NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 28, 2023*
Decided December 5, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-1794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TEKOA Q. TINCH,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18-cr-00336-1

Andrea R. Wood,
Judge.

O R D E R

Tekoa Tinch was convicted by a jury of attempting to possess and distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced to 192 months' imprisonment. He now challenges his conviction, raising numerous trial and post-trial errors. We affirm.

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* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Background

Tinch was approached in 2018 by a friend, Ivan Walton, about a plan to kidnap a Chicago-based drug dealer who had failed to pay a Mexican cartel. The cartel induced Walton and Tinch to undertake the kidnapping with an offer of money and drugs. Walton was arrested soon after speaking with Tinch, and he began cooperating with law enforcement.

Tinch sought proof of the cartel's legitimacy before he would agree to the scheme. Communicating through Walton, Tinch asked the cartel to put up earnest money or sell him narcotics in advance. Thereafter, Walton introduced Tinch to undercover law enforcement officers posing as members of the cartel. In coded language, they discussed with Tinch his desire to purchase narcotics before carrying out the kidnapping. One undercover officer directed Tinch to bring $2,000 to their next meeting to buy a kilogram of cocaine; Tinch complied. Upon retrieving the drugs (which were sham narcotics) from the undercover officer's car, Tinch was arrested. In Tinch's vehicle, officers found two firearms and $3,000 in cash. He was charged with attempted possession with intent to distribute, possession of a firearm as a felon, and possession of a firearm in furtherance of a drug offense. *See* 21 U.S.C. §§ 841(a)(1), 846; 18 U.S.C. §§ 922(g), 924(c)(1)(A).

The jury found Tinch guilty of attempted possession with intent to distribute cocaine. (He was acquitted of charges of possessing a firearm as a felon or in furtherance of a drug-trafficking crime.) The district court designated Tinch a career offender based on two prior convictions for a controlled substance offense. *See* U.S.S.G. § 4B1.1(b)(2). That status raised his final offense level to 34, which, coupled with a criminal history category of VI, yielded a sentencing range of 262 to 327 months' imprisonment. The court sentenced him to 192 months.

Analysis

Tinch argues that the district court made trial and post-trial errors. We address each argument in turn.

I. Jury Instruction

Tinch asks this court to reverse his conviction because the jury instruction insufficiently stated the element of intent to possess cocaine. The instruction Tinch challenges stated that he was charged with "attempting to possess with intent to distribute a controlled substance, namely, 500 grams or more of … cocaine." Tinch maintains that the instruction omitted the element of specific intent to possess cocaine. And even if the instruction was proper, he adds, no evidence supports the charge that he knowingly attempted to possess a controlled substance—because, technically, the

narcotics he received were sham. Because Tinch did not object at trial, we review the instruction for plain error. *See United States v. Maez*, 960 F.3d 949, 956 (7th Cir. 2020).

There was no plain error. The possession element of this crime requires proof beyond a reasonable doubt that the defendant knew the substance was controlled, intended to possess it, and took a substantial step toward possessing it. *See McFadden v. United States*, 576 U.S. 186, 191–94 (2015); *United States v. Haddad*, 976 F.2d 1088, 1094 (7th Cir. 1992). Tinch takes issue with the instruction laying out the charges against him, but the instruction on the elements of his attempted possession charge included the intent element that Tinch claims is missing. The instruction properly stated, "the government must prove … the defendant *intended* to possess a controlled substance … believed that the substance was some kind of controlled substance; and [t]he defendant knowingly took a substantial step toward possessing [the] substance …[.]" (emphasis added). And nevertheless, the jury heard undisputed evidence supporting an inference that Tinch—who used cash-in-hand to pay for a substance he believed to be cocaine—intended to possess cocaine and took a substantial step toward possessing it. His coded language in conversation with the undercover officers suggests he knew the cocaine to be an illegal substance. Although Tinch denies that he could have had such knowledge (because the substance contained sham ingredients), factual impossibility is not a defense to an attempt charge. *See United States v. Cote*, 504 F.3d 682, 687 (7th Cir. 2007). Indeed, our circuit's pattern jury instructions reflect this. *See* Seventh Circuit Pattern Criminal Jury Instructions, at 1024 (2020) ("The sale of a non-controlled substance that the defendant subjectively believes to be a controlled substance can constitute an attempt …[.]").

