NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. FOSTER LEE SCOTT, Defendant - Appellant.	No. 23-2234 D.C. No. 5:21-cr-00199-GW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted September 10, 2024
Pasadena, California

Before: R. NELSON, MILLER, and DESAI, Circuit Judges.

Foster Scott appeals his conviction after a jury found him guilty of possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). Scott was charged after a detective searched his home and found 322 grams of methamphetamine divided into six baggies and approximately $2,300 in small bills. Scott conceded that he possessed the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

methamphetamine but disputed his intent to distribute.

When a defendant fails to object to an evidentiary ruling, we review for plain error. *United States v. Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not plainly err by allowing Detective Lewis to testify that he believed Scott "possessed the methamphetamine for the purpose of sales." Scott argues that the testimony was improperly speculative or based on hearsay. *See United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014). Lewis's testimony was not based on speculation. Rather, his testimony was based on Scott's statement that he wanted to "make some money" from the methamphetamine. And the testimony did not rely on inadmissible hearsay because it was based on Scott's own statements. *See* Fed. R. Evid. 801(d)(2).

2. The district court did not plainly err by allowing Sergeant Helms to testify as an expert on drug trafficking and drug use. *See* Fed. R. Evid. 704(b) (stating that an expert witness "must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense"). Rule 704(b)'s prohibition is narrow; it prohibits only "direct[] and unequivocal[]" testimony about the defendant's mental state. *United States v. Gonzales*, 307 F.3d 906, 911 (9th Cir. 2002). Although some of Sergeant Helms's testimony came close to the line, he did not "directly or unequivocally"

testify that Scott possessed a specific mens rea. "Even if the jury believed [Sergeant Helms's] testimony, the jury could have concluded that [Scott] was not a typical or representative person." *Id.*

3. Finally, even assuming that the district court erred by failing to give a curative instruction after sustaining a defense objection to a statement by the prosecutor in closing argument, any error was harmless. The district court sustained an objection to the prosecutor's statement. The court's failure to take further curative action was harmless because the jury was instructed that counsel's arguments were not evidence, and other admissible evidence supported the verdict. *See United States v. Nobari*, 574 F.3d 1065, 1082–83 (9th Cir. 2009).

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

TRANSCRIPT OF DIRECT APPEAL

Judge Nelson: We'll turn to the third argument, and that is *United States v. Scott*, case number 23-2234.

DFPD Morris: Good morning, Your Honors, and may it please the court. Kate Morris of the Federal Public Defender's Office on behalf of Foster Lee Scott. I'd like to reserve three minutes of my time for rebuttal, and I'll keep an eye on the clock.

Mr. Scott was convicted of drug trafficking after two law enforcement officers testified that he had the mens rea required for that offense. That was the only issue in dispute at his trial. I'd like to start by addressing the expert testimony from Sergeant Helms, who testified that it was absolutely not possible that someone in Scott's shoes would possess the drugs for personal use, and that the only reason someone in Barstow would possess over 280 grams of meth is for the sole purpose of sales.

That testimony is plain error under the Supreme Court's decision in *Diaz*. *Diaz* held that while an expert can testify that *most* people in the defendant's shoes have the requisite mens rea, an expert violates rule 704(b) if they testify that *all* people in the defendant's shoes have that mens rea -- even if the expert doesn't use the defendant's name. Because by assigning a mens rea to a class of people that includes the defendant, the expert is necessarily giving an opinion about the defendant's mens rea. That's exactly what Sergeant Helms did in this case.

Although Helms started out by giving modus operandi testimony about typical practices of drug dealers and drug users in Barstow, he went beyond the scope of that permissible testimony when he testified that all people who have this quantity of methamphetamine in Barstow would possess it with the intent to distribute. That's just like the example that the court gave in *Diaz* of an expert who testifies at an arson trial that all people in the defendant's shoes set fires maliciously. And that's why it's plain error.

Judge Miller: When I read Helms' testimony, I mean, he makes sort of fairly broad categorical statements about why a person would have this quantity of methamphetamine, but I had not noticed that he was really asked to distinguish between, you know, "most people" or "all people." Where would you point me to as showing that he said "all people" have this intent?

DFPD Morris: So, Your Honor, there are four parts of Helms' testimony that we're contesting. Specifically, number one is when he testifies at pages 423 to 424 of the record that in Barstow, 300 grams of meth is "absolutely not" for personal use.

