

10-399

To Be Argued By:
ANTHONY E. KAPLAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 10-399

UNITED STATES OF AMERICA,
Appellee,
-vs-

LUIS OJEDA, aka Louie Lou,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on January 25, 2010, and a corrected judgment reflecting a final order of forfeiture entered on April 9, 2010. (Appellant's Appendix ("A") at 22 & 24). On January 27, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (A 22). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

1. Did the district court abuse its discretion in denying the defendant's motion for a bill of particulars, where the indictment fully informed the defendant of the charges against him, comprehensive pretrial disclosures were made by the Government, and the defendant has not demonstrated any prejudice?

2. Did the defendant waive his claim that casino records were inadmissible as evidence of unexplained wealth, and if he did not, did the district court commit plain error in admitting the records, which showed the defendant gambling with hundreds of thousands of dollars in 2006 and 2007?

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Preliminary Statement

Luis Ojeda was convicted at trial of conspiring with Anthony Morse and others to possess with intent to sell five kilograms or more of cocaine, and of possessing cocaine with intent to sell. The evidence at trial was overwhelming, featuring testimony from law enforcement officers who conducted surveillance of the defendant, numerous recordings in which the defendant and Morse

discussed their narcotics dealing, as well as testimony from Morse and a confidential informant.

On appeal, the defendant contends that the district court abused its discretion in denying his motion for a bill of particulars. The defendant's claim is meritless, because the Indictment fully apprised him of the charges against him, the comprehensive pretrial discovery informed him of the particulars of the Government's case, and he has failed to show any prejudice.

The defendant also claims that the district court erred in admitting casino records as evidence of unexplained wealth. This claim, however, has been waived. Even if not waived, it was not error, much less plain error, for the district court to admit casino records showing that the defendant gambled with hundreds of thousands of dollars in 2006 and 2007.*

The judgment below should be affirmed.

* The defendant has withdrawn Point II at pages 6-9 of his brief ("Ojeda Br."), which claimed a *Brady/Giglio* violation. See Letter to the Court, filed Nov.12, 2010.

Statement of the Case

On July 10, 2007, a federal grand jury returned an Indictment charging Luis Ojeda and seven co-defendants with drug and gun trafficking offenses. (A 26-33).^{*} Specifically, Count One charged that, from in or about December 2006 to June 25, 2007, Ojeda and his co-defendants conspired to distribute, and to possess with intent to distribute, five kilograms or more of cocaine, in violation of Title 21, United States Code, Section 846. (A 27). Count Five charged that, on or about June 6, 2007, Ojeda possessed cocaine with intent to distribute, in violation of Title 21, United States Code, Section 841. (A 29).

On August 3, 2007, Ojeda filed a motion for a bill of particulars (A 34-35). By order filed August 8, 2008, the district court (Alvin W. Thompson, J.) denied the motion, finding that the Indictment identified the nature of the charges “with sufficient particularity” and that “the significant amount of discovery” provided by the Government was sufficient to apprise the defendant of the evidence against him. (A 38).

^{*} As indicated previously, “A” refers to the Appellant’s Appendix. “SA” refers to the Supplemental Appendix. “Tr.” refers to the six-volume trial transcript. (Record on Appeal Doc. No. (“R. Doc.”) 454-457 & 462-463). “R. Doc.” refers to the docket number for the referenced document.

On September 10, 2008, Ojeda filed a motion to exclude evidence of his casino gambling. (A 158). On October 1, 2008, the district court held a hearing on the motion. (SA 3-23). At the conclusion of that hearing, the Government represented that it would limit its proof on the issue to 2006 and 2007. (SA 19-21). While the defendant initially stated that he maintained his objection, he then stated that he had “no objection . . . if [the Government] presents the evidence as we’ve discussed, I have no problem.” (SA 23). On that basis, the district court denied the defendant’s motion as moot. (*Id.*)

A jury was selected on September 11, 2008, and the trial commenced on October 2, 2008. On October 10, 2008, the jury returned its verdict, finding Ojeda guilty on both counts of the Indictment in which he was named.

On January 20, 2010, Judge Thompson sentenced Ojeda to 150 months’ imprisonment on Count One and Count Five, to be served concurrently. (A 159). Judge Thompson also ordered that Ojeda be placed on supervised release for five years and that the defendant pay a \$200 special assessment. (*Id.*) Judgment entered on January 25, 2010, and a corrected judgment, reflecting the final order of forfeiture, entered on April 7, 2010. (SA 35-37). The defendant filed a timely notice of appeal on January 27, 2010. (A 162).

