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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES RANDOLPH SHERMAN, Defendant-Appellant.	No. 21-10167 D.C. Nos. 2:13-cr-00302-MCE-1 2:13-cr-00302-MCE MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted November 18, 2022
San Francisco, California

Before: TASHIMA and PAEZ, Circuit Judges, and SESSIONS,** District Judge.

James Sherman ("Sherman") appeals his jury conviction for conspiracy to distribute and to possess with intent to distribute heroin and crack cocaine; two counts of distribution of heroin; two counts of distribution of crack cocaine; and possession of crack cocaine with intent to distribute in violation of 21 U.S.C.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

§§ 841(a)(1), 846. At trial, the government presented evidence showing that Sherman supplied heroin and crack cocaine to a co-conspirator ("the dealer") who then sold those drugs to a confidential government source on four occasions between March 2012 and July 2013.

On appeal, Sherman argues that: (1) the evidence at trial tended to show multiple conspiracies between himself and the dealer rather than the single, overarching conspiracy with which he was charged; and (2) the evidence was insufficient to support his convictions for conspiracy and the counts related to heroin and crack cocaine. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. *Single Versus Multiple Conspiracies.* Because Sherman did not move for judgment of acquittal as to his conspiracy conviction, *see* Fed. R. Crim. Pro. 29, we review his challenge to this count for plain error. *United States v. King*, 735 F.3d 1098, 1106 (9th Cir. 2013). "Under plain-error review, reversal is permitted only when there is (1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011) (citations omitted). "We invoke plain error in our discretion to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process." *United States v. Garcia-Guizar*, 160 F.3d 511, 516 (9th Cir. 1998).

Factors that distinguish a single conspiracy from multiple conspiracies are "the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." *United States v. Duran*, 189 F.3d 1071, 1080 (9th Cir. 1999) (citing *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984)). "A single conspiracy may involve several subagreements or subgroups of conspirators." *United States v. Hopper*, 177 F.3d 824 (1999) (citing *Bibbero*, 749 F.2d at 587).

The jury did not plainly err in convicting Sherman of a single overall conspiracy with the dealer between March 14, 2012 and July 15, 2013. At trial, the government established a pattern of communication and meetings between these same two "key participants" that the jury could reasonably have found amounted to a "method of operation [that] remained constant" across the multiple drug deals. *Duran*, 189 F.3d at 1080. Because the jury could have rationally found that the evidence in the record regarding the relevant timeframe was consistent with an overarching, ongoing agreement to supply and deal drugs, the conviction for a single conspiracy is not plainly erroneous.

2. *Sufficiency of Evidence.* Sherman also challenges the sufficiency of evidence for his convictions for conspiracy and for the offenses related to heroin and crack cocaine. At trial, Sherman moved for Rule 29 judgment of acquittal only as to count six for possession with intent to distribute crack cocaine. We

therefore review the conviction for count six under the *Jackson v. Virginia* standard to decide whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319 (1979). We review the remaining convictions for plain error. *See King*, 735 F.3d at 1106; *see also Flyer*, 633 F.3d at 917 (explaining that, when reviewing an insufficiency claim, "it is difficult to conceive of a different result occurring from the application of plain-error review and the application of the standard test for insufficiency of the evidence").

No formal agreement is required for a conspiracy; an agreement may be inferred from the participants' acts pursuant to the scheme or other circumstantial evidence. *Hopper*, 177 F.3d at 829. Evidence is sufficient to connect a defendant to a conspiracy if it shows that the defendant had knowledge of and participated in the conspiracy. *See United States v. Vizcarra-Martinez,* 66 F.3d 1006, 1010 (9th Cir. 1995). "This court has long held that [a] defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions." *Garcia-Guizar*, 160 F.3d at 517–18 (internal quotations omitted).

The government proffered corroborative circumstantial evidence of the conspiracy from the time of each drug deal. The evidence was sufficient for a jury

to reasonably convict Sherman of conspiracy; therefore, the conviction withstands plain-error review.

A defendant who participates in a conspiracy "may be subject to liability for offenses committed as part of that conspiracy, even if the defendant did not directly participate in each offense." *United States v. Grasso*, 724 F.3d 1077, 1089 (9th Cir. 2013) (describing liability under *Pinkerton v. United States*, 328 U.S. 640, 647 (1946)). *Pinkerton* "renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not." *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008). Distribution of heroin and crack cocaine and possession with intent to distribute crack cocaine are all foreseeable felonies in a conspiracy to distribute and possess with intent to distribute those drugs. Because the government sufficiently proved a conspiracy between Sherman and the dealer, the jury did not plainly err in finding Sherman guilty of these "reasonably foreseeable" substantive felonies resulting from that conspiracy. *Id.*

AFFIRMED.