FILED

MAR 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES EDWARD DUCKETT III, aka Little S.G., Defendant-Appellant.	No. 18-30024 D.C. No. 3:15-cr-00316-MO-1 MEMORANDUM[*]

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief Judge, Presiding

Argued and Submitted March 4, 2019
Portland, Oregon

Before: GRABER and BERZON, Circuit Judges, and TUNHEIM,[**] Chief District Judge.

Defendant James Edward Duckett III timely appeals his conviction of conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841 and 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C.

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

[**] The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

§ 841. He also appeals the resulting sentence of 190 months in prison. For the reasons that follow, we affirm his convictions but vacate the sentence and remand for resentencing.

1. Sufficient evidence supported the conspiracy conviction. See United States v. Charette, 893 F.3d 1169, 1172 (9th Cir. 2018) (stating that we review de novo the sufficiency of the evidence). Viewing the evidence in the light most favorable to the government, United States v. Tydingco, 909 F.3d 297, 301 n.1 (9th Cir. 2018), a reasonable jury could have concluded that Defendant and John Wayne Ramsey conspired to distribute cocaine. Tools of the drug trade were found in the trash and during the search of Ramsey's residence. Discarded packaging with Defendant's signature "Camaro" label was found at the house. Defendant was seen at Ramsey's house often, frequently followed by visits from third parties purchasing drugs. Ramsey appeared to be the primary seller after a visit by Defendant.

Our decisions in cases such as United States v. Loveland, 825 F.3d 555 (9th Cir. 2016), do not require a different result. Unlike in those cases, which involved arm's-length transactions, "the totality of the circumstances" here supports the jury's conclusion that Defendant and Ramsey reached an agreement and had a "shared stake" in the illicit business. Id. at 560, 562.

2. Sufficient evidence also supported the possession conviction. Viewing the evidence in the light most favorable to the government, a reasonable jury could have concluded that the drugs found in Special Robinson's garage belonged to Defendant. The drugs bore Defendant's distinctive "Camaro" label, the same label found at Ramsey's house—a location associated with Defendant but not with Robinson. Defendant ran toward the house when he thought the police were closing in. And Defendant appeared to concede guilt, stating "I'll man up" and, later, that he wanted to start serving his sentence soon so he could return to his family. Robinson claimed responsibility for the drugs in an affidavit, but the jury could have discredited that admission, as she initially denied any knowledge of the drugs.

3. The district court did not abuse its discretion by admitting evidence of Defendant's 2011 drug-conspiracy conviction. See United States v. Hardrick, 766 F.3d 1051, 1055 (9th Cir. 2014) (stating that we review for abuse of discretion the admission of evidence of prior acts). The prior acts are admissible because: (1) the acts are not too remote in time, taking place just a few years before this trial; (2) the evidence clearly demonstrates that Defendant committed the acts, as he pleaded guilty; (3) the acts are similar, as indeed, the modus operandi was closely parallel; and (4) the prior acts establish modus operandi, such as the storing of

drugs at a girlfriend's house. See, e.g., United States v. Rendon-Duarte, 490 F.3d 1142, 1144 (9th Cir. 2007) (listing the relevant factors). Additionally, the district court gave a proper limiting instruction, which we presume the jury followed. Penry v. Johnson, 532 U.S. 782, 799 (2001).

4. The district court did not abuse its discretion by applying a three-level enhancement to the sentencing calculation on the ground that Defendant was a "manager or supervisor (but not an organizer or leader)." U.S.S.G. § 3B1.1(b). The distirct court reasonably concluded that Defendant was in charge of the entire operation. It could have inferred from the evidence that he directed Robinson's participation, as she relayed messages and money between Defendant and third parties and that he directed Ramsey in selling drugs he supplied.

5. Under our precedent, United States v. Pimentel-Lopez, 859 F.3d 1134 (9th Cir. 2017) (as amended on denial of rehearing), the district court erred in finding a drug quantity for the conspiracy conviction that exceeded the jury's drug quantity finding. See United States v. Rosas, 615 F.3d 1058, 1063 (9th Cir. 2010) (stating that we review de novo whether a sentence is unconstitutional). The jury affirmatively found that the drug quantity involved in the conspiracy was "[l]ess than 5,000 grams (5KG) of cocaine." Yet the district court, in assessing relevant conduct with respect to the conspiracy count, concluded that the drug quantity

exceeded five kilograms of cocaine. Under Pimentel-Lopez, the district court erred. See 859 F.3d at 1141 (holding that "the affirmative finding by the jury that the quantity of drugs involved was less than a specific amount precluded a contradictory finding by the district judge during sentencing"). Accordingly, the court erred by applying a base offense level of 30 under U.S.S.G. § 2D1.1(c)(5).

Convictions AFFIRMED; sentence VACATED; and case REMANDED for resentencing.