

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA  
DAVENPORT DIVISION

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<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>ANTHONY NORRIS SMITH,</p> <p>Defendant.</p>	<p>No. 3:08-cr-0087-JAJ</p> <p><b>ORDER</b></p>
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This matter comes before the Court pursuant to the Anthony Norris Smith (“Defendant Smith”) September 8, 2009 Motion for New Trial [Dkt. Nos. 95 & 98]. The Government filed a response on September 30, 2009 [Dkt. No. 97]. For the reasons set forth below, the Court denies Defendant Smith’s Motion for New Trial.

On October 16, 2008, the grand jury for the Southern District of Iowa returned a one count indictment against Defendant Smith. Count 1 charged that Defendant Smith conspired to manufacture, distribute, and possess with intent to distribute mixtures and substances containing 50 grams and more of cocaine base (“crack cocaine”), from on or about January 2006 and continuing to on or about August 2008. Trial commenced August 31, 2009. On September 2, 2009, the jury returned a verdict finding Defendant Smith guilty of the conspiracy charged in Count 1. Pursuant to special interrogatories, the jury found that Defendant Smith conspired to manufacture and distribute crack cocaine and that fifty grams or more of crack cocaine were involved in the conspiracy.

Defendant Smith moves for a new trial. In support of the motion, Defendant Smith contends that this Court committed numerous errors. Defendant Smith contends that a failure to suspend the trial to allow witness testimony, a failure to sustain defense counsel’s

objection to speculative testimony, and a lack of sufficient evidence that a jury could find Defendant Smith guilty, all constitute prejudicial and material errors. The Court addresses each of the arguments briefly.

### FACTS

There was overwhelming evidence admitted at trial concerning the existence of a conspiratorial agreement. Task Force Officer Detective Jerry Blomgren (“Blomgren”), with the Drug Enforcement Agency (“DEA”), had an ongoing drug investigation in the Iowa City, Iowa area. This investigation focused on the following conspiracy members: Frederick Benjamin Boyd (“Boyd”), Jeffery Pickett (“Pickett”), Daniel Davis (“Davis”), Patrick Williams (“Williams”), and Anthony Norris Smith (“Defendant Smith”), a/k/a “Red.”

On January 17, 2008, Pickett was the subject of a controlled buy for crack and the police arrested him on the same day. Pickett admitted that Defendant Smith was a crack dealer from whom he could purchase crack and also implicated Defendant Smith’s partner, Patrick Williams, in the conspiracy. Pickett also told the police where to find Boyd. Based on this information, police arrested Boyd on January 18, 2008. Boyd stated in his police interview that he had initially only purchased drugs from Davis. He further stated that it took a number of other drug transactions before Davis introduced Boyd to Defendant Smith and Williams. After meeting Defendant Smith and Williams, Boyd then had dozens of crack cocaine transactions with them. Boyd estimated that he had purchased more than 100 grams of crack cocaine each from Defendant Smith and Williams.

During Pickett’s police interview on January 17, 2008, he also volunteered information about Defendant Smith and Williams. In the presence of law enforcement, Pickett agreed to call Defendant Smith and arrange a crack transaction. Special Agent Chuck Pettrone (“SA Pettrone”), with the Iowa Division of Narcotics, rode with Pickett to Defendant Smith’s apartment. In the car, Pickett arranged further details about the

transaction over a cell phone with Defendant. Once SA Pettrone and Pickett reached Defendant Smith's residence, SA Pettrone prepared Pickett for the controlled buy by searching his person and giving him the controlled buy pre-recorded serialized money. SA Pettrone observed Pickett entering Defendant Smith's residence and a recording on Pickett's person picked up conversation between Defendant Smith and Pickett during the transaction. Pickett left with a packet of five separately packaged rocks of crack cocaine and gave this packet to SA Pettrone.

