

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCELLO MARLO RIVERA,

Defendant - Appellant.

No. 24-673

D.C. No.
2:22-cr-00129-
DAD-1

OPINION

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted March 5, 2026
San Francisco, California

Filed September 23, 2026

Before: Ronald M. Gould, Milan D. Smith, Jr., and Ryan
D. Nelson, Circuit Judges.

Opinion by Judge R. Nelson

SUMMARY*

Criminal Law

The panel affirmed Marcello Rivera's jury conviction and sentence for possessing methamphetamine and possessing ammunition as a felon.

The panel held that the district court did not abuse its discretion, at sentencing, in converting \$5,972 in cash seized at Rivera's residence into its market value in methamphetamine, where the jury found that every dollar constituted methamphetamine proceeds.

The panel held that the district court did not abuse its discretion by applying a sentence enhancement under U.S.S.G. § 2D1.1(b)(12) for maintaining a premises for the purpose of distributing a controlled substance, where Rivera knowingly maintained his home for the purpose of manufacturing and distributing methamphetamine.

Rivera argued that the district court violated Fed. R. Crim. P. 32 by not addressing three objections to the presentence investigation report. The panel rejected this claim because the district court ruled on all of Rivera's objections.

The panel held that the district court did not plainly err in its handling of the case agent's percipient and expert testimony, where the district court instructed the jury that the agent engaged in dual-role testimony, separated the agent's testimony into lay and expert phases, and had the

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

government specify whether each question was directed at the agent's training and experience or his participation in the investigation.

The panel held that the district court did not err in finding that two exhibits containing messages between Rivera and others were evidence of intent under Fed. R. Evid. 404(b)(2) and admissible.

The panel held that the district court did not err in excluding a recorded conversation Rivera had with the case agent shortly after his arrest. Rivera argued that he should have been allowed to introduce the recorded statement that he did not possess methamphetamine in his room, sell drugs, or sell firearms—despite it being hearsay—to impeach the agent's testimony that Rivera made an unrecorded inculpatory statement admitting that he should not have possessed the ammunition because he was a felon. The panel explained that Rivera cannot introduce his own hearsay for the truth of the matter it asserts, made in a separate conversation, and claim it as impeachment evidence. In any event, the district court did not abuse its discretion in concluding that the recorded statements denying responsibility for firearms dealing were irrelevant to statements he made in a different conversation concerning ammunition found in Rivera's home. And any error would be harmless.

Rivera argued that his § 922(g)(1) conviction must be reversed because the statute is facially unconstitutional to the extent it prohibits possession by a felon of ammunition alone. The panel declined to reach the merits of this Second Amendment claim because Rivera did not raise it in a pre-trial objection and did not argue there was good cause for failing to do so.

COUNSEL

David W. Spencer (argued) and Kevin C. Khasigian, Assistant United States Attorneys; Nirav K. Desai, Assistant United States Attorney, Appellate Chief; Eric Grant, United States Attorney; Office of the United States Attorney, United States Department of Justice, Sacramento, California; for Plaintiff-Appellee.

Eric S. Fish (argued) and Gabriel J. Chin, Supervising Attorneys; Alexander Dickey, Rachel Kwak, David LaRiviere, Savanna Burney, and Omar Khalil, Law Students; Aoki Federal Defender Project, University of California Davis School of Law, Davis, California; Douglas J. Beevers, Assistant Federal Public Defender; Heather E. Williams, Federal Defender, Office of the Federal Public Defender, Sacramento, California; David M. Porter, Attorney at Law, Takoma Park, Maryland; for Defendant-Appellant.

OPINION

R. NELSON, Circuit Judge:

A jury convicted Marcello Rivera of possessing methamphetamine and possessing ammunition as a felon. The district court sentenced Rivera to 300 months' imprisonment. He appeals, arguing that his conviction and sentence were invalid because of sentencing error, trial error, and constitutional error. Because Rivera's convictions and sentence are free of error, we affirm.

I

A

The Drug Enforcement Administration (DEA) obtained a search warrant for Rivera's residence in Lodi, California, after learning from a DEA confidential source that Rivera engaged in drug trafficking. The source reported that he had seen Rivera possess multiple pounds of methamphetamine in his home, sell methamphetamine at his residence and elsewhere, and carry a handgun on his person several times.

Agents corroborated several details provided by the source and found that Rivera had multiple felony convictions, along with a lifetime requirement to register as a sex offender. In part, they investigated Rivera by searching his trash, finding a trash bag with its interior covered with shards of methamphetamine (which would have held about 1.5 pounds of methamphetamine when full).

Based on this information, agents executed a warrant at Rivera's residence. After the agents knocked and announced their presence with no response, they forced entry and found Rivera and his girlfriend in the master bedroom of the home. In Rivera's bedroom and the adjoining bathroom, agents found evidence consistent with Rivera flushing methamphetamine down his toilet. Agents also found a digital scale with methamphetamine residue on it. In the master bedroom and Rivera's wallet, agents found several thousand dollars of cash in various denominations totaling \$5,972. In a separate bedroom, agents found another scale and packaging materials.

After searching one of Rivera's cell phones (which had the same number the confidential source said Rivera used to organize methamphetamine deals), agents found a series of

text messages between Rivera and his customers, using coded language to arrange methamphetamine deals. The phone also had a photo of large stacks of cash matching the seized proceeds. Finally, the agents found a pistol magazine in Rivera's garage that was loaded with 17 rounds of 9mm ammunition. Rivera admitted to the case agent (Agent Nehring) that since he is a convicted felon, he should not have had the ammunition.

B

A grand jury issued a two-count indictment against Rivera for possession with intent to distribute methamphetamine and possession of ammunition as a felon. 21 U.S.C. § 841(a)(1); 18 U.S.C. § 922(g)(1). The case proceeded to trial.

Prior to trial, Rivera moved to exclude government exhibit 82—a text message exchange between Rivera and a customer in which the customer used coded language to ask for the prices of Rivera's methamphetamine. The district court denied the motion. Later during the pretrial hearing, Rivera asked the court for a limiting instruction on the exhibit to tell the jury he was not on trial for any offenses other than the two charged in the indictment. The district court instructed the jury Rivera was “not on trial for any conduct or offense not charged in the indictment.”

The government also moved to prevent Rivera from introducing his own recorded hearsay statements from his interview with the arresting agents. Rivera wanted to introduce a set of recorded statements he made near the end of the search of his house and his arrest in which he denied possessing methamphetamine in his room, selling drugs, or selling firearms. Rivera argued that he should be allowed to introduce the recorded statement to impeach Agent

Nehring's testimony that Rivera had admitted to possessing the ammunition found in his garage. The court granted the government's motion, finding that the evidence Rivera sought to admit was inadmissible hearsay and did not fall within any exception.

At trial, the government called Agent Nehring as both a fact and expert witness. The district court followed the standard procedure for dual-role testimony by splitting Agent Nehring's testimony into two phases—a percipient phase, where he testified as a fact witness, and an expert phase, where he testified as an expert witness. The district court instructed the jury on how to evaluate Agent Nehring's fact and expert testimony based on the Ninth's Circuit's model instruction for dual-role testimony after both parties agreed. *See* Ninth Cir. Model Crim. Jury Instr. No. 3.15 (Mar. 2022 ed.).

Rivera objected three times during Agent Nehring's percipient phase testimony. First, he objected when Agent Nehring testified that Rivera's trash appeared to have been full of methamphetamine based on the fragments within it, arguing that Agent Nehring was mixing fact and expert testimony. The district court resolved this issue by giving the dual-role instruction, to which Rivera agreed. Second, Rivera objected when Agent Nehring testified that he could not collect any methamphetamine fragments from Rivera's toilet bowl because they were dissolving (i.e., he started explaining what happens when methamphetamine touches water). Rivera argued that this veered into scientific testimony. The district court resolved this objection by instructing the jury to disregard the testimony to the extent that Agent Nehring began to testify about the reaction that occurs when methamphetamine contacts water. Finally, Rivera again objected on the same basis when Agent

Nehring testified that the opaqueness and cloudiness on the inside of one bag found in Rivera's bedroom appeared to come from methamphetamine based on the crystalline material in the bag. The court overruled the objection.

Agent Nehring's expert testimony took place on the fourth day of trial, and four other witnesses testified between the percipient and expert phases of his testimony. Agent Nehring, now in his expert capacity, testified about the tools of the trade common for drug traffickers, methamphetamine prices, what happens when methamphetamine touches water, coded language common for drug dealers, and how drug deals commonly occur. The district court again instructed the jury about the dual-role testimony.

C

The jury found Rivera guilty on both counts. It also returned a special verdict finding that the \$5,972 seized in cash was forfeitable as proceeds of Rivera's methamphetamine trafficking offense.

After conviction, a probation officer prepared a presentence investigation report (PSR) calculating Rivera's advisory Guidelines range as 360 months to life in prison. The PSR, calculated under United States Sentencing Guidelines ("Guidelines") § 2D1.1, led to a base offense level of 36 based on a drug weight of two kilograms of methamphetamine. It then added two levels for maintaining a premises for the purpose of distributing a controlled substance (the premises enhancement) and two levels for obstruction of justice, resulting in a total offense level of 40. The PSR also calculated a Criminal History Category of V.

At sentencing, the district court addressed several of Rivera's objections. As the court explained, all objections

were aimed at how to weigh the evidence in determining the drug quantity except for Rivera's three objections on calculating drug quantity, the premises enhancement, and a criminal history issue. It therefore asked Rivera if he agreed with its characterization of most of the objections and if he was amenable to the court overruling all of them, which Rivera knowingly agreed to.

The district court imposed the premises enhancement, citing the Sixth Circuit's decision in *United States v. Johnson*, 737 F.3d 444, 447–49 (6th Cir. 2013). Next, it found by “even . . . beyond” a preponderance of the evidence that Rivera flushed methamphetamine down his toilet but declined to conclude that the bags with methamphetamine shards in the bedroom had been full. Instead, the court focused on the \$5,972 that was seized, finding a reasonable basis to conclude it was associated with methamphetamine transactions. Thus, the district court decided that the seized cash could be converted to its methamphetamine equivalent based on market prices.

Based on expert trial testimony, the district court used the seized proceeds to conservatively estimate that Rivera was responsible for possessing between 500 grams and 1.5 kilograms of methamphetamine. This resulted in a base offense level of 34, a total offense level of 38 with the enhancements, and a criminal history category of V under the Guidelines—yielding the recommended Guidelines sentence of 360 months to life imprisonment. The district court ultimately sentenced Rivera to a below-the-Guidelines sentence of 300 months (25 years) in prison. Rivera timely appealed.

II

The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

“[W]e review the district court’s selection and interpretation of the Sentencing Guidelines de novo and its application of the [G]uidelines to the facts for an abuse of discretion.” *United States v. Herrera*, 974 F.3d 1040, 1045 (9th Cir. 2020) (citing *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc)). We review the district court’s factual findings for clear error. *Gasca-Ruiz*, 852 F.3d at 1170. We review the district court’s evidentiary rulings for abuse of discretion. *Hyer v. City & Cnty. of Honolulu*, 118 F.4th 1044, 1055 (9th Cir. 2024).

III

Rivera advances several arguments contending that his conviction is tainted with reversible error. All lack merit.

A

First, Rivera argues that the district court abused its discretion by converting the cash into a monetarily equivalent amount of drugs. We allow currency found in a search to be “convert[ed] . . . into drugs for sentencing purposes.” *United States v. Otis*, 127 F.3d 829, 836 (9th Cir. 1997); see Guidelines § 2D1.1. A sentencing court may do so “where the amount of a drug seized does not reflect the scale of the offense” at issue. *United States v. Gonzalez-Sanchez*, 953 F.2d 1184, 1186 (9th Cir. 1992). But when a sentencing court converts currency in this way, there must be “evidence connecting the money to drug-related activities.” *Otis*, 127 F.3d at 836. In other words, the district court must find by a preponderance of the evidence that the

money had a nexus to a drug transaction. *See Gonzalez-Sanchez*, 953 F.2d at 1187.

That requirement is met here. In its special verdict, the jury found that the “approximately \$5,972 in U.S. currency” was “property constituting or derived from proceeds obtained, directly or indirectly, as a result of the offense charged in Count 1 of the indictment and bill of particulars.”¹ And Count 1 was possession with intent to distribute methamphetamine. In other words, the jury found that every dollar of the \$5,972 seized constituted methamphetamine proceeds, and the district court reasonably relied on that finding during sentencing. Unlike *Gonzalez-Sanchez*, where “there was no evidence at all connecting the [money at issue] to any drug-related activities,” the jury here made a finding “based on the record and made by a preponderance of the evidence.” 953 F.2d at 1187. This allowed the district court to then convert the cash into its market value in methamphetamine.

And the district court erred on the side of caution (i.e., in Rivera’s favor) since “approximation is by definition imprecise.” *United States v. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002) (citation omitted). Even though the cash easily could have amounted to more methamphetamine under prevailing market rates, the district court only converted it to an amount between 500 grams and 1.5 kilograms. The district court followed our caselaw and the Guidelines.

¹ The jury made this finding under 21 U.S.C. § 853(a)(1), which is sufficient to conclude that the district court reasonably converted the entire forfeitable cash amount to drug quantity. We therefore need not address Rivera’s alternative argument under § 853(a)(2).

Rivera argues that the district court did not mention the jury's verdict when converting the cash into its drug equivalent. But *Gonzalez-Sanchez* requires only record evidence that reflects "a connection between the money seized and a drug transaction." 953 F.2d at 1187. And the jury's finding supports that such a connection could be, and was, made. *See id.*

Even if we adopted Rivera's proposed rule requiring the district court to mention the jury's verdict, the district court would simply resentence him after pointing to the jury's finding, causing any error to be harmless.² *See United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167 (9th Cir. 2009). The district court did not abuse its discretion in converting the cash to its methamphetamine equivalent.

B

The district court did not err by applying the premises enhancement to Rivera's total offense level. Under § 2D1.1(b)(12) of the Guidelines, the base sentence for a possession with intent to distribute offense is "increase[d] by 2 levels" "[i]f the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance" An application note to this guideline explains that "[t]he enhancement applies to any defendant

² The government also points to other record evidence to demonstrate a connection between the proceeds and drug dealing, further rendering any error harmless. This includes photos of additional cash, testimony that the bags recovered by agents would have held multiple pounds of methamphetamine when full, the scale and high-capacity packaging material found at Rivera's house, text messages describing transactions involving pounds of methamphetamine, and Rivera's statements to the confidential source that he regularly obtained quantities of at least 15 pounds of methamphetamine.

‘who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.’” *Johnson*, 737 F.3d at 446 (quoting Guidelines § 2D1.1 cmt. n.17) (cleaned up).³ The PSR recommended applying this two-level enhancement to Rivera’s sentence. Rivera objected, arguing that the provision “was designed for the problem of crack houses” not “just to punish people who own a home and are also drug dealers.”

At the time of sentencing, both parties agreed that no Ninth Circuit precedent squarely spoke to the applicability of this enhancement in Rivera’s case. Instead, the district court adopted the rationale of *Johnson* to find that the enhancement applied.

In *Johnson*, the Sixth Circuit interpreted the ambit of § 2D1.1(b)(12). As the court explained, the “Sentencing Commission added the drug-house enhancement in response to the Fair Sentencing Act of 2010, which directed the Commission to include a two-level enhancement for ‘maintain[ing] an establishment for the manufacture or distribution of a controlled substance.’” *Id.* (citing Pub. L. No. 111–220, § 6(2), 124 Stat. 2372, 2373 (2010)) (alterations in original).

³ Comment Note 17 is consistent with the plain text of the Guideline and does not “improperly expand[.]” the Guideline’s provision. *United States v. Castillo*, 69 F.4th 648, 654–55 (9th Cir. 2023). The Guideline broadly applies when a defendant “maintain[s] a premises for the purpose of . . . distributing a controlled substance.” § 2D1.1(b)(12) (2023). Even without the comment, we would reach the same result because Rivera’s conduct falls within the scope of the plain text of the Guideline.

The Sixth Circuit concluded that “the drug-house enhancement applies to anyone who (1) knowingly (2) opens or maintains any place (3) for the purpose of manufacturing or distributing a controlled substance.” *Id.* at 447 (citing *United States v. Russell*, 595 F.3d 633, 644 (6th Cir. 2010); *United States v. Flores–Olague*, 717 F.3d 526, 531–32 (7th Cir. 2013); *United States v. Miller*, 698 F.3d 699, 706 (8th Cir. 2012)). In *Johnson*, the defendant knowingly stored marijuana in his home, thus fulfilling the first element, and lived in the home—which the Sixth Circuit explained met the second element requirement to “maintain” the place at issue. *Id.* at 447–48.

On the third element, the Sixth Circuit explained that a “defendant may maintain a place for the purpose of distributing drugs even if that is not ‘the sole purpose for which the premises was maintained.’” *Id.* at 447 (quoting Guidelines § 2D1.1 cmt. n.17). All that matters is that “‘one of [the] primary or principal uses for the premises’ is the distribution of drugs.” *Id.* (emphasis in the original) (quoting Guidelines § 2D1.1 cmt. n.17). The defendant in *Johnson* “maintained at least one room in his home for the purpose of storing marijuana for later distribution,” and law enforcement found plenty of evidence that the defendant “used space in his home for storing large quantities of drugs, the central purpose of which was to further a drug-trafficking conspiracy.” *Id.* at 447–48. Thus, the premises enhancement applied.

In *Johnson*, the defendant argued that drug deliveries were made to his home infrequently, but the court explained that “the question is not just how often drugs were delivered to the defendant’s home,” but “how frequently [the defendant] used his home to advance the drug-trafficking conspiracy ‘including’ by ‘stor[ing] a controlled substance

for the purpose of distribution.” *Id.* at 448 (quoting Guidelines § 2D1.1 cmt. n.17) (cleaned up). Second, the defendant in *Johnson* argued that if the drug enhancement applied to him “it [would] come up everywhere—every time drugs are found in a home.” *Id.* at 449. But the court rejected this argument, explaining that “where the storage of drugs in the home constitutes merely an ‘incidental or collateral use[] for the premises’—say when the defendant keeps drugs in his home for casual personal use—the enhancement will not apply.” *Id.* (citation omitted).

Johnson correctly interpreted the scope of Guideline § 2D1.1(b)(12) considering the provision’s plain text. And we have since adopted the rule laid out by the Sixth Circuit and several other circuits. *See United States v. Tekola*, 176 F.4th 608, 612 (9th Cir. 2026). Under *Tekola*, the reasoning in *Johnson* applies to Rivera’s direct appeal. *See United States v. Engstrom*, 166 F.4th 835, 848 (9th Cir. 2026) (generally courts “apply changes in precedent in cases on direct appeal.”).

Under *Tekola*, the district court did not abuse its discretion by applying the drug premises enhancement to Rivera’s sentence. *See Gasca-Ruiz*, 852 F.3d at 1170. Rivera used his home to store and distribute methamphetamine. Rivera kept many tools of his drug trade at his home, including packaging materials for dividing methamphetamine for his customers, scales for weighing methamphetamine, and a loaded magazine ready to insert into a handgun. And evidence from Rivera’s cell phone shows that he used his home to conduct methamphetamine deals as far back as February 2021.

This case closely resembles *Johnson* and *Tekola*. Rivera knowingly maintained his home for the purpose of

manufacturing and distributing methamphetamine. *Johnson*, 737 F.3d at 447; *Tekola*, 176 F.4th at 609. Thus, under *Tekola*, the premises enhancement properly applies.⁴

C

Rivera argues that he filed three formal objections to the PSR not addressed by the district court: “(1) there was no evidence any drugs from the bags found during the searches were sold at the residence; (2) Application Note 17 was invalid under [*Stinson v. United States*, 508 U.S. 36 (1993)], and [*Kisor v. Wilkie*, 588 U.S. 558 (2019)]; and (3) the hearsay of the undisclosed informant was unreliable and violated his right to due process at sentencing.” Rivera claims that the district court violated Federal Rule of Criminal Procedure 32, which states that the district court “must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.” *United States v. Doe*, 705 F.3d 1134, 1153 (9th Cir. 2013) (quoting Fed. R. Crim. P. 32(i)(3)(B)).

Rivera’s argument is unavailing. Rivera agreed with the district court that it could overrule all but his objections to

⁴ Rivera’s counterargument, citing *United States v. Craft*, 99 F.4th 407 (7th Cir. 2024), proves unavailing. There was no evidence in *Craft* that the defendant “received or stored methamphetamine at his home for later distribution.” 99 F.4th at 411. Thus, that court concluded that the use of drugs in the home was only incidental or collateral. *Id.* at 411–12. The approach in *Craft* fully comports with the approach outlined in *Johnson* and adopted in *Tekola*, which recognized that merely incidental or collateral uses of the premises will not result in the premises enhancement. Still, as discussed, more than ample evidence supports the district court’s conclusion that the incidental or collateral use exception did not apply.

the drug quantity, the premises enhancement, and a criminal history issue. On that basis, the district court overruled all objections other than those three. The district court also addressed “the three [objections] that have been identified on the record.” Thus, the district court ruled on all of Rivera’s objections under Federal Rule of Criminal Procedure 32(i)(3)(B). The court told Rivera that it “was prepared to overrule *all* of the defense objections except those relating to” the drug quantity, the premises enhancement, and a criminal history issue. And Rivera’s counsel stated that he did not “see any legal problem with the Court overruling those objections.” So even if an error occurred (which it did not), such an error would be unreviewable on appeal under the invited error doctrine. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc); *United States v. Magdaleno*, 43 F.4th 1215, 1219–20 (9th Cir. 2022).

D

The district court did not err in its handling of Agent Nehring’s percipient and expert testimony. Agent Nehring testified on each of the four days that the jury heard witness testimony. The district court instructed the jury that Agent Nehring was engaged in dual-role testimony, using the Ninth Circuit’s model instruction, both before his expert testimony started and at the end of the case. And the district court separated Agent Nehring’s testimony into lay and expert phases, with several other witnesses testifying between to ensure that the jury did not get confused between percipient and expert testimony.

While we recognize “several dangers with a witness testifying in both lay and expert (‘dual-role’) capacities . . . dual role testimony is not categorically

prohibited.” *United States v. Holguin*, 51 F.4th 841, 862 (9th Cir. 2022) (cleaned up). Instead, “[d]istrict courts must instruct jurors about how to evaluate a dual-role testimony.” *Id.* “The dangers of dual-role testimony can also be mitigated by separating testimony into lay and expert phases.” *Id.* When a district court has instructed the jury on dual-role testimony, bifurcated the testimony into percipient and expert phases, and had the government “specify whether each question was directed at [the agent’s] training and experience or his participation in the investigation,” we have upheld that procedure. *Id.* at 862–64; *see also United States v. Anchrum*, 590 F.3d 795, 804 (9th Cir. 2009) (risks of dual-role testimony mitigated where testimony was bifurcated and the prosecutor announced he would “shift gears” between phases). Because the district court implemented all these protections here, it did not plainly err in handling Agent Nehring’s testimony. *See Holguin*, 51 F.4th at 862–64; *see also United States v. Olivas*, 150 F.4th 1107, 1112–13 (9th Cir. 2025) (plain-error review applies when a party did not lodge a specific objection to the challenged testimony).

Rivera’s counterarguments fail. Rivera first argues that Agent Nehring improperly testified about his law enforcement experience while giving percipient testimony. Rivera did not raise this objection at trial. Second, Rivera argues that Agent Nehring improperly discussed his work with confidential informants during his expert testimony. And third, Rivera argues that Agent Nehring’s expert credentials inhibited defense counsel from effectively cross-examining him.

On the first argument, we have held that law enforcement experience-based testimony can be proper even when an officer is testifying as a lay witness. *See United States v.*

Perez, 962 F.3d 420, 436 (9th Cir. 2020) (testifying about what “gang jargon” meant and identifying “indicia of drug trafficking” is permissible in both the lay and expert phases); *United States v. Simas*, 937 F.2d 459, 465 (9th Cir. 1991) (officers can “give their opinion that the defendant’s activities match the usual criminal *modus operandi*” in the percipient phase (cleaned up)); *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995) (a lay witness officer can testify “about the nexus between drug trafficking and the possession of weapons” by specifically making reference to his experience as a part of the Drug Enforcement Bureau). Given this precedent, Agent Nehring’s statement during his fact testimony that he had executed many search warrants and seen many methamphetamine labs did not impermissibly bolster his credibility and thus was not plain error. *See Anchrum*, 590 F.3d at 804–05.

Next, Rivera argues that Agent Nehring’s testimony about how it was common for him to work with confidential informants impermissibly implied that a confidential informant was used. Rivera argues that the government was thus able to use Agent Nehring’s testimony to imply the existence of inadmissible evidence about a confidential informant. Once again, Rivera did not raise this objection at trial, meaning we review only for plain error. *Olivas*, 150 F.4th at 1113.

The authority Rivera cites for this argument—*United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007)—dealt with a dual-role witness offering lay testimony where the witness testified about the meaning of conversations that were inadmissible hearsay. In other words, the jury would have had to consider hearsay for *Freeman* to control. Rivera argues (1) that Agent Nehring’s statement that he used confidential informants in the past necessarily means that he

used one in Rivera's case, and (2) that any such informant's testimony would be inadmissible. Such a tenuous argument does not warrant reversal, as it is unclear whether any error occurred (let alone whether it would be clear or obvious). *United States v. Walter-Eze*, 869 F.3d 891, 911 (9th Cir. 2017) (the first two elements of plain error are "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute" (citation omitted)).

Finally, Rivera argues that on cross-examination, Agent Nehring referenced his experience in law enforcement in explaining why he believed the bags in Rivera's room were full of methamphetamine. But lay opinion testimony is based on a witness's perception and necessarily informed by the witness's experiences. Fed. R. Evid. 701; *Perez*, 962 F.3d at 436. Agent Nehring was not required to pretend that he had never engaged in law enforcement operations of a similar kind. So the district court's treatment of Agent Nehring's testimony was not an abuse of discretion. See *Perez*, 962 F.3d at 436.

E

The district court did not err by admitting exhibits 82 and 83 into evidence at trial. Exhibit 82 included messages between Rivera and Martha in which Martha explained to Rivera that she was "trying to get more cash" and needed "to know prices on clear and Negra" (i.e., ostensibly messaging Rivera to get drugs). Exhibit 83 consisted of messages between Rivera and Alex in which they discussed plans to meet (with their conversation ostensibly implying a drug sale). Rivera now argues that exhibits 82 and 83 should have been excluded under Federal Rule of Evidence 404(b).

Rule 404(b)(1) states that "[e]vidence of any other crime, wrong, or 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 Rule 404(b)(2) states that “[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” At trial, the district court overruled Rivera’s objection because the evidence was relevant to show that Rivera intended to distribute, rather than merely use, the methamphetamine he possessed.

The district court did not abuse its discretion in finding that the exhibits were evidence of intent permissible under Rule 404(b)(2). We have held similar testimony—when used to prove intent to distribute drugs—permissible under Rule 404(b). *See, e.g., United States v. Hegwood*, 977 F.2d 492, 496 (9th Cir. 1992). The district court’s decision was well within its discretion. *See id.*

F

The district court did not err in excluding the recorded conversation Rivera had with Agent Nehring shortly after his arrest. During trial, Agent Nehring testified that Rivera made an unrecorded inculpatory statement toward the end of his search, in which Rivera admitted that he should not have possessed the ammunition because he was a felon.

Rivera argues that he should have been allowed to introduce a recorded statement from his post-arrest interview—despite it being hearsay—to impeach Agent Nehring. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Fed. R. Evid. 801. Hearsay is inadmissible unless a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court provide otherwise. Fed. R. Evid. 802. Admitting Rivera’s statement would have required a hearsay exception.

In *United States v. Collicott*, we recognized that when a party uses a portion of a conversation involving a prior inconsistent statement, this opens the door to admit the rest of the conversation by the other side. 92 F.3d 973, 980–81 (9th Cir. 1996). But *Collicott* does not support Rivera’s argument because Rivera did not seek to introduce a prior inconsistent statement by *Agent Nehring* for the purpose of impeachment. Instead, Rivera sought to introduce his own excluded statement for the truth of the matter it asserts (i.e., that he did not possess methamphetamine in his room, sell drugs, or sell firearms). Rivera was free to try to find a prior inconsistent statement that Agent Nehring made and then introduce the entire conversation it was part of under *Collicott*’s rule of completeness. See 92 F.3d at 980–81. But Rivera cannot introduce his own hearsay for the truth of the matter it asserts, made in a separate conversation, and claim it as impeachment evidence.

If Agent Nehring hypothetically said on the stand, “I saw X,” then Rivera could introduce any prior inconsistent statements Agent Nehring made where he told others, “I never saw X.” What Rivera cannot do is introduce statements that he made to Nehring that, if true, might undermine what Agent Nehring previously heard. The latter scenario is hearsay not admissible under any exception because Rivera is offering his statement for the truth of the matter it asserts, rather than offering a prior inconsistent statement that Agent Nehring made. Rivera’s hearsay is not valid impeachment evidence.

Rivera also arguably attempted to introduce the recording for purposes of impeachment by contradiction. Fed. R. Evid. 607. Under this theory, Rivera’s recorded statements denying responsibility for firearms dealing would be introduced not for the truth of the matter asserted, but to

contradict Agent Nehring’s claim that Rivera admitted guilt while not being recorded. At any rate, the district court did not abuse its discretion in concluding that Rivera’s recorded statements denying responsibility for firearms dealing were irrelevant to statements he made in a different conversation concerning ammunition found in Rivera’s home.

And any error would be harmless. If it was “more probable than not that the error did not materially affect the verdict,” we do not reverse the district court’s decision to exclude the evidence. *Boyd v. City & Cnty. of San Francisco*, 576 F.3d 938, 949 (9th Cir. 2009). Agents found a loaded handgun magazine and drug paraphernalia to help Rivera weigh and sell methamphetamine. From that alone, Rivera faced an uphill battle to show that he did not knowingly possess ammunition as a felon or that he was not engaged in the drug trade. Such a conclusion would have likely required much more than the excluded statements. *See Greer v. United States*, 593 U.S. 503, 508–09 (2021).

G

Finally, Rivera argues that his conviction for possession of ammunition under 18 U.S.C. § 922(g)(1) must be reversed because the statute is facially unconstitutional to the extent that it prohibits possession of ammunition alone by a person convicted of a crime punishable by more than one year. But Rivera did not preserve this claim.

Rivera did not file a pre-trial motion raising a Second Amendment challenge. *United States v. Brewster*, 116 F.4th 1051, 1062–63 (9th Cir. 2024). Challenges brought under *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), must be raised in a pre-trial objection or be supported by a showing of good cause to preserve the claim on appeal. *See Brewster*, 116 F.4th at 1062–63. Rivera does

not argue that there was good cause. Thus, we do not reach the merits of Rivera's Second Amendment claim.⁵

IV

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

⁵ Even if reached, Rivera's argument is foreclosed by precedent. *See United States v. Duarte*, 137 F.4th 743, 752 (9th Cir. 2025) (en banc); *see also United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010) (holding that § 922(g)(1) prevents a felon from possessing any firearm or ammunition).