FILED
United States Court of Appeals
Tenth Circuit

October 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL PATRICK GUTIERREZ,

Defendant - Appellant.

No. 22-8045
(D.C. No. 1:22-CR-00007-ABJ-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **McHUGH**, Circuit Judges.

Immediately upon his release from a twelve-year federal prison sentence for narcotics trafficking, Defendant Daniel Patrick Gutierrez, a self-described "meth kingpin," conspired to trade firearms and cash for more than seven pounds of methamphetamine from a supplier in Colorado. R. Vol. II at 63, 69-70. After a week-long trial, a jury convicted Defendant of (1) conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A); (2) use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); (3) distribution of 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1),

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

(b)(1)(A); and (4) felon in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). R. Vol. I at 90. At sentencing, the Government requested an enhancement pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851 because Defendant had two prior felony drug offenses. The district court applied the enhancement and sentenced Defendant to a mandatory minimum imprisonment sentence of 300 months on Counts One and Three, 120 concurrent months on Count Two, and 60 consecutive months on Count Four. R. Vol. I at 91; R. Vol. III at 950.

Defendant raises three issues on appeal.[1] First, he argues the district court erred by permitting a Government expert witness to opine on the meaning of clear, noncoded text messages between Defendant and coconspirator Joseph Hooker. Second, Defendant contends the district court erred by admitting an officer's eyewitness testimony identifying Defendant as the individual who fled the scene of a traffic stop where police recovered methamphetamine from Defendant's coconspirator. Third, Defendant argues his sentence violates the Eighth Amendment after *Miller v. Alabama*, 567 U.S. 460 (2012), because he committed one of the two predicate offenses supporting his statutory sentencing enhancement as a juvenile. We review Defendant's two unpreserved evidentiary

[1] We conclude Defendant waived appellate review of his prosecutorial vindictiveness claim. Under Fed. R. Crim. P. 12(b)(3)(A)(iv), a defendant must raise a vindicative prosecution claim before trial. A court may review an untimely Rule 12(b)(3) motion if the moving party shows good cause. Fed. R. Crim. P. 12(c)(3). Defendant did not raise the issue below and made no attempt to show good cause for his failure to do so. We therefore deem his claim waived and decline to review it. *See United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011) (defendant waived argument under Rule 12 when he "made no showing of [good] cause in his opening brief, and he failed to do so again in his reply brief despite the government's raising the waiver issue in its response").

challenges for plain error and his sentencing argument *de novo*. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

The parties are familiar with this case's procedural history and the facts elucidated at trial. We recount only what is necessary to resolve the issues before us today. On December 22, 2020, Wyoming Department of Criminal Investigations ("DCI") officers arranged a controlled purchase of 3.5 grams of methamphetamine from Defendant's coconspirator Joseph Hooker at the C'mon Inn in Evansville, Wyoming. R. Vol. III at 278-282; 334-35. Two weeks later, officers arrested Hooker at the same location. *Id.* at 351. In a search of Hooker's hotel room and vehicle, officers recovered approximately 200 grams of methamphetamine, empty jeweler bags consistent with narcotics distribution, a duffel bag containing two pistols and ammunition, and Hooker's cell phone. *Id.* at 302-08, 319, 671.

Hooker's cell phone data contained over three hundred text messages between Hooker and two cell phone numbers linked to Defendant. *Id.* at 352; Gov. Ex. 400, 401. In these texts, Defendant and Hooker arranged joint purchases of methamphetamine from a third-party source in Denver, Colorado, later identified to be Justin Duran. R. Vol. III at 427-29, 521, 642. DCI Special Agent Jason Ruby interpreted twenty text messages at trial and opined that they suggested Hooker and Defendant jointly purchased one-pound quantities of methamphetamine from Duran at least three times. *Id.* at 682-96; Aplt's Op. Br. at 14-16. Special Agent Ruby explained that his opinion was corroborated by "Cash App" and "Walmart2Walmart" transaction records that showed Hooker paid Defendant's

associates and family members for his share shortly before the suspected methamphetamine purchases. R. Vol. III at 423-36, Vol. II at 227.

