In the

United States Court of Appeals

For the Seventh Circuit

Nos. 20-1405, 20-1442, 20-2112, 20-2304, 20-2420, 20-2458, 20-2462, 20-2498, 20-2499, 20-3266, & 21-1002

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS JONES, et al.,

Defendant-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:18-cr-00116-JRS-MJD — **James R. Sweeney, II**, *Judge*.

ARGUED APRIL 20, 2022 — DECIDED DECEMBER 22, 2022

Before WOOD, HAMILTON, and KIRSCH, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Fourteen people were charged and convicted for a conspiracy to transport illegal drugs from Georgia for distribution in Kokomo, Indiana. In these consolidated appeals, ten defendants challenge their convictions and/or sentences on a host of issues: Pierre Riley, Reggie Balentine, Michael O'Bannon, Michael Jones, Jason Reed, Shaun Myers, Perry Jones, Thomas Jones, Derrick Owens, and

Antwon Abbott. We affirm all challenged convictions, and we affirm the sentences of all but one defendant. We vacate the sentence of Thomas Jones and remand his case for resentencing. We begin with an outline of the drug conspiracy and the procedural history of this case, adding more details later as needed for specific issues.

I. *Factual and Procedural Background*

A. *The Drug Distribution Conspiracy*

In 2016, the Kokomo, Indiana, Drug Task Force was investigating Reggie Balentine, Michael O'Bannon, Michael Jones, and others for illegal drug activity. The investigation expanded when agents from the federal Drug Enforcement Administration joined in late 2017.

The evidence at trial showed that, from mid-2016 to May 2018, the targeted defendants and others obtained and distributed substantial quantities of methamphetamine, cocaine, and heroin. Reggie Balentine, who lived in Kokomo, pooled money from co-conspirators in Indiana to buy the drugs from Pierre Riley, their source in Georgia. For most shipments, Balentine and Riley arranged to have couriers drive or travel by bus from Indiana to Georgia with cash to buy drugs and transport them back to Kokomo. Riley or his associates would meet the couriers, who would exchange the money for drugs and quickly return to Indiana. When the drugs arrived in Kokomo, Balentine stored them in the homes of his associates and other locations until the drugs could be sold. Balentine then distributed the drugs to Michael O'Bannon, Michael Jones, Shaun Myers, Jason Reed, Derrick Owens, Perry Jones, and Antwon Abbott.

In April 2018, investigators began closing in on the operation. On April 25, 2018, officers intercepted a courier on her way to Indiana. They seized the methamphetamine and cocaine she was transporting, but they did not arrest her at the time. The drugs seized were only the first of two shipments from one transaction arranged by Balentine. Because of the police attention on the first courier, Myers volunteered his girlfriend to drive to Georgia to pick up the second shipment. Balentine and Riley agreed. Aware of the conspirators' attempt to retrieve the second shipment, officers stopped Myers' girlfriend after she completed the exchange with Riley on April 26, 2018. They seized the rest of the drugs.

To protect the drug trafficking operation, Riley and Balentine plotted to kill a person they suspected was a confidential informant. They later sought help from O'Bannon, whose home the suspected informant had allegedly robbed. Riley and Balentine put up money for the murder and helped O'Bannon pay his share. O'Bannon was responsible for hiring out-of-state hitmen, and he met them when they arrived in Kokomo. Officers foiled the plot by stopping O'Bannon as he drove with the hitmen to the target's home. Officers later found several firearms in the hitmen's hotel room.

On April 26, 2018, the DEA special agent in charge of the investigation applied for a warrant to search the residences of several conspirators, including Balentine, Abbott, and O'Bannon. The searches turned up guns and drugs.

B. *Pretrial Proceedings*

A federal indictment charged fourteen people with conspiracy to distribute controlled substances and individual counts related to drugs, firearms, murder for hire, and money

laundering. Nine defendants pleaded guilty. Michael Jones, Myers, Reed, and O'Bannon were tried together before a jury and convicted on most charges. Abbott's charges were severed, and he was convicted in a separate bench trial. The district court then sentenced the defendants to lengthy terms in prison.

Ten defendants have appealed, challenging decisions on pretrial motions to suppress, jury selection, admission of trial evidence, the sufficiency of evidence, and sentencing. We have sorted the challenges into five major groups that follow the sequence of the prosecution. Part II of this opinion addresses the pretrial motions to suppress. Part III addresses a *Batson* challenge to the government's use of peremptory strikes in jury selection. Part IV addresses a challenge to so-called dual-role witness testimony at trial and an instruction the court gave during that testimony. Part V explains why the evidence was sufficient to support all convictions at trial. Finally, Part VI addresses multiple sentencing issues.

II. *Pretrial Motions to Suppress*

We begin by reviewing the district court's denial of two motions to suppress. The first sought to suppress evidence obtained through use of court-approved wiretaps. In the second, Abbott sought to suppress evidence seized in a search of his residence.

A. *Motion to Suppress the Wiretap Evidence*

The four defendants in the jury trial, Michael Jones, Reed, Myers, and O'Bannon, argue that the district court erred by denying a motion to suppress evidence obtained from use of a wiretap, supposedly in violation of 18 U.S.C. § 2518. Before the government can use a wiretap to gather evidence of a

crime, it must apply for court authorization. 18 U.S.C. § 2516; *United States v. Mandell*, 833 F.3d 816, 820 (7th Cir. 2016).

Section 2518 governs the standards and procedures for approving a wiretap. The government's application must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." § 2518(1)(c). To grant the application, the court must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." § 2518(3)(c). Evidence obtained from a wiretap that fails to comply with federal law is inadmissible. *Mandell*, 833 F.3d at 820, citing § 2515.[1]

In February 2018, investigators sought court approval to intercept wire and electronic communications from Balentine's phones. Attached to the application was an affidavit from the lead case agent. The district court authorized the initial wiretap on February 22, 2018. After that authority expired, investigators sought approval for another wiretap in April 2018, which the court also granted.

Several defendants moved to suppress evidence obtained from the wiretaps. The district court denied the motions, finding that the government's affidavits demonstrated what is

[1] Defendants also assert that the intercepted conversations and text messages were obtained in violation of their Fourth Amendment rights, but, given the more demanding requirements of 18 U.S.C. § 2518, that argument adds nothing to their statutory arguments. See *United States v. Giordano*, 416 U.S. 505, 526–27 (1974) (grounds for suppression in Wiretap Act included, but were not limited to, constitutional violations and likely included a wiretap application that failed to establish probable cause).

sometimes described as the "necessity" for each wiretap. On appeal, defendants challenge the court's conclusion that the "necessity" requirement was satisfied.

To be clear, the wiretap statute does not require literal "necessity." The statute "was not intended to ensure that wiretaps are used only as a last resort in an investigation, but rather that they are not to be routinely employed as the initial step in a criminal investigation." *Mandell*, 833 F.3d at 821, quoting *United States v. McLee*, 436 F.3d 751, 762–63 (7th Cir. 2006). The government's burden of establishing that normal methods have not worked or are unlikely to work or would be too dangerous "is not great," and we consider its supporting evidence "in a practical and common-sense fashion." *Id.*, quoting *McLee*, 436 F.3d at 763.

We review for an abuse of discretion the issuing judge's conclusion that the statute has been satisfied. *McLee*, 436 F.3d at 763, citing *United States v. Zambrana*, 841 F.2d 1320, 1329 (7th Cir. 1988). Defendants contend that the supporting affidavits for both the February and April wiretap applications failed to justify use of wiretaps.

1. *The February Wiretap Application*

Defendants argue that the February application contained largely conclusory statements with insufficient factual support and thus failed to establish that normal investigatory tools were insufficient. They assert that those traditional methods were in fact fruitful and permitted investigators to begin identifying Balentine's associates as well as some of the locations where he was storing the controlled substances. We have cautioned, however, that the success of traditional techniques does not prevent investigators from otherwise

establishing sufficient grounds for a wiretap. See, e.g., *United States v. Campos*, 541 F.3d 735, 748 (7th Cir. 2008) (rejecting argument that wiretap was not necessary because normal investigative techniques were "working and working well").

The investigators here had made progress with normal investigative techniques, but the February wiretap application and supporting affidavit established sufficient grounds to use a wiretap. For example, the affidavit explained that physical surveillance of Balentine's home indicated that he conducted drug trafficking from his home. But without electronic surveillance, investigators did not know whether Balentine stored the drugs at his home or whether they were stored elsewhere and brought to Balentine's home for specific transactions. Investigators observed people dropping off packages at Balentine's home at times that coincided with a confidential informants' requests for drugs, which led to their suspicion that Balentine may not have kept the drugs in his home.

The investigators had also used mobile tracking devices, but they were not as helpful because Balentine stayed at his home most of the time and apparently coordinated the drug distribution network through his phone. A stationary pole camera outside of his home was helpful but did not show whether visits were related to drugs.

According to the affidavit, investigators considered other techniques, such as using an undercover agent and applying for a search warrant, but these strategies were deemed to be either unsafe or ineffective. The application further explained that a wiretap was needed to help investigators determine the identities and roles of various accomplices to the conspiracy, the nature and methods of the drug trafficking business, and where the drugs were stored.

The issuing judge did not abuse her discretion in finding that the February affidavit was sufficient to justify use of the wiretap. See, e.g., *Campos*, 541 F.3d at 747 (§ 2518 was satisfied where search warrant was not feasible because officers did not know where drugs were stored, continuation of physical surveillance would alert suspects to investigation, and use of confidential informant was dangerous); *McLee*, 436 F.3d at 763 (affirming wiretap authorization where officers had been unable to identify primary supplier or roles of conspirators in overall scheme using normal investigatory techniques).

2. *The April Wiretap Application*

In April, investigators sought authorization for a second wiretap to permit them to continue intercepting communications from one of the phones subject to the February wiretap and to begin intercepting communications on two more phones used by Balentine and Michael Jones. Defendants argue that the April affidavit failed to demonstrate why, after the first wiretap expired, normal investigative procedures were insufficient to further the investigation.

The April application showed that, after investigators obtained authorization for the February wiretap, they continued to use traditional investigative techniques. The supporting affidavit explained that investigators had been using a confidential informant and that, while the informant had proved helpful, it had become too dangerous for him to continue assisting investigators. Despite these risks, investigators attempted to find a new confidential informant. They recruited a potential informant, but that person had only secondary contact with the conspiracy and thus could not be as helpful.

The affidavit also said that officers had arrested Owens' father and the hitmen in the murder-for-hire plot, but that those individuals had provided no useful information and "did not further the investigation in any substantial way."

Finally, the April affidavit described the same inadequacies of traditional techniques that justified the February wiretap. For example, the April affidavit explained that the investigators were still using physical surveillance and that the wiretap let them confirm that some of the visitors were coming to Balentine's house for drug-related reasons. Yet investigators were still not able to confirm the true nature of many visits. The investigators had also obtained approval to place GPS trackers on the phones of some known members of the conspiracy, including Riley and Everhart. The tracking allowed them to identify and then to search Everhart's residence for drugs. But knowing the location of the conspirators, without knowing what they were doing or why, limited the value of the GPS tracking. The April affidavit thus showed that investigators continued to use traditional investigative techniques but that the techniques were either unsafe or limited in their usefulness. The April affidavit also provided sufficient grounds for the district court to find that the requirements of § 2518 were satisfied. We affirm the district court's denial of the motion to suppress evidence obtained from the use of the wiretaps to intercept communications between the defendants.

B. *Abbott's Motion to Suppress*

On April 26, 2018, the lead DEA agent applied for warrants to search the residences of several members of the drug conspiracy. The application included a reference to a North Philips Street address that was designated as the residence of

Antwon Abbott. Officers searched that residence and seized methamphetamine.

Abbott moved to suppress evidence seized in the search on the ground that the warrant was not supported by probable cause. He also moved for an evidentiary hearing to resolve a dispute about whether the home searched was his residence at relevant times. The district court denied both motions, finding that the search warrant affidavit established probable cause and that an evidentiary hearing was not required because there was no dispute of material fact that would affect the outcome of his motion.

1. *Motion to Suppress*

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures, and searches based on warrants require probable cause. To establish probable cause, a search warrant affidavit must set forth facts "sufficient to induce a reasonably prudent person to believe that a search thereof will uncover evidence of a crime." *United States v. Johnson*, 867 F.3d 737, 741 (7th Cir. 2017), quoting *United States v. Gregory*, 795 F.3d 735, 741 (7th Cir. 2015). We give "great deference" to an issuing judge's probable cause determination. *Id.*, quoting *United States v. Robinson*, 724 F.3d 878, 884 (7th Cir. 2013). We review de novo a district court's legal conclusions in denying a motion to suppress, and we review its factual findings for clear error. *Id.*

Abbott challenges the district court's probable cause determination on two grounds. First, he argues that the affidavit failed to establish that the North Philips Street address was his residence. Second, he argues that the information in the

affidavit indicating that there may be drugs on the premises was stale and otherwise insufficient.

The agent's affidavit offered sufficient facts to infer that the North Philips Street address was in fact Abbott's residence. The affidavit noted that on March 11, 2018, Abbott told Balentine to deliver drugs he had purchased to "my crib." The affidavit explained that "my crib" was a reference to Abbott's residence on North Philips Street. Then, on April 8, 2018, Abbott gave Balentine the North Philips Street address after Balentine asked where Abbott was and said that he was in the area and could stop by.

Officers had also conducted surveillance of the North Philips Street address for weeks, observing Abbott there on April 11, 2018. In the week before the warrant application was submitted, officers also saw Abbott's car in the driveway. Together, these facts were sufficient for the district court to find that the North Philips Street address was probably Abbott's residence at the time of the search.

Abbott also argues that the affidavit did not show probable cause to believe contraband would be found at his home on the day of the search because the evidence in the affidavit, especially the reference to the March 11 drug transaction, was stale. When making a probable cause determination, a court must consider the age of the information in the warrant affidavit. *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012) ("'Staleness' is highly relevant to the legality of a search for a perishable or consumable object, like cocaine.…"). But the age of the information alone does not require a court to deny a warrant if "other factors indicate that the information is reliable and that the object of the search will still be on the premises." *Edmond v. United States*, 899 F.3d 446, 454 (7th Cir. 2018),

quoting *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991).

For example, when the affidavit describes "ongoing, continuous criminal activity, the passage of time becomes less critical." *Edmond*, 899 F.3d at 454, quoting *Lamon*, 930 F.2d at 1188. We have such ongoing activity here. The affidavit referred to intercepted communications between Abbott and Balentine on April 10, April 11, and April 16 in which Abbott ordered drugs. That last communication occurred just ten days before the warrant application.

In addition, courts making probable cause determinations may rely on an officer's experience with drug trafficking operations and her resulting belief that indicia of drug trafficking will likely be found at a suspect's home. E.g., *United States v. Zamudio*, 909 F.3d 172, 176–77 (7th Cir. 2018) (affirming probable cause finding based in part on officer's sworn statements that drug traffickers typically store drug paraphernalia, drug money, and records of their dealings at their homes). In the affidavit here, the lead agent said that in previous drug investigations, he had found evidence of drug trafficking and other contraband when conducting residential searches. The agent's experience provided additional support for the probable cause determination. The district court did not err in denying the motion to suppress evidence obtained from officers' execution of the search warrant.

2. *No Evidentiary Hearing*

Abbott also argues that the district court should at least have held an evidentiary hearing to decide whether and when he actually lived at the North Philips Street address. A defendant bears the burden of showing the need for an

evidentiary hearing on a motion to suppress. A hearing is required only "when a substantial claim is presented and there are disputed issues of material fact that will affect the outcome of the motion." *United States v. Curlin*, 638 F.3d 562, 564 (7th Cir. 2011).

Abbott has not offered reason to think that the district court was misled by information in the agent's affidavit, nor has he offered a genuine dispute about where he lived and when. At oral argument, he claimed that certain details related to the March 11 transaction with Balentine were left out of the affidavit. But the affidavit established probable cause for the search even without reference to the March 11 transaction. The district court did not abuse its discretion by denying Abbott's motion without an evidentiary hearing.