Based on this controlled buy, on January 25, 2008, the police obtained and executed a search warrant for Defendant's residence at No. 11, 13 Sixth Avenue, Coralville, Iowa. The police did not find any crack cocaine during the search, but did find indicia of occupancy for Defendant Smith and Williams, Defendant Smith and Williams' Illinois Identification cards, fifteen cell phones and cell phone records, empty plastic baggies, razor blades, a convenience check, Western Union receipts, and brass knuckles, among other items.

Other evidence and testimony indicate that Defendant Smith was a very active participant in the conspiracy. In an interview on March 6, 2009, Davis stated that he had regularly driven Defendant Smith around Iowa City in his taxicab to deliver crack. Davis also purchased crack from Defendant Smith and Williams for his own use. Also, a search of Defendant Smith's cell phone records indicated thousands of phone calls from and to Defendant Smith from Williams, Pickett, Davis, and Boyd. Catherine Lair testified that Defendant Smith had asked her to obtain a cell phone for him; the cell phone records indicate this cell phone was the number Pickett called during the controlled buy with SA Pettrone. The phone record also showed contact with known cell numbers of Davis, Boyd, Williams, and Pickett. Additionally, Defendant Smith had a crack cocaine supply source in Chicago, and Defendant Smith and Williams pooled their money to purchase crack cocaine in Chicago and bring it back to Iowa City.

At the trial, Boyd testified against Defendant Smith. In his testimony, the prosecutor asked Boyd directly if Boyd had ever purchased crack directly from Defendant Smith.

Q: Do you know a person by the name of Red?

A: Yes.

Q: And how do you know that person?

A: Buy crack from him.

Q: Do you see him here today?

A: Right there. (Indicating)

Mr. Cronk: The record should reflect the witness has identified the defendant.

(Trial Tr. 222, Sept. 1, 2009.) The prosecutor then continued with his questioning to determine the quantity of crack Boyd had purchased from Red/Defendant.

Q: So could you estimate for us how much crack you purchased from Red directly?

A: I don't know. 100 grams or more probably, 150 grams.

Mr. Larson: Your Honor, I am going to object to that answer. He said I don't know and then he gave us a number.

The Court: Overruled.

Q: Let's be conservative. You said half ounces. How many times did you get a half ounce?

A: Three or four.

Q: So that would be –

A: Conservative would probably be 100 grams, 120 grams.

(Trial Tr. 227, Sept. 1, 2009.) As the record reflects, the Court allowed the speculative testimony over defense counsel's objection. Additional testimony then followed with corroborating statements made by other conspirators, including Daniel Davis, Jeffrey Pickett, and Patrick Williams.

Outside the presence of the jury on the last day of trial, defense counsel requested

the Court's permission to subpoena Knox County Jail<sup>1</sup> Correctional Officer James Robinson. Defense counsel stated that Robinson's testimony would be helpful to his case because Robinson had observed Williams and Defendant interacting.

Mr. Larson: Your Honor, my client had a discussion yesterday on the way back to Knox County Jail with a Knox County officer named James Robinson and apparently Mr. Robinson has information that would be relevant to the case in that he would have observations to offer to describe the relationship between Patrick Williams and Mr. Smith.

. . .

Essentially that they were friendly, they passed food back and forth, they went to class together, and that they were friends basically, cousins is the way, you know, the officer – I don't know if he thinks they're cousins, but whatever, but they were friends in jail and then together, spent a lot of time together, and that he is going to testify that there weren't any problems which I think would go to Mr. Williams' credibility regarding these threats or [sic] him being scared and so on. I just learned about this two minutes ago from my client and so obviously I haven't done a subpoena, I haven't talked to the witness, everything I've got has been from my client this morning, so I would like the Court's assistance in making arrangements to have Mr. Robinson available.

(Trial Tr. 475-76, Sept. 2, 2009.) The prosecutor, defense counsel, and the Court then discussed the merit and relevancy of Robinson's testimony.

Mr. Cronk: Your Honor, that's I think cumulative. There isn't any question that they were friends, that they were cousins. Mr. Williams didn't agree to cooperate with the government until after he was sentenced and so there's no reason for him to do anything other than play along with Mr. Smith. This is cumulative and I don't see how it gets to the point.

