NO:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

MAYCOL MENDEZ-MARADIAGA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

---

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
TRACY DREISPUL*
Assistant Federal Public Defender
Deputy Chief, Appellate Division
Counsel of Record
150 W. Flagler Street, Suite 1500
Miami, FL 33130
305-536-6900

November 22, 2021

APPENDIX

TABLE OF APPENDICES

A-1

860 Fed.Appx. 650
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Maycol MENDEZ MARADIAGA,
Defendant-Appellant.

No. 19-14938
|
Non-Argument Calendar
|
(June 23, 2021)

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 1:19-cr-20224-UU-1, Ursula Ungaro, Senior District Judge, of possession with intent to distribute cocaine. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] trial court acted within its discretion in admitting evidence of defendant's prior arrest for possession of 3,4-methylenedioxymethamphetamine (MDMA);

[2] government's failure to produce English translations of transcripts of recorded conversations that occurred during prior drug deals that defendant had with government's confidential informant did not violate best evidence rule;

[3] government's failure to produce the English translations did not violate rule requiring government to disclose, upon defendant's request, any relevant written or recorded statement by defendant in government's possession;

[4] trial court did not plainly err in allowing defendant to be cross-examined about his prior drug deals with informant without transcripts of the conversations recorded during those prior drug deals;

[5] trial court acted within its discretion in excluding defendant's evidence of prior bad acts by informant; and

[6] sufficient evidence supported finding that defendant was predisposed to commit drug offenses, as required to overcome defendant's entrapment defense.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (6)

[1] Criminal Law Controverting defense evidence or theory

Trial court acted within its discretion in admitting evidence of defendant's prior arrest for possession of 3,4-methylenedioxymethamphetamine (MDMA) in defendant's trial for possession with intent to distribute cocaine, where defendant asserted an entrapment defense, placing his predisposition to commit drug offenses at issue and allowing the government to offer evidence that would establish that predisposition. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Evid. 404(b).

[2] Criminal Law Record or Other Writing as Best Evidence

Government's failure to produce English translations of transcripts of recorded conversations that occurred during prior drug deals that defendant had with government's confidential informant, about which government cross-examined defendant, did not violate best evidence rule, in defendant's trial for possession with intent to distribute cocaine; government did not quote from the recorded conversations, characterize those conversations, or ask defendant about specific statements in those conversations, but instead only asked whether, at any point during those prior deals,

defendant mentioned helping the informant, in order to rebut defendant's contention that he had only sold drugs to informant to help the informant. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Evid. 1002.

[3] **Criminal Law** Defendant's confession or other statement

Government's failure to produce English translations of transcripts of recorded conversations that occurred during prior drug deals that defendant had with government's confidential informant, about which government cross-examined defendant, did not violate rule requiring government to disclose, upon defendant's request, any relevant written or recorded statement by defendant in government's possession, in defendant's trial for possession with intent to distribute cocaine; rule did not require government to translate a recorded statement, and government did not utilize transcripts on cross-examination. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Crim. P. 16(a)(1)(B).

[4] **Criminal Law** Witnesses

Trial court did not plainly err in allowing defendant to be cross-examined about his prior drug deals with government's confidential informant without transcripts of the conversations recorded during those prior drug deals, in trial for possession with intent to distribute cocaine; defendant asserted entrapment defense, placing his predisposition to commit drug offenses at issue, defendant also asserted that he only sold drugs to informant in the deals at issue in trial to help informant, allowing government to inquire as to reasons for prior drug deals, defendant's counsel received the recordings of prior drug deals, and government notified district court and defendant that it intended to introduce evidence of prior drug deals. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Evid. 404(b).

[5] **Criminal Law** Incriminating others

Trial court acted within its discretion in excluding defendant's evidence of prior bad acts by government's confidential informant, in defendant's trial for possession with intent to distribute cocaine; defendant was in fact able to elicit some testimony showing that informant's motive to assist law enforcement was to remain in the United States, which was relevant to defendant's argument that informant persuaded defendant to sell drugs, and defendant's evidence about informant's illegal reentries into United States and about informant's subsequent arrest and his drug dealing activity after the transactions that led to defendant's charged offenses did not show defendant's lack of predisposition to commit drug crimes, which was at issue due to defendant's assertion of entrapment defense. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1); Fed. R. Evid. 404(b).

