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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TONY SAELEE, Defendant-Appellant.	No. 20-10209 D.C. No. 3:18-cr-00199-CRB-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted May 14, 2021
San Francisco, California

Before: Jacqueline H. Nguyen and Daniel P. Collins, Circuit Judges, and Timothy M. Burgess,[*] District Judge.

Opinion by Judge Collins

[*] The Honorable Timothy M. Burgess, United States District Judge for the District of Alaska, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed a criminal judgment in a case in which a jury convicted Tony Saelee of attempted possession of Ecstasy with intent to distribute, and conspiracy to distribute Ecstasy and to possess it with intent to distribute.

After Government officers inspecting incoming international parcels discovered large quantities of illegal drugs in two packages falsely labeled as containing documents from a German law firm, agents replaced the drugs with decoy materials and then completed the delivery of the packages. An undercover agent dressed as a postal carrier delivered the packages to their intended addressee, Saelee, who stated that he was expecting them and signed for their delivery. He was promptly arrested by Government agents, and subsequently charged with drug-trafficking offenses. Asserting multiple violations of the Fourth Amendment in connection with his arrest and the ensuing search of his apartment, Saelee moved to suppress much of the evidence against him. The district court denied the motion and Saelee was convicted at a jury trial.

Under the independent source doctrine, suppression is unwarranted, even where evidence was initially discovered during, or as a consequence of, an unlawful search, when the evidence is later obtained independently, from activities untainted by the initial illegality. Saelee contended that the district court erred in applying the independent source doctrine and that, in light of the agents' multiple violations

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[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

of the Fourth Amendment, the evidence obtained as a result of those violations should have been suppressed. Assuming without deciding that the Fourth Amendment violations occurred, the panel held that because all of the tangible and intangible evidence obtained as a result of the alleged violations was independently rediscovered or reseized when the agents executed a search warrant that was both sought and issued independently of any such violations, the district court correctly denied the motion to suppress.

The panel disagreed with Saelee's contention that a variety of evidentiary errors at his jury trial warrant reversal of his conviction and a new trial. The panel rejected Saelee's contention that the district court abused its discretion in admitting, as co-conspirator statements, Saelee's roommate's text messages with him. The panel held that the district court did not prejudicially abuse its discretion in admitting messages and testimony from Chai Choy Saechao concerning Saelee's offer to sell him Ecstasy pills and Saechao's purchases of Ecstasy from persons he believed to be intermediaries of Saelee. The panel rejected Saelee's further contentions that the district court prejudicially abused its discretion when it admitted a photo from his cellphone, showing a hand holding what appears to be a wad of $100 bills; another cellphone photo showing bags of marijuana; and a cellphone screen shot of his retirement account balance. The panel held that the district court did not abuse its discretion in allowing the Government to raise, on redirect of a Homeland Security Investigations agent, the discovery of ammunition in Saelee's bedroom.

The panel rejected Saelee's argument that a new trial is warranted because, in violation of a pretrial order, one of the Government's witnesses mentioned at trial a post-arrest statement made by Saelee after he had invoked his right to counsel. The panel wrote that the jury is presumed to have

followed the district court's unambiguous curative instruction, which struck the statement and ordered the jury to disregard it.

The panel rejected Saelee's argument that there was insufficient evidence of his knowledge of the packages' original contents to support the jury's guilty verdicts and that his motion for a judgment of acquittal under Fed. R. Crim. P. 29 should have been granted. The panel wrote that a jury could readily conclude, beyond a reasonable doubt, that Saelee was aware of the packages' original contents and that he thereby attempted to possess Ecstasy with the intent to distribute and that he conspired with his roommate to so possess that Ecstasy and to distribute it.

COUNSEL

Christopher J. Cannon (argued) and Matthew A. Laws, Sugarman & Cannon, San Francisco, California, for Defendant-Appellant.

Kelly I. Volkar (argued), Assistant United States Attorney; Patrick K. O'Brien, Assistant United States Attorney; Ryan Arash Rezaei, Assistant United States Attorney; Matthew Martin Yelovich, Assistant United States Attorney; David L. Anderson, United States Attorney; Merry Jean Chan, Appellate Section Chief, Criminal Division; United States Attorney's Office, San Francisco, California; for Plaintiff-Appellee.

OPINION

COLLINS, Circuit Judge:

After Government officers inspecting incoming international parcels discovered large quantities of illegal drugs in two packages falsely labeled as containing documents from a German law firm, agents replaced the drugs with decoy materials and then completed the delivery of the packages. An undercover agent dressed as a postal carrier delivered the packages to their intended addressee, Defendant-Appellant Tony Saelee, who stated that he was expecting them and signed for their delivery. He was promptly arrested by Government agents, and subsequently charged with drug-trafficking offenses. Asserting multiple violations of the Fourth Amendment in connection with his arrest and the ensuing search of his apartment, Saelee moved to suppress much of the evidence against him. The district court denied the motion and Saelee was convicted at his subsequent jury trial. On appeal, he contends that the district court erred in denying his motion to suppress and that multiple errors at his trial warrant reversal of his conviction. We reject these challenges and affirm the district court's judgment.

I

A

On April 16, 2018, a United States Customs and Border Protection ("CBP") Officer assigned to the K-9 unit at JFK International Airport in New York was conducting a routine sweep of incoming mail bags with his trained drug-sniffing dog. After the dog alerted to a particular package from Germany, the CBP officer opened it and discovered what appeared to him, based on his experience, to be "Ecstasy"

pills.[1] The package had been sent from Germany via Deutsche Post, putatively from a law firm in Goch, and was addressed to "Tony Fin" at a street address in Richmond, California. The package had a tracking number that could be used to determine its status in the delivery process with Deutsche Post and then, after its arrival in the U.S., with the U.S. Postal Service ("USPS").

The next day, a different CBP officer working at JFK inspected a second incoming parcel, which listed the same sender and addressee, and he also discovered Ecstasy pills. That parcel also had been sent through Deutsche Post and was labeled with a tracking number. Together, the two packages contained a total of approximately 2,971 Ecstasy pills.

After their respective seizures, the two packages were promptly delivered to a San Francisco-based Transnational Narcotics Team within the Homeland Security Investigations ("HSI") division of the Department of Homeland Security. A check of California DMV records, as well as a separate check of USPS records, revealed that Tony Saelee resided at the residence to which the two packages had been addressed. HSI agents searching for "Tony Fin" on social media located a Facebook account with that name, and the person depicted as "Tony Fin" on that account matched Tony Saelee as depicted in his DMV photo.

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[1] The official chemical name for Ecstasy is 3,4-Methylenedioxymethamphetamine, also known as "MDMA." It is listed on "Schedule I" under the Controlled Substances Act, *see* 21 C.F.R. § 1308.11(d)(11), and its possession and distribution are prohibited under that Act. *See* 21 U.S.C. § 841(a)(1), (b)(1)(C).

The HSI agents decided to arrange for a "controlled delivery" of both packages to Saelee. They replaced the seized pills with "sham blue pills made out of detergent material" and then resealed the two packages. HSI Special Agent William Anderson contacted the U.S. Postal Inspection Service ("USPIS") to obtain their cooperation in delivering the packages through what would appear to Saelee to be normal USPS channels. USPIS created false entries for the two packages in the USPS tracking database, so that anyone checking that history online would think that the packages were being processed in the ordinary course. HSI and USPIS then arranged to have an undercover USPIS agent dress as a regular USPS postal carrier and deliver the packages to Saelee's residence while HSI agents (including Agent Anderson) secretly waited in the USPS mail truck.

The controlled delivery took place at approximately 9:30 AM on Monday, April 23, 2018. As planned, the undercover USPIS agent drove a USPS mail truck to Saelee's residence, which was an apartment above a store. The entrance to the apartment was reachable through an external stairwell that led exclusively to that unit, and the agent parked the truck in front of that stairwell, thereby giving Agent Anderson a view up the stairs from inside the truck. Before proceeding to the apartment, the USPIS agent first used his cell phone to call the HSI agents who were with him, and then, after putting the phone on mute, he took the phone with him so that the agents would be able to hear any conversation during the delivery. After proceeding up the stairwell with the packages, the USPIS agent had to knock on the door several times before Saelee finally opened it. The agent asked Saelee whether he was Tony Fin, and Saelee said yes. Saelee confirmed to the agent that he was expecting the packages, and he signed a standard USPS form to confirm receipt of

them. The agent then returned to the mail truck and showed the HSI agents that Saelee had signed for the packages.

A few days before this controlled delivery, Agent Anderson had prepared a nearly complete affidavit in support of a search warrant for Saelee's apartment, after exchanging drafts with the U.S. Attorney's Office. Agent Anderson had discussed the possibility of getting an "anticipatory search warrant," in advance of the controlled delivery, that would authorize a search of the apartment upon fulfillment of the triggering condition that the planned controlled delivery first be successfully completed. *Cf. United States v. Grubbs*, 547 U.S. 90, 96–97 (2006) (upholding such a warrant as consistent with the Fourth Amendment if supported by "probable cause to believe the triggering condition will occur" (emphasis omitted)). But Agent Anderson decided instead to "seek a traditional search warrant," after the controlled delivery, based on the facts concerning the actual delivery itself. He did in fact seek such a warrant after the controlled delivery, and it was granted at 10:43 AM.

But Agent Anderson did not submit the search warrant application *immediately* after the controlled delivery. Instead, only a few minutes after the USPIS agent had returned to the mail truck, the HSI agents (including Agent Anderson) first proceeded up the stairwell to Saelee's apartment and, with weapons drawn, knocked on the door and announced their presence. As Agent Anderson stated in a declaration in opposition to Saelee's later suppression motion, he decided to arrest Saelee and secure the premises right away, because he believed that he had both probable cause to arrest Saelee and sufficient exigent circumstances to justify taking immediate action. Specifically, Agent Anderson stated that he was "concerned about agent safety"

for a number of reasons, including the concern that Saelee would realize he had received fake drugs and that "his arrest was imminent," and Agent Anderson's awareness of multiple shootings in the immediate vicinity, including one in which Saelee himself called police six months earlier to report a shot fired into his apartment.

When Saelee opened the door in response to the HSI agents' arrival at around 9:35 AM, they arrested him for attempted possession of a controlled substance with intent to distribute. Saelee was read his *Miranda* rights and invoked his right to counsel. After directing Saelee to sit on the couch in the living room, the agents conducted a protective sweep of the apartment to ensure that no other individuals were present. At some point (the record is unclear as to exactly when), Saelee had his cell phone in his hand, and an agent took it from him.

At the suppression hearing, the district court concluded that the evidence submitted by Saelee "supports the fact" that, in addition to a protective sweep, the agents also conducted "an extensive search . . . prior to obtaining the warrant." Specifically, Saelee submitted evidence that metadata from the digital files of photographs taken by the agents indicated that the agents had begun seizing and photographing items by 9:54 AM, which was almost 50 minutes before a magistrate judge signed a search warrant for the premises. Moreover, one of the agents testified at trial that, when they began their search, the agents posted sheets of paper labeling each room, and the agents' digital photos showed that the rooms had all been labeled by 9:55 AM. The district court noted that, for purposes of the suppression motion, the Government did not contest that the search of the apartment and the seizure of items began before the warrant was issued, and on appeal the Government

likewise does not dispute that point. It is undisputed, however, that nothing was removed from the apartment until after the warrant was obtained. Moreover, although Saelee's cell phone was among the items that were seized before the warrant was issued, the Government has consistently maintained that the cell phone's *contents* were not examined until after the warrant was obtained. Saelee has not contended otherwise, either in the district court or on appeal.

Agent Anderson stated that, as soon as the apartment was initially secured, he "called the U.S. Attorney's Office" and "dictated a final paragraph for the warrant affidavit [he] had started days earlier," and the completed written application "was then submitted to a federal magistrate judge." "Approximately one hour later," Agent Anderson telephonically swore before the magistrate judge to the veracity of the contents of his supporting affidavit. That affidavit generally recounted the facts of the investigation leading up to the controlled delivery, and its only reference to the events surrounding the actual delivery and its aftermath consisted of the following paragraph:

> Earlier today, on the morning of April 23, 2018, law enforcement officers conducted a controlled delivery of the above-described packages to SAELEE at the SUBJECT PREMISES. Prior to the controlled delivery, officers replaced the baggies of suspected Ectsasy [*sic*] with sham Ectsasy [*sic*]. The sham Ectsasy [*sic*] was placed in the original packaging described above. At approximately 9:30 a.m., a United States Postal Inspector approached the SUBJECT PREMISES and knocked on the door. A person matching the known appearance of Tony SAELEE answered the door. The postal inspector told SAELEE that he had two packages for "Tony

> Fin," and asked SAELEE if he was Tony Fin. SAELEE replied that he was Tony Fin and signed for both packages. SAELEE then closed the door and proceeded back into the SUBJECT PREMISES with the above-described packages. After approximately ten seconds, agents knocked on the front door of the SUBJECT PREMISES and announced their presence. When SAELEE opened the front door again, agents placed him under arrest for attempting to possess with intent to distribute a controlled substance. Agents then secured the SUBJECT PREMISES pending authorization to search the SUBJECT PREMISES.

The warrant was granted by the magistrate judge at 10:43 A.M. It authorized officers to search Saelee's apartment for eight enumerated categories of items, including "[a]ny contraband drugs or drug trafficking paraphernalia"; "any evidence of communications, whether in paper, electronic or other form," between Saelee and anyone "suspected to be involved" with the drug-trafficking conspiracy; "[d]ocuments or records of financial transactions or instruments"; and "electronic devices" that contain evidence of certain drug-related communications, which could be searched only in accordance with specified standard protocols attached to the warrant.

When agents searched the phone's contents pursuant to the warrant, they discovered several sets of text messages that were subsequently introduced at trial. One set consisted of messages between Saelee and his roommate (whom we will designate by his initials "M.N."). In these texts, M.N. and Saelee discussed the delivery of a package that was ultimately expected to be delivered on "Monday" (*i.e.*, April 23, the date of the controlled delivery) and for which M.N.

told Saelee, "We paying you." There was also a set of messages that were exchanged via Facebook and texting, approximately five to six days before the controlled delivery, between Saelee and "Chai Vang" (whose true name was later discovered to be Chai Choy Saechao). In them, Saechao first asks for "pills," then specifically for "100 tan bowers," offering "1100 for 100," and Saelee confirms that he can meet with Saechao the next day (*i.e.*, on April 19). At trial, Saechao confirmed that he had used the term "bowers" to refer to Ecstasy, and that he was requesting 100 pills for $1100.

In searching the phone, the agents also learned that its Facebook Messenger app was logged into the Facebook profile for "Tony Fin." They also found several photos on the phone that were introduced at trial over Saelee's objection. These included a photo of a hand holding a rubber-banded wad of $100 bills, a photo of several large see-through plastic bags that appeared to contain marijuana, and a screenshot of Saelee's retirement account statement, which showed a vested balance of $63,493.79 and said "Good morning, Tony" at the top.

The return for the search warrant indicated that the agents also seized 25 rounds of .45-caliber ammunition, as well as Saelee's wallet. The digital photos taken by the agents confirm that, before the warrant was issued, the wallet had been moved from the spot where it was originally found in Saelee's bedroom, opened, and photographed. The record is less clear as to when exactly the ammunition was seized, but a photo taken by the agents at 9:55 AM shows the ammunition sitting in plain view on top of an X-Box video game system in Saelee's bedroom. Finally, agents found the two delivered packages, unopened, in Saelee's bedroom on top of a laundry basket. For purposes of this appeal, we will

proceed on the assumption that all of these items were seized before the warrant was obtained.

B

Saelee was ultimately indicted on two counts: (1) attempted possession of Ecstasy with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 846; and (2) conspiracy to distribute Ecstasy, and to possess it with intent to distribute, in violation of the same sections.

Before trial, Saelee moved to suppress the evidence seized from his apartment and phone, as well as "all observations of agents made during their warrantless search." The district court denied the motion, holding that, even assuming that the agents' actions prior to obtaining the warrant violated the Fourth Amendment, the "independent source" doctrine made suppression inappropriate. As the court explained, "the agents would have sought the search warrant unprompted by anything they saw inside" Saelee's apartment, and the magistrate judge's issuance of the warrant was "untainted" by any illegality because no information learned from the Fourth Amendment violations was included in the warrant.

Saelee later filed a motion *in limine* to exclude, *inter alia*, his text messages with Saechao and M.N., the agents' photo of ammunition in his bedroom, and the photos of cash, marijuana, and his retirement account balance that were found on his phone. The district court initially excluded the evidence regarding ammunition under Federal Rule of Evidence 403 as more prejudicial than probative but admitted the other challenged evidence. At trial, the district court subsequently also admitted evidence concerning the agents' discovery of the ammunition, finding that the

defense had "opened the door" by asking the HSI agents whether they had been "searching for weapons" when they went through the apartment.

After a three-day jury trial, Saelee was convicted on both counts. Saelee moved for a judgment of acquittal or for a new trial, arguing, *inter alia*, that the evidence was insufficient to sustain the conviction and that the district court had improperly admitted various items of evidence. The district court denied these motions and sentenced Saelee to 20 months' imprisonment on each count, to run currently, followed by three years of supervised release. Saelee timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

II

Saelee contends that the district court erred in applying the independent source doctrine and that, in light of the agents' multiple violations of the Fourth Amendment, the evidence obtained as a result of those violations should have been suppressed. We review the district court's denial of the motion to suppress de novo and its underlying factual findings for clear error. *United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011). We review the district court's application of the independent source doctrine for clear error. *United States v. Lang*, 149 F.3d 1044, 1047–48 (9th Cir. 1998); *United States v. Montoya*, 45 F.3d 1286, 1295 (9th Cir. 1995).

For purposes of our analysis, we will follow the district court in assuming, without deciding, that the agents committed the following asserted violations of the Fourth Amendment: (1) without a warrant, they "encroach[ed] upon the curtilage of [Saelee's] home with the intent to arrest" him, *see United States v. Lundin*, 817 F.3d 1151, 1160 (9th

Cir. 2016); (2) they arrested Saelee in his home without a warrant and in the absence of exigent circumstances, *see Payton v. New York*, 445 U.S. 573, 589–60 (1980); and (3) before obtaining a warrant, they entered the apartment and conducted an extensive search, which well exceeded the scope of a protective sweep or a permissible securing of the premises, and seized the delivered packages, Saelee's cell phone and wallet, and the ammunition in his bedroom, *see Maryland v. Buie*, 494 U.S. 325, 327 (1990); *Segura v. United States*, 468 U.S. 796, 810 (1984) (plurality); *Payton*, 445 U.S. at 587–88. As noted earlier, however, it is undisputed that, prior to the issuance of the warrant, nothing was removed from the premises and the contents of Saelee's cell phone were not examined. *See supra* at 6.

Even assuming that these violations of the Fourth Amendment occurred, that does not necessarily mean that suppression of evidence is warranted. The exclusionary rule—"a prudential doctrine created by th[e] [Supreme] Court to compel respect for the constitutional guaranty" of the Fourth Amendment, *Davis v. United States*, 564 U.S. 229, 236 (2011) (simplified)—is "applicable only . . . where its deterrence benefits outweigh its substantial social costs," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (simplified). The rule is therefore subject to certain well-established exceptions, one of which "has come to be known as the 'independent source' doctrine." *Murray v. United States*, 487 U.S. 533, 537 (1988); *see also Utah v. Strieff*, 579 U.S. 232, 238 (2016). Under that doctrine, suppression is unwarranted, even where evidence was "initially discovered during, or as a consequence of, an unlawful search," when that evidence is "later obtained independently[,] from activities untainted by the initial illegality." *Murray*, 487 U.S. at 537. This exception ensures that the police will be placed "in the same, not a *worse*, position that they would

have been in if no police error or misconduct had occurred." *Id*. (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

To establish that "evidence initially acquired unlawfully" has later been independently obtained through an untainted source, the Government must show "that no information gained" from the Fourth Amendment violations "affected either [1] the law enforcement officers' decision to seek a warrant or [2] the magistrate's decision to grant it." *Murray*, 487 U.S. at 539–40. We conclude that the district court correctly held that both of those showings had been made here; indeed, Saelee does not seriously contend otherwise.

First, there is no clear error in the district court's factual finding that the agents' decision to seek the warrant was unaffected by the alleged Fourth Amendment violations. *See Murray*, 487 U.S. at 543 (holding that this determination is an issue of fact to be determined by the district court in the first instance). Before any of the challenged actions occurred, Agent Anderson had already prepared a near-complete warrant application in consultation with the U.S. Attorney's Office, save for the addition of a single paragraph to be inserted after the controlled delivery was completed. Moreover, it is clear that Agent Anderson dictated that final paragraph very shortly after the initial entry into Saelee's apartment at 9:35 AM, and prior to the search activities documented in the agents' photos. The warrant was granted by the magistrate judge at 10:43 AM, shortly after Agent Anderson telephonically swore to the contents of the warrant application before that magistrate, and Agent Anderson averred that the warrant application was submitted to the magistrate approximately one hour *after* he had dictated that additional paragraph to the U.S. Attorney's Office. That indicates that Agent Anderson called the U.S. Attorney's

Office at approximately 9:43 AM—meaning that he did so promptly after the initial arrest and securing of the premises and before most (if not all) of the ensuing search and seizure activities. Given that the application was nearly complete before any unlawful conduct occurred, and was completed within minutes of the allegedly illegal arrest and entry, the district court did not clearly err in concluding that the agents' decision to seek the warrant was unaffected by any of the Fourth Amendment violations that Saelee alleges.

Second, the magistrate judge's decision to issue the warrant was plainly not affected by the asserted Fourth Amendment violations. The only "facts" included in the warrant application that were learned as a result of the alleged violations were that Saelee had been arrested and that the premises had been secured. *See supra* at 6–7. That information adds nothing, logically or legally, to whether there was probable cause to search the premises, and it is therefore clear that it did not influence the magistrate judge's decision to issue the warrant. *See Murray*, 487 U.S. at 543; *United States v. Heckenkamp*, 482 F.3d 1142, 1149 (9th Cir. 2007).

Although these two requirements of the independent source doctrine were thus met, Saelee contends that the doctrine nonetheless cannot be applied in this case. According to Saelee, because the evidence here had already been seized before the warrant was issued and thereafter remained continuously in the HSI agents' custody, there was only one seizure and any purported subsequent "seizure" pursuant to the warrant was illusory and not *factually* independent. We reject this contention, which is inconsistent with *Murray*.

In *Murray*, police officers conducting surveillance observed two vehicles leave a warehouse and shortly thereafter those vehicles were lawfully seized and discovered to contain marijuana. 487 U.S. at 535. After learning about the marijuana seizures, several of the officers unlawfully forced their way into the unoccupied warehouse, observed bales in plain view that presumably contained marijuana, and then exited without disturbing anything. *Id*. They then applied for a warrant to search the warehouse and in doing so made no mention of the unlawful entry or of the discovery of the bales of marijuana. *Id*. at 535–36. Because the magistrate's decision to issue the warrant was unaffected by the unlawful entry (of which the magistrate was unaware), the Court held that the independent source doctrine would apply if, on remand, the district court were to find that the officers' decision to seek the warrant was not affected by their having "earlier entered the warehouse." *Id*. at 543.

In reaching this conclusion, the Court recognized that "[k]nowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry," and that knowledge, of course, could not be unlearned. 487 U.S. at 541. The Court nonetheless held that such knowledge "was *also* acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply." *Id*. (emphasis added). "Invoking the exclusionary rule" in these circumstances, the Court stated, "would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one." *Id*. After thus holding that knowledge unlawfully acquired and thereafter continuously known could nonetheless be re-acquired lawfully and independently pursuant to an untainted warrant, the Court held that the same analysis applied "to the *tangible* evidence, the bales of

marijuana." *Id*. (emphasis added). In so holding, the Court expressly rejected the First Circuit's contrary view that "*objects* 'once seized cannot be cleanly reseized *without returning the objects to private control*.'" *Id*. (quoting *United States v. Silvestri*, 787 F.2d 736, 739 (1st Cir. 1986) (emphasis added)). As the Court explained:

> [R]eseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.

Id. at 542. To be sure, the Court noted, it "may well be difficult" for officers to persuade a court to find that the requirements of the independent source doctrine are satisfied "where the seized goods are kept in the police's possession," but the Court rejected the First Circuit's suggestion that such continuity of possession *precluded* application of the independent source doctrine. *Id*.

Murray's reasoning on this point forecloses Saelee's argument here. Just as "intangible evidence already discovered" as a result of an unlawful search can be said to be independently "rediscover[ed]" if "that later acquisition was not the result" of the unlawful conduct, so too, objects that have already been seized at a location and are still at that location can be "reseiz[ed]" there when an independently sought-and-issued warrant authorizes their seizure at that location. *Id*. at 541–42. The independent source doctrine does not require that the officers "return[] the objects to private control" before reseizing them pursuant to the warrant. *Id*. at 541 (citation omitted). As the *Murray* Court

noted, continuous police custody of the objects may make it hard for the police to persuasively make the necessary factual showing that their decision to seek a warrant for the search and seizure of the objects was not affected by the unlawful conduct, *see id*. at 542, but as we have explained, the officers amply made that showing here.

Our conclusion on this score is further supported by the Fifth Circuit's decision in *United States v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000). There, a local police officer, acting without a warrant, seized a computer containing child pornography from a computer repair shop that had reported discovering such material on the device. *Id.* at 324–25. After federal agents were notified, they obtained a warrant to search the computer and then took custody of it from the police. *Id.* at 325. After the federal agents copied and examined the computer's hard drive, they used the information obtained to secure a further warrant to search the home of the computer's owner, Grosenheider. *Id*. They then returned the computer to the repair shop, where Grosenheider's wife subsequently picked it up, and after she returned home, the federal agents executed the second warrant and again seized the computer. *Id*. Grosenheider argued, similar to Saelee's argument here, that the federal agents' seizure of the computer from the custody of the local police pursuant to a warrant could not be deemed independent of the police's unlawful prior seizure, because the federal agents' custody was directly continuous with that initial unlawful custody. *Id*. at 328–29. The Fifth Circuit rejected this argument as inconsistent with *Murray*, noting that "the *Murray* Court specifically found that an independent 're-seizure' can cure an earlier illegal seizure in the same way a valid later search can cure an earlier illegal one." *Id*. at 329. That was especially true, the Fifth Circuit concluded, when the local police's assertedly unlawful

custody did not make "any use of the computer" while they held it but "simply safeguarded it." *Id*. That same analysis applies equally here.

Moreover, the Fifth Circuit cogently noted that the only interest that would be served by a rule requiring a return of the computer to private custody before it could be independently reseized would be to grant Grosenheider the opportunity to destroy its contents or conceal its whereabouts. *Id*. at 329. Those are, of course, not interests that the exclusionary rule is designed to protect. There is no "'constitutional right' to destroy evidence," and such a concept "defies both logic and common sense." *Id*. at 330 (quoting *Segura*, 468 U.S. at 816). The same is true here: it would make no sense to say that, in order for the Government to be able to invoke the independent source doctrine, it must first return to Saelee's custody and control all of the items that were seized pending issuance of the warrant.[2]

[2] As the Fifth Circuit noted, "murky dicta" from an opinion joined by only two Justices in *Segura* could be read to support the opposite view that an initial unlawful and continuing seizure (such as assertedly occurred in this case) cannot be cured by the subsequent issuance of a warrant. *See Grosenheider*, 200 F.3d at 329 (quoting *Segura*, 468 U.S. at 806 (opin. of Burger, C.J., joined by O'Connor, J.) ("If all the contents of the apartment were 'seized' at the time of the illegal entry and securing, presumably the evidence now challenged would be suppressible as primary evidence obtained as a direct result of that entry.")). But the only issue in *Segura* was whether the independent source doctrine precluded suppression of evidence that was *newly discovered* upon the execution of an independently obtained warrant at an apartment that the police had already entered and occupied (allegedly unlawfully), and the Court answered that question in the affirmative. *See Segura*, 468 U.S. at 813–16. As the Court subsequently noted in *Murray*, the "admissibility of what [the police] discovered while waiting in the apartment was *not* before" the Court in *Segura*. *See Murray*, 487 U.S. at 538 (emphasis added). The Court's analysis in *Murray*, by contrast,

Because all of the tangible and intangible evidence obtained as a result of the alleged Fourth Amendment violations was independently rediscovered or reseized when the agents executed a search warrant that was both sought and issued independently of any such violations, the district court correctly denied Saelee's motion to suppress.[3]

III

Saelee also contends that a variety of evidentiary errors at his jury trial warrant reversal of his conviction and a new trial. We disagree.

A

We reject Saelee's contention that the district court abused its discretion in admitting, as co-conspirator statements, M.N.'s text messages with Saelee.[4]

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directly addresses "reseizure[s]," *id*. at 542, and its analysis is controlling here. *See Grosenheider*, 200 F.3d at 329–30.

[3] In the district court, Saelee alternatively argued that the independent source doctrine does not apply to flagrant violations of the Fourth Amendment, citing the Eighth Circuit's decision in *United States v. Madrid*, 152 F.3d 1034 (8th Cir. 1998). *But see United States v. Huskisson*, 926 F.3d 369, 374 n.2 (7th Cir. 2019) (holding that Seventh Circuit precedent did not allow for such an exception to *Murray*). Saelee, however, has not renewed that argument in his opening brief on appeal, and we deem it forfeited. *United States v. Nunez*, 223 F.3d 956, 958–59 (9th Cir. 2000).

[4] Saelee argues that the admission of these statements violated his rights under the Sixth Amendment's Confrontation Clause and that we should therefore apply de novo review. But "statements in furtherance of a conspiracy" are "by their nature . . . not testimonial," and thereby do not implicate the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 56 (2004); *see also United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005). Accordingly, in examining the admission of M.N.'s

At trial, the Government introduced the following set of text messages between Saelee and M.N.:

M.N.	Time	Saelee
Are you home ?	9:16 AM	
Aye keep your room door pole		
Open		
Package coming today		
	9:16 AM	Nope
What do you mean nope	9:17 AM	
	9:17 AM	They don't even knock
We paying you	9:17 AM	
Just keep an eye out around 11		

texts, "[w]e review for an abuse of discretion the district court's decision to admit coconspirators' statements, and review for clear error the district court's underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy." *United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007) (citation omitted).

M.N.	Time	Saelee
	9:18 AM	I'll set alarm clock for 1030
		Then I'll leave me door open
Me door ? How cute	9:19 AM	
Never mind it's still in Oakland	9:28 AM	
So Monday		
Thank you tho	9:29 AM	
[Additional texts omitted]		
	9:37 AM	
Anything ? Came ?	11:31 AM	
	11:32 AM	Just hella mail

M.N.	Time	Saelee
		Did it said delivered?
Ok nvm	11:33 AM	

Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it is "offered against an opposing party" and was "[1] made by the party's coconspirator [2] during and in furtherance of the conspiracy." If the parties dispute whether these two requirements of the rule have been met, "the offering party must prove them by a preponderance of the evidence." *Bourjaily v. United States*, 483 U.S. 171, 176 (1987); *see also* FED. R. EVID. 104(a). When a district court evaluates whether a particular statement qualifies as non-hearsay under Rule 801(d)(2)(E), "[t]he statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it." FED. R. EVID. 801(d)(2). Accordingly, the Government "must produce some independent evidence which, viewed in light of the coconspirator statements, establishes the requisite connection between the accused and the conspiracy." *United States v. Castaneda*, 16 F.3d 1504, 1507 (9th Cir. 1994). Because "[e]vidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative," the independent evidence must be such that, taken together with the alleged coconspirator statements, it can "fairly" be said to be "incriminating." *Id*. (citation omitted). To establish that the defendant had the requisite incriminating connection to a conspiracy, however, the Government "need show only a slight connection with the conspiracy." *Id*. Applying these standards, we hold that the district court did not clearly err

in concluding that M.N.'s text messages, taken together with other independent evidence, sufficiently establish that Saelee participated in a conspiracy with M.N.

As an initial matter, *Saelee's* text messages to M.N. are admissible against Saelee as statements of a party opponent under Rule 801(d)(2)(A), and they therefore count as "independent evidence" that, considered together with M.N.'s statements, can provide the requisite connection. *See Castaneda*, 16 F.3d at 1509. Saelee's messages confirm that he agreed to look out for a package. M.N.'s statements, together with several interlocking items of independent evidence, support a reasonable inference that the package in question was one of the Ecstasy-filled packages that arrived via controlled delivery on Monday, April 23. In a text message at 9:16 AM on Saturday, April 21, M.N. told Saelee to watch for a "[p]ackage coming today," but then, at 9:19 AM, M.N. sent a text message stating, "Never mind it's still in Oakland." Nine minutes later, he sent a further text stating, "So Monday." The Government produced a log showing that someone checked the tracking information for one of the two packages at 11:19:39 AM Central Time on Saturday, April 21—*i.e.*, 9:19 AM Pacific Time. The Government also produced the tracking information for that package, and between 4:57 PM Central Time on April 20 and 3:20 PM Central Time on April 21, the latest entry on the tracking record showed the package as having arrived in Oakland. Although Saelee claims that the Government should have produced evidence linking M.N. to the particular IP address that checked the package's status at 9:19 AM, the absence of such evidence does not detract from the reasonable—indeed, strong—inference that M.N. or someone with him checked the package status at 9:19 AM, after which M.N. immediately reported to Saelee that the package was still in Oakland.

Saelee asserts that, even if the Government sufficiently showed that he agreed to look out for this particular package, there is no independent evidence establishing that either he or M.N. knew that it contained Ecstasy or were otherwise conspiring with one another to possess or distribute Ecstasy. This contention fails. In finding that the requirements of Rule 801(d)(2)(E) were met, the district court was "not bound by evidence rules, except those on privilege," *see* FED. R. EVID. 104(a); *see also Bourjaily*, 483 U.S. at 178–79, and there is ample evidence to support the district court's conclusion. Saelee's knowledge of the package's contents may reasonably be inferred from the fact that it was addressed to him, not M.N.; the package was found in Saelee's bedroom, not M.N.'s; at 9:32 AM on April 21, M.N. texted Saelee a photo, with no accompanying words, showing what appear to be yellow pills (which Agent Anderson testified appeared to be Ecstasy); when Saelee initially responded "Nope" to M.N.'s initial inquiry about a package, M.N. reminded Saelee that he was "paying" him; and Saelee had only days earlier engaged in a separate series of text messages with Saechao offering to sell him Ecstasy. *See supra* at 7–8. M.N.'s knowledge may be inferred from the fact that he showed an unusual level of focused interest in the delivery of a package containing a large quantity of Ecstasy; that he reminded Saelee that he was "paying" him concerning the package; and that he sent Saelee a photo of what appears to be Ecstasy the same morning that he discussed the package with Saelee.

Given that the district court properly concluded that Saelee and M.N. were engaged in a conspiracy to possess the Ecstasy-filled package with intent to distribute the pills inside it, there can be little doubt that M.N.'s text messages were "in furtherance" of that conspiracy. *See* FED. R. EVID.

801(d)(2)(E). Indeed, Saelee does not separately contest that element of the rule in his opening brief. The requirements of the rule were thus satisfied, and M.N.'s text messages were properly admitted.

B

We reject Saelee's remaining arguments that the district court prejudicially erred in admitting several additional items of evidence.

The district court did not prejudicially abuse its discretion in admitting messages and testimony from Saechao concerning Saelee's offer to sell him Ecstasy pills and Saechao's purchases of Ecstasy from persons he believed to be intermediaries of Saelee. In the messages, Saelee on April 18 indicated a willingness to deliver Ecstasy to Saechao the next day. Given that timing, the pills that would be involved in this contemplated sale (which never actually happened) would necessarily have to have been different from the not-yet-arrived pills from Germany that were the object of his conspiracy with M.N. Although Saelee's April 18 offer to sell Ecstasy to Saechao is thus evidence of some "*other* crime, wrong, or act," it was admissible for the purpose of establishing "intent, . . . knowledge, . . . [or] absence of mistake." *See* FED. R. EVID. 404(b)(1), (2) (emphasis added). The drug-trafficking conspiracy and attempted possession charges against Saelee both required a showing that Saelee had the intent to distribute the Ecstasy that was sent from Germany, *see United States v. Suarez*, 682 F.3d 1214, 1218–19 (9th Cir. 2012), and the fact that Saelee contemplated selling Ecstasy only days before those packages were set to arrive certainly bears on whether or not he was clueless as to their contents. As to Saechao's testimony about purchasing Ecstasy from

persons he thought were Saelee's intermediaries, we conclude that, even assuming that there was insufficient foundation to admit this testimony, any error was more likely than not harmless in light of Saelee's direct offer to sell Ecstasy to Saechao and the other evidence of guilt at trial. *United States v. Lim*, 984 F.2d 331, 335 (9th Cir. 1993).

We reject Saelee's further contentions that the district court prejudicially abused its discretion when it admitted a photo from his cellphone, showing a hand holding what appears to be a wad of $100 bills; another cellphone photo showing bags of marijuana; and a cellphone screenshot of his retirement account balance. *See supra* at 8. Even assuming *arguendo* that the district court abused its discretion in concluding that the two photos were probative "of Saelee's knowledge and intent" with respect to the two packages and that the screenshot was admissible to confirm Saelee's ownership of the phone, any error was harmless in light of the strength of the properly admitted evidence against Saelee. The same core evidence of Saelee's knowledge that we summarized earlier in connection with our discussion of Rule 801(d)(2)(E) was admitted at trial and, considered together with M.N.'s texts, that evidence strongly confirms that Saelee was aware of the packages' contents. *See supra* at 21–23. Saelee's ownership of his phone was overwhelmingly established by the contents of the phone and by the fact that it was seized from his hand. Given the strength of the other evidence on these points, and the limited risk of prejudice from the photos and the screenshot, "it is more probable than not that the prejudice resulting" from any error here "did not materially affect the verdict." *Lim*, 984 F.2d at 335 (citation omitted).

The district court did not abuse its discretion in allowing the Government to raise, on redirect of Agent Anderson, the

discovery of ammunition in Saelee's bedroom. The district court originally excluded any evidence of the ammunition on the ground that it was more prejudicial than probative, *see* FED. R. EVID. 403, but the court later admitted such evidence after concluding that the defense had "opened the door" when cross-examining Agent Anderson. Specifically, defense counsel asked a series of questions about the agents' operation plan for the controlled delivery and later search, including whether the agents "would have known if [Saelee] owned any registered firearms" and whether the agents were "searching for weapons or anything like that." As defense counsel explained during an ensuing colloquy with the court outside the presence of the jury, the purpose of this question was to show that, contrary to what Agent Anderson had claimed at trial, the agents had "no reasonable expectation of danger." The district court acted well within its discretion in concluding that, by affirmatively suggesting that there was no basis to believe that Saelee was involved in firearms, this line of examination altered the balance of prejudice versus probative value under Rule 403 vis-à-vis Saelee's possession of ammunition. That is, the discovery of ammunition was now relevant to show that the suggested inference that Saelee had no involvement in firearms was false.

C

Saelee also argues that a new trial is warranted because, in violation of a pretrial order, one of the Government's witnesses mentioned at trial a post-arrest statement made by Saelee after he had invoked his right to counsel. The district court properly denied Saelee's motion for a new trial on this ground.

As noted earlier, after Saelee was read his *Miranda* rights upon his arrest, he invoked his right to counsel. *See supra* at

5. Despite that invocation, agents subsequently asked Saelee which bedroom was his, and he told them which one it was. Saelee filed a motion *in limine* seeking to exclude this and any other post-arrest statements on the ground that they were taken in violation of *Edwards v. Arizona*, 451 U.S. 477, 483 (1981). After the Government failed to articulate a theory as to why the challenged statements were not subject to suppression under *Edwards*, and instead agreed not to use them in its case-in-chief, the district court ruled that Saelee's post-arrest statements could not be used except for impeachment. Nonetheless, one of the HSI agents at trial, when asked to explain how he knew which room was Saelee's, answered that "he told us that that was his room." After Saelee objected, the district court struck this statement and gave the following curative instruction:

> Okay. Ladies and gentlemen, there was some testimony, recent testimony, as to a statement made by the defendant. Because there was an understanding that no statements of the defendant are going to be admitted in this case, accordingly, you are—that statement is stricken and you are admonished to disregard it.

Saelee's statement was never referenced again at trial.

Here, after the agent's improper testimony, the district court enforced its pretrial ruling by striking the statement and ordering the jury to disregard it. The jury is presumed to have followed that instruction, *see United States v. Parks*, 285 F.3d 1133, 1139 (9th Cir. 2002), and there is little, if any, basis for concluding that the jury may have failed to do so here. Which room was Saelee's was already amply demonstrated by the fact that his wallet was found on the dresser in that room. Moreover, Saelee's admission that the

bedroom was his was hardly the sort of statement that might be considered so inherently and overwhelmingly incriminating that a jury could not be expected to follow an explicit instruction directing them to disregard it. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (holding that a jury is presumed to "follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions and a strong likelihood that the effect of the evidence would be devastating to the defendant" (simplified)). Although Saelee asserts that the district court should have said that the agent's testimony violated a prior *order*, rather than an "understanding," this difference in wording does not provide any basis for concluding that the jury would be unable to follow the court's unambiguous instruction to disregard the statement.[5]

IV

Finally, Saelee argues that the evidence was insufficient to support the jury's guilty verdicts and that his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 should have been granted. As should already be clear from our prior discussion, we disagree with this argument.

In assessing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact

[5] To the extent that Saelee argues that the *cumulative* effect of the various asserted errors discussed in this Section III was sufficiently prejudicial to warrant the granting of a new trial, we reject any such contention in light of the strength of the properly admitted evidence against Saelee.

could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). On appeal, Saelee does not dispute that *if* there was sufficient evidence to show that he "knew that the packages he accepted contained a controlled substance," then all of the elements of both the attempted possession-with-intent-to-distribute charge and the conspiracy charge were satisfied here. Instead, he rests his argument on the premise that there was insufficient evidence of his knowledge of the packages' original contents. But as we have explained, the evidence at trial, including Saelee's text message exchanges with M.N., supports a rational inference that he knew that the packages sent from Germany contained a controlled substance. *See supra* at 21–23. A jury could readily conclude, beyond a reasonable doubt, that Saelee was aware of the packages' original contents and that he thereby attempted to possess Ecstasy with the intent to distribute and that he conspired with M.N. to so possess that Ecstasy and to distribute it. The jury's verdicts were supported by sufficient evidence.

AFFIRMED.