The defendant is presently incarcerated.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The Defendant's Pretrial Motions

1. The motion for a bill of particulars

On August 3, 2007, Ojeda filed a motion for a bill of particulars. (A 34). The motion requested “[a] list of each transaction in which the Government claims LUIS OJEDA was involved, together with any other involved parties, the nature, date and location of said transaction, as it pertains to evidence offered against him at trial.” (A 34). In support of the motion, Ojeda argued, in conclusory fashion, that he would be unable to prepare for trial without the requested information. (R. Doc. 47-2).

In opposing the motion, the Government stated:

In this case, the defendants have received voluminous discovery . . . including, among other things, the federal arrest warrants, affidavits relating to federal search warrants, surveillance reports, seizure of evidence reports, Title III line sheets and recordings, and laboratory reports. In addition, all of the physical evidence seized in connection with the investigation and in the government's possession at this time has been made available for review by defense counsel by contacting the case agent. Further, upon request and in an effort to resolve matters, summaries of cooperating witness[es]'s anticipated testimony at

trial have been provided to counsel who have requested such summaries in an effort to resolve their cases.

(R. Doc. 178, at 10).

By order filed August 8, 2008, the district court denied the motion, finding that the Indictment “identifie[d] with sufficient particularity the nature of the charges against Ojeda.” (A 38). The court also found it undisputed that “a significant amount of discovery material[s]” had already been provided to Ojeda, thus apprising him of “the particularized evidence against him.” (*Id.*)

2. The motion to exclude evidence of gambling

On September 10, 2008, Ojeda filed a motion to exclude evidence of his gambling activity. (A 158). Ojeda argued that the evidence was irrelevant and that any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. (R. Doc. 279-2).

On October 1, 2008, the district court held a hearing on the motion. (SA 3-23). During the hearing, the defendant argued that the jury “should not hear about his gambling habit prior to the conspiracy period.” (SA 18). The court framed then framed the issue as follows:

THE COURT: Let me just sort of put this in a legal framework.

What I'm really hearing [defense counsel] make is a 403 objection to the time periods outside the period that is alleged in the Indictment as the period of conspiracy.

[DEFENSE]: Yes, Your Honor.

(SA 19).

Counsel for the Government then offered to limit its proof to 2005, 2006, and 2007, arguing that 2005 was “a relevant time frame” even though outside the period charged in the Indictment. (*Id.*) After further discussion, counsel for the Government also agreed to exclude evidence relating to 2005, stating: “[I]n light of the Court’s questions and objections raised, I’m not going to press at this point 2005.” (SA 21).

The court then inquired whether the parties were in agreement, resulting in the following exchange:

THE COURT: Okay. So it sounds to me as though the motion in limine has been – well, we don’t have a stipulation because I think you’re still preserving your objection, correct . . . ?

[DEFENSE]: Yes. But I have no objection to – if [the Government] presents the evidence as we’ve discussed, I have no problem.

THE COURT: Okay. In that case I'll deny the motion in limine as moot.

(SA 23).

B. The Defendant's Trial

1. The Government's case

In late 2006, a task force of federal, state, and local law enforcement agencies began investigating the distribution of kilogram quantities of cocaine in eastern Connecticut by co-defendants Anthony Morse and Timothy Sczurek. (Tr. 36-38). Morse testified against Ojeda at trial.

According to Morse, he was involved in the purchase and sale of kilogram quantities of cocaine and marijuana. (A 47-48). Once he obtained the cocaine, Morse would "cut" the cocaine to increase the quantity, use a "press" to process it into kilogram form, and redistribute it. (A 53 & 68-72).

Morse knew Ojeda since early 2006, when they met at the Mohegan Sun casino. (A 57). Morse was told by Ojeda that he was in a position to distribute cocaine if Morse could sell it to him at a favorable price. (A 57-58). Shortly thereafter, in the spring or summer of 2006, Morse began supplying Ojeda with kilogram quantities of cocaine. (A 58-59).