[6] **Criminal Law** Narcotics and drugs

Sufficient evidence supported finding that defendant was predisposed to commit drug offenses, as required to overcome defendant's entrapment defense in his trial for possession with intent to distribute cocaine; in dealings with government's confidential informant, defendant used drug terminology in referring to amount of cocaine he had procured, complained that he had not gotten himself "out there" like he wanted to, and stated that he had dealt with others involved in illegal drug dealing for years, defendant stated that he was "getting back in the game," defendant had engaged in four prior drug deals with informant before the charged offenses, and defendant's statements during charged offenses demonstrated his ready commission of the deals and his refusal to back out of the deals. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1).

***652** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:19-cr-20224-UU-1

Attorneys and Law Firms

Amanda Perwin, Jonathan Colan, Nicole D. Mariani, U.S. Attorney Service - Southern District of Florida, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff - Appellee.

Michael Caruso, Federal Public Defender, Tracy Michele Dreispul, Federal Public Defender's Office, Miami, FL, for Defendant - Appellant.

Before WILSON, ROSENBAUM, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Maycol Mendez Maradiaga appeals his conviction for possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). On appeal, he raises four arguments.

First, Mendez Maradiaga asserts that the district court abused its discretion by allowing the government to cross-examine him about a 2012 arrest for possession of MDMA ("molly") because the government did not show that he committed the offense by a preponderance of the evidence. He also asserts that the district court plainly erred by allowing the government to cross-examine him about his prior recorded drug sales to Marvin Reyes, a confidential informant ("CI") because, without transcripts of those conversations, the questioning violated Fed. R. Evid. 404(b), Fed. R. Crim. P. 16, and the best evidence rule.

Second, Mendez Maradiaga argues that the district court abused its discretion by excluding his evidence that he did not participate in drug dealing outside of his involvement with Reyes. Third, he contends that the district court abused its discretion by excluding his evidence about Reyes's prior bad acts because that evidence would show Reyes's motive in entrapping him and rebut the government's evidence. Lastly, Mendez Maradiaga argues that the evidence was insufficient to support the jury's finding that he was predisposed to commit the offense. We address each argument in turn.

I.

We "review evidentiary rulings for abuse of discretion." *United States v. Wenxia Man*, 891 F.3d 1253, 1264 (11th Cir. 2018). Accordingly, district courts enjoy ***653** wide discretion in making evidentiary rulings. *United States v. Stephens*, 365 F.3d 967, 973 (11th Cir. 2004). Evidentiary challenges raised for the first time on appeal are reviewed only for plain error. Fed. R. Crim. P. 52(b); *United states v. Charles*, 722 F.3d 1319, 1322 (11th Cir. 2013). Plain error occurs where: (1) there is an error; (2) that is plain; (3) that affects the defendant's substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Presendieu*, 880 F.3d 1228, 1237 (11th Cir. 2018).

In general, evidence of a defendant's prior crimes, wrongs, or other bad acts is not admissible to prove his character and show that he acted in accordance with that character on a particular occasion. Fed. R. Evid. 404(b)(1). However, this evidence may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2). Further, evidence of prior bad acts is not extrinsic, and thus is admissible, if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense. *United States v. Ellisor*, 522 F.3d 1255, 1269 (11th Cir. 2008). To be admissible under Rule 404(b), evidence of prior bad acts must withstand a three-part test: (1) the evidence must be relevant to an issue other than character; (2) the probative value must not be substantially outweighed by its undue prejudice; and (3) the government must offer sufficient proof so that the jury could find that defendant committed the act. *Id.* at 1267.

Although the government normally may not introduce evidence of a defendant's predisposition to engage in criminal activity, it may do so once a defendant submits evidence which raises the possibility that he was induced to commit the crime. *United States v. Salisbury*, 662 F.2d 738, 741 (11th Cir. 1981). The introduction of extrinsic offense evidence is a reliable method of proving the criminal predisposition needed to rebut the allegation of entrapment. *Id.*

Rule 16 requires the government to disclose, upon the defendant's request, any: (1) relevant written or recorded statement by the defendant that is within the government's possession, custody, or control, and the government knows that it exists; (2) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (3) the defendant's recorded testimony before a grand jury relating to the charged offense. Fed. R. Crim. P. 16(a)(1)(B). In addition, "[t]he best evidence rule, codified as Federal Rule of Evidence 1002, requires the production of originals to prove the content of any writing, recording or photograph." *United States v. Guevara*, 894 F.3d 1301, 1309 (11th Cir. 2018); *see also* Fed. R. Evid. 1002. "The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing." *Guevara*, 894 F.3d at 1309-1310.

