NOT FOR PUBLICATION

FILED

DEC 8 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAFARA ECHO SHORTMAN, Defendant-Appellant.	No. 21-30198 D.C. Nos. 1:18-cr-00028-DLC-1 1:18-cr-00028-DLC MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted October 6, 2022
Portland, Oregon

Before: OWENS and MILLER, Circuit Judges, and PREGERSON,** District Judge. Partial Concurrence and Partial Dissent by Judge MILLER.

Safara Shortman challenges the factual basis for her guilty pleas to conspiracy to possess with intent to distribute at least 50 grams of actual methamphetamine, in violation of 21 U.S.C. § 846 ("Count One"), and possession

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

** The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

with intent to distribute at least 50 grams of actual methamphetamine, in violation of 21 U.S.C. § 841(a)(1) ("Count Two"). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291. When, as here, "a defendant raises an issue on appeal that was not raised before the district court, such as the lack of a factual basis for a guilty plea under Rule 11, our review is limited to plain error." *United States v. Bain*, 925 F.3d 1172, 1176 (9th Cir. 2019). We affirm in part and reverse in part.

1. Shortman challenges the factual basis for her guilty plea to Count Two on the grounds that the proffered facts—three sales of methamphetamine—could only support a distribution charge, not a possession with intent to distribute charge. She cites *United States v. Mancuso*, 718 F.3d 780, 793 (9th Cir. 2013), for the proposition that "separate acts of distribution . . . must be charged in separate counts." But *Mancuso* held only that the government may not aggregate multiple, distinct acts of distribution into one count of distribution. *See id.* It did not undermine the government's discretion to charge conduct that meets the elements of both distribution and possession with intent to distribute as the latter instead of the former; indeed, *Mancuso* itself affirmed the defendant's conviction for possession with intent to distribute. *See id.* at 786-87, 792.

Shortman further argues that the government needed to prove that she possessed 50 grams of methamphetamine (with intent to distribute it) at one time.

She did. During one transaction, she sold an informant more than 50 grams of actual methamphetamine. The district court therefore did not err in accepting the proffered facts as a basis for Shortman's plea to Count Two.

2. Shortman challenges the factual basis for her guilty plea to Count One on many of the same grounds. But her arguments based on *Mancuso* fail for the reasons described above.

Shortman separately argues that the factual basis only established a buyer-seller relationship between her and her source and did not establish a conspiratorial agreement between her and any other person. We agree.

To prove conspiracy, "the government must show that the buyer and seller had an agreement to further distribute the drug in question." *United States v. Moe*, 781 F.3d 1120, 1124-25 (9th Cir. 2015) (citation omitted). "Under the buyer-seller rule, 'mere sales to other individuals do not establish a conspiracy to distribute or possess with intent to distribute . . . .'" *Id.* (quoting *United States v. Lennick*, 18 F.3d 814, 819 n.4 (9th Cir. 1994)). Instead, "there has to be an agreement, not just surmise or knowledge, between the seller and buyer for the buyer to redistribute." *United States v. Loveland*, 825 F.3d 555, 561 (9th Cir. 2016). "Distinguishing between a conspiracy and a buyer-seller relationship requires a fact-intensive and context-dependent inquiry . . . . " *Moe*, 781 F.3d at 1125.

The offer of proof established that Shortman had distributed

methamphetamine, but it did not show any agreement that Shortman had with any others. Shortman's counsel raised this issue with the court, but then abandoned the argument when the government stated that they had "determined that she was distributing methamphetamine to other persons" and identified her source. Neither of those facts shows that Shortman had more than a buyer-seller relationship with any other person. That her counsel accepted them as evidence of a conspiracy suggests that he—and Shortman—misunderstood the elements of conspiracy and the buyer-seller rule that he had seemingly invoked.

The court later asked the government whether "the telephone intercepts or telephone records" and "the tracking device" showed not just "a source, but some agreement with somebody else to in fact distribute methamphetamine." The government responded affirmatively yet provided no facts to support their reply. The court accepted the conclusory assertion without probing, for instance:

> whether the drugs were sold on credit or on consignment; the frequency of sales; the quantity of drugs involved; the level of trust demonstrated between buyer and seller, including the use of codes; the length of time during which sales were ongoing; whether the transactions were standardized; whether the parties advised each other on the conduct of the other's business; whether the buyer assisted the seller by looking for other customers; and whether the parties agreed to warn each other of potential threats from competitors or law enforcement.

Id. at 1125-26 (footnotes omitted) (describing factors relevant to determine existence of a conspiracy to distribute). Even the amount of methamphetamine

Shortman distributed is, alone and with the record as a whole, plainly insufficient to prove any agreement to further distribute. *See id.* at 1126 n.4; *see also United States v. Ramirez*, 714 F.3d 1134, 1140 (9th Cir. 2013).

At the plea colloquy, Shortman admitted that she "knowingly distributed with—well, conspired with somebody else to distribute methamphetamine," and had "an agreement with somebody else that [she was] going to distribute [more than 50 grams of] methamphetamine." But the inquiry ended there—with a bald recitation of the elements of the charged crimes.

"The purpose of [the factual basis] requirement is to ensure that the defendant is not mistaken about whether the conduct he admits to satisfies the elements of the offense charged." *United States v. Mancinas-Flores*, 588 F.3d 677, 682 (9th Cir. 2009). Bare, conclusory statements agreeing with statutory elements did not suffice to fulfill that purpose here.

Because neither the plea colloquy nor the record as a whole establishes a sufficient factual basis to show that Shortman's relationship with her supplier went beyond buyer-seller, and because the plea colloquy suggests that Shortman did not understand that a buyer-seller agreement would not satisfy the elements of conspiracy when she pled, the district court plainly erred in accepting Shortman's guilty plea on Count One. This "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *See United States v. Olano*, 507

U.S. 725, 732 (1993) (setting forth plain error framework).

We affirm as to Count Two. We reverse as to Count One and remand for resentencing.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

United States v. Shortman, No. 21-30198

MILLER, Circuit Judge, concurring in part and dissenting in part:

I would affirm as to both counts. At the change-of-plea hearing, the district court recognized that conspiracy requires more than merely a buyer-seller relationship, and it asked government counsel to address that issue: "[E]verybody has a source, but [is there] some agreement with somebody else to in fact distribute methamphetamine?" Counsel answered in the affirmative, and Shortman said that she agreed. That answer, coupled with the statements of defense counsel, established the elements of the offense. It might have been better if the district court had asked more detailed questions, but our review is for plain error, which means that Shortman must show an error that was "clear or obvious, rather than subject to reasonable dispute." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). In my view, any error in this case does not satisfy that standard.