Preston Wisenbaker, a cooperating coconspirator, testified that he accompanied Defendant on three different trips to Denver to purchase one pound of methamphetamine from Duran between late 2020 and Wisenbaker's arrest in July 2021. R. Vol. III at 510, 518-30. On the first trip, Defendant and Wisenbaker traded an AR-15 rifle, two handguns, and cash for approximately one pound of methamphetamine. *Id.* at 520-22. A few weeks later, Wisenbaker traveled to Denver again with Defendant and paid cash for a pound of methamphetamine from the same supplier. *Id.* at 525-28. During their third trip, Defendant acted as a middleman in procuring a pound of methamphetamine from Duran for Wisenbaker. *Id.* at 530. Wisenbaker testified that he continued to sell methamphetamine to Defendant afterward. *Id.* at 531.

On July 19, 2020, Laramie County Sheriff's Deputy Robert Fertig conducted a traffic stop on a reported stolen vehicle at a "Loaf 'N Jug" gas station in Cheyenne Wyoming. *Id.* at 570. When Deputy Fertig pulled in behind the vehicle, an unknown male exited the back seat with a black bag and fled on foot across traffic. *Id.* After a brief foot pursuit, Deputy Fertig allowed the suspect to escape. *Id.* at 571. He returned to the Loaf 'N Jug to attend to the vehicle's other occupants. *Id.* Defendant's wife, coconspirator Ashely Gutierrez, also fled the scene. She left behind her purse containing her ID, credit cards, photos of her and Defendant, and approximately 51 grams of methamphetamine. *Id.* at 574-75. Based on the totality of the circumstances and Deputy Fertig's prior contacts

with Defendant, he opined at trial that Defendant was the unknown male who fled the scene. *Id.* at 590.

On August 13, 2021, a joint law enforcement SWAT team executed a search warrant at Defendant's home. *Id.* at 187. Defendant surrendered to authorities. *Id.* In Defendant's bedroom, officers found two rifles, several rounds of ammunition, user quantities of methamphetamine, and a hand-written ledger showing debts for methamphetamine and other controlled substances. *Id.* at 196-202; Gov. Ex. 118. Officers also discovered a decorative rocking chair, signed by Defendant, with the phrase "Mr. H2O Meth Kingpin" written across the seat. *Id.* at 200.[2] Officer David Uhrich identified himself to Defendant and told him he was being charged with conspiracy to distribute methamphetamine in Natrona County, Wyoming. *Id.* at 190. Defendant then admitted to Uhrich that he had sold to "a couple" people in Casper. *Id.* Defendant was arrested and taken into custody. R. Vol. II at 58.

II.

Defendant challenges his convictions in Counts One and Three based on his assertion that the district court erroneously admitted two witnesses' testimony at trial. Defendant acknowledges he did not preserve either issue. Aplt's Op. Br. at 3-4. We therefore review for plain error. *United States v. Draine*, 26 F.4th 1178, 1186 (10th Cir. 2022). Under this standard, we "reverse only if there is (1) error, (2) that is plain, which

[2] Preston Wisenbaker testified that Defendant referred to himself as "H2O." R. Vol. III at 532. Defendant also texted Joseph Hooker: "This is my new number . . . H20 [sic]," with an attached photograph of himself. Gov. Ex. 401 at 1-2.

(3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Koch*, 978 F.3d 719, 724 (10th Cir. 2020) (quotation omitted). An error is plain if it "is clear or obvious at the time of the appeal." *Id.* (quotation omitted). To be obvious, the error "must be contrary to well-settled law." *Id.* (quotation omitted). "In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue." *Id.* (quotation omitted).

A. Expert Testimony

We first address Defendant's argument that the district court plainly erred by failing to *sua sponte* limit the scope of Special Agent Ruby's testimony interpreting text messages between Defendant and coconspirator Joseph Hooker.

The Government offered Special Agent Ruby as an expert witness in narcotics trafficking without objection from Defendant. R. Vol. III at 217. The district court qualified him as an expert. *Id.* at 218. Special Agent Ruby did not participate in Defendant's investigation firsthand. *Id.* at 668. Instead, he opined as an expert that Defendant conspired with Joseph Hooker to purchase and distribute methamphetamine based on his review of the evidence and his seventeen years of experience in law enforcement investigating drug trafficking. *Id.* at 219-21, 669, 676. Special Agent Ruby testified about the meaning of twenty specific text messages between Defendant and Hooker at trial. *Id.* at 682-96; Aplt's Op. Br. at 14-16. While interpreting the texts, he explained coded language and slang related to drugs and firearms, the street value of drugs, and drug distribution mechanics. R. Vol. III at 682-96. He repeatedly affirmed that his

testimony was based on his training and experience as a law enforcement officer. R. Vol. III at 677-78, 687, 689. Defendant does not provide individualized analysis of each text message for error. Rather, he makes a general objection to Special Agent Ruby's interpretation of all twenty text messages. He asserts two errors under Federal Rule of Evidence 702: (1) Special Agent Ruby's testimony was irrelevant because the texts had plain meanings that did not require explanation by an expert; and (2) there is no record that Special Agent Ruby reliably applied his experience and training to reach his opinions. Aplt's Op. Br. at 29-30.

