PUBLISH

FILED
United States Court of Appeals
Tenth Circuit

August 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. CARL ALVIN CUSHING, Defendant - Appellant.	No. 19-7052
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. KRIS LEE HALL, Defendant - Appellant.	No. 19-7054

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA (D.C. NOS. 6:18-CR-00016-RAW-7 & 6:18-CR-00016-RAW-9)

William D. Lunn, William D. Lunn Attorney at Law, Tulsa, Oklahoma, for Appellant Cushing.

Andrea D. Miller (Robert Lee Wyatt IV, Wyatt Law Office, with her on the briefs), Oklahoma City, Oklahoma, for Appellant Hall.

Linda A. Epperley, Assistant United States Attorney (Brian J. Kuester, United States Attorney, and Robert A. Wallace, Assistant United States Attorney, with her on the brief), Office of the United States Attorney, Muskogee, Oklahoma, for Appellee.

Before **TYMKOVICH**, Chief Judge**, BALDOCK** and **BACHARACH**, Circuit Judges.

TYMKOVICH, Chief Judge.

Carl Cushing and Kris Hall were convicted by a jury of a drug conspiracy to distribute large quantities of methamphetamine. On appeal, Cushing and Hall raise a number of challenges to their convictions. As we explain in detail below, none of these claims has merit. We hold that, among other things, the evidence was sufficient to convict both Cushing and Hall of the drug conspiracy, the district court did not err in admitting res gestae evidence to provide the jury appropriate context to the crime, and the expert testimony presented at trial was properly admitted.

Exercising jurisdiction under 28 U.S.C. § 1291, we accordingly affirm.

I. Background

This case centers around a methamphetamine distribution operation in Oklahoma. In 2007, Waylon Williams started transporting and selling marijuana in quantities of about 100 pounds every couple of weeks. When Williams fell into debt with his supplier around 2013, he began dealing methamphetamine, starting at a pound for $15,000 every few weeks. Several years into his operation, Williams was receiving "upwards of five to ten pounds of

methamphetamine at one time." Hall, R., Vol. 2 at 480.[1] Initially, he obtained the methamphetamine from a source in Oklahoma City and sold it near his home in the Stilwell, Oklahoma, area.

When Williams began selling methamphetamine, he started by selling to "people [who] were involved with meth or did meth," which were "mostly . . . a lot of [Williams's] friends." Hall, R., Vol. 4 at 639. These friends included Kris Hall and co-conspirator J.C., both who had been school friends of Williams. Williams also gave methamphetamine away to others and hosted parties—where guests would use methamphetamine—in his barn at his rural residence. Williams began selling to J.C. in 2014 and to Hall in 2015. Williams had not previously used methamphetamine with Carl Cushing, but he nevertheless began selling to Cushing in 2014. Within about a year, Cushing became Williams's second-largest customer. Williams often "fronted" methamphetamine to Cushing and collected money later. Hall, R., Vol. 4 at 661. By late 2017, Williams was sourcing his methamphetamine from J.C.

But by then, Williams's activities had already attracted the attention of the Oklahoma Bureau of Narcotics and Dangerous Drugs (OBN). In 2017, the Drug Enforcement Administration (DEA) contacted Agent John Morrison of the OBN about a wiretap investigation the DEA was performing on Williams's Oklahoma

[1] For ease of reading and because the trial transcript is the same for both defendants, our references to the record for both defendants are to Hall's submitted record. Citations are styled as Hall, R., Vol. [Number] at [Page Number].

City source. From this, the DEA was able to obtain Williams's phone number and communicate it to Agent Morrison. Around the same time, a search warrant had been served at Williams's residence by the Adair County Sheriff's Office, which in turn informed Agent Morrison of the search. Agent Morrison made the link between the phone number provided by the DEA wiretap investigation and Williams's residence through surveillance.

Agent Morrison successfully requested a pen register for Williams's cell phone number, which kept track of the numbers with which Williams was in contact and the duration of the calls. From this pen register data, Agent Morrison was ultimately able to identify numbers belonging to Cushing and Hall. Agent Morrison also obtained a warrant to install a GPS tracker on Williams's vehicle. Based on these investigative techniques, Agent Morrison received authorization in November 2017 for a wiretap on Williams's cell phone of all incoming and outgoing communications.

The wiretap yielded information about the numbers who contacted Williams and whom Williams contacted. The recorded calls and text messages—along with additional information from a jailhouse interview of another customer of Williams, M.W.—also provided information about particular patterns of Williams's drug dealing. For example, Williams's failure to respond to a text message often indicated to the customer to proceed to his house for a deal anyway. He also told his customers to not talk on the phone about drugs and to use vague terminology when talking about drugs. Based on the numbers who

contacted Williams frequently, Agent Morrison obtained search warrants to wiretap the phone numbers of several others, including Cushing, Hall, J.C., and B.S.—all of whom would be among those ultimately charged in the superseding indictment. In early 2018, the investigation became more "aggressive" as the drug task force increasingly stopped vehicles leaving Williams's property. Hall, R., Vol. 2 at 419. Some of these stops helped identity the users of the cell phone numbers on the wiretaps, such as Hall.

On January 29, 2018, Agent Morrison and other officers carried out a search warrant on Williams's property. Williams was tipped off by someone who had seen the police gathering nearby before entering his property, and he called his girlfriend—and co-conspirator—C.B. to tell her to destroy something in his workshop. Williams went into a wooded area when the police arrived but soon emerged onto a county road and turned himself in. The officers arrested Williams. Williams immediately began to cooperate with the officials, providing information about his methamphetamine business.

Six weeks later, a search warrant was executed at Cushing's residence. Officers found methamphetamine residue and security cameras but little else. Cushing was not present, though his girlfriend was. Around the same time, officers searched Hall's house and found scales, marijuana paraphernalia, two stolen firearms, sandwich baggies, and security cameras. They did not find methamphetamine.

In March 2018, a grand jury handed down a superseding indictment for conspiracy to "knowingly and intentionally distribute and possess with the intent to distribute" more than 500 grams of methamphetamine. The indictment named twelve individuals, including Williams, Cushing, Hall, and B.S. Hall was arrested at his residence on March 22, 2018. But on that same day, officers found that Cushing had fled from his home. From an interview with Cushing's girlfriend, who was at Cushing's residence when the search warrant was served, officers discovered that Cushing was hiding at a cabin in Proctor, Oklahoma. On April 25, 2018, officers arrived at the cabin to execute an arrest warrant and found Cushing. The officers saw methamphetamine in plain view on the kitchen table, and when they searched the house pursuant to a search warrant, they also found a canister in the bathroom with 18.68 grams of methamphetamine inside. Cushing was arrested. In response to the charge in the indictment, Williams and eight others entered plea deals. Cushing, Hall, and B.S. proceeded together to trial.

At trial, the jury heard testimony from Agent Morrison as well as Williams, and both of their testimonies were integral to the government's case. During the testimony of both Agent Morrison and Williams, the government introduced calls and texts exchanged with the defendants that had been intercepted by the wiretap. Relevant to this appeal, the jury heard from other individuals who knew Williams, Cushing, Hall, or B.S., many of whom testified to Cushing and Hall's use of drugs and whether they provided them to others in furtherance of the

conspiracy. The jury also heard testimony from DEA Agent Brian Epps, a law enforcement officer with professional experience in methamphetamine distribution and conspiracy enforcement. Agent Epps testified as an expert on methamphetamine distribution slang, culture, and methods.

At the end of trial, the jury found B.S. not guilty but Cushing and Hall guilty. Cushing and Hall each appealed, and we consolidate their appeals here.