III. *The Batson Challenge*

Moving to the trial itself, defendants O'Bannon, Michael Jones, Reed, and Myers argue that the district court erred by denying a *Batson* challenge to the government's use of peremptory strikes to exclude two African American jurors.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the Constitution forbids the government from exercising a peremptory strike against a juror solely on account of the juror's race. The analysis for such claims of purposeful discrimination involves three steps. First, the defendant "must make a prima facie case that the peremptory strike was racially motivated." *United States v. Lovies*, 16 F.4th 493, 499 (7th Cir. 2021). The burden at step one is "low" and requires "only circumstances raising a suspicion that discrimination occurred." *Id.*, quoting *United States v. Cruse*, 805 F.3d 795, 807 (7th Cir. 2015). Second, the prosecution must then

provide a non-discriminatory explanation for its decision to strike the juror. The persuasiveness of that justification is not relevant at step two. *Id.* at 500. Third, the trial court must determine "whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.*, quoting *Cruse*, 805 F.3d at 807. The key question is "whether a strike was racially motivated," and courts must assess "the *honesty*—not the accuracy—of a proffered race-neutral explanation." *Id.*, quoting *Cruse*, 805 F.3d at 808 (emphasis in original).

We review a district court's *Batson* findings for clear error and give deference to its credibility determinations. *Lovies*, 16 F.4th at 500. We will affirm the district court's findings "unless 'we arrive at a definite and firm conviction that a mistake has been made.'" *Id.*, quoting *Cruse*, 805 F.3d at 806.

Defendants target step three of the *Batson* analysis, so we focus our review there. They argue that the district court made two distinct errors: (1) at step three, the court did not consider the rate at which the government struck African Americans, and (2) the government's explanations for the strikes were obviously pretextual.

A. *Consideration of Statistical Evidence*

First, defendants assert that the district court was required to consider the government's "strike rates" at step three of the *Batson* analysis and that its failure to do so was reversible error. Here, after 29 prospective jurors were excused for hardship or other cause, 42 jurors remained. Of those remaining, seven were African American. The government used three of its six peremptory strikes on the remaining African Americans. This resulted in the exclusion of 43% of eligible African

American venire members compared to just 13% of white venire members.

Defendants recognize that "more than 'bare statistics' is required to prove purposeful discrimination." *Mahaffey v. Ramos*, 588 F.3d 1142, 1146 (7th Cir. 2009), quoting *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). They insist, however, that the court must at least consider such statistical evidence, which they assert here "overwhelmingly indicate[d]" discriminatory intent. They rely on our decision in *Harris v. Hardy*, 680 F.3d 942 (7th Cir. 2012), and in particular our statement that the "State's disproportionate use of its peremptory challenges to exclude African Americans *must* be taken into account" and "given appropriate weight." *Id*. at 951, 953 (emphasis added).

We do not read *Harris*, though, to go so far as to mandate as a matter of law the reversal of a district court's *Batson* determination solely because it did not address statistical evidence of discriminatory intent at step three. In *Harris*, the state used at least 75% of its preemptory strikes to remove at least 70% of the prospective jurors who were African American. 680 F.3d at 951. The problem was that the state courts did not even consider that pattern of strikes in assessing the credibility of the prosecutor's explanations at step three. *Id.* The courts in *Harris* instead reviewed each strike in isolation, ignoring the pattern of strikes against African Americans, which gave rise to an inference of discriminatory intent. *Id.* at 951–52. It was not just the failure to give weight to the pattern of strikes alone, however, that led us to grant habeas relief under *Batson*. We said that the implausibility of the state's proffered reasons for the strikes was "[e]ven more compelling." *Id.* at 953.

It is important for courts to consider all "circumstantial and direct evidence of intent as may be available," including a pattern of peremptory strikes, that may support an inference of discriminatory intent. *Harris*, 680 F.3d at 952, quoting *Batson*, 476 U.S. at 93. We have not deferred to a district court's *Batson* findings of fact when it "incorrectly recount[ed] much of the record and fail[ed] to note material portions." *United States v. Stephens*, 514 F.3d 703, 713 (7th Cir. 2008) (reversing grant of new trial under *Batson*; district court's "central error was its failure to take into account the government's non-discriminatory explanations for its peremptory challenges," leading it to ignore strategic race-neutral reasons for the strikes).

We are not persuaded that the district court misunderstood or misstated the record. The court noted the strike rates at step one. The rates were also relevant at step three and could have lent modest support to defendants' challenge. But the fact that the court did not repeat the overall strike rates a little later at step three does not require reversal of its *Batson* determination as a matter of law. The statistical evidence is equivocal at best, given the small numbers in comparison to *Harris*. Only two strikes are disputed. And as we explain next, the court properly focused on the credibility of the government's explanations for those strikes.

B. *The Government's Explanations*

1. *Juror 52*

As noted, the government used three of its six peremptory strikes against African American venire members. Two are challenged on appeal: Juror 52 and Juror 57. At *Batson* step two, the government offered two race-neutral explanations

for striking Juror 52. First, it expressed concern about his ability to stay focused during the trial because he had expressed concern about losing clients if he were to miss work to serve on the jury. Second, the government said it doubted that Juror 52 could be neutral after he made an "agenda-driven comment" in voir dire. At step three, the court found that the government's race-neutral explanations for striking Juror 52 were "credible."

Defendants contend that neither of the stated reasons for striking Juror 52 is credible. First, they argue that the government's failure to strike Juror 52 for hardship or cause undermines its argument that prosecutors were concerned he would be unable to focus on the trial. They also insist that the government's concerns over Juror 52's ability to focus were based on mere speculation. Second, defendants argue that neither the court nor the government sufficiently explained why Juror 52's comments during voir dire suggested he had "an agenda."

Defendants bore the burden at step three of proving that the government's justifications for striking Juror 52 were a pretext, thus permitting an inference of discrimination. The district court reasonably concluded that they failed to meet their burden.

The district court accepted the government's explanation that it was concerned that Juror 52 would be unable to focus on the trial given his apprehensions about missing work. Juror 52 worked in a client-focused field, selling musical instruments, and he expressed concern that serving on the jury would negatively affect his business. A court could reasonably find that Juror 52's apprehension provided a legitimate justification for exercising a peremptory strike against him.

The government's failure to challenge Juror 52 for cause (hardship) does not, on its own, necessarily undermine its reliance on a related argument to justify a peremptory strike. See *Hernandez v. New York*, 500 U.S. 352, 362–63 (1991) ("While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.") (internal citation omitted).

Nor did the district court err in rejecting defendants' attempt to compare Juror 52 to Juror 59, who was not struck. One way for defendants to satisfy their burden at *Batson* step three is to identify a similarly situated, non-African American juror to whom the government's proffered reason for striking Juror 52 also applied but who was not struck. *Miller-El*, 545 U.S. at 241; *Harris*, 680 F.3d at 949. Defendants argued that Juror 59 also expressed concerns about her work situation. The district court reasonably rejected the comparison. Juror 59 said she would not be paid after ten days of missing work, but she expressed no concerns about losing her job. By contrast, Juror 52 said that he worked in sales, which required building "rapport," and he expressed fears that missing work would cause him to lose clients.

The district court also did not err in accepting as credible the government's explanation that it feared Juror 52's statements in voir dire reflected possible bias. During jury selection, defense counsel asked potential jurors whether they could commit to the idea that "until the end of the trial, [defendants] are constantly considered not guilty until the government proves otherwise." In response, Juror 52 said, "you're saying they're considered to be not guilty. I would say they're not guilty, not considered anything." Defense counsel

asked Juror 52 to repeat his comment, and Juror 52 said, "You're saying as they're sitting here, they are considered to be not guilty. Why aren't they just not guilty?" to which defense counsel replied, "Correct."

Before the district court, the government said that Juror 52's comments were "agenda-driven," and it justified striking him on the grounds that it "wanted to have a fair trial." We can understand how the government might reasonably interpret Juror 52's question why defendants at trial are merely "considered" not guilty rather than "just not guilty" as indicating a potential slant in favor of the defense. The government might have been more explicit in its explanation, but we have approved reasons given by the government that rest on "intuitive assumptions." *United States v. Jordan*, 223 F.3d 676, 687 (7th Cir. 2000), quoting *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991). Without other evidence that disputed or called into question the hardship and potential bias offered to explain the government's strike of Juror 52, the district court did not clearly err in rejecting the defendants' *Batson* challenge to that strike.

2. *Juror 57*

At *Batson* step two, the government offered several race-neutral reasons for striking Juror 57. Her oldest son was incarcerated at the time, and she believed her youngest son's schizophrenia was caused by his drug addiction. The government also noted that the trial would create potential hardships for Juror 57, who needed flexibility to care for her youngest son. Juror 57 had explained that her employer allowed her to leave on short notice to care for her son, but the government cautioned that providing such latitude "certainly would be problematic in this environment."

At step three, the court initially upheld the *Batson* challenge to the strike of Juror 57, admitting that it was a "tougher call." The court at first found persuasive defendants' argument that Juror 57's speculation that drugs caused her youngest son's schizophrenia made her predisposed against the defense and thus undermined the government's reliance on that issue as an explanation for its strike. Upon the government's request for reconsideration of that decision, however, the court changed course and overruled the *Batson* challenge. The court found that the government attorneys appeared "earnest and determined to express a race-neutral reason." The court also observed that no non-African American jurors were situated similarly to Juror 57. The court then also struck Juror 57 sua sponte for hardship based on her need to care for her son.

Defendants do not challenge on appeal the district court's decision to remove Juror 57 for cause based on the hardship she would face in caring for her younger son during trial. We would find no abuse of discretion in any event, given the legitimate need to avoid disruptions at trial and to ensure that all jurors are able to appear each day. That conclusion seems to render the *Batson* issue moot with respect to Juror 57. Even if the *Batson* challenge were not moot, the district court did not clearly err in finding credible the government's reasons for striking Juror 57.

First, the fact that a juror has a family member in prison can be a valid, race-neutral justification for a strike. *United States v. Hendrix*, 509 F.3d 362, 370 (7th Cir. 2007); *United States v. Lewis*, 117 F.3d 980, 983 (7th Cir. 1997). The court could reasonably credit the government's explanation for its strike: that Juror 57's son was incarcerated, which might bias her against the government.

As with Juror 52, defendants offer no similarly situated non-African American juror who was not struck. For the first time on appeal, however, defendants attempt to offer as a comparator a juror who said in voir dire that she did not currently have alternative childcare to take her son to school in the morning on a "couple days throughout the length of the trial," which might cause her to run late on those days. We agree with the government, however, that those circumstances could be accommodated more easily than Juror 57's. Juror 57 said that the difference between being at trial and at work was that, at work, "they're aware of my situation with my son [and] … if I have to leave, they usually make accommodation for that and tell me to leave if there's an emergency with him." Juror 57's situation reflected a need for flexibility that would not work well in the environment of a trial, especially a long, multi-defendant trial.

Some prospective jurors overestimate the burdens of serving, but others underestimate the burden. They also may not appreciate how disruptive accommodations might be for everyone else involved in the trial. The district court did not err in finding that explanation from the government credible as well. Whether the *Batson* challenge was rendered moot by the court's dismissal for cause or was properly denied as without merit, Juror 57's dismissal was not a reversible error.

IV. *Admission of Case Agent's Trial Testimony*

During the jury trial, a DEA special agent who led the investigation offered so-called "dual-role" testimony, offering both expert opinions from his general experience in law enforcement and lay testimony based on the specific insights he gained investigating this conspiracy. Defendants Myers,

Reed, Michael Jones, and O'Bannon objected at trial and renew their challenge on appeal on two main grounds.

First, defendants argue that the district court abused its discretion when it permitted the agent's dual-role testimony and did not put in place sufficient procedures to minimize the dangers of such testimony. Second, they contend that the district court erred when it allowed the agent to interpret whole telephone conversations rather than limiting the testimony to interpreting specific "code words" that the jury may not have understood. We review a district court's decision to admit or exclude expert testimony for abuse of discretion. *United States v. Jett*, 908 F.3d 252, 265 (7th Cir. 2018).

A. *Dual-Role Testimony*

We have permitted dual-role (both expert and fact) witness testimony in cases "where experienced law enforcement officers were involved in the particular investigation at issue." *United States v. Parkhurst*, 865 F.3d 509, 518 (7th Cir. 2017), quoting *United States v. York*, 572 F.3d 415, 425 (7th Cir. 2009). We have assumed, however, that such dual-role testimony can be confusing to jurors. *Id.*

In *Jett*, we clarified the procedures that district courts should consider using to reduce the risks posed by dual-role testimony. For example, we explained that when the district court learns the prosecution will be presenting dual-role testimony from a case agent, "it should first encourage the government to present the expert and lay testimony separately," to avoid the confusion that might be created by switching back and forth. 908 F.3d at 269. When the expert portion of the testimony begins, the court should allow the government to establish the agent's qualifications and then "instruct the jury

that the testimony it is about to hear is the witness's opinion based on training and experience, not firsthand knowledge, and that it is for the jury to determine how much weight, if any, to give that opinion." *Id.* at 269–70.

The goal is to ensure that the jury understands that expert opinion testimony is different and should be evaluated differently than factual testimony. *Id.* at 270. We also provided an example of a helpful cautionary jury instruction addressing this issue. *Id.*, quoting *United States v. Garrett*, 757 F.3d 560, 570 (7th Cir. 2014).

In this case the district court at times did not follow the procedures we suggested (but did not mandate) in *Jett*. In particular, the court's cautionary instruction about the dual-role testimony was problematic, as explained next. But defendants have not persuaded us that they were prejudiced by the court's handling of the agent's testimony. We find no reversible error, though district courts should not use the instruction given in this trial as a model.

1. *The Cautionary Instruction*

Defendants asked the court to provide a cautionary instruction like that in *Jett* to address the agent's dual-role testimony and to help the jury distinguish between the different forms of testimony he would provide. The court offered to give an instruction that mirrored the language we approved in *Jett*:

> You're hearing the testimony of [the case agent], who will testify to both facts and opinions. Each of these types of testimony should be given the proper weight. As to the testimony to facts, consider the factors discussed earlier in the

> preliminary instructions … As to the testimony on opinion, you do not have to accept the agent's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions, along with the other factors discussed in these instructions for weighing the credibility of witnesses.

See *Jett*, 908 F.3d at 270. Neither the government nor defendants objected to that language. Because defendants approved, the government argues that any challenge to the instruction on appeal is waived.[2]

If the district court had given the instruction the defendants approved, we would agree. But the instruction the court actually gave was not what the parties approved. The actual instruction was improvised and confusing. Of greatest concern to us, it included an unexpected summary of the court's findings on the factors used to determine the admissibility of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

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[2] The government also argues that any cross-references in defendants' briefs to their appendices as support for their challenge to the testimony are waived and should not be considered. See *DeSilva v. DiLeonardi*, 181 F.3d 865, 866 (7th Cir. 1999) (refusing to consider arguments that were adopted by reference but not actually made in appellate briefs because "adoption by reference amounts to a self-help increase in the length of the appellate brief"). The defendants did not, however, include new arguments in their appendices. Instead, they used the appendices to organize factual examples that they referenced in their briefs. Given the volume of material, that was a reasonable way to present the issue and did not give the defense an unfair advantage. We have considered those examples in our review of this issue.

(1993), phrased as an endorsement of the testimony. Defendants' approval of the *proposed* instruction did not prevent them from challenging on appeal the materially different instruction actually given.

