" as other witnesses'

[8] If Price would've had anything to say about prison gangs or Gunn's drug use, this, too, would've been cumulative testimony. Potts had testified about how gangs operated at the Oklahoma State Penitentiary. Newport and Travis Richards had testified that Gunn was a drug addict.

testimony—the definition of cumulativeness. *Cumulative*, *Black's Law Dictionary* (11th ed. 2019). Perhaps Gunn is correct that Price would have added unique testimony to the trial. But he fails to show that the district court abused its discretion by concluding otherwise.

Likewise, the court's rejecting a subpoena for Dr. Howard wasn't an abuse of discretion. Gunn wanted Dr. Howard to testify about Gunn's schizoaffective disorder, the side effects of Gunn's prescription drugs, and how Gunn's street-drug use could have also affected him. Gunn had disclaimed any intent to use Dr. Howard's testimony to undermine Gunn's capacity to stand trial. Rather, he claims that Dr. Howard's testimony would show that it was unlikely that Gunn could manage or lead a conspiracy. But leadership isn't an element of a drug conspiracy, nor is lack of leadership a defense. *See United States v. Pickel*, 863 F.3d 1240, 1252 (10th Cir. 2017) (citations omitted) (holding that a defendant can be convicted of participating in a conspiracy even if he played only a "minor role"). As the district court found, this meant that Gunn's mental health wasn't relevant to the charged conduct.

And though the second superseding indictment did allege that Gunn helped lead the IMG conspiracy, its allegations weren't limited to Gunn's leadership role. For example, the indictment alleged that Gunn kept drugs and cash with his couriers and directed drug deals from prison. It also alleged that Gunn worked with Smith to smuggle drugs into the prison. Neither of these actions required any special leadership or strategic abilities that an ordinary

drug dealer wouldn't possess. And either allegation, if proven, would tie Gunn to the conspiracy. Gunn offers no support for his argument that his mental-health issues and drug use tended to prove that he was part of a smaller conspiracy. It's unclear why avolition, lack of ambition, disorganization, and social isolation—the alleged symptoms of Gunn's schizoaffective disorder—would make someone less able to arrange drug deals or smuggle drugs.

As we have recently noted, "Courts must be cautious about admitting marginally relevant mental-health evidence because the jury may think that it provides an 'excuse' for misconduct[,] or it may otherwise generate sympathy for the defendant." *United States v. Martinez*, 923 F.3d 806, 815 (10th Cir. 2019) (citation omitted). The district court followed this principle, finding no legitimate reason for Gunn to elicit Dr. Howard's testimony. On appeal, Gunn merely repeats the arguments he presented to the district court. He doesn't identify any reason that the court's ruling was an abuse of discretion. We conclude that it wasn't. *See id.* at 813 ("It is not the job of the court, however, to come up with arguments why a defendant's mental illness must have influenced his conduct in committing a crime.").

Because Gunn failed to show that Price's and Dr. Howard's testimony were necessary for his defense, Fed. R. Crim. P. 17(b), the district court didn't abuse its discretion by rejecting Gunn's request to subpoena them.

B. Admissibility of Dr. Marlar's Testimony

Turning now to Dr. Marlar, Gunn argues that the district court erred by not enforcing his subpoena and instead ruling that Dr. Marlar's testimony was inadmissible. He says that Dr. Marlar would have testified about Gunn's schizoaffective disorder, Gunn's heroin addiction, and the October 2018 event during which Dr. Marlar treated Gunn after he was found unresponsive. Like he did for Dr. Howard's testimony, Gunn contends that Dr. Marlar's testimony would have revealed that he didn't have the psychological capacity or desire to lead a large drug conspiracy. Gunn also quibbles with framing the district court's ruling as one about Dr. Marlar's expert credentials. The ruling instead concerned the testimony's relevance, he says.

As for Gunn's semantic argument about Dr. Marlar's expertise, the court said that Dr. Marlar's testimony seemed "speculative" and cast doubt on the admissibility of testimony from "an emergent care doctor who saw [Gunn] a limited number of times" who would testify "presumably about mental health issues and addiction." R. vol. 3, at 972. True, the court's ruling could have been clearer, but in context, the court was ruling on Dr. Marlar's expertise. The court's statements followed a colloquy with Gunn's attorney about whether Dr. Marlar would be giving expert testimony; Gunn's attorney called it "soft expert testimony" but maintained that Dr. Marlar would mainly be a fact witness about the October 2018 incident. *Id.* at 971. The court then juxtaposed its rulings on Dr. Marlar's expert testimony ("I certainly would not permit Dr. Marlar to

testify in that regard") and Dr. Marlar's fact testimony ("those [topics] would certainly be in his purview as a fact witness"). *Id.* at 973. In context, the court was saying that an emergency-room physician is unqualified to testify generally about mental health and addiction. Gunn doesn't quarrel with this reasoning, just about whether that reasoning even existed.