II. Analysis

On direct appeal, Cushing and Hall raise many of the same challenges to their trial. They contend that (1) the evidence presented by the government was insufficient to sustain the conspiracy convictions because it failed to prove interdependence as well as the existence of a single conspiracy; (2) a variance between the indictment and the trial evidence resulted in prejudice; (3) the district court erred in admitting evidence of other acts under Federal Rule of Evidence 404(b); (4) the district court erred in permitting a law enforcement officer to testify as an expert on drug conspiracy matters; and (5) cumulative error warrants reversal.

Hall additionally argues that the district court erred in denying a requested jury instruction for multiple conspiracies. Cushing also contends the district court plainly erred in not declaring a mistrial *sua sponte* after an ambiguous statement during Williams's testimony about someone going to prison purportedly pointed to Cushing.

We first address sufficiency of the evidence, variance, and the jury instruction claims. We then address the admission of the evidence of other acts under Federal Rule of Evidence 404. Then, we discuss the improper expert testimony claim, followed by the witness-comment argument. Finally, we address the cumulative error claim.

A. Sufficiency of the Evidence for Conspiracy Convictions

1. Standard of Review

We "review the sufficiency of the evidence to support a conviction . . . de novo." *United States v. Wyatt*, 964 F.3d 947, 952 (10th Cir. 2020) (quoting *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013)). "We view the evidence in the light most favorable to the government to determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt." *United States v. Johnson*, 821 F.3d 1194, 1201 (10th Cir. 2016). Reversal is appropriate "only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hernandez*, 509 F.3d 1290, 1295 (10th Cir. 2007).

As for variance—which is essentially an attack on the interdependence element of conspiracy—we also engage in de novo review in determining whether there was a variance between the charged crime and the evidence presented at trial. *United States v. Hill*, 786 F.3d 1254, 1266 (10th Cir. 2015). "We treat a conspiracy variance claim as an attack on the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same

conspiracy." *Id.* (internal quotation marks omitted). As a result, "we view the evidence and draw all reasonable inferences therefrom in the light most favorable to the government, asking whether a reasonable jury could have found the defendant guilty of the charged conspiracy beyond a reasonable doubt." *United States v. Caldwell*, 589 F.3d 1323, 1328 (10th Cir. 2009) (internal quotation marks omitted; alterations incorporated).

Accordingly, "this court does not decide credibility issues or reweigh the evidence." *Johnson*, 821 F.3d at 1201. Rather, we "accept the jury's resolution of conflicting evidence[] [a]s long as the possible inferences are reasonable" because "it was for the jury, not the court, to determine what may have occurred." *Id.* (internal quotation marks omitted). While the "evidence supporting a conviction must do more than raise a mere suspicion of guilt," *United States v. Hutchinson*, 573 F.3d 1011, 1033 (10th Cir. 2009), the only question is "whether the government's evidence, credited as true, suffices to establish the elements of the crime," *Johnson*, 821 F.3d at 1201 (internal quotation marks omitted).

2. Conspiracy

To convict a criminal defendant of conspiracy, the government must prove (1) the defendant and another person agreed to violate the law, (2) the defendant's "knowledge of the essential objective of the conspiracy," (3) the defendant's "knowing and voluntary involvement," and (4) "interdependence among the alleged coconspirators." *United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000); *see also United States v. Patterson*, 713 F.3d 1237, 1245

(10th Cir. 2013). "By necessity, the government may establish these elements by direct or circumstantial evidence." *United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992). "[A]n inference is only reasonable where there exists a probability that the conclusion flows from the proven facts." *Rahseparian*, 231, F.3d at 1262 (internal quotation marks omitted).

For the first element, the "agreement need not be explicit, but rather may be inferred from the facts and circumstances of the case. An agreement to distribute drugs can sometimes rationally be inferred from frequent contacts among the defendants and from their joint appearances at transactions and negotiations." *Evans*, 970 F.2d at 669. Mere association, casual transactions, and a solely buyer-seller relationship between the defendant and member of the conspiracy are not sufficient. *Id.*

For the second, the defendant must share a "common purpose or design with his alleged coconspirators," such as distributing large amounts of drugs. *Id.* When establishing a conspiracy on the basis of purchases and sales, "[e]vidence that an intermediate distributor bought from a supplier might be sufficient to link that buyer to a conspiracy to distribute drugs because both buyer and seller share the distribution objective." *Id.* An individual who is merely a consumer "generally does not share the distribution objective and thus would not be part of a conspiracy to *distribute* [drugs]." *Id.* (emphasis in original); *see also United States v. Ivy*, 83 F.3d 1266, 1285 (10th Cir. 1996) ("[A] consumer generally does not share the distribution objective and thus would not be part of a conspiracy to

distribute crack cocaine." (emphasis in original)). "[T]he purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors, who do intend to redistribute drugs for profit, thereby furthering the objective of the conspiracy." *Ivy*, 83 F.3d at 1285–86.

The third element requires the government to prove knowing and voluntary participation. A "conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy, . . . but he or she must have a general awareness of both the scope and the objective of the enterprise to be regarded as a coconspirator." *Evans*, 970 F.2d at 669–70 (internal citation and quotation marks omitted). Yet "[m]ere knowledge of illegal activity, even in conjunction with participation in a small part of the conspiracy, does not by itself establish that a person has joined in the grand conspiracy." *Id.* at 670.

And for the fourth element, "[i]nterdependence is present if the activities of a defendant charged with conspiracy facilitated the endeavors of other alleged coconspirators or facilitated the venture as a whole." *Johnson*, 821 F.3d at 1203 (quoting *United States v. Wardell*, 591 F.3d 1279, 1291 (10th Cir. 2009)). "What is required is a *shared*, single criminal objective, not just similar or parallel objectives between similarly situated people." *Evans*, 970 F.2d at 670 (emphasis in original). The government must prove that the coconspirators "intended to act together for their shared mutual benefit within the scope of the conspiracy

charged." *Id.* at 671 (emphasis removed). "[I]nterdependence exists where 'each co-conspirators[']s activities constituted essential and integral steps toward the realization of a common, illicit goal.'" *United States v. Edwards*, 69 F.3d 419, 431 (10th Cir. 1995) (quoting *United States v. Fox*, 902 F.2d 1508, 1514 (10th Cir. 1990)).

3. Variance

A variance claim is essentially an attack on the interdependence element of conspiracy. *See Hill*, 786 F.3d at 1266. In the conspiracy context, a "variance arises when an indictment charges a single conspiracy but the evidence presented at trial proves only the existence of multiple conspiracies." *United States v. Carnagie*, 533 F.3d 1231, 1237 (10th Cir. 2008); *see also Caldwell*, 589 F.3d 1328. A variance challenge is essentially a challenge against the sufficiency of the government's evidence on the interdependence element of conspiracy. *See Hill*, 786 F.3d at 1266; *Edwards*, 69 F.3d at 432 ("In determining whether a single conspiracy existed, a focal point of the analysis is whether the alleged coconspirators' conduct exhibited interdependence."). "Interdependence requires that each co-conspirator must have a shared criminal objective, not just similar or parallel objectives between similarly situated people." *Hill*, 786 F.3d at 1266. Consequently, "[w]e must evaluate 'what kind of agreement or understanding existed as to each defendant.'" *Id.* (quoting *United States v. Record*, 873 F.2d 1363, 1368 (10th Cir. 1989)).

But "[e]ven if we determine that a variance occurred, we need not reverse the district court unless we determine that the defendant was substantially prejudiced by the variance." *Id.*; *see also Edwards*, 69 F.3d at 432 ("However, a variance is not fatal to the government's case unless the variance affects 'the substantial rights of the accused.'" (quoting *Berger v. United States*, 295 U.S. 78, 82 (1935))). "A variance can be prejudicial by either failing to put the defendant on sufficient notice of the charges against him, or"—as relevant in this case—"by causing the jury to determine the defendant's guilt by relying on evidence presented against other defendants who were involved in separate conspiracies (the so-called 'spillover effect')." *Hill*, 786 F.3d at 1266 (first internal citation omitted; quoting *Edwards*, 69 F.3d at 433). "When deciding whether a prejudicial spillover occurred, we consider (1) whether the separate conspiracies affected the jury's ability to evaluate each defendant's individual actions, (2) whether the variance caused the jury to misuse evidence, and (3) the strength of the evidence underlying the conviction." *Hill*, 786 F.3d at 1266; *see also Carnagie*, 533 F.3d at 1241.