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Rule 702 establishes a standard of evidentiary reliability and appoints the district court as the gatekeeper. *United States v. Cushing*, 10 F.4th 1055, 1079 (10th Cir. 2021) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)). If a party challenges expert testimony, then the district court must make factual findings that the expert testimony is relevant and reliable. *Id.* "Relevant expert testimony must logically advance a material aspect of the case . . . and be sufficiently tied to the facts of

the case that it will aid the jury in resolving a factual dispute." *United States v. Garcia*, 635 F.3d 472, 476 (10th Cir. 2011) (quotations omitted). Moreover, an expert's testimony must have "a reliable basis in the knowledge and experience of his or her discipline." *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1233 (10th Cir. 2005) (quotation omitted).

In drug prosecutions, we routinely allow law enforcement officers to testify as experts "because the average juror is often innocent of the ways of the criminal underworld." *United States v. Vann*, 776 F.3d 746, 758 (10th Cir. 2015) (quotation omitted). Officers' specialized knowledge as to the means and methods of the narcotics trade can provide helpful context for the jury. *United States v. Garza*, 566 F.3d 1194, 1199 (10th Cir.2009). We recently concluded that a DEA agent's testimony interpreting text messages "on methamphetamine slang, culture, and dealing protocol was . . . well within Rule 702 as expert testimony." *Cushing*, 10 F.4th at 1080 (citing *United States v. Cristerna-Gonzalez*, 962 F.3d 1253, 1259 (10th Cir. 2020)). In *United States v. Cushing*, we again upheld the same DEA agent's testimony against another Rule 702 challenge. 10 F.4th at 1080. We reasoned that even if a lay person could generally define some of the language contained in the defendant's text messages such as "stuff" or "come by," the agent's testimony nevertheless provided important context that aided the jury's understanding of the case. *Id.*

First, we address Defendant's argument that the district court plainly erred by failing to rule *sua sponte* that Special Agent Ruby's testimony was not relevant or helpful to the jury. Defendant cites no authority from the United States Supreme Court or this court that support his contention. To the contrary, Special Agent Ruby's testimony is consistent with

our precedent. The twenty texts discussed at trial are littered with coded language. Some examples include: "Homeboy it's 5000 a p any way you break it"; "blues are 7 a pop"; "So can I touch the 8"; "I got like 2gs on me"; "I got that cash I owe you and I need my thingy back." R. Vol. III at 676-77, 684-87. Other texts contained vague language commonly used by methamphetamine dealers and buyers: "How much more I need to get half on my own"; "I'm tapped out ready to go again"; "It should be good I'm always open"; "3800 threw [sic] this chick"; and "Need a number on a half." *Id.* at 684, 689-91, 694. Special Agent Ruby clarified the remaining texts by putting them in context using his expertise in street drug prices and local dealing protocol. For example, the plainest text he interpreted stated "Come in." *Id.* at 692. Special Agent Ruby opined that the text suggested Defendant and Hooker met at a residence after the two had discussed splitting a pound of methamphetamine for $3800. *Id.* at 691-92. Special Agent Ruby's testimony went no further than what we upheld in *Cushing*. 10 F.4th at 1080 (no error where DEA agent interpreted text messages stating "stuff" and "come by" because, "[e]ven if a layperson could generally define the word "stuff," it is the *context* that is important here.") (emphasis in original). Accordingly, Defendant has not shown error.

Second, Defendant argues Special Agent Ruby failed to explain how his experience led to his conclusions, rendering his opinions unreliable. Defendant asserts the error was plain based on *United States v. Medina-Copete*, 757 F.3d 1092 (10th Cir. 2014). In *Medina-Copete*, we held an expert law enforcement officer's testimony was unreliable under Rule 702 in part because the record lacked the necessary connection between the officer's experience and his conclusions at trial. *Id.* at 1104. The government described

the officer as a "cultural iconography hobbyist" whose research included visiting several shrines of Mexican drug traffickers' patron saints. *Id.* at 1098. The officer testified that a written prayer to Santa Muerte—a purported "narco-saint"—discovered in the defendant's hand during a traffic stop suggested she was seeking protection from law enforcement and therefore had knowledge of the methamphetamine recovered in her car. *Id*. at 1099-1100. We concluded the officer's opinion was not adequately explained by his testimony that he "visit[ed] several shrines" of Mexican patron saints or "compil[ed] several cases" where patron saint references had been connected to drug trafficking. *Id.* at 1104.