Semantics aside, district courts, in their gatekeeping role, examine expert reliability *and* relevance. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). Irrelevant expert testimony, even by a qualified expert, is inadmissible. *See id.* at 591; Fed. R. Evid. 702(a). The district court didn't abuse its discretion by ruling that Dr. Marlar's testimony was irrelevant. For the reasons given above for Dr. Howard's testimony, we reject Gunn's defense-theory argument for Dr. Marlar. Gunn's leadership wasn't an element of the three crimes with which he was charged, nor was it relevant to any defense. Dr. Marlar's fact testimony about the October 2018 incident, though "in his purview," as the district court found, was also irrelevant to the charged conduct. R. vol. 3, at 973. Gunn doesn't explain why his being treated for a possible drug overdose would help the jury analyze whether he was guilty of a drug conspiracy or possessing drugs with intent to distribute. And we also affirm the court's Rule 403 ruling. Gunn's mental acuity and addiction weren't at issue, and Dr. Marlar's testimony would've only confused the jury, like Dr. Howard's testimony would've done. *See Martinez*, 923 F.3d at 815; Fed. R. Evid. 403.

Because Gunn failed to show that Dr. Marlar's testimony was admissible, the district court didn't abuse its discretion by not enforcing its subpoena.

* * *

In a last effort, Gunn tries a novel due-process argument. Because the three witnesses' testimonies "might have caused a reasonable doubt" about his guilt, excluding them violated due process. Opening Br. 22–23. To succeed on a constitutional challenge to an admissibility ruling, a defendant must first show that the district court abused its discretion in excluding the evidence. *United States v. Williams*, 934 F.3d 1122, 1131 (10th Cir. 2019). Because the district court acted within its discretion in not issuing subpoenas for Price and Dr. Howard and in ruling Dr. Marlar's testimony inadmissible, Gunn cannot show a due-process violation.

We affirm these evidentiary rulings.

III. Multiple-Conspiracies Instruction

Gunn contends that the district court should have given a Tenth Circuit Pattern Jury Instruction about multiple conspiracies. At trial, he attempted to disassociate himself from the wide conspiracy charged in the indictment and instead place himself in a separate, smaller conspiracy. A multiple-conspiracies instruction tells the jury that it must find that the defendant belonged to the conspiracy charged in the indictment; proof that the defendant participated in some other conspiracy isn't enough to convict.

We review a district court's refusal to give a jury instruction for abuse of discretion, and in reviewing that decision, we examine all the jury instructions de novo to see whether they accurately state the law. *United States v. Cushing*, 10 F.4th 1055, 1073 (10th Cir. 2021) (quoting *United States v. Moran*, 503 F.3d 1135, 1146 (10th Cir. 2007)), *cert. denied*, 142 S. Ct. 813 (2022). But we won't reverse a district court's failure to give a multiple-conspiracies instruction if the given instructions impart (1) that "the government had the burden of proving beyond a reasonable doubt the [single] conspiracy as alleged" and (2) "that the evidence should be considered separately as to each individual defendant." *Id.* (alteration in original) (quoting *United States v. Evans*, 970 F.2d 663, 675 (10th Cir. 1992)).

Gunn disputes that the instructions meet this standard but then asks us to adopt a new, more lenient test in *Evans*'s stead. Of course, this panel can't overrule *Evans*—it's a published opinion. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." (citations omitted)). All we can do is examine the jury instructions to see if they're clear enough under *Evans*.

We reject Gunn's argument and hold that the instructions correctly stated the law. Taking the two *Evans* prongs in reverse order, Instruction 23 meets the second prong; it instructs the jury to "separately consider the evidence against each defendant on each count and return a separate verdict for each defendant."

R. vol. 1, at 769. Gunn's argument turns on the first *Evans* prong. He claims that the conspiracy-elements Instruction 24 inadequately conveys that "the government had the burden of proving beyond a reasonable doubt the [single] conspiracy as alleged." *Evans*, 970 F.2d at 675 (alteration in original). Here's what Instruction 24 said:

> [21 U.S.C. § 846] makes it a crime for anyone to conspire with someone else to violate federal laws pertaining to controlled substances. In this case, the defendants are charged with conspiracy to possess controlled substances, including methamphetamine, with intent to distribute and distribution of those controlled substances. Methamphetamine is a Schedule II controlled substance.
>
> To find a defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> First: two or more persons agreed to violate the federal drug laws – here, as described in Count 1, the federal drug law prohibiting possession of controlled substances with intent to distribute and distribution of the same;
>
> Second: the defendant knew the essential objective of the conspiracy;
>
> Third: the defendant knowingly and voluntarily involved himself in the conspiracy; and
>
> Fourth: there was interdependence among the members of the conspiracy.

