United States Court of Appeals
For the Eighth Circuit

No. 17-2142

United States of America

Plaintiff - Appellee

v.

Thomas Thadeus Szczerba, also known as Enzo

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: March 14, 2018
Filed: July 26, 2018

Before WOLLMAN, SHEPHERD, and ERICKSON, Circuit Judges.

WOLLMAN, Circuit Judge.

A jury found Thomas Thadeus Szczerba guilty of the following four offenses related to interstate prostitution: one count of conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371; one count of interstate transportation of an individual to engage in prostitution in violation of 18 U.S.C. §§ 2421 and 2; one count of use of facilities in interstate commerce with intent to aid

an enterprise involving prostitution in violation of 18 U.S.C. §§ 1952(a)(3) and 2; and one count of use of facilities in interstate commerce with intent to distribute proceeds from an enterprise involving prostitution in violation of 18 U.S.C. §§ 1952(a)(1) and 2. The district court[1] sentenced Szczerba to 140 months' imprisonment. Szczerba appeals from the denial of his motion to suppress evidence, his motion to exclude expert evidence, his motion for a mistrial, his motion for a new trial based on the government's failure to disclose certain evidence, and his motion for judgment of acquittal. Szczerba also argues that the district court erred in calculating his sentence and imposed a substantively unreasonable sentence. We affirm.

I. Background

B.M. moved from Louisiana to Houston, Texas, for a fresh start. She met Szczerba in 2015, while she was working as a stripper at a club that he frequented. Szczerba befriended B.M. and introduced her to Keisha Edwards, a prostitute who used the alias Stacey Monroe. B.M. eventually moved into the apartment that Szczerba and Edwards shared. In June 2015, B.M. began performing sex acts for money, using the alias Avery Monroe. At that time, she was twenty-two years old.

Szczerba and Edwards took photos of B.M. and posted them with an advertisement on Backpage.com, a website known for advertising prostitutes. Szczerba gave B.M. a phone and a script to use when customers called. She recorded in a notebook the customer's first name, the length of time the customer had requested, and the amount that the customer had agreed to pay. Szczerba and Edwards set the rates for B.M.'s services, requiring her to make $1,000 per day. B.M. met customers at Szczerba's Houston apartment and at other locations. After having sex with the men, she gave Szczerba the money she received.

[1]The Honorable Henry E. Autrey, United States District Judge for the Eastern District of Missouri.

Szczerba provided B.M. with condoms, food, clothing, and personal hygiene products. He controlled when she slept and when she ate. He regulated her phone access. He carried in his wallet a card on which were written B.M.'s full name, her social security number, and her family's address. B.M. testified that she felt threatened by Szczerba, and she worried that he would find her family. Szczerba publicly embarrassed and degraded B.M. by loudly calling her a bitch, a whore, and a slut.

Szczerba's social media account described him as "the king, professional relationship consultant, thoroughbred, the horse trainer," and he included hashtags like #PGO and #AOB, which mean Pimping Going On and All On a Bitch. Law enforcement officers testified that the term "king" means pimp, that "stable" refers to the pimp's prostitutes, and that "thoroughbred trainer" means a pimp with "the most thoroughly trained girl; the top-of-the-line girl."

In late June 2015, Szczerba drove B.M. from Houston to Chicago, Illinois, where they met Edwards. Several days later the three traveled to Wisconsin. On July 10, 2015, they traveled to St. Louis, where Edwards rented a room at a downtown hotel. Edwards and B.M. saw customers in each city, after Szczerba and Edwards placed advertisements for the services of Stacy and Avery Monroe on Backpage.com.

B.M. started her menstrual cycle during the stay in St. Louis. Szczerba told her to place a make-up sponge in her vagina so that customers would not know that she was menstruating. The sponge did not work, however, and B.M. bled on a customer during vaginal intercourse. B.M. worried that Szczerba would be angry if the customer did not pay, so she stopped intercourse and called Szczerba, who instructed her to place another sponge in her vagina, which she did. B.M. finished having intercourse with the customer, later describing it as "excruciating" and "like contractions."

One of the make-up sponges was lodged in B.M.'s vagina. She asked Szczerba to take her to the hospital, but he decided to remove the sponge himself with tweezers. Szczerba eventually drove B.M. to the hospital to have the sponge removed. As he dropped her off, Szczerba told B.M. to use her alias and "Don't be stupid." A physician assistant removed the sponge and prescribed antibiotics for B.M., who used the first name Avery and her real last name. Although Szczerba wanted B.M. to continue working that night, she was in too much pain to see customers. She resumed working the next day.

B.M. had not been meeting her $1,000 daily quota in St. Louis, so Szczerba instructed her to go out and find customers. B.M. and Edwards went to a few bars in downtown St. Louis on July 15, 2015, and eventually met a man named Jordan. The three went back to Jordan's apartment, where they had drinks and used cocaine. An argument erupted when Edwards tried to steal Jordan's phone, causing Edwards to run out of the apartment. When Jordan and B.M. went down to the lobby of the apartment building, they discovered Edwards and Szczerba. According to B.M., "[e]veryone was screaming" and Jordan "was mad about the phone and was waving a gun at Szczerba."

B.M. decided to flee. She lost a shoe as she ran and kicked off the other one. B.M. testified that she "ran until [she] found somewhere safe to hide." She climbed inside a dumpster, where she stayed until she no longer could hear Szczerba and Edwards calling for her. B.M. then climbed out of the dumpster, hid behind it, and called a friend in Houston, who used three-way calling to dial 911 at approximately 5:27 a.m. on July 16, 2015. When officers arrived, B.M. was standing shoeless and scared near a dumpster. Officers brought her to the hospital for medical care.

Sergeant Patricia Nijkamp of the St. Louis Metropolitan Police Department met B.M. at the hospital. Nijkamp was an intelligence detective at the time and was

responsible for investigating crimes related to human trafficking, sex trafficking, and labor trafficking.

B.M. appeared shaken as she told Nijkamp about how Szczerba kept her from using her cell phone, from eating, and from sleeping, until she made $1,000, and how he forced her to work while she was menstruating. B.M. gave Nijkamp a black notebook, which included the script for taking calls and listed the first names of various men, dates, times, addresses, lengths of time, and amounts to be charged.

B.M. told Nijkamp the room number and hotel name where Szczerba and Edwards were staying and said that Szczerba had driven from Texas to Missouri in a gold Mercedes. Nijkamp confirmed that there was a room registered to Edwards at the hotel and that there was a gold Mercedes registered to Edwards in the hotel parking lot. Nijkamp thereafter went to the hotel room, where Szczerba and Edwards were arrested and refused consent to a search. After Nijkamp and other law enforcement officers secured the hotel room and the Mercedes, Nijkamp applied for a search warrant.

After the warrant issued, officers searched the hotel room and the Mercedes. Among the items they found were several boxes of condoms, sex toys, dental dams, make-up sponges, feminine hygiene products, medication prescribed to Avery M., and several receipts. Szczerba and Edwards were charged in a seven-count superseding indictment with offenses related to sex trafficking and prostitution. After the district court denied the motions to suppress evidence and to exclude expert evidence, the case proceeded to trial. On the first day of trial, Edwards pleaded guilty to use of facilities in interstate commerce with intent to aid an enterprise involving prostitution and use of facilities in interstate commerce with intent to distribute proceeds from an enterprise involving prostitution.

The government called as witnesses B.M., Nijkamp, and several other law enforcement officers. It presented the evidence discovered in the hotel room and in the Mercedes, as well as the recording of B.M.'s 911 call, the Backpage.com advertisements for Stacy and Avery Monroe, and evidence of Szczerba's bank transactions and his posts on social media. Over Szczerba's objection, the district court allowed Detective Derek Stigerts of the Sacramento, California, Police Department to testify as an expert. Stigerts defined terms that are commonly used in the "pimp/prostitution subculture." He also explained how prostitutes are advertised and how pimps recruit and control prostitutes.

Before the fourth day of trial began, the prosecutor produced a summary of an interview prepared by Special Agent Jennifer Lynch of the Federal Bureau of Investigation (FBI). The summary previously had not been disclosed to defense counsel. According to the document, Lynch and Nijkamp interviewed a man who had met B.M. in St. Louis on July 15, 2015. After he bought B.M. and Edwards drinks, B.M. told the man she had been a stripper and showed him photos of her wearing lingerie. At approximately 12:30 or 1:00 a.m., the man declined to pay the women for sex. Defense counsel cross-examined Lynch about the contents of the summary and argued in closing that the incident tended to show that B.M.—not Szczerba or Edwards—advertised herself as a prostitute.

On the fifth day of trial, after the case was submitted to the jury and the alternate juror was released, one of the jurors called in to report that he would not be able to continue serving as a juror. Before the court declared a mistrial and while it was explaining to the jury what had happened, the twelfth juror called and said that he could report for duty. The court overruled Szczerba's objection to allowing the jury to continue deliberating and denied his motion for a mistrial.

The twelve-member jury returned guilty verdicts on four of the seven counts charged against Szczerba. The district court denied Szczerba's post-trial motion for judgment of acquittal or a new trial.

