No.

In the

Supreme Court of the United States

October Term 2018

Casey Peebles,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

United States Court of Appeals
For the Eighth Circuit

No. 18-1369

United States of America

Plaintiff - Appellee

v.

Casey Peebles

Defendant - Appellant

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

Submitted: January 14, 2019
Filed: March 12, 2019
[Unpublished]

Before SMITH, Chief Judge, COLLOTON and ERICKSON, Circuit Judges.

PER CURIAM.

In United States v. Peebles, 883 F.3d 1062 (8th Cir. 2018), we affirmed the district court's denial of Casey Peebles's motion for judgment of acquittal. While Peebles's first appeal was pending, he filed a motion for new trial under Federal Rule of Criminal Procedure 33, asserting an affidavit signed by co-defendant Joseph

Rander constitutes newly discovered evidence necessitating a new trial. The district court[1] denied the motion. We affirm.

On October 7, 2016, a jury found Peebles guilty of conspiracy to distribute 100 grams or more of heroin and of possession with intent to distribute 100 grams or more of heroin. Evidence at trial established that Peebles was a member of the Rander Drug Trafficking Organization, which delivered drugs from California and distributed them throughout the greater St. Louis, Missouri, metropolitan area. An informant testified for the prosecution about events that occurred on April 2 and 3, 2013, at 5911A Highland Avenue in St. Louis. The informant testified that Rander told him to "work the door" and provide security while Rander distributed heroin. According to the informant, Rander told him Peebles was about to pull up and he should go to the door to let Peebles in. The informant notified police that Peebles briefly entered the residence, where Rander handed Peebles a Ziploc bag filled with narcotics. Police subsequently stopped Peebles's car and found 247.3 grams of a substance containing heroin during a search of a passenger.

On October 31, 2017, Peebles filed a motion for new trial on the basis of "newly discovered evidence." The evidence consisted of an affidavit signed by Rander on August 13, 2017, and received by defense counsel ten days later. In the affidavit, Rander states he was never at 5911A Highland on the dates in question, he does not know Peebles or the passenger, and the statements attributed to Rander by the informant were false. Rander was not called to testify at Peebles's trial.

The district court determined a hearing on the motion was unnecessary and denied the motion. The court concluded: (1) the evidence was not newly discovered; (2) Peebles did not execute due diligence to discover the evidence; and (3) it was not

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

probable that the evidence would have resulted in an acquittal had it been presented at trial. Peebles timely appealed.

We review the district court's denial of a motion for new trial based on newly discovered evidence for clear abuse of discretion. United States v. Bell, 761 F.3d 900, 911 (8th Cir. 2014) (citation omitted). To obtain a new trial on the basis of newly discovered evidence, Peebles must show:

> (1) the evidence is in fact newly discovered since trial; (2) diligence on his part; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issues involved; and (5) it is probable that the new evidence would produce an acquittal at the new trial.

Id. (quoting United States v. Myers, 503 F.3d 676, 682–83 (8th Cir. 2007)).

The district court did not clearly abuse its discretion. In Bell, we held that "[e]ven where an affidavit is not available until after trial, if the factual basis for the testimony in the affidavit existed before trial, then it is not newly discovered evidence." Id. (citing Meadows v. Delo, 99 F.3d 280, 282 (8th Cir. 1996)). Peebles's "new evidence" is similar to that in Bell's failed appeal: Peebles knew about Rander's involvement in the conspiracy prior to trial; failed to obtain Rander's testimony earlier; and failed to explain why he did not locate, attempt to interview, or subpoena Rander before trial. See id. at 911–12 (affirming the district court's conclusions that Bell's evidence was not newly discovered and Bell did not demonstrate due diligence). In light of the ample evidence presented at trial of Peebles's guilt, the district court was also well within its discretion to conclude it was not probable that the evidence in the affidavit would have resulted in an acquittal. We affirm the district court's denial of Peebles's motion for new trial and grant Peebles's motion to supplement the record.

Sheet 1- Judgment in a Criminal Case

United States District Court

Eastern District of Missouri

UNITED STATES OF AMERICA

v.

CASEY PEEBLES

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: S1-4:14CR00345-10 ERW

USM Number: 42206-044

THE DEFENDANT:

T. Patrick Deaton, Jr.
Defendant's Attorney

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) after a plea of not guilty Two and Five of the Superseding Indictment on October 7, 2016.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §846, 21 U.S.C. §841(a)(1), 21 U.S.C. §841(b)(1)(B) and 21 U.S.C. § 851(a)(1)	Conspiracy to Possess With Intent to Distribute Heroin	September 29, 2011, through date of indictment, October 14, 2015	Two
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 851(a)(1)	Possession With Intent to Distribute Heroin	On or about April 23, 2013	Five

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 3, 2017
Date of Imposition of Judgment

E. Richard Webber
Signature of Judge

Honorable E. Richard Webber
Senior United States District Judge
Name & Title of Judge

January 3, 2017
Date signed

DEFENDANT: CASEY PEEBLES
CASE NUMBER: S1-4:14CR00345-10 ERW
District: Eastern District of Missouri

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of 120 months.

This term consists of a term of 120 months on each of counts two and five, such terms to be served concurrently. This sentence shall run concurrently to any sentences imposed by the State of Missouri, 21st Circuit, St. Louis County in Dockets numbered 12SL-CR03829-01 and 2198R-02459-01.

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant be evaluated for placement in the Bureau of Prisons facility at Greenville, Illinois. While in the custody of the Bureau of Prisons, it is recommended that the defendant be evaluated for participation in Residential Drug Abuse Program, and a mental health evaluation and treatment. The Court further recommends that the defendant participate in an Occupational/Educational Program, particularly in carpentry, flooring and painting, and in post high school level educational coursework. These recommendations are made to the extent they are consistent with the Bureau of Prisons policies.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./pm on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Services Office

MARSHALS RETURN MADE ON SEPARATE PAGE

DEFENDANT: CASEY PEEBLES
CASE NUMBER: S1-4:14CR00345-10 ERW
District: Eastern District of Missouri

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of eight years.