Tinch raises additional objections to the jury instructions (e.g., seeking to contest the indictment, the investigative technique instruction, the instruction on drug type and quantity, or the omission of a limiting instruction for "other acts" evidence). But he waived these objections by failing to meaningfully develop them. *See* FED. R. APP. P. 28(a)(8)(A); *see also Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001).

II. Evidence

As to the evidence at trial, Tinch argues that the district court erred in admitting evidence of the kidnapping conspiracy, co-conspirator hearsay, and "other acts" under Federal Rule of Evidence 404(b)(2) (allowing introduction of otherwise inadmissible character evidence if independently relevant to prove motive, intent, mistake, knowledge, identity, or common plan). The court had provisionally allowed the government to introduce evidence of (1) the kidnapping plan and negotiations to purchase cocaine—for the non-propensity purpose of showing knowledge, motive, and intent, (2) a conversation between Tinch and Walton made in furtherance of the

kidnapping job and drug-trafficking endeavor—as non-hearsay effect on the listener, and (3) conversations between Tinch and an undercover officer made in furtherance of the kidnapping job and drug-trafficking endeavor—as non-hearsay effect on the listener. But the court—citing concerns of unfair prejudice under Federal Rule of Evidence 403—barred the prosecution from referring directly to the kidnapping plan. (The court allowed the prosecution at trial to refer to the kidnapping plan only as the "Mexican cartel job.")

Tinch challenges the government's proffers. We review the district court's evidentiary ruling for an abuse of discretion. *See United States v. Washington*, 962 F.3d 901, 905 (7th Cir. 2020). With regard to the first proffer, he contends that evidence of the kidnapping plot, even in its sanitized form, was overly prejudicial. But the district court, in adhering to Rule 403, is afforded "great deference" in determining how best to censor references to the kidnapping. *See United States v. Inglese*, 282 F.3d 528, 538 (7th Cir. 2002). And Tinch has not explained how he was prejudiced by the court's rulings to limit direct references to the kidnapping plan.

As to the second and third proffers (which we have grouped here because both were offered for their effect on Tinch as the listener), Tinch argues that his conversations with Walton and the undercover officer were inadmissible hearsay because the statements were offered for their truth. Further, he asserts that Walton and the undercover officer did not fall under the co-conspirator hearsay exception because they were not co-conspirators when the statements were made. *See* FED. R. EVID. 801(d)(2)(E).

But the statements in these conversations were not hearsay because they were offered to show an effect on Tinch, the listener. *See United States v. Graham*, 47 F.4th 561, 567 (7th Cir. 2022). The trial transcript reflects that the conversations were used to show not the truthfulness of the statements made by Walton and the undercover officer, but rather their effect on Tinch, through his response and reactions.[1] *See id.*; *see also United States v. Gaytan*, 649 F.3d 573, 579–80 (7th Cir. 2011) (explaining that introducing

[1] Even if these statements were offered for their truth, Walton's statement satisfied the hearsay party-opponent exception because the government adequately proved that a conspiracy existed between Tinch and Walton before Walton's arrest. *See* FED. R. EVID. 801(d)(2)(E); *see also United States v. Cruz-Rea*, 626 F.3d 929, 937 (7th Cir. 2010). As the district court acknowledged, any statements made by Walton *after* his arrest and cooperation could not have been admitted under the party-opponent exception, nor could the undercover officer's statements. *See United States v. Mahkimetas*, 991 F.2d 379, 382–83 (7th Cir. 1993).

an out-of-court conversation to render the defendant's words or acts intelligible is a permissible, non-hearsay use of the out-of-court conversation).