4. Evidence Against Cushing and Hall

Cushing argues that the government failed to present sufficient evidence to convict him on the conspiracy charge and that he was prejudiced by a variance in the evidence presented at trial. Hall also raises a sufficiency-of-the-evidence claim, contending that the government's failure to prove the elements of conspiracy resulted in a prejudicial variance. We address these claims in turn,

ultimately concluding that the evidence was sufficient to sustain Cushing and Hall's convictions and that neither was prejudiced by a variance at the trial.

The superseding indictment in this case, filed in March 2018, characterized the object of the conspiracy as follows:

> Beginning on a date in 2014, the exact date being unknown to the Grand Jury, and continuing until or about January 29, 2018, in the Eastern District of Oklahoma and elsewhere, [Defendants, including Carl Alvin Cushing and Kris Lee Hall], defendants herein, did willfully and knowingly combine, conspire, confederate, and agree together, and with others known and unknown to the Grand Jury, to commit offenses against the United States in violation of [21 U.S.C. § 846], as follows: 1. To knowingly and intentionally distribute and possess with the intent to distribute in excess of 500 grams of a mixture or substance containing a detectable amount of methamphetamine . . . .

Hall R., Vol. 1 at 65.

a. Cushing

Cushing raises sufficiency of the evidence issues, contending that the government failed to establish more than a buyer-seller relationship between Cushing and Williams. He also makes a variance argument, contending that the evidence did not prove interdependence between Cushing and the other co-conspirators to tie Cushing to Williams's distribution organization. We reject these arguments.

At trial, the government presented evidence that Williams regularly sold Cushing two ounces per month, starting in 2014, and that Cushing was his second-largest client. After the biggest customer, who received four to six

ounces a month, Cushing and one other man received two ounces a month. Additionally, Williams testified that he had frequently provided methamphetamine on credit to Cushing. Because a call from Cushing "was going to benefit [Williams] financially most of the time," Cushing was one of the few people for whom Williams would answer the phone. Hall, R., Vol. 4 at 675. Williams also testified that he did not know who Cushing was selling to, and Williams told the court that some of his customers were users and some were dealers.

In addition, one co-conspirator, A.K., testified that she would regularly go to Cushing's residence to buy methamphetamine, usually paying $20 for a quarter gram or $40 for a half gram. She told the court that she would often go to Cushing's bedroom to complete the transaction. While she would often smoke the methamphetamine she obtained from Cushing, she would also sell it to others for cash. A.K. also testified that she bought methamphetamine from Williams and sometimes sold it to others. She also saw Cushing and Cushing's girlfriend at Williams's residence. And she also saw Cushing sell methamphetamine to others. Finally, A.K. would go over to Cushing's residence to hang out and attend parties—gatherings at which she saw people smoke methamphetamine to get high. Cushing's girlfriend also testified that she and Cushing used about a gram of methamphetamine on a daily basis, which Cushing provided.

Furthermore, the government introduced into evidence dozens of text messages between Cushing and others that pointed toward methamphetamine

dealing. These include, for example, a text message exchange reading "Carl this is Sheila I ne3d just 20 can I grab it," followed by "Please wouldn't ask but down and out[.]" Hall, R., Vol. 7 at 1391. Other examples of text messages that suggested Cushing was dealing methamphetamine, all admitted during Agent Morrison's testimony about the wiretap, were seen by the jury. Several of these exchanges—with various numbers, which are denoted by the last four digits of the callers' numbers—are listed below with the trial exhibit designation, the 2018 dates of the text messages, and the contents.

Ex. 37	1/3	Caller 2914: Hey bud can I swing by?
	1/3	Caller 2914: U home bud
	1/3	Cushing's Number: Headed back from Springdale
	1/3	Caller 2914: Ok u got anything on u? Got cash
	1/3	Caller 2914: I can meet u at Atwood's again if so
	1/3	Cushing's Number: Nothing with me
	1/3	Caller 2914: Kk man Ill head to your house in a bit cool?
	1/3	Cushing's Number: Ok
	1/3	Caller 2914: Getting gas at station 2 then headed that way
	1/3	Caller 2914: I just pulled in
	1/3	Cushing's Number: We're just coming tru siloam
	1/3	Caller 2914: Ok
	1/3	Caller 2914: It's cool man I'll wait
	1/3	Cushing's Number: Ok
Ex. 39	1/7	Caller 3473: U guys still up
	1/7	Caller 3473: Was going to come get sum stuff
	1/7	Caller 3473: Swing by my house on your way through or holler when you go through

Ex. 47	1/4	Caller 4420: I kown I owe you 1 besides this but I will have to separate it
	1/4	Caller 4420: Could I get any kind of a deal with 400 cash . . . The ole boy I deal with is laid up with some piece of ass in Fayetteville don't know when he's coming home
Ex. 49	1/5	Caller 5949: Thank you Carl, I appreciate everything u do. Love u
	1/5	Caller 5949: She picked me up, we're here at her house she needed to stop here for a min I just want to know what it weighs cuz I'm sure they will weigh it there.
	1/5	Caller 5949: And as shitty as she is being to me I wouldn't be surprised if it come up short. Just saying
	1/5	Cushing's Number: Both weights and a half for u
	1/5	Caller 5949: Okay last thing I promise....can I keep 10 bucks
	1/7	Caller 5949: I got100
	1/6	Cushing's Number: O.k. but it was. 20 short[2]

Hall, R., Vol. at 1393–1409.

Based on this evidence—and taking it in the light most favorable to the government—a reasonable jury could conclude beyond a reasonable doubt that Cushing was obtaining large enough quantities to sell to multiple people. As the government asserted in its brief, this was no isolated drug purchase. The jury's conclusion that Cushing was not just purchasing methamphetamine from Williams but also reselling it is reasonable and sufficiently supported by the

[2] The discrepancy in receipt date between these last two messages is contained in the exhibit but was not addressed at trial or by any party on appeal.

evidence presented at trial. Cushing had been regularly buying methamphetamine in large quantities to sell to multiple buyers, in furtherance of the goal of distributing the charged quantity of methamphetamine. Williams provided methamphetamine to Cushing on credit, from which the jury could reasonably infer that Cushing meant to pay this debt by selling the drug to others. Williams listed Cushing as one of his biggest customers, in addition to testifying that he knew some of his (Williams's) customers were dealers. Although Williams testified that he did not know if Cushing was dealing, A.K. and Cushing's girlfriend testified that Cushing had sold or provided methamphetamine to them and others.

And in addition to the testimony of both A.K. and Cushing's girlfriend that they obtained methamphetamine from Cushing, the jury also saw a number of text messages that indicated Cushing was dealing to multiple other people. A text from "Sheila" told Cushing she "[needed] 20," followed by another text that said, "Please wouldn't ask but down and out[.]" Hall, R., Vol. 7 at 1391. Another number texted Cushing, saying that "the ole boy I deal with" is unavailable and asking for "any kind of a deal with 400 cash." Hall, R., Vol. at 1406. Yet another text exchange discussed "weights" and negotiation over payment. Hall, R., Vol. at 1408. These and other text message exchanges, seen by the jury, support the jury's conclusion that Cushing was dealing methamphetamine to a number of people in furtherance of the overarching drug conspiracy. Alongside Williams's testimony that he was providing large amounts of methamphetamine

to Cushing, at least sometimes on credit, the jury could infer that Cushing was dealing the methamphetamine that he bought from Williams. The evidence supports Cushing's involvement in the single conspiracy of distributing methamphetamine, both as a customer of Williams and as a seller to multiple other people.

