

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE W. HUBBARD, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2019 U.S. App. LEXIS 34435
No. 17-5853
November 19, 2019, Filed

Editorial Information: Prior History

United States v. Hubbard, 2019 U.S. App. LEXIS 21311 (6th Cir. Ky., July 17, 2019)

Counsel {2019 U.S. App. LEXIS 1} For United States of America, Plaintiff -
Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Ron L. Walker Jr., Assistant U.S.
Attorney, Office of the U.S. Attorney, Lexington, KY.
Lonnie W. Hubbard, Defendant - Appellant, Pro se, Bruceton
Mills, WV.

Judges: Before: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

Opinion

ORDER

Lonnie W. Hubbard, a pro se federal prisoner, has filed a petition for rehearing of this court's order of July 17, 2019, that affirmed his convictions for conspiracy to distribute prescription medication and seventy related counts and the 360-month term of imprisonment imposed by the district court.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

We therefore **DENY** Hubbard's petition for rehearing.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-5853

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 17, 2019
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNIE W. HUBBARD,

Defendant-Appellant.

)
)
)
)
) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
) KENTUCKY
)
)

ORDER

Before: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

Lonnie W. Hubbard, a federal prisoner, appeals his convictions for conspiracy to distribute prescription medication and seventy related counts and the 360-month term of imprisonment imposed by the district court. Counsel indicates that Hubbard has directed counsel to request oral argument but moves to withdraw. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2015, the United States filed a thirty-eight count indictment against Hubbard, a pharmacist; his company, Rx Discount of Berea, PLLC ("Rx Discount"); his wife; and six others. The indictment alleged that the defendants conspired to distribute oxycodone and pseudoephedrine; distributed oxycodone, pseudoephedrine, and hydrocodone; failed to obtain proper identification from persons purchasing pseudoephedrine; maintained a drug premises; and conspired to commit money laundering and other fraudulent financial transactions. Two

Appendix A

superseding indictments were subsequently filed, bringing the total number of charges against Hubbard to seventy-three. An eight-day trial was held in February 2017. During trial, Counts 7 and 47 were dismissed on the motion of the United States. The jury found Hubbard guilty on the remaining seventy-one charges and the district court imposed a total term of imprisonment of 360 months, to be followed by three years of supervised release. The district court also ordered criminal forfeiture of real and personal property, as well as cash. Hubbard filed a motion for a new trial, which was overruled.

On appeal, Hubbard's counsel filed a motion to withdraw, pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967), and Sixth Circuit Rule 12(c)(4)(C), notifying this court of a lack of good-faith issues to appeal. Appellate counsel explained that, after a review of the court record and transcripts, as well as correspondence with Hubbard, he identified the following issues of possible merit: (1) the district court erred in admitting improper character evidence, in violation of Federal Rule of Evidence 404(b), as well as certain other evidence; (2) the evidence was insufficient to convict Hubbard of crimes where he was merely acting as a pharmacist and no conspiracy was demonstrated; (3) the district court erred in permitting opinion testimony by case agents absent a dual-role cautionary jury instruction; (4) the district court otherwise failed to instruct the jury properly as to conspiracy, deliberate ignorance, and operating and maintaining a drug-involved premises; and (5) the district court erred in sentencing Hubbard to 360 months of incarceration and ordering criminal forfeiture. Counsel determined that these arguments would be frivolous, however. Hubbard responded to counsel's motion to withdraw, raising the potential claims submitted by counsel and also alleging that (6) the district court erred by denying his motion for a new trial; (7) his indictment was constructively amended; (8) cumulative error violated his right to due process and a fair trial; and (9) Count 60 of the indictment failed to state an offense.

We subsequently entered an order granting counsel's motion to withdraw, appointing new counsel under the Criminal Justice Act, and allowing the filing of supplemental briefs following the appointment of counsel. Although new counsel was appointed, he filed a motion to withdraw, pursuant to *Anders*, stating that he had nothing to add to original counsel's brief. He did not supplement his motion with a supplemental *Anders* brief. Hubbard filed a supplemental response,

restating the arguments raised in his original response. After independently examining the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 82-83 (1988), and the briefs of counsel and Hubbard, the panel agrees that counsel's motion to withdraw should be granted because no grounds for appeal can be sustained.

Admission of Evidence

First, there are no apparent errors in the admission of evidence. Prior to trial, Hubbard filed a motion in limine to exclude certain evidence, which the district court overruled. Hubbard now asserts that the following evidence was improperly admitted under Rule 404(b) because it was unfairly prejudicial: (a) evidence that Hubbard's self-certification of online training to sell certain chemicals had lapsed during the time of the conspiracy; (b) a photograph of cash taken during a traffic stop; (c) evidence of misfiled prescriptions; (d) evidence of fronting pills; (e) evidence of double-billing; and (f) improperly selling pseudoephedrine in bottles rather than blister packs.

Rule 404(b) provides, in relevant part, that "[e]vidence of a crime, wrongs, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." "Res gestae evidence, also described as 'background' or 'intrinsic' evidence, is 'an exception' to the Rule 404(b) bar on propensity evidence," however. *United States v. Gibbs*, 797 F.3d 416, 423 (6th Cir. 2015) (quoting *United States v. Adams*, 722 F.3d 788, 810 (6th Cir. 2013)). We review a district court's evidentiary rulings for an abuse of discretion. *United States v. Rodriguez-Lopez*, 565 F.3d 312, 314 (6th Cir. 2009).

The record demonstrates that the district court analyzed the challenged evidence pursuant to the analysis developed in this circuit. See *United States v. Ayoub*, 498 F.3d 532, 547 (6th Cir. 2007). The court determined, however, that the evidence was not actually propensity evidence under Rule 404(b), but rather was intrinsic to the crimes charged. No arguable issue could be raised on appeal that this was an abuse of discretion. The lapse of Hubbard's self-certification and his selling of pseudoephedrine in bottles rather than blister packs were relevant to the conspiracy and pseudoephedrine charges (Counts 1, 2-6, 8-14), as well as defenses to be raised. Evidence of

misfilled prescriptions was intrinsic to the conspiracy and distribution charges where there was evidence that Hubbard filled a prescription for oxycodone in July 2015, during the time of the conspiracy, that was not signed by a physician and that he filled the 5 mg prescription with 10 mg pills. Evidence that Hubbard “loaned” pills to patients without prescriptions or before the refill date of the prescription and that the practice was illegal was intertwined with the distribution of oxycodone counts (Counts 49-59). Evidence that Hubbard required patients to pay cash for medications and then also billed Medicare or Medicaid was relevant to the distribution counts (Counts 16-42). And the photograph of the cash was relevant to proving his cash drug sales and money laundering (Counts 62-73).