R. vol. 1, at 770. In Gunn's view, because the first element merely says he must have conspired to distribute methamphetamine, the jury could have convicted him based on his involvement in a smaller-scale distribution conspiracy, including one he claims was only for his personal use.

We conclude that taken together, the given instructions satisfy the first *Evans* prong. To begin, Instruction 24 is nearly identical to the instruction we

upheld against a multiple-conspiracies-instruction challenge in *Cushing*, 10 F.4th at 1074. Even without that recent precedent, Gunn's jury instructions are clear. Instruction 24's first element uses the phrase "as described in Count 1," pointing the jury to Instruction 3, which describes the Count 1 conspiracy's manner and means over sixteen paragraphs. Instruction 19 cautions the jury that "[t]he defendants are not on trial for any act, conduct, or crime not charged in the Second Superseding Indictment." R. vol. 1, at 765. More to Gunn's point, Instruction 20 reminds the jury that "the fact that a defendant may have committed an act similar to the one charged in this case [a separate conspiracy to distribute drugs] does not mean that defendant necessarily committed the act charged in this case [the conspiracy from the indictment]." *Id.* at 766. And Instruction 27 says that "[i]f you are convinced that *the charged conspiracy existed*, then you must next determine whether the defendant was a member of *that conspiracy*." *Id.* at 774 (emphases added).

Read together, Instructions 3, 19, 20, 24, and 27 told the jury that it could convict Gunn only if it found that he belonged to the charged conspiracy. So the given instructions meet the *Evans* test, and the district court didn't abuse its discretion by declining to give a multiple-conspiracies instruction. *See also United States v. Edwards*, 69 F.3d 419, 433–34 (10th Cir. 1995) (rejecting multiple-conspiracies-instruction challenge under *Evans*).

IV. Sufficiency of the Evidence

Next, Gunn argues that the district court erred in denying his motion for a judgment of acquittal. He maintains that the evidence was insufficient to convict him of the charged drug conspiracy. We review sufficiency-of-the-evidence challenges de novo, viewing the evidence "in the light most favorable to the government." *Cushing*, 10 F.4th at 1064 (citations omitted). In reviewing the record, we ask "whether the government's evidence, credited as true, suffices to establish the elements of the crime." *United States v. Johnson*, 821 F.3d 1194, 1201 (10th Cir. 2016) (quoting *United States v. Hutchinson*, 573 F.3d 1011, 1033 (10th Cir. 2009)). And we'll reverse only if "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cushing*, 10 F.4th at 1064 (quoting *United States v. Hernandez*, 509 F.3d 1290, 1295 (10th Cir. 2007)).[9]

A conspiracy has four elements: (1) the defendant's and another person's agreement to violate the law, (2) the defendant's "knowledge of the essential

[9] Gunn didn't renew his motion for judgment of acquittal after the close of all evidence, so plain-error review applies. *See United States v. Alexander*, 817 F.3d 1205, 1209 n.3 (10th Cir. 2016) (citing *United States v. Cox*, 929 F.2d 1511, 1514 (10th Cir. 1991)). But the plain-error standard is "essentially the same" as the sufficiency-of-the-evidence standard. *Id.* (quoting *Cox*, 929 F.2d at 1514). After all, a conviction on insufficient evidence is "plainly an error, clearly prejudiced the defendant, and almost always creates manifest injustice." *Williams*, 934 F.3d at 1127 (quoting *United States v. Goode*, 483 F.3d 676, 681 n.1 (10th Cir. 2007)). So we proceed as if Gunn preserved his argument, which ultimately doesn't matter because "we determine the evidence was sufficient to support [Gunn's] conviction—resulting in no error." *Pickel*, 863 F.3d at 1257 n.16 (citation omitted).

objective of the conspiracy," (3) the defendant's "knowing and voluntary involvement," and (4) "interdependence among the alleged coconspirators." *Cushing*, 10 F.4th at 1065 (citations omitted). Gunn challenges the government's evidence for all but the second element. We discuss the government's evidence for the three contested elements below.