Credited as true, all the evidence introduced against Cushing at trial clearly supports the jury's conclusion that Cushing and Williams shared the common purpose of distributing methamphetamine. As this court held in *Patterson*, evidence that the defendant "attempted to arrange to purchase large quantities of cocaine, on credit, to finance continued drug-dealing operations" was an example of the "substantial evidence that [the defendant] was involved in and knew about the wider drug conspiracy scheme and intended to further distribute the drugs." *Patterson*, 713 F.3d at 1246. Indeed, "[e]vidence that an intermediate distributor bought from a supplier might be sufficient to link that buyer to a conspiracy to distribute drugs because both buyer and seller share the distribution objective." *Ivy*, 83 F.3d at 1285. Cushing not only purchased large amounts of methamphetamine from Williams on credit but also turned around and sold it to others. Cushing's agreement with Williams to be provided methamphetamine on credit facilitated the single conspiracy—in which Williams was the central figure—as a whole. *See, e.g.*, *Evans*, 970 F.2d at 673 (finding the evidence sufficient to support convictions where the "defendants had knowledge of the

general nature and scope of the illegal enterprise and that they all shared the distribution objective").

Cushing's relationship with Williams and his frequent visits to Williams's residence to buy and use methamphetamine along with others charged, indicate that Cushing was one among a whole web of people buying and distributing the drug in furtherance of the single conspiracy. The evidence introduced specifically about Cushing supports this conclusion, and there is no indication that a conspiracy conviction resulted in prejudicial spillover from "other conspiracies." Indeed, B.S., Cushing and Hall's co-defendant, was found not guilty of the same charges. This supports the conclusion that the jury distinguished between co-defendants and did not allow evidence brought against one defendant to spill over and prejudice other defendants. And finally, the jury was instructed to consider each defendant and the evidence against them separately; in the absence of evidence that the jury failed to do this, we presume that they followed these instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions.").

Thus, we reject Cushing's claim that the government did not prove more than a buyer-seller relationship between Cushing and Williams as well as his variance claim that the evidence proved multiple conspiracies rather than a single conspiracy. Giving the jury's findings the proper deference on appeal, *see Johnson*, 821 F.3d at 1201, we conclude that the evidence against Cushing proved the elements of the conspiracy charge and did not result in a variance.

b. Hall

Hall argues that (1) the government did not establish a relationship between Williams and Hall that went beyond a buyer/seller relationship, (2) the government failed to establish interdependence among the parties, and the government's failure to prove a single conspiracy created a prejudicial variance between the indictment and the evidence, and (3) the district court erred in failing to give a jury instruction on multiple conspiracies.

A lifelong friend of Williams, Hall lived about half a mile from Williams and regularly bought methamphetamine from him. Williams testified that Hall did not know his (Williams's) sources, did not hold methamphetamine or money for Williams, and did not store it for Williams, among other actions typically present in a relationship that is more than the one shared by a buyer and his seller. At Hall's highest usage, he bought about half an ounce every couple of weeks. And Williams testified that, as far as he knew, Hall was using all the methamphetamine that he was purchasing.

But despite the smaller amounts that Hall purchased, the jury heard evidence that Hall was involved with Williams and the methamphetamine distribution operation in other ways. The government introduced evidence of texts and calls between Hall and Williams, including texts dealing with a $500 purchase of methamphetamine and a $300 purchase of a Ruger firearm. When others who testified at trial, such as A.K., told the court that they bought $20 or $40 worth of methamphetamine at a time, a $500 purchase is notable. Hall was

one of the few people from whom Williams would answer a phone call because a call from Hall "was going to benefit [Williams] financially most of the time." Hall, R., Vol. 4 at 675.

But participation in a drug conspiracy is not solely limited to the act of buying and selling drugs; it also includes *facilitating* the drug operation, such as exchanging information related to concealment and law enforcement activity. The jury heard evidence that Williams and Hall relayed information to each other about police activity and other events that could threaten the secrecy of the "methamphetamine business." Hall, R., Vol. 4 at 691. For example, Williams sent Hall a text message warning him that "the roads are too hot," which referred "to the meth traffic or the traffic going down [Williams's] road and [that] there were too many cops." Hall, R., Vol. 5 at 705. The jury also heard about how Hall warned Williams of police activity. For instance, the following exchange between the prosecutor and Williams occurred immediately after the jury listened to a recording of a call where Hall had called Williams:

Government:	Now, have there been times when people have called you or texted you when there were police gathered up in a particular location?
Williams:	Yes.
Government:	And why would they do that?
Williams:	Because I was in the methamphetamine business.
	[. . .]
Government:	And why would they call you because of your business, if the police were gathered up in a particular location?
Williams:	Because it was a pretty good chance they were coming to see me.

[. . .]

Government: So in this call that you were having with Mr. Hall, there is a discussion about the police gathered up some place?

Williams: Yes.

Hall, R., Vol. 4 at 691. In that same call, Hall informed Williams that their names had been "mentioned" by some "goofy chick." Hall, R., Vol. 4 at 693. Williams testified that Hall was "talking about our names being mentioned . . . with the meth business." Hall, R., Vol. 4 at 693. On the call, Williams then told Hall about "that deal over in Arkansas," Gov. Ex. 14 at 4:46, which he testified was "about [co-conspirator M.W.] being in jail and being interviewed by DEA." Hall, R., Vol. 4 at 693. The prosecutor continued:

Government: If someone were talking to the DEA about you, would that concern people in your customer base?

Williams: It should.

Government: Why is that?

Williams: Because trouble is coming, because we are in the meth business.

Hall, R., Vol. 4 at 694. Agent Morrison also testified that this call between Williams and Hall occurred after Agent Morrison had interviewed M.W. in an Arkansas jail.

Moreover, M.W.—who was indicted in this same conspiracy— testified that both she and her friend J.G. obtained methamphetamine from Hall, usually about a half a gram at a time.[3] M.W. also testified that she saw "ounce

[3] During cross-examination, M.W. admitted that her courtroom testimony was the first time she had admitted to leaving Hall's house with meth.

quantities" at Hall's residence. Hall, R., Vol. 5 at 961. And she testified that Hall's methamphetamine "tasted oily," which tasted the same as Williams's meth. Hall, R., Vol. 5 at 965. J.G. testified that she did work for Hall—including bailing hay, babysitting his children, and cleaning his house—but did not receive payment in cash. J.G. testified that Hall provided her methamphetamine, but she also stated that she never purchased the drug from him. When she asked to buy drugs from him on one occasion, Hall told her that "he doesn't sell drugs." Hall, R., Vol. 5 at 1082. But J.G. also testified that she shared methamphetamine with "a few people" without selling it. Hall, R., Vol. 5 at 1091. C.B. testified that she had seen Hall at Williams's house and that Williams supplied everyone with methamphetamine. J.C., who became Williams's source, testified that he and Hall consumed methamphetamine together.

Furthermore, the government introduced at trial a recording of an intercepted call from Hall to Williams during the time frame of the charged conspiracy.[4] In the call, Hall tells Williams that he (Hall) had beaten "Haley,"

---

[4] The call was transcribed as follows in the record:

[BEGINNING OF CALL]
WILLIAMS: HELLO.
HALL: HEY BROTHER.
WILLIAMS: SUP!
HALL: LISTEN, UH...THEY, THEY GODDAMN COMING FOR ME RIGHT NOW.
WILLIAMS: THE WHAT NOW?
HALL: UH, THEY'RE COMING FOR ME RIGHT NOW.
WILLIAMS: WHAT FOR?