Hubbard’s overriding argument with respect to the admission of this evidence appears to be that it was prejudicial because there were alternative, innocent explanations for these facts. Even if this evidence has alternative explanations, however, those explanations do not make it irrelevant to the charged acts. “[A]ll evidence tending to prove guilt is prejudicial to a criminal defendant. If it were otherwise, the [prosecution] would not produce it as evidence and the court would not admit it as relevant.” *Bey v. Bagley*, 500 F.3d 514, 522 (6th Cir. 2007). Thus, there is no good-faith basis to argue that the district court abused its discretion by admitting this evidence.

Sufficiency of the Evidence

Next, no arguable issue for appeal could be raised in connection with the sufficiency of the evidence. We will not entertain a defendant’s challenge to the sufficiency of the evidence on appeal unless the defendant moved for a judgment of acquittal under Rule 29 at the close of the government’s case-in-chief and at the close of all the evidence. *United States v. Williams*, 940 F.2d 176, 180 (6th Cir. 1991). Specificity in a Rule 29 motion is not required, but when a defendant makes a motion on specific grounds, all grounds not specified in the motion are waived. *United States v. Dandy*, 998 F.2d 1344, 1356-57 (6th Cir. 1993).

At the close of the government’s case-in-chief, Hubbard’s counsel moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 for insufficient evidence. Counsel stated, “I think specifically mention [sic] was 49 through 59 on the . . . second superseding indictment. I don’t think they put any information on at all about lack of medical need . . . of those people on

those counts.” At the close of all the evidence, Hubbard’s counsel stated “the defense would renew our Rule 29 motions, same reasons and same specifics as 49 through 59 counts.” Because Hubbard’s Rule 29 motion was made as to Counts 49 to 59 only, which related to the distribution of oxycodone, his challenges to the sufficiency of the evidence as to his other convictions are forfeited.

When reviewing a conviction for insufficient evidence, we must inquire “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We will “reverse a judgment for insufficiency of evidence only if, viewing the record as a whole, the judgment is not supported by substantial and competent evidence.” *United States v. Blakeney*, 942 F.2d 1001, 1010 (6th Cir. 1991).

Federal law states that: “[i]t shall be unlawful for any person knowingly or intentionally to . . . distribute . . . a controlled substance.” 21 U.S.C. § 841(a)(1). This court long ago held that “the language in § 841(a)(1) and 21 C.F.R. § 1306.04(a) clearly defines the pharmacist’s responsibilities that give rise to conduct that constitutes an unlawful distribution of a prescription drug.” *United States v. DeBoer*, 966 F.2d 1066, 1068-69 (6th Cir. 1992). “[K]nowingly distributing prescriptions outside the course of professional practice is a sufficient condition to convict a defendant under the criminal statutes relating to controlled substances.” *United States v. Volkman*, 797 F.3d 377, 386 (6th Cir. 2015) (citation omitted).

Viewing the evidence presented in a light most favorable to the government, a rational jury could find that Hubbard knowingly and unlawfully distributed oxycodone. According to his own testimony, Hubbard worked as a pharmacist for about eleven years before he opened Rx Discount, and he was aware that he had a legal duty to ascertain his customers’ medical needs. However, the evidence established that Hubbard ignored numerous red flags about the prescriptions that were coming into his pharmacy in contravention of standard pharmacy practice, warnings from colleagues and industry professionals, and even common sense. The evidence demonstrated that he did the bare minimum to “establish” a relationship with the individuals who were coming to purchase controlled substances, he asked few—if any—questions of the purchasers of controlled

substances regarding their legitimate medical needs, and he continued to sell to individuals that had been arrested for offenses involving controlled substances. Moreover, other pharmacists in the community would not fill the prescriptions that Hubbard was filling, and Hubbard was made aware by multiple drug wholesalers that he was selling too much oxycodone. Despite Hubbard's argument that he filled prescriptions for customers who testified at trial that they had real injuries and medical needs that required prescription medication, a jury could rationally conclude that Hubbard abdicated his duty as a pharmacist to ensure that each of those prescriptions was for a legitimate medical need, even in light of the witnesses' alleged injuries or conditions. No arguable issue could be raised on appeal to challenge the sufficiency of the evidence as it related to Counts 49 to 59.

Jury Instructions

Hubbard next challenges several aspects of the jury instructions. He first asserts that the district court erred in permitting opinion testimony by case agents Jill Lee, Shannon Allen, and Paula York absent a dual-role cautionary jury instruction. Because Hubbard did not object to the lack of such an instruction below, our review is limited to plain error, deciding "whether the instructions, when taken as a whole, were so clearly wrong as to produce a grave miscarriage of justice." *United States v. Miller*, 734 F.3d 530, 538 (6th Cir. 2013) (quoting *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992)).

Federal Rule of Evidence 701 allows non-experts to give "testimony in the form of an opinion" only to the extent the testimony "is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of [Federal] Rule [of Evidence] 702." Lee, Allen, and York—who were all licensed pharmacists—testified as to their training and what they had experienced while working in or observing other pharmacies. They provided opinions that the practices of Rx Discount were outside the norm and that Hubbard was not meeting his obligation to ensure that the drugs he was dispensing were for legitimate medical needs. With respect to York, the district court instructed the jury that she testified as an opinion witness and it was up to the jury to decide how much weight to give to her opinion; in

doing so, the court instructed that the jury could consider her qualifications and how she reached her conclusions.

While neither Lee nor Allen could have explained why they would be concerned about the practices of Rx Discount without speaking about their specialized knowledge of the pharmacy industry, any error in failing to give a cautionary instruction as to Lee and Allen did not affect Hubbard's substantial rights. Because of the instruction given on York's testimony, the jury was aware of how to evaluate a witness's opinion and many of the concerns that Lee and Allen raised were also raised by other witnesses, including two other pharmacists whose opinions Hubbard has not challenged. No non-frivolous issue could be raised on appeal that the failure of the district court to give a cautionary instruction as to Lee and Allen resulted in a grave miscarriage of justice.

Hubbard next argues that the district court otherwise failed to instruct the jury properly as to conspiracy, making it unclear as to whether the jury knew that, to find him guilty, they had to find that he conspired to distribute oxycodone, pseudoephedrine, or both. He also claimed that this resulted in a constructive amendment of his indictment. The record refutes Hubbard's claim, however, and establishes that the jury was clearly instructed as to conspiracy. No non-frivolous argument could therefore be raised as to this instruction or regarding a claim that Hubbard's indictment was constructively amended.

