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United States Court of Appeals
For the Eighth Circuit

No. 21-3286

United States of America

Plaintiff - Appellee

v.

Derek J. Petty

Defendant - Appellant

No. 21-3290

United States of America

Plaintiff - Appellee

v.

Derek J. Petty

Defendant - Appellant

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

Submitted: September 22, 2022
Filed: December 20, 2022
[Unpublished]

Before COLLOTON, WOLLMAN, and STRAS, Circuit Judges.

PER CURIAM.

A jury found Derek Petty guilty of conspiracy to acquire a controlled substance. *See* 21 U.S.C. §§ 843(a)(3), (d)(1), 846. Petty received a total of 91 months in prison, most of which were for violating the conditions of supervised release. We affirm.

I.

Derek Petty developed an addiction to prescription pain pills after he injured his leg. At first, a doctor prescribed them. But at some point, his girlfriend, who worked in the doctor's office, started writing the prescriptions herself.

A pharmacist noticed. Petty had filled nine prescriptions totaling 1,560 oxycodone pills at the same pharmacy over an eight-month period. The pharmacist talked to the practice's office manager, who then notified the Drug Enforcement Administration.

Following a federal investigation, a grand jury indicted Petty with "knowingly and intentionally combin[ing], conspir[ing], confederat[ing], and agree[ing] . . . to acquire and obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, and subterfuge, in violation of [21 U.S.C. § 843(a)(3)]." Petty filed a motion to dismiss the indictment, but not until after the government had rested its case. He argued then, as he does now, that the indictment is missing a citation to the general drug-conspiracy statute, *see* 21 U.S.C. § 846, and a list of all the facts the jury would need to

find to convict him. The district court[1] took the motion under advisement, and following the close of evidence, denied it.

The jury, for its part, found Petty guilty. Based on the verdict, the district court revoked supervised release and sentenced him to a 55-month prison term to be served consecutively with a 36-month sentence on the conspiracy count. On appeal, he renews the arguments he made before.

II.

The timing is strict for a motion that raises "a defect in the indictment or information." Fed. R. Crim. P. 12(b)(3)(B). "[I]f the basis for the motion [was] reasonably available and the motion can be determined without a trial on the merits," the defendant must raise it in a pretrial motion. Fed. R. Crim. P. 12(b)(3).

Petty's motion, first brought at the close of the government's case, questioned whether the indictment "state[d] an offense" or suffered from a "lack of specificity." Fed. R. Crim. P. 12(b)(3)(B)(iii), (v). Knowledge of these alleged deficiencies was "reasonably available" before trial started because they would have been "apparent on the face of the indictment" itself. *United States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019). And given that no evidence would be necessary to evaluate them, the motion could have been "determined without a trial on the merits." Raising them for the first time after the trial began, as Petty did, makes these challenges untimely, which ordinarily means we will not review them. *Fogg*, 922 F.3d at 391; *see United States v. Webster*, 797 F.3d 531, 535 & n.3 (8th Cir. 2015).

The one exception is for "good cause." Fed. R. Crim. P. 12(c)(3). The problem for Petty, however, is that he has not suggested any cause for the delay, much less a good one. Indeed, he filed a number of pretrial motions and just decided not to include the

[1]The Honorable Stephen R. Clark, United States District Judge for the Eastern District of Missouri.

challenges to the indictment among them. Petty's counsel even admitted that there was no "issue of notice": he just thought problems with the indictment could be raised at any time. Under these circumstances, we will not excuse the late filing. *See Fogg*, 922 F.3d at 391; *United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015).

Realizing that the pretrial-motion requirement presents a problem for him, Petty argues that Rule 12 is unenforceable under the Rules Enabling Act. His theory is that it "modif[ies] a[] substantive right," 28 U.S.C. § 2072(b), making it more than just a procedural rule.

Federal procedural rules approved by the Supreme Court are "presumptive[ly] valid[]." *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6 (1987). And here, a requirement that certain challenges be made before trial "really regulates procedure." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). It affects only "the manner and the means" by which rights are enforced, not "the rules of decision." *Shady Grove Orthopedic Assocs., P. A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)). A pretrial-motion requirement, in other words, is perfectly consistent with the Rules Enabling Act.[2]

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[2]Petty makes two other arguments to get around the pretrial-motion requirement. First, he argues that the district court constructively amended the indictment by allowing the jury "to convict [him] of an offense different from or in addition to the offenses charged in the indictment." *United States v. Whirlwind Soldier*, 499 F.3d 862, 870 (8th Cir. 2007). To the extent this argument is different from a challenge to the sufficiency of the indictment itself, it fails because he was charged *and* convicted of a conspiracy offense. *See id.*; *see also United States v. White*, 241 F.3d 1015, 1021 (8th Cir. 2001) (concluding that "the words 'combined, conspired, confederated, and agreed' adequately set forth the charge of conspiracy"). His second argument, which is that the district court had to scrutinize the indictment anyway in reviewing his posttrial motions, fares no better. Just because the indictment became relevant later does not excuse Petty from failing to challenge it earlier. *Cf. United States v. Zam Lian Mung*, 989 F.3d 639, 641–42 (8th Cir. 2021) (holding that the pretrial-motion requirement applies even if the defendant later argues that the indictment and jury instructions were deficient).

III.

Petty's two remaining challenges fare no better. One deals with the district court's decision not to remove a juror and the other with the decision to revoke supervised release. Neither was an abuse of discretion. *See United States v. Needham*, 852 F.3d 830, 839 (8th Cir. 2017); *United States v. Ahlemeier*, 391 F.3d 915, 919 (8th Cir. 2004).

A.

When one of the jurors had trouble hearing during voir dire, she reported it to the district court. In her words, she was worried about "miss[ing] something." After listening to how she described the issue, the court decided not to strike her for cause and gave her an audio assistive device for trial. As the court found, she was candid in acknowledging and describing her hearing problems, and there was no evidence that they kept her from acting impartially. *See United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998) (holding that no new trial is necessary unless the defendant can show that the juror was dishonest, partial, and that knowledge of those facts would have permitted a for-cause strike). Beyond satisfying those basic requirements, nothing more was necessary. *Id.*; *see Needham*, 852 F.3d at 839–40 (explaining that courts presume a juror is impartial).

B.

Nor was there a due-process problem with the decision to revoke supervised release. *See Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972). Although the government never presented evidence that Petty violated the condition that he remain law-abiding, none was necessary because the jury had already found that he broke the law. *See United States v. Trung Dang*, 907 F.3d 561, 566 (8th Cir. 2018) ("Unquestionably, the commission of acts sufficient to support a conviction . . . satisf[ies] the requisite misconduct to warrant revocation of supervised release."). The criminal conviction itself, along with all the procedural protections he received at the sentencing

hearing, were more than enough to satisfy "the minimum requirements of due process." *Morrissey*, 408 U.S. at 488–89.

IV.

We accordingly affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:19-cr-00272-SRC-1
	)	
DEREK J. PETTY,	)	
	)	
Defendant.	)	

Memorandum and Order

This matter comes before the Court on Defendant Derek J. Petty's motion for a judgment of acquittal, or in the alternative, motion for a new trial, Doc. 190, and his motion to dismiss count one of the Indictment, Doc. 191. The United States filed responses to both motions. Docs. 196 and 207. Petty filed a reply in support of his motion for a judgment of acquittal or, in the alternative, motion for a new trial. Doc. 212.