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<sup>1</sup>Knox County Jail is located in Galesburg, Illinois, approximately 45 miles from the courthouse.

. . .

The Court: When did – when did Mr. Williams begin cooperating with the government?

. . .

Mr. Cronk: I do have a letter from him I received on July 6th so I know we didn't talk to him until after that. There's a report that –  
Mr. Larson: July 22nd I believe is the date of that report.

. . .

Mr. Larson: I have seen the letter Mr. Williams wrote to Mr. Cronk. It just says I want to talk to you or something, it is about four lines long, I have seen it, I didn't think it was of any evidentiary value so that is why we haven't dealt with it earlier, but I have seen it. Whatever that date is is the date where he was thinking about cooperating or first contacted you or Mr. Cronk.

(Trial Tr. 476-77, Sept. 2, 2009.) Again outside the presence of the jury, the Court further questioned defense counsel regarding the relevancy of Robinson's testimony. The Court ultimately denied defense counsel's request.

The Court: Let's go back to the issue that we discussed concerning this morning's request to secure testimony from the Knox County Jail. Mr. Larson, do you contend that this behavior happened after Mr. Williams agreed to cooperate with the government?

Mr. Larson: No, Your Honor.

The Court: Right, because he landed – we have had him in a different jail.

. . .

The Court: This is all behavior while he was still denying that he was a co-conspirator of Mr. Smith?

Mr. Larson: Correct, unless – yes. I mean, there is that letter that says July 6th, but – there is that letter that says July 6th.

The Court: And there's no evidence that the defendant was aware of that

prior to the time that they were separated. The appearance of a friendship and the lack of an altercation in jail is evidence that I assume is an attempt to rebut Mr. Williams' explanation as to why his testimony in court this week is inconsistent with statements that he's made in court before. It is tangential and peripheral in that the evidence, if offered, related to a time where Mr. Williams was not in an adversarial position to Mr. Smith, that is that he was continuing to claim that he was not a co-conspirator, thus the testimony, if offered now, would be simply cumulative of every witness who has testified that Mr. Williams and Mr. Smith have been adult life-long friends, that they lived together, and while not related by blood, behaved as though and held themselves out as they were close as cousins. The appearance of a friendship prior to Mr. Williams' becoming hostile to Mr. Smith does not cast significant doubt on the claim of Mr. Williams that he has fear of reprisal after testifying and for that reason I exclude the evidence or deny the request to secure that testimony made on the final morning of trial as untimely, but more importantly as cumulative of other testimony and probably not relevant or at best marginally relevant.

(Trial Tr. 502-03, Sept. 2, 2009) (emphasis added). Defense counsel also requested a Motion for Judgment of Acquittal at the close of evidence. The Court denied this motion based on sufficient evidence being present, such that a jury could make a finding of guilty.

The Court: In ruling on a Motion for Judgment of Acquittal, the Court takes all the evidence in a light most favorable to the government. The Court has to as a matter of law do that. From the testimony admitted so far there is sufficient evidence that a jury could find that there was the requisite conspiratorial agreement here. The Eighth Circuit Court of Appeals has ruled on many occasions that the testimony of co-conspirators corroborating each other is sufficient evidence to send the case to the jury. The Motion for Judgment of Acquittal [is] denied.

(Trial Tr. 501, Sept. 2, 2009.)