This term consists of a term of eight years on each of counts two and five, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CASEY PEEBLES
CASE NUMBER: S1-4:14CR00345-10 ERW
District: Eastern District of Missouri

ADDITIONAL SUPERVISED RELEASE TERMS

While on supervision, the defendant shall comply with the standard conditions that have been adopted by this Court and shall comply with the following additional conditions. If it is determined there are costs associated with any services provided, the defendant shall pay those costs based on a co-payment fee established by the probation office.

1. The defendant shall submit his person, residence, office, or vehicle to a search conducted by the probation office based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of commencement of supervision and at least two periodic drug tests thereafter for use of a controlled substance.

3. The defendant shall participate in a substance abuse treatment program approved by the probation office, which may include substance abuse testing, counseling, Residential Re-entry Center placement, residential or inpatient treatment.

4. The defendant shall participate in a mental health treatment program approved by the probation office.

5. The defendant shall participate in an educational program approved by the probation office, which shall include post high school level coursework.

DEFENDANT: CASEY PEEBLES
CASE NUMBER: S1-4:14CR00345-10 ERW
District: Eastern District of Missouri

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on sheet 6

	Assessment	Fine	Restitution
Totals:	$200.00		

☐ The determination of restitution is deferred until _____. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such a determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant ot 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:			

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the. ☐ fine ☐ restitution.

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: CASEY PEEBLES
CASE NUMBER: S1-4:14CR00345-10 ERW
District: Eastern District of Missouri

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $200.00 due immediately, balance due

☐ not later than _____ , or

☒ in accordance with ☐ C, ☐ D, or ☐ E below; or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below; or ☐ F below; or

C ☐ Payment in equal _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time: or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $100 on each of counts two and five, for a total of $200, which shall be due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Under 21 U.S.C. §853, the defendant has forfeited all of his right, title and intereset in the property previously identified in the Preliminary Order of Forfeiture issued on October 31, 2016.

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5)fine interest (6) community restitution.(7) penalties, and (8) costs, including cost of prosecution and court costs.

9a

DEFENDANT: CASEY PEEBLES
CASE NUMBER: S1-4:14CR00345-10 ERW
USM Number: 42206-044

UNITED STATES MARSHAL
RETURN OF JUDGMENT IN A CRIMINAL CASE

I have executed this judgment as follows:

_____

_____

The Defendant was delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

☐ The Defendant was released on _____ to _____ Probation

☐ The Defendant was released on _____ to _____ Supervised Release

☐ and a Fine of _____ ☐ and Restitution in the amount of _____

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

I certify and Return that on _____, I took custody of _____

at _____ and delivered same to _____

on _____ F.F.T. _____

U.S. MARSHAL E/MO

By DUSM _____

10a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. 4:14CR00345 ERW
	)	
CASEY PEEBLES	)	
	)	
Defendant(s).	)	

MEMORANDUM & ORDER

This matter is before the Court on Defendant Casey Peeble's Motion for New Trial Based on Newly Discovered Evidence [756].

I. BACKGROUND

On October 29, 2014, Casey Peebles ("Defendant") was indicted, along with eleven others, for various charges related to a drug trafficking conspiracy. Specifically, Defendant was charged with knowingly and intentionally possessing with the intent to distribute a mixture or substance containing a detectable amount of heroin in violation of 21 U.S.C. §841(a)(1). On October 14, 2015, a superseding indictment was filed and Defendant was charged with knowingly and willfully conspiring, combining, confederating, and agreeing with each other to distribute heroin and to possess with the intent to distribute heroin in violation of 21 U.S.C. §841(a)(1) (Count II) and knowingly and intentionally possessing with the intent to distribute a mixture or substance containing a detectable amount of heroin in violation of 21 U.S.C. §841(a)(1) (Count V). On October 7, 2016, a jury found Defendant guilty on both counts. The Court sentenced Defendant to 120 months on each count, to be served concurrently, and an eight-year term of supervised release.

During the trial, a co-defendant, Quantiae Harris ("Harris") testified for the Government. Harris testified about his knowledge of the drug trafficking organization at issue in this case and the events of April 2-3, 2013, at 5911A Highland Avenue in St. Louis, Missouri. Specifically, he

testified Defendant came to 5911A Highland to purchase heroin from Joseph Rander, a co-defendant. Harris was the "doorman" of the location; he provided security and let people in and out. Harris testified as follows regarding Joseph Rander:

a. Yes, he had called me and told me he needed me to work the door.

b. He said Twin people fit'n to come through, we fit'n to be on, we fit'n to be back together.

c. He had told me I need you to work the door; so when he come, I need you to open the door for me.

d. Well, he had got a call, he had got a call from him telling him he was about to pull up; so he had told me to go to the door.

Harris further testified Defendant entered the residence and Joseph Rander handed him a Ziploc bag filled with narcotics. Defendant left the residence and returned to his car. Harris notified law enforcement of the transaction and Defendant's car was stopped. Heroin was found on another passenger in the vehicle. Defendant was indicted and tried based on this evidence, along with additional evidence, and a jury found him guilty. Defendant now contends newly discovered evidence proves Harris's testimony was false.

II. DISCUSSION

In his motion, Defendant asserts new evidence has been discovered regarding Joseph Rander's statements; specifically, Joseph Rander has signed an affidavit stating he was never at 5911A Highland on the night in question, he does not know Defendant, and any statements attributed to me on that night are false. Defense counsel states he did not know about the facts in the affidavit until he received it in August 2017. Defendant claims the jury would not have found him guilty but for the testimony of Harris about Joseph Rander's statements. Therefore, according to Defendant, a new trial is warranted.

