**NONPRECEDENTIAL DISPOSITION**
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# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

Argued January 24, 2023
Decided February 1, 2023

**Before**

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-1282

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| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee*, | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| *v.* | No. 1:18-CR-00162(1) |
| WING NUEN LIU,<br>*Defendant-Appellant*. | Gary Feinerman,<br>*Judge*. |

**O R D E R**

Wing Nuen Liu was convicted in a bench trial of conspiring to distribute 100 kilograms or more of marijuana. *See* 21 U.S.C. § 846. On appeal, he argues for the first time that the government did not prove that he had knowledge of this quantity distributed through the conspiracy. But by not raising this argument in the district court, Liu forfeited it, and the district court did not plainly err in finding him guilty of the conspiracy charge. We affirm.

During the first half of 2016, Liu and his co-conspirators bought marijuana from suppliers in California and distributed it illegally to buyers in Illinois and Texas. During this period, the conspirators made nearly ten trips to California to meet with new suppliers and buy marijuana. Liu attended some, but not all, of these trips. They then transported the drugs, often in rental cars, to destinations in Illinois and Texas.

Two years later, the government charged Liu with two counts of conspiracy to distribute marijuana in violation of 21 U.S.C. § 846. Liu pleaded guilty to Count 2 of the indictment—conspiring to distribute a "detectable amount" of marijuana. But he proceeded to a bench trial on Count 1, which charged him with conspiring to distribute 100 kilograms or more of marijuana.

At trial, co-conspirator Tony Sam—who was cooperating with the government—testified about the group's operations to obtain and distribute marijuana through trips to California or shipments in the mail. Sam estimated the quantity involved in each shipment, totaling between 370 and 490 pounds (approximately 167 to 222 kilograms) of marijuana. Additionally, the government called witnesses who introduced plane, rental car and hotel records, Facebook messages, and phone calls corroborating Liu's travel to and from California, as well as his communications with co-conspirators.

In opening and closing arguments, Liu's counsel argued that the government had not met its evidentiary burden to prove that 100 kilograms of marijuana were involved in the case. Counsel argued, for instance, that Sam's testimony was speculative. Counsel further argued that the government had not shown that Liu had agreed with the other defendants to commit a crime—a prerequisite for proving conspiracy.

The district court found Liu guilty on Count 1, explaining that the evidence established that the conspiracy distributed "well over 100 kilograms" of marijuana. The court credited Sam's testimony about the approximate drug quantities at each stage of the operation. The court noted that Sam's estimates were corroborated by the amount of marijuana that the police had caught him with and by a drug-trafficking expert's testimony about marijuana's market price.

After trial, Liu moved for a judgment of acquittal, arguing that the government failed to prove that the substance involved was marijuana rather than hemp. The district court denied the motion, ruling that the evidence at trial supported the

conclusion that the substance was marijuana. The court sentenced Liu to 75 months in prison on Count 1 and 60 months on Count 2, running concurrently.

On appeal, Liu challenges the nature of the evidentiary burden faced by the government to convict him of Count 1—conspiring to distribute 100 kilograms or more of marijuana. To argue that the 100-kilogram quantity was an element of the crime, and not a sentencing factor, he invokes *Alleyne v. United States*, 570 U.S. 99 (2013), which requires that any fact affecting the statutory sentencing range be proved as an element of the offense. In his view, weight is an element of the completed distribution offense, and a defendant must know and agree that the prohibited weight is the object of the conspiracy. And he says that the co-conspirator's testimony and the other evidence at trial did not establish his knowledge of the 100-kilogram quantity or his agreement to distribute this amount.

Because Liu did not raise this argument in the district court, he forfeited it. *See, e.g., United States v. Burns*, 843 F.3d 679, 685–86 (7th Cir. 2016). We thus review the district court's decision for plain error. *Id.* at 687; *United States v. Canfield*, 2 F.4th 622, 626 (7th Cir. 2021). To establish plain error, Liu must show that (1) there was error; (2) the error was plain; (3) it affected his substantial rights; and that (4) it seriously affected the fairness, integrity, or public reputation of the proceedings. *United States v. Sprenger*, 14 F.4th 785, 790 (7th Cir. 2021).

The district court did not plainly err by not requiring the government to establish that Liu specifically knew the total drug quantity. To prove conspiracy under § 846, the government must show only that (1) two or more individuals agreed to commit an unlawful act; and (2) the defendant knowingly and intentionally entered the agreement. *United States v. Maldonado*, 893 F.3d 480, 484 (7th Cir. 2018) (internal citation omitted). Knowledge of the specific drug type or quantity is not an element of a conspiracy offense. *United States v. Gonzalez*, 737 F.3d 1163, 1168 (7th Cir. 2013); *United States v. Carrera*, 259 F.3d 818, 830 (7th Cir. 2001).

Liu contends that we should read *Alleyne* to have altered these principles in our caselaw. He tries to extend the "knowingly or intentionally" language from § 841(a)(1), the provision that criminalizes distributing illegal substances, to § 841(b), which lists the penalties implicated by certain drug quantities (and, in this case, to a showing of conspiracy under § 846).

But the district court did not plainly err by declining to adopt Liu's interpretation of *Alleyne.* Although we have yet to address this construction, every other circuit to do so has rejected it, concluding that *Alleyne* did not impose a mens rea requirement on the penalty provisions in § 841(b). *See, e.g.*, *United States v. Williams*, 974 F.3d 320, 362–64 (3d. Cir. 2020); *United States v. Dado*, 759 F.3d 550, 569–70 (6th Cir. 2014); *United States v. Collazo*, 984 F.3d 1308, 1325–29 (9th Cir. 2021) (en banc). According to these courts, *Alleyne*'s reconsideration of the elements of a criminal offense did not disturb basic principles of co-conspirator liability, *Williams*, 974 F.3d at 363–64, or demand an unnatural reading that would extend § 841(a)(1)'s mens rea requirement to § 841(b). *Collazo*, 984 F.3d at 1326–27. By following the view of every circuit to consider the issue, the district court here did not plainly err.

AFFIRMED