Morse testified that, in their first transaction, he dropped off "a couple of kilos" of cocaine at Ojeda's

house on Prest Street in New London. (A 59). As their relationship developed, Morse would “front” Ojeda the cocaine, *i.e.*, provide him with the cocaine and collect the money after Ojeda sold it. (*Id.*) Morse testified that he sold Ojeda “[r]oughly around two to three keys” of cocaine in each transaction. (A 59-60). The majority of the time, Morse and Ojeda conducted the drug transactions at Ojeda’s house on Prest Street. (A 61). Morse also described a cocaine transaction involving “Hector,” a supplier from North Carolina, and Ojeda, which took place at Morse’s house in Gales Ferry. (A 60-61). Finally, Morse testified that, on several occasions, he and Ojeda conducted drug transactions at a house Ojeda was refurbishing on Connecticut Avenue. (A 61, 63).*

* Following this portion of Morse’s testimony, defense counsel requested a sidebar (A 64). At sidebar, defense counsel acknowledged that the Government had provided interview reports and agent notes from four interviews of Morse. (A 96; *see also* A 138-39 (statement by Government counsel that there were no other notes or reports available other than the notes of a Special Assistant United States Attorney, as to which defendant has never disputed the Government’s claim of work product privilege)). Defense counsel complained, however, that the reports and notes failed to disclose the following details from Morse’s testimony: that the transactions with Ojeda involved “three or four kilos at a time,” that the transactions occurred on Prest Street or Connecticut Avenue, and that Ojeda had met Hector. (A 97). After further discussions (A 97-104 & 137-47), defense counsel
(continued...)

Morse further testified that, towards the end of 2006, he began experiencing difficulty obtaining cocaine. (A 54). As a result, Morse turned to other sources of supply, including Ojeda. (A 54-56). Whether Morse was Ojeda's supplier or customer depended on which of the two had access to quantities of cocaine. (A 108).

Intercepted telephone calls confirmed the nature of the relationship between Ojeda and Morse. For example, in a call recorded on May 18, 2007, Ojeda told Morse that his source was coming the following night and that Ojeda had asked that source for "10" kilograms of cocaine. (A 116-18). During the call, Morse asked Ojeda to "try to put one or two for me, if you can" (A 117). The two also discussed the price of cocaine, which Ojeda indicated would be "excellent" at \$18,000 per kilogram. (A 121-22). The two commiserated about the paucity of cocaine and agreed to let the other know when their respective sources of cocaine come through. (A 121 & 125).

On May 29, 2007, Ojeda and Morse discussed the difficulty in obtaining more than a kilogram or two of cocaine. (A 128-29). The two also discussed that a kilogram was selling for "28," *i.e.*, \$28,000. (*Id.*)

* (...continued)
acknowledged that the reports and notes contained a "general reference" to the large quantities of cocaine sold by Morse to Ojeda, but maintained that they lacked evidentiary detail. (A 147-48).

On May 30, 2007, Ojeda and Morse agreed to meet at Ojeda's house on Connecticut Avenue. (A 132-33). Morse went to the house to pick up a kilogram of cocaine, for which Morse had previously paid Ojeda \$28,000. (A 133).

On May 31, 2007, Ojeda and Morse discussed obtaining cocaine from one another, depending on whichever source came through first. (A 135). During that call, Ojeda lamented that he expected to obtain cocaine from a source, but was not able to complete the transaction because his son had been in an accident. (A 135-36).

The evidence at trial also encompassed the drug transaction that was the subject of Count Five of the Indictment, in which Ojeda and co-defendant Alberto Garcia sold cocaine to an informant. The informant testified that Garcia claimed to have access to substantial quantities of narcotics and offered to sell the informant an ounce of cocaine for \$1000, plus a \$100 finder's fee. (Tr. 492-94).

The sale was arranged for June 6, 2007. The informant met Garcia at 44 Connecticut Avenue in New London, where Garcia was assisting Ojeda with the renovations. The informant was told by Garcia that his source would be arriving later that day. (Tr. 496-499). The informant then left the area. (Tr. 499-500). Later, law enforcement officers conducting surveillance observed Ojeda arrive at the premise. (Tr. 425-26).

The informant, after being called by Garcia, returned to 44 Connecticut Avenue. (Tr. 499-500). The informant

observed Ojeda hand Garcia a baggie. (Tr. 501). The informant and Garcia then went into the kitchen, where the informant paid Garcia for the drugs. (Tr. 501-02). As the informant was leaving, he observed Garcia handing money to Ojeda. (Tr. 502 & 506). The baggie purchased from Garcia and Ojeda was subsequently determined to contain approximately 25.9 grams of cocaine. (Tr. 598).