Federal Rule of Criminal Procedure 33 states a court may vacate a judgment and grant a new trial "if the interest of justice so requires." A motion filed under this rule based on newly

discovered evidence must be filed within three years after the jury verdict. Fed. R. Crim. P. 33(b)(1). The moving party must demonstrate:

> (1) the evidence is in fact newly discovered since trial; (2) diligence on his part; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issues involved; and (5) it is probable that the new evidence would produce an acquittal at the new trial.

United States v. Bell, 761 F.3d 900, 911 (8th Cir. 2014). For newly discovered evidence, the test is whether it could have been discovered earlier with due diligence. *Id.*

There are several issues with Defendant's motion that prevent the Court from granting a new trial. First, the evidence is not newly discovered since trial. The Eighth Circuit has held a defendant who does not testify and subsequently comes forward with exculpatory evidence for a co-defendant does not constitute newly discovered evidence. *United States v. Lofton*, 333 F.3d 874, 875-76 (8th Cir. 2003); *United States v. Bell*, 761 F.3d 900, 911 (8th Cir. 2014). Although Defendant cites to a First Circuit opinion which states an exculpatory affidavit from a co-defendant who exercises their Fifth Amendment privilege not to testify may constitute newly discovered evidence, this Court must follow the Eighth Circuit holdings stating the contrary.

Second, it is not clear from defense counsel's affidavit the required due diligence was done to discover this evidence. Defense counsel's affidavit states "Affiant did not have his lawyer's permission to interview Rander and was not aware of the facts in Rander's affidavit." However, there is no indication Defendant subpoenaed Joseph Rander to appear at trial or what attempts were made to interview him. Further, at the time of trial, Defendant was aware Joseph Rander was a co-defendant, he was aware of the facts to which Joseph Rander had pled guilty, and he was aware of Harris's testimony because Harris testified at the pretrial conference. This evidence is not newly discovered; however, even if it could be considered newly discovered, Defendant did not execute due diligence to discover the evidence.

Finally, it is not probable the new evidence would have produced an acquittal in this trial. There was ample evidence introduced at trial of Defendant's guilt including Leah Douglas's testimony, law enforcement testimony, and seizures of drugs. Further, Joseph Rander's testimony

would have been easily impeached with his plea agreement in which he admitted to distributing heroin to Defendant. *See Blackledge v. Allison*, 431 U.S. 63, 77 (1977) (Solemn declarations in court, such as during a plea hearing, carry a "strong presumption of verity."). For these reasons, the Court will deny Defendant's motion for new trial.

III. RELIEF PENDING APPEAL

Defendant currently has an appeal pending before the Eighth Circuit in this case. Pursuant to FRCP 37:

> If a timely motion for relief is made that the court lacks the authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion; or
>
> (3) state either that it would grant the motion if the court of appeals remands for the purpose or that the motion raises a substantial issue.

In accordance with this rule, the Court denies Defendant's motion and does not find it raises a substantial issue.

Accordingly,

IT IS HEREBY ORDERED that Defendant Casey Peeble's Motion for New Trial Based on Newly Discovered Evidence [ECF No. 756] is **DENIED**.

So Ordered this 8th day of February, 2018.

E. RICHARD WEBBER
SENIOR UNITED STATES DISTRICT JUDGE

Exhibit A

to Motion for New Trial Based on Newly Discovered Evidence

State of Arkansas)
) :ss ACKNOWLEDGEMENT
County of St Francis)

AFFIDAVIT

I, Joseph Rander, Registration number 42207044, do depose and state under penalty of perjury, pursuant to Title 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

1.) That I was a defendant in case number 4:14-cr-00345-ERW-DDN, in the Eastern District of Missouri.

2.) That during and throughout the life of the charged case of conspiracy I never knew or came in contact with Casey Peebles.

3.) That I was never at 5911 Highland on the night of April 2-3, 2013.

4.) That any statements attributed to me on that night in the presence of any person is absolutely false.

5.) That at least eleven individuals were contained in the indictment charging me with being a member of the conspiracy. Of the eleven people charged, I do not know Casey Peebles or Leah Douglas.

6.) That the statements made by Quantae Harris in a trial, in case number 4:14-cr-00345-ERW-DDN, United States v. Peebles, were absolutely untrue as they related to me having told him anything in regard to Casey Peebles at any time.

Further, I, the affiant, sayeth not.

Executed on this 13 day of August, 2017

Joseph Rander

Affiant Joseph Rander

Exhibit B

to Motion for New Trial Based on Newly Discovered Evidence

No. S1-4:14-cr-00345-ERW

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. S1-4:14-cr-00345-ERW
	)	
Casey Peebles,	)	
	)	
Defendant.	)	

Affidavit in Support of Motion for New Trial

State of Missouri	)
	) ss
County of St. Louis	)

Affidavit of Patrick Deaton

Thomas Patrick Deaton Jr., being duly sworn, deposes and states:

1. I am Thomas Patrick Deaton Jr., and I am over 18 years of age. I reside at 18 Aberdeen Place, St. Louis, Missouri 63105. I am fully competent to make this affidavit, and I have personal knowledge of the facts stated in this affidavit.

2. I am the attorney for Casey Peebles.

3. Casey Peebles was charged and tried for conspiring to distribute and to possess with intent to distribute heroin and for possessing with intent to distribute a mixture or substance containing a detectable amount of heroin in St. Louis, Missouri.

4. A jury returned verdicts of guilty on both charges on October 7, 2016.

5. In order to render these verdicts, the jury must have found that Joseph Rander sold heroin to Casey Peebles on the night of April 2, 2013, inside an apartment at 5911A Highland Avenue in St. Louis, Missouri. Casey Peebles testified that, on the date in question, (a) he went to that address to meet a woman, (b) he did not obtain a controlled substance, and (c) he did not know Joseph Rander.