## CONCLUSIONS OF LAW

### A. Motion for New Trial - Standard

A district court may grant a new trial if the interests of justice so requires. FED. R. CRIM. P. 33. The Rule 33 remedy should be used sparingly and with caution. United States v. Dodd, 391 F.3d 930, 934 (8th Cir. 2004). The trial court may exercise its broad discretion in considering the motion, and its decision is subject to reversal only for a clear abuse of discretion. United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996). The district court has broader discretion in granting a new trial than it does in granting a judgment of acquittal. United States v. Boesen, 473 F. Supp. 2d 932, 941 (S.D. Iowa 2007) (citing United States v. Campos, 306 F.3d 577, 579 (8th Cir. 2002)). See United States v. Starr, 533 F.3d 985, 999 (8th Cir. 2008). Unlike a motion for a judgment of acquittal, the district court need not examine the evidence in the light most favorable to the government. United States v. Gascon-Guerrero, 382 F. Supp. 2d 1097, 1102 (S.D. Iowa 2005). A court may weigh evidence and evaluate for itself the credibility of witnesses to determine if a miscarriage of justice may have occurred. Starr, 533 F.3d at 999; United States v. Davis, 103 F.3d 660, 668 (8th Cir. 1998); United States v. Rodriguez, 812 F.2d 414, 417 (8th Cir. 1987); United States v. Boesen, 473 F. Supp.2d 932, 936 (S.D. Iowa 2007).

Motions for new trials based on the weight of evidence are generally discouraged, and the authority to grant such a motion should be exercised “sparingly” and “with caution. United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). The jury verdict is to be upheld, unless the court determines that a miscarriage of justice will occur. United States v. Johnson, 403 F. Supp. 2d 721, 766 (N.D. Iowa 2005) (quoting Campos, 306 F.3d at 579). Nonetheless, a new trial may be granted under several scenarios. First, a new trial may be granted “if the evidence weighs heavily enough against the verdict that a miscarriage of justice occurred.” Ortega v. United States, 270 F.3d 540, 547 (8th Cir.

2001) (quoting United States v. Lacey, 219 F.3d 779, 783 (8th Cir. 2000)). Second, even if there is sufficient evidence to sustain a verdict, but a preponderate of evidence weighs “sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, [the court] may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.” United States v. Walker, 393 F.3d 842, 847-48 (8th Cir. 2005). See also United States v. Lewis, 436 F.3d 939, 945 (8th Cir. 2006). In both of these scenarios for granting a new trial, abuse of discretion occurs when the court “fails to consider a factor that should have been given significant weight, considers and gives significant weight to an improper or irrelevant factor, or commits a clear error of judgment in considering and weighing only proper factors.” Campos, 306 F.3d at 580.

### **B. Failure to Allow Witness Testimony**

Defendant Smith asks the Court to review the exclusion of James Robinson’s testimony, a correctional officer for Knox County, Illinois. Defendant Smith states that Robinson would have offered testimony as to the relationship between Defendant Smith and Patrick Williams, a government witness. Defendant Smith asserts this testimony “would have been offered to rebut the testimony of Mr. Williams that he was afraid of the Defendant.” [Dkt. No. 95 at para. 2(A).] Defendant Smith learned of this potential witness after the second day of trial. [Dkt. No. 98 at 2.]

The standard of review for denying a request for a Rule 17(b) subpoena is abuse of discretion. United States v. Hang, 75 F.3d 1275, 1282 (8th Cir. 1996). The requesting party has the burden of showing a requested witness is “necessary to an adequate defense, and reversal is only appropriate if the exceptional circumstances of the case indicate that the defendant’s right to a complete, adequate and fair trial is jeopardized.” United States v. Wyman, 724 F.2d 684, 686 (8th Cir. 1984). Rule 17(b) does not extend to subpoenaing witnesses “whose testimony clearly would be lacking in materiality to the trial at hand.” Terlikowski v. United States, 379 F.2d 501, 508 (8th Cir. 1967), cert. denied, 389 U.S.

1008 (1967). See generally United States v. Pickard, 278 F. Supp.2d 1217, 1247-48 (D. Kan. 2003) (“A trial court may properly refuse to issue a subpoena when the defendant fails to set forth the expected testimony of a witness, when the witness would offer only cumulative testimony, when the defendant fails to make a satisfactory showing of necessity, when the defendant’s request is untimely, or when the issuance of a subpoena would otherwise constitute an abusive or unreasonable use of process.”) (internal citations omitted). Additionally, merely alleging that a witness is material and necessary is insufficient in establishing that a witness is needed for an adequate defense. United States v. LeAmous, 754 F.2d 795, 798 (8th Cir. 1985). It is in the court’s discretion to determine whether or not to allow witnesses when defense counsel representations as to the purpose of the testifying witness are vague. Pickard, 278 F. Supp. 2d at 1248 (“[T]he court made every effort to give the defendant the benefit of the doubt . . . in some instances, [it] may have leaned too far in favor of the defendant . . .”).