Number two is at ER 418 to 419. That's when he testifies that the only reason someone in Barstow would possess over 280 grams of meth is for the "sole purpose" of sales. Number three is the mirroring hypothetical. That's at ER 422 to 423. He's asked by the prosecutor; "In Barstow, if a person had 300 grams of meth inside a large Ziploc bag divided equally into five Ziploc bags and over $2,000 in cash, what would your opinion

be as to that person's intent?" Yeah, okay. And then number four is ER 421 to 422. That's where he's shown the government's photos depicting the evidence in this case, and he gives his opinion that the drugs in this case were possessed for the "sole purpose" of sales. So it's our position, that's him saying...

Judge Miller: So just to take that last one, "In hearing that and seeing the six baggies, what is that indicative of to you?" I think there should have been an "of." "What is that indicative to you?" He says, "of possessing for the sole purpose of sales."

I'm not sure that saying this is "indicative" of possession for the purpose of sales is quite the same as saying that *all* persons who had drugs under these circumstances would have the mens rea required by the statute. I agree the gap is fairly small, but *Diaz* was willing to tolerate a fairly small gap between the kind of expert testimony that it said was impermissible and the kind that it said was OK. So what's your response to that?

DFPD Morris: Well, on that fourth piece of testimony, I think the problem is the use of the phrase "sole purpose" of sales. I think that's pretty unequivocal and categorical as the mens rea that a person with the evidence in this case would necessarily have. But I agree that that fourth piece of testimony, the reason I listed it fourth is because I don't think it's quite as clear as the first three pieces of testimony that I identified.

I think the mirroring hypothetical in particular, that's clearly plain error under *Diaz*. And in fact, mirroring hypotheticals...

Judge Miller: But that one, that was the one on 423, right? He's given the hypothetical. "What would your *opinion* be?" "He or she is a drug dealer, and they're possessing that amount for the purpose of sales." I mean, when you're asking what would your *opinion* be, he's stating what his opinion would be. It's not accompanied by a probability. And so in an ordinary sense, "my opinion is X." That doesn't mean "my opinion is X with 100% certainty," which is what *Diaz* prescribes. So isn't there again a small -- I mean, it's a subtle distinction -- but *Diaz* was willing to tolerate fairly subtle distinctions, wasn't it?

DFPD Morris: Your Honor, I disagree with that. Rule 704(b) is called "Opinion on an Ultimate Issue." The Supreme Court was clear in *Diaz* that an expert giving an opinion on the ultimate issue, that's what's covered by that rule. So I don't think just by an expert saying, "Well, in my opinion, that person is a drug dealer and they would absolutely not possess the drugs for the purpose of personal use" -- just saying "that's my opinion" doesn't take you outside of 704(b). The whole point of 704(b) is to cover expert *opinions* on an ultimate issue. So I think that would allow the government to circumvent 704(b) if all an expert has to do is say, "In my opinion, the drugs in this case were used for the purpose of sales."

Judge Desai: Can you address the issue of harmlessness? Because let's assume we agree with you that the prosecutor's statements were improper and the district court erred by failing to give a curative instruction. Doesn't the other evidence suggest that Scott was lying, or at least making inconsistent statements about his meth use, such

that the error would be harmless?

DFPD Morris: I'm sorry, Your Honor's question is about the misconduct claim?

Judge Desai: Right.

DFPD Morris: Well, the evidence doesn't suggest that he was lying about his meth use. We transmitted the exhibit to the court where he -- this is the 2021 video -- where he, according to the government, says that he uses a sixteenth of a gram. If the court listens to the audio of that video, he doesn't say he uses a sixteenth of a gram. That's not -- I would just ask the court to listen to that, because he doesn't say the word "sixteenth of a gram." What happens in that video is that Sergeant Hollister is asking him how much he uses. My client gives a very confused response, and ultimately Hollister gets him to say that he uses "a couple of little nuggets" at a time, but he doesn't say he uses a sixteenth of a gram. So there wasn't evidence that he was lying about that. He is clear in direct that he uses several sixteenths or "teeners" per day, and then Sergeant Helms, the expert, testifies that a "teener" is a sixteenth of an ounce. So it's actually pretty clear that my client was saying he uses several sixteenths of an ounce per day.

In terms of the harm of the misconduct, I have a couple of points on that. The first point is that the misconduct went to the heart of the personal use defense because obviously it's much less plausible if -- that defense is much less plausible -- if the jury thinks that my client was using a sixteenth of a gram every day because that would have made his stash last about three and a half years. Whereas if they believe it's a sixteenth of an ounce, it would have only lasted him about a month and a half to three months. So that's a far more plausible explanation for the quantity.

I'd also add two more points, which is that this court has recognized that a federal prosecutor's remarks carry a lot of weight with the jury. And then, third, that these comments were made on rebuttal so there was no opportunity for the defense to rebut them and point out what I just pointed out to Your Honor about the fact that in the video he doesn't say it's the 16th of the gram. Because it was on rebuttal, the defense didn't have an opportunity to clarify that.

Judge Miller: But you did object to the statement, right? And the district court sustained the objection. So I guess the argument has to be that it was plainly erroneous for the district court to not *sua sponte* what exactly? Give an instruction to disregard the statement?

DFPD Morris: Yes, Your Honor. Well, on the standard of review, our position is that because this is a constitutional violation, the government's ... It's our position is this isn't plain error. It's a constitutional violation. And so the burden is actually on the government to prove harmlessness beyond a reasonable doubt.

But in terms of what we think the court should have done, yes, we think the court should

have stricken the comment and given an instruction that is sufficiently responsive and specific to cure the harm. Along the lines of: "That was an improper line of argument, a defendant has every right to consult with and prepare with the counsel, and you're instructed not to draw any adverse inference from that consultation and preparation."

Judge Miller: Because the court did give the standard instruction that the statements of the lawyers during argument are not evidence, right?

DFPD Morris: Yes, it did. But the court also gave in its preliminary instructions the instruction -- and this is at ER 68 -- it told the jury that even though closings are not evidence, they are very important when it comes to how you weigh the evidence.

Judge Miller: I take the point about the standard review, but assuming that I think the plain error standard does apply, what's the best case for the proposition that it is plain or obvious error? That, having sustained an objection, it's plain error not to go on to *sua sponte* give a lengthy instruction to the jury, which you might think would only sort of highlight the comment in the minds of the jurors? What case says that the court is supposed to do that?

DFPD Morris: Well, I'll answer that in two parts. The first part is that all the court did here was, say, "sustained." That's legalese. A jury isn't necessarily going to understand what the court has done there. Often in general instructions to the jury, the court will actually say to the jury, "I'm going to make a series of rulings throughout trial. You're not to draw any inferences from my rulings." So the idea that by saying that defense counsel pops up and says "objection" and the district court says "sustained," that that cures the prejudice of the misconduct, I just don't think a jury would understand what "sustained" means.

In terms of what case is the best case, I would say we cited *Nobari*, which is a Ninth Circuit case from 2009, and *Simtob*, which is a 1990 Ninth Circuit case. And they both stand for the position that once the court recognizes that there's a misconduct problem, it has an affirmative duty to remedy the misconduct with an adequate curative instruction.

Judge Nelson: Want to reserve?

DFPD Morris: Yes, please. Thank you.

AUSA Williams: Good morning, Your Honors. May it please the court. David Williams for the government.

Earlier this morning, Judge Nelson suggested that with thorny questions, sometimes the most straightforward option is to just say that things are harmless, and to say you don't need to address every nuance because it's harmless. And this is... I don't know that I would say that these questions are thorny, but it is an easy case for harmlessness. This

is a case where the defendant had almost a pound of methamphetamine. It was not barely 50 grams. It was not sort of on the margins between personal use and dealing quantities. It was almost a pound of methamphetamine in six separately packaged baggies. He had over $2,000 cash in small bills in his hands when the officers found him.

Judge Desai: Can you address the -- I think your friend on the other side listed four instances in which Helm's testimony violated the 704 rule set forth in *Diaz*. And I'm particularly interested on the one at pages 422 and 423. Where the statement that 300 grams of methamphetamine would, quote, "absolutely not" be for personal use. Doesn't that sound like an unequivocal statement that all defendants have a particular mens rea?

AUSA Williams: I don't think so. I think that when you read it in context, it's talking about his belief of what he would infer, but it's not saying that he would say every single defendant would do it. It's that if he saw this, he would definitely think that it was. That doesn't mean that nobody... That doesn't mean that there aren't other exceptions to the rule.

Judge Desai: "Absolutely not" sounds pretty unequivocal to me, and I am reading it in context. I'm reading all of the lines and the pages around this testimony.

AUSA Williams: I agree. "Absolutely not" is not equivocal as to his belief, but I think what the "absolutely not" refers to can be read to talk about his *belief* as opposed to *how many people*, the whole universe. Is he saying absolutely, most people would do it, or is he saying, absolutely, every single person would do it?

And when you look through the testimony, he never says that his description of who sells drugs is universal. He never uses the words "all." He never uses the words "every." He never talks about each drug dealer. What he talks about is that each case is independent and different, needs to be evaluated under the "totality of the circumstances." He uses that phrase repeatedly, and he talks about the different things that you would look at.

And so what he's saying... I think in this context, what he's saying it is: he would "absolutely not" believe it because as a general rule, that's not how it works. But that doesn't mean that every single person is doing that.

But again, I think much easier way to deal with this is simply to say it's harmless for a variety of reasons. The $2,000 in cash, almost a pound of methamphetamine, the fact that he had no way to have obtained that much methamphetamine. His story was that he stole money from his girlfriend. His girlfriend was a waitress whose monthly rent was $500. Him saying that $2,000 in cash stuffed under the mattress was hers, I think is facially implausible under the circumstances of this case.

He talks about how he got a "very great" deal. And his whole story is he got a great deal

on this purchase of meth for personal use that comes out to $100 over the course of three months. Already implausible on its face.

Also implausible -- even accepting the defendant's calculation of... The maximum that he ever actually claimed to use was five grams a day. That is a more than two month supply of meth. And it's just not an amount of meth that any one person could use without distributing it.

There is no evidence whatsoever to suggest that any meth user is personally holding and parceling out five grams per day, every day, for three months without using significantly more or significantly less on some days. I think his entire testimony was simply implausible under the circumstances of this case.

So I think that in context, the "absolutely not" refers to the officer's beliefs as opposed to the universe of people who do it.

But the easier way to deal with it is harmlessness, for sure.

Judge Miller: And to be clear, you're saying harmlessness, but it's really, this is on plain error, so it's prong three or...

AUSA Williams: Prong three and prong four. It's not just prong three, it is also prong four. That it's not just prong three, is there prejudice? It's also -- was there a violation of substantial rights and integrity and fairness to the judicial process? That under the circumstances of this case, amongst many things, I don't think anyone is surprised that an expert opinion would be that having a pound of meth is consistent with drug sales. I don't think this is outside the scope of public reputation of judicial proceedings. I think that this happens... this or things very, very, very close to it happen frequently in almost every single drug case. And saying that this is so detrimental that it seriously affects the public reputation of judicial proceedings, I think, stretches plein error much further than it can go.

I am happy to talk about any other particular questions the court has, but I would move to *Diaz* quickly, because I think it was something that we didn't get the full briefing on.

Diaz is expressly consistent with this Circuit's precedent on what the proper subject of expert testimony can be. And in doing so, I think when you look at the expert testimony here, you compare it with this court's prior cases -- *Younger*, *Gonzalez* -- I don't think that you can say that Diaz is...

Judge Desai: And *Diaz* didn't change the standard for 704(b).

AUSA Williams: No, it didn't change the standard in this Circuit. And so, to the extent that it talks about this issue, it doesn't talk about hypotheticals. It has nothing whatsoever to say about hypotheticals. That question about the mirroring hypothetical, *Diaz* can't change the standard because it didn't talk about it. This Circuit's precedent on

mirroring hypotheticals is almost exactly the same as this case. And so to the extent that there might be some wiggle room and some play between *Diaz* and this Circuit's precedent, which I don't think that there is... Even if there is, we come back to the harmlessness question. This is a bad case for... this is a bad vehicle for addressing that because you have so much meth and so much cash that there's just... Even if you reach that issue, I don't think that you come out reversing the case because you still have to come up with the third and fourth prongs of harmless error.

Judge Miller: Can you address the statement in closing argument? One oddity here, of course, is that the objection came kind of in the middle of the statement, and we don't really know what the second half of the sentence was going to be, but it kind of sounds like it was leading up to some insinuation that defense counsel had planned with the defendant for the defendant to lie. What are we to make of that?

AUSA Williams: I don't think that it was a plan to lie. I think that where it was going was, I described this in the briefing, that this is in the middle of a, I think, five or six page discussion of four separate problems with defendant's story of the case. One of the problems was that on direct, he testified one way. And on cross, he acknowledged that he said, I think it was a sixteenth of a *gram*. A gram, it is what it is. He says that. And so his testimony did change on cross as to that point.

And I think what the prosecutor was saying was his preplanned testimony went well because he knew what he was going to say. And on cross, he got flustered and changed his story. I don't think that it was saying that defense counsel had anything illicit in mind. I think it was the sort of ordinary slip of the tongue that can happen in a courtroom when you're looking at people across the table, you see two people next to you and you talk about them both, as opposed to malicious intent. I certainly don't think there's any showing of that. And I think that it was talking about the defendant's changing story, is what it was talking about. And when the prosecutor picks up after the objection, that's the sentence that he completes -- that the defendant's story changed and that the defendant's story made no sense. And in context, I think that's where that was going. And the reference to defense counsel was a slip of a tongue. Which an objection is a perfectly appropriate way to address, and did thoroughly address.

And I think the court's question earlier to my colleague about whether the district court should have *sua sponte* issued a curative, the curative that she gave as a possibility, I think it goes much too far. What she's contemplating would be that any time an objection is sustained, the court should always give a curative instructing the jury as to why there was a problem with the evidence. And that's not the case.

I think that when you instruct the jury as to why there might be a problem with evidence or a problem with a statement, you do call attention to what the problem was. And rightly or wrongly, it can plant seeds in jury's minds that the court wouldn't want to do. And if the court's going to do that, it should at least come at the request of a defense attorney.

Defense counsel could have done that here, didn't do that, I think was satisfied with the way the statement was reframed. I think that's the logical inference from the way this closing statement went forward after that.

She also mentioned briefly that this came up on rebuttal and that defense counsel didn't have a chance to address the issue of whether it was a sixteenth of a gram or a sixteenth of an ounce. Whether it was a sixteenth of a gram or a sixteenth of an ounce was a huge issue throughout the entire rest of the trial. It's not like this was the first surprise time it came up. There was extended cross-examination over the question. This wasn't a surprise "gotcha" in rebuttal. This was part of the case, which I think also diminishes any prejudice -- that this wasn't a surprise moment that the jury had never even thought about. This was what they had been hearing throughout the rest of the case.

Does the court have any further questions?

Judge Nelson: I don't think so.

DFPD Morris: My colleague on the other side said that *Diaz* had nothing to say about mirroring hypotheticals along the lines of the one that was used in this case. I disagree with that. For one thing, it came up at oral argument in *Diaz*. Justice Kagan asked a question of the Assistant to the Solicitor General about it, and the government acknowledged that mirroring hypotheticals along the lines of the one that Justice Kagan posed in her question, are just a transparent way to circumvent the requirements of 704(b). They're taking an inconsistent position with that in this case.

I would also say that the problem isn't the mirroring hypothetical *question*, it's the *answer*. So a prosecutor is allowed to ask an expert witness a hypothetical that closely tracks the facts of the case, but the expert can't give an unequivocal answer about the mens rea that a person in that situation would have under *Diaz*. *Diaz* makes very clear that you can't use a hypothetical question to create a class of people that necessarily includes the defendant and then give an opinion about the mens rea of a person in that class. So I think *Diaz* does functionally say something about the use of mirroring hypotheticals.

Going on to prong three of plain error, I just want to come back to the standard for prejudice under plain error. This came up earlier today. The standard for prong three is a "reasonable probability" of a different outcome. That certainly doesn't require us to prove an acquittal absent the errors. It doesn't even require us to prove a reasonable probability of a different outcome by a preponderance. It's less than 51%.

And applying that standard to, in particular, Helms' testimony, what you have is an expert put on by the United States to talk about drug trafficking, who testifies in a single-issue trial -- mens rea was the only issue -- that in his expert opinion, it was absolutely not possible that my client possessed the drugs for personal use. So what

he's saying is basically in his expert opinion, he believes my client is guilty.

This court has recognized that expert opinions carry special weight with juries. That's particularly the case with Sergeant Helm, who was presented as highly credentialed and experienced. He told the jury he'd been on the force for over a decade. He'd worked over 300 drug investigations. He said he was in a supervisory role. He was a watch commander and advised other officers as to whether their drugs cases were more likely personal use or sales. And the government relied extensively on his testimony. They previewed it in opening and then they relied on it in closing and in rebuttal.

I know I don't have much time left. I just wanted to say.

Judge Nelson: You don't have any time left. So, look, we appreciate the arguments. I think we have, you've done a good job of representing your client. Thank you.

Thank you to both counsel for your arguments in the case. The case is now submitted.