HALL: I'M HIDDEN ON MY FUCKING [U/I] UH, I BEAT HALEY WITH A FUCKING HALF GALLON, BUSTED IT ON THE BACK OF HER HEAD AND KICKED THE FUCK OUT OF HER WITH A STEEL TOE. UH, I MEAN SHE FUCKING SNITCHED ME OUT LIKE A MOTHER FUCKER DUDE! UH I DON'T KNOW REALLY WHAT TO DO RIGHT NOW, WAYLON, UH...

[VOICES OVERLAP]

WILLIAMS: MM...SHIT...FUCK.

[VOICES OVERLAP]

HALL: ... GODDAMNED, DUDE, THEY GOT MORE MOTHERFUCKING LAWS COMING RIGHT NOW THAT I DON'T KNOW WHAT TO DO ABOUT IT, MAN.

WILLIAMS: YEAH? UH...

HALL: YOU TELL ME WHAT TO DO, BROTHER, AND I WILL DO IT, I GOTTA GET...

[VOICES OVERLAP]

WILLIAMS: UH, I DON'T KNOW.

HALL: ...THE FUCK OUT OF HERE AND I DON'T KNOW HOW, MAN.

WILLIAMS: IS THERE ANY WAY YOU CAN GET TO THE ROAD WHERE I CAN GET YOU THERE OR NOT?

HALL: YEAH MAYBE.

WILLIAMS: WHERE AT?

HALL: I DON'T KNOW, MAN, MAYBE TYLER SPRINGS OR SOMETHING LIKE THAT?

WILLIAMS: YEAH.

[VOICES OVERLAP]

HALL: I MEAN, THEY'RE COMING HARD, DUDE, I MEAN THERE'S A FUCKING TON OF THEM, BROTHER, GODDAMNED THEY'RE COMING LIKE A MOTHERFUCKER RIGHT NOW, MAN!

who had "snitched" on Hall, with a "half gallon" and "kicked . . . her with a steel toe." Hall, R., Vol. 2 at 435–46; Gov. Ex. 1 at 00:20.

We conclude there was sufficient evidence to convict Hall on conspiracy to distribute methamphetamine and that there was no variance between the charged activity and the evidence presented at trial. While it is true that a mere buyer-seller relationship does not suffice to prove that a buyer is involved in a larger conspiracy, the evidence introduced against Hall could lead a reasonable trier of fact to conclude that Hall acted to further the aims of the single, large conspiracy. Hall was buying methamphetamine from Williams in small quantities, but the jury heard evidence that Hall gave the drug to several other people, including M.W. and J.G. As the government noted in its brief, selling for profit is not a requisite element in conspiracy—furthering the objective of *distribution* is. Hall

---

WILLIAMS:	OKAY, WHAT? YOU WANT ME?...MEET ME AT THE TRAILER OR WHAT?
HALL:	I'M GONNA GO ACROSS EAGLETON'S PLACE, OKAY?
WILLIAMS:	OKAY.
	[VOICES OVERLAP]
HALL:	I'LL, I'LL CALL YOU BACK IN JUST A MINUTE, OKAY?
WILLIAMS:	UH-HUH.
HALL:	ALL RIGHT THANKS, BROTHER, ALL RIGHT BYE.
	[END OF CALL].

Hall, R., Vol. 2 at 436; Hall, R., Vol. 9 at 1510. The jury heard the recording in full, *see* Hall, R., Vol. 2 at 436, but did not have access to the transcript during deliberations.

often partied and hung out at Williams's residence, where large amounts of methamphetamine were stored, repackaged, and redistributed—some by Hall, some by others like Cushing. Hall provided methamphetamine to M.W., who also bought methamphetamine from Williams and who testified that Hall and Williams's methamphetamine tasted the same.

Furthermore, Hall's recorded communications with Williams indicate Hall was concerned with—and willing to take action against—"snitching," and he communicated this to Williams, his friend and methamphetamine source. Hall's concern about "snitching" supports the conclusion that he knowingly participated in furthering the goals of the methamphetamine distribution by attempting to keep the operation concealed. The call about "Haley[']s" "snitching" could circumstantially but not necessarily be related to the methamphetamine operation. But the jury heard evidence from both Agent Morrison and Williams that the other call—in which Hall told Williams about M.W. having "mentioned" their names—was a direct reference to the methamphetamine conspiracy.

The selling and buying of drugs are not the only actions that further the distribution objective of a methamphetamine operation. Counter-intelligence about law enforcement action and about other people talking about the drug operation furthers the conspiracy—namely, by maintaining the necessary secrecy of an illicit drug operation. From the evidence presented at trial, a jury could rationally conclude that Hall was keeping tabs on "snitches" for Williams, asking Williams for direction, or tipping Williams off about law enforcement—or all

three. That the jury concluded that Hall's call to Williams was in furtherance of the methamphetamine distribution conspiracy is a reasonable conclusion supported by the evidence introduced at trial.

All this evidence stands alone against Hall and does not involve evidence adduced against co-defendants. As discussed above, B.S. (Cushing and Hall's co-defendant) was found not guilty on the same charges. It is clear the jury distinguished between co-defendants and did not allow evidence brought against one defendant to prejudice another. And given the jury instructions to consider each defendant and the evidence against them separately, we presume that they did so without indications to the contrary.

As this court has concluded, we do "not decide credibility issues or reweigh the evidence." *Johnson*, 821 F.3d at 1201. Rather, we "accept the jury's resolution of conflicting evidence[] [a]s long as the possible inferences are reasonable" because "it was for the jury, not the court, to determine what may have occurred." *Id.* (internal quotation marks omitted). When viewed in the light most favorable to the government, the evidence was sufficient to prove Hall's participation in the conspiracy, and there was no variance between the charged conduct and the evidence at trial.

As for Hall's contention that the district court erred in refusing to give instructions on multiple conspiracies, rather than one, "[w]e review the [d]istrict [c]ourt's refusal to give requested instructions for abuse of discretion." *United States v. Moran*, 503 F.3d 1135, 1146 (10th Cir. 2007). "To assess whether the

court properly exercised its discretion, we review the jury instructions de novo to determine whether, as a whole, they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *Id.* (internal quotation marks omitted).

In the Tenth Circuit,

> a failure to instruct the jury on uncharged multiple conspiracies is not reversible error as long as the jury instructions adequately conveyed that "the government had the burden of proving beyond a reasonable doubt the [single] conspiracy as alleged, and that the evidence should be considered separately as to each individual defendant."

Evans, 970 F.2d at 675 (quoting *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir. 1979)). In *Evans*, this court determined that where the instructions had indicated that the jurors were to consider the case against each defendant separately, without considering any evidence against other defendants, reversal was not warranted.

Here, the jurors were instructed as follows on the single conspiracy charge:

> This law makes it a crime for anyone to conspire with someone else to violate federal laws pertaining to controlled substances. In this case, the defendants are charged with conspiracy to knowingly and intentionally distribute and possess with intent to distribute in excess of 500 grams of a mixture or substance containing a detectable amount of methamphetamine.
>
> To find a defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> *First*: two or more persons agreed to violate the federal drug laws;

> *Second*: the defendant knew the essential objective of the conspiracy;
>
> *Third*: the defendant knowingly and voluntarily involved himself or herself in the conspiracy;
>
> *Fourth*: there was interdependence among the members of the conspiracy; and
>
> *Fifth*: the overall scope of the conspiracy involved at least 500 grams of a mixture or substance containing a detectable amount of methamphetamine.