In relevant part, emphasis ours, the district court instructed the jury:

> Now, you may recall that prior to the break, the government tendered [the case agent] as an expert. And as you may recall from when we discussed [the police captain] yesterday, that based on certain qualifications, to include specialized knowledge, experience, education and training, as we've just heard about this morning with respect to [the case agent] and with respect to [the police captain] yesterday, *that they can be tendered as witnesses if their testimony will be helpful to the jury to determine a fact at issue, which we found yesterday with* [*the police captain*], *which I think is the case today with* [*the case agent*] *with respect to code words. We talked about code words.* We've heard again this morning on the amount of data that the agent has considered and his career as well as in this case in particular and the same with [the police captain]. *The testimony will be the product of reliable principles and methods, which is basically their experience in this case, and that they have reliably applied those principles and methods to the facts in this particular case. So we think that this -- the Court thinks that this testimony will be helpful to you.*

We are particularly concerned by the court's reference to its findings on the Rule 702 and *Daubert* factors. The judge told the jury in so many words that he had determined that the agent's testimony would be helpful and that the testimony was the product of reliable principles and methods.

Under Rule 702 and *Daubert*, the district court serves as a "gatekeeper" to prevent unreliable and irrelevant evidence from reaching the jury, but the district court does not "take the place of the jury to decide ultimate issues of credibility and accuracy." *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805, 809 (7th Cir. 2012). "If the proposed expert testimony meets the *Daubert* threshold of relevance and reliability, the accuracy of the actual evidence is to be tested before the jury with the familiar tools of 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Id*. at 805, quoting *Daubert*, 509 U.S. at 596.

We have not been directed to other cases in which a judge disclosed his or her Rule 702 or *Daubert* findings to a jury, let alone given such an endorsement of the witness's testimony. The district court's instruction improperly endorsed the case agent's testimony by indicating that the court had already found his testimony to be reliable, relevant, and helpful. This type of explicit judicial endorsement of a witness's testimony was not appropriate. Such an endorsement can be even riskier with dual-role testimony, where there is already a risk that the jury "might be smitten by an expert's 'aura of special reliability' and therefore give his factual testimony undue weight." *York*, 572 F.3d at 425, quoting *United States v. Brown*, 7 F.3d 648, 655 (7th Cir. 1993).

During the trial, however, defendants did not object to the court's improvised changes to the agreed instruction.

Accordingly, we could reverse only if the court's instruction amounted to plain error. See generally Fed. R. Crim. P. 30(d) & 52(b); *United States v. Olano*, 507 U.S. 725 (1993). The instruction actually given was an error, and the error was plain. But defendants have not persuaded us that the error affected their substantial rights or that we should exercise our discretion to set aside the results of the trial on this basis. See *id*. at 732.

As a general rule, district judges should avoid the sort of endorsement of a witness that occurred here. The substance of the challenged testimony here, however, simply was not that important or controversial. If defendants had thought the unexpected endorsement in the instruction was important, they had every right and would have had every reason to raise the issue with the district judge. They could have asked for an immediate corrective instruction disavowing the explicit endorsement of the agent's opinion testimony. We are confident that the jury could have understood such a correction. Defendants did not do so. Moreover, the evidence against the defendants was strong, and we are not persuaded that any specific testimony by the agent was so critical as to cause us to question the reliability of the jury's ultimate verdicts. We decline to reverse on this basis.

2. *Structure of the Testimony*

In addition to their criticism of the court's jury instruction, defendants assert that the government's questioning of the case agent did not clearly distinguish the capacity in which he was testifying. They cite several portions of the trial transcript where the government did not preface each question with a specific reference to the agent's own case investigation or his general expertise in the field. For example, the government referred to intercepted communications between O'Bannon

and Balentine and then simply asked the agent: "What did you understand that to mean?" Similarly, the government quoted intercepted communications between Balentine and Myers and then asked: "What did you understand that to be a reference to?"

Failure to ensure that testimony is structured to provide a clear distinction between the different capacities in which a witness is testifying can pose a problem. For example, in *York*, we acknowledged that the government had "started off well" in its examination of the officer by prefacing its questions with phrases like "based on your experience in crack cocaine investigations," which indicated a focus on the witness's expert perspective. 572 F.3d at 426. But "things got murky" when the government asked questions about the specific investigation and then immediately inquired into the meaning of general code words. *Id.* More concerning was the government's prefacing of questions: "Based on your experience of crack cocaine investigations *and this investigation in particular*." *Id.* (emphasis in original). That lumped the two capacities together. We held in *York* that the district court erred in admitting responses to a few specific questions in part because the government's phrasing of the questions likely confused the jury. We said it was difficult to discern whether the witness's interpretation of "code words" was based on his expertise or his work on that particular investigation, though we ultimately found the error harmless. *Id.* at 429–30.

Here, too, the government did not include a qualifier in *every* question to clarify in which capacity the case agent was testifying. But from our reading of the transcript, we are confident that the jury could follow the nature of the agent's testimony based on the flow of questioning. For example, the

question that immediately preceded the one about O'Bannon and Balentine's conversation included a "through this investigation" qualifier. The last properly prefaced question before the one defendants cite regarding the conversation between Balentine and Myers was more distant, about two pages' worth of questions. But again, the line of questioning there was focused on the agent's work on this particular investigation. The jury should have been able to understand the question in context.

The government also tended to structure its questioning so that it asked several questions at a time about the agent's general expertise or his work in this specific investigation rather than switching back and forth more frequently. It also tried to indicate clearly when it was transitioning from one perspective to another. For instance, the government began its inquiry about the agent's general experience with "I would like to discuss with you your knowledge based upon your training and experience and what you've learned in your capacity as a law enforcement officer … not anything specific to this case, okay?" Then, when it wanted to focus on case-specific questions, it explained, "I would like to, if I may at this time, now return your attention and your testimony to questions based solely on your involvement in this investigation … and move away from your opinions based upon your expertise and training, okay?" These are the sorts of clear signals that we have deemed helpful in managing dual-role testimony.

3. *Prejudice*

Considering the case agent's testimony as a whole, we conclude that the district court did not commit reversible error in permitting the dual-role testimony. The court's

handling of the testimony was at times confusing, and it did not implement our suggested precautions as well as possible. And, as discussed above, we are troubled by the cautionary jury instruction, which improperly signaled to the jury that the judge deemed the case agent's testimony reliable and helpful. But defendants simply have not shown that any errors in the presentation of the agent's dual-role testimony were likely to have caused unfair prejudice to them. See *York*, 572 F.3d at 429–30 (court's failure to consistently implement protective procedures for the dual-role witness testimony was harmless error given otherwise "overwhelming" evidence of guilt). Without grounds for thinking that the errors likely affected the jury's verdicts, we find no reversible error.

B. *Interpretation of Whole Messages*

Defendants also maintain that the court abused its discretion when it permitted the case agent to interpret whole telephone conversations instead of limiting his testimony to individual words or phrases. In support, they point to questions like: "Mr. Riley says, 'We'll pay for it.' What did you understand that to mean?" Defendants acknowledge that we have often allowed expert witnesses to interpret code words. See, e.g., *United States v. Are*, 590 F.3d 499, 512 (7th Cir. 2009); *York*, 572 F.3d at 423–24. But they assert that the case agent's testimony here was a far cry from such accepted testimony because he was not interpreting individual words and phrases but was instead interpreting entire conversations, even when no interpretation was required.

We agree with the government that the agent's challenged interpretations were offered not as expert testimony but as lay testimony based on his work with this specific investigation. See *United States v. Cheek*, 740 F.3d 440, 447 (7th Cir. 2014)

("When a law enforcement officer testifies about the meaning of drug code words used by defendants based on personal knowledge obtained from the investigation of those defendants, the officer is testifying as a lay witness.").

Asking a case agent to testify about his "impressions" of intercepted communications poses an avoidable risk that the agent will invade the jury's province. Such testimony on direct can also prompt argumentative cross-examination. That's a fair response to argumentative direct testimony, but there are usually better ways to spend a jury's time.

In a similar case, however, we declined to reverse after an agent involved in the investigation testified about his "impressions" of intercepted conversations based on his interpretation of conspirators' use of code words. In *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008), the prosecutor had asked, for example, for the agent's "impression of what it means for them to say they are going to go have a drink at 10:30 to 11:00 o'clock?" *Id.* at 830–31. We held that the testimony was properly admitted as lay testimony. It was rationally based on the agent's "first-hand perception of the intercepted phone calls" and assisted the jury in determining whether the elements of the charge had been proven. *Id.* at 831–32. We emphasized that the "impressions" testimony was particularly useful there because the conspirators did not use typical drug words but instead made up code words as they went along. *Id.* at 832.

Here, the case agent's testimony did not amount to reversible error solely because it was not limited to the interpretation of specific code words and phrases. As in *Rollins*, the agent testified to his perception of the conversations in a way that may have been useful to the jury. And, even if some of

the government's questions risked invading the province of the jury, defendants have not shown that they were prejudiced as a result, such as by offering examples of communications that the agent misunderstood. In light of the considerable evidence in the record of defendants' guilt, any error arising from the case agent's "impressions" testimony was harmless. See *Jett*, 908 F.3d at 267 (holding that even if district court had abused discretion in admitting testimony interpreting defendants' text messages, error was harmless where other evidence was "plenty persuasive" of defendants' guilt). We find no reversible error in the admission of the case agent's testimony.

V. *Sufficiency of the Evidence*

Defendants Michael Jones, Reed, and Myers (but not O'Bannon) contend that the district court should have granted their motions for judgment of acquittal for insufficient evidence. All three contest their convictions on Count 1 for conspiracy to distribute and to possess controlled substances with the intent to distribute. 21 U.S.C. §§ 841(a)(1) & 846. Michael Jones also challenges his convictions on Count 14, possession with intent to distribute controlled substances, 21 U.S.C. § 841(a)(1), and Count 20, laundering of monetary instruments, 18 U.S.C. § 1956(a)(1)(A)(i).

In considering challenges to the sufficiency of the evidence, we "afford great deference to a jury's verdict of conviction" and review the evidence in the light most favorable to the government. *United States v. Godinez*, 7 F.4th 628, 638 (7th Cir. 2021). We will overturn a conviction only when "the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt." *Id.*, quoting *United States v. Khan*, 937 F.3d 1042, 1055 (7th Cir. 2019). While a

defendant faces a significant hurdle in challenging his conviction, "the height of the hurdle depends directly on the strength of the government's evidence," for we recognize that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *United States v. Moreno*, 922 F.3d 787, 793 (7th Cir. 2019), quoting *United States v. Garcia*, 919 F.3d 489, 496–97 (7th Cir. 2019), quoting in turn *Jackson v. Virginia*, 443 U.S. 307, 317 (1979).

A. *Count 1 Conspiracy*

Count 1 charged defendants with conspiring to possess with the intent to distribute and to distribute controlled substances. To convict a defendant of a drug conspiracy, "the government must prove that (1) two or more people agreed to commit an unlawful act, and (2) the defendant knowingly and intentionally joined in the agreement." *United States v. Hidalgo-Sanchez*, 29 F.4th 915, 924 (7th Cir. 2022), quoting *United States v. Hopper*, 934 F.3d 740, 754 (7th Cir. 2019). In a drug-distribution conspiracy, like that charged here, there must be "proof that the defendant knowingly agreed—either implicitly or explicitly—with someone else to distribute drugs." *United States v. Thomas*, 845 F.3d 824, 830 (7th Cir. 2017), quoting *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir. 2010). While there may be an express agreement, the government most often relies on circumstantial evidence. We consider the totality of the circumstances to determine whether the evidence supported the verdict. *Id.*

A challenge for the prosecution in drug-distribution conspiracies is that "characteristics inherent in any ongoing buyer-seller relationship will also generally suggest the existence of a conspiracy." *Johnson*, 592 F.3d at 754. For example,

both a typical buyer-seller relationship and a conspiracy may involve "sales of large quantities of drugs, repeated and/or standardized transactions, and a prolonged relationship between the parties." *Id.* But the existence of a routine buyer-seller relationship alone is not sufficient to establish a conspiracy. *Moreno*, 922 F.3d at 794; see also *United States v. Pulgar*, 789 F.3d 807, 812 (7th Cir. 2015) (explaining that in drug-distribution conspiracy cases "we will also overturn a conviction when the plausibility of a mere buyer-seller arrangement is the same as the plausibility of a drug-distribution conspiracy").

To prove a conspiracy, as opposed to a mere buyer-seller relationship, "the government must offer evidence establishing an agreement to distribute drugs that is distinct from evidence of the agreement to complete the underlying drug deals." *United States v. Maldonado*, 893 F.3d 480, 484 (7th Cir. 2018), quoting *Johnson*, 592 F.3d at 755. Circumstances that may show a conspiracy include "sales on credit, an agreement to look for customers, commission payments, evidence that one party provided advice for the other's business, or an agreement to warn of future threats to each other's business from competitors or law enforcement." *United States v. Villasenor*, 664 F.3d 673, 680 (7th Cir. 2011); accord, *United States v. Harris*, 51 F.4th 705, 715–16 (7th Cir. 2022).

The evidence as to Michael Jones, Reed, and Myers was sufficient for a reasonable jury to find that they knowingly agreed to participate in the conspiracy. The jury was properly instructed on the difference between a conspiracy and a buyer-seller relationship, and it found all defendants guilty of conspiracy.

1. *Michael Jones*

Michael Jones argues that the evidence was insufficient to prove his part in the Count 1 conspiracy because he did not share a common purpose with Balentine. He concedes that he purchased large quantities of drugs from Balentine, but he insists that he did not otherwise share a common goal with Balentine to sell to a particular customer and that his independent drug dealing was never traced back to Balentine.

Despite Jones' attempts to downplay his relationship with Balentine, the trial evidence was sufficient for the jury to find that he was a knowing co-conspirator. First, Jones bought large amounts of methamphetamine from Balentine on credit. Those transactions were reflected in a drug debt of about $16,000 that he owed Balentine in March 2018. A reasonable jury could infer from the multiple, large-quantity sales on credit that Jones was involved in the conspiracy. E.g., *Harris*, 51 F.4th at 716; *Maldonado*, 893 F.3d at 485; cf. *Villasenor*, 664 F.3d at 680 (explaining that credit sales of small quantities for buyer's personal consumption would not be sufficient to establish conspiracy).

Second, Jones' and Balentine's plan to find out whether a mutual customer was an informant provided strong evidence that they had shared interests for their drug dealing. Jones had suspected that the customer was an informant because he continued to try to buy drugs from him even when Jones charged a higher price. When Jones expressed his concerns, Balentine suggested that Jones offer to sell drugs to the customer at a price higher than he would have to pay to get the same drugs from Balentine. If the customer agreed to pay the higher price, then they would know that he was an informant. (Their theory was that only an informant, using cash from the

police, would be willing to pay such a high price for drugs when he could get them more cheaply from someone else.)

The plan to detect a potential police informant is the type of coordination to further shared interests that can signal a conspiratorial relationship. See, e.g., *Moreno*, 922 F.3d at 795 (affirming conspiracy conviction where defendant sought to protect co-conspirators by warning them about potential law enforcement intervention, telling them to stop using certain phones, and discussing with co-conspirators other threats to their criminal activity); *Maldonado*, 893 F.3d at 485 (affirming conspiracy conviction where defendants worked cooperatively, which included negotiating and coordinating deals together, checking quality of cocaine together, and teaching each other how to hide drugs in a car).

Third, intercepted communications between Michael Jones and Balentine indicated that they purchased drugs together. In one call, Balentine told Jones that he had been trying to get in touch with him because the couriers were leaving for Georgia, and Balentine wanted to know whether Jones wanted to put in money. Jones responded that he had something for Balentine, and the case agent testified that he understood that to mean that he had money for Balentine. The trial evidence supported the verdict finding Michael Jones guilty beyond a reasonable doubt on Count 1.

2. *Jason Reed*

Reed challenges his conviction on Count 1 on two grounds. He first asserts that the testimony of Melissa Baird, connecting him to Balentine and the conspiracy, was unreliable. He argues that her testimony was self-serving to obtain leniency and that it lacked sufficient corroboration.