Hubbard next challenges the instruction on his state of mind. In part, this instruction stated: "if you're convinced that the defendant deliberately ignored a high probability that others were using and/or distributing pseudoephedrine or oxycodone without a legitimate medical purpose, then you may find that the defendant knew that others were using and/or distributing these substances without a legitimate medical purpose." Hubbard argues that the instruction was misleading in that pseudoephedrine does not require a medical purpose to be sold and that there were no allegations that "others were using" pseudoephedrine illegally. He asserts that this allowed the jury to convict him of selling pseudoephedrine recklessly.

No arguable issue could be raised in connection with this instruction. Counsel did not object to the instruction and no plain error is evident. There was testimony by multiple witnesses that they used the pseudoephedrine purchased at Rx Discount to manufacture methamphetamine—

an illegal activity. Hubbard's recklessness argument also fails. The district court specifically instructed the jury that "[c]arelessness, negligence, or foolishness . . . is not the same as knowledge, and it's not enough to convict."

Hubbard also argued that it was plain error for the district court not to instruct on "good faith." No non-frivolous argument could be raised in connection with this claim, however. Not only did counsel not object to the lack of a good-faith instruction, but also the judge reviewed with the jury the provisions of 21 U.S.C. § 841(a)(1) and further instructed them that, in order to convict Hubbard, they had to find that he was aware that he was distributing oxycodone without a legitimate medical purpose and that the pseudoephedrine he was selling was being used to manufacture illegal drugs. These instructions effectively informed the jury of the good-faith defense. See *United States v. Carroll*, 518 F.2d 187, 189-90 (6th Cir. 1975) (citing *White v. United States*, 399 F.2d 813, 816-17 (8th Cir. 1968)).

Nor can any non-frivolous argument be raised in connection with the jury instructions on the charge of operating and maintaining a drug-involved premises, Count 60 of the indictment, or that count's failure to state an offense. The record reflects that the district court changed the instructions based on Hubbard's concerns that jurors might believe that distributing pseudoephedrine was, in and of itself, illegal.

Sentence

Next, no arguable issue can be raised on appeal concerning Hubbard's sentence. We review criminal sentences for both substantive and procedural reasonableness. *Gall v. United States*, 552 U.S. 38, 51 (2007). When considering whether a sentence is procedurally reasonable, the court must

ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.

Id.

Hubbard first argues that his sentence is procedurally unreasonable because the district court erred in applying the following enhancements: a two-level enhancement for abusing a position of trust; a two-level enhancement for maintaining a premises for distribution of controlled substances; a four-level enhancement for being an organizer or leader of criminal activity that involved five or more participants; a two-level enhancement for obstructing justice; and a two-level enhancement because the offense involved sophisticated money laundering. Additionally, Hubbard challenges the district court's calculation of his drug quantity.

We review a court's factual findings regarding the application of an enhancement for clear error. *United States v. Begley*, 602 F. App'x 622, 625 (6th Cir. 2015). The government must prove that a defendant's conduct warrants the enhancement by a preponderance of the evidence. *United States v. Wright*, 747 F.3d 399, 412 (6th Cir. 2014).

After reviewing the record, we conclude that no arguable issue could be raised on appeal concerning the challenged enhancements, as each was supported by a preponderance of the evidence. As a pharmacist, Hubbard abused his position of trust, *see* USSG § 3B1.3; Hubbard's conviction for maintaining a premises for distribution of controlled substances more than meets the preponderance standard for application of that enhancement, *see* USSG § 2D1.1(b)(12); Hubbard had decision-making authority over the pharmacy and controlled his employees, which was sufficient to apply the organizer/leader enhancement, *see* USSG § 3B1.1(a); Hubbard engaged in behavior designed to avoid detection and testified falsely about certain matters, which supported the obstruction-of-justice enhancement, *see* USSG § 3C1.1; and Hubbard's money laundering activities involved "layering," which was sufficient to apply the sophisticated-money-laundering enhancement, *see* USSG § 2S1.1(b)(3).

Hubbard also disputes the calculated drug quantity. Drug-quantity approximations are not clearly erroneous if they are "supported by competent evidence" and "err on the side of caution." *United States v. Hernandez*, 227 F.3d 686, 699 (6th Cir. 2000). The district court thoroughly discussed the objection to the calculation. With respect to the pseudoephedrine, the court noted that the calculation was "conservative by about 50 percent." With respect to oxycodone, the district court explained that the evidence supported a "logical inference" that the out-of-state

prescriptions were improper and “that the defendant knew that and was soliciting those individuals that were drug-seeking.” The district court also noted that, for the calculation to lower Hubbard’s base offense level to 37, it would have to be below a marijuana equivalency of 90,000 kilograms. Even assuming that some of the prescriptions were legitimate, it would not make enough difference to affect Hubbard because the probation officer’s conservative calculation was more than three times the amount needed to get to base offense level 38. Because a rational basis supported the drug quantity, no arguable issue could be raised that it was improperly calculated or that Hubbard’s sentence is procedurally unreasonable on this basis.

Hubbard also challenges the substantive reasonableness of his sentence. “Substantive reasonableness focuses on whether a ‘sentence is too long (if a defendant appeals) or too short (if the government appeals).’” *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019) (quoting *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018)). Moreover, we presume that a within-guidelines sentence is reasonable. *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc).

Hubbard’s presentence report calculated his advisory sentencing guidelines range as life imprisonment based on a total offense level of 43 and a criminal history category of I. Because the statutorily authorized maximum sentences were less than the minimum of the advisory guidelines range, the statutory maximum sentences became the guidelines range: 240 months for each of Counts 1-6, 8-14, 16-46, and 48-61; and 120 months for each of Counts 15 and 62-73. Hubbard requested a variance on the basis of his history and characteristics and the sentences being imposed on medical professionals around the country. The government argued that the information on other sentences was insufficient to compare with Hubbard and that a sentence in the guidelines range would be appropriate.

The district court stated that it had considered the information provided by both parties and conducted its own research regarding drug sentences and the need to avoid unwanted sentencing disparities. Considering all of that information, the district court concluded that a variance was not warranted and denied Hubbard’s motion. The district court then explained that it had considered the relevant sentencing factors in 18 U.S.C. § 3553(a). The court highlighted the fact

that Hubbard held a position of trust within the community and violated that trust; when confronted, he tried to claim deliberate ignorance and failed to accept responsibility, even after the jury found him guilty; Hubbard's motive was greed; and the drug quantity involved was "astounding" and the highest the court had ever seen. The district court stated that Hubbard had created a lot of damage to his community through his distribution of thousands and thousands of pills and that, to curb the epidemic of prescription drug abuse in Kentucky, Hubbard was one of the individuals that needed to be guarded against. Considering the nature of Hubbard's conduct and the volume of the drugs being sold, the district court concluded that an appropriate sentence would be 30 years, or 360 months. Because the record does not demonstrate that the district court chose Hubbard's sentence arbitrarily, based it on an impermissible factor, or unreasonably weighed any factor, no good-faith argument could be raised on appeal that the within-guidelines 360-month sentence was substantively unreasonable.