I. Background

On April 3, 2019, a grand jury returned the following Indictment against Petty and a co-defendant, Sierra Price, for one count of conspiracy:

> Beginning on an unknown date, but including the period between April 2018 and December 2018, within the Eastern District of Missouri, the defendants, **DEREK J. PETTY and SIERRA PRICE**, did knowingly or intentionally combine, conspire, confederate, and agree together with each other to commit the following offense against the United States: to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, and subterfuge, in violation of Title 21, United States Code, Section 843(a)(3) and punishable under Title 21, United States Code, Section 843(d)(1).

Docs. 1–2. The Court held a four-day jury trial for Petty between April 27 and April 30, 2021. Docs. 166, 167, 171, 174. The United States presented evidence that Petty had submitted numerous forged prescriptions to a pharmacy over the course of an eight-month period in 2018,

obtaining controlled substances such as Oxycodone and Adderall. Petty made oral motions for a judgment of acquittal at the close of the United States' case and at the close of all of the evidence, both of which the Court denied. Doc. 171. When the United States rested, Petty also made an oral motion to dismiss the Indictment. *Id.* After taking the motion under advisement, the Court held a hearing and denied Petty's motion to dismiss the Indictment without prejudice, finding the motion untimely because it had not been raised before trial. *Id.* The Court instructed the jury on conspiracy under 21 U.S.C. § 846, using the Eighth Circuit Pattern Jury Instructions (Criminal), No. 6.21.846A. Doc. 177 at pp. 5–6.

On April 30, 2021, the jury found Defendant "Derek J. Petty guilty of the crime of conspiracy to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, or deception as charged in Count I of the Indictment." Doc. 179. Petty filed a renewed motion for a judgment of acquittal under Rule 29(c), or in the alternative, a motion for a new trial under Rule 33. Doc. 190. Petty also filed a motion to dismiss count one of the Indictment under Rule 12. Doc. 191. For the reasons outlined below, the Court denies Petty's post-trial motions.

II. Discussion

A. Motion to dismiss count one of the indictment

1. Timeliness

After the jury rendered its verdict, Petty filed a renewed motion to dismiss count one of the Indictment on the basis that the Indictment fails to state an offense. Doc. 191. Petty claims that the Indictment failed to state all of the elements of a conspiracy under 21 U.S.C. § 846 and failed to cite the relevant conspiracy statute: 21 U.S.C. § 846. *Id.* at 1–2. Petty

asserts that this motion is timely, and alternatively, that good cause exists for the Court to consider the motion on its merits. *Id.*

Rule 12 of the Federal Rules of Criminal Procedure governs pretrial motions. Rule 12(b)(3)(B) requires a motion claiming a defect in an indictment to be raised before trial if the basis for the motion is reasonably available at the time and the motion can be decided without a trial on the merits. Fed. R. Crim. P. 12(b)(3)(B). A claim that the indictment failed to state an offense must be made *before trial*. Fed. R. Crim. P. 12(b)(3)(B)(v). The Advisory Committee Notes to the 2014 Amendment to Rule 12 clarify that "Rule 12(b)(3)(B) has . . . been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the 'indictment or information fails . . . to state an offense.'" *See* Fed. R. Crim. P. 12 advisory committee notes to 2014 amendments.

The Court finds that Petty's motion is untimely because Petty failed to raise the issue in a pretrial motion. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). The basis for the motion was "reasonably available" to him long before his trial because the alleged insufficiencies appeared on the face of the Indictment, and the motion did not require a trial on the merits. *See* Doc. 1. Petty could have filed his motion to dismiss the Indictment at any time in the two years between his indictment and his trial, but he failed to do so, making his motion untimely. Doc. 191 at 1–2.

Rule 12(c)(3) provides that a court may still consider an untimely Rule 12(b)(3) defense or objection "if the party shows good cause." To show good cause, a party must show both cause and prejudice. *United States v. Paul*, 885 F.3d 1099, 1104 (8th Cir. 2018). Here, the alleged defects appeared in the Indictment issued more than two years before Petty's trial. Doc. 1. The Court continued Petty's trial date due to the circumstances of the COVID-19 pandemic,

and as a result, Petty had access to the United States' Proposed Jury Instructions more than a year in advance of the trial. Doc. 100. Those instructions included the Eighth Circuit Pattern Jury Instructions for conspiracy under 21 U.S.C. § 846, giving Petty ample notice of the conspiracy statute at issue. *Id.* at 25–28 (citing Eighth Circuit Pattern Jury Instructions (Criminal), No. 6.21.846A). Petty had countless opportunities to object to the sufficiency of the Indictment, as he sought and obtained multiple extensions to file pretrial motions; and Petty filed and the Court[1] held hearings on Petty's numerous other pretrial motions. Docs. 29–31, 38–39 49–50, 52–53, 54–55, 57, 59, 62–64, 73, 86, 93–99, 104, 108, 114, 122, 161, 164.

When Petty moved to dismiss the Indictment during trial, the Court questioned why Petty's counsel had not raised the issue before the trial, pointing them to Rule 12(b)(3). Petty's counsel did not claim that they were confused as to what Petty was accused of or that they had insufficient information to act on. They openly admitted that it was not a notice issue and that it was clear that the Indictment charged a conspiracy. But they deliberately waited to challenge the Indictment at the end of the United States' case, explaining that they didn't believe it was in Petty's best interest to raise the issue before trial. The Court finds that Petty has not shown cause or prejudice for his delay. *See United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015) (no good cause where the alleged defect "appeared on the face of the superseding indictment" yet the defendant failed to object to the sufficiency of the indictment before trial); *United States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019) (no good cause where "the alleged defects appeared on the face of the superseding indictment and in the grand jury materials provided before trial" yet the defendant failed to object before trial).

1 Magistrate Judge John M. Bodenhausen held a hearing on Petty's motion for bond to be set, Docs. 57, 59, as well as a hearing on Petty's motions for disclosure of expert witnesses and disclosure of Rule 404(b) evidence and Petty's motion for a *James* hearing, Docs. 62–64, 73. The undersigned held hearings on Petty's motions in limine, Docs. 93–99, 104, 161, 164, and his motion for reconsideration regarding temporary release, Docs. 108, 114, 122.

Petty insists, as he did during trial, that a motion alleging that the indictment failed to state an offense can be raised at any time during litigation. Doc. 191 at 2 (citing *United States v. Villarreal*, 707 F.3d 942, 957 (8th Cir. 2013) ("[T]he claim that the indictment fails to state an offense may be raised at any time.")). But *Villarreal* does not lend an inkling of support to Petty's argument; it was decided before the 2014 amendment to Rule 12(b)(3)(B). After the 2014 amendment, any challenge to the indictment for failure to state an offense *must* be made before trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). The Eighth Circuit explicitly acknowledged in *United States v. Webster* that after the amendment to Rule 12, such motions must be raised in a pretrial motion. 797 F.3d 531, 535 n.3 (8th Cir. 2015). And in *United States v. Fogg—a case Petty cites in his motion*—the Eighth Circuit unequivocally confirms that under Rule 12(b)(3)(B), "a defense that the indictment is defective because it fails to state an offense 'must be raised by pretrial motion . . .'" 922 F.3d 389, 391 (8th Cir. 2019) (citing Fed. R. Crim. P. 12(b)(3)(B)(v)). Petty's insistence that his motion is timely flies in the face of Rule 12 and current Eighth Circuit caselaw.

Petty also asks the Court to disregard Rule 12 because under the Rules Enabling Act, 28 U.S.C. § 2072(b), the Federal Rules cannot "abridge, enlarge or modify any substantive right." Doc. 191 at p. 3. He claims that Rule 12(b)(3)(B)(v) improperly abridges or modifies a substantive right: the Fifth Amendment right to be tried on charges heard by a grand jury. *Id.* But Petty cites no authority showing that Rule 12(b)(3)(B)(v) violates the Rules Enabling Act. *See id.* at 3–4; Doc. 212 at 4–5. And the Court is aware of no case invalidating Rule 12(b)(3)(B)(v) under the Rules Enabling Act. The Court must apply a Federal Rule, where applicable, unless such rule contravenes the Rules Enabling Act, 28 U.S.C. § 2072, or the Constitution. *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 255 (1988) (the Federal Rules of

Criminal Procedure are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."). The Federal Rules of Criminal Procedure are presumptively valid under the Rules Enabling Act. *United States v. Jacobs*, 2011 WL 2604764, at *2 (D. Neb. June 30, 2011) (citing *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 6 (1987) and *In re Baycol Prod. Litig.*, 616 F.3d 778, 786 (8th Cir. 2010)), *report and recommendation adopted*, 8:11-CR-34-JFB (D. Neb. July 22, 2011); *In re Richards*, 213 F.3d 773, 785 (3rd Cir. 2000).

Federal Rules that are "strictly procedural" are valid under 28 U.S.C. § 2072(b) of the Rules Enabling Act. *United States v. Walsh*, 75 F.3d 1, 6 (1st Cir. 1996) (citing *Burlington Northern R. Co.*, 480 U.S. at 5). "This extends to rules that fall 'within the uncertain area between substance and procedure, [but] are rationally capable of classification as either.'" *Id.* (citation omitted). Rule 12(b)(3)(B)(v) provides that a challenge to the sufficiency of an indictment for failure to state an offense must be made in a pretrial motion. Fed. R. Crim. P. 12(b)(3)(B)(v). Rule 12(b)(3)(B)(v) followed the guidance of *United States v. Cotton*, 535 U.S 625, 631 (2002), which held that a defect in the indictment is *not* a "jurisdictional" defect that deprives the Court of its power to hear a case, which could be raised at any time in the proceedings. *See* Fed. R. Crim. P. 12, Advisory Committee Note to 2014 Amendments (citing *Cotton*, 535 U.S at 631). *Cotton* recognized "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." *Id.* at 634 (citing *Johnson v. United States*, 520 U.S. 461, 465 (1997)). Even assuming that Rule 12(b)(3)(B)(v) affects Petty's Fifth Amendment right to be tried on charges found by a grand jury, Doc. 191 at p. 6 (citing *United States v. O'Hagan*, 139 F.3d 641, 651 (8th Cir. 1998)), it merely supplies the procedural means by which a criminal defendant may challenge the

sufficiency of an indictment; it does not alter the substance of the Fifth Amendment right. *See* Fed. R. Crim. P. 12(b)(3)(B)(v); *United States v. Arshad*, 325 F. Supp. 3d 695, 699 (E.D. La. 2018) ("Rule 12(b)(3)(B) is the *procedural mechanism* for challenging a defect in the indictment prior to trial." (emphasis added)). In other words, the Rule dictates *when*, not *whether*, a defendant may raise a challenge to an alleged defect in the indictment, a matter well within the province of criminal-procedure rules. *See id*. Thus, Petty has not shown that Rule 12(b)(3)(B) is invalid under the Rules Enabling Act.

Petty's argument also belies the purpose underlying the amendments to Rule 12(b)(3)(B) to permit various defects that can be remedied before trial to be remedied before trial. *See* Fed. R. Crim. P. 12 advisory committee notes to 2014 amendments ("The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can—and should—be resolved then."). The Rule as amended avoids the waste of judicial resources that would occur by allowing defendants to do what Petty did here: stay silent on a known, curable defect, proceed through pretrial motions, empanel a jury, hold an entire trial on the merits, and then raise the issue after the fact (colloquially referred to as "sandbagging"). *See id*. Petty cites no authority that the Fifth Amendment or any other law allows, much less requires, this.

The Court applies Rule 12(b)(3)(B)(v), finding Petty's motion untimely, and denies the motion to dismiss count one of the Indictment for this reason alone. Doc. 191. But even if the Court considers the motion on the merits, the Court still finds that the Indictment stated the elements of conspiracy under 21 U.S.C. § 846.

2. Standard

Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the

offense charged." "The test for determining the sufficiency of an indictment is whether it contains the elements of the offense intended to be charged, lets the defendant know what he must be prepared to meet, and if any other proceedings are taken against him for a similar offense . . . the record shows with accuracy to what extent he may plead a former acquittal or conviction." *United States v. Wearing*, 837 F.3d 905, 910 (8th Cir. 2016) (internal quotations omitted) (quoting *United States v. Debrow*, 346 U.S. 374, 376 (1953)); *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir. 1988) ("An indictment is sufficient if it fairly informs the accused of the charges against him and allows him to plead double jeopardy as a bar to a future prosecution."). An indictment is ordinarily sufficient if it 'tracks the statutory language.'" *Wearing*, 837 F.3d at 910 (quoting *United States v. Tebeau*, 713 F.3d 955, 962 (8th Cir. 2013)). "The validity of an indictment is determined 'from reading the indictment as a whole and . . . by practical, not technical considerations." *United States v. Perkins*, 748 F.2d 1519, 1524 (11th Cir. 1984) (citing *United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977)). "The test is not whether the indictment could have been framed in a more satisfactory manner but whether it conforms to minimal constitutional standards." *Id.*

There is no requirement that an indictment use the precise language found in the statute, so long as "by fair implication it [the indictment] alleges an offense recognized by law." *United States v. Boykin*, 794 F.3d 939, 944 (8th Cir. 2015). "[A] court may not insist that a particular word or phrase appear in the indictment when the element is alleged in a form which substantially states the element." *Id.* at 944–45. An indictment is insufficient only if an "essential element 'of substance' is omitted, rather than one 'of form' only." *Mallen*, 843 F.2d at 1102. Finally, "[a]n indictment will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant

was convicted." *United States v. Hayes*, 574 F.3d 460, 472 (8th Cir. 2009) (internal citation and quotation marks omitted); *see also United States v. Davis*, 103 F.3d 660, 675 (8th Cir. 1996) ("[A]n indictment that is challenged after jeopardy has attached will be liberally construed in favor of sufficiency. The indictment will then be upheld unless it is so defective that by no reasonable construction can it be said to charge the offense for which the defendants were convicted.").

3. Discussion

Petty asserts that the Indictment did not allege all of the elements of conspiracy, including that the defendant "voluntarily and intentionally joined in the agreement" and that defendant "knew the purpose of the agreement or understanding." Doc. 191 at p. 1. An indictment for conspiracy under 21 U.S.C. § 846 is sufficient if it alleges: "a conspiracy to [commit the underlying offense], the time during which the conspiracy was operative[,] and the statute allegedly violated, even if it fails to allege or prove any specific overt act in furtherance of the conspiracy." *United States v. Forrester*, 616 F.3d 929, 940 (9th Cir. 2010) (internal citation omitted). Petty's Indictment states that he and Sierra Price, during an 8-month period in 2018, "did knowingly or intentionally combine, conspire, confederate, and agree together with each other to commit the following offense against the United States: to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, and subterfuge, in violation of Title 21, United States Code, Section 843(a)(3)[.]" Doc. 1. The Indictment first tracks the language of the conspiracy offense in 21 U.S.C. § 846, stating that Petty and Price "did knowingly and intentionally *combine, conspire, confederate, and agree* together with each other *to commit* the following offense . . ." *Id.* (emphasis added). Then the Indictment refers to the underlying offense in 21 U.S.C. § 843(b)(3), stating that Petty "knowingly and intentionally"

conspired "to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, and subterfuge[.]" Doc. 1. The Court finds that the Indictment was sufficient to charge Petty with conspiracy under 21 U.S.C. § 846.

The Court first observes that the statutory language of 21 U.S.C. § 846 does not lay out the exact elements of a conspiracy found in the Eighth Circuit Pattern Jury Instructions. *See* 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."); *but see* Eighth Circuit Pattern Jury Instructions (Criminal), No. 6.21.846A ("The crime of conspiracy as charged in *[Count ___ of]* the Indictment, has three elements, which are: *One*, on or before *(insert date)*, two *[or more]* persons reached an agreement or came to an understanding to *(insert offense, e.g., distribute cocaine)*; *Two*, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and *Three*, at the time the defendant joined in the agreement or understanding, [he][she] knew the purpose of the agreement or understanding.").

By using the "conspires to commit" language from 21 U.S.C. § 846, the Indictment alleges the essential elements of conspiracy "by fair implication." *Boykin*, 794 F.3d at 944. The Court must not insist that the Indictment use "a particular word or phrase" when the Indictment still "substantially states the element," especially when the Indictment tracks the statutory language. *Id.* at 944–45; *Wearing*, 837 F.3d at 910. As the United States points out, the Eighth Circuit has repeatedly upheld indictments for conspiracy under 21 U.S.C. § 846 using nearly-identical language to this Indictment. *United States v. White*, 241 F.3d 1015, 1021 (8th Cir. 2001); *United States v. Huggans*, 650 F.3d 1210, 1218 (8th Cir. 2011); *United States v.*

Wallace, 578 F.2d 735, 741 n.6 (8th Cir. 1978) (noting that "the charge of conspiracy to violate a criminal law has implicit in it the elements of knowledge and intent"); *see also United States v. Thomas*, 348 F.3d 78, 84 (5th Cir. 2003).

For example, in *White*, the Eighth Circuit held that the words "combined, conspired, confederated, and agreed" were adequate to set forth a 21 U.S.C. § 846 conspiracy charge. 241 F.3d at 1021 ("[T]his language was sufficient for the appellant 'to prepare his defense and to plead double jeopardy to any future prosecution.'" (citing *Mallen*, 843 F.2d at 1102)). Since *White*, numerous courts have found that indictments tracking the "combined, conspired, confederated, and agreed" language in *White* were sufficient to state a charge of conspiracy, with one court finding the language sufficient under an even-less-deferential standard. *United States v. Stockman*, 2009 WL 2595613, at *1 (D.S.D. Aug. 20, 2009) ("[T]he indictment's sufficiency was not raised before the trial [in *White*], so a standard of review more deferential to the government than the one in the instant case was applied. This court now finds that the phrase also meets the stricter standard."); *see also United States v. Romanyshyn*, 2009 WL 2969520, at *1 (D.S.D. Sept. 16, 2009). Here, the Indictment used the exact same language as the indictment in *White*, so the Court finds that the Indictment sufficiently states the elements of the conspiracy offense.

Petty argues that the Indictment's lack of a citation to the conspiracy statute, 21 U.S.C. § 846, makes the Indictment insufficient. Doc. 191 at pp. 9–10. He asserts that the Indictment could just as easily be read to charge him with conspiracy to omit an offense against the United States under 18 U.S.C. § 371. *Id.* at p. 8. Petty seemingly ignores that under Rule 7(c)(2) of the Federal Rules of Criminal Procedure, an incorrect or missing citation will not ordinarily invalidate an indictment. Rule 7(c)(2) provides, "[u]nless the defendant was misled and thereby

prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction."

Petty has not shown that the omission of the statutory citation misled him or prejudiced him in any conceivable way. Doc. 191 at pp. 8–10. The Indictment charged the offense of conspiracy to acquire or obtain a controlled substance by misrepresentation, fraud, forgery, deception, and subterfuge, and the words "did knowingly and intentionally combine, conspire, confederate, and agree together with each other to commit . . ." clearly set out a conspiracy charge under 21 U.S.C. § 846. *See* Doc. 1. Petty admitted that his challenge to the Indictment was not based on a notice issue. He provided no argument that the missing citation prevented him from understanding that he was charged with conspiracy or that he was actually confused as to which conspiracy statute he was charged with. Doc. 191 at 8–10. As the Court has already discussed, Petty had access to the United States' Proposed Jury Instructions for more than a year in advance of his trial, which contained the Eighth Circuit Pattern Jury Instructions for conspiracy under 21 U.S.C. § 846. Doc. 100. On multiple occasions, Petty's counsel referred to this action as a conspiracy prosecution, Docs. 38, 49, 52, 54, 57, 62–64, 86, 93, 95–99, even arguing on several occasions that the Court should exclude the hearsay statements of Sierra Price, Petty's "alleged coconspirator." Doc. 64 (citing *United States v. Adams*, 401 F.3d 886, 893 (8th Cir. 2005) (conspiracy case under 21 U.S.C. § 846)); Doc. 98 (citing *United States v. Macklin*, 573 F.2d 1046, 1049 (8th Cir. 1978) (conspiracy case under 21 U.S.C. § 846)). Petty was not misled or prejudiced by the missing citation, and Petty's bald assertions to the contrary are disingenuous. The Court finds the Indictment valid under Rule 7(c)(2) of the Federal Rules of Criminal Procedure.

In sum, the Indictment was not "so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted." *Hayes*, 574 F.3d at 472. The Court therefore denies Petty's motion to dismiss count one of the Indictment. Doc. 191.

B. Motion for a judgment of acquittal

1. Standard

Rule 29 of the Federal Rules of Criminal Procedure controls post-trial motions for a judgment of acquittal. *See* Fed. R. Crim. P. 29(c)(2) ("If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal."). Such motions "put in issue the sufficiency of the evidence to sustain the verdict." *United States v. Lincoln*, 630 F.2d 1313, 1316 (8th Cir. 1980). The Eighth Circuit has previously explained the nature of a motion for a judgment of acquittal:

> [A post-verdict motion for a judgment of acquittal is] precisely like an appeal from a judgment of conviction on the ground that the evidence was not sufficient to sustain the verdict on which the judgment was entered. The court reviewing the sufficiency of the evidence, whether it be the trial or appellate court, must . . . view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence. The verdict may be based in whole or in part on circumstantial evidence. The evidence need not exclude every reasonable hypothesis except that of guilt; it is sufficient if there is substantial evidence justifying an inference of guilt as found irrespective of any countervailing testimony that may have been introduced. If so, the issue of guilt or innocence has been properly submitted to the jury for its determination, and the motion for judgment of acquittal is properly denied.

Lincoln, 630 F.2d at 1316 (internal citations omitted). Jury verdicts are not lightly overturned, *United States v. Peneaux*, 432 F.3d 882, 890 (8th Cir. 2005), and will be upheld as long as a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Jirak*, 728 F.3d 806, 811 (8th Cir. 2013); *United States v. Ford*, 726 F.3d 1028, 1033 (8th Cir. 2013) (citing *United States v. Lewis*, 557 F.3d 601, 612 (8th Cir. 2009)); *United States*

v. Peters, 462 F.3d 953, 957 (8th Cir. 2006) (a district court "must uphold the jury's verdict even where the evidence 'rationally supports two conflicting hypotheses' of guilt and innocence" (quoting *United States v. Serrano–Lopez*, 366 F.3d 628, 634 (8th Cir. 2004))).

2. Discussion

a. Sufficiency of the Indictment

Petty contends that the jury could not have found him guilty of conspiracy under 21 U.S.C. § 846 because the Indictment against him failed to allege all of the essential elements of 21 U.S.C. § 846. Doc. 190 at p. 7 (citing *United States v. Baker*, 367 F.3d 790, 797 (8th Cir. 2004) ("A motion for judgment of acquittal should be granted only where the evidence, viewed in the light most favorable to the government, is such that a reasonably minded jury must have a reasonable doubt as to the existence of *any of the essential elements of the crime charged*." (emphasis added by Petty)). Petty observes that the Indictment does not charge the following "essential elements" of a conspiracy charge:

> (1) that "the defendant voluntarily and intentionally joined in the agreement[,]"
> (2) that "at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding[,]" or
> (3) that the "misrepresentation, fraud, forgery, deception, or subterfuge" was a "cause in fact" of the acquisition of the controlled substance.

Doc. 190 at p. 7 (citing Eighth Circuit Pattern Jury Instructions (Criminal), No. 6.21.846A and *United States v. Wilbur*, 58 F.3d 1291, 1292 (8th Cir. 1995) (causation an element of 21 U.S.C. § 846)). Petty basically claims that because of defects in the Indictment, a jury could not find, beyond a reasonable doubt, the existence of each of the "essential elements of the crime charged." Doc. 190 at 7 (citing *Baker*, 367 F.3d at 797).

The Court observes that Petty's motion is not a proper motion for a judgment of acquittal, as it is not based on the sufficiency of the evidence presented at trial. *See Ford*, 726 F.3d at

1033 ("A post-verdict motion for judgment of acquittal puts in issue the *sufficiency of the evidence* to sustain the verdict." (emphasis added)). Petty's motion is just a repackaged version of his untimely motion to dismiss the Indictment that he raised during trial and raised again in his motion to dismiss count one of the Indictment, Doc. 191. As the Court already discussed, Petty's challenges to the sufficiency of the Indictment were untimely under Rule 12(b)(3)(B) and ultimately fail because the Indictment was sufficient to state a conspiracy offense under 21 U.S.C. § 846.

Petty provides no authority for his implicit position that he can challenge the sufficiency of the Indictment through motion for a judgment of acquittal under Rule 29. Doc. 190 at pp. 5–7. Petty cites a single case relating to a motion for a judgment of acquittal, *Baker*, 367 F.3d at 797, where the court did not even remotely address a defect in the indictment. *Baker* found that the evidence presented at trial was sufficient to support a guilty verdict, without any mention of whether the indictment at issue contained the "essential elements" of an offense. *Id.* All of Petty's remaining authorities deal with challenges to an indictment in the context of a Rule 12(b)(3)(B)(v) motion. Doc. 190 at pp. 5–7 (citing *United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988); *Wilbur*, 58 F.3d at 1292). Petty's challenges to the sufficiency of the Indictment were untimely under Rule 12(b)(3)(B)(v) and unpersuasive on the merits, and the Court need not consider an identical challenge to the Indictment through a contrived motion for a judgment of acquittal. The Court denies Petty's motion to the extent it raises yet another challenge to the sufficiency of the Indictment.

b. Sufficiency of the evidence

Petty also briefly argues the evidence presented at trial was insufficient for a reasonable jury to find the *mens rea* element of conspiracy: that he acted "voluntarily and intentionally"

and "knew the purpose of the agreement or understanding." Doc. 190 at p. 7. Petty claims that the United States introduced no evidence that he knew the fraudulent prescriptions were not authorized by his doctor, as Price testified that she never discussed the fraudulent nature of the prescriptions with Petty. *Id.* at pp. 7–8.

A conviction for conspiracy "may be based on circumstantial as well as direct evidence." *United States v. Erdman*, 953 F.2d 387, 389 (8th Cir. 1992). Circumstantial evidence is often necessary in a conspiracy case because "knowledge frequently cannot be proven except by circumstantial evidence, and the determination often depends on the credibility of the witnesses, as assessed by the factfinder." *See id.* at 390; *United States v. Madrid*, 224 F.3d 757, 761 (8th Cir. 2000) ("A defendant challenging the sufficiency of the evidence in a conspiracy case has a heavy burden, as proof of the crime may rest on indirect or circumstantial evidence.") (citation omitted). Further, to be a conspirator, it is not required that Petty knew "all [of] the details of the conspiracy." *United States v. Hernandez*, 986 F.2d 234, 236 (8th Cir. 1993) (citing *United States v. Watts*, 950 F.2d 508, 512 (8th Cir.1991), *cert. denied*, 503 U.S. 911 (1992) (citation omitted)).

Although the United States submitted no direct evidence that Petty knew the prescriptions were fraudulent, the United States presented enough circumstantial evidence from which a reasonable jury could find that Petty was aware of the nature of the prescriptions, or at least willfully blind to the critical facts. *See United States v. Cunningham*, 83 F.3d 218, 221 (8th Cir. 1996) (approving a deliberate ignorance or "willful blindness" instruction in a conspiracy case). At trial, the United States introduced testimony that Petty had requested that Price write him numerous prescriptions between April and December of 2018, despite Petty never visiting a doctor after April 12, 2018. Although Dr. Williams had previously prescribed Tramadol and

Hydrocodone for Petty's knee pain, Petty obtained unauthorized prescriptions for Oxycodone and Adderall, both controlled substances. Petty obtained a high volume of these prescription medications and several times attempted to get a refill of a month's worth of pills twice in a given month. And even though Price testified that she never explicitly told Petty that the prescriptions were unsanctioned, she also admitted that she never told Petty that the prescriptions were issued by a doctor either.

Further, the testimony at trial demonstrated that Petty and Price concocted a false story to tell at the pharmacy so that Petty could obtain an early prescription refill. Rose Robinson was one of the pharmacists who received Petty's prescriptions and spoke to him about the early refill. Petty informed Robinson that Petty's wife flushed his medication down the toilet during a domestic dispute, and Robinson refused to fill the prescription. Matthew Milligan, another pharmacist, eventually filled Petty's prescription after calling the doctor's office to confirm Petty's story. Price, answering the office phone, repeated the same story to Milligan when he sought to confirm that the doctor had approved Petty's early refill. But in reality, Petty did not have a wife, and no one had flushed his medication down the toilet; Price admitted on the stand that she and Petty had made the story up so that Petty could get an early refill. Petty's involvement in obtaining an early refill and lying to the pharmacists to justify it creates a reasonable inference that he knew the prescriptions were fraudulent when he joined with Price to submit them to the pharmacy.

Viewing the totality of the evidence in the light most favorable to the verdict, and giving the United States the benefit of all reasonable inferences, the Court concludes that the evidence presented at trial was sufficient for the jury to find Petty guilty beyond a reasonable doubt on the charge of conspiracy under 21 U.S.C. § 846. It was the jury's function to evaluate Price's

credibility and to weigh her testimony alongside the testimony of the United States' other witnesses and the circumstantial evidence of a conspiracy. *United States v. Ireland*, 62 F.3d 227, 230 (8th Cir. 1995) (citing *United States v. Agofsky*, 20 F.3d 866, 869 (8th Cir.), *cert. denied*, 513 U.S. 909 (1994)). Therefore, the Court declines to overturn the jury's guilty verdict and acquit Petty. *See United States v. Surratt*, 172 F.3d 559, 565 (8th Cir. 1999) ("It is not necessary for the evidence before the jury to rule out every reasonable hypothesis of innocence. It is enough that the entire body of evidence be sufficient to convince the fact-finder beyond a reasonable doubt of the defendant's guilt.") (citing *United States v. Noibi*, 780 F.2d 1419, 1422 (8th Cir. 1986)). Accordingly, the Court denies Petty's motion for a judgment of acquittal. Doc. 190 at pp. 7–8.

B. Motion for a new trial

1. Standard

Rule 33(a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." The decision to grant or deny a Rule 33 motion "is within the sound discretion of the [district] court." *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002). The court "can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *Id.* (citation and internal quotation marks omitted). But the court must allow the jury's verdict to stand unless the court determines a miscarriage of justice will occur. *Id.*; *see also United States v. Fetters*, 698 F.3d 653, 656 (8th Cir. 2012) ("Motions for new trial are generally disfavored and will be granted only where a serious miscarriage of justice may have occurred." (internal citation omitted)); *United States v. Worman*, 622 F.3d 969, 977 (8th Cir. 2010) ("A district court will upset a jury's finding only if it

ultimately determines that a miscarriage of justice will occur."). With respect to allegations of trial error, the court should "balance the alleged errors against the record as a whole and evaluate the fairness of the trial" to determine whether a new trial is appropriate. *United States v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988). The granting of a new trial under Rule 33 "is a remedy to be used only 'sparingly and with caution.'" *United States v. Dodd*, 391 F.3d 930, 934 (8th Cir. 2004) (quoting *Campos*, 306 F.3d at 579).

2. Discussion

Petty requests a new trial based on numerous alleged trial errors that make his conviction for conspiracy "a miscarriage of justice." Doc. 190 at p. 8. First, Petty claims that the Indictment fails to allege an offense. *Id.* at p. 8. Second, Petty claims that the Court constructively amended the Indictment. *Id.* at p. 13. Third, Petty claims that the Court erred by refusing to excuse Juror Number One. *Id.* at p. 16. Fourth, Petty claims that testimony about his probationer status prejudiced him. *Id.* at p. 21. Finally, Petty raises the same challenge to the sufficiency of the evidence as in his motion for a judgment of acquittal. *Id.* at p. 23.

a. Indictment fails to allege an offense

Petty claims that his conviction of a crime for which a grand jury never found probable cause is unconstitutional and results in a miscarriage of justice, even if his motions to Dismiss the Indictment were untimely. *Id.* at p. 8. But as the Court discussed above, the Indictment was sufficient to charge Petty with conspiracy under 21 U.S.C. § 846. *See White*, 241 F.3d at 1021. The Indictment set forth all of the essential elements of the offense, providing Petty with notice of the charges and "allow[ing] him to plead double jeopardy as a bar to a future prosecution." *Mallen*, 843 F.2d at 1102. Because the Indictment was sufficient to allege an

offense against Petty, the Court denies Petty's motion for a new trial on this ground. Doc. 190 at p. 8.

b. Constructive amendment

Petty asserts that the Court constructively amended the Indictment by instructing the jury on the elements of conspiracy under 21 U.S.C. § 846. *Id.* at 13. "A constructive amendment occurs when the essential elements of the offense as charged in the indictment are altered in such a manner . . . that the jury is allowed to convict the defendant of an offense different from or in addition to the offenses charged in the indictment." *United States v. Whirlwind Soldier*, 499 F.3d 862, 870 (8th Cir. 2007) (internal citations omitted). This often occurs "through the evidence presented at trial or the jury instructions." *Id.* A constructive amendment implicates a defendant's Fifth Amendment right to a grand jury, "thus a constructive amendment of an indictment is reversible error per se." *United States v. Jarrett*, 684 F.3d 800, 802 (8th Cir. 2012). "[T]he trial court is precluded from amending an indictment so as to . . . broaden the possible bases for conviction[.]" *United States v. Brooks*, 438 F.3d 1231, 1237 (10th Cir. 2006) (citing *Stirone v. United States*, 361 U.S. 212, 216 (1960)).

Petty claims that the Court's instruction of the jury on the elements of conspiracy under 21 U.S.C. § 846 was a constructive amendment because the Indictment did not allege all of the elements of conspiracy, including that Petty "voluntarily and intentionally joined in the agreement" and that he "knew the purpose of the agreement or understanding." Doc. 190 at p. 16 (citing Eighth Circuit Pattern Jury Instructions (Criminal), No. 6.21.846A). But as the Court already explained with regard to Petty's motion to dismiss count one of the Indictment, the language in the Indictment was sufficient to state all of the essential elements of a conspiracy

under 21 U.S.C. § 846. The Court finds that the Indictment was not constructively amended, therefore the Court denies Petty's motion for a new trial on this ground. Doc. 190 at p. 13.

c. Juror Number One

Petty next argues that the Court erred by refusing to excuse Juror Number One when, after the jury was sworn, she informed the Court that she was concerned about her ability to hear all of the proceedings in the courtroom. *Id.* at p. 17. Petty asserts that Juror One's inability to hear parts of the voir dire impacted his Sixth Amendment right to "a fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Petty claims that Juror One could not fully participate in the voir dire process because of her hearing problems, therefore he was unable to elicit enough information from her to intelligently exercise his peremptory and for-cause challenges. Doc. 190 at p. 19 (citing *United States v. Barnes*, 604 F.2d 121, 139 (2d Cir. 1979)). He avers that Juror One either deliberately concealed her hearing difficulties during voir dire or failed to hear the Court's voir dire questions entirely, creating grounds for a new trial. *Id.* (citing *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998) and *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)).

The record belies Petty's unsupported claims. First, Juror One did not conceal her hearing issues during voir dire. When the Court asked the venire panel whether any members had hearing problems, Juror One raised her hand and volunteered information to the Court. Juror One told the Court that she wore hearing aids but that she could hear everything in the courtroom as long as people spoke loudly or used a microphone. The Court confirmed to Juror One that the judge, the lawyers, and witnesses in the case would all have microphones, and Juror One agreed that she would be able to hear in that case.

Second, Juror One declared that could hear all of the voir dire questions directed to her from the Court and the lawyers. After the jury was selected and sworn in, Juror One informed the Court that she was still concerned about being able to hear the courtroom proceedings. The Court brought Juror One forward and examined her in the presence of the parties' counsel. Juror One said that during voir dire she experienced difficulty hearing the lawyers when they were not speaking into the microphone and that she sometimes could not hear the other venire members, who were wearing cloth masks at the time. She stated that, in total, she could hear 95% of what the lawyers said during voir dire. The Court explained to her that all of the participants in the trial would be using microphones and that she could use an audio assistive device from the Court that would allow her to hear everything spoken into the microphones. Petty then moved to strike Juror One for cause on the basis that she had been unable to fully participate in voir dire.

Upon further questioning from the Court, Juror One stated that she had difficulty hearing the Court's questions during voir dire only "once in a great while." She confirmed that she could hear everything that applied to her and that she was able to give answers to all applicable voir dire questions. She stated that there were no questions that she had any concern about and that she gave complete answers to any question directed at her. She affirmed that she heard all of the questions from the lawyers during voir dire, with the exception of a few instances where the prosecutor was asking specific questions of other venire members while facing away from the microphone. The only time Juror One was unable to hear the other members of the venire panel was when the other members were speaking softly and the Court had to instruct them to raise their voices. The Court then confirmed with Juror One that she could hear the proceedings with the use of her audio assistive device.

The Court decided not to strike Juror One or make her an alternate, finding that she had provided a full and complete voir dire, she had answered all questions directed to her, and the Court had given Juror One another chance to answer any other relevant voir dire questions. The Court stated that her use of the audio assistive device would allow her to fully participate in the trial and instructed counsel to bring any further issues related to Juror One to the attention of the Court, should they arise during the trial.

In light of this record, the Court finds that Petty was not deprived of his right to a fair trial because of Juror One's potential hearing problems during voir dire. Juror One did not conceal any information from the Court during voir dire—she informed the Court of her concerns both during voir dire and afterwards. And Juror One confirmed that she could hear every question posed to her during voir dire. The only questions she couldn't hear was when the prosecutor was speaking to several individual venire members about their personal experiences, as well as the members' answers, when they did not speak loudly. In some of those instances, the Court even had to tell the venire members to raise their voices so that they could be heard. Juror One used the audio assistive device during the entire trial and did not indicate at any time that she had difficulty hearing the proceedings; to the contrary, the Court frequently checked in with Juror One throughout the trial, both on and off the record, and confirmed that she could hear—at no time during trial did Juror One express any concern about hearing. Nor did the attorneys raise any issues with Juror One's competency at any time during the trial. The Court determines that allowing Juror One to remain on the jury despite her hearing issues during voir dire did not constitute a "miscarriage of justice."

Even assuming Petty had a valid objection to Juror One, which the Court finds he did not, he could have asserted or renewed it during trial, before the jury rendered its verdict, at a time

when the Court could have replaced her with an alternate. After inquiring of Juror One and providing the Court's standard audio assistive device, the Court was satisfied that Juror One was qualified and fully capable of hearing the proceedings. Throughout the trial, the Court inquired of Juror One whether she could hear, and she unfailingly answered affirmatively. Petty did not lodge any further objections to Juror One at any time after the Court empaneled the jury and the trial began. Petty and his counsel sat through the entire trial and never once raised a concern about Juror One's hearing or attentiveness, even when the Court inquired if Petty's counsel had observed any issues with Juror One. And, while the Court seated two alternate jurors and retained them until the publishing of the verdict under Rule 12(b)(3) of the Federal Rules of Criminal Procedure, at no time before the jury rendered its verdict did Petty move to have Juror One replaced by an alternate.

On these facts, the Court finds that Petty knowingly and voluntarily waived any objection to Juror One's competency. *See, e.g., United States v. Witt*, 215 F.2d 580, 584–85 (2nd Cir. 1954), *cert. denied, sub nom.*, *Talanker v. United States*, 348 U.S. 877 (1954).; *United States v. Renfro*, 620 F.2d 569, 577 (6th Cir. 1980); *United States v. Fuentes-Coba*, 738 F.2d 1191, 1198 (11th Cir. 1984); *see also United States v. Donelson*, 2005 WL 2205023, at *5 (N.D. Iowa Sept. 9, 2005) ("Defendant did not object to the contacted juror remaining on the case at the time of the incident. If Defendant had objected, the court could have seated alternate jurors."); *Delgado v. United States*, 403 F.2d 208, 208–9 (9th Cir. 1968) (defendant affirmatively waived the district court's error when the district court discovered during trial that it had only allowed defendant six peremptory challenges instead of ten, finding "the burden rested upon appellant to suggest the alternative which he now proposes if he preferred it to those suggested by the court."). Assuming Petty had a valid objection to Juror One, which he did not, he waived the

objection by not timely asserting or renewing it. Therefore the Court denies Petty's motion for a new trial on this ground. Doc. 190 at p. 16.

d. Testimony about Petty's probationer status

Petty also argues that he was denied a fair trial because one of the United States' witnesses revealed on direct examination that Petty was "on probation." Doc. 190 at p. 21 (citing *Black v. Shultz*, 530 F.3d 702, 706 (8th Cir. 2008)). Petty states that the Court granted his motion in limine, Doc. 95, prohibiting the United States from raising Petty's prior criminal convictions unless Petty elected to testify. Doc. 190 at p. 21. But during the United States' case-in-chief, the United States elicited testimony from Sierra Price that Petty was "on probation." On the third day of trial, the United States asked Price whether she talked to Petty about whether he thought he would get in trouble for using the fraudulent prescriptions. In response, Price indicated that Petty knew he would get in trouble because he was already "on probation." Petty objected to the testimony and immediately moved for a mistrial. The Court conferred with counsel for both parties, ultimately sustaining Petty's objection but denying the motion for a mistrial without prejudice. The Court issued a curative instruction to the jury, instructing them to disregard the answer to the United States' question and striking the answer from the record. The Court also told the jury during its closing instructions that "[t]estimony that I struck from the record, or told you to disregard, is not evidence and must not be considered." Doc. 177.

District courts have broad discretion on whether to grant a mistrial or a new trial based on the disclosure of improper testimony to the jury. *United States v. Fetters*, 698 F.3d 653, 656 (8th Cir. 2012). "The prejudicial effect of any improper testimony is determined by examining the context of the error and the strength of the evidence of the defendant's guilt." *United States*

v. Hollins, 432 F.3d 809, 812 (8th Cir. 2005). Generally, remedial instructions cure improper statements, and substantial evidence of guilt "precludes . . . reversing the district court." *United States v. Molina–Perez*, 595 F.3d 854, 861–62 (8th Cir. 2010). Like new trials, mistrials are a disfavored remedy: "A mistrial is a drastic remedy for jury exposure to improper witness statements—a remedy which [appellate courts] disfavor." *United States v. Beckham*, 917 F.3d 1059, 1067 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 857 (2020). Courts consider five factors in determining whether a motion for a mistrial based on improper witness statements should be granted: "(1) whether the remark was unsolicited; (2) whether the government's line of questioning was reasonable; (3) whether a limiting instruction was immediate, clear, and forceful; (4) whether any bad faith was evidenced by the government; and (5) whether the remark was only a small part of the evidence against the defendant." *Id.*

Contrary to Petty's assertions, the United States violated no order by eliciting testimony referencing Petty's prior convictions. During the pretrial conference, the United States stipulated to Petty's motion in limine, Doc. 95, agreeing not to mention Petty's prior convictions during trial unless he decided to testify. The Court never granted Petty's motion in limine or entered an order prohibiting the United States from raising the issue, so there was no clear violation of a Court order.

After considering the *Beckham* factors, the Court declines to grant a mistrial. 917 F.3d at 1067. Counsel for the United States did not intentionally elicit the comment from Price about Petty's probation status, and the United States did not elicit any more such testimony for the rest of the trial. The United States asked Price what Petty said about possibly getting in trouble for obtaining controlled substances through the fraudulent prescriptions. This was a reasonable line of questioning given Petty's defense that he did not know that Price was

fraudulently obtaining prescriptions. Price did not testify to what Petty had said, instead responding that Petty was "on probation." Counsel for the United States represented to the Court that she did not intend for Price to bring up Petty's probation, and that she had instructed Price during preparation not to say anything about Petty's convictions. For these reasons, the first, second, and fourth factors do not favor the drastic remedy of a mistrial.

Turning to the third factor, the Court also promptly gave a curative instruction to the jury to ignore Price's answer to the question. *See United States v. Coleman*, 349 F.3d 1077, 1087 (8th Cir. 2003) ("[I]mproper testimony ordinarily is cured by measures less drastic than a mistrial, such as an instruction to the jury to disregard the testimony." (internal citations and quotations omitted)); *Fetters*, 698 F.3d at 656 (upholding district court's denial of a mistrial and a new trial where three government witnesses improperly referenced the defendant's criminal history in violation of a trial stipulation when the Court immediately struck the testimony and gave a curative instruction); *see also United States v. Taylor*, 813 F.3d 1139, 1149 (8th Cir. 2016) (striking testimony and instructing jury to disregard usually cures the effect of a prejudicial statement). When a court gives a curative instruction, a mistrial is only appropriate if the "verdict was 'substantially swayed' by the prejudicial comment." *United States v. Urick*, 431 F.3d 300, 304 (8th Cir. 2005). "In making this determination, [the Court] must evaluate whether a curative instruction was sufficient in the context of the entire trial, and weigh the prejudice against the strength of the government's evidence."

After conferring with counsel for the parties, the Court told the jury to disregard Price's answer to the United States' previous question and that the answer was stricken from the record. The instruction was given immediately after the violation, and it clearly explained that the jury was not to consider Price's answer to the question. In giving the instruction, the Court was

careful not to repeat the fact that Petty was on probation. The Court instructed counsel not to raise the issue of probation again, and there were no further instances of testimony referring to Petty's prior convictions. And at the close of all of the evidence, the Court instructed the jury that it must not consider any testimony that the Court had stricken from the record or told them to disregard. Doc. 177. The third factor does not favor a mistrial.

As for the fifth factor, Price's remark was only a small part of the evidence against Petty. Over the course of Petty's three-day trial, the United States presented no less than seven witnesses and twenty-one exhibits against Petty. Testimony established that the prescriptions Petty obtained were not authorized by a doctor, and that Price never told Petty that the prescriptions were legitimate. Petty asked Price for numerous prescriptions between April and December of 2018, even though he never visited a doctor after April 2018. Petty obtained a large amount of prescription medication and attempted to get several early refills in a given month. He even told pharmacists a fake story about his wife flushing his medication down the toilet, which was corroborated by Price over the phone. In the context of the entire case and the strong evidence presented against Petty, the jury was unlikely to be "substantially swayed" by Price's single comment that Petty was on probation. *Urick*, 431 F.3d at 304. *See United States v. Cole*, 380 F.3d 422, 427 (8th Cir. 2004) ("In the face of the strong evidence and wide array of testimony against Cole, one objectionable statement by a prosecution witness was not sufficient to create prejudicial error."). A lone, stray remark by Price, for which the Court promptly issued a curative instruction, constitutes only a minute part of the evidence against Petty. The fifth factor does not favor mistrial.

The Court declines to grant the disfavored remedy of a mistrial, or a new trial, based on Price's lone mention of "probation" during trial. *See Beckham,* 917 F.3d at 1067. The record

shows that the United States did not intend for Price to bring up Petty's probation, and no other testimony referred to Petty's prior convictions for the remainder of the trial. The Court also provided an immediate and carefully-worded curative instruction, prompting the jury to disregard Price's statement. Petty provides no evidence, apart from bare speculation, that the jury impermissibly considered the fact that he was on probation in coming to its verdict. Accordingly, the Court denies Petty's motion for a new trial on this ground. Doc. 190 at p. 21.

e. Sufficiency of the evidence

Finally, Petty argues that the evidence was insufficient to convict him of conspiracy, incorporating the arguments in his motion for a judgment of acquittal. Doc. 190 at p. 23 (citing Doc. 190 at p. 7). He claims that a reasonable jury could not find the *mens rea* element of conspiracy: that he acted "voluntarily and intentionally" and "knew the purpose of the agreement or understanding." Doc. 190 at 7. Petty suggests that the evidence could not have proven beyond a reasonable doubt that he knew the prescriptions were fraudulent. *Id.* at pp. 7–8.

Motions for a new trial based on the weight of the evidence are "generally disfavored." *Campos*, 306 F.3d at 579. When the defendant challenges the sufficiency of the evidence, the jury's verdict may be overturned only if "the evidence weighs heavily enough against the verdict such that a miscarriage of justice may have occurred." *United States v. Sturdivant*, 513 F.3d 795, 802 (8th Cir. 2008); *see also United States v. McCraney*, 612 F.3d 1057, 1064 (8th Cir. 2010) ("Where a defendant moves for a new trial on the grounds that the verdict is contrary to the weight of the evidence, the district court should grant the motion if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred." (internal citation and quotation marks omitted); *United States v. Camacho*, 555 F.3d 695, 705 (8th Cir.

2009) ("[A] new trial motion based on insufficiency of the evidence is to be granted only if the weight of the evidence is heavy enough in favor of acquittal that a guilty verdict may have been a miscarriage of justice.").

As the Court explained in its analysis of Petty's motion for a judgment of acquittal, a conviction for conspiracy can be based on circumstantial evidence, *Erdman*, 953 F.2d at 389, and a defendant need not know all of the details of the conspiracy to commit the offense, *Causor–Serrato*, 234 F.3d at 387. The United States needed to present no direct evidence that Petty was aware of the nature of the prescriptions. The United States presented circumstantial evidence of Petty's participation in obtaining prescription medications through fraudulent prescriptions. In particular, the evidence demonstrated that Petty and Price coordinated together to tell the pharmacy a fake story so that Petty could obtain an early refill on his prescription medication. The evidence was sufficient for a reasonable jury to find that Petty was aware of, or at least that he was "willfully blind," to the fact that the prescriptions were fraudulent. The evidence does not "weigh[] heavily enough against the verdict that a miscarriage of justice may have occurred." *Sturdivant*, 513 F.3d at 802. Accordingly, the Court denies Petty's motion for a new trial on this ground. Doc. 190 at p. 23.

III. Conclusion

The Court denies Petty's [191] motion to dismiss count one of the Indictment. The Court also denies Petty's [190] motion for a judgment of acquittal, or in the alternative, motion for a new trial.

Dated this 17th day of September 2021.

SL R. CL

STEPHEN R. CLARK
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3286

United States of America

Appellee

v.

Derek J. Petty

Appellant

No: 21-3290

United States of America

Appellee

v.

Derek J. Petty

Appellant

Appeals from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:19-cr-00272-SRC-1)
(4:15-cr-00099-SRC-1)

ORDER

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

February 07, 2023

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

/s/ Michael E. Gans