Next, Tinch asserts that the court improperly admitted testimony of prior bad acts. A prior bad act by the defendant is inadmissible to show a defendant's propensity for criminal behavior unless the defendant first introduces—or "opens the door" to—evidence of the act. *See* FED. R. EVID. 404(a)(2); *see also United States v. Jett*, 908 F.3d 252, 271 (7th Cir. 2018). Here, a special agent testified on redirect examination that, based on his interpretation of Tinch's text messages with another narcotics associate, Tinch used the same coded language to discuss cocaine with undercover officers. But there was no error because defense counsel opened the door to this testimony by first cross-examining the agent about the text messages.

III. Sentencing

Tinch also appeals his sentence. First, he argues that the district court erred at sentencing by not verifying that he had discussed the presentence report with counsel. *See* FED. R. CRIM. P. 32(i)(1)(A). But the district court complied with this procedure, confirming that Tinch had ample time with his attorney over email to discuss the report.

Second, Tinch asserts that the district court overstated his criminality when it designated him a career offender. *See* U.S.S.G. § 4B1.1(b)(2). (The Guidelines define "career offender" as a defendant over eighteen, whose instant offense is a felony that is a crime of violence or a controlled substance offense, and who has at least two prior felony convictions for crimes of violence or controlled substance offenses.) Tinch points out that two prior drug-trafficking offenses did not involve violence. But the Guidelines tally convictions for *either* a crime of violence *or* a controlled substance offense. *See id.* § 4B1.2(c). And a sentence is presumed reasonable if the sentencing judge, as here, properly applies guideline recommendations. *See Rita v. United States*, 551 U.S. 338, 347 (2007); *United States v. Boroczk*, 705 F.3d 616, 624 (7th Cir. 2013).

Third, Tinch challenges the court's denial of a two-level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 based on his decision to contest the constitutionality of the statute under which he was convicted (that is, being convicted for attempted possession of cocaine that turned out to be sham narcotics). A constitutional challenge to the statute of conviction, on its own, does not preclude a reduction for acceptance of responsibility. *See United States v. Purchess*, 107 F.3d 1261, 1266 (7th Cir. 1997); *see also* U.S.S.G. § 3E1.1 cmt. 2 (defendant may still be eligible for acceptance of responsibility reduction even though the defendant makes a constitutional challenge to a statute or a challenge to the applicability of a statute to his

conduct). But a reduction for acceptance of responsibility is not meant for defendants who contest their guilt. *See United States v. Cunningham*, 103 F.3d 596, 598 (7th Cir. 1996); *United States v. McIntosh*, 198 F.3d 995, 1001–02 (7th Cir. 2000). And Tinch did not directly acknowledge his participation in illegal conduct, as required by § 3E1.1(a). Further, the court noted that Tinch "consistently tried to find technicalities and loopholes to avoid the consequences of the jury verdict." *See* U.S.S.G. § 3E1.1 cmt. 1(A) (frivolously contesting relevant conduct suggests defendant does not accept responsibility); *see also United States v. Munoz*, 610 F.3d 989, 993 (7th Cir. 2010) (upholding denial of reduction where defendant untruthfully minimized his participation in conspiracy and falsely denied knowing that his conduct was a crime).

Fourth, Tinch contends that the district court should not have applied a two-level special-offense-characteristic enhancement to his offense level for possessing a firearm, since he was acquitted of the firearm possession charge. *See* U.S.S.G. § 2D1.1(b)(1). But *United States v. Watts*, 519 U.S. 148 (1997), forecloses this argument. *Watts* held that a jury's decision to acquit a defendant of charges does not prevent the court from considering the conduct underlying the acquitted charge at sentencing, if the preponderance of the evidence shows that the acquitted conduct is connected to the offense of conviction. *Id.* at 156. Relevant connections to the offense include other acts that are part of the same course of conduct, scheme, or plan as the offense. *See United States v. Mumford*, 25 F.3d 461, 468 (7th Cir. 1994) (weapon possessed during offense and related relevant conduct led to sentence enhancement). Given that the firearms were in Tinch's car when he drove to the drug deal, the court appropriately applied the enhancement.

We have considered Tinch's remaining arguments, but none merits discussion.

Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.