Hubbard also challenges the district court's order that he forfeit real property, vehicles and boats, and certain amounts of currency on the basis that the forfeiture order violates the Eighth Amendment, no conspiracy was proven, and the drug quantity was inflated. Criminal forfeiture is a punishment for violating federal drug laws. *Libretti v. United States*, 516 U.S. 29, 39 (1995). Punishment should be proportional to the crime, but the proportionality required "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Graham v. Florida*, 560 U.S. 48, 60 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)). The evidence at trial established that Hubbard used more than two million dollars in cash from the sale of controlled substances to purchase real estate, vehicles, a boat, recreational water vehicles, and to open a retirement account. The order of forfeiture required that he surrender the items purchased with those proceeds as well as the remainder of the cash obtained from the sales. The order was not therefore "grossly disproportionate." Moreover, the jury's verdict forecloses Hubbard's argument that no conspiracy was proven, and the drug quantity was very conservatively calculated, as discussed above.

Hubbard's Pro Se Arguments

Hubbard makes two other arguments in his pro se brief: that the district court erred by denying his motion for a new trial, and that cumulative error violated his rights to due process and a fair trial. Neither argument will support a non-frivolous claim on appeal.

When considering a motion for a new trial, district judges “may act as a thirteenth juror, assessing the credibility of witnesses and the weight of the evidence.” *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007) (citing *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998)).

The role of the court of appeals, however, is not to sit as a “thirteenth juror” and re-weigh the evidence, but to examine the evidence to determine whether the district court’s ruling that the verdict is not against the manifest weight of the evidence was “a clear and manifest abuse of discretion.”

Lutz, 154 F.3d at 589 (quoting *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988)).

Hubbard’s motion for a new trial was based on his claims that the government failed to demonstrate that he knew or should have known that the pseudoephedrine he was selling would be used to manufacture methamphetamine and failed to prove a lack of medical need in dispensing a controlled substance. He also argued that bad acts were improperly introduced despite his motion in limine. As explained herein, these alleged errors would not support viable claims on appeal. Because these claims lacked merit, the district court did not abuse its discretion by denying Hubbard’s motion for a new trial.

To warrant a new trial, the cumulative effect of any errors must have “deprived [the defendant] of a trial consistent with constitutional guarantees of due process.” *Hernandez*, 227 F.3d at 697. Where, as in this case, no individual ruling has been shown to be erroneous, however, there is no “error” to consider, and the cumulative error doctrine does not warrant reversal. *United States v. Deitz*, 577 F.3d 672, 697 (6th Cir. 2009).

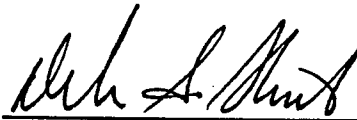
Additional Review

Finally, a review of the remaining trial record reveals no other non-frivolous issue to support an appeal. There were no arguable issues apparent during the parties’ discovery, no violation of Hubbard’s right to a speedy trial, voir dire was unremarkable, and there are no allegations of prosecutorial misconduct. Further, any claims regarding the ineffective assistance

of counsel would be properly raised in a post-conviction proceeding, "where the record regarding counsel's performance can be developed in more detail," rather than on direct appeal. *United States v. Lopez-Medina*, 461 F.3d 724, 737 (6th Cir. 2006).

Hubbard's request that counsel participate in oral argument is **DENIED**. We **GRANT** counsel's motion to withdraw and **AFFIRM** the judgment of the district court.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

**UNITED STATES OF AMERICA, Plaintiff, v. LONNIE W. HUBBARD, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL
DIVISION**

**2017 U.S. Dist. LEXIS 62982
Criminal Action No. 5: 15-104-DCR
April 26, 2017, Decided
April 26, 2017, Filed**

Editorial Information: Subsequent History

Affirmed by, Request denied by, Motion granted by United States v. Hubbard, 2019 U.S. App. LEXIS 21311 (6th Cir. Ky., July 17, 2019)

Counsel {2017 U.S. Dist. LEXIS 1} For Lonnie W. Hubbard, Defendant: James D. Hodge, LEAD ATTORNEY, Hodge Law Firm, London, KY.

For USA, Plaintiff: Lauren Tanner Bradley, Ron L. Walker, Jr., LEAD ATTORNEYS, U.S. Attorney's Office, EDKY, Lexington, KY; David Y. Olinger, Jr., Katherine A. Crytzer, U.S. Attorney's Office, EDKY, Lexington, KY.

Judges: Danny C. Reeves, United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM OPINION AND ORDER

Defendant Lonnie Hubbard has moved the Court for a new trial, arguing that: (i) his convictions were not supported by sufficient evidence¹ and (ii) the Court improperly admitted other act evidence in violation of Fed. R. Evid. 404(b). [Record No. 371] The government disagrees, contending that Hubbard's conviction was not against the manifest weight of the evidence and that the "other act" evidence cited by Hubbard is intrinsic to the charges and is not subject to Rule 404(b). [Record No. 372] Hubbard's motion will be denied for the reasons that follow.

I.

Hubbard was a licensed Kentucky pharmacist who owned RX Discount Pharmacy in Berea, Kentucky. He was the active pharmacist at this business and also employed relief pharmacists to assist him from time-to-time. Law enforcement began investigating Hubbard after one of the relief pharmacists {2017 U.S. Dist. LEXIS 2} reported Hubbard's practices regarding filling out-of-state oxycodone prescriptions.

The United States indicted Hubbard and several others in December 2015. Hubbard was charged with a total of 73 counts, including charges of conspiring to illegally distribute pseudoephedrine and oxycodone; illegally distributing pseudoephedrine; illegally distributing hydrocodone; illegally distributing oxycodone; opening and maintaining a business for the purpose of illegally distributing controlled substances and pseudoephedrine; conspiring to commit money laundering; and money

lyfcases

1

- Appendix C

19450032

laundering. The Court conducted a trial, and the jury ultimately convicted Hubbard of all of the charges presented to it.²

II.