A. Agreement

For the first element, an agreement to violate the law "may be inferred from the facts and circumstances of the case." *Id.* (quoting *Evans*, 970 F.2d at 669). Gunn argues that the primary evidence to support an agreement—that he would sometimes use the same IMG members as Postelle to smuggle drugs—wasn't enough to convict. The government responds by listing several drug transactions that circumstantially support Gunn's agreement. In reply, Gunn claims that the government is conflating the IMG's general agreement to sell drugs with the specific conspiracy from the indictment.

Based on the evidence presented at trial, a rational jury could find that Gunn agreed to break the law by dealing drugs. The government elicited testimony about several drug transactions in which Gunn was involved as an intermediary, buyer, or seller. Gunn sold methamphetamine to Smith through Matthews, had Smith sell drugs for him, and bought an ounce of heroin from Newport. The clearest indication that Gunn agreed to break the law was from the first drug deal the FBI detected on its wiretap. Gunn sold Smith a quarter pound of methamphetamine after arranging a source and a middleman, who

arranged for a courier to deliver the drugs. So there was enough evidence for a rational jury to find an illicit agreement.

B. Participation

For the third element, a defendant must "have a general awareness of both the scope and the objective of the enterprise to be regarded as a coconspirator," but "[m]ere knowledge of illegal activity" isn't enough. *Id.* at 1066 (quoting *Evans*, 970 F.2d at 670) (alteration in original). Gunn argues that the primary evidence to support his voluntary participation was that he used the same drug suppliers in Mexico as the rest of the IMG used. He says this isn't enough to convict. In response, the government inventories its evidence about Gunn's leadership role in the IMG and Gunn's actions to advance the conspiracy. Gunn's refrain: Being in a gang isn't a crime, and a general agreement to help other IMG members doesn't prove a conspiracy to deal drugs as alleged in the indictment.

A rational jury had enough evidence to find that Gunn voluntarily participated in the IMG's drug conspiracy. To start, because the government elicited testimony about the extent of the conspiracy, we can assume that the jury inferred that the IMG was coextensive with the conspiracy. The jury heard that the IMG was "all about making money and selling drugs" and that "[b]asically[] all" of the IMG leaders, including Gunn, were selling drugs. R. vol. 3, at 120–21, 136–37. Not only that, but Gunn's role in the IMG was also coextensive with drug dealing. Gunn was on a phone call with Postelle during

which they discussed the IMG's membership roster, signifying that Gunn was aware of the conspiracy's scope. Gunn organized drug deals using Matthews and Smith as points of contact on the outside. With Postelle, Gunn disciplined members for drug-related infractions, such as when he ordered a member's pinkie fingers cut off who came up short on drug money and when he demoted another member who sold drugs to an undercover agent. All of this goes far beyond mere knowledge of illicit activities within the gang. Gunn was an integral member of the conspiracy, and there was ample evidence for a rational jury to find participation.

C. Interdependence

For the fourth element, a defendant must have "facilitated the endeavors of other alleged coconspirators or facilitated the venture as a whole." *Cushing*, 10 F.4th at 1066 (quoting *Johnson*, 821 F.3d at 1203). In other words, there must be a "*shared*, single criminal objective." *Id.* (quoting *Evans*, 970 F.2d at 670). Gunn argues that the only evidence to support interdependence was his using the same couriers and suppliers as other IMG members. He cites his defense theory that he was running a smaller conspiracy and claims that his deals were "always in an effort to obtain drugs for himself." Opening Br. 14. The government counters with eight events that it says show Gunn's interdependence with the conspiracy and other coconspirators. Gunn chalks these events up to the accoutrements of leading a gang and says they don't bear on the charged drug conspiracy.

The evidence was sufficient for a rational jury to find that Gunn and his coconspirators were interdependent and shared an illicit goal. Newport's testimony handed the jury evidence of interdependence on a silver platter: "[I]t was like a big group . . . that we assisted in helping these transactions go on." R. vol. 3, at 277. Other evidence also helped prove the IMG's interdependence. For example, Gunn supported the endeavors of his coconspirators by teaching Newport how to get heroin residue off the bag. Contrary to Gunn's argument that he sought only to feed his own drug habit, the jury heard plenty of testimony about how Gunn helped other IMG members with their drug deals. He offered to supply other members with drugs, introduced IMG members to suppliers, and dealt drugs to other incarcerated members. He helped Hager by managing Hager's methamphetamine deals for a week. And Gunn shared Smith, one of his couriers, with Hudson. There was enough evidence for a rational jury to find interdependence within the IMG conspiracy.

* * *

All Gunn can marshal is that *some* rational trier of fact *could have* acquitted him of the drug-conspiracy charge. That isn't the benchmark on a sufficiency-of-the-evidence challenge. Crediting the government's evidence as true and drawing reasonable inferences in its favor, the evidence was more than enough to convict Gunn of the charged conspiracy. We affirm his conviction on Count 1.