Baird was Reed's girlfriend at some point during the life of the conspiracy. She testified that she and Reed traveled from Kokomo to Terre Haute once or twice a week to deliver drugs to two of Reed's customers. She also said that Reed obtained the methamphetamine he sold from Balentine, and she knew this because they would go to Balentine's home to pick up the drugs.

"[E]valuating the credibility of the witnesses is the jury's job." *Cruse*, 805 F.3d at 812. Finding a witness incredible as a matter of law is typically reserved for "extreme situations," where, for example, it was "physically impossible for the witness to observe what he described" or "impossible under the laws of nature for those events to have occurred at all." *United States v. Conley*, 875 F.3d 391, 400 (7th Cir. 2017), quoting *United States v. Hayes*, 236 F.3d 891, 896 (7th Cir. 2001).

Reed's appellate attack on Baird's credibility fails. Her testimony could be challenged as biased, self-serving, and/or unreliable, but such challenges to Baird's credibility of this kind were for the jury to assess. Reed has not shown that the jury was required, as a matter of law, to disregard her testimony.

In addition, other evidence supported the conspiracy verdict against Reed. On at least some occasions, Reed bought drugs from Balentine on credit. Reed also worked with Balentine to ensure they were both repaid for drugs they had sold to others on credit. The plan started when Reed's customer, Derrick Owens, was pulled over for a traffic stop and managed to discard drugs he had purchased from Reed on credit to avoid their discovery. Owens was thus unable to pay Reed, who himself had purchased the drugs from Balentine on credit. Owens agreed to buy methamphetamine from Balentine directly and to resell it so he could start to pay off his debt

to Reed, and Reed his resulting debt to Balentine. In arranging this deal, Reed communicated with both Balentine and Owens to sort out the details and arrange a meeting. Reed and Balentine also agreed that neither of them would sell drugs to Owens, or Michael Reynolds, who was also Reed's customer, on credit until they were able to pay off their debts. Evidence of Reed's coordination with Balentine and Owens to execute this plan contributed to the evidence supporting the verdict.

In his second argument, Reed contends that the Owens transaction did not establish his ongoing involvement in the conspiracy because there were no future arrangements or promises that he would profit from that transaction. This argument is not persuasive. The coordination between Reed and Balentine to complete the Owens transaction reflected an "informed and interested cooperation" that can mark a conspiracy. *United States v. Colon*, 549 F.3d 565, 568 (7th Cir. 2008), quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943); see also *Maldonado*, 893 F.3d at 485 (affirming conspiracy conviction where defendant and co-conspirator worked together to negotiate and coordinate drug transaction with third party and both took a cut from the deal). We affirm Reed's conviction on Count 1.

3. *Shaun Myers*

Like Michael Jones and Reed, Myers challenges his Count 1 conviction on the grounds that he had a simple buyer-seller relationship with Balentine and was not engaged in the broader drug conspiracy. He concedes that he was recorded talking to Balentine about a shipment of drugs from Georgia, but he contends he did not have a financial stake in the drugs and did not plan to receive any of them.

The jury could reasonably find Myers' contentions implausible, given the other direct evidence of his stake in the drug conspiracy and his efforts to further it. Myers was not just an isolated buyer of drugs from Balentine. The government offered evidence that Myers was fully aware of Balentine's plans to buy drugs from Riley in Georgia. Strong evidence of conspiracy came from Myers' giving Balentine $35,000 to help buy drugs from Riley in April 2018. Balentine also informed Myers when the drugs were intercepted. Myers' financial contribution to the drug purchase offered strong, and certainly sufficient, evidence of his participation in the conspiracy.

In addition, after that first portion of the shipment was intercepted by police, Myers sent his girlfriend to Georgia to pick up the second. See *Hopper*, 934 F.3d at 757 (by "'put[ting] their money and transportation resources together for an extended period of time,' the co-conspirators 'thereby ha[d] a stake in each other's success, and kn[ew] that the others intended to resell' the drugs") (alterations in original), quoting *United States v. Harris*, 567 F.3d 846, 851 (7th Cir. 2009); see also *United States v. Lomax*, 816 F.3d 468, 475 (7th Cir. 2016). We affirm Myers' conviction on Count 1.

B. *Michael Jones – Counts 14 and 20*

1. *Count 14*

Michael Jones also argues that we should reverse his conviction on Count 14 for possession with intent to distribute controlled substances. He presents his argument as one about the sufficiency of the evidence. But we agree with the government that his argument is better understood as a claim that the district court erred in admitting witness testimony that

went to an element of the offense. Jones' argument is complicated, however, by the fact that he seems at times to assert that the witness impermissibly testified to his *intent* to possess the drugs, while at others he seems to argue that the witness should not have been allowed to offer his opinion as to whether Jones or his girlfriend possessed the drugs. The government also notes that Jones did not clearly object at trial to the witness's testimony on the ground that it went to his intent but objected more generally to "speculation" and irrelevance.

We need not decide whether Michael Jones' objection at trial preserved this issue. We are not persuaded there was a reversible error. Here are the facts: On May 1, 2018, officers executed a search warrant at Jones' home, which he shared with his girlfriend, Rebecca Myers. Officers found several controlled substances and a digital scale in the master bedroom. They also seized firearms and about $9,000 in cash. At the time of the search, officers arrested Jones on an outstanding arrest warrant. Based on the contraband, officers also arrested Myers.

At trial, the government asked the officer who provided the probable cause affidavit for Myers' arrest if it was "your understanding that it was Rebecca Myers and Rebecca Myers alone that possessed the methamphetamine that morning?" The officer answered "No**."** The government then asked, "What did you believe?" Jones' counsel objected, arguing that the question called for speculation and was not relevant. The court overruled the objection, explaining that "certainly he can say what he believed at the time." The officer testified that he believed Michael Jones also possessed the methamphetamine.

We do not understand the decision to overrule the defense objection. In a trial on guilt or innocence, the opinion of an investigating officer about guilt or innocence is not helpful or relevant. *United States v. Noel*, 581 F.3d 490, 496–98 (7th Cir. 2009) (error to admit officer's opinion that photographs met legal definition of child pornography, but error was harmless). The issue is whether the government can present admissible evidence of the underlying facts that convinces the jury of guilt, beyond a reasonable doubt.

As a general rule, of course, lay or expert opinion testimony should not be excluded simply "because it embraces an ultimate issue." Fed. R. Evid. 704(a). Nevertheless, an expert in a criminal case cannot testify to "an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged." Fed. R. Evid. 704(b). An expert may testify, however, "in general terms about facts or circumstances from which a jury might infer that the defendant" possessed drugs with intent to distribute them. *United States v. Winbush*, 580 F.3d 503, 512 (7th Cir. 2009). In considering whether to admit such opinion testimony, the most important question for a court is whether it will be "helpful to the trier of fact." *Noel*, 581 F.3d at 496.

The officer's belief as to whether Rebecca Myers alone possessed the seized drugs could not have been helpful to the jury or relevant as a general matter. It went directly to the question of whether Jones possessed the drugs, an element of the charge. It was the jury's job to make its own finding on that question from the relevant evidence in the record. See *Noel*, 581 F.3d at 497 (explaining that a detective's testimony about whether photographs the defendant possessed met the definition of child pornography "was a bare conclusion that

provided nothing but the bottom line," and even as an expert, the detective "could not 'merely tell the jury what result to reach'"), quoting Fed. R. Evid. 704 advisory committee's note to 1972 rule. The officer's testimony invaded the province of the jury and amounted to one officer's opinion about whether the accused was guilty.

Whether the error was reversible is another matter. With the issue framed as a challenge to the sufficiency of the evidence, as opposed to an evidentiary error, we find no reversible error. The opinion was admitted and was available to support the conviction. More important, the government presented other evidence sufficient to support the verdict.

Jones did not physically possess the drugs at the time of the search. But of course a defendant can be convicted for possession based on constructive possession of the contraband. *United States v. Perryman*, 20 F.4th 1127, 1133 (7th Cir. 2021). To prove constructive possession, the government must demonstrate a "connection between the defendant and the illegal drugs" that shows that he had the "power and [the] intention to exercise dominion and control over the object, either directly or through others." *Id.*, quoting *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012). When a defendant does not exclusively control the property where the contraband is found, the government may satisfy its burden by showing "a 'substantial connection' to the location where contraband was seized." *United States v. Morris*, 576 F.3d 661, 667 (7th Cir. 2009). A defendant who has joint control over contraband may be found guilty of possessing it. *United States v. Lawrence*, 788 F.3d 234, 240–41 (7th Cir. 2015).

The evidence here was certainly sufficient for the jury to find that Michael Jones possessed the Count 14

methamphetamine, at least constructively and jointly. Officers found the drugs in the bedroom of the home that Jones shared with Myers. Both Myers and Jones sold drugs. See, e.g., *Lawrence*, 788 F.3d at 240–42 (upholding drug possession conviction where drugs were found in a drawer of the bedroom that defendant shared with his fiancée and defendant himself sold drugs). We affirm Michael Jones' conviction on Count 14.

2. *Count 20*

Michael Jones also argues that there was insufficient evidence to sustain his conviction for money laundering. Count 20 of the indictment charged him with laundering monetary instruments, 18 U.S.C. § 1956(a)(1)(A)(i), when he bought a sport utility vehicle in September 2017.

To affirm the conviction for money laundering, "we must determine that a rational trier of fact could have concluded from the record that [Jones] knowingly used the proceeds from a specified unlawful activity in financial transactions that were intended to promote the continuation of the unlawful activity, or were designed to conceal or disguise the proceeds of the unlawful activity." *United States v. Arthur*, 582 F.3d 713, 718 (7th Cir. 2009).

Jones contends that the record does not support the verdict because there is no evidence that he used drug proceeds to purchase the vehicle. He instead argues that Rebecca Myers, whose name was on the title, purchased the vehicle with her own money. He also argues that even if he did purchase the vehicle, he could have done so with legal gambling winnings rather than illegal drug proceeds.

As a preliminary matter, the government asserts that Jones waived the argument he raises now by conceding the point in his original motion for judgment of acquittal or a new trial. In that motion, he noted that the "government certainly provided circumstantial evidence that when viewed most favorably to the verdict, proves [Jones] conducted a financial transaction with proceeds that derived from the distribution of controlled substances." In his motion for judgment of acquittal, he instead argued that there was insufficient evidence that he purchased the vehicle to further or promote his illegal drug dealing.

A defendant waives an argument when he "intentionally relinquishes a known right." *United States v. Barnes*, 883 F.3d 955, 957 (7th Cir. 2018), quoting *United States v. Haddad*, 462 F.3d 783, 793 (7th Cir. 2006). Evidence that the decision not to raise an argument was strategic permits an inference that the argument was waived. *Id.* at 957–58 (explaining that defendant had made strategic choice to focus on criminal history category during sentencing and argued for the exclusion of some prior offenses while telling the court that the points for other offenses were appropriate). Here, it is reasonable to infer that Jones' concession reflected a strategic decision to challenge his conviction on a ground he thought would be more successful and that in doing so he waived his argument on appeal. *Id.* at 957. The argument was waived.

Even if Jones had not waived this argument, his challenge would still fail. The evidence was sufficient for the jury to find he did purchase the vehicle and used drug proceeds to do so. The salesman spoke only to Jones when negotiating the purchase of the vehicle, and he paid for it in cash that day. To be sure, given the practical realities of car buying, a jury might

have believed that Jones was merely negotiating on Rebecca Myers' behalf. The salesman testified that it is "not uncommon" for one person to negotiate the sale for a second person in whose name the car is registered. But the jury did not have to accept that benign version. See *Colon*, 919 F.3d at 516 (jury can "employ common sense in making reasonable inferences from circumstantial evidence," and government's case "need not exclude every reasonable hypothesis of innocence so long as the total evidence permits a conclusion of guilt beyond a reasonable doubt"), quoting *United States v. Starks*, 309 F.3d 1017, 1021–22 (7th Cir. 2002). The jury "is free to choose among various reasonable constructions of the evidence." *Id.*, quoting *Starks*, 309 F.3d at 1022.

Moreover, the money that Jones claims he made from legal gambling was earned in April 2018, several months *after* he bought the vehicle. Jones also filed no federal tax returns and received no W-2 forms from 2015 to 2017, which made it less likely that he bought the vehicle using legitimate income obtained through employment. Considered together, ample evidence supported a finding beyond a reasonable doubt that Michael Jones was guilty on Count 20 for laundering monetary instruments.

VI. *Sentencing*

We turn now to a host of sentencing issues, which together take up the second half of this opinion. Six defendants argue that various Sentencing Guideline enhancements were erroneously applied to them. Two defendants argue that the district court erred in its drug quantity calculations. Three contend that the district court erred by relying upon inaccurate or unreliable information in calculating their sentences. One defendant challenges the substantive reasonableness of his

sentence, and another asks us to depart from controlling Supreme Court precedent on considering at sentencing conduct for which the defendant was tried and acquitted.

A. *Aggravating Role Enhancements*

Defendants Riley, Balentine, and Michael Jones all argue that the district court erred in finding that they played aggravating roles in the conspiracy that justified enhancing their sentences. Under the Sentencing Guidelines, a defendant's offense level is increased by four levels if he is an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive" and by three levels if he was a "manager or supervisor" of the same. U.S.S.G. § 3B1.1(a)–(b).

The Guidelines do not explicitly define the terms "organizer," "leader," "manager," or "supervisor," but the accompanying commentary offers a list of factors that courts can use to distinguish between the organizer or leader roles and the manager or supervisor roles. These factors include the exercise of decision-making authority, the nature of participation in the offense, the recruitment of accomplices, a claimed right to a greater share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the offense, and the degree of control exercised over others. § 3B1.1 n.4. Ultimately, in applying the enhancement, the court must conduct a practical inquiry and make a "commonsense judgment about the defendant's relative culpability given his status in the criminal hierarchy." *United States v. House*, 883 F.3d 720, 724 (7th Cir. 2018), quoting *United States v. Dade*, 787 F.3d 1165, 1167 (7th Cir. 2015). The court may consider the Sentencing Guidelines factors, but none of those alone is a prerequisite for applying the enhancement. *Id.*

We review the district court's findings of fact for clear error, and we review de novo whether those facts support the enhancement. *House*, 883 F.3d at 723. We will reverse a district court's application of an aggravating role enhancement only if "we are left with a 'definite and firm conviction that a mistake has been made.'" *Id.*, quoting *United States v. Harris*, 791 F.3d 772, 780 (7th Cir. 2015).

1. *Pierre Riley*

Riley pleaded guilty to Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 6 (conspiracy to use facilities of interstate commerce to commit murder for hire), and Count 19 (conspiracy to launder monetary instruments). The district court found that Riley's offense level was 46 (which was adjusted down to the maximum of 43), and that his applicable criminal history category was IV. In calculating Riley's offense level, the district court applied several enhancements, including a four-level increase for his role as an organizer or leader in the Count 1 conspiracy and a two-level increase for his role as an organizer or leader in the Count 19 money laundering conspiracy. The district court's calculations yielded an advisory guideline range of life imprisonment for Count 1, 120 months on Count 6, and 240 months on Count 19. The court sentenced Riley to 490 months in prison on Count 1 and 120 months on each of Counts 6 and 19, to be served concurrently.

Over Riley's objections, the district court found by a preponderance of the evidence that he acted as an organizer or leader when he directed the activities of Kristen Kinney, Brianna Glover, Balentine, and O'Bannon. The court noted that Riley told Kinney to hold on to drug proceeds, to deposit the proceeds in accounts that he controlled, to pay bills for him,

to pick him and the drug couriers up from the bus stop, and to hold onto and deliver methamphetamine to Balentine. The court also observed that true leaders immunize or insulate themselves from their subordinates, which it found "certainly was indicative or indicated in this case by the use of others in the co-conspiracy, especially women." Finally, the court found that Riley directed O'Bannon and Balentine and played a "definitive role" in the murder-for-hire plot, as Riley gave the initial order to have the suspected informant killed.