Medina-Copete is inapposite because Special Agent Ruby is not a drug investigation "hobbyist." Special Agent Ruby received formal training from the DEA and DCI on drug investigations. R. Vol. III at 221-22. He spent twelve of his seventeen years in law enforcement with the Wyoming DCI investigating controlled substances violations. *Id.* at 219-20. Conducting electronic surveillance, including cell phone analyses, of suspected drug traffickers was a primary component of his job. *Id.* at 223-24. Special Agent Ruby also taught surveillance and drug identification courses at the Wyoming Law Enforcement Academy. *Id.* at 222. His opinions at trial were well within the scope of his expertise. Moreover, he repeatedly affirmed that his interpretations were based on his training and experience. R. Vol. III at 677-78, 687, 689. We have routinely upheld similar testimony from other qualified law enforcement witnesses. *See Cristerna-Gonzalez*, 962 F.3d at 1260 (compiling cases). We hold Defendant failed to establish that the admission of Special Agent Ruby's testimony was plain error.

B. Identification Testimony

Defendant next contends the district court plainly erred by failing to *sua sponte* exclude under Federal Rule of Evidence 403 Deputy Fertig's testimony that he identified Defendant as the individual who fled the scene of the Loaf N' Jug traffic stop.

To satisfy the third prong of the plain error test, Defendant must show "a reasonable probability that the error affected the outcome of the proceedings." *Koch*, 978 F.3d at 729 (quotation omitted). On this point, Defendant argues the identification was the only evidence that tied him "directly to distribution-quantity level[s] of a controlled substance." Aplt's Op. Br. at 43. The remaining evidence, he asserts, "was either circumstantial or rested on the testimony of a convicted felon." *Id.* Defendant's argument overlooks the strength and volume of the circumstantial evidence that supports his convictions. As we have stressed, "direct evidence of conspiracy is often hard to come by." *United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009) (quotation omitted). Thus, "conspiracy convictions may be based on circumstantial evidence, and the jury may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action." *Id.* (quotation omitted).

Even without Deputy Fertig's testimony, we find ample evidence in the record to support Defendant's convictions for conspiracy to distribute methamphetamine and distribution of methamphetamine. The government introduced hundreds of inculpatory text messages between Defendant and coconspirator Joseph Hooker. Gov. Ex. 400 and 401. Special Agent Ruby opined that those texts show Defendant and Hooker purchased one pound of methamphetamine together on three different occasions. R. Vol. III at 685.

Cash App and Walmart2Walmart transaction records corroborated his testimony. Gov. Ex. 202A, 500-505. Officers arrested Defendant's coconspirator Joseph Hooker with 200 grams of methamphetamine, empty jeweler bags consistent with narcotics distribution, and a Taurus handgun that Defendant possessed the day before Hooker's arrest. Gov. Ex. 401 at 27; R. Vol. III at 302-08, 319, 671. Preston Wisenbaker testified that he accompanied Defendant to purchase one pound of methamphetamine from the same supplier on three more occasions. R. Vol. III at 133-143. Finally, Defendant's bedroom contained user quantities of methamphetamine, paraphernalia, and a ledger showing debts for methamphetamine. *Id.* at 196-202; Gov. Ex. 118. Defendant even admitted to an officer that he sold methamphetamine to "a couple" of people in Casper, Wyoming. R. Vol. III at 189-90. Defendant has not shown a reasonable probability that the result of his trial would have been different without Deputy Fertig's testimony. Accordingly, he has not overcome the high bar of plain error review. *See Puckett v. United States*, 556 U.S. 129, 136 (2009) ("Meeting all four prongs [of plain error] is difficult, as it should be." (quotation omitted)).

III.

Defendant also argues that his twenty-five-year mandatory minimum sentence offends the Eighth Amendment because he committed one of the two predicate offenses supporting his statutory sentencing enhancement when he was a juvenile. We review *de novo*. *United States v. Orona*, 724 F.3d 1297, 1300 (10th Cir. 2013).[3]

[3] To the extent Defendant also presents an Eighth Amendment challenge to the discretionary nature of 21 U.S.C. § 841 and the Government's decision to seek an enhancement against him, we deem his argument to be waived. Defendant did not present this theory below nor did he provide a plain error analysis in either his opening or

When a Defendant violates 21 U.S.C. § 841(a)(1) "after 2 or more prior convictions for a serious drug felony . . . have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years . . . ." 21 U.S.C. § 841(b)(1)(A). Before seeking an enhancement under § 841(b)(1)(A), the Government must file a pretrial information "stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). Before sentencing, the district court must inquire whether the defendant affirms or denies his prior convictions as alleged in the § 851 information. 21 U.S.C. § 851(b).

Before Defendant's trial, the Government filed an information pursuant to § 851 stating it intended to seek an enhanced sentence. R. Vol. I at 26-27. It identified two of Defendant's prior convictions as predicates: (1) a 2003 Wyoming state conviction for possession with intent to distribute methamphetamine and (2) a 2009 federal conviction for conspiracy to possess with intent to distribute cocaine. *Id.* Defendant stipulated that his 2009 conviction qualified as a predicate serious drug felony. *Id.* at 36. But he objected to the use of his 2003 conviction as a predicate offense in part because doing so would prohibit the district court from considering his youth in determining his sentence, thereby running afoul of "clear dicta and admonitions in *Miller*." *Id.* at 44. The district court rejected Defendant's argument and applied the enhancement, finding *Miller* and its progeny do not apply to Defendant because he was facing sentencing on an adult conviction, and he was charged and convicted as an adult in his 2003 predicate offense. R. Vol. III at 946-47, 950.

---

reply brief. We therefore decline to review his claim. *Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1306 (10th Cir. 2017) (forfeiture-and-waiver rule applies when a litigant changes to a new theory on appeal).

In *Miller v. Alabama*, the United States Supreme Court held that the Eighth Amendment prohibits sentencing juvenile offenders to mandatory life in prison without the possibility of parole. 567 U.S. 460, 479 (2012). *Miller* built upon *Roper v. Simmons*, 543 U.S. 551 (2005), which held the Eighth Amendment bars capital punishment for juveniles, and *Graham v. Florida*, 560 U.S. 48 (2010), which held the Amendment prohibits imposing life without parole for nonhomicide juvenile offenders. *Id.* at 470. All three cases relied on the principle that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Miller* 567 U.S. at 477. All three cases dealt with sentencing juveniles to either mandatory life in prison without parole or the death penalty.

Defendant's sentence does not violate the Eighth Amendment. *Miller* is inapposite because Defendant is a recidivist offender who was sentenced to less than life in prison for a crime he committed as an adult, based on two prior *adult* convictions. The Supreme Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Nichols v. United States*, 511 U.S. 738, 747 (1994) (quotation omitted). "When a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's status as a recidivist." *United States v. Rodriquez*, 553 U.S. 377, 386 (2008) (quotation omitted). For that reason, we have rejected the argument that *Roper* and *Graham* prohibit using a prior juvenile conviction to enhance a defendant's sentence under the Armed Career Criminal Act. *Orona*, 724 F.3d at 1307-10. Bound by *Orona*'s reasoning, we conclude the use of Defendant's 2003 conviction to enhance his

sentence under §§ 841(b)(1)(A) and 851 does not offend the Eighth Amendment. Two other circuits have considered the same argument and reached the same conclusion. *See United States v. Crawley*, 760 F. App'x. 241, 244 (4th Cir. 2019) (use of defendant's prior adult conviction, that he committed while he was a juvenile, to enhance his sentence to life under §§ 841(b)(1)(A) and 851 did not violate the Eighth Amendment after *Miller*); *see also United States v. Hoffman*, 710 F.3d 1228, 1232-33 (11th Cir. 2013) (same). Defendant has presented no "sound reason to go against the tide." *United States v. Thomas*, 939 F.3d 1121, 1131 (10th Cir. 2019) ("The avoidance of unnecessary circuit splits furthers the legitimacy of the judiciary and reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location.") (citation omitted).

Because Defendant has two prior "serious drug felony" offenses within the meaning of 21 U.S.C. § 841(b)(1)(A), we conclude the district court did not err in applying §§ 841(b)(1)(A) and 851 to enhance Defendant's sentence.

***

For the foregoing reasons, the district court's judgment of conviction and imposition of sentence is AFFIRMED.