Hall, R., Vol 1 at 196. Moreover, the instructions gave definitions and clarifications for "conspiracy," "knowing and voluntary involvement" in a conspiracy, and "interdependence."[5] Hall, R., Vol 1 at 197–98. And the jurors received thorough instructions on the defense's buyer-seller theory. For example, the instructions informed the jury that "[p]roof of the existence of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy." Hall, R., Vol 1 at 202–03. The jury was also instructed to consider the case

---

[5] Significantly, in a section called "'Interdependence' Defined," the instructions explained to the jury:

> You are also required to find that interdependence existed among the members of the conspiracy. This means that the members intended to act for their shared mutual benefit. To satisfy this element, you must conclude that the defendant participated in a shared criminal purpose and that his or her actions constituted an essential and integral step toward the realization of that purpose.

Hall, R., Vol. 1 at 198.

against each defendant separately. Under a heading of "Multiple Defendants—Single Count," the instructions stated:

> The rights of each of the defendants in this case are separate and distinct. You must separately consider the evidence against each defendant and return a separate verdict for each. Your verdict as to one defendant, whether it is guilty or not guilty, should not affect your verdict as to any other defendant.

Hall, R., Vol. 1 at 192.

Although Hall contends that the district court should have provided instruction on multiple conspiracies, the district court did not abuse its discretion in declining to do so. The provided jury instructions both "adequately conveyed that 'the government had the burden of proving beyond a reasonable doubt the [single] conspiracy as alleged, and that the evidence should be considered separately as to each individual defendant.'" *Evans*, 970 F.2d at 675 (quoting *Watson*, 594 F.2d at 1340). The jury instructions consistently referred to one, single conspiracy throughout the document. And the language for separate evidence consideration is nearly identical to the instructions found sufficient in *Evans*. *See Evans*, 970 F.2d at 675 (quoting jury instruction excerpts and concluding they satisfied the Tenth Circuit standard). As in *Evans*, the jury instructions provided here satisfy the requisite standard, and we conclude that the district court did not abuse its discretion in issuing them.

B. Res Gestae Evidence

1. Standard of Review

"Admissibility of evidence under Rule 404(b) involves a case-specific inquiry that is within the district court's broad discretion." *United States v. Henthorn*, 864 F.3d 1241, 1248 (10th Cir. 2017) (internal quotation marks omitted). Accordingly, "[w]e review a district court's decision to admit such evidence for an abuse of discretion and will not reverse unless the district court's decision exceeded the bounds of permissible choice in the circumstances or was arbitrary, capricious or whimsical." *Id.* (internal quotation marks omitted).

2. Rule 404(b) and Huddleston

The Federal Rules of Evidence prohibit evidence of crimes, wrongs, or other acts when used "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). But such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

The Supreme Court explicated in *Huddleston v. United States* a four-part test to determine whether Rule 404(b) evidence is properly admitted. *See* 485 U.S. 681 (1988). The *Huddleston* test requires that:

> (1) The evidence must be offered for a *proper purpose* under Rule 404(b);
> (2) The evidence must be *relevant* under Rule 401;
> (3) The *probative value* of the evidence must not be substantially outweighed by its potential for unfair prejudice under Rule 403; and

> (4) The district court, upon request, must have *instructed the jury* pursuant to Rule 105 to consider the evidence only for the purpose for which it was admitted.

Henthorn, 864 F.3d at 1247–48 (emphasis in original). Generally, the standard for "satisfying Rule 404(b) admissibility is permissive: if the other act evidence is relevant and tends to prove a material fact other than the defendant's criminal disposition, it is offered for a proper purpose under Rule 404(b) and may be excluded only under Rule 403." *United States v. Irving*, 665 F.3d 1184, 1211 (10th Cir. 2011) (internal quotation marks omitted; alterations incorporated).

Moreover, Rule 404(b) "only applies to evidence of acts *extrinsic* to the charged crime." *Irving*, 665 F.3d at 1212 (emphasis added; internal quotation marks omitted). Evidence is extrinsic "when it is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense." *United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015) (internal quotation marks omitted). Intrinsic evidence, on the other hand, is "directly connected to the factual circumstances of the crime and provides contextual or background information to the jury." *Id.* (internal quotation marks omitted). Indications that evidence is intrinsic include situations in which the evidence:

- was inextricably intertwined with the charged conduct,
- occurred within the same time frame as the activity in the conspiracy being charged,
- was a necessary preliminary to the charged conspiracy,
- provided direct proof of the defendant's involvement with the charged crimes,

- was entirely germane background information, directly connected to the factual circumstances of the crime, or
- was necessary to provide the jury with background and context of the nature of the defendant's relationship to his accomplice.

Kupfer, 797 F.3d at 1238 (internal quotation marks and citations omitted; alterations incorporated).

a. Cushing

Cushing contends that the admission of several text messages sent after the January 29, 2018, cutoff date in the superseding indictment was improper character evidence admitted under Rule 404(b). The text message exchanges were admitted as trial exhibits 42, 44, 45, and 46, and they are included in their entirety below:

Ex. 42	3/2	Caller: Hey can I come by
	3/3	Caller: Hey bud u home me and Joel was gonna swing by
	3/3	Caller: Well we came by but nobody answered the door holla at me when u get a chance
Ex. 44	3/5	Caller: Hey I have ur $50 us, Jen &amp
	3/5	Cushing's Number: Its all good
Ex. 45	3/1	Caller: Hey one of u call me will u
	3/2	Caller: Let me know if I can stop n get that on my way 2 work 2 moro. Plz. Can I plz. Thanx
Ex. 46	3/4	Caller: Hey I need 2 come c u. Plz. Pretty plz
	3/4	Cushing's Number: K
	3/4	Cushing's Number: When u coming by
	3/4	Caller: Imma call if u don't txt me back.
	3/4	Cushing's Number: K

3/4 Caller: Ummm me n lanie is n we r gettn dressed then we headed that way
3/4 Caller: U leaving or sumthin
3/4 Cushing's Number: No just wondering

Hall, R., Vol. 7 at 1402–05. Cushing also argues that the admission of 18.68 grams of methamphetamine found at his cabin during an April 2018 search—and thus past the January 2018 cutoff date—was also improperly admitted under Rule 404(b).

With regard to the text messages, Cushing argues that the texts after January 2018 were admitted as evidence of his "propensity to continue communicating with people who wanted to come to his house." Cushing, Aplt. Br. at 52. The government argues that these texts were res gestae because they were part of the "rest of the story," which includes the months from the end of the superseding indictment to Cushing's flight from being arrested. Cushing, Aple. Br. at 32.

Some of the examples described in *Kupfer* weigh against these text messages as intrinsic evidence. For example, the texts clearly occurred outside the "time frame as the activity in the conspiracy" being charged. *Kupfer*, 797 F.3d at 1238. For the same reason, the texts were not a "necessary preliminary to the charged conspiracy." *Id.* But the other *Kupfer* scenarios strongly support the conclusion that the text messages were intrinsic to the charged conspiracy. First, the texts provided additional proof that Cushing was engaging in the charged crimes—that is, people continued to come to his house to pick up methamphetamine, in the same manner as during the stated indictment period. It

was thus inextricably intertwined with the charged conduct. Second, Cushing continuing to deal methamphetamine from the end of January to his arrest in April gave important context to the jury about why he had fled his residence when law enforcement came to execute the search warrant at his residence in March. The texts evincing his continued drug transactions also help to explain why he hid from law enforcement in a remote cabin, where he was ultimately arrested—a fact that points toward his guilty conscience.

Even if we assume for purposes of argument that there was error, it was harmless. In "determining whether a particular error was harmless, we 'should not consider the error in isolation, but rather should consider it in the context of the entire record.'" *Irving*, 665 F.3d at 1209 (quoting 28 *Moore's Federal Practice* § 652.03[1], at 652–58 (3d ed. 2011)). This is because a "non-constitutional error, such as a decision whether to admit or exclude evidence, is considered harmless 'unless a substantial right of a party is affected.'" *Id.* (quoting *United States v. Charley*, 189 F.3d 1251, 1270 (10th Cir.1999)). An error affects a substantial right of a party if "it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

Here, introduction of the text messages that occurred after January 29, 2018, did not impact the outcome of the case. As discussed above, the government introduced many text messages that took place *during* the time period

stated in the indictment that pointed toward Cushing's guilt. *See* Section II.A.4.a, *supra*. These January text messages, along with the witness testimony regarding Cushing's dealings, represented "substantial, independent evidence" of Cushing's guilt. *Irving*, 665 F.3d at 1209. The text messages intercepted after January 29 supported the government's case against Cushing but were not necessary to it.