It is well established that, when a defendant testifies in his own defense, the jury may disbelieve his testimony, conclude that the opposite of his testimony is true, and consider it as substantive evidence of his guilt. *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995). This Court has found that the district court did not abuse its discretion in allowing the government to question a defendant about a prior drug arrest, without offering testimony from the ***654** arresting officers or lab reports about the drugs, because the prior arrest was probative to the defendant's charges on trial. *United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir. 2005).

[1] Here, the district court did not abuse its discretion by admitting evidence of Mendez Maradiaga's prior arrest. Mendez Maradiaga is correct in noting that the government did not produce the arresting officer or a lab report with regard to the 2012 arrest. However, the arrest was relevant and probative to whether he was truthful in asserting that he had never sold drugs before his interactions with the government. *See* Fed. R. Evid. 404(b); *Salisbury*, 662 F.2d at 741. By asserting an entrapment defense, Mendez Maradiaga placed his predisposition to commit drug offenses at issue and allowed the government to offer evidence that would establish that predisposition. *See Salisbury*, 662 F.2d at 741. As with the defendant in *Ramirez*, the district court did not abuse its discretion in allowing the government to question Mendez Maradiaga about a probative arrest that was directly related to his defense at trial. *See Ramirez*, 426 F.3d at 1354. Moreover, Mendez Maradiaga was not unduly prejudiced by the government's questioning because the district court allowed him to rebut it on redirect, and the jury was free to believe his testimony. *See Brown*, 53 F.3d at 314.

As to the transcripts, Mendez Maradiaga did not object to the use of the transcripts on Rule 404(b) or Rule 16 grounds. Thus, we review those arguments for plain error. *See Presendieu*, 880 F.3d at 1237. The district court did not plainly err in allowing Mendez Maradiaga to be cross-examined about his prior drug deals with Reyes.

[2] First, the government did not quote from the recorded conversations, characterize those conversations, or ask Mendez Maradiaga about specific statements in those conversations. The government only asked whether Mendez Maradiaga, at any point during those prior deals, mentioned helping Reyes because of his troubles in Honduras. Thus, the government's failure to produce English translations of those transcripts did not violate the best evidence rule because the government did not ask about the content of those conversations. *See Guevara*, 894 F.3d at 1309; Fed. R. Evid. 1002.

[3] Similarly, the government's questioning did not violate Rule 16 because that rule does not require that the government translate a recorded statement, and the government did not utilize the transcripts on cross-examination. Fed. R. Crim. P. 16(a)(1)(B). Indeed, the district court later excluded use of the transcripts in accord with Mendez Maradiaga's objection and prevented the jury from reviewing the transcripts during their deliberation.

[4] Lastly, as noted above, Mendez Maradiaga's entrapment defense allowed the government to offer evidence that would show that he was predisposed to commit the offenses in his indictment under Rule 404(b). *See Salisbury*, 662 F.2d at 741. Moreover, Mendez Maradiaga's prior drug deals were inextricably intertwined with the charged offenses because they occurred within a year of the deals at issue during his trial and were all with the government's CI. *See Ellisor*, 522 F.3d at 1269. Mendez Maradiaga's testimony that he only sold drugs to Reyes to help him placed the veracity of his testimony at issue and allowed the government to inquire as to the reason for his prior drug deals with Reyes. *See Salisbury*, 662 F.2d at 741. Further, Mendez Maradiaga's counsel did not dispute that he received the recordings of prior drug sales, and the ***655** government notified the district court and Mendez Maradiaga that it intended to introduce evidence of his prior drug sales under either the inextricably intertwined doctrine

or Rule 404(b). Thus, the district court did not plainly err. Accordingly, we affirm in this respect.

II.

A defendant who has raised an entrapment defense is entitled to present evidence of specific conduct to show a lack of predisposition to commit the charged crime. *See United States v. Rutgerson*, 822 F.3d 1223, 1239-40 (11th Cir. 2016).

Here, the district court did not abuse its discretion in limiting Lampkins's and Mendez Maradiaga's testimony. Although the district court sustained the government's objections regarding Mendez Maradiaga's lack of involvement in drug deals outside of those with Reyes, it allowed him to testify to that lack of involvement during his cross-examination and redirect. On cross-examination, Mendez Maradiaga testified that he never sold drugs to anyone other than Reyes. Further, during his redirect, the district court permitted Mendez Maradiaga to testify that, between 2015 and 2019, he was not investigated for any drug deals that did not involve Reyes. Thus, the district court allowed Mendez Maradiaga to introduce evidence of his lack of drug dealing outside of his involvement with Reyes.

III.

A defendant may, under some circumstances, introduce evidence concerning the criminal history, or prior bad acts, of a non-testifying confidential informant, pursuant to Rule 404(b). *See United States v. Stephens*, 365 F.3d 967, 974-75 (11th Cir. 2004).