Furthermore, a court may exclude evidence when it is cumulative and a waste of time. FED. R. EVID. 403. “[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403. “District courts have broad discretion to admit or exclude evidence under Rule 403.” Junk v. Terminix Int’l Co., Ltd., 2008 WL 5142188, at \*3 (S.D. Iowa 2008) (quoting United States v. Pruneda, 518 F.3d 597, 605 (8th Cir. 2008)); see also Harris v. Chand, 506 F.3d 1135, 1140 (8th Cir. 2007).

After weighing the evidence, the Court finds that denying the testimony of witness James Robinson was not a prejudicial error. Robinson’s testimony would have confirmed that Williams and Defendant were friendly with each other before Williams agreed to cooperate against the defendant. This additional testimony would be cumulative and

irrelevant because Robinson observed Williams and Defendant interact only up until the point Williams offered to testify against Defendant. Williams did not become a cooperating government informant against Defendant until after Williams' sentencing and his subsequent removal to a different facility. Robinson's observation of Williams and Defendant's interaction occurred prior to Williams' sentencing of 292 months. As the government points out, Williams testified at trial that "the reason he did not come forward earlier was because he was afraid of Smith and what might happen to him and his family if he cooperated." [Gov't Response, Dkt. No. 97 at 4.]

### **C. Frederick Benjamin Boyd's Statements About Drug Purchases**

Defendant Smith petitions the Court to review the admission of Frederick Benjamin Boyd's testimony over defense counsel's objection. Defendant Smith states that Boyd's testimony about the quantity of drugs he allegedly purchased from Defendant Smith was speculative and inadmissible. [Dkt. No. 95 at para. 2(B); Dkt. No. 98 at 2]

Federal Rule of Evidence 602 stipulates that a witness may not testify "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602. A witness's own testimony provides a sufficient basis to prove personal knowledge. Id. Testimony is inadmissible if the testimony is about matters the witness never observed. See United States v. Oliver, 908 F.2d 260 (8th Cir. 1990). Furthermore, Rule 701 provides that if a witness is not testifying as an expert, then any testimony by the witness expressing his opinion or inference is "limited to those that are rationally based on the witness's perception and helpful to understanding the witness's testimony or determining a fact in issue." US Salt, Inc. v. Broken Arrow, Inc., 563 F.3d 687, 690 (8th Cir. 2009) (citing FED. R. EVID. 701). Witnesses may provide lay opinion testimony "about facts within his or her range of generalized knowledge, experience, and perception." United States v. Espino, 317 F.3d 788, 797 (8th Cir. 2003). Testimony from witnesses with "relevant, first-hand knowledge

of facts” directly in issue is admissible. Supervalu, Inc. v. Assoc. Grocers, Inc., 2007 WL 624342, at \*4 (D. Minn. 2007).

Conversely, speculative testimony, “or that which is not based on the perception of a lay witness, is inadmissible.” Burk v. Thorson, Inc., 66 F. Supp. 2d 1069, 1075 n.1 (D. Minn. 1999) (citing Washington v. Dep’t of Transp., 8 F.3d 296, 300 (5th Cir. 1993)). Testimony offered by the witness to show only his own perception of a fact is not speculative testimony. Id. (emphasis added). The court has great deference in determining the legal relevancy and potential prejudice of allegedly speculative testimony. See United States v. Just, 74 F.3d 902, 904 (8th Cir. 1996). Additionally, the court will reverse for unfair prejudice of speculative testimony only for abuse of discretion. United States v. Henderson, 416 F.3d 686, 693 (8th Cir. 2005). Unfair prejudice by admission of evidence depends primarily on whether there was an undue tendency to suggest the jury made a decision on an improper basis. United States v. Farrington, 499 F.3d 854, 858-59 (8th Cir. 2007) (citing FED. R. EVID. 403). Evidence is not unfairly prejudicial “merely because it hurts a party’s case.” Henderson, 416 F.3d at 693 (citing United States v. Emeron Taken Alive, 262 F.3d 711, 714 (8th Cir. 2001)).