Riley argues first that he was merely the drug source for the conspiracy and that a supplier for a large-scale drug operation is not always an organizer or leader of the conspiracy. See *Colon*, 919 F.3d at 518 ("A defendant who acts as a mere conduit in an operation—even one that deals in large quantities of drugs—should not (without more) receive a leadership enhancement."). Here, however, additional facts indicate that Riley did much more than merely supply drugs, including planning the murder for hire.

Riley also challenges the district court's findings that he directed specific individuals in the conspiracy. For example, he contends that there was little support for the finding that he directed Balentine and O'Bannon in the murder-for-hire plot. The presentence report said that Riley told Balentine to call O'Bannon and to instruct O'Bannon to locate hitmen, and that O'Bannon complied. Riley argues that any reliance on the murder-for-hire plot to establish his leadership role was an error because the court did not apply an organizer or leader enhancement for that count. But as we discuss below, the murder-for-hire plot is relevant conduct for the drug conspiracy. The district court could rely on that evidence to apply the enhancement for Count 1.

Perhaps Riley's instructions to O'Bannon might be understood as isolated requests to an equal rather than as part of the continual and ongoing supervision often required to establish an aggravating role enhancement. See *United States v. Weaver*, 716 F.3d 439, 444 (7th Cir. 2013). But the district judge who presided over the trial and guilty pleas was not limited to the presentence report. Riley contributed money for the planned hit, and he decided initially not to include O'Bannon before changing his mind. Riley also received updates from Balentine on what was happening on the ground in Kokomo. This evidence may not have established that Riley was directing Balentine, given their comparable involvement in the plot: Balentine told Riley they needed to move faster and that he wanted to use out-of-state hitmen. But it was nevertheless sufficient for the court to find that Riley was exercising control or authority over O'Bannon, who was responsible for trying to carry out the murder.

As is often the case under the aggravating-role Guideline, whether the control Riley exerted over O'Bannon fit better within the four levels for an organizer or leader or three levels for a manager or supervisor enhancement could be considered a close question, and one where we give considerable deference to the district court. But here, because Riley's offense level was 46, it makes no difference to his ultimate sentence whether a four-level or a three-level enhancement is applied. In either case, his offense level will be adjusted down to the maximum of 43. Because we are confident that the evidence supported at least the three-level enhancement, we affirm.

Riley's role in the murder-for-hire plot resembles that of the defendant in *House*, where we upheld the application of

the three-level manager or supervisor enhancement. 883 F.3d at 724. That defendant was instrumental in designing the loan fraud scheme, used his business as a front to secure the loans, and provided the information that co-conspirators used to apply for the loans. *Id.* Riley's role here as a coordinator, funder, and supervisor of the murder plot would similarly support at least the three-level enhancement. If the district court had applied the three-level manager or supervisor enhancement instead of the four-level organizer or leader enhancement, the one-level reduction would not have changed Riley's guideline range. It still would have been life in prison for Count 1.

Riley also challenges the district court's finding that he directed Kinney. Riley focuses mainly on inconsistencies in Kinney's testimony about how often and in what ways he directed her. He contends these weaknesses undermine the court's reliance on her testimony. We find no reversible error. To be sure, inconsistent evidence in some cases may in fact be unreliable, and the court must make a searching inquiry into the accuracy of such evidence. *United States v. Galbraith*, 200 F.3d 1006, 1012 (7th Cir. 2000). Here, however, the inconsistencies Riley identifies do not undermine the finding about whether he was directing Kinney. They relate only to how often he directed her. As noted above, the leadership enhancement requires evidence of ongoing supervision. The evidence supported that here. Kinney testified at trial that she went to the bank ten to twelve times on Riley's behalf to convert the drug money. The fact that Kinney, on a different occasion, said that she went to the bank more often does not require reversal of the court's finding that Riley continually supervised her.

Riley also insists that the apparent obligation Kinney felt to Riley to follow his instructions and those of Balentine did not make him an organizer or leader. But Kinney's personal relationship with and commitment to Riley also did not preclude the court's finding that she acted at his direction.

Finally, Riley argues that there was insufficient evidence for the court to find that he led or controlled Glover. The court received evidence that Riley directed Glover to pick up or drop off drugs on at least two occasions on April 24 and 26**.** The limited and short-term nature of his direction of Glover might not, by itself, support the organizer or leader enhancement. See *Colon*, 919 F.3d at 519 (defendant's requests that a courier drive him to a drug sale did not suffice to show he acted as a manager/supervisor, "much less an organizer or leader"). The case agent testified that Riley often had Glover perform other tasks for him, though it is not clear from the record what those tasks were or if they related to the drug conspiracy. Perhaps if we considered only Riley's control over Glover, the evidence might not be enough to establish the organizer or leader enhancement.

But given the evidence that Riley also directed O'Bannon and Kinney, the district court did not clearly err in applying the organizer or leader enhancement. And as mentioned above, even if the four-level organizer or leader enhancement did not apply, the three-level manager or supervisor enhancement certainly would have, in which case Riley's guideline sentence would not have changed. Any error in the district court's choice between a three- or four-level role enhancement would have been harmless. See, e.g., *United States v. Prado*, 41 F.4th 951, 955 (7th Cir. 2022) (finding any error harmless where district court's calculation and defendant's proposed

calculation resulted in same guideline range); *United States v. Thomas*, 897 F.3d 807, 817 (7th Cir. 2018) (same); *United States v. Fletcher*, 763 F.3d 711, 718 (7th Cir. 2014) (same).

2. *Reggie Balentine*

Balentine pleaded guilty to Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 4 (distribution of 50 grams or more of methamphetamine), Count 6 (conspiracy to use facilities of interstate commerce to commit murder for hire), Count 8 (felon in possession of firearm), Count 10 (attempted possession with intent to distribute 50 grams or more of methamphetamine), and Count 18 (actual possession with intent to distribute 50 grams or more of methamphetamine). The district court calculated his total offense level as 46, which was reduced to the maximum of 43, and his criminal history category as VI. The court applied a four-level enhancement for Balentine's aggravated role as an organizer or leader in the Count 1 drug conspiracy. The court calculated Balentine's guideline range as life in prison. Balentine was ultimately sentenced to concurrent terms of 504 months in prison on each of Counts 1, 4, 10, and 18, and 120 months on each of Counts 6 and 8.

In applying the four-level enhancement, the district court explained that Balentine was responsible for gathering money to buy drugs from Riley in Georgia, he directed the activities of Kristen Kinney, including telling her when to pick up drug proceeds and drop off methamphetamine to him, and he also directed the activities of Melissa Baird and Perry Jones, who similarly delivered drugs and picked up drug proceeds for him. The court also justified its decision on the ground that Michael Jones received a three-level aggravating role

enhancement, and it was clear that Jones' role was not as critical as Balentine's.

On appeal, Balentine argues that the court should not have applied any aggravating role enhancement. He asserts that the conspiracy was made up of individuals with equal roles and that no single co-conspirator exercised control or coercive power over another. In the alternative, Balentine argues that he qualified at most for the three-level manager or supervisor enhancement.

The district court did not clearly err in applying the four-level organizer or leader enhancement. As discussed above, the conspiracy at issue here was not strictly hierarchical. Some conspirators, such as Riley and Balentine, seem to have operated as equals. But there was certainly evidence of *a* hierarchy, with some conspirators having more authority and control in the drug operation than others. For example, Balentine coordinated with Riley to decide how much methamphetamine and other drugs to buy and when they should be bought to ensure a steady supply. Lower-level members of the conspiracy, like Myers, would contact Balentine for updates on when the next shipment of drugs would arrive. Balentine was also responsible for pooling the money from his co-conspirators in Indiana to buy the drugs, and he kept track of how much each person would receive from a new shipment. After officers seized the load that Melissa Baird was transporting, Balentine conferred with Myers about raising prices to make up the loss. Balentine recommended that Myers sell the methamphetamine at $500 per ounce. Balentine also agreed to split up the second shipment among the various co-conspirators instead of keeping it for Riley and himself. He also helped protect the drug operation by giving advice to his co-conspirators about

how to deal with customers who were suspected of being informants and were threats to the operation.

Balentine's actions resemble those of other defendants for whom we have upheld the application of the organizer or leader enhancement. See, e.g., *United States v. Grigsby*, 692 F.3d 778, 791 (7th Cir. 2012) (upholding application of manager or supervisor enhancement but noting that defendant who "initiated the scheme, played a leading role in recruiting the coconspirators, and supervised the execution" of offense could also qualify for organizer or leader enhancement).

Balentine's direction of Perry Jones, Baird, and Kinney in furtherance of the drug conspiracy reinforced the district court's application of the enhancement. On several occasions, Balentine told Perry Jones to pick up drug proceeds or to deliver drugs to Balentine's customers, including Michael Jones and O'Bannon. (As a result, the fact that Perry Jones had his own customers does not mean that he was not also working at the direction of Balentine.) Balentine also directed Baird to sell drugs on his behalf to various buyers after she stopped working for Reed, who had been arrested and jailed. Baird also stored drugs for Balentine at her house. According to Baird, Balentine agreed to give her a loan if she traveled to Georgia to pick up the drugs, and she complied. Balentine used Kinney in a similar way, directing her to take cash to the bank for him and to store drugs at her home.

Accordingly, the district court did not clearly err in applying the enhancement. Balentine "used his compatriots to insulate himself from some of the perils of dealing by directing them" to engage in those actions and exercised sufficient control over them to support the enhancement. *United States v. Noble*, 246 F.3d 946, 954 (7th Cir. 2001) (upholding organizer

or leader enhancement where defendant provided drugs for whole distribution scheme, controlled drug price, directed co-conspirators to deliver drugs for him and to store drugs at their homes, and exercised such control over others that they agreed to go to jail for him).

3. *Michael Jones*

The jury convicted Michael Jones on Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 2 (distribution of 50 grams or more of methamphetamine), Count 14 (possession with intent to distribute 5 grams or more of methamphetamine), Count 16 (felon in possession of a firearm), and Count 20 (laundering of monetary instruments). The district court calculated Michael Jones' offense level to be 47, which was reduced to the maximum of 43, and it found his criminal history category was VI. Over Jones' objection, the court applied a three-level enhancement for his role as a manager or supervisor in the conspiracy. Jones' final guideline range was life in prison. The court sentenced him to concurrent terms of 420 months on Counts 1, 2, and 14, 120 months on Count 16, and 240 months on Count 20.

The district court acknowledged that Jones' aggravating role presented a close question but found by a preponderance of the evidence that he managed or supervised Thomas Jones and Rebecca Myers. The court relied upon the circumstances surrounding the transaction with the suspected informant. Michael Jones made arrangements for the deal with the suspected informant, but Thomas Jones actually carried out the exchange. The court also found that Rebecca Myers worked under Michael Jones' direction and delivered drugs at his request.

On appeal, Jones asserts that the evidence failed to establish that he was a manager or supervisor. Specifically, he contends there was conflicting testimony as to whether he directed Thomas Jones. He also argues more generally that there was no proof he managed Thomas Jones or Rebecca Myers in furtherance of the conspiracy.

The district court did not clearly err in applying the enhancement to Michael Jones. Thomas Jones delivered the methamphetamine to the suspected informant after Michael Jones negotiated the terms of the deal. Two associates of Michael Jones testified that Thomas Jones was a courier for Michael and often present during Michael's drug dealing. As for Rebecca Myers, intercepted communications between Balentine and Michael Jones indicated that, at Jones' direction, she hid drugs in a body cavity to keep the police from finding them. She later recovered the drugs and gave them back to Michael Jones, presumably so he could sell them. Such evidence was sufficient to find that Michael Jones acted as a manager or supervisor, directing both Thomas Jones and Rebecca Myers in connection with the drug distribution conspiracy.

Moreover, even if the court had erred with this enhancement, it would have been harmless. See *Thomas*, 897 F.3d at 817 (explaining that a "guideline error that does not actually affect the final guideline range calculated" does not affect substantial rights in plain-error analysis). Michael Jones' total offense level was 47, but because this was greater than the guideline maximum of 43, the court treated his offense level as 43. Even a complete reversal of any role enhancement (rather than, say, a reduction to a two-level increase) would yield an offense level of 44, which would also be treated as 43. Jones

would face the same guideline range of life in prison. We affirm the court's application of the enhancement.

B. *Firearm Enhancement*

Riley, Thomas Jones, and Abbott all argue that the district court erred in applying the two-level firearm enhancement to their sentences. We affirm the application of the firearm enhancement for Riley and Abbott but reverse as to Thomas Jones.

Under the principal drug Guideline, a two-level enhancement applies if "a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The enhancement may apply to a defendant did not personally possess the firearm. *United States v. Ramirez*, 783 F.3d 687, 690 (7th Cir. 2015). Another person's possession can be attributed to a defendant if it involves "jointly undertaken criminal activity," so that "all acts and omissions of others that were—(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity" are offense conduct attributable to the defendant. U.S.S.G. § 1B1.3(a)(1)(B); see also *Ramirez*, 783 F.3d at 690. Before a court can apply the firearm enhancement to a defendant who did not personally possess a firearm "or have actual knowledge of a coconspirator's gun possession," it must find by a preponderance of the evidence "(1) that someone in the conspiracy actually possessed a firearm in furtherance of the conspiracy, and (2) that the firearm possession was reasonably foreseeable to the defendant." *Ramirez*, 783 F.3d at 690. We review the district court's findings of fact for clear error and will reverse only "if we are left with a definite and firm conviction that a mistake has been made." *Id.*

1. *Pierre Riley*

At Riley's sentencing, the district court applied a two-level enhancement to Count 1 based on the multiple firearms possessed by his co-conspirators. Riley objected, arguing that he knew few of those in the conspiracy and that their possession of firearms was not readily foreseeable to him. The district court found otherwise and relied particularly on the foreseeability of firearms in the murder-for-hire plot. The court also found that it should have been foreseeable to Riley that members of a large-scale drug conspiracy would possess firearms.

As a preliminary matter, Riley argues that the court erred in relying on the possession of guns in connection with the murder-for-hire plot on the theory that the hitmen were not part of the broader drug conspiracy. Their possession of firearms, in his view, thus could not have been in furtherance of or connected to the drug conspiracy.

We reject Riley's attempt to separate the murder-for-hire plot from the drug conspiracy it was intended to protect. The firearm enhancement may apply when the evidence establishes "that a gun was possessed during the commission of the offense or relevant conduct." *United States v. Olson*, 450 F.3d 655, 684 (7th Cir. 2006). For jointly undertaken criminal activity, relevant conduct includes acts and omissions "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1)(B).

The murder-for-hire plot was both relevant conduct and in furtherance of the drug conspiracy. Riley and Balentine decided to have a person killed because they suspected he was

an informant. After an associate warned both Balentine and Riley not to sell drugs to that person anymore because he might be an informant, Balentine told Riley they needed to move faster with their plan. They hatched the murder-for-hire plot to further their drug conspiracy by preventing its detection and prosecution.

O'Bannon may have had his own reasons for participating in the murder-for-hire plot, given his suspicions that the targeted victim had robbed his home. But Riley and Balentine did not even include O'Bannon in their plan at first. They brought him in only later, in part because he could find out-of-state hitmen. Ample evidence showed that Riley and Balentine devised the murder-for-hire plot to protect the drug conspiracy.

The possession of the guns by the hitmen was of course reasonably foreseeable to Riley. When officers pulled over O'Bannon, who was driving the hitmen toward the target's home, officers found ammunition in the vehicle. That same day, officers found two handguns in the hitmen's hotel room. The simple fact that it was a murder-for-hire plot made it foreseeable to Riley that guns or other dangerous weapons would likely be involved. We affirm the firearm enhancement for Riley.

2. *Thomas Jones*

Thomas Jones, the nephew of Michael Jones, pleaded guilty to Count 2 for distributing 50 grams or more of methamphetamine. That conviction was based on his sale of methamphetamine, on behalf of Michael Jones, to a suspected informant in January 2018.

The district court calculated Thomas Jones' offense level as 30 and his criminal history category as IV. Over his objection, the calculation included a two-level enhancement for firearms possessed in relation to the offense under U.S.S.G. § 2D1.1(b)(1). The court determined that Jones' guideline range was 135 to 168 months in prison. The court sentenced him to 135 months in prison on Count 2.

Thomas Jones challenges the application of the firearm enhancement on two grounds. First, he contends that the district court did not properly define the scope of the criminal conduct he jointly undertook. In the alternative, he argues that the evidence did not support the district court's finding that any gun possession was both in furtherance of the criminal activity and reasonably foreseeable to him.

a. *Scope of Criminal Activity*

When applying § 1B1.3(a)(1)(B), the district court must first determine the scope of the criminal activity that the defendant agreed to undertake jointly. *United States v. Salem*, 597 F.3d 877, 886 (7th Cir. 2010). The "scope of the jointly undertaken criminal activity 'is not necessarily the same as the scope of the entire [scheme].'" *Id.* at 889, quoting § 1B1.3 cmt. n.3(B). After some initial uncertainty, the district court here made sufficiently clear that it was focusing on Thomas Jones' participation in the January 2018 drug transaction charged in Count 2 involving Thomas Jones, Michael Jones, and the suspected informant.

b. *Actual Possession in Furtherance of the Criminal Activity*

On the merits, Thomas Jones argues that the evidence did not support the court's finding that others' possession of

firearms was in furtherance of that transaction and reasonably foreseeable to him. The transaction in Count 2 was negotiated between Michael Jones and the buyer. It was completed when Thomas Jones delivered drugs to the buyer. The buyer, who had never before met or spoken to Michael Jones, contacted Michael on January 25, 2018 via a social media site and asked to purchase methamphetamine. Jones agreed, and the buyer drove to Kokomo to pick up the drugs. The buyer brought his wife, his child, and a few friends with him on the trip. His wife, who accompanied her husband for "protection," carried a concealed gun on her hip.

When the buyer arrived, he and his wife got into Michael Jones' vehicle to discuss the terms of the deal. Thomas Jones was also a passenger in the vehicle. Michael Jones and the buyer did not discuss anything orally. Instead, they negotiated by typing and then deleting notes on a cell phone. (The buyer speculated that they did so because Michael Jones did not know him and did not know whether he might be wearing a recording device.) After they agreed on a price, the parties went their separate ways. The buyer then met up with Thomas Jones later that evening to carry out the exchange of money for meth.

On these facts, the district court found that the firearm enhancement applied to Thomas Jones. As mentioned above, to apply the firearm enhancement for a defendant who did not personally possess a firearm, like Thomas Jones here, the court must find by a preponderance of the evidence "(1) that someone in the conspiracy actually possessed a firearm in furtherance of the conspiracy, and (2) that the firearm possession was reasonably foreseeable to the defendant." *Ramirez*, 783 F.3d at 690. Here, in defining the scope of the joint criminal

activity for Thomas Jones, the court noted that a firearm was present during the Count 2 transaction. It ruled that the evidence supported the enhancement because "Mr. Michael Jones possessed a firearm in furtherance of the joint criminal act, and/or [the buyer] possessed a firearm in furtherance of the joint criminal act; and such possession was reasonably foreseeable by the defendant."

On this record, application of the firearm enhancement to Thomas Jones was clearly erroneous. There must be *actual* possession of a firearm by a co-conspirator for the enhancement to apply on a theory of possession related to jointly undertaken criminal activity. See *United States v. Vold*, 66 F.3d 915, 920–21 (7th Cir. 1995) (assumption that co-conspirator possessed a firearm on a particular occasion based solely on evidence from others that he usually had a firearm was erroneous and "unwarranted"); accord, *Ramirez*, 783 F.3d at 690 (concluding that first step of court's inquiry was met when defendant conceded that her co-conspirators possessed four firearms in furtherance of the drug enterprise); *United States v. Block*, 705 F.3d 755, 763 (7th Cir. 2013). The record here includes no evidence that Michael Jones or even the buyer actually possessed a firearm in connection with the January 2018 transaction. The evidence does indicate that the buyer's wife wore a concealed firearm in the initial meeting, but Thomas Jones is not accountable for that firearm.

The district court found by a preponderance of the evidence that Michael Jones actually possessed a firearm during the January 2018 transaction. It justified its findings, in part, on testimony from a customer of Michael's who said that he was "always" armed. The customer testified that he never saw Michael Jones without a gun during their drug transactions

and that he never left his home without a gun. But that customer was not a party to the drug transaction in question. The court also pointed to an incident in April 2018 when Michael Jones and his girlfriend, Rebecca Myers, were pulled over by police and police recovered a pistol in the yard near where the traffic stop occurred. Thomas Jones was not involved in that incident, and it occurred several months after the events charged in Count 2. Finally, the court noted that guns were recovered during a search of Michael Jones' home. Again though, that search occurred on May 1, 2018, about four months after the drug transaction in question. None of that evidence establishes that Michael Jones actually possessed a firearm during the January 2018 transaction with the suspected informant.[3]

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[3] The dissenting opinion cites *United States v. Luster*, 480 F.3d 551, 558 (7th Cir. 2007), for the proposition that step one is not an "onerous burden" and can be satisfied by evidence showing that a co-conspirator "regularly carried a gun during the course of the conspiracy." We do not read *Luster* to hold that a co-conspirator's habit of carrying a gun is enough to establish that he actually possessed a firearm during the jointly undertaken criminal activity. Rather, the relevant language in *Luster* referred to the second requirement at step one: that the co-conspirator's actual possession of a firearm be in furtherance of the conspiracy. That, we said, was not an "onerous burden, as firearms found in close proximity to illegal drugs create a presumption that they are possessed in connection with the drug offense." *Id.* Evidence in *Luster* clearly established that Luster's co-conspirators actually possessed firearms during the nine-month conspiracy to distribute cocaine: one co-conspirator stored drugs and firearms at his music studio and the other "regularly carried" a gun during the conspiratorial time period. *Id.* Here, by contrast, though testimony indicated that Michael Jones regularly possessed firearms, that testimony did not establish that he possessed a firearm during the joint criminal activity with Thomas Jones.

There was similarly no evidence that the buyer possessed a firearm in connection with the transaction. Instead, the only person who actually possessed a firearm at the January 2018 meeting was the buyer's wife. At trial, the buyer testified that he brought his wife and two friends to Kokomo with him when he met Jones. He said that he brought them as "security" to "watch [his] back" in case Jones, whom he was meeting for the first time, robbed him. When they arrived in Kokomo, his two friends stayed at a gas station with his daughter while he and his wife went for a ride in Michael Jones' vehicle. The buyer testified that his wife was carrying a gun and that she accompanied him for protection. He also testified that he told his wife that he was meeting Michael Jones to buy marijuana, not methamphetamine.

As discussed above, the district court determined that the scope of criminal activity for purposes of the Thomas Jones firearm enhancement was the January 2018 transaction. The buyer's wife was a participant in that purchase: though she was kept in the dark about details, she knew her husband was buying drugs and she accompanied him for protection. But she was on the other side of the transaction, which was a first-time sale by Michael Jones to the buyer. Michael and Thomas Jones were not conspiring with the buyer and his wife, so her possession of a firearm is difficult if not impossible to attribute to Thomas Jones.

c. *Foreseeability*

The district court found that it was foreseeable to Thomas Jones that the buyer's wife would carry a gun given the "distrust" among the parties, the "amounts of drugs that were involved," and the "precautions that were taken with respect to the meet[ing]." The court also noted that Thomas Jones lived

on and off with Michael, who had guns in his home, and that weapons had been involved in Thomas Jones' own drug dealing.

It is true that the parties to the January 2018 transaction distrusted one another. But the fact that Thomas Jones had never met the buyer or his wife and knew nothing about them cuts in the other direction: he had no reason to know that either of them would carry a gun to that first meeting, where Michael and Thomas brought no drugs. Her possession of a firearm was foreseeable to Thomas Jones only in the sense that parties to any drug transaction might be armed because, as the government argued at sentencing, drug dealing is dangerous. The firearm enhancement in § 2D1.1(b)(1) requires more specific evidence tied to the case. See *Block*, 705 F.3d at 764 (noting that while district courts may consider the "practical reality of the drug trafficking industry" in evaluating foreseeability, "common sense assumptions about the drug trade only go so far and cannot alone satisfy the foreseeability requirement"); *Vold*, 66 F.3d at 921 ("We have never held, however, that the mere risk involved in a drug manufacturing conspiracy establishes the reasonable foreseeability of a concealed firearm under Guideline § 2D1.1(b)(1) absent other evidence.").

The alternative conclusion would come close to making the firearm enhancement a strict liability penalty for everyone any time one party to a drug transaction possessed even a concealed firearm, regardless of whether the particular defendant had any specific reason to expect that a gun would be present. This would be inconsistent with the purpose of the firearm enhancement, which is to reflect the increased danger of violence that exists when drug traffickers possess weapons.

U.S.S.G. § 2D1.1(b)(1) cmt. n. 11(A). The firearm enhancement should not be applied to treat as equally culpable a person who brings the firearm to a deal and a counter-party who is not armed and is not even aware the other is carrying. In this case, there was no particular reason for Thomas Jones to foresee that the buyer's wife was carrying a firearm. The enhancement could have no deterrent effect. The district court clearly erred in applying the enhancement to Thomas Jones. We vacate his sentence and remand for resentencing.

3. *Antwon Abbott*

Abbott was convicted on Count 21 (possession with intent to distribute five grams or more of methamphetamine). The district court calculated his total offense level as 30 and his criminal history category as III. The court applied a two-level enhancement, finding that Abbott's co-conspirators possessed firearms and that their possession was foreseeable to him. The court concluded that Abbott's guideline range was 121 to 151 months in prison. He was sentenced to 121 months.

In applying the enhancement, the district court referred to evidence that Abbott and Balentine were involved in a jointly undertaken criminal activity, that Balentine possessed firearms in his home where he stored and dealt drugs, and that his possession was reasonably foreseeable to Abbott.

Abbott argues on appeal that it was not reasonably foreseeable to him that Balentine possessed firearms. But intercepted communications between Balentine and Abbott undermine his argument and support the court's application of the enhancement. In March 2018, Abbott tried to sell Balentine two firearms for $600 apiece. Balentine declined to buy the guns, telling Abbott that he had just purchased another

firearm. Balentine's admission to Abbott that he already had a firearm at his home was sufficient to demonstrate reasonable foreseeability as to Abbott. We affirm the application of the firearm enhancement to Abbott.

C. *Career Offender Enhancement*

Owens, Michael Jones, and Balentine all challenge the district court's findings that they were career offenders under U.S.S.G. § 4B1.1. The defendants argue that their prior Indiana state drug convictions do not qualify as predicate "controlled substance offense[s]" because Indiana law applies to substances not covered by the definition of a "controlled substance" under the federal Controlled Substances Act.

These defendants recognize that our decision in *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020), rejected an identical argument. They ask us to reconsider that decision. *Ruth* held that the definition of "controlled substance" in the Sentencing Guidelines is not limited to the definition of "controlled substance" in the federal Controlled Substances Act. *Id.* at 654. In reaching that conclusion, we acknowledged there was a circuit split on that question with several circuits choosing an approach contrary to our own. *Id.* at 653. But without a signal from the Sentencing Commission that it intended to incorporate the federal definition into the Guidelines, we declined to do so ourselves. *Id.* at 652. Since *Ruth*, we have rejected repeated arguments that we should abandon it. We do so again here and affirm application of the career offender enhancement to these defendants.

D. *Livelihood Enhancement*

Balentine argues that the district court erred when it applied the so-called livelihood enhancement to him. A

defendant who receives an aggravating role adjustment and who "committed the offense as part of a pattern of criminal conduct engaged in as a livelihood" is subject to a further two-level increase in his offense level. U.S.S.G. § 2D1.1(b)(16)(E). The phrase "engaged in as a livelihood" is defined in the commentary for § 4B1.3. A defendant engages in criminal conduct "as a livelihood" if "(A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then-existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period." U.S.S.G. § 4B1.3 cmt. n.2. Again, we review the district court's factual findings on such a guideline issue for clear error. *United States v. Taylor*, 45 F.3d 1104, 1106 (7th Cir. 1995).

Over Balentine's objection, the district court found by a preponderance of the evidence that he received $90,000 from his sale of methamphetamine from May 2017 to May 2018. The $90,000 figure was based on the conservative estimate that Balentine sold at least 20 kilograms of methamphetamine in that period and received $4,500 per kilogram, though other evidence indicated he received as much as $21,000 per kilogram. The court also found by a preponderance of the evidence that methamphetamine distribution was Balentine's primary occupation during that period.

On appeal, Balentine argues first that the district court erred in calculating the income he derived from drug trafficking because the court failed to consider the $81,000 he lost when the drugs Baird was transporting to Indiana were seized. If the court had considered that loss, he contends, his

income from drug trafficking would not have satisfied the enhancement's first prong.[4]

The district court did not err in estimating the income Balentine derived from his criminal activity. As an initial matter, the government confirmed at sentencing that the drugs seized by police were not included in the 20-kilogram figure used to calculate Balentine's income over the relevant period. The court was therefore right to conclude that Balentine's gross income from selling methamphetamine was at least $90,000. Balentine argues that the $81,000 must be deducted from this figure to arrive at his net income, but this argument overlooks the fact that Balentine and his co-conspirators pooled their money together to purchase the seized drugs. It would not be proper to attribute the full loss of $81,000 to him even if we assumed it mattered.

The government satisfies prong one if it can show that the defendant earned more than 2,000 times the then-current federal minimum hourly wage. In this case, the government needed to show only that Balentine earned more than $14,500 in a year from drug dealing. Consequently, even if the full $81,000 loss were credited to Balentine, prong one would be satisfied if he earned more than $95,500 from dealing drugs. The court's estimate of $90,000 was conservative, and the full $81,000 loss cannot be attributed solely to Balentine. The

[4] It is not clear why such a loss from an ongoing criminal sales business should actually matter under the Guidelines, let alone to a judge trying to implement the broader penological purposes of sentencing set forth in 18 U.S.C. § 3553(a). Consider, for example, whether a court should be concerned about the reasons for a loss. Should it matter whether a loss resulted from law enforcement interdiction or betrayal by a co-conspirator? But we need not dwell on the point here.

district court would not have erred on prong one even if Balentine were entitled to deduct his net loss from the interdiction.

Balentine next argues that the district court erred in finding that drug dealing was his primary occupation because it failed to consider all of his legitimate sources of income. Balentine has not shown that he maintained any legitimate employment. He did not file any federal tax returns, and no W-2s were filed on his behalf showing he had legal employment at the time. Instead, he relies on the $18,000 annually that he received from his mother's death settlement. Courts must consider the totality of the circumstances when determining whether criminal conduct is the defendant's primary occupation. U.S.S.G. § 4B1.3 cmt. n.2. The district court here did take into account the $18,000 that Balentine received annually from the settlement, even though it expressed skepticism about whether that was an "occupation." The district court did not clearly err in finding that the facts justified application of the livelihood enhancement to Balentine.[5]

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[5] We doubt that receipt of passive income, such as from a structured settlement of a lawsuit or an annuity, would properly count as "legitimate employment" for guideline purposes under the definition in § 4B1.3. Nor is it apparent why a sentencing judge exercising sound discretion under § 3553(a) should care about the answer to that question. Countless questions can arise under the Guidelines that have little to do with an appropriate sentence. See, e.g., *United States v. Marks*, 864 F.3d 575, 576–77 (7th Cir. 2017) (application of career-offender guideline depended on whether state court records showed exactly which of several earlier convictions were covered by a particular earlier state parole revocation, bringing those convictions within time period considered for criminal history calculation); *United States v. Iovino*, 777 F.3d 578, 581 (2d Cir. 2015) (discussing precedents on counting victims under fraud Guideline and holding that where defendant embezzled from condominium association, individual

E. *Enhancement for Use of Violence*

Michael Jones' offense level was increased by two levels because "the defendant used violence, made a credible threat to use violence, or directed the use of violence." U.S.S.G. § 2D1.1(b)(2). He argues on appeal that the enhancement was erroneous. Again, we review the district court's findings of fact for clear error and will reverse only "if we are left with a definite and firm conviction that a mistake has been made." *Ramirez*, 783 F.3d at 690.

At sentencing, the district court found by a preponderance of the evidence that Jones had used violence to collect drug debts. The court relied mainly on evidence that in the second half of 2016**,** Michael Jones kidnapped a woman and held her hostage in his home because her boyfriend had not paid a drug debt.

Jones argues that the alleged kidnapping was outside the scope of the charged conspiracy and thus did not further it. He argues that the first evidence of his involvement in the conspiracy was from January 2018, long after the violent incident allegedly occurred.

The district court did not clearly err in finding that the facts supported the enhancement. The indictment alleged and trial evidence showed that the drug distribution conspiracy began no later than mid-2016. The PSR summarized evidence

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condominium owners were all victims where their assessments were raised to cover losses); *United States v. Smith*, 751 F.3d 107, 120 (3d Cir. 2014) (counting as victims for guideline purposes both banks and individual account holders who suffered pecuniary harm). As we said in *Marks*, when faced with such arcane questions, a sentencing judge may and often should ask, "Why should I care?" 864 F.3d at 576.

that Jones was involved before January 2018. In particular, the PSR referred to instances in December 2016 and August 2017 when Jones possessed drugs, or paraphernalia with drug residue on it, and money. An incident that occurred in the latter half of 2016 would have been within the scope of the conspiracy and his involvement in it.

We also have no trouble agreeing with the district court that kidnapping as leverage to collect a drug debt can be understood as a credible threat of violence in furtherance of the conspiracy, or at least as relevant conduct. Evidence showed that Michael Jones owed money to Balentine. Late payments by his customers would prevent him from repaying his debts to Balentine. We affirm the enhancement for Michael Jones.

F. *Drug Quantity Calculations*

Michael Jones and Abbott also challenge the district court's drug quantity calculations used to set their respective base offense levels. Drug quantity, of course, is a powerful driver of guideline calculations for drug offenders.

The government must prove by a preponderance of the evidence the quantity of drugs attributable to the defendant. *United States v. Freeman*, 815 F.3d 347, 353 (7th Cir. 2016). A defendant in a drug conspiracy is responsible "not only for drug quantities directly attributable to him but also for amounts involved in transactions by coconspirators that were reasonably foreseeable to him." *Id.*, quoting *United States v. Turner*, 604 F.3d 381, 385 (7th Cir. 2010).

Since drug networks and dealers rarely keep transparent and reliable accounts, determining drug quantities under the Guidelines is "not an exact science," and district courts may make reasonable estimates based on the evidence. *United*

States v. Austin, 806 F.3d 425, 431 (7th Cir. 2015), quoting *United States v. Sewell*, 780 F.3d 839, 849 (7th Cir. 2015). In estimating drug quantity, the district court may use "testimony about the frequency of dealing and the amount dealt over a specified period of time." *United States v. Hernandez*, 544 F.3d 743, 746 (7th Cir. 2008), quoting *Noble*, 246 F.3d at 952. That information must bear "sufficient indicia of reliability to support its probable accuracy." *Freeman*, 815 F.3d at 354, quoting *United States v. Hankton*, 432 F.3d 779, 789 (7th Cir. 2005). We review a district court's drug quantity calculation for clear error. *Id*. at 353.

1. *Michael Jones*

The court found by a preponderance of the evidence that Jones was accountable for 5,647.6 grams of methamphetamine, 4.73 grams of heroin, and 499 grams of cocaine, yielding a base offense level of 38. The court's calculation included drugs that Jones received while the conspiracy was ongoing but from individuals unrelated to the conspiracy. The court concluded that those transactions were also relevant conduct. The court's calculation also included drugs that were purchased and sold as part of the larger Count 1 conspiracy, even though Michael Jones was not directly involved himself in those transactions. The court reasoned that because Jones bought large amounts of drugs from Balentine, he had to know that the broader conspiracy was moving similarly large amounts of drugs through other people.

On appeal, Michael Jones argues that he should be responsible only for the 91 grams of methamphetamine that he sold to one buyer in January 2018, not the much larger quantities of drugs that Balentine transported from Georgia or the drugs Jones received from suppliers not charged in the indictment.

Michael Jones contends that the drugs transported from Georgia were not reasonably foreseeable to him and that the drugs he received from people other than those named in the indictment were not within the scope of relevant conduct.

Drugs obtained from sources outside the conspiracy should not be included automatically in the relevant conduct analysis; a closer look is needed. "The mere fact that the defendant has engaged in other drug transactions is not sufficient to justify treating those transactions as 'relevant conduct' for sentencing purposes." *United States v. Purham*, 754 F.3d 411, 415 (7th Cir. 2014), quoting *United States v. Crockett*, 82 F.3d 722, 730 (7th Cir. 1996). The district court did not err here, however, when it included the drugs Jones received from sources outside the charged conspiracy.

When setting a defendant's base offense level, the district court considers acts or omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. U.S.S.G. § 1B1.3(a)(2). "Two offenses are part of the same course of conduct where they are 'connected or sufficiently related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.'" *Purham*, 754 F.3d at 414, quoting § 1B1.3 cmt. n.5(B). In determining whether two offenses are sufficiently related to be considered the same course of conduct, courts should consider the "degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." U.S.S.G. § 1B1.3 cmt. n.5(B).

The drug transactions at issue here occurred from late 2017 to May 2018 and thus overlapped with the charged conspiracy. Cf. *Purham*, 754 F.3d at 414 (district court erred in treating as relevant conduct drug transactions that occurred

two years before the charged conspiracy). Michael Jones regularly received methamphetamine from individuals outside the conspiracy. He received approximately one pound of methamphetamine from his outside source each week. Finally, both the conspiracy and Jones' transactions with the outside sources involved methamphetamine eventually sold in Kokomo, so the offenses were very similar. Cf. *United States v. Soto-Piedra*, 525 F.3d 527, 531–32 (7th Cir. 2008) (sale of crack cocaine by defendant's co-conspirators was not relevant conduct because defendant never sold crack himself and there was no evidence he knew that powder cocaine he sold was being converted to crack then sold by his co-conspirators); *Purham*, 754 F.3d at 415 (sales of cocaine to residents of same city on two separate occasions years apart did not link two instances as "relevant conduct").

The overlap between the drugs in the conspiracy and those Michael Jones obtained from other sources at the same time, for distribution in the same city, was sufficient to treat them as relevant conduct, for we "define relevant conduct broadly." *United States v. Orozco-Sanchez*, 814 F.3d 844, 850 (7th Cir. 2016). The district court did not err by treating the drugs Jones purchased from sources outside the charged conspiracy as relevant conduct.

The court also did not err when it included in the Michael Jones calculation the drugs Balentine transported from Georgia as part of the Count 1 conspiracy. Those transactions were foreseeable to Jones, who contributed money to make the purchase. The district court did not err in its drug quantity calculation for Michael Jones.

2. *Antwon Abbott*

The district court attributed 23.2 grams of actual methamphetamine and 127.6 grams of methamphetamine mixture to Abbott, for a base offense level of 28. At sentencing, Abbott objected to the 127.6 grams of methamphetamine mixture. According to wiretap evidence, that was the amount he purchased from Balentine. The court overruled the objection, finding that the evidence of drug quantity was sufficiently reliable.

Abbott first argues there was insufficient evidence that he was purchasing *any* methamphetamine from Balentine. During Abbott's bench trial, the case agent testified that Abbott texted Balentine, "Need one, cuz." Based on his knowledge obtained through the investigation, the agent explained that Abbott was requesting one ounce of methamphetamine. Abbott points out that Balentine sold drugs other than methamphetamine. But the agent testified that methamphetamine was Balentine's primary product, and other evidence he gathered over the course of the investigation supported his understanding that Abbott was requesting methamphetamine. There was no error on this point.

Abbott argues next that a methamphetamine transaction he had planned with Balentine in March 2018 did not in fact occur. "[N]egotiated quantities of undelivered drugs can be included so long as there was true negotiation and not idle talk." *United States v. Corral*, 324 F.3d 866, 871 (7th Cir. 2003). Abbott's request was not idle talk. He reached out to Balentine on the evening of March 15 requesting one ounce of methamphetamine. According to Balentine, Perry Jones tried to contact Abbott about the deal later that evening. The deal was cancelled later when Abbott learned that his potential

customer had stopped in Lafayette and would not be able to meet him to complete the deal. The evidence thus indicated that Abbott arranged to purchase one ounce of methamphetamine from Balentine. The district court did not clearly err in including that planned March 2018 transaction in its drug quantity calculation.

G. *Inaccurate or Unreliable Evidence*

Reed, O'Bannon, and Perry Jones all challenge their sentences on the ground that they were based on unreliable testimony or inaccurate information regarding their prior offenses. We reject these challenges.

Criminal defendants have a Fifth Amendment right to be sentenced based on accurate information. *United States v. Tucker*, 404 U.S. 443, 448–49 (1972), cited in *United States v. Walton*, 907 F.3d 548, 552 (7th Cir. 2018). To prove a violation of that right, "a defendant must show both that the information is false and that the court relied on it." *Walton*, 907 F.3d at 552.

1. *Jason Reed*

Reed was found guilty on Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 4 (distribution of controlled substances), and Count 9 (felon in possession of a firearm). The district court found that Reed's offense level was 43 and that his criminal history category was VI. The district court applied a three-level enhancement for his role as a manager or supervisor in the conspiracy. Reed's guideline sentence was life in prison. He was sentenced to concurrent terms of 420 months on Counts 1 and 4 and 120 months on Count 9.

Reed argues that his sentence should be vacated because his leadership role enhancement and drug quantity

determination were based on unreliable testimony from Melissa Baird, his former girlfriend and co-conspirator. Specifically, he asserts that Baird's testimony that Reed obtained methamphetamine from Balentine for her benefit was unreliable, given that Baird had a personal relationship with Balentine. Similarly, he insists that Baird's testimony that Reed directed her was not believable since Baird had relationships with Balentine and Riley that were independent of Reed.

The district court addressed Baird's credibility. The judge saw her testify at trial and found her testimony to be credible. The judge considered Baird's personal relationship with Balentine but did not find it undermined her credibility. The judge also noted that while independent corroboration of Baird's testimony was not necessary, some was available in the form of Reed's coordination of the drug deal between Balentine and Owens. The court also overruled Reed's objection to the drug quantity and base offense level, again crediting Baird's testimony.

The district court's decision to credit Baird's testimony was not clearly erroneous. Reed's arguments attacking Baird's credibility are, to put it mildly, common in drug prosecutions. His attacks presented issues for the district court to weigh and decide. Baird's interest in seeking some favor or leniency in her own prosecution did not require the district court to discredit her testimony. *United States v. Lockwood*, 840 F.3d 896, 901 (7th Cir. 2016) (district court may credit testimony that is "totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant"), quoting *United States v. White*, 360 F.3d 718, 720 (7th Cir. 2004). Baird's personal relationship with Balentine did not require the court to find that Reed could not have

obtained drugs for Baird. Nor did it preclude the court from finding that Baird was working on Reed's behalf. We affirm Reed's sentence.

2. *Michael O'Bannon*

The jury found O'Bannon guilty on Count 6 (conspiracy to use facilities of interstate commerce to commit murder for hire), Count 11 (possession with intent to distribute between 5 and 50 grams of methamphetamine), and Count 13 (possession of a firearm as a previously convicted felon). The district court found that O'Bannon's total offense level was 47, which was adjusted down to the maximum of 43, and that his criminal history category was IV. His guideline sentence would have been life, but statutory maximums on the counts of conviction meant that the guideline sentence became the de facto life sentence of 720 months (consecutive statutory maximums). The district court gave O'Bannon a long but below-guideline sentence totaling 450 months: concurrent terms of 450 months on Count 11 and 120 months each on Counts 6 and 13.

On appeal, O'Bannon argues that the district court calculated his guideline range based on unreliable evidence. At sentencing, he objected to the district court's reliance on statements made by an associate of his. The district court did not acknowledge the argument and did not make any findings as to the associate's reliability. O'Bannon asserts that the district court's silence on the point requires us to vacate his sentence. We agree that the district court's silence was an error, but a

close look at the overall sentencing decision shows that the error was harmless.[6]

To explain, when a defendant is sentenced based on the drug quantity Guidelines, the court "must find the government's information sufficiently reliable to determine drug quantity by a preponderance of the evidence." *United States v. Helding*, 948 F.3d 864, 870 (7th Cir. 2020). The court must also "take care in determining the accuracy" of evidence that would substantially increase the drug quantity. *Id.* A sentencing court has discretion to credit statements of confidential informants about drug quantity, but when a defendant objects to the evidence as unreliable, the court needs to make a finding about its reliability. *Id.* at 866 (vacating sentence and remanding where district court made no finding about reliability of key evidence).

Here, the district court found that O'Bannon was responsible for a conservative estimate of 48 pounds or 21.77 kilograms of methamphetamine based on a statement made by O'Bannon's associate to the case agent. The associate did not testify at the trial or sentencing hearing. In his statement, the associate claimed that for at least two years, he traveled to Georgia with O'Bannon two to five times a month to conduct drug business. He said they would pick up two to eight pounds of methamphetamine on each trip. At another point, however, the associate said they bought seven to eight pounds of methamphetamine per trip. O'Bannon alerted the district court to this inconsistency and other errors in the associate's statement that made the math calculations "fuzzy,"

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[6] The government did not respond to this argument in its brief, and we denied its later request to file a supplemental brief.

but the court did not make any findings that explained its reliance on the associate's statement.[7]

That was a procedural error. Both Federal Rule of Criminal Procedure 32(i) and U.S.S.G. § 6A1.3 require the court to make findings on disputed issues. While we have often said that a district court need not belabor the obvious at sentencing, the reliability of secondhand information from an associate about the volume of a defendant's dealings is not obvious. A sentencing court "may pass over in silence frivolous arguments for leniency, but where a defendant presents an argument that is 'not so weak as not to merit discussion,' a court is required to explain its reason for rejecting that argument." *United States v. Schroeder*, 536 F.3d 746, 755 (7th Cir. 2008), quoting *United States v. Miranda*, 505 F.3d 785, 792 (7th Cir. 2007). O'Bannon pointed to inconsistencies suggesting that the associate's statement was unreliable. The court should have explained why it nevertheless found the associate credible. *Helding*, 948 F.3d at 871–72 (vacating sentence where trial court did not take steps to ensure that out-of-court statements from confidential informants about quantity defendant sold had "a modicum of reliability").

In this case, however, we are persuaded that even if the amounts attributed to O'Bannon by that associate were removed from the calculation, there would have been no bottom-line effect on the guideline recommendation. The judge made clear that he thought a preponderance of the evidence

[7] The associate also claimed that methamphetamine sold for about $40,000 per kilogram in Kokomo. At the sentencing hearing, however, the case agent said that estimate was "not accurate whatsoever," and that methamphetamine sold for about $10,000 per kilogram.

showed that O'Bannon could properly be found accountable for the even larger drug quantities attributed to Reggie Balentine and Perry Jones. If the judge had done so, he would have used a base offense level of 38 for O'Bannon's drug count rather than the 36 that was actually used. See O'Bannon Sent. Tr. 118–19, 128, 168.

In other words, despite the erroneous failure to address the credibility of the associate's statement, the judge cut O'Bannon a significant break on drug quantity. Numerous other enhancements would still have applied regardless of the base offense level: two levels for possession of firearms, two levels for using or directing use of violence, two levels for a pattern of criminal conduct, three levels for being a manager or supervisor, and two more levels for obstructing justice. O'Bannon Sent. Tr. 134.

If we were to remand for a finding on the associate's statement, and if the district court were to find the statement about drug quantity not credible, we have no doubt the court would hold O'Bannon accountable for Balentine's and Perry Jones' drug quantities. That would raise his base offense level by two levels. Under either base offense level, the total guideline calculation would still be literally off the chart, and the result would be a total offense level of 43 with a recommendation of a life sentence. Because no count of conviction authorized a life sentence, the life recommendation would in turn be converted to a recommendation of maximum statutory sentences totaling 720 months. O'Bannon Sent. Tr. 135. The judge varied downward substantially from the recommendation, providing a detailed explanation under 18 U.S.C. § 3553(a) that showed thoughtful consideration of powerful aggravating

and mitigating circumstances and the individual circumstances of O'Bannon's life and his crimes.

Because O'Bannon's guideline range and ultimate sentence would not change on remand, the district court's oversight was harmless, so we affirm O'Bannon's sentence. See *Thomas*, 897 F.3d at 817 (two-level error harmless where final range would still have been life in prison); *Fletcher*, 763 F.3d at 718 (guideline error harmless where either calculation was higher than statutory maximum, so that final guideline recommendation of statutory maximum would stay the same); *United States v. Anderson*, 517 F.3d 953, 966 (7th Cir. 2008) (guideline error harmless where Guidelines would call for same range upon resentencing).

3. *Perry Jones*

Perry Jones pleaded guilty to Count 1 (conspiracy to possess with intent to distribute and to distribute controlled substances), Count 7 (felon in possession of a firearm), and Count 17 (felon in possession of a firearm). The district court found that his total offense level was 38 and his criminal history category was V, which yielded a guideline range of 360 months to life. The court sentenced him to concurrent terms of 260 months on Count 1, 60 months on Count 7, and 60 months on Count 17.

At sentencing, Perry Jones sought a downward departure or variance on the ground that his criminal history category overstated the seriousness of his record. Specifically, he argued that his 1994 Indiana conviction for dealing cocaine within 1000 feet of school property, for which he was sentenced to 25 years in prison, did not deserve three criminal history points. The only information about the offense

available to the court was that Jones had sold cocaine to an informant for $40. The Sentencing Guidelines encourage departures where criminal history calculations over- or underrepresent the seriousness of the defendant's record and the likelihood that the defendant will commit other crimes. U.S.S.G. § 4A1.3(b)(1). Courts have wide discretion in deciding whether to grant a departure or variance. *United States v. Marin-Castano*, 688 F.3d 899, 905 (7th Cir. 2012). Here, the district court denied Perry Jones' request for a downward departure or variance based on criminal history, though its final sentence was 100 months below the bottom of the guideline range.

On appeal, Jones argues that the district court erred by assuming that there were aggravating factors involved in his 1994 offense and giving "specific consideration" to those assumptions when setting his sentence. We are not persuaded.

In considering Perry Jones' request for a downward departure, the district court explained that it did not know what the rules were under Indiana law, but "it would appear that … there was a reason for a serious sentence like that." The court acknowledged that the low ($40) stakes in the transaction presented the best argument for a downward departure but said "there's just scant little here on the $40 to justify a 25-year sentence. I think there's got to be more." The court again expressed its suspicions about the circumstances of the offense, explaining, "I don't know what the law is, but a 25-year sentence is not insignificant. So I think that there had to be some serious stuff going on there. It's within a school. Maybe that was it." In response to defense counsel's assertion that the court should focus on what was in the record and not speculate on what may have justified the sentence, the court

explained that it would be improper to look the other way and say this was a minor offense when "the severity of the sentence argues otherwise."

The district court had before it hard evidence showing that the state court imposed a 25-year sentence—a long sentence by any standards. It was not speculative for the court to interpret that sentence as a reflection of the seriousness of the offense. Though the low stakes of the transaction weighed in favor of a downward departure, the district court, with the limited information it had before it, was not required to find that the Guidelines overstated the seriousness of Jones' 1994 conviction.

More generally, as we see the issue, the problem is not that the district court relied on bad information. The problem is instead that Jones did not provide enough information to convince the court to disregard the guideline calculations. Based on the available information about Jones' 1994 conviction, the district court correctly assessed three criminal history points. Jones offered one additional detail (that the deal was for only $40 worth of drugs) but nothing more. The judge considered the point and candidly speculated about possible explanations for the severe sentence. In the absence of more information about the circumstances of the 1994 case, the judge simply was not persuaded to depart. Jones has not shown that the court relied on speculation in setting his (below-guideline) sentence.

It is possible that additional information might show that three criminal history points overstate the seriousness of the 1994 conviction. But the district court's calculation was correct. If Jones had additional information showing that his criminal history points overstated the seriousness of his 1994

conviction, he had the opportunity to provide it to the court and should have done so. The court was not required to depart from the Guidelines as written, especially without reliable information supporting Jones' argument that those provisions overstated the seriousness of the conviction.

We recognize that the judge wondered aloud why the 1994 sentence was so serious and speculated about possible explanations. There is nothing wrong with such questioning and speculating along the path to a final decision. The judge's questions could not be answered by the parties, but that does not mean the court relied upon false information in deciding the sentence. Instead, the court followed the Guidelines in the criminal history calculation for the 1994 conviction. Jones simply did not provide information to the court requiring it to vary or depart from that technically correct calculation.

Moreover, considering the court's broader explanation for the sentence, the 1994 conviction that is the focus on appeal played little if any role in the court's ultimate decision to give Jones a below-guideline sentence. When addressing criminal history, the court focused instead on several undisputed aspects of his record that weighed against a downward departure or variance. Jones had been in and out of prison his whole life. Even after he received a 25-year sentence when he was only 18 years old, he continued to engage in crime. The court also noted that Jones had been released early on parole for the 1994 conviction, but he violated parole and went back to prison, as he did several other times. The district court did not err in its treatment of Jones' criminal history in general or the 1994 conviction in particular.

H. *Substantive Reasonableness*

At the time of sentencing, Perry Jones was 45 years old. He reports that he is in poor health and asserts that African American men his age have an average life expectancy of about seventeen years. Even the below-guideline sentence of 260 months may amount to a life sentence for him. Given all this, Perry Jones argues that his sentence was substantively unreasonable.

We review the substantive reasonableness of a district court's sentencing decisions for abuse of discretion. *United States v. Griffith*, 913 F.3d 683, 687 (7th Cir. 2019). "When assessing the substantive reasonableness of a sentence under the abuse of discretion standard, we presume that a within-guidelines sentence is reasonable." *Id.* at 689. It follows that we also presume that a below-guidelines sentence is not unreasonably harsh. *Id.* The defendant "bears the burden of rebutting that presumption by demonstrating that the sentence is unreasonably high in light of the section 3553(a) factors." *Id.*

Jones argues that his "addiction-related, non-violent, low-level drug distribution[]" convictions mandate a lower sentence. In other words, he contends that the circumstances of his criminal history and life in general justify a further reduced sentence.

We have often said that the probability that a defendant "will not live out his sentence should certainly give pause to a sentencing court." *United States v. McDonald*, 981 F.3d 579, 582 (7th Cir. 2020), quoting *United States v. Wurzinger*, 467 F.3d 649, 652 (7th Cir. 2006). Such sentences can arise where a defendant has amassed a long record of repeated criminal

activity, as Perry Jones had. We have affirmed such de facto life sentences where the sentencing court appreciated the severity of the sentence, as the court did here. *Id.*

Different judges might have responded differently to Jones' mitigating arguments, but such differences do not show error. The district court considered these circumstances in setting this sentence. The court acknowledged that Jones had faced many challenges in his life and that he had been introduced to drugs early on, leading to an addiction that he struggled to overcome. The court acknowledged that Jones' criminal activity was not necessarily a product of greed or a desire to create a large-scale drug operation but was instead driven by his addiction. The court also considered Jones' age when setting his below-guideline sentence. The court ultimately concluded, however, that the seriousness of the offense, including the involvement of guns and the fact that Jones fled from police on multiple occasions, justified the sentence imposed.

Jones cites the thorough opinion by the late Judge Weinstein in *United States v. Bannister*, 786 F. Supp. 2d 617 (E.D.N.Y. 2011), which reviewed broad issues of race, poverty, and history shaping the criminal justice system, federal sentencing law, and individual sentencing decisions. *Bannister* is an example of the broad discretion district judges regained in the wake of *United States v. Booker*, 543 U.S. 220 (2005), as the Sentencing Guidelines were rendered effectively advisory.

The district court here had the discretion to follow an approach like *Bannister*, but it was not required to do so. The court in this case weighed the mitigating factors differently than Jones would have liked. That is not sufficient to rebut the presumption that his below-guideline sentence was not

unreasonably severe. See *United States v. Trujillo-Castillon*, 692 F.3d 575, 578 (7th Cir. 2012) (district court did not err in evaluating mitigating evidence simply because it assigned such evidence less weight than defendant would have liked).

Perry Jones also argues that the current conversion ratio for methamphetamine is "faulty" because it does not comport with changes in how the drug is manufactured and trafficked. This challenge amounts to a generalized policy disagreement with the Guidelines. District courts may depart or vary from the advice of the Guidelines based on such policy disagreements, but they are not obliged to do so. *United States v. Oberg*, 877 F.3d 261, 264 (7th Cir. 2017); *United States v. Stephens*, 986 F.3d 1004, 1010 (7th Cir. 2021) ("[A] sentencing court may pass over generalized policy disagreements with the Guidelines."). The potentially "problematic" treatment of methamphetamine in the Guidelines is an issue that may be addressed by Congress or the Sentencing Commission, or by individual judges. It does not make Perry Jones' sentence unreasonable. We affirm his sentence.

I. *Acquitted Conduct*

Finally, O'Bannon argues that he was unconstitutionally sentenced based on conduct for which he was acquitted. The jury acquitted him of the Count 1 conspiracy, but the district court nevertheless imposed a three-level enhancement for his role as a manager or supervisor of that conspiracy after finding by a preponderance of the evidence that O'Bannon had actually participated in the conspiracy. As O'Bannon acknowledges, his argument is foreclosed by binding Supreme Court precedent. *United States v. Watts*, 519 U.S. 148, 157 (1997) (jury's verdict of acquittal does not prevent sentencing court from considering conduct underlying acquitted

charge so long as conduct has been proved by preponderance of evidence); accord, e.g., *United States v. Bridgewater*, 950 F.3d 928, 938 (7th Cir. 2020); *United States v. Hurn*, 496 F.3d 784, 788 (7th Cir. 2007). The district court did not err on this point.

* * *

We AFFIRM the convictions of all the defendants. We also AFFIRM the sentences for all defendants, except for Thomas Jones, whose sentence is VACATED and whose case is REMANDED for resentencing consistent with this opinion.

KIRSCH, *Circuit Judge*, dissenting in part. I agree with the majority's resolution of every issue but one. In my view, the district judge committed no error in applying the firearm enhancement to Thomas Jones, and therefore, he is not entitled to resentencing.

Our review of the district court's application of a firearm enhancement is highly deferential. "We review the district court's factual findings for clear error and will reverse only if we are left with a definite and firm conviction that a mistake has been made." *United States v. Ramirez*, 783 F.3d 687, 690 (7th Cir. 2015). For the enhancement to apply to Thomas Jones, the district court needed to find by a preponderance of the evidence that: (1) someone in the jointly undertaken criminal activity actually possessed a firearm in furtherance of the activity, and (2) the firearm possession was reasonably foreseeable to Thomas Jones. See *id.* The district court found that Thomas Jones's uncle and co-conspirator Michael Jones possessed a firearm in furtherance of the joint criminal act—the January 2018 drug deal—and his possession was reasonably foreseeable to Thomas Jones. Neither finding was erroneous.

A sentencing judge's factual finding at step one "is not an onerous burden," and can be satisfied by evidence that a co-conspirator "regularly carried a gun during the course of the conspiracy." See *United States v. Luster*, 480 F.3d 551, 558 (7th Cir. 2007). The district court found that Michael Jones possessed a gun at the January 2018 transaction based on exactly this type of evidence. The judge found credible the trial testimony of Michael Bradley, a drug dealer who purchased methamphetamine from Michael Jones on several occasions from the fall of 2017 to March 2018. Bradley testified that Michael Jones was "always" armed and never left his home without a

gun. Bradley further testified that "[t]here was never a time that [Michael Jones] didn't have a gun" during their drug transactions. According to Bradley, Michael Jones kept a gun on his person and in his Hummer—the same vehicle in which Thomas and Michael Jones met with the buyer and his wife and executed the January 2018 transaction. The judge also relied on corroborating evidence demonstrating that Michael Jones possessed guns on other occasions. This reliable evidence that Michael Jones always possessed a gun and kept a gun in his Hummer supported an inference that he possessed a gun at the January 2018 drug deal.

The majority eschews clear error review to discard the district court's supported factual findings. But nothing in the record suggests that the district court made a mistake. The majority says that the record contains "no evidence that Michael Jones … actually possessed a firearm in connection with the January 2018 transaction." Ante at 62. To reach that conclusion, the majority dismisses Bradley's testimony because he "was not a party to the drug transaction in question." *Id.* at 63. But sentencing judges are not required to track down direct evidence from an eyewitness or an individual actually involved in the particular jointly undertaken activity. Bradley's credible testimony supported a finding that Michael Jones possessed a gun at the January 2018 drug transaction because he "always" possessed a gun during drug transactions from the fall of 2017 to March 2018 and kept one in his Hummer. Nothing in the record suggests that this inference was implausible. See *United States v. DeLeon*, 603 F.3d 397, 402 (7th Cir. 2010). The majority might view Bradley's testimony differently than the district judge, but our "task on appeal is not to see whether there is any view of the evidence that might undercut the district court's finding; it is to see whether there is

any evidence in the record to support the finding." *United States v. Wade*, 114 F.3d 103, 105 (7th Cir. 1997); see also *United States v. Ford*, 22 F.4th 687, 693 (7th Cir. 2022) (clear error does not permit reversal simply because the facts before the sentencing judge "allowed room for argument"); *United States v. Jarrett*, 705 F.2d 198, 208 (7th Cir. 1983) (as the factfinder at sentencing, the district court is entitled to accord such weight as it sees fit to witness testimony).

Because the majority holds that the district judge clearly erred at step one, it does not address whether Michael Jones's gun possession was reasonably foreseeable to Thomas Jones. Clearly, it was. Michael and Thomas Jones lived together and conspired to sell methamphetamine at the January 2018 transaction and on several other occasions. According to Rebecca Myers, after Thomas Jones got out of prison for another meth conviction in December 2017, he lived with her and Michael Jones. As the majority acknowledges, the district court "noted that Thomas Jones lived on and off with Michael, who had guns in his home[.]" When agents searched the residence in May 2018, they recovered four firearms. The district judge also found that there was evidence that Thomas Jones "was not a stranger to weapons in his own past drug dealings," making it foreseeable that this type of transaction might include guns. (In February 2016, officers executing a search warrant searched Thomas Jones's safe and found a gun, magazine, and drugs.) There is nothing unusual about guns at drug transactions, particularly by those who regularly possess guns in connection to drug dealing. See *United States v. Jones*, 900 F.3d 440, 449 (7th Cir. 2018) ("Our court has recognized that, given the dangers of drug trafficking, guns and drugs often go hand in hand."). I would affirm the district court's unremarkable factual finding that Michael Jones's gun

possession at the January 2018 drug deal was reasonably foreseeable to Thomas Jones.

In sum, I respectfully dissent from the majority's holding that the district court clearly erred in applying the firearm enhancement based on Michael Jones's possession at the January 2018 transaction. But this holding does not bar application of the enhancement for a different reason on remand. The first time around, the district court opted to define the scope of the joint criminal undertaking as the January 2018 transaction because "even though [it] could" find that Thomas Jones participated in the broader conspiracy, the judge didn't believe he needed to make such a finding. It will be up to the district judge on remand to decide whether to re-evaluate the scope of Thomas Jones's participation in jointly undertaken criminal activity.