[5] Here, the district court did not abuse its discretion in excluding Mendez Maradiaga's evidence about Reyes's prior bad acts. As an initial matter, Mendez Maradiaga largely was able to elicit testimony about Reyes's prior bad acts, even though the district court sustained some of the government's objections. Indeed, Mendez Maradiaga elicited testimony showing that Reyes's motive to assist law enforcement was to remain in the United States, which was relevant to Mendez Maradiaga's argument that Reyes persuaded him to sell drugs. Further, Mendez Maradiaga has not established how Reyes's illegal reentries would have shown that Mendez Maradiaga was not predisposed to commit drug crimes. Moreover, the district court did not err in excluding evidence about Reyes's subsequent arrest in 2019 and his drug dealing activity after his transactions with Mendez Maradiaga in 2015. Fed. R. Evid. 404(b). Those acts occurred after the 2015 drug deals and do not establish Mendez Maradiaga's lack of predisposition to commit the drug crimes in his indictment. *Id.*; *Ellisor*, 522 F.3d at 1269.

Similarly, the district court did not abuse its discretion in excluding Vladimir's testimony, which concerned Reyes's subsequent drug arrest and was not relevant to Mendez Maradiaga's entrapment defense, because the testimony focused on events that occurred years after Mendez Maradiaga's case. See Fed. R. Evid. 404(b). Additionally, the jury was already aware of Reyes's drug dealing because Mendez Maradiaga testified as such during trial. Finally, Vladimir's proffered testimony that Reyes used a "sob story" to persuade others to sell drugs was not relevant to whether Mendez Maradiaga was predisposed to commit drug crimes. *See* Fed. R. Evid. 404(b). Accordingly, we affirm in this respect.

***656** IV.

Entrapment is generally a jury question. *United States v. Brown*, 43 F.3d 618, 622 (11th Cir. 1995). Therefore, entrapment as a matter of law is a sufficiency of the evidence inquiry. *Id.* When an entrapment defense is rejected by the jury, our review is limited to deciding whether the evidence was sufficient for a reasonable jury to conclude that the defendant was predisposed to take part in the illicit transaction. *Id.* Further, a jury's verdict cannot be overturned if any reasonable construction of the evidence would allow the jury to find the defendant guilty beyond a reasonable doubt. *Id.* We "review the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government and making [a]ll reasonable inferences and credibility choices ... in favor of the government and the jury's verdict." *Wenxia Man*, 891 F.3d at 1264 (internal quotations omitted).

The entrapment defense has two elements: "(1) government inducement of the crime; and (2) lack of predisposition on the part of the defendant." *Id.* The defendant bears the burden of production to show that the government induced him to commit the crime, and he can meet the burden by producing evidence that the government's conduct "created a substantial risk that the offense would be committed by a person other than one ready to commit it." *Id.*

If the defendant produces such evidence of inducement, the burden shifts, and the government must "prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *United States v. Dixon*, 901 F.3d 1322, 1343 (11th Cir. 2018). Predisposition is a fact-intensive inquiry into the defendant's state of mind, and juries may consider evidence such as how readily he committed the crime and whether he had the opportunity to back out of it. *Wenxia Man*, 891 F.3d at 1270. "The government need not produce evidence of predisposition prior to its investigation." *Brown*, 43 F.3d at 625. Moreover, post-crime statements will support a jury's rejection of an entrapment defense, and the existence of prior related offenses is relevant, but not dispositive. *Id.*

Additionally, "[p]redisposition may be demonstrated simply by a defendant's ready commission of the charged crime." *United States v. Isnadin*, 742 F.3d 1278, 1298 (11th Cir. 2014) (internal quotations omitted). Further, "[a] predisposition finding is also supported by evidence that the defendant was given opportunities to back out of illegal transactions but failed to do so." *Id.* Finally, the fact-intensive nature of the entrapment defense often makes jury consideration of demeanor and credibility evidence a pivotal factor. *Brown*, 43 F.3d at 625.

"The jury is free to choose among alternative reasonable interpretations of the evidence, and the government's proof need not exclude every reasonable hypothesis of innocence." *United States v. Tampas*, 493 F.3d 1291, 1298 (11th Cir. 2007). Inconsistent jury verdicts are generally insulated from review because "a jury may reach conflicting verdicts through mistake, compromise, or lenity," but "it is impossible to determine whose ox has been gored." *See United States v. Powell*, 469 U.S. 57, 68–69, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984); *United States v. Mitchell*, 146 F.3d 1338, 1344 (11th Cir. 1998). Thus, "as long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an inconsistent verdict on another count." *Mitchell*, 146 F.3d at 1345.