6. Since the time that the verdict was returned, Casey Peebles has discovered the existence of crucial evidence on those issues. The affidavit of Joseph Rander shows that Rander was never at 5911A Highland on the night of April 2, and he never knew or came in contact with Casey Peebles.

7. Casey Peebles could not have, despite the exercise of reasonable diligence, discovered the existence of this evidence or presented it at any time before August 23, 2017. Joseph Rander was a codefendant of Casey Peebles. He did not go to trial. He pleaded guilty in federal court. Affiant did not have his lawyer's permission to interview Rander and was not aware of the facts in Rander's affidavit. Although Rander had already been sentenced in federal court by the time of Peebles's trial, Rander still faced the possibility of prosecution in state court because of dual sovereignty.

8. The existence of this new evidence was first brought to my attention when I received the affidavit of Joseph Rander in the mail. The envelope with the affidavit arrived in my box at a UPS store on August 23, 2017. I was not expecting to receive an affidavit from Joseph Rander. I had not solicited the affidavit myself or asked anyone else to contact Rander. I opened the envelope within a week and mailed a copy of the affidavit to Rander's attorney and to Assistant United States Attorney Michael Reilly on August 29, 2017.

9. The affidavit of Joseph Rander shows that the existence of this evidence was first discovered on August 13, 2017, when Rander executed the affidavit.

10. This evidence is not cumulative of any evidence in the trial record because no witness testified that Joseph Rander was not present at 5911A Highland Avenue on the night of April 2, 2013. Casey Peebles did not know Joseph Rander.

11. This evidence is not merely impeaching because it completely contradicts the testimony of Quantiae Harris about what Joseph Rander did and where Rander was on the night of April 2.

12. It is my opinion, as defense counsel, that this newly discovered evidence, as stated in Joseph Rander's affidavit, will prove sufficiently persuasive to produce different verdicts than the ones previously rendered.

13. It is my opinion, as defense counsel, that granting a new trial is necessary to prevent a miscarriage of justice if the verdicts were allowed to stand.

Signed by me on October 30, 2017, at 6383 Clayton Road, St. Louis, Missouri 63117.

Thomas Patrick Deaton Jr.

Thomas Patrick Deaton Jr.

Subscribed and sworn to before me on October 30th, 2017 at 6383 Clayton Road, St. Louis, Missouri 63117.

RANDYYCIA GARRETT
Notary Public - Notary Seal
STATE OF MISSOURI
St. Louis City
My Commission Expires: June 19, 2021
Commission # 17911580

Notary Public

My commission expires: 06-19-2021

Appellant's Exhibit C

August 2018 Affidavit by Joseph Rander

Appeal No. 18-1369

State of Missouri)
City of St. Louis) :SS Acknowledgement

AFFIDAVIT

I, Joseph Rander, do state and depose, under penalty of perjury, that the following is true and accurate, pursuant to title 28 U.S.C Sec. 1746:

1.) That on approximately 13th day of August, 2017, I had prepared and submitted an affidavit for the defense attorney for Casey Peebles in case # 4:14-cr-00345 (ERW) (DDN)

2.) That affidavit specifically targeted statements wrongly attributed to me by government witness Quantee Harris.

3.) That I have made several efforts to contact defense attorney Patrick Deaton.

4.) Each of my efforts have failed. However, it has come to my attention that defense attorney Patrick Deaton, in recognition of ethical concerns, would not speak to me without consent of my attorney of record.

5.) It is important to note that I have been trying to assure defense attorney Patrick Deaton, that I fully intend to testify to the information contained in the aforementioned affidavit of August, 2017.

6.) That my statements therein are true and accurate and that I intend to repeat them under oath, if necessary, whether it is a hearing or trial.

7.) Finally, I fully authorize, the defense, to depose or question me on behalf of Casey Peebles. Clearly, if Casey Peebles convictions rests on statements I never made then I wish to correct this injustice and I am willing to testify to that extent.

Further, I, the affiant, sayeth not.
Executed this 17 day of August, 2018

Affiant Joseph Rander

KESHA RENEA ROBINSON
Notary Public
Commission # 11273024
St. Louis County
Notary Seal
STATE OF MISSOURI
My Commission Expires 11-29-2018

Kesha Renea Robinson
Kesha Renea Robinson
08/17/2018

883 F.3d 1062
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff–Appellee
v.
Casey PEEBLES, Defendant–Appellant

No. 17-1126
|
Submitted: December 15, 2017
|
Filed: March 5, 2018
|
Rehearing and Rehearing En Banc Denied May 10, 2018 *

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of Missouri, No. 4:14-CR-345-ERW/DDN, E. Richard Webber, J., of conspiracy to distribute 100 grams or more of heroin and possession with the intent to distribute 100 grams or more of heroin. Defendant appealed the district court's denial of his motion for judgment of acquittal, as well as a number of evidentiary rulings, 2015 WL 5164997.

Holdings: The Court of Appeals, Erickson, Circuit Judge, held that:

[1] evidence was sufficient to support defendant's conviction for conspiracy to distribute more than 100 grams of heroin;

[2] evidence was sufficient to support defendant's conviction for possession of heroin with the intent to distribute it;

[3] out-of-court statements made by defendant's coconspirators were made in furtherance of drug trafficking conspiracy;

[4] district court's decision to permit expert testimony of law enforcement officer, who testified concerning the modus operandi of drug trafficking operations, was not an abuse of discretion;

[5] exclusionary rule regarding drug courier profile testimony did not apply to law enforcement officer's testimony that drug traffickers had a preference to use young female couriers without extensive criminal histories; and

[6] limitation on cross-examination of two police officers who were part of group of drug task officers assigned to monitor drug trafficking operation, as to their involvement in World Series ticket scandal, did not violate defendant's rights under the Confrontation Clause.

Affirmed.