In any event, district courts have broad discretion in this area. The district court considered the issue, heard argument, and admitted the evidence. We conclude the text messages were intrinsic to the charged conduct, and thus the district court's decision did not "exceed[] the bounds of permissible choice in the circumstances" and was not "arbitrary, capricious or whimsical." *Henthorn*, 864 F.3d at 1248. We reject Cushing's claim that admission of the text messages after the indictment time period was reversible error.

As for the admission of the 18.68 grams of methamphetamine seized from Cushing's cabin when he was arrested, we review this issue under a plain error standard. Counsel for Cushing did not explicitly object to the admission of the evidence from the April 2018 search. Rather, upon introduction of the evidence, counsel stated: "Your Honor, the execution of this search warrant was in April of 2018. That is outside of the scope of this conspiracy. I am just putting the Court on notice and asking for a limiting instruction in light of the fact that this conspiracy ended in January of 2018." Hall, R., Vol. 5 at 902. This is less an objection than an acknowledgment that this evidence can be admitted—just, preferably, with a limiting instruction (which the district court declined as

unnecessary). Because Cushing fails to argue plain error in his briefing, his argument fails. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal[] surely marks the end of the road for an argument for reversal not first presented to the district court.").

But even assuming that Cushing did sufficiently preserve this issue, this evidence supports Cushing's guilty conscience and is thus intrinsic to the charged crime. Cushing was at a remote cabin when officers came with a warrant on April 25—not at his home. As the prosecutor pointed out in closing arguments, the fact that Cushing fled from his home and "went to his hideout and stayed for over a month" could be considered by the jury in determining his consciousness of guilt. Hall, R., Vol. 6 at 1296. So, too, could the fact that a search of Cushing's house revealed only methamphetamine residue, not methamphetamine—but the search of the cabin where Cushing took refuge yielded an 18.68-gram stash. This indicates that he not only fled but took his drugs to conceal them from law enforcement. Thus, the fruit of this search is intrinsic evidence and was properly admitted by the district court.

b. Hall

Hall contends that his call to Williams about a "snitch"—a recording of which was heard by the jury during trial, and the transcript of which is included in full in footnote 4—should not have been admitted because it was extrinsic to the conspiracy charge and does not pass prongs two and three of the Rule 404(b)

analysis. Hall argues that the call was not part of the conspiracy because Williams testified that the call had "nothing to do with" his drug activities. Hall, R., Vol. 5 at 784.

We reject this argument. The recording of the call was intrinsic to the overarching conspiracy such that it provided context or background information for the jury. For one, it demonstrated important characteristics of the relationship between Hall and Williams at the time of the alleged conspiracy: that Hall sought direction and advice from Williams in a time of distress, and that Williams was willing to help him without much further information—implying trust and a strong bond. For another, the call occurred within the time frame of the alleged conspiracy—indeed, while Hall was regularly purchasing methamphetamine from Williams and while Hall shared it with others, as discussed above. Moreover, it proved that Hall was doing something that he was concerned about being "snitched" on, and his first call was to Williams at such a time. Given the important contextual information the call gave the jury about Hall's relationship with Williams, its probative value to the jury regarding the conspiracy charge was high.

Even if the call is extrinsic to the conspiracy, it still passes Rule 404(b) review. Hall contends that the call cannot pass prongs two and three of the *Huddleston* test. But the relationship between alleged coconspirators is relevant to a charge of conspiracy, especially when they talk about illicit activities such as violence against "snitches." Relevancy merely requires that the evidence have a

tendency to prove or disprove one of the elements of the case. At the very least, the call tends to prove that Hall looked to Williams for support, direction, and direct assistance in times of law enforcement attention. It is true that the call prejudices Hall, as it evinces violence and a willingness to retaliate against someone who informs law enforcement about him. But given what the call tells a jury about the relationship between two alleged coconspirators, its value is not outweighed by the risk of prejudice. Thus, the district court did not abuse its discretion in admitting the recording of the call.

C. Expert Testimony

1. Standard of Review

The Tenth Circuit "review[s] de novo whether the district court applied the proper standard in admitting expert testimony." *United States v. Avitia-Guillen*, 680 F.3d 1253, 1256 (10th Cir. 2012). "We also review de novo whether the court 'actually performed its gatekeeper role in the first instance.'" *Id.* (quoting *United States v. Roach*, 582 F.3d 1192, 1206 (10th Cir. 2009)). "We then review the trial court's actual application of the standard in deciding whether to admit or exclude an expert's testimony for abuse of discretion." *Roach*, 582 F.3d at 1206 (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) (internal quotation marks omitted)). Accordingly, "we will not reverse the district court without a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1219 (10th Cir. 2007). "Although

the abuse of discretion standard is deferential, abuse is shown where the decision was made based upon a mistaken view of the law." *United States v. Allen*, 449 F.3d 1121, 1125 (10th Cir. 2006).

2. Rule 702 and Expert Testimony on Criminal Activity

The Federal Rules of Evidence limit a lay witness's testimony to opinions "(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 Rule 702." Fed. R. Evid. 701. Rule 702 provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Rule 702 "establishes a standard of evidentiary reliability" and places the trial court in the role of gatekeeper. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).

In its gatekeeper role, the district court must make findings—if a party challenges expert testimony—that the expert testimony is reliable and relevant. *See United States v. Vann*, 776 F.3d 746, 757 (10th Cir. 2015) ("Thus, the district court must satisfy itself that the proposed expert testimony is both reliable and

relevant, in that it will assist the trier of fact before[] permitting a jury to assess such testimony." (internal quotation marks omitted)). "Relevant expert testimony must logically advance a material aspect of the case . . . and be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *United States v. Garcia*, 635 F.3d 472, 476 (10th Cir. 2011) (internal citations omitted). "In assessing whether testimony will assist the trier of fact, district courts consider several factors, including whether the testimony is within the juror's common knowledge and experience, and whether it will usurp the juror's role of evaluating a witness's credibility." *Id.* at 476–77 (internal quotation marks omitted).

In the criminal context, "[b]ecause the average juror is often innocent of the ways of the criminal underworld, expert testimony is allowed in order to provide jurors a context for the actions of defendants." *Garcia*, 635 F.3d at 477. The Tenth Circuit recently re-affirmed the principle that law-enforcement officers can testify as experts on knowledge accumulated on the job because "knowledge derived from previous professional experience falls squarely within the scope of Rule 702 and thus by definition outside of Rule 701." *United States v. Cristerna-Gonzalez*, 962 F.3d 1253, 1259 (10th Cir. 2020) (internal quotation marks omitted); *see also United States v. Kamahele*, 748 F.3d 984, 998 (10th Cir. 2014) ("[W]e have long recognized that police officers can testify as experts based on their experience because the average juror is often innocent of the ways of the criminal underworld." (internal quotation marks omitted)); *Vann*, 776 F.3d

at 758. "Although a law-enforcement officer's testimony based on knowledge derived from the investigation of the case at hand is typically regarded as lay testimony, opinion testimony premised on the officer's professional experience as a whole is expert testimony." *Cristerna-Gonzalez*, 962 F.3d at 1259. As a result, "there is no problem with the nature of the testimony" when a qualified law-enforcement officer testifies about components of drug distribution, including coded language in intercepted calls, indicators of illicit drug operations, common tools of the drug trade, records of drug business, and a criminal organization's territory and culture. *Id.* at 1260.

a. Cushing

As an initial matter, Cushing generally objects in his briefing to law-enforcement officers' testimony as experts, warning that these "roadshows" give the jury the impression that officers are experts in solving crime and deciding who is guilty and innocent. Cushing, Aplt. Br. at 59. But we have explicitly allowed not only this type of testimony, but this *type of testimony* from this *same law enforcement officer*. In *United States v. Cristerna-Gonzalez*, the panel held that knowledge derived from experience on the job is "squarely" within the scope of expert testimony. 962 F.3d at 1259. The panel there concluded Agent Epps's testimony on methamphetamine slang, culture, and dealing protocol was therefore well within Rule 702 as expert testimony. Because Agent Epps's testimony was substantially the same in this case as it was in *Christerna-Gonzalez*, we follow

our precedent and reject Cushing's claim that the district court erred in allowing this testimony.