Under Federal Rule of Criminal Procedure 33, a court "may vacate any judgment and grant a new trial if the interest of justice so requires." The rule itself does not define the "interest of justice" or identify the circumstances under which a new trial is appropriate. *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010). However, courts have determined that a defendant is entitled to a new trial where, as relevant here, the "jury's verdict was against the manifest weight of the evidence" or the district court committed a substantial legal error. *Id.* (internal quotation marks and citations {2017 U.S. Dist. LEXIS 3} omitted). Neither showing has been made entitling Hubbard to relief in the present case.

A. Manifest Weight of the Evidence

Sustaining a motion for a new trial based on a claim that the verdict is against the manifest weight of the evidence is appropriate "only in the extraordinary circumstance where the evidence preponderates heavily against the verdict." *United States v. Hughes*, 505 F.3d 578, 592-93 (internal quotation marks and citation omitted). A district court is permitted to assess the credibility of witnesses and weigh the evidence in making this determination. *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998).³

i. Conspiracy Charge

The indictment charges Hubbard with conspiring to distribute pseudoephedrine and oxycodone in violation of 21 U.S.C. §§ 841 and 846. [Record No. 295] This required the government to prove that Hubbard conspired with others to distribute oxycodone outside the scope of his professional practice and without a legitimate medical purpose and to distribute pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance. 21 U.S.C. §§ 841, 846. The jury was instructed that, to find Hubbard guilty of this charge, they must find that the government proved: (1) an agreement to violate the drug laws; and (2) that {2017 U.S. Dist. LEXIS 4} Hubbard knowingly and voluntarily joined the conspiracy.

For the agreement element, the government must prove that the participants in the conspiracy came to some form of mutual understanding regarding the illegal activity. *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990). It is not necessary that the government prove a formal agreement. *United States v. Hughes*, 891 F.2d 597, 601 (6th Cir. 1989) Instead, a conspiracy can be "inferred from acts done with a common purpose" and it is sufficient for the evidence to establish some tacit or implicit understanding. *Id.* "The existence of a conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan." *United States v. Martinez*, 430 F.3d 317, 330 (6th Cir. 2005) (internal quotation marks omitted). Although sales alone do not establish the agreement necessary for proof of a conspiracy, "evidence of repeat purchases from a single source and large volumes of narcotics creates an inference of conspiracy." *United States v. MacLloyd*, 526 Fed. Appx. 434, 439 (6th Cir. 2013) (citations omitted). A pharmacist may conspire to distribute controlled substances illegally "by filling prescriptions of oxycodone for the benefit of numerous drug dealers and fake patients" while knowing or having reason to know that the individuals are obtaining the drugs for illicit use. *United States v. Green*, 818 F.3d 1258, 1275 (11th Cir. 2016).

The jury's verdict convicting Hubbard of conspiring {2017 U.S. Dist. LEXIS 5} to distribute oxycodone in violation of 21 U.S.C. §§ 841 and 846 is not against the manifest weight of the evidence. First, the government introduced evidence of the existence of an agreement to illegally distribute oxycodone

outside the scope of professional practice and not for a legitimate medical purpose. Individuals from Kentucky testified that they would travel to other states to obtain prescriptions for pain medication. These individuals confirmed that they did not have a medical need for the pain medication but, instead, were addicts who were required to travel out-of-state to obtain prescriptions because they were unable to obtain them from doctors in Kentucky. They further reported that they would use the oxycodone or sell it on the street.

There was also ample evidence showing that Hubbard knowingly agreed to distribute oxycodone outside the scope of professional practice and not for a legitimate medical purpose, and that he voluntarily joined the conspiracy by filling these prescriptions. Many government witnesses testified to the numerous "red flags"⁴ suggesting that Hubbard's customers were purchasing oxycodone for illicit purposes. First, the fact that so many customers were bringing prescriptions{2017 U.S. Dist. LEXIS 6} for pain medication from other states was an indication that these prescriptions were illegitimate. Hubbard would require cash payments to fill out-of-state oxycodone prescriptions at inflated prices. There was also evidence that customers would request pills of a certain color, which is indicative of diversion. Simply put, some colors are more valuable than others when being sold on the street.

The evidence of Hubbard's conduct in filling prescriptions also proved that he was aware that the products were intended for illegitimate uses. Witnesses testified that Hubbard told customers not to arrive early or wait outside the pharmacy because he did not want a line in front of his business. There was also evidence that Hubbard attempted to manipulate data regarding the sale of controlled substances by limiting the number of out-of-state prescriptions that he would fill each day, and that he required customers to obtain unnecessary non-controlled medications. Additionally, the government introduced video evidence in which a customer told Hubbard that he was having trouble obtaining prescriptions for controlled substances. Hubbard then provided him with information for an out-of-state pain{2017 U.S. Dist. LEXIS 7} clinic, stating that this clinic was the only place he knew that was "selling any."

Based on the evidence presented during trial, the jury's verdict convicting Hubbard of conspiring to distribute oxycodone outside the scope of professional practice and not for a legitimate medical purpose was not against the manifest weight of the evidence.

Likewise, the jury's verdict convicting Hubbard of conspiring to distribute pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance was not against the manifest weight of the evidence. The government introduced evidence establishing an agreement to distribute pseudoephedrine illegally. Multiple witnesses testified that they would purchase products containing pseudoephedrine from Hubbard's pharmacy. They would then sell it to others who they knew would use it to manufacture methamphetamine or manufacture methamphetamine themselves. There was also proof that Hubbard would sell pseudoephedrine products to customers who had travelled long distances to purchase it from his pharmacy because the pharmacy had a reputation for being an easy place to purchase the product. This{2017 U.S. Dist. LEXIS 8} evidence demonstrated an implicit agreement to distribute pseudoephedrine while knowing or having reasonable cause to believe that it would be used to manufacture methamphetamine in violation of the drug laws.

The evidence also showed that Hubbard knowingly violated the drug laws. Hubbard sold pseudoephedrine products at inflated prices, which is indicative of knowledge that the customers were purchasing the product to manufacture methamphetamine and not for the medicinal purpose for which it is intended. Additionally, Hubbard informed a law enforcement agent that he would sell pseudoephedrine to anyone with "a pulse and an ID," indicating that he adopted a lax approach to

sales that facilitated the purchase of pseudoephedrine products for the purpose of manufacturing methamphetamine. The jury's conviction for conspiracy to distribute pseudoephedrine in violation of the drug laws was not against the manifest weight of the evidence.

ii. Pseudoephedrine Charges

Hubbard was convicted of several counts of distributing pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance in violation of 21 U.S.C. § 841.5 [Record No. 295]{2017 U.S. Dist. LEXIS 9} Hubbard argues that his pseudoephedrine convictions cannot stand because all of his pseudoephedrine sales complied with the requirements imposed by NPLeX.6 This argument is without merit.

