APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-6820

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	**FILED** Dec 21, 2017 DEBORAH S. HUNT, Clerk
Plaintiff-Appellee,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
MANUEL SILE-PEREZ,	)	
Defendant-Appellant.	)	

ORDER

Before: BATCHELDER, GIBBONS, and WHITE, Circuit Judges.

Manuel Sile-Perez ("Perez"), a federal prisoner appearing through counsel, appeals his convictions for conspiracy with intent to distribute cocaine, and possession with intent to distribute cocaine and aiding and abetting. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2014, Department of Justice agents in California, including Frank Cortez, learned that Jose Roberto Remedios-Faguagua ("Remedios"), Perez's co-defendant, went to California, where he agreed to a deal to purchase ten kilograms of cocaine that would take place in Louisville. On November 5, 2014, Remedios, accompanied by Perez and co-defendant Nathaniel Barbour, conducted a series of meetings with Cortez and a confidential informant in Louisville. The audio recordings of these meetings are of poor quality. At first, Perez, Remedios, and Barbour did not bring sufficient money to purchase the cocaine but were eventually joined by co-defendant Walter Elliot, who was driving a black Malibu containing the money. Perez, Remedios, Barbour, and Elliot went to a storage unit to conduct the transaction, where they were arrested by law enforcement. Remedios, Barbour, and Elliot pleaded guilty, but Perez went to trial.

At a preliminary hearing, Special Agent Lisa Brooks testified about the events of November 5, 2014. Specifically, Brooks testified that Cortez told her that Perez had told him that the money for the drugs was in the black Malibu.

Perez filed a motion to dismiss the indictment because the government had failed to provide him with either audio tapes or transcripts containing his recorded statements. In the alternative, Perez requested that "all Grand Jury testimony as well as Jenks [sic] material be provided at this point so that counsel has some idea [of] how to proceed with this case," and a continuance. The district court granted the continuance and denied the motion to dismiss, and the government provided Perez with the audiotapes and transcripts.

After Remedios pleaded guilty, Perez sought to subpoena him as a witness. Remedios asserted his Fifth Amendment privilege against self-incrimination and moved to quash the subpoena. The district court determined that Remedios had a reasonable fear of prosecution by other jurisdictions and did not compel him to testify.

Perez also filed a motion in limine seeking, among other things, to prohibit "[a]ny mention of any prior alleged drug trafficking activity involving [Perez]." The district court denied Perez's motion with respect to prior drug trafficking because "prior drug deals with a co-conspirator are admissible under [Federal Rule of Evidence] 404(b) to show intent."

The day before the trial was scheduled to begin, the government provided Perez with, among other things, a report written by Cortez. The report summarized the events of November 5, 2014, and discussed a number of previously undisclosed incriminating statements by Perez. Perez moved to suppress the incriminating statements or, in the alternative, for a week-long continuance. He argued that his defense was that he was an uninvolved bystander, and that he was prejudiced by the late disclosure because he would have to substantially change his trial strategy. The government initially described the report as Jencks Act material, *see* 18 U.S.C. § 3500, then as evidence discoverable under Federal Rule of Criminal Procedure 16. The district court ruled that it would permit Cortez to testify about the incriminating statements and held that the court would recess until the afternoon of the following day, after jury selection was complete, so that counsel and Perez could reassess their defense. The next day, Perez renewed his motion to exclude testimony about his statements and his motion for a longer continuance. The government argued that the report was Jencks Act material and was not discoverable under Rule 16. The district court denied Perez's motions and noted that, even if the report were Rule 16 material, Perez had enough time to change his trial strategy because the report was only a few pages long.

At trial, Barbour testified that his cousin, Deloney, introduced Barbour to Perez because Deloney knew that both Barbour and Perez sold drugs, and that Barbour had purchased several kilograms of cocaine from Perez from 2013 to 2014. Deloney testified that he introduced Barbour to Perez because they were both into "narcotics or whatever." The district court overruled Perez's objection to Barbour's testimony, finding it admissible under Rule 404(b).

Cortez testified about incriminating statements made by Perez, including that: (1) Perez told him that Barbour had not brought all of the money; (2) Perez told him that "he was going to convince Barbour's customers or partner to buy the rest of the cocaine"; and (3) Perez indicated that he "[was] ready for the transaction" at the final meeting.

The jury convicted Perez of conspiracy with intent to distribute cocaine, in violation of 21 U.S.C. § 841(b)(1)(B) and § 846, and of possession with intent to distribute cocaine and aiding and abetting, in violation of 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 2. The district court sentenced Perez to two sixty-month terms of imprisonment, to run concurrently.

On appeal, Perez argues that the district court: (1) should have either excluded incriminating statements in Cortez's report or granted a week-long continuance; (2) erred by admitting Barbour's and Deloney's testimony; and (3) erred by allowing Remedios, who had already pleaded guilty, to assert his Fifth Amendment privilege against self-incrimination.

Perez first argues that the government's late disclosure of Cortez's report was a violation of discovery pursuant to Federal Rule of Criminal Procedure 16, and the court should have cured that violation either by excluding the evidence or by granting a week-long continuance. This court reviews a district court's evidentiary rulings for an abuse of discretion. *United States v. White*, 846 F.3d 170, 174 (6th Cir. 2017). "An abuse of discretion occurs when a district court relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." *Id.* (quoting *United States v. Dixon*, 413 F.3d 540, 544 (6th Cir. 2005)).

The government argues that Cortez's report was not discoverable under Rule 16 but was properly Jencks Act material. The Jencks Act requires the government to produce a statement or report made by a government witness after that witness has testified, and Perez does not claim that the government failed to meet that requirement. Instead, Perez argues that the statements in the report were discoverable under Rule 16 as "relevant written or recorded statement[s] by the defendant," and that the government was accordingly obliged to disclose them on Perez's request. Fed. R. Crim. P. 16(a)(1)(B).

Assuming, without deciding, that Perez's statements in the report were discoverable under Rule 16, the district court did not abuse its discretion. "If a party fails to comply with [Rule 16], the court may . . . (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances." Fed. R. Crim. P. 16(d)(2). In determining the appropriate sanction, a court may consider:

> (1) the reasons for the government's delay in producing the materials, including whether it acted intentionally or in bad faith; (2) the degree of prejudice, if any, to the defendant; and (3) whether the prejudice to the defendant can be cured with a less severe course of action, such as granting a continuance or a recess.

United States v. Maples, 60 F.3d 244, 247 (6th Cir. 1995).

The district court inquired about the prejudice to Perez, and determined that, because the report was only three or four pages, a one-day recess was sufficient to cure that prejudice. Perez does not claim that the delay in disclosure was intentional or in bad-faith and, although he argues that he suffered substantial prejudice, he does not argue that he suffered incurable prejudice. "[S]uppression of evidence must be viewed as an undesirable remedy reserved for cases of incurable prejudice or bad faith conduct demanding punishment by the court." *Id.*

Perez also argues that the district court abused its discretion by determining that a one-day recess, instead of a week-long continuance, was sufficient to cure any prejudice. He claims that he was prejudiced because his trial strategy hinged on the idea that the government would not be presenting any incriminating statements he had made at trial. But Perez was aware of his own statements, was aware Cortez was going to testify, and was aware of Brooks's testimony at the preliminary hearing, which made it clear that Perez made incriminating statements to Cortez. With that knowledge, it is difficult to credit Perez's argument that he did not previously know whether Perez had made any incriminating statements to Cortez, and he has failed to show that a week-long continuance was necessary. The district court did not abuse its discretion by determining that one day was sufficient.

Perez next argues that the district court improperly admitted Barbour's and Deloney's testimony under Rule 404(b). Under Rule 404(b), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(1), (2).

"[T]here is an on-going dispute in this circuit concerning the proper standard of review of Rule 404(b) evidence." *United States v. Carter*, 779 F.3d 623, 625 (6th Cir. 2015).

> Sometimes, this Court will: (1) review for clear error the district court's determination that prior bad acts took place; (2) apply de novo review to a district court's determination that the evidence was offered for a permissible purpose; (3) and review for abuse of discretion the determination that the probative value of 404(b) evidence is not substantially outweighed by unfair prejudice.

United States v. LaVictor, 848 F.3d 428, 444-45 (6th Cir.), *cert. denied*, 137 S. Ct. 2231 (2017). "Other times, this Court has applied a single-tier abuse of discretion standard" to all three elements. *Id.* at 445. In this case, the result is the same under either standard of review.

Perez first argues that "there is no evidence that the other acts actually occurred," because Barbour's testimony was "uncorroborated and unsubstantiated," as was Deloney's. But there is no requirement that other-acts evidence be corroborated or substantiated by physical evidence, and this court has previously held "that the testimony of a single witness is sufficient for a reasonable jury to conclude that the defendant committed the prior acts, even where the witness is less than completely reliable." *United States v. Johnson*, 458 F. App'x 464, 470 (6th Cir. 2012) (citing *United States v. Matthews*, 440 F.3d 818, 828-29 (6th Cir. 2006), *abrogated on other grounds as recognized by United States v. Sandoval*, 460 F. App'x 552, 562 (6th Cir. 2012)). Barbour testified about specific incidents and, even if he may have been less than completely reliable, it was neither abuse of discretion nor clear error for the district court to conclude that those prior acts took place. *See Sandoval*, 460 F. App'x at 561-62.

Perez also argues that the evidence was not admissible for a legitimate Rule 404(b) purpose. But "[t]his court has 'repeatedly recognized that prior drug-distribution evidence is admissible [under Rule 404(b)] to show intent to distribute,'" *United States v. Hardy*, 643 F.3d 143, 151 (6th Cir. 2011) (quoting *United States v. Ayoub*, 498 F.3d 532, 548 (6th Cir. 2007)), and that is the purpose for which the testimony was admitted. Corroboration and substantiation are not relevant to that purpose. *See Johnson*, 458 F. App'x at 470.

Finally, Perez argues that the testimony was more prejudicial than probative. But Perez's argument relies on *United States v. Bell*, 516 F.3d 432, 444-47 (6th Cir. 2008), in which this court found that prior acts of personal drug use were not probative of intent to possess and distribute, and the challenged testimony is about prior acts of distribution. "*Bell* is inconsistent with prior precedent and is therefore not controlling" on this issue. *Hardy*, 643 F.3d at 152. Thus "it cannot be said that the district court abused its discretion on the issue of probity." *Id.*

Finally, Perez argues that the district court erred by allowing Remedios to assert his Fifth Amendment privilege against self-incrimination at Perez's trial after Remedios pleaded guilty. To the extent that Perez suggests that Remedios's assertion of his Fifth Amendment privilege can be reviewed de novo simply because it implicates the Fifth Amendment, he is incorrect. This court reviews "a district court's decision whether to allow a witness to take the stand after being advised of his intention to invoke his Fifth Amendment privilege for an abuse of discretion." *United States v. McAllister*, 693 F.3d 572, 583 (6th Cir. 2012). Perez challenges the district court's determination that Remedios had a reasonable fear of prosecution; he does not challenge the district court's interpretation of the Fifth Amendment. *See United States v. Blackwell*, 459 F.3d 739, 752 (6th Cir. 2006).

"A defendant's right to force a witness to testify must yield to that witness' assertion of his Fifth Amendment privilege against self incrimination, where it is 'grounded on a reasonable fear of danger of prosecution.'" *United States v. Gaitan-Acevedo*, 148 F.3d 577, 588 (6th Cir. 1998) (quoting *United States v. Damiano*, 579 F.2d 1001, 1003 (6th Cir. 1978)). "This [court] has held that 'a guilty plea is not a blanket waiver of the privilege against self-incrimination and it survives through sentencing.'" *United States v. Allebban*, 578 F. App'x 492, 504 (6th Cir. 2014) (quoting *United States v. Boothe*, 335 F.3d 522, 525 (6th Cir. 2003)). Perez argues that Remedios did not have a reasonable fear of the danger of prosecution because he waived his right to appeal or collaterally attack his sentence in his plea agreement, except with respect to ineffective assistance of counsel. But Remedios could still have suffered adverse effects at sentencing. Moreover, the district court's finding that Remedios had a reasonable fear of prosecution in other states was not an abuse of discretion.

Perez also argues that the district court should have required Remedios to take the stand to answer individualized questions. "Ordinarily, a witness seeking to invoke the Fifth Amendment must take the stand and answer individualized questions before the district court can conclude that the invocation is proper." *Id.* at 503 (citing *United States v. Bates*, 552 F.3d 472, 475-76 (6th Cir. 2009)). "[H]owever, when a defendant has a clear entitlement to claim the privilege, forcing the defendant to take the stand is 'futile' and thus unnecessary." *Bates*, 552 F.3d at 476 (quoting *United States v. Highgate*, 521 F.3d 590, 594 (6th Cir. 2008)). Once the district court had found that Remedios was entitled to invoke the Fifth Amendment, it was not required to force Remedios to take the stand. Thus, the district court did not abuse its discretion by permitting Remedios to invoke his Fifth Amendment privilege against self-incrimination.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deb S. Hunt

Deborah S. Hunt, Clerk