II. Discussion

A. Motion to Suppress Evidence

Sergeant Nijkamp requested that a search be authorized for the hotel room and the Mercedes. Her affidavit in support of the search warrant stated that on July 16, 2015, B.M. had "escaped from two suspects that had been forcing her to prostitute herself." It explained that B.M., Szczerba, and Edwards had been staying in St. Louis for approximately five days, during which:

> Szczerba[] put the victim in a constant state of fear for her safety by threatening to beat her, forcefully grabbing her face while yelling and berating her, denying her freedom of movement, having control of her cell phone, denying her requests for food . . . . [and] not allowing her to rest or sleep until she reached her daily quota of $1000 . . . , and forcing her to prostitute herself while on her menstrual cycle by using a make up sponge as a feminine hygiene product.

The affidavit identified the hotel name, address, and room number, as well as the Mercedes's Texas license plate number and vehicle identification number. The affidavit listed the following evidence that B.M. stated would be found in the room and the vehicle: cell phones, laptop computers, large amounts of cash, condoms, lubricant, and receipts and paperwork relating to the crime of trafficking for the purpose of sexual exploitation. Nijkamp presented the affidavit to a state court judge, before whom the affidavit was "[s]ubscribed and sworn to." The state court judge also signed the affidavit.

On the basis of the criminal complaint and Nijkamp's affidavit, a state court judge found that there was probable cause for the issuance of a search warrant. The warrant stated that the hotel room and the gold Mercedes were registered to Edwards. It identified the name, address, and room number of the hotel and the location, license plate number, and vehicle identification number of the Mercedes. Instead of commanding the search of the hotel room or the Mercedes, however, the warrant stated that it authorized the search of "said person." The warrant did not identify the items authorized to be seized during the search, and although it referred to Nijkamp's supporting affidavit, it did not incorporate the affidavit by reference.

Nijkamp served as the lead detective in the case. She believed that the warrant authorized the search of the hotel room and of the Mercedes and the seizure of evidence set forth in her affidavit. Nijkamp brought a copy of the warrant and the supporting affidavit with her when she went to conduct the searches. She, along with her lieutenant, supervised the officers searching the hotel room and the vehicle. As set forth above, the officers found incriminating evidence during the searches.

Szczerba moved to suppress evidence. A magistrate judge[2] determined that the warrant was invalid because it did not accurately describe the locations to be searched and did not particularly describe the items to be seized. The magistrate judge concluded, however, that the officers' reliance on the warrant was objectively reasonable and thus recommended that the motion to suppress be denied. Over Szczerba's objection, the district court adopted the recommendation and denied the motion. In reviewing the denial of a motion to suppress evidence, we review for clear error the district court's findings and *de novo* its conclusions of law. United States v. Hamilton, 591 F.3d 1017, 1021 (8th Cir. 2010).

[2]The Honorable David D. Noce, United States Magistrate Judge for the Eastern District of Missouri.

Szczerba argues that the district court properly determined that the search warrant was invalid, but erred in applying the Leon good-faith exception to the exclusionary rule. He contends that the warrant did not authorize the search of the hotel room or the car, nor did it set forth any items to be seized. We view the warrant as having two problems: the authorization of the search of "said person" and the failure to list the items to be seized.

We first conclude that the warrant's authorization to search "said person" instead of "said property" did not render the warrant invalid. The warrant particularly described the hotel room and the Mercedes. The omission of the word "property" from the authorizing language appears to be a clerical error in light of the warrant's meticulous identification of the hotel room and the Mercedes, the affidavit's similarly meticulous description and its request to search the hotel room and the Mercedes, and the warrant's otherwise nonsensical authorization of the seizure of "above described property" (*i.e.*, the hotel room and the Mercedes) if it "be found on the said person by you."[3] In these circumstances, a reasonable officer executing the warrant likely would have read the warrant to authorize the search of the particularly described property and not the person who was mentioned only in relation to the property and only because the property was registered in her name.

The warrant lacked particularity, because it did not list the items to be seized or incorporate Nijkamp's affidavit. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The particularity requirement can be satisfied by listing the items to be seized in the warrant itself or in an affidavit that is incorporated into the warrant. Hamilton, 591 F.3d at 1024. The Supreme Court has said that a

[3]Nijkamp testified that she borrowed the authorizing language from other search warrants and erroneously used the word "person" instead of "property."

warrant will be read to incorporate an affidavit "if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Groh v. Ramirez, 540 U.S. 551, 557-58 (2004); see United States v. Curry, 911 F.2d 72, 77 (8th Cir. 1990) ("[A] description in the supporting affidavit can supply the requisite particularity if 'a) the affidavit accompanies the warrant, and b) the warrant uses suitable words of reference which incorporate the affidavit therein.'" (quoting United States v. Strand, 761 F.2d 449, 453 (8th Cir. 1985))).

We do not agree with the government's contention that the details-lacking warrant incorporated Nijkamp's affidavit by reference. The warrant mentioned the affidavit only once in its averment of probable cause. Both the Supreme Court and this court have concluded that a warrant does not incorporate a supporting affidavit when it merely states that the affidavit establishes probable cause. See Groh, 540 U.S. at 555, 558 (holding that a warrant did not incorporate the supporting affidavit by "recit[ing] that the Magistrate was satisfied the affidavit established probable cause to believe that contraband was concealed on the premises"); Strand, 761 F.2d at 453 (holding that a warrant did not incorporate the supporting affidavit by stating that the "grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s)"); see also Curry, 911 F.2d at 77 (holding that a warrant did not incorporate the supporting affidavit because it "did not contain suitable words of reference . . . , such as 'see attached affidavit' or 'as described in the affidavit'" (citations omitted)).

"Not every Fourth Amendment violation results in exclusion of the evidence obtained pursuant to a defective search warrant," however. Hamilton, 591 F.3d at 1027. Because the purpose of the exclusionary rule is to "safeguard Fourth Amendment rights generally through its deterrent effect," Herring v. United States, 555 U.S. 135, 139-40 (2009) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)), it "applies only where it 'result[s] in appreciable deterrence,'" id. at 141 (quoting United States v. Leon, 468 U.S. 897, 909 (1984)). Exclusion "almost always

requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," Davis v. United States, 564 U.S. 229, 237 (2011), and can result in "letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system,'" Herring, 555 U.S. at 141 (quoting Leon, 468 U.S. at 908). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." Davis, 564 U.S. at 237.

Over time, the Supreme Court has "recalibrated [its] cost-benefit analysis in exclusion cases to focus on the 'flagrancy of the police misconduct' at issue.'" Id. at 238 (quoting Leon, 468 U.S. at 911). When law enforcement officers "exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." Id. at 238 (quoting Herring, 555 U.S. at 144). But "when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'" Herring, 555 U.S. at 147-48 (quoting Leon, 468 U.S. at 907-08 n.6).

Szczerba argues that the evidence should have been suppressed because the warrant was "so facially deficient that no executing officer could reasonably presume its validity." Appellant's Br. 15. He cites the Supreme Court's decision in Groh v. Ramirez, which held that the Leon good-faith exception to the exclusionary rule did not entitle officers to qualified immunity after they conducted a search based on a warrant that failed to identify the items that officers intended to seize and did not incorporate by reference the itemized list that was contained in the warrant application. Neither the warrant application nor the affidavit accompanied the warrant when officers executed the search, as both documents had been placed under seal. The Court held that no reasonable officer could believe that the warrant was valid, explaining that "even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." Groh, 540 U.S. at 564.

Similarly, in Leon, the Court explained that suppression remains an appropriate remedy if, "depending on the circumstances of the particular case, a warrant [is] so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923.

Considering the circumstances surrounding the issuance and execution of the search warrant in this case, we conclude that the warrant was not so obviously deficient that any reasonable officer would have known that it was constitutionally fatal. With respect to the places to be searched, the district court found that the warrant "clearly and immediately present[ed] to the reader's eye the two locations that Sgt. Nijkamp knew were the subjects of her affidavit and were the expected locations for authorized searches." Order and Recommendation of June 7, 2016, at 12. Although the warrant itself did not describe the items to be seized, it specifically referred to Nijkamp's affidavit ("the supporting written affidavit"), which "clearly describes the locations to be searched (the hotel room and the vehicle) and the items to be seized (cell phones, lap top computers, large amounts of cash, condoms, lubricants, and the receipts and paperwork relating to the alleged crime)." Id. The issuing judge signed the supporting affidavit, and Nijkamp testified that she brought both the affidavit and the warrant with her to supervise the search of the hotel room and the Mercedes. That the affidavit was signed by the issuing judge and that it accompanied the warrant distinguishes this case from Groh.

Moreover, application of the exclusionary rule in this case would not result in appreciable deterrence of police misconduct. To be sure, Nijkamp acted negligently in drafting the warrant. She should have used appropriate authorizing language and ensured that the supporting affidavit was incorporated into the warrant. But in considering the totality of the circumstances, the district court found that Nijkamp was "most mindful of the Fourth Amendment warrant requirement," in that she asked for consent to search, secured the hotel room after consent was refused, applied for

a warrant, and "concealed no facts from the judge." Order and Recommendation of June 7, 2016, at 12. Nijkamp's conduct certainly did not reflect the type of deliberate, reckless, or grossly negligent disregard for the Fourth Amendment that the exclusionary rule can effectively deter. We thus conclude that the district court did not err in denying Szczerba's motion to exclude evidence.