Ojeda was arrested on June 25, 2007. (Tr. 320-24). When arrested, Ojeda had \$2540 in cash and the cellular telephone that he had been using to discuss the drug transactions with Morse. (Tr. 328). Ojeda consented to a search of his residence, where law enforcement officers found a shoebox containing \$16,769. The shoebox was hidden in the crawl space of a bedroom closet. (Tr. 345-46 & 356-57).

After being advised of his rights, Ojeda agreed to be interviewed and indicated that he wanted to cooperate. (Tr. 623-624). Ojeda stated that, over the year preceding his arrest, he had bought about 500 grams of cocaine on four to five occasions and lesser amounts at other times. (Tr. 624-25).

Although Ojeda did not file a tax return in 2006 (Tr. 576), casino records showed that he gambled hundreds of thousands of dollars in 2006 and 2007. Records from Mohegan Sun showed that he “bought in,” *i.e.*, put down cash, for \$557,470 and \$135,860 in 2006 and 2007, respectively (Tr. 576-77). Records from Foxwoods Casino showed that he lost \$123,356 in 2006 and \$49,500 in the first quarter of 2007, after which he was barred from the

casino. (Tr. 389-90). At no point did the defendant object to the evidence of his unexplained wealth. (Tr. 360 & 387).

2. The defense case

Ojeda testified in his own defense. Ojeda testified that, while he had dealt drugs with Morse, he had stopped by the end of 2005. (Tr. 701-03 & 802-03). He knew that there was a scarcity of cocaine in 2006-2007 and said that Morse called him to see if Ojeda knew where he could get cocaine. (Tr. 701-02). However, Ojeda stated that Morse “never” delivered kilograms of cocaine to him. (Tr. 705). Ojeda denied that he sold cocaine on June 5, 2007. (Tr. 697-98). Ojeda also denied admitting, after his arrest, that he bought half-kilogram quantities of cocaine from Morse. (Tr. 711).

Ojeda admitted being a heavy gambler (Tr. 678), but he claimed that he sometimes let friends use the cards issued by the casinos to track his expenditures. (Tr. 681 & 733). He testified that he had not filed a tax return for 2006 since he was in the process of having one prepared; however, he admitted that he had not filed a tax return for 2005. (Tr. 715). He claimed that the money he used to gamble came from rentals, proceeds from the sale of a house in May 2007, and a credit card. (Tr. 680).

Summary of Argument

I. The district court did not abuse its discretion in denying Ojeda's motion for a bill of particulars. The indictment was sufficient to inform Ojeda of the charges against him, the comprehensive discovery provided by the Government apprised Ojeda of the evidence against him, and Ojeda has failed to establish any prejudice. *See* point I.C., *infra*.

II. Ojeda has waived any claim, both in the district court and on appeal, that the evidence of his casino gambling was inadmissible. *See* point II.C.1., *infra*. Alternatively, the district court did not commit plain error in admitting such evidence, which showed a significant amount of unexplained wealth. In any event, the evidence against Ojeda was overwhelming, so he has not shown that the alleged error affected any substantial rights or affected the fairness or integrity of the proceedings. *See* point II.C.2., *infra*.

For all of these reasons, this Court should affirm the district court's judgment of conviction.

Argument

I. The defendant's claim that the district court abused its discretion in denying a bill of particulars is meritless

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts," above.

B. Governing law and standard of review

Under the Federal Rules of Criminal Procedure, an indictment must contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1); *see United States v. De La Pava*, 268 F.3d 157, 162 (2d Cir. 2001). Accordingly, an indictment should be specific enough to permit a defendant to prepare a defense, thereby conforming to the Sixth Amendment's requirement that a defendant "be informed of the nature and cause of the accusation." *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999); *see also United States v. Brozyna*, 571 F.2d 742, 746 (2d Cir. 1978) (indictment should be sufficiently clear so that defendant "will not be misled while preparing his defense").

When an indictment is insufficient, it may be supplemented by a bill of particulars. *See* Fed. R. Crim. P. 7(f). A bill of particulars is intended to allow a defendant "to identify with sufficient particularity the nature of the

charge pending against him, thereby enabling defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted for a second time for the same offense.” *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (per curiam).

Accordingly, a bill of particulars is required “only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.” *United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990). A bill of particulars “is not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means.” *Walsh*, 194 F.3d at 47; *see Torres*, 901 F.2d at 234; *United States v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984).

In particular, a bill of particulars is not intended solely to provide the defendant with “evidentiary detail” about the Government’s case. *See Torres*, 901 F.2d at 234 (“Acquisition of evidentiary detail is not the function of the bill of particulars.” (quoting *Hemphill v. United States*, 392 F.2d 45, 49 (8th Cir. 1968))). Indeed, as a general matter, the Government is “not required to disclose its evidence in advance of trial.” *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974) (citing cases).

The denial of a motion for a bill of particulars is reviewed for “abuse of discretion.” *Walsh*, 194 F.3d at 47 (citing *United States v. Barnes*, 158 F.3d 662, 665-66 (2d Cir. 1998)). This Court has stated that the decision to grant

a motion for a bill of particulars lies within the “sound discretion” of the district court. *See Panza*, 750 F.2d at 1148. ““So long as the defendant was adequately informed of the charges against him and was not unfairly surprised at trial as a consequence of the denial of the bill of particulars, the trial court has not abused its discretion.”” *Torres*, 901 F.2d at 234 (quoting *United States v. Maull*, 806 F.2d 1340, 1345-46 (8th Cir. 1986)).

Finally, the denial of a bill of particulars is harmless error if the defendant cannot demonstrate that he was taken by surprise by the evidence presented at trial and that such evidence prejudiced his defense. *See Barnes*, 158 F.3d at 665-66. Indeed, this Court has noted that it has “repeatedly refused, in the absence of any showing of prejudice, to dismiss . . . charges for lack of specificity.” *Walsh*, 194 F.3d at 45 (citing *United States v. McClean*, 528 F.2d 1250, 1257 (2d Cir. 1976)).

C. Discussion

The district court did not abuse its discretion in denying Ojeda’s motion for a bill of particulars, because the Indictment was sufficient on its face and because the comprehensive disclosures by the Government were sufficient to allow Ojeda to prepare for trial and avoid unfair surprise. Moreover, Ojeda has entirely failed to show that he was prejudiced by the district court’s decision.

As an initial matter, the Indictment contained a plain, concise, and definite statement of the essential facts

constituting the offenses charged. Count One of the Indictment clearly stated that Ojeda knowingly and intentionally conspired, from in or about December 2006 through June 25, 2007, with specific co-conspirators, including Anthony Morse, to distribute five or more kilograms of cocaine. (A 27). Count Five of the Indictment clearly stated that, on or about June 6, 2007, Ojeda and Albert Garcia knowingly and intentionally possessed cocaine with intent to distribute. (A 29). As such, the Indictment provided Ojeda with the essential facts constituting the offenses charged.

Moreover, as the district court found, it was undisputed that the Government had disclosed “a significant amount of discovery material” to the defendant, thereby apprising him of “the particularized evidence against him.” (A 38). Indeed, Ojeda admits that the Government provided “extensive discovery,” including “DEA reports, transcripts of telephone calls, and other materials.” Brief for Defendant-Appellant Luis Ojeda, dated Aug. 30, 2010 (“Ojeda Br.”), at 6. Ojeda also received four sets of interview reports and agents notes concerning four proffer sessions with Anthony Morse (A 96), and no other non-privileged reports existed (A 138-39). Under the circumstances, the district court did not abuse its discretion in denying Ojeda’s motion for a bill of particulars.

On appeal, Ojeda complains that Morse testified about “additional criminal acts,” Ojeda Br. at 6, but he fails to identify such acts other than to simply quote from the argument that he made below, where he claimed that

Morse testified about allegedly undisclosed details of the transactions. *See* Ojeda Br. at 7 (quoting A 97).

However, Ojeda’s claim is unavailing because — putting aside what was actually disclosed in the reports and notes* — the complained-of details in Morse’s testimony cannot have come as a surprise in any event. For example, as to the size of the drug transactions with Morse, Ojeda was heard on numerous telephone calls discussing the price of kilogram quantities of cocaine and arranging transactions involving kilogram quantities of cocaine. (*E.g.*, A 117-18, 121-22, 128-29, & 131-32). As to the location of the drug transactions, Ojeda was heard on a telephone call arranging for Morse to come to Ojeda’s house on Connecticut Avenue to pick up a kilogram of cocaine. (A 132-33). While the calls concerned sales by Ojeda rather than purchases, there is simply no plausible basis on the record for Ojeda to claim that he was unfairly surprised by the details in Morse’s testimony. Because this Court has never required the Government to disclose every detail of the prosecution’s case, *see United States v. Cephas*, 937 F.2d 816, 823 (2d Cir. 1991) (“[T]he

* The reports and notes from the Morse interviews were reexamined by counsel for the defendant and the Government, after which the defendant agreed to withdraw his claim of a *Brady/Giglio* violation. *See* Letter to the Court, filed Nov. 12, 2010.

government need not particularize all of its evidence.”), Ojeda’s claim must fail.

Finally, even assuming *arguendo* that the district court abused its discretion in denying a bill of particulars, Ojeda has entirely failed to articulate what he would have done differently in preparing his defense. Because Ojeda has not alleged, and cannot demonstrate, that he was prejudiced by the district court’s decision, the decision should be upheld. *See Barnes*, 158 F.3d at 666 (defendant unable to articulate any “specific prejudice” resulting from the alleged failure to disclose the substance of cooperating witness’ testimony relating to drug purchases).

II. The defendant’s challenge to the admission of evidence related to his gambling is meritless

According to Ojeda, the district court erred in allowing the Government to present evidence of his casino gambling. *See Ojeda Br.* at 10. But Ojeda specifically acquiesced to the evidence after the Government agreed to limit its proof, stating that he had “no objection . . . if [the Government] presents the evidence as we’ve discussed, I have no problem.” (SA 23). In doing so, Ojeda has waived this claim. Ojeda has also waived this claim by failing to present his arguments properly on appeal.

Assuming *arguendo* that the claim has not been waived, the admission of the evidence is reviewed only for plain error because Ojeda failed to object at trial. Because it was not plain error for the district court to admit

evidence of Ojeda's unexplained wealth, the judgment below should be affirmed.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts," above.

B. Governing law and standard of review

1. Admission of "other act" evidence

Under the Federal Rules of Evidence, evidence of "other crimes, wrongs, or acts" is not admissible to prove propensity, but "may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" Fed. R. Evid. 404(b).

The Court "evaluates Rule 404(b) evidence under an 'inclusionary approach' and allows evidence 'for any purpose other than to show a defendant's criminal propensity.'" *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002) (quoting *United States v. Pitre*, 960 F.2d 1112, 1118 (2d Cir. 1992)).

Accordingly, evidence may be introduced under Rule 404(b) "if (1) it is introduced for a proper purpose, (2) it is relevant to the charged offense, (3) its prejudicial effect does not substantially outweigh its probative value, and (4) it is admitted with a limiting instruction if requested."

United States v. Rutkoske, 506 F.3d 170, 177 (2d Cir. 2007).

2. Standard of review

When an appellant challenges an evidentiary ruling on appeal having failed to object below, the plain error standard applies. *See United States v. Johnson*, 529 F.3d 493, 501 (2d Cir. 2008).

The plain error standard applies even if the disputed evidence was the subject of a motion *in limine* to exclude, if the district court did not make a “definitive ruling” on the motion. Fed. R. Evid. 103(a); *see United States v. Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir. 1995) (holding that pretrial motion dismissed as moot was not sufficient to preserve evidentiary objection).

To establish plain error, the appellant must show “(1) error, (2) that is plain, and (3) that affects substantial rights.” *Johnson*, 529 F.3d at 501 (internal quotation marks omitted). Even if all three conditions are met, the error should be corrected “only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 502. “In fact, the error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Lombardozzi*, 491 F.3d 61, 73 (2d Cir. 2007) (internal quotation marks omitted) (citing cases).

Even review for plain error is unavailable, however, if the defendant waived the claim of error in the court below. *Yu-Leung*, 51 F.3d at 1122. “[W]aiver is the intentional relinquishment or abandonment of a known right.” *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted). Where a defendant indicates that the district court’s proposed resolution of an issue is satisfactory, he waives his right to appeal that resolution. *See United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009) (concluding that the defendant waived his right to challenge a jury instruction that he had indicated to the district court was satisfactory).

Finally, an issue may be waived on appeal when not sufficiently argued in a brief. *See United States v. Fell*, 531 F.3d 197, 233 n.25 (2d Cir. 2008) (“Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.”), *cert. denied*, 130 S. Ct. 1880 (2010); *United States v. Crispo*, 306 F.3d 71, 86 (2d Cir. 2002) (same); *see generally* Fed. R. App. P. 28(a) (establishing requirements for appellate brief).

C. Discussion

1. The defendant waived his challenge to the admission of evidence related to his gambling

During a hearing on the defendant's motion *in limine* to exclude evidence related to his gambling, the defendant stated that he had "no objection" to the evidence if the Government limited the evidence to 2006 and 2007. (SA 23). Relying on the defendant's acquiescence, the district court denied the motion as moot. (*Id.*). The defendant did not object to that ruling, nor did he object at trial when the casino records, limited to 2006 and 2007, were offered into evidence. The defendant's acquiescence amounts to a waiver. *See Polouizzi*, 564 F.3d at 153.

In *Polouizzi*, the parties disagreed on jury instructions with respect to an insanity defense. *See id.* at 148. The trial court offered its own version of the instruction, in response to which defense counsel stated, "Your Honor, I do not have any objection at this time." *Id.* The defendant also did not object when the instruction was read to the jury. *See id.* Under the circumstances, the Court had little difficulty in concluding that, "by agreeing that the instruction was satisfactory, Polizzi waived the right to challenge the instruction on appeal." *Id.* at 153.

Polouizzi is controlling here, because Ojeda agreed that limiting the evidence of unexplained wealth to 2006 and 2007 would be satisfactory resolution of the dispute. Ojeda's waiver should therefore "negate even plain error

review.” *Yu-Leung*, 51 F.3d at 1122; *see also United States v. Tartir*, 347 Fed. Appx. 655, 657 (2d. Cir. 2009) (holding that defendant had waived claim by indicating that he would not oppose admission of “404(b)-type evidence”).

Even if Ojeda’s claim was not waived in the district court, it has been waived on appeal. Ojeda literally offers no reasons or explanation for his claim that the evidence of gambling was unduly prejudicial. *See* Ojeda Br. at 10-12; *cf.* Fed. R. App. P. 28(a)(9)(A). Accordingly, the claim has been waived. *See Fell*, 531 F.3d at 233 n.25 (declining to consider alleged Fifth and Eighth Amendment violations).

The district court’s judgment should therefore be affirmed.

2. It was not plain error for the district court to admit evidence of the defendant’s gambling

Even assuming, *arguendo*, that the defendant’s claim has not been waived, it is meritless. Simply put, it was not error for the district court to admit the casino records as evidence of unexplained wealth. Even if the district court erred, the error was not plain, did not affect any substantial rights, and did not seriously affect the fairness, integrity, or public reputation of the proceedings.

As Ojeda properly admits, “evidence of unexplained wealth is admissible in narcotics crimes.” Ojeda Br. at 10.

Indeed, this Court has long held that unexplained wealth can be “highly probative of . . . involvement in narcotics trafficking.” *United States v. Young*, 745 F.2d 733, 763 (2d Cir. 1984) (citing cases); *United States v. Barnes*, 604 F.2d 121, 146 (2d Cir. 1979) (“Evidence of the possession and receipt of huge amounts of money is highly relevant . . .”). Given the long-standing rule that unexplained wealth can be probative of narcotics trafficking, it was not error, much less plain error, for the district court to allow the evidence.

Finally, the alleged error did not affect any substantial rights, nor affect the fairness, integrity, or public reputation of the proceedings, in light of the overwhelming evidence against Ojeda. The evidence included testimony from law enforcement officers, a co-defendant who engaged in numerous drug transactions with Ojeda, and an informant who conducted a controlled purchase from Ojeda, all corroborated by telephone intercepts and consensually-recorded calls. In addition, the jury heard about Ojeda’s post-arrest admissions that he was involved in dealing drugs with Morse. Taken as a whole, the evidence against Ojeda was overwhelming. *See Johnson*, 529 F.3d at 503 (holding that verdict should not be overturned despite “egregious and obvious” errors in light of overwhelming evidence).

Moreover, Ojeda admitted his culpability on Count One after the trial during a safety-valve proffer. *See Ojeda Br.* at 4 n.3. Ojeda’s admissions of guilt, made first after his arrest and again after his conviction, together with the other overwhelming evidence of his guilt, provides

sufficient assurance that no miscarriage of justice has occurred and that the district court's judgment should be affirmed.

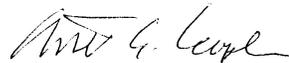
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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