[6] Here, the government met its burden to show that Mendez Maradiaga was predisposed to commit the offense, because his meetings with Lampkins and ***657** Reyes showed that he possessed expertise in dealing drugs, and he referred to that expertise during those meetings. During the October 2015 meeting, Mendez Maradiaga used drug terminology in referring to the amount of cocaine that he had procured for Lampkins. Similarly, during the November 2015 deal, Mendez Maradiaga complained about the money that he was making from the deal and stated that he had not "gotten [himself] out there like [he] want[ed] to." Indeed, Mendez Maradiaga stated that he had dealt with others involved in illegal drug dealing for years. Mendez Maradiaga further demonstrated his predisposition to commit drug crimes by stating that he had "a cat right here" who sold crack cocaine, when Lampkins asked Mendez Maradiaga if he knew anyone who dealt crack cocaine. He also stated that he was "getting back in the game." Further, Mendez Maradiaga admitted that he had engaged in four prior drug deals with Reyes before the offenses charged in his indictment. Mendez Maradiaga's statements during the transactions demonstrated his "ready commission" of the deals and showed his refusal to back out of the deals. *Isnadin*, 742 F.3d at 1298. Additionally, because Mendez Maradiaga testified in his own defense, the jury was free to disbelieve his assertion that he had never sold drugs before and was entitled to conclude the opposite. *Brown*, 53 F.3d at 314. Mendez Maradiaga's assertion that the jury's acquittal on Counts 1 and 2 shows that no reasonable jury could find him guilty on Count 3 is inapposite because this Court has held that inconsistent jury verdicts are generally insulated from review, and the jury's guilty verdict is supported by sufficient evidence. *Powell*, 469 U.S. at 68–69, 105 S.Ct. 471; *Mitchell*, 146 F.3d at 1344-45.

Accordingly, we affirm. [1]

AFFIRMED. [2]

All Citations

860 Fed.Appx. 650

Footnotes

1 We need not address Mendez Maradiaga's assertion that cumulative error requires a new trial because his final claim necessarily fails, as there can be no cumulative error where there are no individual errors. *United States v. Azmat*, 805 F.3d 1018, 1045 (11th Cir. 2015).

2 Mendez Maradiaga's motion to supplement the record is DENIED.

End of Document

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cr-20224-UU

UNITED STATES OF AMERICA

v.

MAYCOL MENDEZ MARADIAGA,

Defendant.
_____/

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL

THIS CAUSE is before the Court upon Defendant's Motion for Judgment of Acquittal (D.E. 50) (the "Motion").

THE COURT has reviewed the Motion and pertinent portions of the record and is otherwise fully advised in the premises.

BACKGROUND

Defendant was indicted on one count of conspiracy to distribute cocaine and two counts of possession with intent to distribute cocaine. D.E. 1. The defense theory at trial was that Defendant was entrapped by the Government's confidential informant ("CI"), Marvin Reyes ("Reyes"). Defendant made a *prima facie* showing of government inducement based on Reyes's conduct; the burden then shifted to the Government to prove beyond a reasonable doubt that Defendant was not predisposed to commit the crimes. The Government cross-examined Defendant about a previous 2012 arrest for a narcotics-related crime in Miami. *See* D.E. 50 at 1; D.E. 60.

On September 10, 2019, the Court denied Defendant's Fed. R. Crim. P 29(a) motion for judgment of acquittal at the close of all the evidence. The Court instructed the jury on entrapment. D.E. 35 at 16. On September 11, 2019, the jury found Defendant guilty of one count of possession

with intent to distribute cocaine, relating to the transaction that occurred in November 2015. D.E. 47. The jury found Defendant not guilty of conspiracy and not guilty of possession with intent to distribute cocaine alleged to have occurred in October 2015. *Id.* In the instant Motion, Defendant argues that evidence of his predisposition is legally insufficient. D.E. 50 at 2. The Government responds that the evidence clearly established that Defendant was not entrapped. D.E. 60 at 3.

LEGAL STANDARD

A motion for judgment of acquittal under Fed. R. Crim. P. 29(c) permits the court to set aside a jury's guilty verdict and enter an acquittal. The Court must "determine whether, viewing all of the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Grigsby*, 111 F.3d 806, 833 (11th Cir. 1997) (quoting *United States v. O'Keefe*, 825 F.2d 314, 319 (11th Cir. 1987)). "The court must resolve any conflicts in the evidence must be resolved in favor of the government, and must accept all reasonable inferences that tend to support the government's case." *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999) (internal citations and quotation marks omitted).

DISCUSSION

Entrapment requires government inducement of the crime and a lack of predisposition by the defendant to commit the crime. *United States v. Duran*, 596 F.3d 1283, 1298–99 (11th Cir. 2010) (citing *United States v. Ventura*, 936 F.2d 1228, 1230 (11th Cir. 1991)). A defendant must first present sufficient evidence of government inducement to raise the defense, then the burden shifts to the government to demonstrate beyond a reasonable doubt that the defendant was

predisposed to commit the offense charged. *Id.* The Eleventh Circuit has rejected a "fixed list of factors" for evaluating an entrapment defense, but has posited "several guiding principles":

> The predisposition inquiry is a purely subjective one which asks the jury to consider the defendant's readiness and willingness to engaged in the charged crime absent any contact with the government's officers . . . . The Government need not produce evidence of predisposition prior to its investigation. Predisposition may be demonstrated simply by a defendant's ready commission of the charged crime. A predisposition finding is also supported by evidence that the defendant was given opportunities to back out of illegal transactions but failed to do so. Post-crime statements will support a jury's rejection of an entrapment defense. Existence of prior related offenses is relevant, but not dispositive. Finally, the fact-intensive nature of the entrapment defense often makes jury consideration of demeanor and credibility evidence a pivotal factor.

United States v. Isnadin, 742 F.3d 1278, 1298 (11th Cir. 2014) (internal citations and quotation marks omitted); *United States v. Rutgerson*, 822 F.3d 1223, 1235 (11th Cir. 2016). "Where . . . the jury has rejected an entrapment defense and government inducement is not at issue, [the court's] 'review is limited to deciding whether the evidence was sufficient for a reasonable jury to conclude beyond a reasonable doubt that the defendant was predisposed to take part in the illicit transaction.'" *Rutgerson*, 822 F.3d at 1234–35 (quoting *United States v. Brown*, 43 F.3d 618, 622 (11th Cir. 1995)).

Defendant argues that evidence of his predisposition is legally insufficient because the Government's "only evidence" as to predisposition involved the 2012 arrest in which: Defendant denied that he possessed the narcotics; the Government did not call any witness to dispute Defendant's version of events; the Government failed to call any of the officers involved in the arrest; the Government did not introduce a lab report; and the state dropped the charges. D.E. 50 at 1–2. The Government responds that Defendant's predisposition was established not only by his 2012 arrest, but by: Defendant's ready commission of the charged crime; Defendant not backing out of selling the narcotics; and Defendant's post-crime statements. D.E. 60 at 4–6.

The Court rejects Defendant's assertion that the "only evidence" of Defendant's predisposition to commit a narcotics crime was his 2012 arrest. D.E. 50 at 1. Throughout his Motion and reply, Defendant repeats that a defendant must be predisposed to commit the criminal act "prior to" first being approached by the government, implying that the only possible evidence of predisposition must be his 2012 arrest. D.E. 50 at 8 (quoting *Jacobson v. United States*, 503 U.S. 540, 549 (1992));[1] D.E. 61 at 2. As the Eleventh Circuit in *Isnadin* explained, the "[e]xistence of prior related offenses is relevant, but not dipositive." 742 F.3d at 1298.

Viewing all of the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, there were other facts legally sufficient for the jury to find beyond a reasonable doubt that Defendant was predisposed to committing a narcotics offense. First, Defendant's predisposition was demonstrated by his ready commission of the crime. Where "trial evidence indicates that [a defendant] was willing and eager to participate in the crime . . . the jury [may] appropriately infer his predisposition to smuggle narcotics prior to the commencement of the investigation." *United States v. Brown*, 43 F.3d 618, 625–26 (11th Cir. 1995). Defendant testified that he sold cocaine to the undercover agent ("UCA") and the UCA testified that he purchased cocaine from Defendant. The jury heard audio and saw video recordings of the transaction. D.E. 34. In his reply, Defendant argues that because he testified that he initially refused Reyes's requests, he did not readily commit the crimes. D.E. 61 at 5. However, when push came to shove and Defendant was presented with money in exchange

[1] In *United States v. Brown*, the Eleventh Circuit stated that "*Jacobson* does not constitute an innovation in entrapment law, and maintains the Supreme Court's long-held position that predisposition requires a subjective inquiry focused on the defendant's state of mind prior to government inducement." 43 F.3d 618, 624 (11th Cir. 1995) (internal citations and quotation marks omitted).

for cocaine, Defendant readily engaged in the transaction. The jury rejected any notion of Defendant's purported reluctance.

Second, Defendant did not back out of selling the narcotics. On November 3, 2015, Defendant conducted a phone call with the UCA and agreed to sell eight ounces of cocaine for $9,600. D.E. 60 at 5; D.E. 34. The jury heard the audio and saw the transcripts of that phone call. *Id.* The next day, Defendant arrived with the eight ounces of cocaine and sold it to the UCA. *Id.* The jury heard the audio and saw the transcripts, video, and a photograph of the drug transaction. D.E. 34. When the deal was completed, Defendant discussed possible future drug transactions with the UCA. D.E. 60 at 5. The transaction took time to orchestrate and involved several steps, including the day between the phone call and the transaction, in which Defendant could have backed out but chose not to. Moreover, the jury heard evidence relating to five different narcotics transactions: (1) the October 2015 transaction, of which Defendant was acquitted; (2) the November 2015 transaction, of which Defendant was found guilty; (3) an uncharged transaction with Reyes, which occurred in December 2014; (4) a second uncharged transaction with Reyes, which occurred in January 2015; and (5) a third uncharged transaction with Reyes, which occurred in August 2015. D.E. 34. There was no evidence that Defendant attempted to back out of any of the drug transactions, let alone the November 2015 drug transaction of which he was convicted.

Third, Defendant made several recorded post-crime statements indicating his willingness to sell and continue selling narcotics to the UCA, such as: "I'm getting *back in the game* . . . right now"; "Little by little I gotta step up my game"; "Let me get my hand, my full hand out there, and we can make money, man"; "If you can start coming more constantly, it's better for us, you feel me?" D.E. 60 at 5–6 (emphasis added). These statements demonstrate Defendant's predisposition to sell narcotics.

CONCLUSION

The evidence at trial was sufficient for the jury to find, beyond a reasonable doubt, that Defendant was predisposed to committing a narcotics crime. The Court emphasizes that the jury considered Defendant's own demeanor and credibility and rejected the entrapment defense as to the November 2015 drug transaction. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion, D.E. 50, is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this _22d__ day of October, 2019.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record via CM/ECF

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cr-20224-UU

UNITED STATES OF AMERICA

v.

MAYCOL MENDEZ MARADIAGA,

Defendant.
_____/

ORDER DENYING MOTION FOR NEW TRIAL

THIS CAUSE is before the Court upon Defendant's Motion for New Trial (D.E. 58) (the "Motion").

THE COURT has reviewed the Motion and pertinent portions of the record and is otherwise fully advised in the premises.

BACKGROUND

Defendant was indicted on one count of conspiracy to distribute cocaine and two counts of possession with intent to distribute cocaine. D.E. 1. The defense theory at trial was that Defendant was entrapped by the Government's confidential informant ("CI"), Marvin Reyes ("Reyes"), who was later deported and did not testify. The Court rejected Defendant's proposed *voir dire* question about the jury's ability to accept an entrapment defense (D.E. 26) and rejected Defendant's proposed jury instruction about the testimony of a government informant (D.E. 25 at 1).

Before and during trial, Defendant sought to introduce reverse 404(b) evidence about Reyes that would support his entrapment defense, particularly that (1) Reyes recruited several people to sell narcotics outside of his role as a CI for the government, and (2) that the Government

deported Reyes after it learned that he attempted to sell cocaine outside of his role as a CI. *See* D.E. 29. The Court did not allow the evidence.

Defendant testified about his entrapment defense. To impeach Defendant, the Government cross-examined him about his 2012 narcotics-related arrested in Miami in which the charges were dropped. Defendant denied possessing the narcotics in 2012 and the Government did not call any witness who could tie Defendant to the 2012 narcotics. Defendant now moves for a retrial because: (1) the venire panel should have been questioned about its willingness to accept an entrapment defense; (2) the Court should have allowed Defendant to introduce reverse 404(b) evidence against Reyes; and (3) the 404(b) evidence of Defendant's prior bad acts was insufficient to be introduced at trial. D.E. 58 at 2.

LEGAL STANDARD

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The "interest of justice" standard is broad and is not limited to correcting erroneous court rulings prejudicial to the defendant. *United States v. Vicaria*, 12 F.3d 195, 198 (11th Cir. 1994). "On a motion for a new trial based on the weight of the evidence, the court need not view the evidence in the light most favorable to the verdict. It may weigh the evidence and consider the credibility of the witnesses." *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). Motions for new trials based on weight of the evidence are "not favored," and are to be granted "sparingly and with caution." *Id*. at 313.

DISCUSSION

I. The Court Properly Rejected Defendant's Proposed *Voir Dire* Question

"Because the obligation to empanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been

accorded ample discretion in determining how best to conduct the *voir dire*." *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). Defendant argues that because narcotics-trafficking is an "inflammatory topic and that many people cannot accept that a person was entrapped into selling narcotics," he was not given a "'full and fair opportunity to expose bias or prejudice on the part of the veniremen.'" D.E. 58 at 14 (quoting *United States v. Robinson*, 475 F.2d 376, 380–81 (D.C. Cir. 1973)). The Court allowed Defendant to argue and offer a factual basis that would justify asking the question. The Court then exercised its ample discretion and rejected the request. At the close of the evidence, the Court instructed the jury on the defense of entrapment, and the jury found Defendant not guilty on two of three counts. D.E. 47. The Court is satisfied that it was within its discretion to reject the proposed *voir dire* question.

II. The Court Properly Excluded Evidence of Reyes's Prior Bad Acts

Defendant argues he is entitled to a new trial because the Court excluded evidence of Reyes's 2018 and 2019 drug sales, which occurred outside the scope of his role as a CI, and subsequent deportation. Neither party called Reyes as a witness. Defendant argues that he should have been able to introduce Reyes's prior bad acts through Agent Diaz, who did testify. D.E. 58 at 13–14.

As this Court has previously explained (D.E. 29), "there is no blanket prohibition on admitting evidence concerning a non-testifying confidential informant's criminal history, if that evidence is used to substantiate a defense." *United States v. Raphael*, 487 F. App'x 490, 496 (11th Cir. 2014). However, the relevance of a non-testifying CI's criminal history has a temporal component. *United States v. Williams*, 954 F.2d 668, 672 (11th Cir. 1992) (rejecting the defendant's argument that the trial court "abused its discretion in excluding evidence that a UC was arrested [on drug charges] after this investigation"); *Raphael*, 487 F. App'x at 496 (holding

that the trial court in a drug case improperly limited defense counsel's cross-examination of a UC about a non-testifying CI's criminal history where the CI had multiple arrests for dealing cocaine and an attempted murder charge prior to his involvement in the case). The Court found Reyes's termination and subsequent deportation, which occurred over three years after Defendant's charged offenses, to be irrelevant and immaterial.

III. Evidence of Defendant's Prior Bad Acts Was Sufficient and Properly Admitted

Defendant argues that the evidence the Government used to impeach him was a "grossly insufficient" "back door" tactic to attack Defendant's character because the Government did not provide evidence to refute Defendant's denial of being involved in a narcotics offense in 2012. This argument is identical to that made in Defendant's post-trial motion for judgment of acquittal (D.E. 50). Therefore, for the reasons the Court provided in denying Defendant's post-trial motion for judgment of acquittal (D.E. 63 at 3–5), this argument also fails.

CONCLUSION

Defendant has not met his burden of showing a miscarriage of justice that would justify a new trial. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion, D.E. 58, is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this _26th__ day of November, 2019

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record via CM/ECF

A-4

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

MAYCOL MENDEZ MARADIAGA

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:19-20224-CR-UNGARO-

USM Number: 18148-104

Counsel For Defendant: Hilton Napolean, II
Counsel For The United States: Jason Reding, AUSA
Court Reporter: William Romanishin

The defendant was found guilty on Count(s) Three of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
Tilte 21 USC 841(a)(1)	Possession with intent to distribute a mixture and substance containing a detectable amount of cocaine	11/4/15	Three

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

The defendant has been found not guilty on count(s) All remaining Count(s).

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

Date of Imposition of Sentence:
11/27/2019

URSULA UNGARO
United States District Judge

November 27th, 2019

DEFENDANT: MAYCOL MENDEZ MARADIAGA
CASE NUMBER: 1:19-20224-CR-UNGARO-

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **FORTY-ONE (41) MONTHS as to Count Three.**.

The Court makes the following recommendations to the Bureau of Prisons:

S. Fl.
Drug treatment

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: MAYCOL MENDEZ MARADIAGA
CASE NUMBER: 1:19-20224-CR-UNGARO-

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS.**.

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

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

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

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

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

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

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MAYCOL MENDEZ MARADIAGA
CASE NUMBER: 1:19-20224-CR-UNGARO-

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

DEFENDANT: MAYCOL MENDEZ MARADIAGA
CASE NUMBER: 1:19-20224-CR-UNGARO-

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00	$	$

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

DEFENDANT: MAYCOL MENDEZ MARADIAGA
CASE NUMBER: 1:19-20224-CR-UNGARO-

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $ due immediately, balance due

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

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

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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