The evidence at trial established that Hubbard sold pseudoephedrine products that were used to manufacture methamphetamine. As previously discussed, witnesses testified that they used the pseudoephedrine that Hubbard sold them to manufacture methamphetamine, or sold it to others who used it for that purpose. Additionally, law enforcement officers testified that they investigated methamphetamine labs involving individuals who had purchased the methamphetamine precursor from Hubbard's pharmacy.

The trial evidence also established that Hubbard knew or had reason to know that he was selling pseudoephedrine products to individuals who were using it to manufacture methamphetamine. The data introduced at trial established that Hubbard sold extremely large quantities of pseudoephedrine through his small, independent pharmacy. Hubbard's drug suppliers warned him that his sales of this drug were excessive when they ended their business relationship with him. *See United States v. Warhurst*, 132 Fed. Appx. 795 (11th Cir. 2005) (concluding that the defendant had knowledge that{2017 U.S. Dist. LEXIS 10} he was selling pseudoephedrine illegally based in part on a "call from the compliance coordinator [that] indicate[d] that [the defendant] knew [his] mass sales were a problem").

Hubbard's sales practices also indicate that he knew that his customers were using pseudoephedrine products to manufacture methamphetamine or were selling it to others who were doing so. Witnesses testified that Hubbard charged an inflated price for pseudoephedrine products. The fact that Hubbard knew that his customers were willing to pay increased prices supports the inference that he knew that they were purchasing the pseudoephedrine products for the purpose of making methamphetamine. Witnesses also testified that Hubbard had told them that he would sell pseudoephedrine to anyone with a "pulse and an ID," suggesting that he was intentionally selling large volumes of pseudoephedrine products without regard for the purpose for which the customers were purchasing it. Likewise, it is a fair and reasonable inference that Hubbard either knew or should have known that individuals were traveling long distances to purchase pseudoephedrine from his pharmacy because they were using the product to manufacture methamphetamine rather{2017 U.S. Dist. LEXIS 11} than for legitimate medical purposes.

The government presented more than adequate evidence to establish that Hubbard was selling pseudoephedrine products while knowing that the products were being used to manufacture methamphetamine. Hubbard's argument based on his compliance with the limitations imposed by NPLeX does not alter this conclusion. Hubbard had the ultimate responsibility for determining whether a particular pseudoephedrine sale was appropriate, regardless of the NPLeX limits. Simply put, if he had reason to know that a person would use the product to manufacture methamphetamine, the sale was illegal. This is true regardless of whether the specific quantities that he sold complied with the limitations imposed by NPLeX. NPLeX is designed to assist pharmacists, but it is not intended to be dispositive. Here, the evidence establishes that Hubbard sold pseudoephedrine products while knowing or having reason to know that the products were being

purchased to manufacture methamphetamine. His conduct violated § 841, and it is irrelevant that he complied with NPLeX limits. Accordingly, the jury's verdict on these counts was not against the manifest weight of the evidence.

iii. Hydrocodone{2017 U.S. Dist. LEXIS 12} Charge

The indictment also charged Hubbard with one count of distributing hydrocodone outside the scope of professional practice and not for a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1). [Record No. 295] Hubbard argues that his conviction on this count is against the manifest weight of the evidence because the customer had a legitimate medical need for the medication. However, the evidence introduced at trial established facts to the contrary and the conviction on this charge was not against the manifest weight of the evidence.

The government introduced evidence establishing that Hubbard filled a hydrocodone prescription for a customer who stated that she was being weaned off the medication. However, Hubbard filled two prescriptions within a seven-day period, resulting in the customer receiving all of the drug in a short amount of time—directly contravening the physician's instructions regarding weaning. Additionally, the evidence demonstrated that Hubbard filled the prescription while knowing that it was not for a legitimate medical need. Hubbard required cash as payment for the prescription, despite the customer having insurance coverage. *See Green*, 818 F.3d at 1276 (concluding that the defendants had knowledge{2017 U.S. Dist. LEXIS 13} that many of the pharmacy's customers were drug dealers or using drugs illicitly in part because the customers usually paid in cash, a "tell-tale sign[] of drug abuse").

iv. Oxycodone Charges

The indictment also charges Hubbard with several counts of distributing oxycodone outside the scope of professional practice and not for a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1).⁷ Hubbard argues that the convictions on these counts are against the manifest weight of the evidence because the customers testified that they had a legitimate medical need for the oxycodone and their medical need was verified by MRIs that Hubbard required that they provide. However, the government introduced overwhelming evidence establishing that Hubbard distributed oxycodone illegally. His conviction on these counts was not against the manifest weight of the evidence.

The evidence relating to the circumstances surrounding the prescriptions showed that that they were not for a legitimate medical need. Many of Hubbard's customers were Kentucky residents who traveled long distances to other states to obtain oxycodone prescriptions and then bring them back to Hubbard's pharmacy to be filled. *See Green*, 818 F.3d at 1276 (noting that prescriptions{2017 U.S. Dist. LEXIS 14} put the defendants on "clear notice" that they were for illicit use because the customers "were traveling long distances from the prescribing physician to fill prescriptions"). The physicians prescribing the oxycodone did not specialize in pain management—one physician was a gynecologist and another was a pediatrician. *See, e.g., United States v. Darji*, 609 Fed. Appx. 320, 339 (6th Cir. 2015) (concluding that the pharmacist had illegally distributed controlled substances in part because a prescribing physician was a psychiatrist, who would not normally prescribe hydrocodone). Additionally, many of the physicians were under investigation by the DEA as a result of their controlled substance distribution practices. *See id.*

Government witnesses testified that several aspects of the customer interactions indicated that they were obtaining oxycodone for illicit use. The prescriptions were for 15mg and 30mg doses which is some indication of illicit drug use rather than for legitimate medical need. Similarly, customers would request specific colors when having their prescriptions filled, which suggests that the pills were being

diverted. Certain colors have greater street value. For these reasons, several pharmacists testified that they would not be comfortable{2017 U.S. Dist. LEXIS 15} filling the out-of-state prescriptions that Hubbard regularly filled. See *United States v. DeBoer*, 966 F.2d 1066, 1069 (6th Cir. 1992) (discussing evidence supporting the defendant pharmacist's conviction, including that other pharmacists testified that they would not honor the prescriptions that the pharmacist filled).

Hubbard also told his customers not to wait in line before his pharmacy opened. This is additional evidence that Hubbard was aware that this activity would call attention to his pharmacy's practices. See *Green*, 818 F.3d at 1276 (stating that the "long lines of customers" indicated that the customers were abusing their prescriptions rather than obtaining the drugs for a legitimate purpose). And Hubbard would charge customers inflated fees to fill out-of-state prescriptions and would require that they pay in cash, regardless of whether they had insurance. See *Darji*, 609 Fed. Appx. at 339 (upholding the defendant pharmacist's conviction for illegally distributing controlled substances and noting that he charged highly inflated fees and did not accept insurance). On occasion, he would bill their insurance as well.

The volume of Hubbard's oxycodone sales is also some evidence that he was distributing products outside of professional practice. Several witnesses testified that Hubbard's{2017 U.S. Dist. LEXIS 16} oxycodone sales numbers were staggering for an independent pharmacy in the Berea, Kentucky area. See *DeBoer*, 966 F.2d at 1069 (discussing the pharmacist defendant's abnormally large amounts of controlled substance sales, which indicated that he was selling the drug illegally). Additionally, the evidence indicated that several drug suppliers terminated their business relationship with Hubbard because they were concerned with the high volume of sales of controlled substances. Many suppliers shared these concerns with Hubbard while ending their business relationship with him. See *id.* (opining that a letter from a supplier refusing to continue selling controlled substances to the defendant "because of excessive orders which placed the supplier at risk for violation DEA regulations" supported an inference that the defendant was knowingly selling controlled substances illegally).

The government also introduced evidence that Hubbard sought to manipulate his controlled substance sales numbers. Specifically, he would limit the number of out-of-state oxycodone prescriptions per day and require customers to obtain non-controlled substance medication that they did not need. This evidence demonstrates that Hubbard was{2017 U.S. Dist. LEXIS 17} knowingly distributing oxycodone outside the scope of professional practice. See *Darji*, 609 Fed. Appx. at 336 (discussing the pharmacist defendant's practice of intentionally manipulating his controlled substance orders and shifting prescriptions among his three pharmacies to "avoid DEA scrutiny regarding the amount of hydrocodone coming from his pharmacies").

The evidence further demonstrates that many of Hubbard's customers did not have a legitimate medical need for oxycodone. These customers testified that they obtained oxycodone based on their addictions, and not because they had medical conditions requiring it. They did not have a medical need for the medication and they were required to travel out of state to obtain prescriptions because Kentucky doctors would not write them. The customers further stated that they would obtain their prescriptions from pain clinics where they would not be treated by a physician to determine whether they had a legitimate medical need for the medication. They would, at most, undergo a cursory physical before being provided with a prescription.

Contrary to Hubbard's contention, the MRIs required of his customers did not establish a legitimate medical need for the pain medication.{2017 U.S. Dist. LEXIS 18} Instead, this was attempted cover for Hubbard. Several government witnesses testified that pharmacists are responsible for verifying that a prescription is legitimate before filling it. Pharmacists often comply with this responsibility by

developing a relationship with the patient, familiarizing themselves with the patient's condition, and, if necessary, calling the prescribing physician to confirm the circumstances of the prescription. Requiring an MRI would not accomplish the goal of verifying the prescription's validity, because pharmacists are not qualified to evaluate MRIs. Rather than establish a legitimate medical need, the evidence indicated that the MRIs were designed to provide documentation suggesting that illegitimate prescriptions were in fact based on a legitimate medical need.

The jury's verdict on these counts was not against the manifest weight of the evidence.

v. Remaining Charges

The indictment also charged Hubbard with several counts of money laundering in violation of 18 U.S.C. §§ 1956(h) and 1957, and with maintaining his pharmacy for the purpose of illegally distributing oxycodone and pseudoephedrine in violation of 21 U.S.C. § 856(a)(1). Hubbard does not raise any additional challenges to these charges in {2017 U.S. Dist. LEXIS 19} his motion, and did not do so at trial. However, each of these offenses requires proof that Hubbard distributed drugs illegally. Hubbard presumably argues that, because the government has not established that he distributed drugs illegally, the remaining convictions are against the manifest weight of the evidence. However, based on the evidence discussed previously, the government established that Hubbard illegally distributed oxycodone and pseudoephedrine. Accordingly, it established that element of each of these charges. Hubbard has failed to demonstrate that his convictions on these charges were against the manifest weight of the evidence.

B. Substantial Legal Error

Federal Rule of Criminal Procedure 33 permits a court to "vacate any judgment and grant a new trial if the interest of justice so requires." A court may grant a new trial "where substantial legal error has occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010). Courts have not clearly defined the level of "substantial error" that would warrant a new trial, but the Sixth Circuit has stated that a new trial is available where "the substantial rights of the defendant have been jeopardized by errors or omissions during trial" *Id.* (quoting *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989)).

Hubbard argues that a new trial is appropriate because {2017 U.S. Dist. LEXIS 20} the Court committed a substantial legal error by admitting evidence over his objection.⁸ He identifies evidence that he alleges constitutes "other acts" evidence admitted in violation of Federal Rule of Evidence 404(b). Specifically, Hubbard argues that the Court erred in admitting: evidence that he sold SudoGest; a photograph of large sums of cash found in Hubbard's vehicle that was taken during a traffic stop; evidence that Hubbard failed to maintain his certification to sell pseudoephedrine; evidence of "misfills" and/or forgery relating to certain prescriptions; testimony that Hubbard loaned/fronted pills; and evidence that Hubbard improperly billed insurance.

As an initial matter, even assuming error in admitting the evidence that Hubbard cites, such error would not warrant a new trial. The government presented substantial evidence to establish Hubbard's guilt. There was no shortage of proof from which the jury was able to conclude that Hubbard was guilty of the crimes charged. Given the overwhelming proof demonstrating Hubbard's guilt, the evidence that he identifies is minor. Moreover, Hubbard has not indicated that the admission of the evidence was so prejudicial as to amount to "jeopardiz[ing]" any substantial rights. {2017 U.S. Dist. LEXIS 21} Accordingly, he has not demonstrated that the admission of the evidence amounted to an injustice that would warrant a new trial.

Notwithstanding the foregoing, there was no error in admitting the evidence under Rule 404(b). Rule 404(b) provides that, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's

character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, Rule 404(b) only applies to evidence that is "extrinsic" to the crime charged, which is evidence for which there is a lack of temporal proximity, causal relationship, or special connections between the other acts and the charged offense." *United States v. Chalmers*, 554 Fed. Appx. 440, 450 (6th Cir. 2014). In contrast, the rule does not apply to "background" evidence or evidence that is "intrinsic" to the offense(s) charged. *Id.*

Courts have explained that the "contours of what constitutes 'intrinsic' evidence are not exactly clear" *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013). However, "intrinsic evidence requires a connection to the charged offense." *Id.* It includes that which is "part of a single criminal episode. Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of illegal activity." *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995). The Sixth Circuit has indicated that whether evidence{2017 U.S. Dist. LEXIS 22} is intrinsic depends on whether there is "temporal proximity, causal relationship, or spatial connections between the other acts and the charged offense." *Chalmers*, 554 Fed. Appx. at 450, 451.

Here, the evidence in issue was intrinsic because of the close temporal, spatial, and causal link between it and the offenses charged. The evidence in question was not subject to Rule 404(b) and the Court did not err by admitting it. Hubbard's argument regarding this evidence fails.

During the period charged, Hubbard sold over 1,000 100-count bottles of SudoGest, despite the bottles' being labeled "not for retail sale." A witness testified that he purchased a bottle of the product from Hubbard and used it to manufacture methamphetamine. The indictment charged Hubbard with conspiracy to distribute pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture methamphetamine. Evidence that Hubbard distributed bottles of pseudoephedrine that were not for retail use and to individuals who used them to manufacture methamphetamine is direct evidence of Hubbard's guilt regarding the conspiracy charge. Accordingly, it is intrinsic evidence that is not subject to Rule 404(b).

The government also presented photographs{2017 U.S. Dist. LEXIS 23} of a bank bag of currency taken during an unrelated traffic stop. This evidence is intrinsic to the hydrocodone and oxycodone charges because, as previously discussed, the fact that Hubbard required his customers to pay cash for prescriptions indicated that he was knowingly distributing the pills outside of the scope of professional practice and not for a legitimate medical purpose. The photographs of cash were evidence of the large amounts of cash that Hubbard was collecting at his pharmacy and thus were intrinsic evidence that went directly to proving that Hubbard was filling a large number of illegitimate oxycodone prescriptions. These photographs also were intrinsic evidence regarding the money laundering charges.

There was a temporal, spatial, and causal proximity between the evidence relating to Hubbard's failure to maintain his certification to sell pseudoephedrine and the offenses charged. The government introduced evidence that Hubbard failed to maintain his certification during the time charged in the conspiracy count. The certification evidence was temporally related to this charge. It was also spatially and causally related because it dealt with the manner in which Hubbard{2017 U.S. Dist. LEXIS 24} conducted business in his pharmacy, which is where he sold all of the pseudoephedrine on which the offenses charged were based.

The government also introduced evidence that Hubbard forged and filled a prescription by signing an oxycodone prescription that the prescribing doctor had neglected to sign and also increasing its strength. Forging a doctor's signature and altering a prescription is outside the scope of professional practice for a pharmacist. Accordingly, this evidence was direct proof of the crime charged and was intrinsic evidence of that offense.

Evidence that Hubbard was loaning and fronting pills was also directly related to the crimes charged. The government presented evidence that Hubbard would provide customers with partial fills of their oxycodone prescriptions before the date for filling that the prescription itself provided. Pharmacist witnesses testified that they would not engage in this practice because they are not permitted to fill prescriptions prior to the date that they are set to be filled. This evidence demonstrated that Hubbard was distributing oxycodone outside the scope of professional practice, as charged in the indictment.

Finally, evidence that Hubbard{2017 U.S. Dist. LEXIS 25} improperly billed Medicare and Medicaid for various prescriptions was intrinsic to the crimes charged. When filling out-of-state oxycodone prescriptions, Hubbard would charge inflated cash prices and also bill the customer's insurance. Requiring cash payments was direct evidence that Hubbard was knowingly distributing oxycodone outside the scope of professional practice and not for a legitimate medical purpose. Additionally, the conduct was temporally related to crimes charged because it occurred contemporaneously with the offenses. It was also spatially and causally related because it occurred in the same pharmacy from which Hubbard was illegally distributing controlled substances and also dealt with the manner in which he was distributing those substances.

For these reasons, the evidence that Hubbard identifies in his motion for a new trial was intrinsic to the offenses charged. Accordingly, Rule 404(b) does not apply and Hubbard's argument that the evidence was admitted improperly fails.

III.

For the foregoing reasons, it is hereby

ORDERED that Hubbard's motion for a new trial [Record No. 371] is **DENIED**.

This 26th day of April, 2017.

Signed By:

/s/ Danny C. Reeves

United States District Judge

Footnotes

1

As will be discussed, Hubbard incorrectly makes his argument by reference to the sufficiency of the evidence. Sufficiency of the evidence is the standard that is applicable to motions for acquittal under Fed. R. Crim. P. 29. The standard applicable to a motion for a new trial is whether the conviction is against the manifest weight of the evidence.

2

The government dismissed some of the counts in the indictment before the case was submitted to the jury.

3

Hubbard often refers to the "sufficiency" of the evidence in his motion for a new trial. However, the sufficiency of the evidence is the standard of review applicable to a motion for an acquittal under Rule 29. *United States v. Hughes*, 505 F.3d 578, 592 (6th Cir. 2007). In contrast, the standard that applies for a motion for a new trial under Rule 33 is whether the jury's verdict is against the manifest

weight of the evidence. *Id.* Because Hubbard filed a motion for a new trial, that is the standard under which the Court will evaluate his motion. In any event, for the reasons discussed below, there is also sufficient evidence upon which a reasonable trier of fact could have relied to convict Hubbard of the crimes charged.

4

As explained at trial, the DEA has identified numerous red flags, which indicate that a pharmacist's practices in selling controlled substances and/or listed chemicals may violate the drug laws.

5

Some of the counts of the indictment charged the illegal distribution of pseudoephedrine while aided and abetted by others in violation of 18 U.S.C. § 2. Because of the generalized nature of Hubbard's argument, this distinction is not relevant for purposes of this analysis.

6

NPLeX is a system that pharmacists use to assist them in selling pseudoephedrine products. The system imposes limits on the quantity of pseudoephedrine that an individual customer is permitted to purchase in a day or a month. Pharmacists enter a customer's information into the system and the system indicates whether the customer is permitted to purchase the pseudoephedrine.

7

Some of the oxycodone counts charged Hubbard with distribution, aided and abetted by others. This distinction is not relevant for purposes of addressing Hubbard's argument.

8

Hubbard also makes a brief argument that a new trial is appropriate because "essential elements were not proven in the trial," which raises the same challenge as his argument relating to the adequacy of the evidence supporting his convictions. For the reasons outlined in the prior section, the government introduced evidence establishing all elements of the crimes charged. This argument lacks merit.