Cushing also objects to the scope of Agent Epps's testimony, contending that it was duplicative (in terms of user and distribution weights of methamphetamine) and well within the knowledge of an untrained layperson. The latter is based on Agent Epps's testimony about commonly used methods among methamphetamine dealers and buyers of using vague language (such as "stuff" or "come by"). *See, e.g.*, Hall, R., Vol. 6 at 1142. Here, the district court made findings that Agent Epps's expert testimony was reliable—similar to the finding affirmed in *Cristerna-Gonzalez*. Even if a layperson could generally define the word "stuff," it is the *context* that is important here. Indeed, this court has repeatedly said that the average person is "often innocent of the ways of the criminal underworld." *Garcia*, 635 F.3d at 477. Thus, it was reasonable for the district court to conclude that the testimony was relevant. Moreover, the presumption of the jury's innocence means we presume Agent Epps's testimony on methamphetamine slang and protocol aided the jury's understanding of the case. And Cushing does not argue that Agent Epps's testimony usurped the jury's role in evaluating witness credibility. Thus, the district court's decision here to permit Agent Epps to present expert testimony on these terms was well within its discretion.

b. Hall

Hall, on the other hand, challenges Agent Epps's review of the record as incomplete. But Hall supports this argument with no law whatsoever. Hall's argument seems to be that Agent Epps did not know the case well enough to testify. But as an expert witness, Agent Epps is expected to have expert-level knowledge on the topics he is asked about. His expertise must apply to methamphetamine cases broadly to even meet the *Daubert* standard. *See Daubert*, 509 U.S. at 590 (requiring objective knowledge about a particular topic to meet a "standard of evidentiary reliability"). While experts are of course expected to review relevant parts of the record and make conclusions, Hall does not provide law that indicates an expert is expected to review and be intimately familiar with the entire case file. And ironically, the level of familiarity with a case that Hall advocates would actually *create* the "roadshow" problem put forward by Cushing: that is, asking that Agent Epps be an expert on *this* case, rather than on methamphetamine usage and culture generally, would improperly make him an expert in innocence and guilt of these particular defendants.

Agent Epps reviewed the relevant exhibits and evidence on which he was asked to testify and was clearly familiar with them at trial. *See, e.g.*, Hall, R., Vol. 6 at 1142–46 (Agent Epps's identification of items and photograph exhibits at trial). The limits of his knowledge, when brought to the jury's attention, are matters of witness credibility for the jury to decide. Without sufficient authority

presented by Hall in his briefing, we decline to upset the district court's determination that Agent Epps's testimony was sufficiently relevant and reliable.

D. Witness Statement

1. Standard of Review

Where the defendant makes no objection to a statement by a witness or the prosecution, we review for plain error. *See Vann*, 776 F.3d at 759. "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted). Plain means "clear or obvious under current law." *United States v. Woods*, 764 F.3d 1242, 1245 (10th Cir. 2014) (internal quotation marks omitted). "An error seriously affects the defendant's substantial rights when the defendant demonstrates that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Id.*

2. Statement About Someone "Getting Busted"

Cushing contends that the district court erred in not declaring a mistrial *sua sponte* when the following exchange took place during Williams's testimony:

Prosecutor:	And how would you lose your source if one of your customers found out about it?
Williams:	They could buy from him instead of me.
Prosecutor:	Work around you, right?
Williams:	Yeah.
Prosecutor:	How was it that you became Carl Cushing's source?
Williams:	I don't remember the exact details. He lost his source, I am pretty sure.
Prosecutor:	And how did he lose his source?

> Williams: I'm pretty sure he got busted and went to prison.

Hall, R., Vol. 4 at 790. Cushing did not object to this testimony.

Cushing characterizes this argument as a Federal Rule of Evidence 404(b) challenge, but he does not provide any analysis about Rule 404(b) on this issue. Rather, Cushing apparently raises this challenge under Rule 403, arguing that the probative value of the statement was substantially outweighed by unfair prejudice. Pursuant to Federal Rule of Evidence 403, a trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

While it is true that the word "he" has an indefinite antecedent in Williams's statement, the statement would not make sense if the person who "got busted and went to prison" was Cushing: how would Williams have become his source in prison, given that Williams himself was not in prison? The statement is directed toward understanding why Cushing's original source was no longer available. At most, this statement is ambiguous. But it is more likely that it is simply testimony about a third party. Thus, Rule 404(b) is not applicable here because the statement is not about the defendant or his character. Nor is Rule 403 a good fit, as this statement about a third party going to prison did not unfairly prejudice Cushing. It merely contextualizes how Williams became Cushing's source for drugs.

Moreover, we review this argument for plain error. Cushing does not show that there is a reasonable probability that but for this statement—which a reasonable juror would understand to be about a third party—the result of the trial would have been different. There is no error here—let alone plain error.

E. Cumulative Error

"To analyze cumulative error, we aggregate all the errors that we have found to be harmless and determine 'whether their cumulative effect on the outcome of the trial' mandates reversal." *United States v. Anaya*, 727 F.3d 1043, 1060–61 (10th Cir. 2013) (quoting *Rivera*, 900 F.2d at 1470).

"When there are both preserved and unpreserved errors, cumulative-error analysis should proceed as follows: First, the preserved errors should be considered as a group under harmless-error review. If, cumulatively, they are not harmless, reversal is required." *Anaya*, 727 F.3d at 1061 (quoting *United States v. Caraway*, 534 F.3d 1290, 1302 (10th Cir. 2008)). But "[i]f the preserved errors are cumulatively harmless, then the court should consider whether those preserved errors, when considered in conjunction with the unpreserved errors, are sufficient to overcome the hurdles necessary to establish plain error." *Id.* (quoting *United States v. Rogers*, 556 F.3d 1130, 1144 (10th Cir. 2009)).

Here, it is straightforward to conclude that, in the absence of any individual errors, we decline to find cumulative error. Moreover, any one error by the district court not sufficient to support reversal on that issue will not support a

finding of cumulative error. Cumulative error requires two or more errors, and we find no error in Cushing and Hall's trial.

III. Conclusion

Hall's motion to seal Volume 9 of Hall's Appendix is DENIED in part and GRANTED in part.[6] And for the foregoing reasons, we AFFIRM the convictions of Cushing and Hall.

[6] When a party files a motion to seal, "there is a 'strong presumption in favor of public access.'" *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (quoting *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007)). This is especially true where the sealed documents are used "to determine litigants' substantive legal rights." *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012) (internal quotation marks omitted). To the extent that Hall seeks to seal the transcripts of his intercepted calls to Williams (introduced as recordings to the jury as Exhibits 1 and 14, and the transcripts of which appear at Hall, R., Vol. 9 at 1501–11), that motion is DENIED because they are relevant to our determination of his substantive rights on appeal. The motion to seal is GRANTED with respect to all other parts of Volume 9 of Hall's appendix.