V. Sentencing Issues

Gunn finally argues that the district court erred by overruling two of his objections to the PSR, one about the drug weight attributable to him and another about his leadership role in the conspiracy. We review a district court's imposition of a sentence for abuse of discretion. *United States v. White*, 782 F.3d 1118, 1128 (10th Cir. 2015) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). On a procedural-reasonableness challenge under the Sentencing Guidelines, we review a court's legal conclusions de novo and its factual findings for clear error. *Id.* at 1129 (citations omitted).

A. Drug Weight

Finding Gunn responsible for 39,782.55 kilograms of converted drug weight, the district court assigned him a base-offense level of 36 under U.S.S.G. § 2D1.1. Gunn argues that because the jury's special verdict found only that he was responsible for the statutory range of 50 to 500 grams of methamphetamine, the district court's contrary finding at sentencing violated his Sixth Amendment rights. He directs us to a Ninth Circuit case in support. Yet he acknowledges "contrary authority" from our circuit: *United States v. Magallanez*, 408 F.3d 672 (10th Cir. 2005), which the district court cited at the sentencing hearing.

In *Magallanez*, a drug-weight case, we noted that "sentencing courts maintain[] the power to consider the broad context of a defendant's conduct, even when a court's view of the conduct conflict[s] with the jury's verdict."

408 F.3d at 684. And nothing in *United States v. Booker*, 543 U.S. 220 (2005), which made the Guidelines advisory, changed this rule. *Magallanez*, 408 F.3d at 684–85. We then held that when a district court decides sentencing facts by a preponderance of the evidence, "it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard." *Id.* at 685. Applying *Magallanez* here, the district court wasn't forced to accept the jury's finding that Gunn was liable for only 50 to 500 grams of methamphetamine; it could independently decide the drug quantity at sentencing. *See also United States v. Keck*, 643 F.3d 789, 798 (10th Cir. 2011) (applying *Magallanez*). Gunn doesn't challenge the court's drug-weight finding as clearly erroneous, so we affirm.

B. Leader–Organizer Enhancement

Finding that Gunn was an organizer or leader of a conspiracy involving at least five people, the district court enhanced Gunn's base-offense level by four levels under U.S.S.G. § 3B1.1(a). Because the leader–organizer enhancement is a factual finding, we review it for clear error. *See United States v. Gehrmann*, 966 F.3d 1074, 1085 (10th Cir. 2020) (citation omitted).

To determine whether a defendant qualifies for this enhancement, courts consider seven factors:

> [1] [T]he exercise of decision making authority, [2] the nature of participation in the commission of the offense, [3] the recruitment of accomplices, [4] the claimed right to a larger share of the fruits of the crime, [5] the degree of participation in planning or organizing

> the offense, [6] the nature and scope of the illegal activity, and [7] the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1 cmt. n.4. A defendant need lead or organize only one other participant to qualify as a leader or organizer, so long as the criminal activity includes five or more participants. *United States v. Damato*, 672 F.3d 832, 847 (10th Cir. 2012) (citing *United States v. Hamilton*, 587 F.3d 1199, 1222 (10th Cir. 2009)); § 3B1.1 cmt. n.2.

Gunn offers a single argument for this issue: "The mere fact that Gunn was a leader of the IMG does not establish that he was also a leader of the charged conspiracy." Opening Br. 25. But Gunn's sentence wasn't enhanced because of his gang affiliation. At sentencing, the district court loosely quoted from the PSR, which analyzed Gunn's conduct under the § 3B1.1 factors. Agreeing that all seven factors weighed against Gunn,[10] the court applied the enhancement. As the court found, Gunn made decisions and recruited accomplices for the conspiracy, which was far-reaching. He organized and coordinated drug deals inside and outside prison. And as one of the IMG's leaders, Gunn had the final say on matters pertaining to the conspiracy. These findings are supported by the trial evidence and aren't clearly erroneous.

[10] Though the court determined that all seven factors supported the enhancement, neither the court nor the PSR made any findings about the fourth factor—whether Gunn took a larger share of the conspiracy's proceeds. Thus, we consider this factor neutral or inapplicable. This doesn't change the overall conclusion, however.

The district court didn't clearly err by finding that Gunn was a leader or organizer of the drug conspiracy, so we affirm the § 3B1.1(a) enhancement.

CONCLUSION

There was no reversible error in this case. We affirm Gunn's convictions and sentence.

Entered for the Court

Gregory A. Phillips
Circuit Judge