B. Motion To Exclude Expert Testimony

Months before trial began, the government filed its summary of expected expert testimony, identifying as an expert Derek Stigerts, a detective with the Sacramento, California, Police Department and a member of an FBI task force that specializes in sex-trafficking investigations. The district court denied Szczerba's motion *in limine* to exclude Stigerts's expert testimony and overruled Szczerba's objection to the testimony at trial. We review the district court's decision to admit expert testimony for abuse of discretion. United States v. Kenyon, 481 F.3d 1054, 1061 (8th Cir. 2007).

Szczerba claims that Stigerts's testimony was admitted in violation of the disclosure requirements of Federal Rule of Criminal Procedure 16(a)(1)(G), which states that "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rule[] 702 . . . of the Federal Rules of Evidence during its case-in-chief at trial." The summary "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G). We conclude that the government satisfied the Rule's requirements. The summary of expert testimony indicated that Stigerts would explain how pimps recruit, control, coerce, and advertise prostitutes and that he would testify regarding the business and subculture of sex-trafficking, including the language and practices commonly used. Stigerts's *curriculum vitae* set forth his twenty-five years of experience as a law enforcement officer, which included extensive experience in investigating crimes

related to prostitution and in interviewing pimps and women involved in prostitution. Stigerts's trial testimony hewed closely to the topics set forth in the summary, and defense counsel most ably cross-examined him. The district court thus did not abuse its discretion in admitting the testimony.

Szczerba next argues that Stigerts's testimony violated Federal Rule of Evidence 702 because it was not based on reliable principles and methods. He contends that Stigerts "should not have been permitted to opine as to his understanding of terminology and as to what pimps and prostitutes 'typically' do because his opinions were not the product of reliable principles and methods." Appellant's Br. 37. We disagree. Stigerts possessed adequate credentials and sufficient factual data—including his interviews of more than 300 women involved in prostitution and 30 suspected pimps, as well as his investigation of more than 120 sex-trafficking cases— on which to base his testimony. See United States v. Geddes, 844 F.3d 983, 991 (8th Cir. 2017) (holding that "the district court did not abuse its discretion in allowing expert testimony 'regarding the operation of a prostitution ring, including recruitment of prostitutes and the relationship between pimps and prostitutes, and regarding jargon used in such rings.'" (quoting United States v. Evans, 272 F.3d 1069, 1094 (8th Cir. 2001))); see also United States v. Brinson, 772 F.3d 1314, 1320 (10th Cir. 2014) (holding that "the district court did not abuse its discretion by allowing Detective Stigerts to testify as an expert regarding the prostitution trade").

We also reject Szczerba's argument that his Sixth Amendment right to confront witnesses was violated because Stigerts's expert testimony was based, in part, on interviews of prostitutes and pimps. See United States v. Palacios, 677 F.3d 234, 243 (4th Cir. 2012) ("Although 'Crawford [v. Washington, 541 U.S. 36 (2004)] forbids the introduction of testimonial hearsay as evidence in itself,' we have recognized that 'it in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to

otherwise inadmissible evidence.'" (quoting United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009))). In sum, we find no abuse of discretion in the district court's decision to admit Stigerts's testimony.

C. Motion for Mistrial

As mentioned above, after the case was submitted to the jury, one of the jurors reported that he would not be able to continue serving as a juror, due to a medical issue. Outside the presence of the jury, the court asked whether the parties would agree to the case being decided by the remaining eleven jurors. Szczerba objected, and the court said that it would declare a mistrial, stating, "So in legal terms, this will be a mistrial; in real people terms, this will be a do-over. I will officially declare it with the other jurors out here." After the jury was called into the courtroom, the court explained that a juror was unavailable:

> Since that leaves 11 of you, there are two choices: One is to declare a mistrial, and the other is to go forward with 11. To go forward with 11 . . . , the parties have to agree. The parties have not agreed to go forward with 11, which I probably wouldn't agree with that either if I was sitting down there.

The law clerk then interrupted, informing the court that the twelfth juror had called and was able to report for duty. At a sidebar, Szczerba objected to the case being decided by the full jury and moved for a mistrial. The court overruled the objection, stating that it "hadn't declared [a mistrial] yet" and that "nothing has been said by the parties or me that impacts on their deliberations in a negative way."

The district court did not abuse its discretion in denying Szczerba's motion for a mistrial. See United States v. Wilson, 565 F.3d 1059, 1069 (8th Cir. 2009) (standard of review). We find no impropriety in the court's statements to the eleven

jurors, and we reject Szczerba's contention that the district court had declared a mistrial and thereafter improperly allowed the jury to continue deliberations.

D. Motion for a New Trial

Szczerba argues that the district court abused its discretion in denying his motion for a new trial. See United States v. Spencer, 753 F.3d 746, 748 (8th Cir. 2014) (standard of review). He contends that the government violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), by failing to disclose FBI Agent Lynch's interview summary until the fourth day of trial.

To establish a Brady violation, a defendant must show that: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material." Spencer, 753 F.3d at 748 (quoting United States v. Keltner, 147 F.3d 662, 673 (8th Cir. 1998)). "Evidence is not material simply because it would have 'help[ed] a defendant prepare for trial.'" Id. (alteration in original) (quoting United States v. Aleman, 548 F.3d 1158, 1164 (8th Cir. 2008)). It is instead "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (quoting United States v. Ladoucer, 573 F.3d 628, 636 (8th Cir. 2009)). Giglio extended the government's duty to disclose to evidence that may be used to impeach government witnesses. United States v. Pendleton, 832 F.3d 934, 940 (8th Cir. 2016).

Szczerba learned about the evidence during trial. "Under the rule in our circuit Brady does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial." Spencer, 753 F.3d at 748 (quoting United States v. Almendares, 397 F.3d 653, 664 (8th Cir. 2005)). Accordingly, to establish a Brady violation, Szczerba must show

that the government's delay in disclosing the evidence deprived him of its usefulness and that this deprivation materially affected the outcome of his trial. Szczerba cannot meet this burden.

Szczerba was able to present and use the evidence during trial. As set forth above, when the government discovered that it inadvertently had failed to disclose the interview summary, it sent FBI agents to locate the man who was interviewed. It produced the summary to defense counsel, who alerted the court of the matter. When the court asked what relief the defendant sought, defense counsel stated that he "would like to inquire of Special Agent Lynch into the substance of the interview that she conducted," which the court allowed him to do. After FBI agents located the man, defense counsel met with him, but ultimately decided not to call him as a witness.

During cross-examination, Lynch explained the circumstances under which the man met B.M. and Edwards: that B.M. told the man that she used to be a stripper in New Orleans, Louisiana; that B.M. showed him photos of her posing for Penthouse; and that their conversation ended after the man declined to pay money for sex. During closing, defense counsel used the evidence to argue that Szczerba was not guilty because B.M. advertised herself as a prostitute.

> [B.M.] show[ed] people pictures of herself; not Keisha [Edwards], not Thomas [Szczerba]. She's doing exactly what the government wants you to believe Thomas [Szczerba] was doing in this case, and that's important.

Although Szczerba complains that he was unable to use the interview summary to impeach Nijkamp and B.M., he did not use the evidence to cross-examine Nijkamp when she was called in rebuttal, nor did he ask to recall B.M. as a witness. Accordingly, we conclude that the delay in the disclosure of the interview summary did not deprive Szczerba of its usefulness. Moreover, in light of the substantial

evidence against Szczerba, we also conclude that any deprivation did not materially affect the outcome of his trial.

E. Challenges to Sentence

A presentence report (PSR) calculated Szczerba's sentencing range under the U.S. Sentencing Guidelines Manual (Guidelines or U.S.S.G.). It grouped together Szczerba's four counts of convictions, see U.S.S.G. § 3D1.2(b), and applied § 2G1.1 to address Szczerba's most serious count of conviction, interstate transportation of an individual to engage in prostitution, see U.S.S.G. § 3D1.3(a). The PSR applied § 2G1.1(c)'s cross reference to § 2A3.1 and determined that Szczerba's base offense level was 30. See U.S.S.G. § 2A3.1(a)(2). The PSR recommended increasing the offense level by 2 because B.M. sustained serious bodily injury. See U.S.S.G. § 2A3.1(b)(4)(B). With a total offense level of 32 and a criminal history category of I, Szczerba's advisory sentencing range was 121 to 151 months' imprisonment. Over Szczerba's objections, the district court adopted the calculations set forth in the PSR.

Szczerba argues that the district court erred in applying the cross reference, which resulted in a base offense level of 30. Guidelines § 2G1.1(c) instructs the district court to apply § 2A3.1 "[i]f the offense involved conduct described in . . . 18 U.S.C. § 2242." The statute provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison . . . knowingly —
>
> (1) causes another person to engage in a sexual act by threatening or placing that other person in fear . . .
>
> or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

Szczerba contends that the cross reference does not apply because his offense conduct does not meet the jurisdictional element of 18 U.S.C. § 2242—*i.e.*, the offense did not occur within "the special maritime and territorial jurisdiction of the United States or in a Federal prison." We do not agree. The conduct described in § 2242 is "caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear." See U.S.S.G. § 2G1.1 cmt. n.4(B) (explaining that "[f]or purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear").[4]

Szczerba argues that the district court erred in applying the cross reference and the 2-level increase to his offense level because the jury acquitted him of the counts that required a finding that Szczerba used force or threats of force. "[A] district court may use a defendant's relevant conduct in sentencing if it finds by a preponderance of the evidence that the conduct occurred, even if that conduct formed the basis of a criminal charge on which a jury acquitted the defendant." United States v. Tyndall, 521 F.3d 877, 883 (8th Cir. 2008). Pointing to the fact that the cross reference and enhancement caused his Guidelines sentencing range to increase from 15 to 21 months' imprisonment to 121 to 151 months' imprisonment, Szczerba argues that the district court should have been required to find by clear and convincing evidence that he had engaged in forceful or threatening behavior, an argument that is foreclosed by our precedent. See United States v. Villareal-Amarillas, 562 F.3d 892, 895 (8th Cir. 2009).

Szczerba argues that the district court committed procedural error when it failed to explain its reasons for imposing a 140-month sentence or address Szczerba's request for a downward variance. The court had extensive knowledge of this case

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[4]We reject Szczerba's argument that the application note somehow conflicts with the Constitution, with 18 U.S.C. § 2242, and with U.S.S.G. § 2G1.1(c).

because it had presided over Szczerba's jury trial. It considered the parties' sentencing memoranda and related filings and listened to the parties' arguments during the sentencing hearing. We conclude that the court did not abuse its discretion in declining to respond to Szczerba's request for a downward variance and that it "was justified in relying on 'the Commission's own reasoning that a Guidelines sentence is a proper sentence.'" United States v. Dace, 660 F.3d 1011, 1014 (8th Cir. 2011) (quoting Rita v. United States, 551 U.S. 338, 356 (2007)).

Conclusion

Finally, we reject Szczerba's argument that the evidence at trial "was insufficient to permit a jury to reasonably conclude that any of the elements of the counts of conviction were proved beyond a reasonable doubt." Appellant's Br. 55. We conclude that, as set forth above, the evidence was sufficient to support the jury's findings that Szczerba committed conspiracy and crimes related to the prostitution of B.M. The district court thus did not abuse its discretion in denying his motion for judgment of acquittal.

The judgment is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. S2 4:15 CR 348 HEA / DDN
	)	
THOMAS THADEUS SZCZERBA, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER AND RECOMMENDATION

On April 27, 2016, this action came before the court for an evidentiary hearing on the pretrial motions of the parties, which were referred to the undersigned Magistrate Judge under 28 U.S.C. § 636(b). Due to matters raised by defendant Thomas Szczerba following the evidentiary hearing, a supplemental hearing was held on May 26, 2016.

Pending are (a) the oral motions of defendant Szczerba to suppress arguably suppressible evidence generally (docs. 23, 65, 97); the documentary motions of defendant Szczerba to suppress physical evidence obtained during the search of the hotel room (doc. 85), and to suppress evidence obtained during the search of the motor vehicle (doc. 86); and (b) the oral motions of the government for a determination by the court of the admissibility of any arguably suppressible evidence (docs. 25, 66, 98).

From the record adduced during the initial evidentiary suppression hearing and the supplemental hearing, the undersigned makes the following findings of fact and conclusions of law:

Facts

1. On July 16, 2015, St. Louis Metropolitan Police Detective Sargent Patricia Nijkamp was assigned to investigate human trafficking and sexual exploitation. On that date, at approximately 6:00 a.m., in conjunction with a 911 emergency phone call, Det.

Richard Brown contacted Sgt. Nijkamp and advised her that a woman, hereinafter referred to as "BM"[1], had been seen running barefoot from her pimp and that the woman was now hiding behind a dumpster. Sgt. Nijkamp was told that BM, who was approximately 22 years old, had been interviewed by Officer Lawrence Matthews, and that BM, while she was hiding behind the dumpster, had a friend call the police for her. After speaking with Officer Matthews, Sgt. Nijkamp directed officers to take BM to a local hospital for medical attention. Sgt. Nijkamp herself went to the hospital to interview BM.

2. At the hospital BM gave Sgt. Nijkamp the physical descriptions of two people who were requiring her to be a prostitute, one of whom was her male pimp. She identified the two as Thomas Szczerba and Keisha Edwards, and she described their physical characteristics. BM told Sgt. Nijkamp that she was not from Missouri but had come from Houston, Texas. Before Texas, she had lived in Louisiana. BM told Sgt. Nijkamp that Szczerba and Edwards brought her from Texas to Missouri, and that these were the people she had run away from earlier that morning. BM told the officer the ways Szczerba prevented her from using her cell phone; that he prevented her from eating or resting unless she had earned $1,000.00 each day; and that he forced her to work during her menstrual period. BM told the officer that Szczerba and Edwards were then in Room 359 of the Westin Hotel in St. Louis.[2] BM also stated that Szczerba and Edwards had transported her from Texas to Missouri in a gold colored Mercedes automobile. Sgt. Nijkamp believed that BM's information was reliable, because she appeared scared and shaken up by her experiences. Police later located the gold Mercedes in the Westin Hotel parking lot.

[1] Upon oral motion of counsel for the government, the undersigned ordered that the transcript of this hearing refer to the subject woman only by these initials.

[2] Sgt. Nijkamp determined that Room 359 was registered to Keisha Edwards.

3. While at the hospital, Sgt. Nijkamp directed other officers to go to the Westin Hotel. Sgt. Nijkamp also provided these officers the physical descriptions of Szczerba and Edwards given to her by BM. She then went to the hotel herself.

4. Sgt. Nijkamp arrived at the hotel at approximately 11:00 a.m. She went to Room 359. There she located the two suspects, Thomas Szczerba and Keisha Edwards, whom she identified by the descriptions BM had given her. Szczerba and Edwards were then arrested. Nijkamp asked the two whether they would consent to a search of Room 359 so the officers would not have to get a search warrant. Szczerba and Edwards refused to consent. Nijkamp observed the condition of the room's interior. She then locked and secured the room in order to preserve it while she went to apply for a search warrant.

5. The police found the gold Mercedes vehicle that BM had described in the hotel parking lot. Sgt. Nijkamp ran the vehicle's Texas license plate and found that the vehicle was registered to Keisha Edwards.

6. Sgt. Nijkamp thereafter went to apply for a Missouri circuit court search warrant for the vehicle and the hotel room.

7. In her sworn, written affidavit in support of a search warrant, Sgt. Nijkamp described the investigatory facts the police had developed. The affidavit stated the following. Around 5:27 a.m. on July 15, 2015, victim BM, who had been born in 1992, called 911 after escaping from two people who had forced her to prostitute herself. BM said her traffickers' location was Room 359 in the Westin Hotel at 811 Spruce Avenue in the City of St. Louis. The room was rented in Keisha Edwards's name. The affidavit described the information provided by BM that, five to six weeks earlier she reluctantly began prostituting herself and giving the proceeds to Szczerba, and that Szczerba and Edwards photographed BM and advertised her availability on the internet. BM told the detective that they had traveled to Chicago, Illinois, and Wisconsin, before arriving in St. Louis five days earlier. During this time, BM was in a constant state of fear for her safety because Szczerba was threatening to beat her. The affidavit described other violent actions Szczerba used to force BM to prostitute herself. Szczerba forced BM to prostitute

herself during her menstrual cycle by using a makeup sponge as a feminine hygiene product. When Szczerba wasn't able to remove the makeup sponge from BM's vaginal cavity with tweezers, BM screamed with pain to such an extent that other hotel residents complained and Szczerba drove her to a hospital for treatment. BM told the police that there were numerous items of evidence of the crime of trafficking for the purpose of sexual exploitation in the suspects' hotel room and vehicle; these items of evidence included "cell phones, lap top computers, large amounts of cash, condoms, and lubricant as well as the receipts and paperwork." (Gov. Ex. 1 at 1–2, Doc. 102-1.)

The affidavit concluded:

> With these facts in mind, I respectfully request that a search warrant be granted [(sic)] Westin Hotel Room #359, located in the City of St. Louis at 811 Spruce Avenue as well as the vehicle used in this crime, a Gold 2003 Mercedes having a Texas License plate of CMV7329 and a VIN #WDVNG70J83A373917 registered to suspect Edwards.

(Id.)

8. At 4:10 p.m. on July 16, 2015, a St. Louis City circuit judge issued the search warrant. The operative language of the warrant was as follows:

> [a][3] Whereas, a complaint in writing, duly verified by oath, has been filed with the undersigned Judge of this court, stating upon information and belief, that the following to wit:
>
> [b] Hotel Room #359 of the Westin Hotel, Located at 811 Spruce Avenue, St. Louis, MO. Registered to suspect Keisha Edwards, DOB /1992.
>
> [c] 2003 Golf Mercedes vehicle having a Texas license plate of CMV7329 and VIN #[**********] parked at or near 811 Spruce Avenue and registered to Keisha Edwards, DOB /1992.
>
> [d] Whereas, the Judge of this Court from the sworn allegations of said complaint and from the supporting written affidavits filed therewith has found that there is probable cause to believe that the allegations of the complaint to be true and probable cause for the issuance of a search warrant therein;

[3] The undersigned has applied bracketed lettering to the separate paragraphs of the warrant to facilitate the discussion of the parties' arguments below.

> [e] Now, therefore, **these are to command you that you search the said person above described** within 10 days after the issuance of this warrant by day or night, and take with you, if need be, the power of your county, and if said above described property or any part thereof be found on the said person by you, that you seize the same and take same into your possession, making a complete and accurate inventory of the property so taken by you in the presence of the person from whose possession the same is taken and giving such person a copy of this warrant.

(Id. at 3) (bolding added).

9. After the search warrant was issued, Sgt. Nijkamp read the warrant and believed it authorized the police to search Room 359 and the gold Mercedes, and to seize from those places items that related to the current investigation of human sex trafficking.

10. At approximately 5:00 p.m. on July 16, 2015, the police searched Room 359, the gold Mercedes vehicle, and the person of Keisha Edwards. On July 22, 2015, the inventory of the items seized was filed with the Clerk of the Circuit Court. (Id. at 4–5.)

11. a. From Room 359 were seized triangle makeup sponges, iPhones, various phone chargers, various "sex toys," a bottle of medicine, medical paperwork, two Mercedes vehicle keys, packaging for lubricant and condoms, condoms, package of cleansing tissue, dental dams, a pink bag containing condoms, a Kindle, a Bose speaker,[4] a watch belonging to Szczerba, and a Mophie brand battery charger.

b. From the gold Mercedes vehicle were seized various receipts and records, a blue date book, a black notebook, and a black whip.

c. From the person of Keisha Edwards Items were seized 2 iPhones.

d. The gold Mercedes vehicle was seized from the parking lot. (Id.)

12. Szczerba's wallet was also seized during the investigation. The wallet contained a handwritten note with BM's personal information, 3 gift cards, a document

[4] The record is unclear about what type of Bose device was seized. The undersigned takes judicial notice that Bose manufactures electronic audio speakers and related devices. Fed. R. Evid. 201; https://www.bose.com/en_us/index.html (last viewed June 6, 2016).

stating a Scottrade account number, a Pinnacle Entertainment card, a Casino card, a Trop Advantage card, and a Trop Awards card. Based upon certain papers and records seized from Szczerba's wallet, the grand jury issued subpoenas to third parties for certain financial data and information.

DISCUSSION

Defendant Szczerba argues (1) the plain language of the search warrant authorized the police to search only the person of Keisha Edwards, not Room 359 or the gold Mercedes automobile; (2) even if the warrant was valid, certain items were seized from outside its lawful scope. The specific seized items defendant complains were outside the scope of the warrant are his wallet, Scottrade documents, gambling casino cards, keys to the gold Mercedes found inside Room 359, a makeup sponge, cell phone chargers, a black whip, a pill bottle, and documents described in the warrant inventory and return as "paperwork."

The government argues that (a) defendant Szczerba has no standing to contest the seizure of items from the gold Mercedes, (b) the warrant was legally sufficient, and (c) items seized from outside the scope of the warrant were nevertheless evidence of criminal activity observed by the police in plain view.

Defendant Szczerba's standing

Defendant Szczerba has standing to complain about the seizure of items from both the gold Mercedes vehicle and Room 359. The government does not contest Szczerba's privacy interest in the hotel room and, therefore, his standing to challenge that search. However, the government argues he has no standing to challenge the search of the gold Mercedes. The court disagrees.

In order to assert a Fourth Amendment violation regarding a vehicle, the defendant must prove that he has a sufficiently close connection to the vehicle. United States v. Gomez, 16 F.3d 254, 256 (8th Cir. 1994). Several factors are weighed when assessing a defendant's standing, including:

> ownership; possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.

Id. A defendant moving to suppress evidence has the burden to show that he has a reasonable expectation of privacy in the place searched and he cannot "rely on the positions the government has taken in the case but must present evidence of his standing, or at least . . . point to specific evidence in the record which the government presented [that] established his standing." United States v. Maxwell, 778 F.3d 719, 732 (8th Cir. 2015). For example, the Eighth Circuit upheld the district court's finding in Gomez, involving a motor vehicle, that the defendant had no possessory interest and, therefore, no standing in the vehicle for several reasons, i.e., he did not have permission to use the car; he did not know the owner; and he denied all interest in the drugs found within the car. United States v. Gomez, 16 F.3d at 256.

In the present case, the record establishes that defendant Szczerba had a sufficiently close relationship to the gold Mercedes to establish he has standing to complain about the seizure of items from it. While the vehicle was not registered to Szczerba, he had free access to use it. The victim told Sgt. Nijkamp that the keys were kept in the hotel room where Szczerba, Edwards, and she were staying. Szczerba's access to the car was also demonstrated when he drove BM to the hospital. Clearly, Szczerba controlled substantial access to the vehicle. There is no evidence that Edwards ever prevented Szczerba from using the vehicle as he wished.

Unlike the circumstances in Gomez, Szczerba could use the gold Mercedes when he wished. Based on the totality of the circumstances regarding defendant Szczerba's access to the vehicle, the undersigned concludes he had a reasonable expectation of privacy in the gold Mercedes and, therefore, standing to challenge the seizure of items from it.

The language of the search warrant

Defendant Szczerba argues that the operative language of the search warrant authorized a search only of the person of Keisha Edwards, and not a search of Room 359 or a search of the gold Mercedes. Therefore, the searches of the Mercedes and of Room 359 were warrantless.

The government argues that the subject search warrant was based upon probable cause to search the gold Mercedes and Room 359 established by Sgt. Nijkamp's affidavit which was signed by the issuing judge and incorporated into the warrant issued by the same judge. The government argues that the language of the warrant which authorized the search of Keisha Edwards was a clerical error which should be disregarded.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The warrant requirement of the Fourth Amendment requires that the warrant be founded on probable cause, particularly describe the place(s) to be searched, and particularly describe the items to be seized. Groh v. Ramirez, 540 U.S. 551, 557 (2004) (ruling that the warrant was "plainly invalid" because it lacked a description of the items to be seized).

An affidavit establishes probable cause to support the issuance of a search warrant when it "sets forth facts sufficient to create a fair probability that evidence of a crime will be found in the place to be searched"; "[a]dditionally, probable cause may be established by the observations of trained law enforcement officers or by circumstantial evidence." United States v. Terry, 305 F.3d 818, 822-23 (8th Cir. 2002). A finding of probable cause may be founded on information from a reliable individual, especially, as in the present case, when the police are able to corroborate the individual's information. United States v. Draper, 358 U.S. 307, 313 (1959). For these determinations this reviewing court should look to the totality of the relevant circumstances. Illinois v. Gates, 462 U.S. 213,

238 (1983). "Applications and affidavits for issuance of a warrant should be examined under a common sense approach and not in a hypertechnical fashion." United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993) (citing United States v. Ventresca, 380 U.S. 102, 109 (1965)).

In this case, Sgt. Nijkamp's affidavit provided sufficient information for the circuit court to find probable cause to believe that evidence of human sex trafficking would be found in Room 359 and in the gold Mercedes. BM, Sgt. Nijkamp's first-person informant and victim of the described perpetrators, told the officer that all three had been and were residing in Room 359 and that they had traveled in the gold Mercedes through several states for her to engage in prostitution. BM provided a wealth of factually specific information about these unlawful activities and much information about the evidence that would be found in the vehicle and in the room.

Whether or not the officer's affidavit established probable cause, however, is not the cardinal issue before the court. The issue is whether the state circuit court issued a constitutionally sufficient and valid search warrant following the submission of the affidavit.

A constitutionally sufficient warrant must provide "enough description so that an officer executing the search can reasonably ascertain and identify the target of the search with no reasonable probability of searching another premises in error." United States v. Valentine, 984 F.2d 906, 909 (8th Cir. 1993).

The warrant in this case did not accurately describe the locations intended by the affidavit to be searched and it did not particularly describe the items to be seized. The specific language of the warrant did not authorize searching Room 359 or the gold Mercedes. In fact, the warrant's drafter appears to have omitted language from the warrant. First, paragraphs [a]–[c] merely refer to Room 359 and the gold Mercedes. The relevance of the room and the vehicle is not stated in the warrant. Rather, paragraph [d] of the warrant stated that from the supporting document the court "has found that there is probable cause to believe that the allegations" in the supporting document are true and establish "probable cause for the issuance of a search warrant therein." (Doc. 102-1 at 3.)

The specific operative language of the search warrant in paragraph [e] authorized the search only of the "said person above described." The language of the warrant involved more than a typographical error, as the government urges. On the face of the warrant the only person "above described" in the warrant is Keisha Edwards. In the warrant, Keisha Edwards is not described as the location of items to be seized, but only as the person in whose name the gold Mercedes and Room 359 were registered. Furthermore, while paragraph [d] of the warrant referred to the "supporting written affidavit[]," it did so only to identify it as the basis for the finding of probable cause. (Id.) ("[w]hereas, the Judge of this Court from the sworn allegations of said complaint and from the supporting written affidavits filed therewith has found that there is probable cause").

An affidavit which is incorporated into a search warrant may provide the constitutionally required particularity for the warrant. Cf. United States v. Hamilton, 591 F.3d 1017, 1024–27 (8th Cir. 2010) (warrant not approved because the incorporating language was vague); United States v. Gamboa, 439 F.3d 796, 806–07 (8th Cir. 2006) (the warrant "clearly incorporated" the document that provided the required particularity). A warrant *with no incorporating language*, such as the one at bar, cannot rely on the underlying affidavit's language to provide the constitutionally required language particularly describing the place(s) to be searched and the items to be seized. Groh v. Ramirez, 540 U.S. at 558-560.

The government relies on United States v. Hamilton. In Hamilton, evidence was seized pursuant to the execution of a state court search warrant that was argued to be legally insufficient because the officer who drafted it "unknowingly deleted the list of items to be seized from the face of the warrant." 591 F.3d at 1020-21. The relevant facts were further described by the Court of Appeals:

> However, the items were specified in Detective Rexford's affidavit, which accompanied the warrant application at the time the circuit judge signed and issued the warrant. Although the warrant referenced the affidavit with the words "See Attached Affidavit," the affidavit was not physically attached to the warrant when the warrant was executed on May 30, 2007,

> and there is no evidence in the record that the affidavit was available at the scene of the search. Detective Rexford executed the warrant and was aware of the items listed in the affidavit to be seized because he had drafted the affidavit.

Id. at 1021. The Eighth Circuit did not constitutionally approve that warrant, in relevant part because the language of the warrant was unclear about what part of the affidavit the judge incorporated into the warrant. Id. at 1027. Rather, suppression of the evidence was avoided by an application of the officer's good faith reliance on the warrant. Id. at 1030.

In the case at bar, no language of the search warrant incorporated into the warrant to any reasonable degree any information from the underlying affidavit. In the circumstances of this case, merely acknowledging the existence of the affidavit as the basis for the finding of probable cause is insufficient to incorporate the affidavit into the warrant.

The searches in this case were not authorized by the subject search warrant.

Good faith reliance on the issued warrant

This court may allow the use of evidence seized in the execution of a constitutionally insufficient warrant, if the officers acted in good faith after obtaining the warrant upon a showing of probable cause from a neutral and detached magistrate. See United States v. Leon, 468 U.S. 897, 922–23 (1984). Suppressing the evidence seized pursuant to a constitutionally deficient warrant is appropriate where a deterrent against willful or negligent conduct resulting in the deprivation of a defendant's rights is needed. See Leon, 468 U.S. at 919 (quoting United States v. Peltier, 422 U.S. 531, 539 (1975)).

The good faith exception to the exclusionary rule should not be applied if: (1) the affidavit upon which the warrant relies was knowingly or recklessly false; (2) the issuing judge was merely a rubber stamp for the police, instead of a neutral and detached judicial officer; (3) there is no substantial basis for a finding of probable cause; or (4) the warrant itself is so facially deficient that no executing officer could presume its validity. U.S. v. Leon, 468 U.S. at 914–15; United States v. LaMorie, 100 F.3d 547, 555 (8th Cir. 1996).

The exclusionary rule is not intended to punish the errors of issuing judges and should only be applied "in those unusual cases in which exclusion will further the purposes of the exclusionary rule." U.S. v. Leon, 468 U.S. at 916, 918.

In deciding whether or not the Leon good faith avoidance of the exclusionary rule should be applied, the court should look at the totality of the circumstances, including the investigating officers' "conduct in obtaining and executing the warrant and what the officer[s] knew or should have known." United States v. Wright, 777 F.3d 635, 639 (3rd Cir. 2015) (quoting United States v. Tracey, 597 F.3d 140, 147 (3rd Cir. 2010)).

Sgt. Nijkamp and the other officers who searched Room 359 and the gold Mercedes reasonably relied on the search warrant as authority for their searches. While paragraphs [b] and [c] of the warrant, which clearly focus on Room 359 and the gold Mercedes, appear detached from the rest of the warrant, they clearly and immediately present to the reader's eye the two locations that Sgt. Nijkamp knew were the subjects of her affidavit and were the expected locations for authorized searches. While paragraph [e] refers to searching "the said person above described," Sgt. Nijkamp knew that Keisha Edwards was a suspect in the investigation. Further, the warrant refers to Sgt. Nijkamp's affidavit, which clearly describes the locations to be searched (the hotel room and the vehicle) and the items to be seized (cell phones, lap top computers, large amounts of cash, condoms, lubricant, and the receipts and paperwork relating to the alleged crime). (Doc. 102-1 at 3.)

Furthermore, Sgt. Nijkamp was most mindful of the Fourth Amendment warrant requirement. She first asked the two suspects whether they would consent to a search of Room 359 to avoid her having to apply for a warrant. When they refused to consent, she secured both the hotel room and the vehicle and then applied for a search warrant. Her affidavit concealed no facts from the judge. Nothing other than the warrant document itself has indicated that the issuing judge did not act as a neutral and detached judicial officer. And there was ample probable cause in the supporting affidavit for the issuance of a constitutionally valid warrant.

Therefore, even with the defective language of the warrant, the good faith doctrine of Leon should be applied to avoid the exclusionary rule.

Scope of the searches

Defendant Szczerba argues that the seized items were not within the Fourth Amendment scope of the items to be seized. The undersigned disagrees.

In the execution of a search warrant, officers are constitutionally authorized to seize any object in plain view, in a place where the officers lawfully are present, if that object's incriminating nature is immediately apparent. United States v. Rodriguez, 711 F.3d 928, 936 (8th Cir. 2013). The incriminating nature of an object may be based on the knowledge of the seizing officers. See United States v. Banks, 514 F.3d 769, 776 (8th Cir. 2008) (seizure of a gun case upheld, because one of the officers at the seizure knew defendant was a felon and a gun case is likely to hold a firearm). "If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." Horton v. California, 496 U.S. 128, 133–34 (1990).

As discussed above, the search warrant clearly referenced Sgt. Nijkamp's affidavit, which described the places to be searched and the items to be seized. Items specifically listed in the affidavit included "cell phones, lap top computers, large amounts of cash, condoms, and lubricant as well as the receipts and paperwork relating to the Crime of 'Trafficking for the Purpose of Sexual Exploitation.'" (Gov. Ex. 1 at 1, Doc. 102-1 at 1.) The items actually seized from the hotel room by Sgt. Nijkamp included makeup sponges; four iPhones; a MacBook Pro; an Alcatel phone; $144 in US currency; various battery chargers; various sex toys; medicine prescribed to and medical paperwork for "Avery Monroe"; lubricant; various condoms; a Kindle; a Bose audio speaker device; defendant Szczerba's watch; and, a Mophie battery charger. (Id. at 5.) From inside the vehicle, police seized various receipts and paperwork, an aqua blue datebook, a black medium sized notebook, and a black whip. (Id.)

Defendant Szczerba describes the items seized in the hotel as a "smorgasbord" of items, all of which should be suppressed. (Doc. 85 at 5.) In the circumstances of this

case, including what BM told Sgt. Nijkamp, all of the seized items reasonably appear to be evidence of defendant Szczerba's trafficking in sexual exploitation. Defendant's wallet and documents in it are clearly contained within "receipts and paperwork." The makeup sponges were vividly described by the victim to Sgt. Nijkamp as being used to ensure she would continue to prostitute herself while on her menstrual cycle. The four iPhones, MacBook Pro, Alcatel cell phone, and Kindle fall within the category of digital devices ("cell phones" and "lap top computers"). The various sex toys, lubricant, and condoms seized are plainly evidence of the alleged crime, regardless of their otherwise legal nature. The prescription medication and medical records for "Avery Monroe" were reasonably seen as evidence of BM's hospital visit after defendant Szczerba allegedly attempted to remove a makeup sponge being used as a feminine hygiene product with a pair of tweezers. (Gov. Ex. 1 at 1, Doc. 102-1 at 1.) Other items seized are reasonably seen as evidence of defendant Szczerba's residence in Room 359: his watch, electronic device chargers, and the Bose device.

ORDER AND RECOMMENDATION

For the reasons set forth above,

IT IS HEREBY ORDERED that the motions of the United States for a determination by the court of the admissibility or not of the government's arguably suppressible evidence (docs. 25 oral, 66 oral, 98 oral) are denied as moot.

IT IS HEREBY RECOMMENDED that the motions of defendant Thomas Szczerba to suppress evidence (docs. 23 oral, 65 oral, 85, 86, 97 oral) all be denied.

The parties have 14 days to file written objections to this Order and Recommendation. The failure to file timely written objections may waive the right to appeal issues of fact.

/S/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed and filed on June 7, 2016.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:15CR348 HEA
	)	
THOMAS THADEUS SZCZERBA and KEISHA EDWARDS	)	
	)	
	)	
Defendants,	)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on the Order and Recommendation of Magistrate Judge David D. Noce addressing Defendant Szczerba's Motions to Suppress Evidence, [Doc. No.'s 23, 65 and 97], Defendant Szczerba's Motion to Suppress Physical Evidence obtained during the search of a hotel room, [Doc. No. 85], Defendant Szczerba's Motion to Suppress Evidence obtained during the search of a motor vehicle, [Doc. No. 86], and Judge Noce's Order and Recommendation addressing Defendant Edwards' Motions to Suppress Evidence, [Doc. No.'s 24, 69 and 130]. Evidentiary hearings were held September 7, 2016 and October 7, 2016. Judge Noce recommends that these motions be denied. Defendants have filed written objections to these recommendations.

When a party objects to the magistrate judge's report and recommendation, the Court must conduct a *de novo* review of the portions of the report, findings, or

recommendations to which the party objected. See *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir.2003) (citing 28 U.S.C. § 636(b)(1)). Pursuant to 28 U.S.C. § 636, the Court will therefore conduct such a *de novo* review of those portions of the Memorandum to which Defendant objects. The Court has reviewed the entire record for this purpose.

Both Defendants object to Judge Noce's finding that, although search of the hotel room and car were not authorized by the search warrant as written, the search was proper under the good faith exception to the exclusionary rule articulated in *United States v. Leon*, 468 U.S. 897 (1984).

Judge Noce's Order meticulously details the events surrounding the searches. After recognizing the defect in the search warrant, *i.e.* that it stated that the person of Defendant Edwards was to be searched, rather than the hotel room and the car, Judge Noce carefully analyzes whether the totality of the circumstances give rise to Sgt. Nijkamp's good faith belief that the police were authorized to search the hotel room and the car. Based on the facts given to Sgt. Nijkamp by the alleged victim, Sgt. Nijkamp had probable cause to believe that a crime had been committed. The suppression of an invalid warrant is appropriate "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 922.

Defendant Edwards objects to Judge Noce's Order because he did not specifically address her argument to suppress the video recording of Defendants' hotel room. Defendant argues that the video should be suppressed because it was not supported by probable cause and was not authorized by any warrant. In his Order, Judge Noce found that Sgt. Nijkamp had two purposes for making the recording. She wanted to inventory and document the contents of the hotel room to avoid a later claim that items were later missing, and she wanted to record the contents and condition of the room for criminal investigatory purposes.

Sgt. Nijkamp acted reasonably in securing the apartment while awaiting a search warrant. Based on the information she received from the alleged victim, she reasonably suspected that Defendants were engaged in wrongful activity. Sgt. Nijkamp secured the apartment to prevent the destruction of evidence of trafficking for the purpose of sexual exploitation. The act of securing the apartment while awaiting a search warrant comports with the Fourth Amendment. *See United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir.1997). Moreover, the affidavit Sgt. Nijkamp filed in support of the search warrant contains no information indicating she exploited her presence while securing the apartment. *United States v. Ruiz-Estrada*, 312 F.3d 398, 404 (8th Cir. 2002). The *Roby* Court cited to *Segura v. United States*, 468 U.S. 796 (1984). In *Segura*, the United States Supreme Court was called upon to decide "whether, when officers have probable cause to believe

that evidence of criminal activity is on the premises," the Fourth Amendment permits police to temporarily secure a dwelling in order to "prevent removal or destruction of evidence." *Id.* at 809. Without deciding whether securing a dwelling constituted a "seizure" under the Fourth Amendment, the Court noted that "[d]ifferent interests are implicated by a seizure than by a search. A seizure affects only the person's possessory interests; a search affects a person's privacy interests." *Id*. at 806. The Court ultimately concluded that, where officers had probable cause to believe that evidence of a crime was inside a dwelling, the Fourth Amendment permits police to secure the dwelling to prevent destruction or removal of evidence while a search warrant is being secured. *Id.* at 810.

Judge Noce's recommendation is based on sound and thorough legal analysis and attentiveness to the evidence. Nothing contained in the Recommendation is contrary to the law, nor does it misstate the facts. Judge Noce reviewed and considered Defendants' arguments and authority that they presented. The objections are overruled.

Judge Noce's conclusions are based on sound legal analysis. The Court agrees with Judge Noce's conclusions in their entirety. The Recommendations are adopted *in toto*.

Accordingly,

IT IS HEREBY ORDERED that Defendant Szczerba's Motions to Suppress

Evidence, [Doc. No.'s 23, 65 and 97], Defendant Szczerba's Motion to Suppress Physical Evidence obtained during the search of a hotel room, [Doc. No. 85], Defendant Szczerba's Motion to Suppress Evidence obtained during the search of a motor vehicle, [Doc. No. 86], and Defendant Edwards' Motions to Suppress Evidence, [Doc. No.'s 24, 69 and 130] are denied.

Dated this 30th day of December, 2016.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4:15CR348 HEA
	)	
THOMAS THADDEUS SZCZERBA, a/k/a "Enzo",	)	
	)	
Defendant.	)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Defendant's Motion for Judgment of Acquittal or, in the Alternative, Motion for New Trial, [Doc. # 222]. The Government opposes the Motion and has filed a response thereto. For the reasons set forth below, the Motion is denied.

Facts and Background

Thomas Szczerba ("Szczerba") and Keisha Edwards ("Edwards") were charged in a second superseding indictment with: Count One: Conspiracy to Commit an Offense Against the United States in violation of Title 18 U.S.C. § 371; Count Two: Conspiracy to Engage in Sex Trafficking in violation of Title 18 U.S.C. §§ 1591(a)(1), (a)(2) and (b)(1) and 1594(c); Count Three: Interstate Transportation of an Individual to Engage in Prostitution in violation of Title 18 U.S.C. §§ 2421 and 2; Count Four: Use of Facilities of Interstate Commerce with

Intent to Aid an Enterprise Involving Prostitution in violation of Title 18 U.S.C. §§ 1952(a)(3) and 2; Count Five: Enticement to Travel in Interstate Commerce to Engage in Prostitution in violation of Title 18 U.S.C. §§ 2421 and 2; Count Six: Sex Trafficking by Force, Fraud or Coercion in violation of Title 18 U.S.C. §§ 1591(a), (b)(1) and 2, and Count Seven: Use of Facilities in Interstate Commerce with Intent to Distribute Proceeds from an Enterprise Involving Prostitution in violation of Title 18 U.S.C. §§ 1952(a)(1) and 2.

On February 8, 2017 both defendants proceeded to trial on the second superseding indictment. Prior to opening statements in the case co-defendant Keisha Edwards entered a guilty plea to aiding and abetting defendant Szczerba in the commission of Count Four: Use of Facilities of Interstate Commerce with Intent to Aid an Enterprise Involving Prostitution in violation of Title 18 U.S.C. § 1952(a)(3), and Count Seven: Use of Facilities in Interstate Commerce with Intent to Distribute Proceeds from an Enterprise Involving Prostitution in violation of Title 18 U.S.C. § 1952(a)(1).

The trial of co-defendant Szczerba proceeded and the United States presented evidence in its case-in-chief. That evidence included testimonial evidence from seven witnesses, documentary evidence in the nature of bank, email, credit card and financial records, a 911 dispatch call and transcript of same,

as well as website information which demonstrated defendant Szczerba's participation in the charged offenses.

After considerable deliberation the jury returned verdicts finding Defendant guilty of Count One: Conspiracy to Commit an Offense Against the United States in violation of Title 18 U.S.C. § 371. He was specifically found guilty of : (1) knowingly transporting the victim in interstate commerce with the intent that she engage in prostitution and (2) knowingly traveling in interstate commerce or using any facility in interstate commerce with the intent to carry on an unlawful activity to wit: prostitution, as well as aiding and abetting another in the commission of three crimes to include, Count Three: Interstate Transportation of an Individual to Engage in Prostitution in violation of Title 18 U.S.C. §§ 2421, Count Four: Use of Facilities of Interstate Commerce with Intent to Aid an Enterprise Involving Prostitution in violation of Title 18 U.S.C. §§1952(a)(3) and Count Seven: Use of Facilities in Interstate Commerce with Intent to Distribute Proceeds from an Enterprise Involving Prostitution in violation of Title 18 U.S.C. §§ 1952(a)(1) and 2.

Discussion

Motion for Judgment of Acquittal

Defendant initially argues that the Government failed to make a submissible

case on each count under Rule 29 (c). The Rule provides a mechanism by which acquittal must be entered if there is insufficient evidence to sustain a conviction. "The standard for determining whether evidence is insufficient is very strict, requiring acquittal only where there is 'no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt.'" *United States v. Munoz*, No. 11B167, 2012 WL 3031143 (D.Minn. July 25, 2012), citing *United States v. Gomez*, 165 F.3d 650, 654 (8th Cir.1999). "When a district court considers a motion for acquittal, it does so with 'very limited latitude.' The court should not assess the credibility of the witnesses or weigh the evidence." *United States v. Thompson*, 285 F.3d 731, 733 (8th Cir.2002). It is the duty of the Court to view the "evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." *United States v. Garcia*, 646 F.3d 1061, 1066 (8th Cir. 2011) (citation and internal quotations omitted); See also, *United States v. Vore*, 743 F.3d 1175, 1180 (8th Cir. 2014). "This standard is quite strict' and the court will not disturb the conviction unless 'no reasonable jury could have found the defendant guilty beyond a reasonable doubt.'" *Id*. (quoting *United States v. Wright*, 739 F.3d 1160, 1167 (8th Cir. 2014)).

Based on all of the evidence presented at trial, the Court concluded that the Government indeed proved all the required elements beyond a reasonable doubt. The evidence was more than sufficient to establish an evidential and legal basis for each count. The record of the trial fully supports this conclusion without reservation or qualification. There was considerable testimony by the victim relating to the conduct of the Defendant and his co-conspirator. A victim's testimony alone can be sufficient to prove the sex crimes in question. *United States v. Bell*, 761 F. 3d 900, 907 (8th Cir. 2014). Here, there was much evidence, including documentary evidence, banking records evidence, World Wide Web evidence, and 911 call evidence, supporting the position of the United States. Credibility is not an issue for the Court in these proceedings. Credibility determinations are uniquely within the province of the trier of fact, so the jury was entitled to afford more weight to the evidence presented by the prosecution. See, *United States v. Geddes*, 844 F.3d 983, 992 (8th Cir. 2017). The facts presented and the applicable law are not servants of the Defendant in this instance. The Rule 29 (c) motion necessarily must fail.

Motion for New Trial

Defendant argues there are *Brady* and *Giglio* violations perpetrated by the United States in the prosecution of the charges which entitle him to relief.

Defendant asserts these violations resonate from the failure of the United States to provide an FBI report relating to the interview of an individual named Michael Ritti. Mr. Ritti was referred to several times during the trial. Defendant asserts that Ritti likely had exculpatory evidence by way of testimony. Under *Giglio* "impeachment evidence falls under *Brady* when the reliability of a given witness may be determinative of a defendant's guilt or innocence." *United States v. Marshall*, No.08-50079-02, 2010 WL 428967, *1 (D.SD. Feb.3, 2010); See also, *Giglio* 405 U. S. at 154.

Under *Brady* the United States must disclose all exculpatory evidence to the defense for use at the trial. In order to succeed on a *Brady* claim, "[a defendant] must establish (1) 'the prosecution suppressed evidence,' (2) 'the evidence was favorable to him,' and (3) 'the evidence was material to either his guilt or his punishment.'" *Mandacina v. United States*, 328 F. 3d 995, 1001 (8th Cir.2003) (quoting *United States v. Carman*, 314 F. 3d 321, 323-324 (8th Cir. 2002)). *See also United States v. Duke*, 50 F.3d 571, 577 (8th Cir. 1995).

Under *Brady*, there is only a violation "if evidence is discovered, after the trial, of information which had been known to the prosecution but unknown to the defense." *United States v. Manthei*, 979 F.2d 124, 127 (8th Cir. 1992) (citing *Nassar v. Sissel*, 792 F.2d 119, 121 (8th Cir. 1986)). "*Brady* does not cover

evidence that would merely help a defendant prepare for trial but is otherwise immaterial to the issues of guilt or punishment." *United States v. Aleman*, 548 F.3d 1158, 1164 (8th Cir. 2008) (citing *United States v. Agurs*, 427 U.S. 97, 112 n.20 (1976)). Materiality is a function of being able to demonstrate that "there is a reasonable probability that if the allegedly suppressed evidence had been disclosed at trial the result of the proceeding would have been different." *Sanchez-Florez*, 533 F.3d at 941 (quoting *Drew v. United States*, 46 F.3d 823, 828 (8th Cir. 1995)). A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Under Eighth Circuit law "… *Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial." *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005).

Defendant argues points which pre-suppose facts, circumstances and details which are in large part not reflective of the record in this trial. The evidence, the FBI report, which forms the core of the Defendant's argument, was indeed provided to the defense and the United States made Mr. Ritti available to the defense. The defense met with Ritti and elected not to call Ritti at trial. The defense did, however, cross-examine FBI Special Agent Jennifer Lynch (drafter of the now alleged notorious report regarding Mr. Ritti's interview) and during the

cross-examination, defense counsel presented the contents of Mr. Ritti's statement through the testimony of Agent Lynch. In rebuttal the defense presented Sgt. Nijkamp and had an opportunity to inquire of Sgt. Nijkamp regarding Mr. Ritti's statement. The statement therefore was not suppressed. See, *United States v. Paredes-Cordova*, 504 Fed. Appx. 48 (2d Cir. 2012)(holding that although government belatedly made mid-trial disclosure in drug conspiracy prosecution of confidential source's statements, the statements were not "suppressed" within the meaning of *Brady*, since defendant had sufficient time to use the statements, as the government also made a full disclosure of material and defense counsel was allowed an opportunity to restructure its cross-examination of another government witness). The clapper of *Brady* was not struck.

The United States had the duty of proving (1) how and why Szczerba transported the victim to the Eastern District of Missouri, (2) how Szczerba traveled, used interstate facilities and transported the victim for the purpose of prostitution, and (3) how Szczerba distributed proceeds generated from acts of prostitution. As such the complained of statement is not material. Mr. Ritti was not the "john" named "Jordan." Ritti did not engage in any commercial sex act with the victim or co-defendant Edwards. More importantly, the report does not demonstrate in any manner, shape, or form that defendant was not involved in the

offenses of which he was convicted.

The FBI report is not even arguably exculpatory. It sheds no light on the culpability of defendant as that relates to any offense of which he was convicted. Defendant was convicted of a conspiracy to commit an offense against the United States (specifically knowingly transporting "Jane Doe" in interstate commerce with the intent that "Jane Doe" engage in prostitution and knowingly traveling in interstate commerce or using any facility in interstate commerce with the intent to carry on an unlawful activity to wit: prostitution), as well as aiding and abetting in the commission of the crimes of: (1) interstate transportation of an individual to engage in prostitution, (2) use of facilities of interstate commerce with intent to aid an enterprise involving prostitution and (3) use of facilities in interstate commerce with intent to distribute proceeds from an enterprise involving prostitution. The record clearly reflects the Ritti FBI report information shines no material light on any of these issues. There is no showing that there is a reasonable probability that if the victim was impeached with the content of the report at trial, the result of the proceeding would have been different. *Sanchez-Florez*, 533 F.3d at 940. In actuality, the compelling evidence of defendant's guilt renders it unlikely that there would have been a "reasonable probability" of a different verdict. *Whitley*, 514 U.S. at 433 (*Brady* materiality standard).

The Defendant also asserts the United States elicited false testimony through Sgt. Nijkamp relating to the "john" known as "Jordan." The record reflects the Sgt. could not locate the person seen in a video presentation relating to the testimony about the individual. Where false evidence is knowingly used by the state, or the state fails to correct false evidence, a due process violation may occur. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). To succeed in this posture the Defendant has to demonstrate: "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) ... the false testimony was material." *Id*.

The record is devoid of any evidence which establishes the "actual" falsity of the evidence in question. The evidence presented to the jury relates to credibility questions and not actual falsity. As such "assessing the credibility of the witnesses lies within the province of the jury." *United States v. Peltier*, 553 F. Supp 890, 897 (D. North Dakota 1982), See also, *United States v. Sullivan*, 618 F.2d 1290, 1295 (8th Cir.1980). This point of the motion likewise fails.

The Defendant continues to assert the United States used evidence which should have been suppressed. He posits no new theories or arguments on this point. The court has already addressed these matters in the ruling on the Report

and Recommendation of the Magistrate and incorporates that ruling into the ruling on the motion.

Finally, Defendant argues that the Court should grant him a new trial based on an address to the jury while deliberations were suspended. As the United States correctly noted in response to the point nothing was said or done to suggest that defendant was interfering with moving forward since there were only 11 jurors at the time or they should act in any way contrary to the law applicable in general and specifically to the trial.

Conclusion

None of Defendant's arguments give rise to a basis upon which to grant his motion for judgment of acquittal or new trial. The United States proved beyond a reasonable doubt all of the necessary elements for conviction. Defendant was not deprived of any constitutional rights throughout the trial. He is not, therefore entitled to a new trial nor to a judgment of acquittal.

Accordingly,

IT IS ORDERED that Defendant's Motion for Judgment of Acquittal or in

the Alternative New Trial, [Doc. #222], is **DENIED**.

Dated this 17th day of May, 2017.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2142

United States of America

Appellee

v.

Thomas Thadeus Szczerba, also known as Enzo

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:15-cr-00348-HEA-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 31, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans