NO. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

Richard Lee David Brown,

Petitioner,

-vs.-

United States of America,

Respondent.

APPENDIX

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 22-2343

United States of America

Plaintiff - Appellee

v.

Richard Ladavid Brown, Jr., also known as Richard Lee David Brown, also known as Junior Brown

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: June 16, 2023
Filed: December 13, 2023

Before GRUENDER, KELLY, and GRASZ, Circuit Judges.

KELLY, Circuit Judge.

A jury found Richard Lee David Brown guilty of possession with intent to distribute a controlled substance. See 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 851. Brown appeals his conviction, alleging multiple pre-trial and trial-related errors. We affirm.

I.

At about 5:00 a.m. on November 18, 2020, law enforcement executed a search warrant at an apartment on Clark Street, in Des Moines, Iowa.[1] Brown, Kenny Smart, and Smart's girlfriend, Dionne Dibble, were present when officers arrived. Lisa Harper, the tenant of the apartment, was not.

When officers first entered the apartment, they saw a man—Brown—running towards the kitchen. They secured Brown, and then searched the three-bedroom apartment.

In the first bedroom, officers found Smart, his tablet, a firearm and ammunition, over a thousand dollars of cash belonging to Smart, and Dibble's cell phone. In the third bedroom, law enforcement found drugs—much of which was later determined to be cocaine base—and drug paraphernalia. On the bed were drugs in plastic bags, along with a hat, a jacket, and a cell phone with a blue case. No fingerprints were found on this evidence, although law enforcement later testified that finding identifiable prints on drug packaging is "[v]ery, very rare." In a still shot from a surveillance video taken of the apartment building the day before, Brown was seen wearing a hat and jacket that looked like those found on the bed.

Later that day, Special Agent Brandon West interviewed Brown. Brown told Agent West that he had stayed in the third bedroom the previous night. Brown also described his cell phone and told Agent West his cell phone number, both of which matched the phone found on the bed in the third bedroom. In Brown's pocket, law enforcement found $590 in cash, which they photographed.

Brown was indicted on one count of possession with intent to distribute cocaine base. His first attorney was appointed in late November 2020, and Brown requested—and received—his first continuance soon after his arraignment. Brown's

[1]The facts in this section are drawn from the record before us on appeal.

first attorney was permitted to withdraw on February 18, 2021, and his second attorney was appointed that same day. In October 2021, Brown's second attorney twice requested that trial be continued, but the district court[2] denied these requests. Brown's second attorney was allowed to withdraw the following month, and the court granted Brown a continuance "to provide the reasonable time necessary for effective preparation."

On December 1, 2021, Brown's third attorney—who was ultimately Brown's trial counsel—was appointed. He initially represented to the court that he would be ready for trial on January 31, 2022. But on January 3, 2022, he filed a motion to continue trial, explaining that he had not appreciated the amount of discovery or the extent of his client's requests for additional investigation and in-person meetings. The court denied the motion.[3]

Brown's trial began on January 31, 2022. The government called Lometa Welch as one of its witnesses. She testified that she went to the Clark Street apartment on the morning that the search warrant was executed, "not long before" the police arrived, to buy crack cocaine. She said she waited by the front door while Lisa Harper got the crack from Brown. Welch claimed that she knew the crack came from Brown because she heard Harper say his name when Harper went into the bedroom, and Welch recognized Brown's voice in response. The government also introduced evidence of Brown's two previous controlled substance related convictions, as well as evidence related to Smart. The jury heard that Smart was arrested on the day the Clark Street apartment was searched, and that he was charged, tried, and found guilty of possession of a firearm as a felon and use of a firearm in furtherance of a drug crime. The jury also heard that Smart not only sold drugs, but

[2]The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

[3]Brown's third attorney thereafter sought to withdraw, citing a breakdown in the attorney client relationship, and Brown filed a *pro se* motion requesting the same. After a hearing, the defense withdrew its request.

that he did so out of the Clark Street apartment, where he also cooked cocaine powder into cocaine base (or crack). As relevant on appeal, the government also introduced into evidence the photograph of Brown's cash and the still shot from the surveillance video taken of the apartment building the day before the search that captured Brown wearing the hat and jacket that looked like those found in the third bedroom.

At the conclusion of the government's case, Brown moved for judgment of acquittal, which the court denied. He then asked that a "mere presence" instruction be given to the jury, but the court denied the request. The jury returned a guilty verdict. The district court denied Brown's motion for a new trial, and sentenced him to a 264-month term of imprisonment and 6 years of supervised release. He timely appeals and raises multiple issues.

II.

As an initial matter, Brown moves to expand the record on appeal and asks us to consider evidence not presented to the district court. But "[a]n appellate court can properly consider only the record and facts before the district court and thus only those papers and exhibits filed in the district court can constitute the record on appeal." United States v. Brewer, 588 F.3d 1165, 1171 n.4 (8th Cir. 2009) (quoting Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc., 528 F.3d 556, 559–60 (8th Cir. 2008)); see Faidley v. United Parcel Serv. of Am., Inc., 889 F.3d 933, 942 n.7 (8th Cir. 2018) (en banc); see also Fed. R. App. P. 10(a) (defining record on appeal).

Because the documents that Brown wants us to consider "were presented for the first time on appeal, 'they are not part of the record for our review,' and we cannot consider them." C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347, 591 F.3d 624, 629 n.4 (8th Cir. 2010) (quoting Bath Junkie, 528 F.3d at 560); see Midwest Fence Corp. v. U.S. Dep't of Transp., 840 F.3d 932, 946 (7th Cir. 2016) ("As a general rule, we will not consider evidence on appeal that was not before the district court when it rendered its decision. Adding new evidence would essentially

convert an appeal into a collateral attack on the district court's decision." (citations omitted)); cf. Fed. R. App. P. 10(e)(2) (allowing errors in, and omissions from, the record to be remedied in limited circumstances not present here). Consequently, we deny Brown's Amended Motion to Expand the Record on Appeal and we examine his arguments based on the record that was before the district court.

III.

Brown argues that the government improperly introduced statements in which he described his cell phone and provided his cell phone number to Agent West. He asserts that their introduction was improper because he made these statements during a custodial interrogation before he received any Miranda warning.

"[A] motion to suppress evidence [must] 'be raised by pretrial motion if the basis [for] the motion is then reasonably available and the motion can be determined without a trial on the merits.'" United States v. Pickens, 58 F.4th 983, 987 (8th Cir. 2023) (quoting Fed. R. Crim. P. 12(b)(3)(C)) (considering issue in Fourth Amendment context). When a party fails to show good cause for not raising suppression in a pretrial motion, "[w]hether this issue is waived, or whether plain-error review is available, is an unsettled question in our circuit." Id. at 988 (expressing the view that waiver is "the proper answer," but nonetheless reviewing suppression argument not raised to district court for plain error); see United States v. Thornton, No. 22-2790, 2023 WL 4994508, at *2 (8th Cir. Aug. 4, 2023) (per curiam) (unpublished) (reviewing defendant's argument to suppress evidence "under a plain-error standard," when the argument was neither "raised by pretrial motion, nor raised at all to the district court").

Brown's argument that his pre-Miranda statements should be suppressed was not raised to the district court, and he has not offered good cause for his failure to do so. Assuming without deciding that plain error review is available to Brown, we review for plain error. See Pickens, 58 F.4th at 988 (first citing United States v. Hill, 8 F.4th 757, 760 (8th Cir. 2021) (per curiam); and then citing United States v.

Bernhardt, 903 F.3d 818, 824 (8th Cir. 2018)). "To obtain relief . . . [Brown] must show an obvious error that affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings." Bernhardt, 903 F.3d at 824–25 (citing United States v. Olano, 507 U.S. 725, 732 (1993)).

Our review of this issue is confined to the record before us on appeal, and Brown's argument relies on information outside that record. The evidence at trial—and before us now—included testimony that soon after the officers entered the Clark Street apartment, Brown was handcuffed. The record does not indicate when Brown was given a Miranda warning or whether the Miranda warning was given before or after the now-challenged statements were made. Because we can "properly consider only the record and facts before the district court," Brewer, 588 F.3d at 1171 n.4 (citation omitted), we cannot conclude the district court plainly erred in allowing the statements into evidence.

IV.

Brown argues that, at trial, the government offered and relied on Lometa Welch's uncorrected false testimony, in violation of his Due Process rights. Because he did not raise this issue at trial, we review for plain error. See United States v. Hill, 31 F.4th 1076, 1082–84 (8th Cir. 2022), cert. denied, 143 S. Ct. 1036 (2023).

Welch testified that she interacted with Lisa Harper at the Clark Street apartment on the morning it was searched. Brown contends that this testimony is false because, he claims, "Harper was not present at the residence that morning." The evidence supports the assertion that Harper was not at the apartment when the officers executed the search warrant. But no evidence in the record supports the assertion that Harper was not present at the apartment earlier that morning—before the search warrant was executed. On this record, Brown has failed to show any error that was plain.

V.

Next, Brown challenges four of the district court's evidentiary rulings. First, its admission of two of Brown's prior state convictions under Federal Rule of Evidence 404(b): a 2014 conviction for possession of a controlled substance (cocaine base) with intent to deliver, and a 2019 conviction for possession of cocaine. Second, its exclusion of "reverse" 404(b) evidence about Smart. Third, its admission of an exhibit showing money that had been returned to Brown before trial. And fourth, its admission of Agent West's testimony about the lack of fingerprints found on contraband seized from the apartment.

A.

For evidence to be admissible under Rule 404(b) it must:

> be (1) relevant to a material issue raised at trial, (2) similar in kind and close in time to the crime charged, (3) supported by sufficient evidence to support a jury finding the defendant committed the other act, and (4) of probative value not substantially outweighed by its prejudicial effect.

United States v. LeBeau, 867 F.3d 960, 978–79 (8th Cir. 2017) (quoting United States v. Halk, 634 F.3d 482, 486–87 (8th Cir. 2011)). "We review the admission of evidence under Rule 404(b) for abuse of discretion." United States v. Jones, 74 F.4th 941, 949 (8th Cir. 2023) (quoting United States v. Riepe, 858 F.3d 552, 559 (8th Cir. 2017)). We "revers[e] only when the evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." United States v. Abarca, 61 F.4th 578, 581 (8th Cir. 2023) (quoting United States v. DNRB, Inc., 895 F.3d 1063, 1068 (8th Cir. 2018)).

Here, the government's proposed uses of Brown's prior convictions to prove knowledge, motive, and intent "were not well-explained, and might prudently have been omitted." United States v. Monds, 945 F.3d 1049, 1052 (8th Cir. 2019). But they were relevant to his "state of mind," and to the elements of the charge brought

against him. Jones, 74 F.4th at 950 (quoting United States v. Davis, 867 F.3d 1021, 1029 (8th Cir. 2017)). The convictions "thus had some 'bearing on the case,' and w[ere] not used 'solely to prove' his 'propensity to commit criminal acts.'" Abarca, 61 F.4th at 581 (quoting DNRB, 895 F.3d at 1068). Moreover, the district court's decision to provide a cautionary instruction before the 404(b) evidence was introduced, as well as a final instruction to the same effect, lessened any unduly prejudicial effect of the convictions. Cf. Monds, 945 F.3d at 1053 (discussing cautionary instruction). The district court did not abuse its discretion.

B.

The "reverse" 404(b) evidence relates to Kenny Smart, who was present at the Clark Street apartment on the morning of the search. "[R]everse" 404(b) evidence "refer[s] to evidence of prior bad acts by a third party, introduced by the defendant and offered to implicate the third party in the charged crime." United States v. Battle, 774 F.3d 504, 512 & n.2 (8th Cir. 2014) (citing cases from the Fourth, Tenth, Seventh, Sixth, Fifth, Ninth, and Third Circuits). Before trial, the district court ruled that evidence pertaining to Smart that was related to the search at Clark Street was admissible, but that it would exclude evidence of Smart's prior convictions. Because Brown objected to the exclusion of the "reverse" 404(b) evidence, we review the district court's decision for abuse of discretion. See Jones, 74 F.4th at 949. We "will 'revers[e] only when an improper evidentiary ruling affected the defendant's substantial rights or had more than a slight influence on the verdict.'" United States v. Vaca, 38 F.4th 718, 720 (8th Cir. 2022) (quoting United States v. Anderson, 783 F.3d 727, 745 (8th Cir. 2015)).

Here, we need not decide the propriety of the evidentiary ruling because there is no indication that the exclusion of the "reverse" 404(b) evidence had more than a slight influence on the verdict. Brown asserts that this exclusion prevented him from raising questions about who in fact possessed the drugs found on the bed during the search. As a result, he argues, he could not "sow doubt into the case against [him]." But the record says otherwise. Smart did not testify at trial, but Brown was able to

offer ample details about Smart and use that information to "sow doubt" as to who possessed the drugs. Given the information about Smart that Brown put before the jury, the exclusion of the "reverse" 404(b) evidence could have had no more than "a slight influence on the verdict."

C.

Next, Brown argues that a photograph of $590 in cash that was found in Brown's front pocket on the day of the search was improperly admitted. Because Brown raises this issue for the first time on appeal, we review for plain error. United States v. Torrez, 925 F.3d 391, 395 (8th Cir. 2019) (citing United States v. Lee, 374 F.3d 637, 649 (8th Cir. 2004)). Brown asserts that because this money was returned to him before trial, the introduction of a photo of the cash at trial was unfairly prejudicial. But Brown points to nothing in the record to support the assertion that this cash was, in fact, returned to him. Even assuming it was, he does not explain why the photo of the cash should be considered "impermissible . . . 404(b) evidence," as he asserts it to be. This rule of evidence limits the use of any "*other* crime, wrong, or act." Fed. R. Evid. 404(b)(1) (emphasis added). Yet the drugs found in the third bedroom and the money found in Brown's pocket were both seized on the day the Clark Street apartment was searched. Brown has not explained how the challenged evidence is evidence of any "crime, wrong, or act" that is separate from the acts forming the basis for the charge against him. The district court did not plainly err in admitting the exhibit.

D.

Brown argues that Agent West should not have been permitted to testify that it was "[v]ery, very rare" to find identifiable prints on drug packaging. This evidence, Brown argues, "goes into the territory of expert witness." Because Brown did not object to this testimony, we review for plain error. See United States v. Yarrington, 634 F.3d 440, 447 (8th Cir. 2011) ("To preserve an argument that evidence was improperly *admitted*, the party must have made specific objections

before the district court." (first citing United States v. Johnson, 450 F.3d 366, 371 n.2 (8th Cir. 2006); and then citing Fed. R. Evid. 103(a)(1))); United States v. Martin, 869 F.2d 1118, 1121–22 (8th Cir. 1989) (applying same standard in context of expert testimony).

Even if the contested statement qualified as expert testimony, see Daubert v. Merrell Dow. Pharms., Inc., 509 U.S. 579, 592–95 (1993); Fed. R. Evid. 702, any error in its admission did not affect Brown's substantial rights. Contrary to Brown's conclusory argument that Agent West's statement "prevent[ed] the jury from a full opportunity to fairly assess the *actual* evidence against [him]," the jury had ample opportunity to assess the evidence presented at trial, including the fact that the forensics lab was unable to locate or develop any identifiable fingerprints on this evidence. There was no plain error.

VI.

Brown asserts the district court erred in denying his request for a "mere-presence" instruction. We review for abuse of discretion. United States v. Franklin, 960 F.3d 1070, 1072 (8th Cir. 2020) (citing United States v. Solis, 915 F.3d 1172, 1178 (8th Cir. 2019) (per curiam)). "When reviewing jury instructions, we ensure that the instructions, taken as a whole, fairly and adequately submitted the issues to the jury." United States v. Glinn, 863 F.3d 985, 988 (8th Cir. 2017) (citing United States v. Merrell, 842 F.3d 577, 583 (8th Cir. 2016)). "A defendant is not entitled to a particularly worded instruction on his theory of defense, but he should be given an avenue to present his contention." United States v. Drew, 9 F.4th 718, 725 (8th Cir. 2021) (quoting Franklin, 960 F.3d at 1072).

As the district court noted, the instructions, when taken together, allowed Brown "the opportunity to argue [] what he [wa]s requesting to argue": that he did not knowingly possess the drugs and his mere presence was insufficient to support conviction. "[T]he 'unmistakable implication'" of Instruction 13, which addressed constructive possession, was "that something more than mere presence was required

in order to convict." Franklin, 960 F.3d at 1072 (quoting United States v. Vore, 743 F.3d 1175, 1182 (8th Cir. 2014)); Drew, 9 F.4th at 725 (noting proposed mere-presence instruction would have been duplicative of interlocking constructive- and joint-possession definitions). And Final Instruction No. 10 required the government to prove that Brown knowingly possessed a controlled substance and intended to distribute some or all of it. Taken as a whole, the final instructions adequately conveyed that more than mere presence was required to convict Brown. See Drew, 9 F.4th at 725; Franklin, 960 F.3d at 1072; United States v. Claxton, 276 F.3d 420, 424 (8th Cir. 2002) (noting "the district court might well have given the mere-presence portion of the requested instruction," but based on the circumstances of that case, did not abuse its discretion in declining to do so).

VII.

Brown argues that he was denied a fair trial when the district court denied his January 3, 2022, motion to continue the trial. "We review the denial of the motion for a continuance for a prejudicial abuse of [the district court's broad] discretion." United States v. Woods, 978 F.3d 554, 567 (8th Cir. 2020) (citation omitted); United States v. Chahia, 544 F.3d 890, 896 (8th Cir. 2008) (recognizing "a 'district court's discretion is at its zenith when the issue [of a continuance] is raised close to the trial date'" (quoting United States v. Whitehead, 487 F.3d 1068, 1071 (8th Cir. 2007))). But we will only reverse if an abuse of discretion occurred "*and* the moving party was prejudiced as a result." See Chahia, 544 F.3d at 896 (quoting United States v. Wilcox, 487 F.3d 1163, 1172 (8th Cir. 2007)).

Brown's argument in support of prejudice is twofold. First, he asserts that "multiple theories of defenses were not explored (including securing the testimony of Ms. Dionne Dibble)." But in the motion to continue, Brown did not mention Dibble or any other witnesses or theories that the defense needed time to pursue. Thus, any speculation now as to what Dibble's testimony would have added to Brown's defense is "insufficient to demonstrate prejudice." Chahia, 544 F.3d at 897 (citations omitted); see United States v. Howard, 540 F.3d 905, 906–07 (8th Cir.

2008) (determining district court did not err in denying defendant's motion for continuance because "[s]peculation is inadequate to establish prejudice"). Moreover, Brown has failed to explain these unexplored defense theories or how a continuance would have allowed him to develop them.

Second, Brown argues that prejudice is "illustrate[d]" by "any issues" that this court finds were unpreserved. This argument is wholly conclusory, failing to "meaningfully argue" how a continuance would have allowed him to preserve any of these issues. See United States v. Williams, 39 F.4th 1034, 1045 n.3 (8th Cir. 2022) (citing Ahlberg v. Chrysler Corp., 481 F.3d 630, 634 (8th Cir. 2007) ("[P]oints not meaningfully argued in an opening brief are waived.")).

Without more, Brown has failed to show that the denial of his motion to continue resulted in prejudice. See Woods, 978 F.3d at 568.

VIII.

Brown appeals the denial of his motion for judgment of acquittal, which we review de novo. United States v. Broeker, 27 F.4th 1331, 1335 (8th Cir. 2022). "[W]e 'view[] the entire record in the light most favorable to the government, resolv[ing] all evidentiary conflicts accordingly, and accept[ing] all reasonable inferences supporting the jury's verdict.'" Id. (quoting United States v. Aungie, 4 F.4th 638, 643 (8th Cir. 2021)). "We will reverse a district court's denial of a motion for acquittal only if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." Id. (cleaned up).

"To convict a defendant of possession with intent to distribute a controlled substance, the government must prove beyond a reasonable doubt that the defendant 'both knowingly possessed and intended to distribute the drugs.'" United States v. Campbell, 986 F.3d 782, 807 (8th Cir. 2021) (quoting United States v. Morales, 813 F.3d 1058, 1065 (8th Cir. 2016)). On appeal, Brown's argument for reversal is

cursory. It does not convince us that we should displace the role of the jury. See United States v. Hollingshed, 940 F.3d 410, 417 (8th Cir. 2019). And, reviewing the record, we are convinced that there was sufficient evidence from which a reasonable jury could find each element of the offense beyond a reasonable doubt.

IX.

Brown also argues that the district court abused its discretion in denying his motion for a new trial. "[T]he key question [is] whether a new trial is necessary to prevent a miscarriage of justice." Manning v. Jones, 875 F.3d 408, 410 (8th Cir. 2017) (citing Dindinger v. Allsteel, Inc., 853 F.3d 414, 421 (8th Cir. 2017)); see Broeker, 27 F.4th at 1335 (stating abuse of discretion as standard of review).

"Federal Rule of Criminal Procedure 33(a) provides that a district court 'may vacate any judgment and grant a new trial if the interest of justice so requires.'" Broeker, 27 F.4th at 1335. But such Rule 33 motions are "disfavored," and we have instructed district courts to exercise "Rule 33 authority sparingly and with caution." Id. (citations omitted). Indeed, new trials are "reserved for exceptional cases in which the evidence preponderates heavily against the verdict." United States v. Stacks, 821 F.3d 1038, 1045 (8th Cir. 2016) (quoting United States v. Knight, 800 F.3d 491, 504 (8th Cir. 2015)). This case does not present us with that exceptional circumstance.

At the district court, Brown argued he was entitled to a new trial based on the failure to instruct the jury on "mere-presence" and the 404(b) rulings. We have already examined these issues. To the extent Brown raises other alleged errors, these were not presented to the district court. In any event, we have addressed these arguments as well. Based on the record before us, the evidence does not weigh so heavily against the verdict such that a miscarriage of justice may have occurred, and consequently "[t]he jury's verdict must be allowed to stand." United States v. Sturdivant, 513 F.3d 795, 802 (8th Cir. 2008) (quoting United States v. Johnson, 474 F.3d 1044, 1051 (8th Cir. 2007)).

X.

Brown asserts that his trial counsel provided ineffective assistance. "We normally defer ineffective-assistance claims to 28 U.S.C. § 2255 proceedings." United States v. Oliver, 950 F.3d 556, 566 (8th Cir. 2020) (citing United States v. McAdory, 501 F.3d 868, 872–73 (8th Cir. 2007)) "There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal." Massaro v. United States, 538 U.S. 500, 508 (2003). But this is not such a case.

First, the evidence underlying Brown's ineffective assistance claim is not sufficiently developed to allow direct appeal review. See Oliver, 950 F.3d at 566 ("A developed record in the ineffective-assistance context requires that 'the district court . . . created a record on the specific issue of ineffective assistance.'" (quoting United States v. Wilder, 597 F.3d 936, 944 (8th Cir. 2010))). Second, Brown's ineffective assistance arguments ask this court to evaluate, *inter alia*, trial counsel's strategic decisions both before and during trial. Brown's "claims, complex and intertwined with trial strategy, are best left for a 28 U.S.C. § 2255 proceeding." United States v. Thompson, 690 F.3d 977, 993 (8th Cir. 2012). "For these reasons, this is not one of the 'exceptional cases' in which an ineffective-assistance claim is ripe for review on direct appeal." Oliver, 950 F.3d at 567 (quoting United States v. Sanchez-Gonzalez, 643 F.3d 626, 628 (8th Cir. 2011)).

XI.

Finally, Brown argues for reversal based on the cumulative effect of his asserted errors. Where none of a defendant's "claimed errors is itself sufficient to require reversal," we may reverse "where the case as a whole presents an image of unfairness that has resulted in the deprivation of a defendant's constitutional rights." United States v. Riddle, 193 F.3d 995, 998 (8th Cir. 1999) (citing United States v. Steffen, 641 F.2d 591, 598 (8th Cir. 1981)); see United States v. Tyerman, 701 F.3d

552, 565 (8th Cir. 2012). Based on the record before us, such relief is not appropriate here.

XII.

We affirm the judgment of the district court.

GRUENDER, Circuit Judge, concurring in part and concurring in the judgment.

In Part III, *ante* at 5-6, the court addresses Brown's argument that the Government improperly introduced statements that he made during a custodial interrogation before he received a *Miranda* warning. Brown did not file a pretrial motion to suppress these statements. The court assumes without deciding that we nevertheless may review for plain error Brown's suppression arguments first raised on appeal. Respectfully, I would not make the same assumption.

Suppression issues must "be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(C). If a defendant fails to make a timely suppression motion, a court may consider the matter "if the party shows good cause." Fed. R. Crim. P. 12(c)(3). In this case, it is undisputed that the basis for the suppression argument Brown raises on appeal was reasonably available pretrial. Brown also does not attempt to show good cause for failing properly to raise the issue in the district court.

Before the 2014 amendment to Rule 12, we would have deemed Brown's suppression arguments waived and refused to consider them. *See, e.g.*, *United States v. Green*, 691 F.3d 960, 963-65 (8th Cir. 2012). This was, in part, because the pre-amendment version of Rule 12 expressly stated that a party waives an untimely Rule 12(b)(3) argument absent good cause. The 2014 amendment removed this reference to waiver. Since then, our cases have grappled with whether unpreserved suppression issues are waived or whether we might review them for plain error. *See,*

e.g., *United States v. Hill*, 8 F.4th 757, 760 (8th Cir. 2021) (assuming without deciding the availability of plain-error review).

The matter remained unresolved until our decision in *United States v. Pickens*, 58 F.4th 983 (8th Cir. 2023). In *Pickens*, we surveyed the history described above, noted that the issue was "unsettled," and then decided the question. *Id.* at 987-89. We held that, after the amendment to Rule 12, "waiver continues to be the proper answer." *Id.* at 988. We reasoned that applying the waiver rule prevents undesirable trial gamesmanship: "If a suppression issue is raised and determined before trial, the trial goes forward with the government introducing whatever evidence is not suppressed. Here, the trial went forward with evidence Pickens now claims should have been suppressed, and the remedy he requests for his untimeliness is an acquittal!" *Id.*; *see also Davis v. United States*, 411 U.S. 233, 241 (1973).

The court wrongly discounts *Pickens*'s resolution of the issue. *See ante* at 5 (characterizing *Pickens* as merely "expressing [a] view"). The views of prior panels bind us. *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel."). I would follow that cardinal rule here. It is true that, after reaching the conclusion that Pickens's arguments were waived, we "alternatively review[ed] for plain error" due to our prior cases' "inconsisten[cy]." *Pickens*, 58 F.4th at 988. But the fact that *Pickens* conducted plain-error review in the alternative does not render its holding on the waiver issue any less binding. *See Massachusetts v. United States*, 333 U.S. 611, 623 (1948) (explaining that where a decision "rested as much upon the one determination as the other . . . the adjudication is effective for both"); *United States v. Files*, 63 F.4th 920, 926 (11th Cir. 2023) ("[A]lternative holdings are as binding as solitary holdings." (internal quotation marks omitted)).

Beyond its binding effect, *Pickens*'s reasoning was sound. The Advisory Committee made clear that removal of the term "waiver" did not render untimely suppression motions subject to plain-error review. *See United States v. Vance*, 893 F.3d 763, 769 n.5 (10th Cir. 2018). Instead, the Advisory Committee's stated

purpose was to clarify that, "[a]lthough the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right," Rule 12 "has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion." Advisory Committee's Notes on 2014 Amendments to Fed. R. Crim. P. 12.

Reviewing unpreserved suppression issues for plain error would make little sense, as this case demonstrates. Without a timely motion, the record will rarely be developed enough for even plain-error review. Here, for example, the court concludes that the district court did not plainly error in allowing the introduction of the challenged statements because the "record does not indicate when Brown was given a *Miranda* warning or whether the *Miranda* warning was given before or after the now-challenged statements were made." *Ante* at 6. I would not engage in the vacuous enterprise of reviewing a nonexistent record for plain error.

In sum, *Pickens* dictates that Brown waived his suppression arguments. Because Part III of the court's opinion does not treat *Pickens* at controlling, I do not join it. I concur in the remainder of the court's opinion and in the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD LEE DAVID BROWN, Defendant.	**No. 4:20-cr-00222-RGE-SHL** **ORDER RE: MOTIONS IN LIMINE**

I. INTRODUCTION

A grand jury in the Southern District of Iowa returned an indictment charging Defendant Richard Lee David Brown with possession with intent to distribute a controlled substance, namely a mixture and substance containing a detectible amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Redacted Indictment, ECF No. 17. Now before the Court are the parties' motions in limine filed in anticipation of trial. *See* Def.'s Mot. Lim., ECF No. 83; Gov't's Mot. Lim., ECF No. 84. The Government resists Brown's motion. Gov't's Resist. Def.'s Mot. Lim., ECF No. 90. Brown resists the Government's motion in part. Def.'s Resp. Gov't's Mot. Lim., ECF No. 92. These matters were addressed at the final pretrial conference on November 22, 2021. Final Pretrial Conference Hr'g Mins., ECF No. 96. This order augments and memorializes the oral rulings made at the final pretrial conference.

II. LEGAL STANDARD

"A district court has broad discretion when deciding whether to admit evidence," and its decision will not be disturbed "absent a clear and prejudicial abuse of that discretion." *Black v. Shultz*, 530 F.3d 702, 707 (8th Cir. 2008) (quoting *Hoselton v. Metz Baking Co.*, 48 F.3d 1056, 1059 (8th Cir. 1995)). Evidence may be admitted if it is relevant. Fed. R. Evid. 402. Relevant

evidence is any evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. But relevant evidence may not be admitted if it is barred by rule, statute, or the United States Constitution. Fed. R. Evid. 402. Relevant evidence may be excluded if its probative value is "substantially outweighed" by "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

III. DISCUSSION

The Court addresses the Government's motion in limine followed by Brown's motion in limine. For the reasons sets forth below, the Court grants in part and denies in part the parties' motions in limine.

A. Government's Motion in Limine

1. Rule 404(b) evidence

The Government moves to admit evidence of Brown's 2014 and 2019 felony convictions under Federal Rule of Evidence 404(b). ECF No. 84 at 1. In 2014, Brown was convicted in the State of Iowa of possession with intent to deliver cocaine base "crack." *See id.*; Order of Disposition, *State of Iowa v. Brown*, No. FECR267652 (Iowa Dist. Ct. Polk Cnty. Apr. 16, 2014). In 2019, Brown was convicted in the State of Iowa of possession of cocaine, second offense. *See* ECF No. 84 at 1; Order of Disposition, *State of Iowa v. Brown*, No. FECR045166 (Iowa Dist. Ct. Buena Vista Cnty. Mar. 27, 2019). The Government argues these prior convictions show motive, intent, knowledge, absence of mistake, and lack of accident to possess cocaine with the intent to distribute it. ECF No. 90 ¶ 2. At the final pretrial conference, Brown acknowledged the 2014 and 2019 felony convictions are within the ambit of Rule 404(b). However, he argues admission of both convictions is overly prejudicial under Rule 403. ECF No. 84 ¶ 1.

Federal Rule of Evidence 404(b) permits evidence of prior crimes for purposes other than

to show propensity. Fed. R. Evid. 404(b). "Rule 404(b) is a rule of inclusion that permits evidence of prior crimes to show a defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *United States v. Monds*, 945 F.3d 1049, 1052 (8th Cir. 2019) (internal quotation marks and citation omitted).

> The evidence must be (1) relevant to a material issue raised at trial, (2) similar in kind and not overly remote in time to the crime charged, (3) supported by sufficient evidence to support a jury finding that the defendant committed the other act, and (4) of probative value not substantially outweighed by its prejudicial effect.

Id.

"[E]vidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime in which intent to distribute drugs is an element." *United States v. Hardy*, 224 F.3d 752, 757 (8th Cir. 2000) (internal quotation marks and citation omitted). "When admitted to show intent, the prior acts need not be duplicates, but must be sufficiently similar to support an inference of criminal intent." *United States v. Walker*, 470 F.3d 1271, 1275 (8th Cir. 2006) (internal quotation marks and citation omitted).

Brown's 2014 and 2019 felony convictions are relevant to and similar in kind to the crime charged here. *Cf. Monds*, 945 F.3d at 1052. Brown's 2014 state felony conviction for possession with intent to deliver cocaine base "crack" is virtually identical to the crime of possession with intent to distribute a controlled substance. *See* ECF No. 84 at 1; ECF No. 17. Brown's 2019 felony conviction for possession of cocaine is directly relevant and similar in kind to the crime charged here because it is an element of the crime of possession with intent to distribute a mixture and substance containing a detectable amount of cocaine base. *See* 21 U.S.C. § 841(a)(1). These prior felony convictions are relevant to Brown's knowledge that he possessed crack cocaine and his intent to distribute cocaine. *Cf. United States v. Gipson*, 446 F.3d 828, 830–31 (8th Cir. 2006)

(affirming the admission of two prior cocaine-related arrests under Rule 404(b) because they tended to establish the defendant's knowledge he possessed cocaine base and his intent to distribute it); *United States v. Cook*, 454 F.3d 938, 941 (8th Cir. 2006) (upholding the district court's exclusion of a six-year-old conviction for possession of marijuana because it was "functionally dissimilar" to the charged crime of possession with intent to distribute cocaine base). Because Brown's felony convictions closely mirror the crime charged in the Indictment, they are "sufficiently similar to support an inference of criminal intent." *Walker*, 470 F.3d at 1275.

Brown's 2014 and 2019 felony convictions are not overly remote in time to the crime charged. *Cf. Monds*, 945 F.3d at 1052. To determine whether prior convictions are too remote in time, the Eighth Circuit applies "a standard of reasonableness, as opposed to a standard comprising an absolute number of years, for the purposes of Rule 404(b)." *Hardy*, 224 F.3d at 757 (internal quotation marks and citation omitted). The 2014 and 2019 felony convictions are seven and three years old, respectively. The Eighth Circuit has upheld the admission of four-year-old to eleven-year-old prior convictions. *Cf. United States v. Fang*, 844 F.3d 775, 780 (8th Cir. 2016) (upholding admission of two-year-old and eight-year-old prior convictions); *United States v. Gaddy*, 532 F.3d 783, 789 (8th Cir. 2008) (finding prior convictions of four, ten, and eleven years old were "not so remote as to be inadmissible"). As such, Brown's three and seven-year-old prior convictions are not overly remote in time.

Additionally, there is sufficient evidence to support a jury finding Brown committed the crimes for which he was convicted in 2014 and 2019. *See Monds*, 945 F.3d at 1052. A jury convicted Brown of possession with intent to deliver cocaine base "crack" in 2014 after finding he committed the offense beyond a reasonable doubt. *See* ECF No. 84 at 4. Brown pleaded guilty to the 2019 charge of possession of cocaine, second offense. *See id.* Finally, the probative value of the felony convictions is not substantially outweighed by any prejudicial effect. *See Monds*,

945 F.3d at 1052; *see also* Fed. R. Evid. 403. Brown's 2014 and 2019 felony convictions are not based on crimes that may inflame the jury's passions and they are similar to the crimes charged in the Indictment. The convictions are not overly prejudicial as they do not tend "to suggest decision on an improper basis." *United States v. Levine*, 477 F.3d 596, 601 (8th Cir. 2007) (internal quotation marks and citation omitted). Thus, evidence as to Brown's 2014 and 2019 state felony convictions is admissible under Rule 404(b) and is not precluded by Rule 403. Any prejudicial effect from the introduction of these convictions will be reduced by a limiting instruction directing the jury as to its use of these prior convictions. As such, admission of Brown's 2014 and 2019 felony convictions is not unduly prejudicial.

Under Rule 404(b), evidence as to Brown's 2014 and 2019 felony convictions is admissible to demonstrate his motive, intent, knowledge, absence of mistake, and lack of accident as to the charged offenses, as explained in the Government's motion. *See* ECF No. 84 at 1–5. The Court grants this aspect of the Government's motion in limine.

2. Reverse Rule 404(b) evidence

The Government moves to exclude prior bad acts evidence of individuals present when the search warrant was executed at the Clark Street residence on November 18, 2020, including Kenny Smart. ECF No. 84 at 5. Brown argues this aspect of the Government's motion is premature. *See* ECF No. 92 at 2.

"'Reverse 404(b)' is a term some courts have used to refer to evidence of prior bad acts by a third party, introduced by the defendant and offered to implicate the third party in the charged crime." *United States v. Battle*, 774 F.3d 504, 512 (8th Cir. 2014). When evidence of separate conduct is "so blended or connected with the [crime] on trial as that proof of one incidentally involves the other; or explains the circumstances; or tends logically to prove any element of the crime charged" it is admissible as intrinsic evidence. *United States v. Bass*, 794 F.2d 1305, 1312

(8th Cir. 1986) (cleaned up) (internal quotation marks and citation omitted).

Here, evidence pertaining to Kenny Smart arising from the search at the Clark Street residence on November 18, 2020, is intrinsic evidence. *Cf. Bass*, 794 F.2d at 1312. Smart was in the same residence as Brown on November 18, 2020, when the search warrant was executed. Smart was convicted of crimes arising from the same facts giving rise to Brown's case. *See* Jury Verdict, *United States v. Smart*, No. 4:20-cr-00219-RGE-SHL (S.D. Iowa June 9, 2021), ECF No. 120. Evidence of the presence of other people in the home on the night Brown was arrested and Smart's criminal conviction arising from the same circumstances underlying this case constitute intrinsic evidence because they incidentally involve each other. *Cf. Bass*, 794 F.2d at 1312. As such, evidence pertaining to Smart that is related to the early morning hours of November 18, 2020—the date the search warrant was executed—is admissible. *Cf. id.* However, Smart's prior convictions or information about him from prior to November 18, 2020, are not intrinsic.

To the extent the Government's motion in limine seeks to exclude evidence about Smart's, or other individuals' bad acts or convictions from prior to the events giving rise to Brown's Indictment, the motion is granted. To the extent the motion seeks to exclude evidence or facts stemming from the execution of the search warrant at the Clark Street residence on November 18, 2020, the Court denies the Government's motion.

3. Jury Nullification

The Government moves to preclude comments encouraging jury nullification. ECF No. 84 at 6. Brown does not resist. ECF No. 92 at 2.

Instructions as to jury nullification are prohibited. *See United States v. Wiley*, 503 F.2d 106, 107 (8th Cir. 1974); *Sparf v. United States*, 156 U.S. 51, 106 (1895). The Eighth Circuit has observed "[t]o encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience

to disobey is to invite chaos." *Wiley*, 503 F.2d at 107. The Court will instruct the jury that it must apply the facts to law, even if it disagrees with the law. Additionally, the Court will instruct the jury that if it finds the Government has proved its case-in-chief beyond a reasonable doubt, then it must return a guilty verdict. The parties are instructed not to provide comments encouraging or referencing jury nullification, as such comments are improper. *Cf. id.* The Court grants this aspect of the Government's motion in limine.

4. Reasonable doubt

The Government moves to preclude the parties from redefining reasonable doubt. ECF No. 84 at 6–7. Defense counsel indicates he will limit comments on the definition of reasonable doubt to the contents of the applicable Eighth Circuit Model Criminal Jury Instruction. ECF No. 92 at 2.

It is generally improper to redefine reasonable doubt. Attempts to quantify reasonable doubt have been "met with strong disapproval in federal courts." *United States v. Pungitore*, 910 F.2d 1084, 1145 (3d Cir. 1990). And novel illustrations or analogies that expand on the standard can risk confusing the jury. *See, e.g.*, *United States v. Pinkney*, 551 F.2d 1241, 1243–44 (D.C. Cir. 1976). The Court will instruct the jury as to the definition of reasonable doubt. Counsel may ask prospective jurors during voir dire about their ability to apply this standard and may discuss the standard during closing arguments, but counsel should avoid redefining the standard or going beyond the Court's instruction. The Court grants this aspect of the Government's motion in limine.

B. Brown's Motion in Limine

1. Rule 404(b) evidence

Brown moves to exclude events from his criminal history that occurred prior to March 27, 2012. Def.'s Mem. Supp. Mot. Lim. 2, ECF No. 83-1. Brown also moves to exclude his prior

convictions from 2012 to 2019. *Id.* at 2–3. The Government intends to introduce evidence of Brown's 2014 and 2019 felony convictions, as discussed above. ECF No. 84 at 1–5; *see supra* Part III.A.1. The Government does not intend to introduce evidence of Brown's other convictions. ECF No. 84 at 1.

For the reasons explained above, evidence of Brown's 2014 and 2019 felony convictions are admissible under Rule 404(b). *See supra* Part III.A.1. As such, the Court denies Brown's motion as to the 2014 and 2019 felony convictions. The Court denies Brown's motion as to the remaining convictions under Rule 404(b) as moot.

2. Rule 609 convictions

Brown moves to exclude evidence of his prior convictions under Rule 609. ECF No. 83 ¶ 1. The Government resists, arguing if Brown testifies in aid of his defense, the Government should be permitted to ask him about convictions admissible under Rule 609. ECF No. 90 ¶ 1.

Under Federal Rule of Evidence 609, if the defendant testifies in his or her criminal case, evidence of a crime that was punishable by imprisonment for more than one year must be admitted if the probative value of the evidence outweighs its prejudicial effect. Fed. R. Evid. 609(a)(1)(B). However, if more than ten years have passed since the conviction, evidence of the conviction is only admissible if the probative value of the conviction substantially outweighs its prejudicial effect and the proponent gives reasonable notice of its intent to use the conviction. Fed. R. Evid. 609(b)(1)–(2).

At the final pretrial conference, the parties identified the 2014 and 2019 Iowa felony convictions involving cocaine; a 2019 Iowa conviction for eluding; and a 2019 Iowa conviction for suborning perjury as prior convictions admissible under Rule 609. Each conviction is not more than ten years old and carries a minimum term of imprisonment of one year. *See* Fed. R.

Evid. 609(a)–(b); *see also* ECF No. 90 ¶ 3. Brown has not indicated if he will testify in his defense. To the extent Brown objects to the admission of these convictions if he does not testify, the Court grants this aspect of his motion—aside from the convictions previously admitted under Rule 404(b). *See supra* Part III.A.1. To the extent Brown objects to the admission of these convictions if he testifies, the Court denies this aspect of Brown's motion.

3. Shooting incident

Brown moves to exclude any reference to "a shooting incident" involving Brown. ECF No. 83 ¶ 4. The Government does not intend to elicit information about this incident. ECF No. 90 ¶ 5. As such, the Court denies this aspect of Brown's motion as moot.

4. Bag of ammunition

Brown moves to exclude any reference to "a bag of ammunition" belonging to him. ECF No. 83 ¶ 5. The Government does not intend to reference this or elicit information about it. ECF No. 90 ¶ 6. As such, the Court denies Brown's motion as moot.

5. Letters

Brown moves to exclude any reference to letters requested of Lometa Welch, Charles Logins, or Heidi Kipnusu pertaining to Brown. ECF No. 83 ¶ 6. The Government does not intend to introduce evidence of the letters. ECF No. 90 ¶ 7. As such, the Court denies this aspect of Brown's motion as moot. The parties may readdress this issue during the course of trial, if necessary.

6. Jail text messages

Brown moves to exclude any reference to or admission of jail text messages authored by him of a sexual nature. ECF No. 83 ¶ 7. The Government does not intend to introduce any such evidence. ECF No. 90 ¶ 8. As such, the Court denies this aspect of Brown's motion as moot.

7. Text messages

Brown moves to exclude text messages recovered from a cell phone located on the bed next to the crack cocaine at issue in this case. ECF No. 83 ¶ 9; ECF No. 83-1 at 6–7; *see also* ECF No. 90 ¶ 9. The text messages at issue reference other drug deals involving Brown, including messages between four different women and Brown sent in the weeks leading up to November 18, 2020. ECF No. 83-1 at 6. Brown also moves to exclude a text message with an attached photograph of a handgun. *Id.* at 7. He argues these text messages are unfairly prejudicial under Rule 403. *Id.* at 6–7. The Government resists, arguing the text messages as to other drug deals involving Brown are not unfairly prejudicial. ECF No. 90 ¶ 9.

At the final pretrial conference, the Government indicated it does not intend to introduce the text message about the handgun. As such, the Court denies this aspect of Brown's motion as moot. The Government indicated it intends to introduce a limited number of text messages concerning other drug deals involving Brown. These text messages, contained on the phone found next to crack cocaine, are relevant to Brown's alleged possession of the crack cocaine. *See* Fed. R. Evid. 401. The substance of the text messages is also relevant to whether Brown intended to distribute the cocaine he allegedly possessed. *See id.* Brown's prior interactions with the text message recipients regarding drug deals within the weeks leading up to November 18, 2020, are relevant to Brown's intent as to the crack cocaine seized in the bedroom near the phone's location. The text messages are relevant and therefore admissible. *See* Fed. R. Evid. 402.

The text messages are not unfairly prejudicial to Brown. *See* Fed. R. Evid. 403. "[E]vidence is not unfairly prejudicial merely because it tends to prove a defendant's guilt." *United States v. Boesen*, 541 F.3d 838, 849 (8th Cir. 2008). Although the text messages are prejudicial in that they tend to prove Brown's guilt, they are not unduly prejudicial. The text messages do not tend to suggest the jury reach a decision on an improper basis. As such, the Court denies Brown's motion

as to the text messages. The Court limits the Government's evidence of the text messages to those it has already identified. However, if Brown opens the door to additional text messages at trial not identified by the Government, the Government may explore the content of those text messages.

IV. ORDER

The Court expects counsel to comport themselves with the representations made in their motions in limine and responses, and to advise their witnesses of the limitations set forth in this Order. The Court further expects counsel to object at trial to evidence they believe is inadmissible.

IT IS ORDERED that the Government's Motion in Limine, ECF No. 84, is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that Defendant Richard Lee David Brown's Motion in Limine, ECF No. 83, is **GRANTED IN PART AND DENIED IN PART.**

IT IS SO ORDERED.

Dated this 24th day of November, 2021.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD LEE DAVID BROWN, Defendant.	**No. 4:20-cr-00222-RGE-SHL** **ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL**

I. INTRODUCTION

A jury found Defendant Richard Lee David Brown guilty of possession with intent to distribute a controlled substance, that is cocaine base. Brown moves for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and, alternatively, for a new trial under Federal Rule of Criminal Procedure 33(a). The Government resists. For the reasons set forth below, the Court denies Brown's motion for judgment of acquittal and motion for a new trial.

II. BACKGROUND

On November 18, 2020, law enforcement officers executed a search warrant at a residence on Clark Street in Des Moines, Iowa, where Brown was present. *See* Gov't's Br. Supp. Resist. Def.'s Mot. J. Acquittal & Mot. New Trial 1, ECF No. 144-1; Def.'s Mot. J. Acquittal & Mot. New Trial ¶ 5, ECF No. 143. A grand jury in the Southern District of Iowa indicted Brown on one count related to the evidence obtained from the Clark Street residence: possession with intent to distribute a controlled substance (cocaine base), in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). Redacted Indictment, ECF No. 17. The matter proceeded to trial on January 31, 2022. Jury Trial Day 1 Mins., ECF No. 123.

At trial, the Government offered numerous exhibits. *See* Trial Ex. List, ECF No. 127. The

admitted exhibits included: cocaine base, methamphetamine, and cocaine seized from Bedroom 3 at the Clark Street residence, photographs of items located in Bedroom 3 of the Clark Street residence, text messages from Brown's phone, packaged cash, and pole camera footage from the day prior to the search. Gov't's Exs. 1–3, 12–18, ECF Nos. 137-1 to 137-2. The photographs from Bedroom 3 depicted a white substance, a cell phone with a sparkle case, and a red hat on a bed. *See* Gov't's Exs. 14–15, ECF No. 137-2 at 5–6. Other photographs of Bedroom 3 depicted a red jacket and a drawer containing a digital scale, baggies, and a pipe. *See* Gov't's Exs. 16–17, ECF No. 137-2 at 7–8. The pole camera footage showed Brown wearing the red hat and jacket located in Bedroom 3. *See* Gov's Ex. 20, ECF No. 137-3 at 1. Text messages from Brown's phone showed Brown arranging the sale of drugs to customers, including references to prices and drug weights. *See* Gov't's Exs. 2c–e, ECF No. 137-1 at 8–14.

The Government also offered witness testimony. *See* Trial Witness List, ECF No. 133. As the Court recalls, one witness testified she often visited the Clark Street residence to buy cocaine from Brown. She testified that in the early morning hours before the search warrant was executed, she saw two individuals at the Clark Street residence: Kenny Smart, asleep in Bedroom 1, and Lisa Harper, the owner of the Clark Street residence. Harper went into Bedroom 3 to retrieve cocaine to sell to the witness. The witness testified she heard Brown's voice from that bedroom as Harper retrieved the cocaine. The same witness testified she purchased crack cocaine from Brown on numerous prior occasions. Narcotics Investigator John Scarlett testified Bedroom 3 contained a distribution quantity of cocaine with a street value of approximately $2,100. The jury also heard testimony regarding Brown's post-*Miranda* interview, in which he admitted to sleeping in Bedroom 3 on the night of November 18, 2020, and the cell phone in the sparkle case belonged to him. The jury convicted Brown of possession with intent to distribute a controlled substance. Jury Verdict, ECF No. 131.

Now before the Court is Brown's motion for judgment of acquittal, or alternatively, for a new trial. ECF No. 143. The Government resists. ECF No. 144. The parties do not request oral argument. *Id.*; ECF No. 143. Because the parties' briefing and exhibits adequately present the issues, no hearing is required. *See United States v. Losing*, 539 F.2d 1174, 1177 (8th Cir. 1976).

Additional factual findings are set forth below as necessary.

III. LEGAL STANDARD

A. Judgment of Acquittal

Under Federal Rule of Criminal Procedure 29(c), a defendant "may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict." A Court must enter a judgment of acquittal if the evidence presented at trial "is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In evaluating the sufficiency of the evidence to sustain a defendant's conviction, the Court "view[s] the evidence in the light most favorable to the guilty verdict, giving the government the benefit of all reasonable inferences that may be drawn from the evidence." *United States v. Basile*, 109 F.3d 1304, 1310 (8th Cir. 1997). The Court does not assess the credibility of witnesses or weigh the evidence as this task belongs to the jury. *See United States v. Ireland*, 62 F.3d 227, 230 (8th Cir. 1995). "[T]he jury's verdict is not to be lightly overturned." *United States v. Rodriguez-Ramos*, 663 F.3d 356, 361 (8th Cir. 2011) (internal quotation marks and citation omitted). The Court "can overturn the jury's verdict only if a reasonable fact-finder must have entertained a reasonable doubt about the government's proof of one of the offense's essential elements." *United States v. Kinshaw*, 71 F.3d 268, 271 (8th Cir. 1995) (internal quotation marks and citation omitted).

B. New Trial

The Court has broad discretion to consider a defendant's motion for new trial. *See United States v. Dodd*, 391 F.3d 930, 934 (8th Cir. 2004). Under Federal Rule of Criminal Procedure

33(a), a court may grant a defendant's request for a new trial "if the interest of justice so requires." The Court must exercise its authority to grant a new trial "sparingly and with caution." *United States v. McClellon*, 578 F.3d 846, 857 (8th Cir. 2009) (internal quotation marks and citation omitted).

IV. DISCUSSION

A. Motion for Judgment of Acquittal

Brown argues the Government put forth insufficient evidence to demonstrate he possessed cocaine base. *See* ECF No. 143 ¶¶ 2, 4–11. The Government resists, arguing more than sufficient evidence demonstrated Brown possessed cocaine base. ECF No. 144 ¶ 3.

A Court will not grant a motion for judgment of acquittal "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Worthey*, 716 F.3d 1107, 1113 (8th Cir. 2013). "To convict a defendant of possession with intent to distribute a controlled substance, the government must prove beyond a reasonable doubt that the defendant both knowingly possessed and intended to distribute the drugs." *United States v. Campbell*, 986 F.3d 782, 807 (8th Cir. 2021) (internal quotation marks and citation omitted). As recounted in the Government's motion, substantial evidence supported the jury's verdict. *See* ECF No. 144-1 at 5–6. Evidence indicated the cocaine base found in Bedroom 3 was located next to Brown's possessions; Brown admitted he slept in Bedroom 3, where the cocaine was located on the morning of the search; text messages from Brown's phone showed Brown arranging drug sales to customers; a photograph from Brown's phone showed him in a bathroom near Bedroom 3; a witness testified she visited the Clark Street residence to purchase drugs from Brown on multiple occasions and hours before the search warrant was executed; and a law enforcement officer testified the amount of cocaine base located in Bedroom 3 was a distribution quantity, with a street value of approximately $2,100. *See id.* at 2–4. The evidence, viewed in the light most favorable to

the Government, provides more than sufficient support for the jury's guilty verdict. *See Basile*, 109 F.3d at 1310. As such, a rational trier of fact could have found beyond a reasonable doubt Brown possessed cocaine base with the intent to distribute it. *See Worthey*, 716 F.3d at 1113.

The Court denies Brown's motion for judgment of acquittal.

B. Motion for New Trial

Brown argues he is entitled to a new trial because the Court did not instruct the jury that "mere presence is not sufficient to support a conviction for possession." ECF No. 143 ¶ 13 (internal quotation marks omitted) (quoting *United States v. Dunlap*, 28 F.3d 823, 826 (8th Cir. 1994)). The Government resists, arguing a mere presence instruction would have been duplicative. ECF No. 144 ¶ 3.

"Jury instructions are sufficient if they fairly and adequately submit the issues to the jury." *United States v. Franklin*, 960 F.3d 1070, 1072 (8th Cir. 2020). "[I]f the instructions as a whole, . . . adequately set[ ] forth the law, afford counsel an opportunity to argue the defense theory[,] and reasonably ensure . . . the jury appropriately considers it[,]" the instructions are sufficient. *United States v. Christy*, 647 F.3d 768, 770 (8th Cir. 2011). "A defendant is not entitled to a particularly worded instruction . . . ." *Franklin*, 960 F.3d at 1072.

The final jury instructions were sufficient. *Cf. id.* They set forth the law and afforded counsel the opportunity to argue the defense theory. *See Christy*, 647 F.3d at 770. The Court instructed the jury that the crime of possession with intent to distribute a controlled substance required the Government to prove beyond a reasonable doubt Brown "possessed a mixture and substance containing a detectible amount of cocaine base; . . . knew that he possessed a controlled substance; and . . . intended to distribute some or all the controlled substance to another person." Final Jury Instr. 10, ECF No. 129; *see Campbell*, 986 F.3d at 807 (providing elements to convict a defendant of possession with intent to distribute a controlled substance). "The jury

thus could not convict based solely on [Brown's] proximity to the . . . drugs; they were required to find . . . [Brown] knew" the drugs were in the home. *Franklin*, 960 F.3d at 1072. The Court also instructed the jury a person has "constructive possession" when he "has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person." ECF No. 129 at 14. The "'unmistakable implication' of the [C]ourt's instruction on constructive possession '[was] that something more than mere presence was required in order to convict.'" *Franklin*, 960 F.3d at 1072 (quoting *United States v. Vore*, 743 F.3d 1175, 1182 (8th Cir. 2014)). These instructions ensured the jury had the opportunity to consider the defense theory. *See Christy*, 647 F.3d at 770. Because the Court provided these instructions, a mere presence instruction would have been "largely duplicative." *Franklin*, 960 F.3d at 1073. The final jury instructions as a whole conveyed the Government had to prove more than Brown's proximity to the cocaine base to convict him. *See Franklin*, 960 F.3d at 1072–73. As such a new trial is not warranted based on the lack of a mere presence jury instruction.

The Court denies Brown's motion for new trial.

V. CONCLUSION

Viewing the evidence at trial in the light most favorable to the Government, the Court finds the evidence was more than sufficient to support the jury's verdict. Judgment of acquittal is not warranted. Additionally, the final jury instructions were sufficient. They set forth the law, afforded counsel the opportunity to argue the defense theory, and reasonably ensured the jury considered the defense theory. Brown is not entitled to a new trial.

Accordingly, **IT IS ORDERED** that Defendant Richard Lee David Brown's Motion for Judgment of Acquittal and Motion for New Trial, ECF No. 143, is **DENIED.**

IT IS SO ORDERED.

Dated this 9th day of March, 2022.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
v.

RICHARD LEE DAVID BROWN,
also known as
Richard LaDavid Brown and Junior Brown

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:20-CR-00222-001

USM Number: 13440-030

Nathaniel A. Nieman
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☑ was found guilty on count(s) after a plea of not guilty. One of the Indictment filed on December 16, 2020.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 851	Possession with Intent to Distribute a Mixture or Substance Containing a Detectable Amount of Cocaine Base	11/18/2020	One

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

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

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

June 23, 2022
Date of Imposition of Judgment

Signature of Judge

Rebecca Goodgame Ebinger, U.S. District Judge
Name of Judge Title of Judge

June 23, 2022
Date

DEFENDANT: RICHARD LEE DAVID BROWN, also known as Richard LaDavid Brown and Junior Brown
CASE NUMBER: 4:20-CR-00222-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

264 months as to Count One of the Indictment filed on December 16, 2020.

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

The defendant be afforded the opportunity to participate in the 500-hour residential drug abuse treatment program and any other substance abuse treatment program.

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

☐ The defendant is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

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

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

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

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RICHARD LEE DAVID BROWN, also known as Richard LaDavid Brown and Junior Brown
CASE NUMBER: 4:20-CR-00222-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Six years as to Count One of the Indictment filed on December 16, 2020.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☑ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: RICHARD LEE DAVID BROWN, also known as Richard LaDavid Brown and Junior Brown
CASE NUMBER: 4:20-CR-00222-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must participate in a cognitive behavioral treatment program, which may include journaling and other curriculum requirements, as directed by the U.S. Probation Officer.

You must participate in an approved treatment program for domestic violence. Participation may include inpatient/outpatient treatment. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You shall not knowingly associate or communicate with any member of the Vice Lords criminal street gang, or any other criminal street gang.

If not obtained while in Bureau of Prisons' custody, you must participate in GED classes as approved by the U.S. Probation Office.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: RICHARD LEE DAVID BROWN, also known as Richard LaDavid Brown and Junior Brown
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CRIMINAL MONETARY PENALTIES

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

☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$0.00	$ 0.00	$ 0.00	$ 0.00

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

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

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RICHARD LEE DAVID BROWN, also known as Richard LaDavid Brown and Junior Brown
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SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

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

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

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

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

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

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office. The Court shall approve such plan.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All crimnal 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.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2343

United States of America

Appellee

v.

Richard Ladavid Brown, Jr., also known as Richard Lee David Brown, also known as Junior Brown

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:20-cr-00222-RGE-1)

ORDER

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

January 19, 2024

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

/s/ Michael E. Gans