West Headnotes (22)

[1] **Criminal Law**
⇦ Nature of Decision Appealed from as Affecting Scope of Review
Criminal Law
⇦ Review De Novo
Criminal Law
⇦ Sufficiency of Evidence
Court of Appeals reviews the denial of a motion for judgment of acquittal de novo and will affirm unless, viewing the evidence in the light most favorable to the government and accepting all reasonable inferences which may be drawn in favor of the verdict, no reasonable jury could have found the defendant guilty.
1 Cases that cite this headnote

[2] **Criminal Law**
⇦ Reasonable doubt
Court of Appeals must uphold a verdict if there is an interpretation of the evidence that would allow a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt.
Cases that cite this headnote

[3] **Conspiracy**
⇦ Particular crimes

To convict a defendant for conspiracy to distribute more than 100 grams of heroin, the government has to prove: (1) the existence of an agreement among two or more people to achieve an illegal purpose, (2) the defendant's knowledge of the agreement, and (3) that the defendant knowingly joined and participated in the agreement. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846.

Cases that cite this headnote

[4] **Conspiracy**

Narcotics and dangerous drugs

Evidence was sufficient to support defendant's conviction for conspiracy to distribute more than 100 grams of heroin; informant testified that he personally witnessed a leader of a drug trafficking organization deliver heroin to defendant inside an apartment, defendant's girlfriend at the time testified as to defendant's involvement in distributing heroin and the events that occurred on the night he was apprehended, and their testimony was consistent with law enforcement officers' observations of defendant on the night in question as well as information that the officers learned during the course of their investigation of the drug trafficking organization. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846.

Cases that cite this headnote

[5] **Criminal Law**

Sufficiency of Evidence

Criminal Law

Character of witnesses or testimony in general

The fact that key testimony is provided by cooperating co-conspirators does not undermine the sufficiency of the evidence, as the jury is presumed to take that fact into consideration when determining the credibility of the witnesses.

1 Cases that cite this headnote

[6] **Controlled Substances**

Possession for sale or distribution

To establish that a defendant possessed heroin with the intent to distribute, the government must prove the defendant knowingly possessed the heroin and he intended to distribute it. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1).

Cases that cite this headnote

[7] **Controlled Substances**

Constructive possession

A person who, although not in actual possession, has both knowledge of presence and control over a thing, either directly or through another person, is in constructive possession of it.

1 Cases that cite this headnote

[8] **Controlled Substances**

Possession for sale or distribution

Evidence was sufficient to support defendant's conviction for possession of heroin with the intent to distribute it; a leader of a drug trafficking organization fronted a quarter kilogram of heroin to defendant, defendant took physical possession of the heroin, during traffic stop, officers found the heroin on defendant's girlfriend, who testified that defendant frequently gave her drugs to hold in order to minimize his chances of arrest, and the purported street value of the amount of heroin in question was $15,000 to $18,000, which supported the jury's finding that defendant possessed the heroin with intent to distribute it. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1).

Cases that cite this headnote

[9] **Controlled Substances**

Possession for sale or distribution

An intent to distribute may be established solely by the quantity of drugs. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1).

Cases that cite this headnote

[10] **Criminal Law**
Accomplice or codefendant evidence

Court of Appeals reviews the district court's admission of out-of-court statements of a coconspirator, made during and in furtherance of the conspiracy, for an abuse of discretion, keeping in mind that its discretion is particularly broad in a conspiracy trial. Fed. R. Evid. 801(d)(2)(E).

Cases that cite this headnote

[11] **Criminal Law**
Hearsay

Court of Appeals reviews for clear error the district court's finding that a statement was made in furtherance of a conspiracy, for purposes of determining whether the statement constituted hearsay. Fed. R. Evid. 801(d)(2)(E).

Cases that cite this headnote

[12] **Criminal Law**
Character of acts or declarations

Out-of-court statements made by defendant's coconspirators in drug trafficking conspiracy, as testified to by an informant, including a statement by a leader of a drug trafficking organization that certain people were planning to "come through," that the leader directed informant to "work the door" when defendant showed up to get heroin, and that the leader told informant that he fronted defendant nine ounces of heroin, were statements made in furtherance of the drug trafficking conspiracy, and thus, district court did not abuse its discretion in concluding that statements were not hearsay. Fed. R. Evid. 801(d)(2)(E).

Cases that cite this headnote

[13] **Criminal Law**
Grounds of Admissibility in General

An out-of-court declaration of a coconspirator is admissible against a defendant if the government demonstrates (1) that a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, and (3) that the declaration was made during the course and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E).

Cases that cite this headnote

[14] **Criminal Law**
Admission of evidence

Defendant chose to preemptively introduce his prior burglary conviction during direct examination in his trial for conspiracy to distribute 100 grams or more of heroin and possession with the intent to distribute 100 grams or more of heroin, and thus, he was precluded from raising the issue of the conviction's admissibility on appeal.

Cases that cite this headnote

[15] **Criminal Law**
Admission of evidence

Criminal Law
Credibility and impeachment

Court of Appeals ordinarily reviews for abuse of discretion when considering whether evidence concerning a prior conviction was properly admitted for impeachment purposes; however, when a defendant preemptively introduces evidence of a prior conviction on direct examination, he may not argue on appeal that the admission of such evidence was error. Fed. R. Evid. 609.

Cases that cite this headnote

[16] **Criminal Law**
Sources of data

District court's decision to permit expert testimony of law enforcement officer, who testified concerning the modus operandi of drug trafficking operations, was not an abuse of discretion, although the district court relied on general precedent allowing admission of testimony by expert witnesses in federal drug prosecutions, rather than conducting an independent evaluation of the reliability of officer's testimony; officer's extensive service record related to drug investigations, consisting of 28 years of law enforcement experience and hundreds of narcotics investigations, made plain that his testimony based on experience was reliable and would have satisfied a more detailed, individualized evaluation.

Cases that cite this headnote

[17] **Criminal Law**
Admissibility

Court of Appeals reviews a district court's decision to admit expert testimony for abuse of discretion, according it substantial deference.

Cases that cite this headnote

[18] **Criminal Law**
Practices or modus operandi of offenders

Exclusionary rule regarding drug courier profile testimony did not apply to law enforcement officer's testimony that drug traffickers had a preference to use young female couriers without extensive criminal histories, in defendant's trial for conspiracy to distribute 100 grams or more of heroin and possession with the intent to distribute 100 grams or more of heroin; exclusionary rule was designed to protect criminal defendants from being identified as drug couriers merely based on their profile, but similar concerns were not present in defendant's trial, where the evidence was offered to establish that his girlfriend fit the profile of a drug courier.

Cases that cite this headnote

[19] **Criminal Law**
Opinion evidence

Any error in allowing law enforcement officer's testimony that drug traffickers had a preference to use young female couriers without extensive criminal histories was harmless in defendant's trial for conspiracy to distribute 100 grams or more of heroin and possession with the intent to distribute 100 grams or more of heroin, where defendant's girlfriend provided direct testimony about her role as a courier for defendant.

Cases that cite this headnote

[20] **Criminal Law**
Cross-examination and impeachment

Limitation on cross-examination of two police officers who were part of group of drug task officers assigned to monitor drug trafficking operation, as to their involvement in World Series ticket scandal, did not violate defendant's rights under the Confrontation Clause, in his prosecution for conspiracy to distribute 100 grams or more of heroin and possession with the intent to distribute 100 grams or more of heroin; while questioning the officers about the scandal may have held some probative value, in light of the nature of the officers' testimony and the corroboration of their testimony by a special agent, it was unlikely that a reasonable jury would have received a significantly different impression of their credibility if the evidence had been allowed. U.S. Const. Amend. 6; Fed. R. Evid. 608(b).

1 Cases that cite this headnote

[21] **Witnesses**
Fraud or dishonesty

Cross-examination of a witness regarding specific instances of his or her untruthfulness may be limited or denied if the probative value of the evidence is substantially outweighed

   27a

by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 608(b).

Cases that cite this headnote

[22] **Criminal Law**
Cross-examination and impeachment

A limitation on cross-examination does not violate the Sixth Amendment's Confrontation Clause unless the defendant demonstrates that a reasonable jury might have received a significantly different impression of a witness's credibility if counsel had been allowed to pursue the proposed line of cross-examination. U.S. Const. Amend. 6.

1 Cases that cite this headnote

*1065 Appeal from United States District Court for the Eastern District of Missouri—St. Louis

Attorneys and Law Firms

Stephen R. Casey, Michael A. Reilly, Assistant U.S. Attorneys, Edward Lawrence Dowd, III, U.S. ATTORNEY'S OFFICE, Eastern District of Missouri, Saint Louis, MO, for Plaintiff–Appellee.

Thomas Patrick Deaton, Jr., Saint Louis, MO, for Defendant–Appellant.

Casey Peebles, Pro Se.

Before SMITH, Chief Judge, KELLY and ERICKSON, Circuit Judges.

Opinion

ERICKSON, Circuit Judge.

*1066 A jury convicted Casey Peebles of two offenses for his participation in a drug trafficking conspiracy. Peebles appeals the district court's[1] denial of his motion for judgment of acquittal as well as a number of evidentiary rulings. For the reasons that follow, we affirm.

I.

Following a five-day trial, a jury convicted Peebles of conspiracy to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846 and possession with the intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1). We recount the pertinent evidence in the light most favorable to the verdict.

In 2013, the St. Louis Metropolitan Police Department was investigating the distribution of narcotics out of an apartment located at 5911A Highland Avenue. The investigation revealed that two brothers, Joseph and Thomas Rander, were among the leaders of an organization moving cocaine, marijuana, and heroin from the San Bernardino, California, area to St. Louis, Missouri, for distribution. An informant, who began cooperating with law enforcement officers following his arrest, had advised investigators that members of the organization preferred to use young female couriers to transport the narcotics as they were less likely to draw the attention of law enforcement. The informant also told law enforcement that the organization had recently received and was distributing a kilogram of heroin out of 5911A Highland Avenue.

Armed with this information, law enforcement began surveilling the Highland Avenue apartment building during the late evening hours on April 2, 2013. Just before midnight, the officers observed a dark-colored Land Rover drive up, and a male (later identified as Peebles) get out of the driver's side door. The man walked into the apartment building. A short time later, they saw the man leave the building while holding a bulky object in the right side of his coat and get back inside the Land Rover.

The informant was inside the apartment while the officers were stationed outside. He relayed to law enforcement what happened after Peebles entered the apartment. The officers briefly followed the Land Rover before stopping it. Law enforcement officers encountered Peebles, Vernon Westcott (Peebles's cousin), and Leah Douglas inside the vehicle. Upon approaching the vehicle, Detective Blake Witzman observed Douglas, who was seated in the rear passenger seat, with her right hand and arm down the front of her pants.

When the initial search did not reveal any heroin, the officers called for a female officer to search Douglas more thoroughly. Officer Erin Becherer arrived at the scene and conducted the search of Douglas. Officer Becherer discovered Douglas was concealing a bag containing 247.3 grams (8.723 oz.) of a substance containing heroin. At nearly the same time, another officer arrived with his trained drug-sniffing dog. During a walk-around, the dog alerted to the area near where Douglas had been seated. Douglas, Westcott, and Peebles were arrested and transported to the Drug Enforcement Administration building for questioning.

*1067 Douglas was originally somewhat deceptive during the interview, telling task force officers that she had stolen the heroin from her boyfriend, who was not Peebles or Westcott. By the time of trial, however, Douglas was cooperating and testified that she was dating Peebles at the time of the stop. She explained that she often accompanied Peebles and was asked to hold narcotics for him as they traveled around to distribute the drugs. Douglas testified that on April 2, 2013, she was with Peebles when he drove to the apartment building on Highland Avenue and that Peebles went inside the building for about ten to fifteen minutes. Douglas said that after Peebles drove away, Peebles commented about the police following them, stating "Here come them boys, Cuz." Douglas testified that as Peebles was removed from the vehicle, Westcott handed heroin to Douglas and she hid it in her pants.

At trial, the informant testified about what he observed on April 2, 2013. He told the jury that he saw a male get out of the driver's side door of a dark-colored Land Rover, enter the apartment, and get heroin from Joseph Rander. After Rander delivered the heroin, the informant let the male out of the apartment and the male returned to the Land Rover. The informant did not know the name of the man on the night in question, but identified Peebles in the courtroom as the male he saw that night.

Over Peebles's objection, the informant testified to various statements made on April 2nd by Joseph Rander, including that Rander told the informant to "work the door," or provide security at the apartment while Rander distributed the heroin. The informant also relayed the following additional statements concerning his interactions with Rander:

- "He said Twin people fit'n to come through, we fit'n to be on, we fit'n to be back together."
- "Well, he had got a call, he had got a call from him telling him he was about to pull up; so he had told me to go to the door."
- "When he had left after I had notified the police that he had got the drugs and left, when I had went back upstairs, that's when Joseph Rander had told me he had gave him 9 ounces, he had fronted him."

After the close of evidence, Peebles moved for a judgment of acquittal, arguing the government presented insufficient evidence for a jury to convict him of either charged offense. The district court denied the motion, and the jury found Peebles guilty of both offenses. The district court sentenced Peebles to concurrent 120–month terms of imprisonment on each count.

II.

A. Sufficiency of the Evidence

[1] [2] Peebles first argues that the government presented insufficient evidence to sustain the convictions. We review the denial of a motion for judgment of acquittal *de novo* and will affirm unless, viewing the evidence in the light most favorable to the government and accepting all reasonable inferences which may be drawn in favor of the verdict, no reasonable jury could have found the defendant guilty. United States v. Chatmon, 742 F.3d 350, 352 (8th Cir. 2014). We must uphold the verdict "[i]f there is an interpretation of the evidence that would allow a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt[.]" United States v. Huyck, 849 F.3d 432, 441 (8th Cir. 2017).

[3] [4] To convict Peebles for conspiracy to distribute more than 100 grams of heroin, the government had to prove: "(1) the existence of an agreement among two or more people to achieve an illegal purpose, *1068 (2) the defendant's knowledge of the agreement, and (3) that the defendant knowingly joined and participated in the agreement." United States v. Whirlwind Soldier, 499 F.3d 862, 869 (8th Cir. 2007). The informant testified that he personally witnessed Rander deliver heroin to Peebles inside an apartment at 5911A Highland Avenue. Peebles's girlfriend at the time testified as to Peebles's involvement

in distributing heroin and the events that occurred on April 2, 2013. Their testimony is consistent with the law enforcement officers' observations of Peebles on the night of August 2, 2013, as well as information that the officers had learned during the course of their investigation of the drug trafficking organization.

[5] The fact that key testimony was provided by cooperating co-conspirators does not undermine the sufficiency of the evidence, as the jury is presumed to take that fact into consideration when determining the credibility of the witnesses. United States v. Coleman, 525 F.3d 665, 666 (8th Cir. 2008) (citing United States v. Velazquez, 410 F.3d 1011, 1015–16 (8th Cir. 2005)) ("We have repeatedly upheld jury verdicts based solely on the testimony of co-conspirators and cooperating witnesses, noting that it is within the province of the jury to make credibility assessments and resolve conflicting testimony."). Viewing the evidence in the light most favorable to the verdict, the evidence was more than sufficient to establish that Peebles was a member of a conspiracy to distribute heroin.

[6] [7] To establish that Peebles possessed heroin with the intent to distribute, the government must prove the defendant knowingly possessed the heroin and he intended to distribute it. United States v. Trejo, 831 F.3d 1090, 1094 (8th Cir. 2016). A person who, although not in actual possession, has both knowledge of presence and control over a thing, either directly or through another person, is in constructive possession of it. United States v. Johnson, 18 F.3d 641, 647 (8th Cir. 1994).

[8] Evidence at trial established that Rander fronted a quarter kilogram of heroin to Peebles and that Peebles took physical possession of the heroin. This evidence, along with its reasonable implications, is sufficient to sustain the conviction. Moreover, during the traffic stop, officers found the heroin on Douglas, who testified that Peebles frequently gave her drugs to hold in order to minimize Peebles's chances of arrest. This evidence when coupled with Peebles's presence and conduct at 5911A Highland Avenue was more than sufficient to establish Peebles's constructive possession of the heroin.

[9] As to the second element, an intent to distribute may be established solely by the quantity of drugs. United States v. Serrano–Lopez, 366 F.3d 628, 635 (8th Cir. 2004). The amount in question was a quarter kilogram (nearly nine ounces) of heroin with a purported street value of $15,000 to $18,000. This quantity supports the jury's finding that Peebles possessed with intent to distribute 100 grams or more of heroin.

B. Evidentiary Rulings

1. Co–Conspirator Statements

[10] [11] Peebles argues that the district court erred in admitting statements made by Rander. An out-of-court statement "offered against an opposing party" that "was made by the party's coconspirator during and in furtherance of the conspiracy" is not hearsay. Fed. R. Evid. 801(d)(2)(E). We review the district court's admission of out-of-court statements "under Rule 801(d)(2)(E) for an abuse of discretion, 'keeping in mind that its discretion is particularly broad in a conspiracy trial.' " United States v. Young, 753 F.3d 757, 771 (8th Cir. 2014) (quoting ***1069** United States v. Davis, 457 F.3d 817, 824–25 (8th Cir. 2006)) (citations omitted). Peebles claims the testimony was inadmissible because the evidence did not support a finding that he was a member of the charged conspiracy or that the statements were anything other than idle chatter. We have concluded that the evidence was sufficient to establish Peebles's membership in the charged conspiracy. We now review for clear error the district court's finding that a statement was made in furtherance of a conspiracy. United States v. Beckman, 222 F.3d 512, 522–23 (8th Cir. 2000).

[12] [13] "It is well-established that an out-of-court declaration of a coconspirator is admissible against a defendant if the government demonstrates (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declaration was made during the course and in furtherance of the conspiracy." United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978); see also Fed. R. Evid. 801(d)(2)(E). For the reasons explained above, the government presented ample evidence that Peebles was a member of a drug trafficking conspiracy engaged in the distribution of heroin in the St. Louis area. The government also presented ample evidence that Peebles was a member of the conspiracy with Rander, the informant, and Douglas. Finally, the statements at issue, including that "Twin people fit'n to come through ... [and] be back together"; that Rander directed the informant to "work the door" when Peebles showed up to get the heroin; and that Rander told the informant that he fronted Peebles nine

ounces of heroin, were undoubtedly statements made in furtherance of the drug trafficking conspiracy. The district court did not abuse its discretion in admitting the out-of-court statements under Fed. R. Evid. 801(d)(2)(E).

2. Impeachment by a Prior Conviction

[14] [15] We ordinarily review for abuse of discretion when considering whether evidence concerning a prior conviction was properly admitted for impeachment purposes. United States v. Levine, 700 F.2d 1176, 1182 (8th Cir. 1983). However, when a defendant preemptively introduces evidence of a prior conviction on direct examination, he may not argue on appeal that the admission of such evidence was error. Ohler v. United States, 529 U.S. 753, 759–60, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000). Peebles chose to preemptively introduce his burglary conviction from 2014 during direct examination and thus is precluded from raising this issue on appeal.[2]

3. Use of Law Enforcement Officer as Drug Trafficking Expert

[16] [17] We review a district court's decision to admit expert testimony "for abuse of discretion, according it substantial deference." United States v. Holmes, 751 F.3d 846, 849 (8th Cir. 2014). Peebles raises two issues related to the expert testimony of Officer Edward Clay, who testified concerning the *modus operandi* of drug trafficking operations. First, he argues that the district court did not conduct an independent evaluation of the reliability of Officer Clay's testimony but instead relied on general precedent allowing admission of testimony by expert witnesses in federal drug prosecutions. We have recognized that the "relevant reliability concerns may focus upon personal knowledge or experience rather than scientific foundations." Id. at 850 (quotations omitted). Officer Clay's extensive service record related to drug investigations, consisting of twenty-eight *1070 years of law enforcement experience and hundreds of narcotics investigations, makes plain that his testimony based on experience was reliable and would have satisfied a more detailed, individualized evaluation. Under these circumstances, the district court's decision to permit his testimony was not an abuse of discretion.

Second, Peebles argues that Officer Clay's testimony that drug traffickers have a preference to use young female couriers without extensive criminal histories was impermissible drug courier profile testimony. We have previously disallowed the introduction of drug courier profiles as substantive evidence because it "involves nothing more than the introduction of investigative techniques that law enforcement officers use to identify potential drug couriers." United States v. Schwarck, 719 F.3d 921, 924 (8th Cir. 2013). We have serious reservations that Officer Clay's testimony is drug courier profile evidence. Douglas's testimony detailing her role in the conspiracy was already before the court. Officer Clay provided background information explaining the habits of drug traffickers and couriers. His testimony was likely admissible as *modus operandi* evidence. See United States v. Jeanetta, 533 F.3d 651, 657–58 (8th Cir. 2008) (if the importance of evidence "would not necessarily be apparent to a lay observer," expert testimony may be necessary to explain its significance in "the world of drug dealing").

[18] [19] Even if we accepted Peebles's characterization, the evidence was admissible. Our exclusionary rule was designed to protect criminal defendants from being identified as drug couriers merely based on their profile. Similar concerns are not present when the evidence is offered to establish that someone other than the defendant was potentially a drug courier–as in this case, where the evidence was offered to establish that Douglas fit the profile of a drug courier. Additionally, any error in allowing Officer Clay's testimony would be harmless due to Douglas's direct testimony about her role as a courier for Peebles.

4. Limitation of Cross–Examination Regarding Past Instances of Untruthfulness

[20] [21] Finally, Peebles asserts the district court erred when it precluded him from questioning two police officers, who were part of the group of drug task force officers assigned to monitor 5911A Highland on April 2nd, about their involvement in the 2006 World Series Ticket Scandal. Federal Rule of Evidence 608(b) provides that the district court has discretion when determining if a specific instance of witness untruthfulness may be inquired into on cross-examination. Cross-examination may be limited or denied if the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." United States v. Beck, 557 F.3d 619, 621 (8th Cir. 2009).

[22] A limitation on cross-examination does not violate the Sixth Amendment's Confrontation Clause unless the defendant demonstrates that a reasonable jury might have received a significantly different impression of a witness's credibility if counsel had been allowed to pursue the proposed line of cross-examination. United States v. Jones, 728 F.3d 763, 766 (8th Cir. 2013). We have previously affirmed exclusion of the very evidence Peebles sought to introduce in this case. Beck, 557 F.3d at 620–21. While questioning the officers about the scandal may have held some probative value, in light of the nature of the officers' testimony and the corroboration of their testimony by Special Agent Witzman it is *1071 unlikely a reasonable jury would have "received a significantly different impression" of their credibility if the evidence had been allowed.

III.

For the foregoing reasons, we affirm Peebles's convictions.

All Citations

883 F.3d 1062, 105 Fed. R. Evid. Serv. 1184

Footnotes

* Judge Gruender did not participate in the consideration or decision of this matter.

1 The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri.

2 Even if we were to consider the argument, Peebles has failed to demonstrate the conviction was inadmissible under Fed. R. Crim. P. 609.

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