After reviewing the evidence, the Court finds that its decision to allow Frederick Benjamin Boyd’s testimony over defense counsel’s objection was not error. When the witness said, “I don’t know...” he obviously meant that he could not be exact. He then gave his best estimate as to how many times he did drug transactions with the defendant. The record shows that following this objection, based on incremental purchases, Boyd gave “conservative estimates” on the total quantity of crack he had purchased from Defendant. The prosecutor rephrased his question by asking about the frequency of purchases Boyd made from Defendant, as well as the approximate quantity per purchase. Using these numbers, Boyd testified to a reasonably accurate quantity of crack between 100 and 120 grams.

Boyd had the personal knowledge necessary to estimate the total amount of crack he had purchased from Defendant Smith. Boyd's testimony was not speculative because he was testifying about matters within his own perception. Boyd is allowed to give a lay opinion regarding the quantity of drugs he had personally purchased from Defendant Smith. The Court finds that defense counsel's objection was properly overruled.

#### **D. Sufficiency of Evidence - Conspiracy**

The government must prove three elements to prove a conspiracy to manufacture or distribute a controlled substance. First, there must be an agreement or understanding to manufacture or distribute a controlled substance. Second, the defendant must have known of the agreement or understanding. Finally, the defendant must have intentionally joined the agreement or understanding. United States v. Davis, 471 F.3d 938, 947 (8th Cir. 2006); United States v. Crumley, 528 F.3d 1053, 1066 (8th Cir. 2008). One becomes a conspirator when one knowingly contributes one's efforts to the conspiracy's objectives. United States v. Galvan, 961 F.2d 738, 741 (8th Cir. 1992). Participation in a conspiracy may be proved by either direct or circumstantial evidence. Davis, 471 F.3d at 947. Accordingly, direct evidence of an explicit agreement is unnecessary. United States v. Whirlwind Soldier, 499 F.3d 862, 869 (8th Cir. 2007). A "tacit understanding among co-conspirators may be, and often will be, inferred from circumstantial evidence." United States v. Hakim, 491 F.3d 843, 846 (8th Cir. 2007).

Nevertheless, a defendant need not know all the details, objects, or participants in the conspiracy to be found guilty of a conspiracy. A defendant may be convicted even for playing a minor role in a conspiracy, so long as the government proves he was a "member of the conspiracy." United States v. Lopez, 443 F.3d 1026, 1030 (8th Cir. 2006). A conspiracy "may exist even if the participants and their activities change over time, and even if many of the participants are unaware of, or uninvolved in, some of the transactions." United States v. Ramon-Rodriguez, 492 F.3d 930, 942 (8th Cir. 2007).

There is sufficient evidence in the record to also allow a jury to conclude that Defendant Smith engaged in a conspiracy to distribute crack cocaine. It is very clear that a conspiratorial agreement existed among Defendant Smith, Boyd, Davis, Pickett, and Williams to manufacture, distribute, and possess with intent to distribute mixtures and substances containing 50 grams or more of cocaine base.

The testimony of several witnesses strongly supports this conclusion. Catherine Lair testified that Defendant Smith requested she obtain a cell phone for him, paying her in cash for its use. This further corroborates the existence of a conspiracy because this cell phone was the number Pickett called to arrange the controlled buy. Pickett and Williams testified that Williams and Defendant Smith would buy drugs in Chicago for distribution in Iowa. Davis and Boyd also testified that they purchased crack from Defendant Smith for distribution and personal use.

The Court concludes that a jury could properly convict Defendant Smith of the conspiracy to manufacture and distribute more than 50 grams of crack cocaine. Upon the foregoing,

**IT IS ORDERED** that Defendant Smith's Motion for New Trial [Dkt. No. 95] is DENIED.

**DATED** this 5<sup>th</sup> day of October, 2009.

  
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JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA