No. 08-2817

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

COREY JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division

Case No. 07-CR-10044

Hon. Joe B. McDade, Presiding Judge

REPLY BRIEF OF DEFENDANT-APPELLANT COREY JOHNSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

ARGUMENT

I. The District Court Erred In Refusing To Give The Jury A Buyer-Seller Instruction.

This Court should reverse Johnson's conviction because the district court erred in refusing to give Johnson's proposed buyer-seller jury instruction. Because Johnson adequately alerted the district court to this issue during the jury instruction conference, this Court should review the district judge's decision *de novo* and conclude that there was ample foundation in the evidence to support giving the instruction. Moreover, the government waived any argument that the district court's error was harmless and, in any event, given the clear and obvious prejudice Johnson suffered, this Court should find the district court's error was not harmless and reverse his conviction. Finally, even if this Court reviews for plain error, Johnson's conviction likewise should be reversed; the district court's plain error substantially affected Johnson's rights because the jury was denied the deliberative tools it needed in order to properly weigh the evidence.

A. The Court should review the district court's decision to reject Johnson's proposed buyer-seller instruction *de novo*.

This Court should review the district court's decision to refuse Johnson's buyer-seller instruction *de novo* because defense counsel adequately preserved the issue for review under Rule 30. Fed. R. Crim. P. 30 (requiring the party to make a timely objection before the jury deliberates that "informs the court of the specific objection and the grounds of the objection"); *United States v. Meyer,* 157 F.3d 1067, 1074 (7th Cir. 1998) (stating this Court "review[s] the district court's decision that a

defendant has failed to present sufficient evidence to become entitled to a jury instruction on a theory of defense *de novo*").

The purpose underlying Rule 30 "is to alert the district court to potential problems in jury instructions and thereby avert any error in the first place," *United States v. O'Neill,* 116 F.3d 245, 247 (7th Cir. 1997), which the court may only do if aware of the potential problem, *see United States v. Requarth,* 847 F.2d 1249, 1253 (7th Cir. 1988). Therefore, "[s]o long as the district judge is apprised of the grounds for the objection, . . . a litigant is not required to adhere to 'formalities of language and style.'" *United States v. Martinez,* 988 F.2d 685, 698 (7th Cir. 1993). In the context of jury instructions, this Court has found that the defendant adequately made his record and thus preserved the issue for appeal when the defendant simply proposed a particular instruction and cited appropriate law at the bottom of the instruction, even though the defendant did not renew his objection after the district judge's ruling. *United States v. Pedigo*, 12 F.3d 618, 626 (7th Cir. 1983). This Court has explicitly noted that Rule 30 "does not require a defendant to argue with the court once the issue has been presented to the court and ruled upon," *id*., because after counsel has "alerted the court and the opposing party to the specific grounds for the objection in a timely fashion[,] . . . [t]here is no utility in requiring . . . counsel to object again after the court has made its final ruling," *United States v. James,* 464 F.3d 699, 707 n.1 (7th Cir. 2006).

Defense counsel here not only satisfied *Pedigo*'s issue-preservation rule by offering a buyer-seller instruction supported by adequate authority, (R. at 168)

(defense proposed buyer-seller jury instruction, citing Seventh Circuit Federal Criminal Jury Instruction 6.12), but he also affirmatively argued the point during the jury instruction conference at the close of evidence, (Trial Tr. 745:3–25).[1] Thus, the district court was adequately apprised of the defendant's position with respect to his proposed jury instruction, *see O'Neill*, 116 F.3d at 247, and once the district court rejected the defendant's buyer-seller instruction, (Trial Tr. 746:1–3), there would have been "no utility" in continuing to belabor the point, *James*, 464 F.3d at 707 n.1. Therefore, this Court should consider Johnson's challenge to the district court's rejection of the buyer-seller instruction preserved and review that decision *de novo*.

B. The district court erred in refusing to instruct the jury on Johnson's buyer-seller theory of defense.

The district court erred when it rejected Johnson's proposed instruction that would have allowed the jury to find that Johnson was merely engaged in buyer-seller relationships rather than conspiratorial ones. A criminal defendant is entitled to an instruction on her buyer-seller theory of defense where the instruction "is supported by law and . . . has some foundation in the evidence, however tenuous." *United States v. Irorere*, 228 F.3d 816, 825 (7th Cir. 2000) (internal quotations omitted); *see also, e.g., United States v. Mims,* 92 F.3d 461, 466 (7th Cir.

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[1] During the jury instruction conference the government objected, stating that a buyer-seller defense was inconsistent with the general denial Johnson had supposedly entered. (Trial Tr. 745:8–15.) Rather than sit idly and tacitly agree with the prosecution, defense counsel countered by claiming that, via Shuntisha Carpenter's testimony, Johnson had "admitted that he [was] a buyer" and that this supported his proposed instruction. (Trial Tr. 745:16–25.)

1996) (reversing a conviction for conspiracy even where "a properly instructed jury might, nonetheless, have determined that there was a conspiratorial agreement"). There was ample evidence at trial, both within the defendant's and the government's presentation of proof, that Johnson engaged in mere buy-sell transactions. *See United States v. Askew*, 403 F.3d 496, 504 (7th Cir. 2005) (stating that the Court had to review the government's evidence as well as the defendant's theory to determine whether a buyer-seller instruction was warranted).

First, the defense presented evidence that Johnson at the very least purchased drugs and used them regularly. (Trial Tr. 695:20–21, 710:25–712:4.) In fact, Shuntisha Carpenter, Johnson's girlfriend, testified that Johnson owned a scale to weigh the drugs he purchased to verify that he received the correct amount. (Trial Tr. 711:13–18.) The government's case-in-chief offered even more proof of the buyer-seller nature of many of these transactions. Perhaps the most glaring example is Johnson's alleged relationship with Robert Griffin. Griffin testified that he would call Johnson whenever he wanted to buy drugs. (Trial Tr. 374:8–13, 379:12–18.) These "as-needed" spot transactions are characteristic of a buyer-seller relationship. *See United States v. Thomas* ("*Thomas II*"), 284 F.3d 746, 753–54 (7th Cir. 2002) (noting that "mutually-satisfactory, spot transactions" supported a finding that the defendant was merely engaged in a buyer-seller relationship rather than a conspiracy). Additionally, the jury could have found that Johnson's relationships with Paul Caston, to whom Johnson sold only user amounts of drugs, (Trial Tr. 264:12–265:10, 268:17–20), and Willie Friend, to whom Johnson sold

drugs no more than seven times in a two-month period, (Trial Tr. 294:17–309:14), indicate mere buyer-seller relationships. *See also* (Appellant's Br. 23–25.) These relationships, combined with the government's inability to prove that Johnson had a shared stake in the illicit ventures of any of his alleged co-conspirators, further solidify the evidentiary basis for Johnson's proposed buyer-seller instruction.

In response, the government offers three equally misguided rationales for the district court's decision. First, the government relies on *Askew* for the proposition that the defendant must offer a buyer-seller defense at trial to be entitled to such an instruction. (Gov't Br. 36.) The government's position overstates *Askew's* ruling and the governing "some evidence" standard. Although this Court in *Askew* considered the defendant's failure to adopt a buyer-seller defense as one factor that cut "in favor of finding no error in the district judge's decision not to give the [buyer-seller] instruction," 403 F.3d at 504, that factor was neither required nor dispositive. In fact, this Court went on to "review the evidence presented by the government to determine whether it was such that a jury could confuse a buyer-seller relationship with a conspiratorial one." *Id.* Thus, the Court's attention was properly focused on the evidence offered by both the government and the defendant at trial, and not on the existence or absence of a buyer-seller theory of defense.

Second, relying on this erroneous formulation of the rule, the government claims that Johnson did not present a buyer-seller theory of defense at trial. (Gov't Br. 37–39) (stating that "[a]t no point in the trial did Johnson suggest that he dealt drugs as part of a buyer-seller relationship" and that "Johnson's position

throughout trial was that he never sold drugs and was merely a user"); *see also* (Trial Tr. 556:8–11) (government trial counsel stating that "[his] understanding of [the buyer-seller] instruction is that it is not given or it's not appropriate to give it where the defendant is indicating that he did not sell or distribute drugs"). Contrary to the government's suggestion, however, the buyer-seller theory of defense is not reserved exclusively for drug sellers; as its name suggests, the defense extends to buyers as well.[2] *See, e.g., Mims*, 92 F.3d at 463–64 (holding that a *buyer* of drugs was entitled to a buyer-seller instruction); *cf. Askew*, 403 F.3d at 503–04 (finding that the defendant's theory of defense that "den[ied] any involvement whatsoever with illegal drugs" cut against giving a buyer-seller instruction). Johnson never denied his drug use, and evidence at trial supported a finding that Johnson was merely a buyer to support his own habit. (Trial Tr. 710:25–712:4.)

Finally, the government concentrates exclusively on facts tending to prove a conspiratorial agreement, (Gov't Br. 39–40), wholly ignoring the other facts in the record that show a buyer-seller relationship. The appropriate standard for determining whether a defendant is entitled to a buyer-seller instruction is not whether the evidence supports a conviction for conspiracy, but instead whether there is some foundation in the evidence to support the buyer-seller instruction. *See, e.g., Mims,* 92 F.3d at 466 (reversing a conviction for conspiracy even where "a

[2] The Seventh Circuit's instruction on buyer-seller relationships states: "The fact that a defendant may have bought cocaine from another person . . . is not sufficient without more to establish that the defendant was a member of the charged conspiracy." (R. at 168.)

properly instructed jury might, nonetheless, have determined that there was a conspiratorial agreement"); *United States v. Gee*, 226 F.3d 885, 895–96 (7th Cir. 2000) (reversing defendant's conviction for conspiracy where "[t]he evidence was as consistent with a buyer-seller relationship as it was with a conspiracy"). Thus, even assuming that a jury could have inferred conspiratorial relationships with some of the witnesses, the record equally supplied ample evidence for a jury to infer buyer-seller relationships with these very same people. Because this evidentiary foundation is all that is required for Johnson to receive his proffered buyer-seller instruction, the district court erred in rejecting it.

C. The government waived any argument that the district court's error in refusing to instruct the jury on Johnson's buyer-seller theory of defense was harmless.

The government waived any argument that the failure to give a buyer-seller instruction was harmless. The government bears the burden of showing that an error was harmless*, see United States v. McKinney*, 954 F.2d 471, 475 (7th Cir. 1992), and where, as here, the government fails to address harmless error, that argument is waived, *United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991) (per curiam). Although this Court does have discretion to undertake a harmless-error analysis on its own, the "controlling considerations are the length and complexity of the record, whether the harmlessness of the error or errors found is certain or debatable, and whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court." *Id.* at 227.

Johnson argued extensively in his opening brief that the district court's error was not harmless, (Appellant's Br. 28–31), yet the government wholly failed to respond.[3] Moreover, given the government's unexplained failure to conduct a harmless-error analysis, this Court need not overlook this waiver and undertake its own analysis, a burdensome exercise that would require the Court to piece together the various relationships to determine which ones are properly categorized as buyer-seller. *See Giovannetti*, 928 F.2d at 226 (discussing the burdens placed on the Court when forced to a review a case for harmless error after a government waiver). Appellant has offered several reasons why the error was prejudicial, so harmlessness is far from certain. In any event, as discussed in detail in the opening brief, (Appellant's Br. 28–31), the district court's error prejudiced Johnson; a reversal of Johnson's conviction would result in a new trial in which the jury would be armed with the necessary deliberative tools it was denied in Johnson's first trial.

D. Even under a plain error standard, the Court should reverse Johnson's conviction because the district court plainly erred in refusing to give a buyer-seller instruction.

Even if this Court were to review the district court's decision for plain error, Johnson's conviction should nevertheless be reversed because the district court's error was plain and obvious. To reverse a conviction for plain error, this Court must find that: (1) an error occurred; (2) the error was "plain," meaning that it was obvious or clear under the law at the time; (3) the error affected the defendant's

[3] The government's plain error analysis does not and cannot substitute for a harmless error analysis. *See McKinney*, 954 F.2d at 475 (noting that "harmless error and plain error are not the same").

substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of the trial. *United States v. Johnson*, 437 F.3d 665, 677 (7th Cir. 2006). Although the government's brief fails to address any of the first three prongs in any systematic way, just such an examination shows that the district court plainly erred when it refused to give the jury a buyer-seller instruction.

1. The district court erred in refusing to give a buyer-seller instruction.

As discussed above and in the opening brief, the district court erred when it refused to instruct the jury on Johnson's buyer-seller theory of defense. A defendant is entitled to an instruction on her theory of defense when: "(1) the proposed instruction is a correct statement of the law; (2) the evidence in the case supports the theory of defense; (3) the theory of defense is not already part of the charge; and (4) failure to include the proposed instruction would deny the defendant a fair trial." *Meyer*, 157 F.3d at 1074. Johnson proposed the Seventh Circuit's pattern instruction on buyer-seller relationships, (R. at 168), and there was ample evidence to support it. The district court nevertheless rejected Johnson's proposed buyer-seller instruction and refused to instruct the jury as to the distinction between a buyer-seller relationship and a conspiracy. (Trial Tr. 746:1–3.) As a result, the district court denied Johnson a fair trial.

2. The district court's error was plain and obvious.

Not only is error required, "the error must be clear under current law . . . ." *Mims*, 92 F.3d at 465. At the time of Johnson's trial, it was a clearly established rule that "[e]vidence that the defendant was in a mere buyer-seller relationship

with the alleged coconspirator is insufficient to establish a conspiracy." *Johnson*, 437 F.3d at 675. This legal principle is manifested in this Court's pattern jury instruction on buyer-seller relationships. (R. at 168) (citing Federal Criminal Jury Instruction 6.12). Additionally, the rule that a defendant is entitled to such an instruction where there is some foundation in the evidence was also clearly established at the time of Johnson's trial. *See, e.g., United States v. Douglas*, 818 F.2d 1317, 1321 (7th Cir. 1987). The district court's error in rejecting Johnson's buyer-seller instruction was thus plain and obvious.

3. The district court's error violated Johnson's substantial rights.

A conviction will be reversed under the plain error standard if the error affected the defendant's substantial rights, meaning that the error "affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993). The purpose of the buyer-seller instruction is to make the jury aware that it cannot base a conspiracy conviction on a simple buyer-seller relationship. *See United States v. Thomas* ("*Thomas I*"), 150 F.3d 743, 745 (7th Cir. 1998) (per curiam) (noting that the buyer-seller instruction "reminds juries that distribution of drugs is not itself conspiracy"). Moreover, the Fifth Amendment affords criminal defendants the right to have the jury instructed on a theory of defense. *See Douglas*, 818 F.2d at 1322. Failure to so instruct the jury violates that defendant's right to a fair trial. *Id.* at 1319.

In this case, because the evidence supported the instruction but the jury was not made aware of this potentially exculpatory theory, the jury did not have the

proper tools with which to deliberate. That is, due to the district court's error, this Court "cannot be sure whether the jury made the factual findings of conspiratorial agreement necessary for a verdict of guilt." *Mims*, 92 F.3d at 466. As a result, the district court's error affected Johnson's substantial rights.

4. The district court's error seriously affected the fairness and integrity of the trial.

Not only did the district court plainly err in refusing to instruct the jury on Johnson's buyer-seller theory, but its error also seriously affected the fairness and integrity of Johnson's trial. If this Court determines that the district court's plain error affected the defendant's substantial rights, it will reverse the defendant's conviction when the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[,]" *Olano*, 507 U.S. at 732 (internal quotations omitted), such as in instances where the error "goes to the very basis of the jury's ability to evaluate the evidence," *Douglas*, 818 F.2d at 1322 (internal quotations omitted). This Court in *Mims* found that "where the existence of a conspiratorial agreement was closely contested and conflicting evidence was presented on the issue, the failure to ensure a jury finding on this essential element undermined the essential fairness and integrity of the trial." *Mims*, 92 F.2d at 466.

In this case, the government cobbled together a conspiracy supported only by tenuous evidence from six unrelated prison inmates testifying pursuant to proffer agreements. The evidence admitted at trial, however, could equally, and in some instances more accurately, be explained as a series of buyer-seller relationships. The mere fact that the jury could have acquitted Johnson of conspiracy on the basis

of these buyer-seller relationships necessitates a finding that the district court's error seriously affected the fairness and integrity of Johnson's trial. To hold otherwise would run afoul of the fundamental principle that defendants should be found guilty beyond a reasonable doubt of the crimes with which they are charged. Because one cannot be sure that the jury adhered to this basic notion of fairness and integrity, this Court should reverse Johnson's conviction.

II. No Rational Juror Could Have Found Johnson Guilty Of Conspiracy To Distribute The Charged Amount Of Drugs.

A. Johnson properly preserved his sufficiency argument.

The government argues that Johnson forfeited his sufficiency argument by failing to ask the district court for an acquittal under Federal Rule of Criminal Procedure 29, thus limiting this Court to a "manifest miscarriage of justice" standard of review. (Gov't Br. 23–24.) The government's argument, however, is without merit. This Court should consider Johnson's motion for a new trial, which was filed seven days after the verdict and raised the sufficiency argument, (R. at 192), to have preserved the argument because: (1) the government's cases are inapplicable; and (2) finding a waiver would undermine the purpose of the waiver doctrine.

First, none of the government's cases in support of a waiver apply in this case because they all involve a complete failure to raise the insufficiency issue at the close of evidence. *See*, *e.g.*, *United States v. Brandt*, 546 F.3d 912, 915–16 (7th Cir. 2008). Here, although Johnson did not file a Rule 29 motion, Johnson raised a sufficiency argument in his Rule 33 motion for a new trial. (R. at 192.) Indeed, this

Court has strongly indicated that for the purposes of waiver of a sufficiency argument, the two motions are equivalent. *See United States v. Sachsenmaier*, 491 F.3d 680, 683 (7th Cir. 2007) (deferring question of whether renewing a Rule 29 motion or filing a new Rule 33 motion is necessary where defendant does not present evidence because outcome did not depend on standard of review); *cf. United States v. Conn*, 297 F.3d 548, 557 (7th Cir. 2002) (holding that plain error was the correct standard of review because the defendant did not file either motion). Furthermore, the Fifth Circuit has found that a motion for a new trial can be treated as a motion for acquittal for purposes of preserving the question of sufficiency for appeal. *United States v. Mann*, 557 F.2d 1211, 1216 n.6 (5th Cir. 1977).

Second, the government's proposed hyper-technical reading of the rule does not further the goals of the waiver doctrine, which is to promote efficiency by having lower courts address issues before they go up to the appellate court. *See United States v. Charles*, 476 F.3d 492, 496 (7th Cir. 2007). Although a Rule 33 motion for a new trial is procedurally different from a Rule 29 motion for acquittal, the two motions are so similar that they "'can be, and often are, combined.'" *United States v. South*, 28 F.3d 619, 624 n.1 (7th Cir. 1994) (holding that a combined motion for acquittal and new trial filed under Rule 33 was proper (quoting 2 Charles A. Wright, *Federal Rules of Criminal Procedure* § 465 (1982))). A lower court will address sufficiency arguments under either procedural vehicle; by attempting to differentiate between the two, the government is emphasizing form over substance.

This Court has said many times that "[c]aptions do not matter; the court must determine the substance of the motion." *United States v. Wood*, 169 F.3d 1077, 1079 (7th Cir. 1999). Accordingly, Johnson properly preserved his sufficiency argument, and this Court should address the sufficiency issue under a "rational juror" standard.

B. The evidence presented to the jury was insufficient to show Johnson's membership in any of the alleged conspiracies.

The evidence presented to the jury does not support the government's contention that there were multiple conspiracies to distribute drugs, each involving Johnson and one of the cooperating witnesses. The requisite agreement between Johnson and each individual witness is unsupported by the evidence, and thus no rational juror could find *any* of the conspiracies alleged.

1. The evidence did not support a finding that Johnson entered into an agreement to distribute with Rico Trice, Daryl Lee, Tyson Moore, Willie Friend, Paul Caston, or Robert Griffin.

The government all but acknowledges that the evidence presented to the jury was insufficient to support a finding of conspiracy between Johnson and most of the cooperating witnesses, spending only one paragraph in its response brief on Trice, Moore, Friend, and Griffin, and failing to mention Lee and Caston altogether. (Gov't Br. 30.) The government correctly raises some, though not all, of the factors the courts frequently consider to determine if a buyer-seller relationship has become a conspiracy to distribute, such as "large quantities of drugs, prolonged cooperation between the parties, standardized dealings, and sales on credit." (Gov't Br. 27.) What the government fails to mention, however, is that none of these factors are

dispositive. *United States v. Rivera*, 273 F.3d 751, 755 (7th Cir. 2001); *see*, *e.g.*, *United States v. Contreras*, 249 F.3d 595, 600 (7th Cir. 2001) (noting that repeat sales are insufficient). Moreover, many of the factors, such as length of affiliation, number of transactions, sales on credit, and amount of trust, weigh against finding a conspiracy here. (Appellant's Br. 39–45.)

The evidence is most clearly insufficient in the cases of Paul Caston, Daryl Lee, and Rico Trice. First, Caston testified that he did not buy his drugs for resale. (Trial Tr. 264:23, 268:17–20.) Thus, he could not have been part of a conspiracy to further distribute. Next, Johnson sold only three small quantities of crack to Lee over the course of a month. This Court found that a similar number of sales in *Rivera*, four sales over three months, did not show a conspiracy. 273 F.3d at 755. Finally, Johnson fronted Trice the price of half his requested drug amount on one occasion. (Trial Tr. 235:22–236:1.) However, fronting a portion of a single drug transaction to one's customer, whom one is charging "outrageous" prices, (Trial Tr. 229:10–14), does not show the high degree of trust characteristic of a conspiracy. Indeed, "a credit transaction standing alone in no way changes the adversarial relationship between a buyer and a seller." *United States v. Lechuga*, 994 F.2d 346, 363 (7th Cir. 1993) (Cudahy, J., concurring in part) (internal citations omitted).

The government also argues that Johnson conspired with Tyson Moore because he sold cocaine to Moore "at a discount" knowing that it would be resold to Willie Friend. (Gov't Br. 30.) This argument, however, is refuted in the government's own statement of facts: Johnson allegedly sold to Moore at $600–700

per ounce, the same price that Johnson allegedly sold to Friend. (Gov't Br. 7.) The fact that Moore purportedly charged Friend $900 per ounce does not show a "discount"; instead, it shows that Moore marked up the price as any mid-level dealer would do. (Trial Tr. 328:23–329:3.) Johnson only sold to Moore four times and to Friend twice over the course of two months. (Trial Tr. 308:20–309:10.) As noted above, a similar number of sales of much larger quantities of drugs in *Rivera* did not show a conspiracy. 273 F.3d at 756.

Finally, the government argues that Johnson's purported conspiracy with Robert Griffin was shown by: (1) the length and frequency of contacts; (2) increasing amounts of cocaine sold to Griffin; and (3) the standardized manner of sales and deliveries. (Gov't Br. 30.) The facts, however, fail to support the government's argument. First, Johnson and Griffin's relationship consisted of three sales over one month in 2005 and ten sales over five months in 2006. This Court found in *Contreras* that without other evidence of prolonged cooperation, ten sales over six to ten months did not indicate the presence of an agreement. 249 F.3d at 600; *see also Thomas II*, 284 F.3d at 753 (finding seven transactions over ten weeks not prolonged in "either a numeric or temporal sense"). Next, the government argues that the increasing amounts of cocaine purchased and the standardized manner of arranging sales both indicate an agreement to distribute drugs. (Gov't Br. 30.) The government's argument is inconsistent; if Griffin frequently purchased different amounts of drugs, then at least one aspect of the sale was not standardized. In fact, Griffin's testimony described a series of transactions that were anything but

standardized, and non-standardized sales here actually cut *against* finding a conspiracy. *Thomas II*, 284 F.3d at 753. In addition to the varying amounts of drugs, Griffin testified that the person who initiated the sale would vary, (Trial Tr. 379:16–18), the location would vary, (Trial Tr. 374:12–15, 379:5–11), and even the type of drug would vary, (Trial Tr. 378:9–19). Like the defendant in *Thomas*, there is nothing in the record that indicates anything more than a series of transactions brokered on an "as-needed" basis. *Thomas II*, 284 F.3d at 753.

2. The evidence did not support a finding that Johnson entered into an agreement to distribute with Ty Johnson.

At trial, the government painted a picture of Johnson as a criminal mastermind with the six cooperating witnesses as his distributors. (Trial Tr. 762–769) ("The defendant was the hub, the center of this wheel. His distributors, the ones that he sold to, were the spokes . . . ."). Having tacitly acknowledged in its brief that the evidence for several of the alleged co-conspirators does not support this theory, (Gov't Br. 30), the government now beats a hasty retreat to a fall-back position that Johnson conspired with Ty Johnson by acting as an agent for Ty's further distribution efforts, (Gov't Br. 28). The evidence, however, does not support the government's backup theory. Instead, the evidence shows nothing more than individual buyer-seller relationships between: (1) Big Homey and Johnson; and (2) Big Homey and Ty. At most, Johnson aided and abetted Ty's distribution. As discussed below, neither theory can support Johnson's conviction.

i. Johnson's conviction cannot be affirmed on an aiding and abetting theory.

As a last-ditch effort to save its charged conspiracy, the government argues that this Court can affirm Johnson's conviction on an alternate aider and abettor liability theory. (Gov't Br. 30.) An aider is punishable as the principal, *United States v. Galiffa*, 734 F.2d 306, 310 (7th Cir. 1984), and this Court has held that criminal defendants do not have to be charged under the aiding and abetting statute in order to support a conviction as an aider or abettor, *see, e.g., id.* at 305 n.11; *United States v. Turner*, 551 F.3d 657, 665–66 (7th Cir. 2008). What is required, however, is that the government actually present an aiding or abetting theory or jury instruction at trial. *United States v. Manzella*, 791 F.2d 1263, 1267 (7th Cir. 1986). Criminals are constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance, and where an aiding and abetting theory was never raised at trial, criminal liability under that alternate theory "comes too late to save the conviction." *Id.*; *see also McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991); *Dunn v. United States*, 442 U.S. 100, 106–07 (1979). Thus, the government's aiding and abetting theory is not an alternate basis on which to affirm Johnson's conviction.

ii. The evidence does not support a finding of an agreement between Ty and Johnson for Ty to distribute.

Conspiracy and aiding and abetting are distinct crimes requiring different elements of proof. The crime of aiding and abetting requires knowledge of the illegal activity that is being aided, a desire to help the activity succeed, and some

act of helping. *Manzella*, 791 F.2d at 1267. In contrast, the crux of a criminal conspiracy is not knowledge, but rather the agreement to commit a further crime. *Lechuga*, 994 F.2d at 348. Indeed, mere knowledge cannot prove the requisite agreement. *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991). The government correctly points out that Appellant inadvertently neglected to include the entire quote from the Supreme Court's dicta in *Direct Sales v. United States*, 319 U.S. 703, 709 (1943). (Appellant's Br. 38; Gov't Br. 31.) This Court, however, has never adopted that dicta and, in fact, has frequently found that aiding and abetting a crime, even with knowledge, does not automatically provide the agreement required to join or form a conspiracy. *See*, *e.g.*, *United States v. Kasvin*, 757 F.2d 887, 891–92 (7th Cir. 1985) (holding that defendant with knowledge of a conspiracy aided the conspiracy by being a regular customer, even if the jury found that he was not part of the agreement to distribute); *United States v. Carson*, 9 F.3d 576, 586 (7th Cir. 1993) ("Inasmuch as the government may be understood to claim that aiding and abetting a conspiracy necessarily makes the aider and abettor a member of the conspiracy, we disagree."); *United States v. Ortega*, 44 F.3d 505, 506 (7th Cir. 1995) (noting that "while a conspirator is almost always also an aider and abettor, . . . an aider and abettor is often not a conspirator") (internal citations omitted).

Thus, the mere fact that Johnson had knowledge of and assisted Ty's distribution is not enough to show that he entered into a conspiracy. Rather, the government was tasked with showing that Johnson's actions went beyond aiding

and abetting, and were instead evidence that he agreed to support Ty in his subsequent distribution efforts. The only arguments the government offers to support this agreement, however, are Johnson's "agency" on Ty's behalf, a supposed relationship of "trust" between them, and Johnson's "pooling" with Ty. (Gov't Br. 27–30.) As discussed below, these theories are without merit.

First, Johnson was not Ty's "agent" simply because on three occasions he took Ty's drug orders to Big Homey. The government leaves out crucial facts that cut against any finding of agency. Johnson's motivation on each of these trips was to purchase large quantities of drugs for himself, quantities that equaled or dwarfed the comparatively small amounts that Ty purchased.[4] Furthermore, Ty did not have the control over Johnson's actions required for an agency relationship—Johnson was there to purchase his own drugs. *Cf. United States v. Garcia*, 89 F.3d 362, 364–65 (7th Cir. 1996) (finding conspiratorial agreement where conduct showing agency relationship included abandoning purchase at behest of distributor). The evidence thus shows that when Johnson made his own drug run to Chicago, he sometimes picked up some for his friend Ty as well. (Trial Tr. 160–173.) The government's reliance on *United States v. Albarran* for the proposition that the delivery of drugs to another for sale to a third party can prove an agreement does not change this result. 233 F.3d 972, 977 (7th Cir. 2000). The defendant in *Albarran* was an agent of the greater distribution network and had access to the network's stash of drugs. *Id.* There is no evidence that Johnson was

[4] Specifically, while Ty purchased .5, 1, and .5 kilograms on each of these trips, Johnson purchased .5, 4, and 3 kilograms of cocaine, respectively. (Trial Tr. 160:25–173:14.)

part of either Big Homey's or Ty's distribution network. All Johnson did was carry the money in and the drugs out. Likewise, Johnson's phone calls to Big Homey on Ty's behalf—calls in which he did not relay the amount of drugs or receive any payment from Ty—show that instead of working for Ty as an agent, he was helping a friend out by acting as a limited middleman.[5]

Just as Johnson's picking up drugs for Ty while on his own drug run does not show an "agency" relationship, the fact that Johnson sometimes "trusted" Ty to pick up his own drugs on Ty's solo runs to Big Homey does not show an agreement to further Ty's distribution.

Finally, the government argues that an agreement can be inferred from the fact that Johnson and Ty "pooled" their money. (Gov't Br. 29.) Conspirators usually "pool" their money to make a single purchase and then later distribute the drugs among themselves because they cannot afford to purchase the drugs alone. *See, e.g., United States v. Baskin-Bey*, 45 F.3d 200, 205 (7th Cir. 1995) (holding that conspiracy existed in part because buyers "doubtless had agreed to parcel out the cocaine among themselves"). Using this common-sense definition, Ty and Johnson did not pool their funds. Johnson brought cash on only one of the three purchases; he received drugs on credit for the other two. (Trial Tr. 203:20–23.) When he did bring cash, he brought $55,000 for three-and-a-half kilograms of cocaine, while Ty

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[5] Furthermore, even if this Court finds that the three in-person transactions constituted an agreement between Ty and Johnson to distribute, the scope of this conspiracy is limited to those three transactions, which total two kilograms of cocaine. Because Johnson's phone calls merely aided and abetted Ty's distribution, the cocaine obtained in *those* purchases should not be counted in the total drug amount. Thus, the jury could not have found Johnson guilty of conspiracy to distribute over five kilograms of cocaine.

brought only $10,000 for a half-kilogram of cocaine. (Trial Tr. 203:4–15.) Johnson was not pooling funds when he was receiving drugs on credit and had no need to pool funds when he brought cash because he already had enough money to buy his own drugs. Moreover, Ty and Johnson received separate packages of cocaine from their separate transactions with Big Homey. (Trial Tr. 170:6–10.) Thus, Johnson and Ty did not enter into an agreement by "pooling."

As discussed above, Johnson was nothing more than a middleman between Ty and Big Homey. Therefore, his actions are, at most, aiding and abetting in Ty's distribution. *United States v. Wesson*, 889 F.2d 134, 135 (7th Cir. 1989) (holding that "[m]iddlemen aid and abet the offense of possession with intent to distribute"). However, because the government did not present an aiding and abetting theory to the jury at trial or via an instruction, it cannot invoke it now to support Johnson's conspiracy conviction. *McCormick*, 500 U.S. at 270 n.8. Moreover, because the evidence did not show that Johnson had any agreement with Trice, Friend, Caston, Lee, or Griffin, and because the evidence also did not show that Ty and Johnson entered into an agreement, the evidence was insufficient to sustain Johnson's conspiracy conviction.

CONCLUSION

For the foregoing reasons, the Appellant, Corey Johnson, respectfully requests that this Court vacate his conviction.

Respectfully Submitted,

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No. 08-2817

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FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. COREY JOHNSON, Defendant-Appellant.	Appeal from the United States District Court for the Central District of Illinois, Peoria Division Case No. 07-CR-10044 Hon. Joe B. McDade, Presiding Judge

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), a version of this reply brief in non-scanned PDF format.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby certify that this brief conforms to the rules contained in Fed. R. App. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 6,177 words.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby certify that I served two copies of this reply brief and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 357 East Chicago Avenue, Chicago, Illinois, on February 4, 2009.

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