

13-3410 (L)

United States v. Demott

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2015

5
6 (Argued: March 9, 2016 Decided: October 9, 2018)

7
8 Docket Nos. 13-3410, 13-4283, 14-178
9

10
11
12
13 UNITED STATES OF AMERICA,

14
15 *Appellee,*

16
17 v.

18
19 CHARLES DEMOTT JR., ROSARIO GAMBUZZA, and ERNEST SNELL,

20
21 *Defendants-Appellants.**
22

23
24 Before:

25
26 LEVAL, POOLER, and WESLEY, *Circuit Judges.*
27

28 Defendants appeal from their convictions in the United States District
29 Court for the Northern District of New York (Glenn T. Suddaby, J.).
30 Defendants were convicted under the Controlled Substance Analogue
31 Enforcement Act of 1986 (the "Analogue Act"), 21 U.S.C. §§ 802(32)(A), 813, of
32 conspiracy to deal in "controlled substance analogues." Defendants argue the
33 Analogue Act is unconstitutionally vague as applied to these charges; that the
34 evidence at trial was insufficient to support the convictions of Snell and
35 Gambuzza; that the trial of Snell and Gambuzza was prejudiced by improper
36 jury instructions relating to the knowledge element under the Analogue Act;

* The Clerk of Court is respectfully directed to amend the caption as set forth above.

13-3410 (L)

United States v. Demott

1 and that Gambuzza's trial was prejudiced by the receipt of inadmissible
2 hearsay evidence.

3 Held, the Analogue Act is not unconstitutionally vague and the trial
4 evidence was legally sufficient. However, Snell and Gambuzza were
5 prejudiced by improper jury instructions on the knowledge element of the
6 Analogue Act, and Gambuzza was also prejudiced by the receipt of
7 inadmissible hearsay evidence. Accordingly, Demott's conviction on his
8 guilty plea is AFFIRMED, and the convictions of Snell and Gambuzza are
9 VACATED. Their cases are REMANDED for retrial.

10 Judge Richard C. Wesley concurs in this opinion and in addition by
11 separate opinion.
12
13
14

15 STEVEN D. CLYMER (CARLA B.
16 FREEDMAN, *on the brief*) for Grant C.
17 Jaquith, UNITED STATES ATTORNEY FOR
18 THE NORTHERN DISTRICT OF NEW YORK,
19 Syracuse, NY.
20

21 JAMES SCOTT PORTER, Seneca Falls, NY
22 for Charles Demott, Jr.; DONALD T.
23 KINSELLA, Albany, NY for Rosario
24 Gambuzza; JAMES P. EGAN (JAMES F.
25 GREENWALD, *on the brief*), for LISA A.
26 PEEBLES, OFFICE OF THE FEDERAL PUBLIC
27 DEFENDER, Syracuse, NY, for Ernest
28 Snell.
29

30 LEVAL, *Circuit Judge*:

31 Defendants Rosario Gambuzza, Ernest Snell, and Charles Demott, Jr.
32 appeal from their convictions under a Second Superseding Indictment (the
33 "Indictment") in the United States District Court for the Northern District of
34 New York (Glenn T. Suddaby, *J.*). All three were convicted under the

13-3410 (L)

United States v. Demott

1 Controlled Substance Analogue Enforcement Act of 1986 (the “Analogue Act”
2 or the “Act”), 21 U.S.C. §§ 802(32)(A), 813, of conspiracy to deal in “controlled
3 substance analogues.” Demott pleaded guilty to Count 1, which charged
4 conspiracy to distribute and to possess with intent to distribute a controlled
5 substance analogue, reserving his right to challenge the constitutionality of
6 the Analogue Act on appeal. Gambuzza and Snell were tried before a jury
7 and convicted on Count 1, as well as on Count 2, which charged conspiracy to
8 import a controlled substance analogue in violation of 21 U.S.C. §§ 813,
9 960(a)(1) and (b)(3), and 963, and, in Gambuzza’s case, on 19 counts of money
10 laundering, in violation of 18 U.S.C. §§ 1956(a)(2)(A) and 2(b).

11 Defendants’ principal contentions are that the Analogue Act is
12 unconstitutionally vague as applied to these charges; that the evidence at the
13 trial was insufficient to support the convictions of Snell and Gambuzza for the
14 drug offense; that the trial Defendants were prejudiced by improper jury
15 instructions relating to the element of knowledge under the Analogue Act;
16 and that Gambuzza’s trial was prejudiced by the receipt of inadmissible
17 hearsay evidence. We agree with the latter two contentions and therefore
18 vacate the convictions of Gambuzza and Snell by reason of errors in the jury

13-3410 (L)

United States v. Demott

1 instructions and the receipt of prejudicial, inadmissible hearsay evidence.

2 Otherwise, we reject Defendants' arguments. We therefore affirm Demott's

3 conviction on his guilty plea and remand for retrial of Snell and Gambuzza.

4 **BACKGROUND**

5 The Indictment charged Defendants with conspiring in and around

6 Syracuse, New York between January 2010 and April 2011 to import from

7 China and deal in two "controlled substance analogues": 4-

8 methylmethcathinone (known as "4-MMC" or "mephedrone") and 4-methyl-

9 n-ethylcathinone (known as "4-MEC").¹ The term "controlled substance

10 analogues" refers to substances that are similar to those listed as "controlled

11 substances" in Schedule I or II of the CSA, 21 U.S.C. § 812. "Controlled

12 substance analogues" are statutorily defined (as further discussed below) as

13 substances that are "substantially similar" to Schedule I or II controlled

14 substances—both in their chemical structure and in their actual, intended, or

15 represented effect on the central nervous system (or "pharmacological

¹ While at the time of the conspiracy neither substance was listed in the schedules of controlled substances set forth in the CSA, 21 U.S.C. § 812, subsequently both have been added to Schedule I, so that, if the same conduct were repeated today, the charges would directly allege violation of the CSA, without reference to the Analogue Act.

13-3410 (L)

United States v. Demott

effect"). *See Id.* § 802(32)(A).² Pursuant to § 813, "controlled substance analogue[s]," when intended for human consumption, are treated for the purposes of federal law as "controlled substance[s] in Schedule I" regulated by the CSA.

In the trial of Snell and Gambuzza, the evidence showed a scheme that originated with importations from China by co-conspirator Vincent Cizenski (who cooperated with the Government and testified against Snell and Gambuzza at trial). Cizenski had previously used MDMA (3,4-methylenedioxy-N-methamphetamine, also known as "Molly" or "ecstasy"), which is a controlled substance listed in Schedule I. In the course of searching the Internet for a similar drug, he came across a seller in China named Eric Chang (also known as Lei Zhang) who offered 4-MMC, a chemical compound that was not, at the time, listed in the schedules of the CSA.

² Although the wording of the statutory definition in § 802(32)(A) is arguably unclear on this point, we assume for purposes of this opinion, as have all the parties, that the requirement of substantial similarity in pharmacological effect is in addition to the requirement of substantial similarity in chemical structure. *See United States v. Roberts*, 363 F.3d 118, 121 (2d Cir. 2004) (assuming that these elements are conjunctive, rather than disjunctive, requirements).

13-3410 (L)

United States v. Demott

1 Cizenski began to order 4-MMC from Chang and to sell the product to
2 others, including another co-conspirator named William Harper, who also
3 cooperated with the Government and testified at trial. Harper sold the drug
4 to Gambuzza, and both Harper and Gambuzza subsequently ordered it
5 directly from Chang. Snell and Demott both purchased the drug from Harper,
6 with Snell at times giving Harper cocaine in exchange.

7 Chang initially sent the co-conspirators 4-MMC. He later began to fill
8 their orders with 4-MEC instead. 4-MEC, like 4-MMC, was not listed in the
9 CSA schedules at the time of the conspiracy. A controlled purchase from
10 Harper for “Molly” in July 2010 was filled with 4-MMC. In contrast,
11 controlled purchases from Harper in September and November 2010 were
12 filled with 4-MEC. Similarly, packages shipped from Chang’s company, CEC
13 Limited, to Harper and Gambuzza in December 2010 were found, when
14 seized by United States Customs and Border Protection (“Customs”) at the
15 border, to contain 4-MEC.

16 When placing orders with Chang, the co-conspirators (who paid with
17 Western Union money orders) referred to 4-MMC as “Mp,” signifying
18 “mephedrone.” Joint Appendix (“App.”) 316-17. In shipping the substances,

13-3410 (L)

United States v. Demott

1 Chang deceptively labeled them as “metal corrosion inhibitor” or “camphanic
2 acid.” *Id.* at 320. He usually included invoices reflecting false prices. The
3 conspirators, including Snell and Gambuzza, used coded language in
4 communicating with each other about the substances. For example, on one
5 intercepted phone call, Gambuzza asked Harper if he had any “extra tanning
6 sessions.” *Id.* at 378. Harper testified that this was code for 4-MMC. On
7 another call, Harper told Gambuzza that the “stuff that we like is now
8 officially illegal in China,” referring again to the 4-MMC they received from
9 Chang, which had recently been made illegal by Chinese law. *Id.* at 379.

10 On April 12, 2011, law enforcement officials executed search warrants
11 at the residences of Snell and Gambuzza. At Snell’s residence, they found
12 plastic bags containing 4-MEC and cocaine in the kitchen cabinets and in a
13 Klondike ice cream bar box in the freezer. They also found a digital scale, a
14 Tupperware dish, and a measuring spoon. At Gambuzza’s residence, they
15 found a digital scale, small plastic baggies, a shipping receipt from CEC
16 Limited, a receipt for a money transfer to CEC Limited, and a sender’s copy of
17 a FedEx Ground order form for a shipment addressed to a co-conspirator in
18 California.

13-3410 (L)

United States v. Demott

1 With respect to the status of 4-MMC and 4-MEC as controlled
2 substance analogues, the government submitted expert testimony that both
3 substances are substantially similar in chemical structure to methcathinone,
4 which is listed in Schedule I, and that their pharmacological effect is
5 substantially similar to that of methcathinone and MDMA, which is also
6 listed in Schedule I.

7 In August 2011, a federal grand jury returned a six-count indictment
8 naming Demott, Gambuzza, and Snell, as well as 19 others. In June 2012, that
9 indictment was replaced with a two-count superseding indictment, which
10 charged a conspiracy to distribute, to possess with intent to distribute, and to
11 import a controlled substance analogue. All three Defendants moved to
12 dismiss the superseding indictment on the ground that the Analogue Act is
13 unconstitutionally vague. The district court denied the motions.

14 The Second Superseding Indictment (described above), under which
15 Defendants were convicted, was filed in January 2013. Demott and Snell each
16 renewed their motions to dismiss it. The district court again denied the
17 motions. Demott then pleaded guilty pursuant to a written agreement,
18 reserving his right to appeal the denial of his motion to dismiss. Snell and

13-3410 (L)

United States v. Demott

1 Gambuzza were tried before a jury and were convicted on all counts. All
2 three now appeal.

3 DISCUSSION

4 I. Vagueness

5 All three Defendants assert on this appeal that the Analogue Act is
6 unconstitutionally vague as applied to the facts of this case. Precedents
7 establish that a statute is unconstitutionally vague if it fails to define the
8 unlawful conduct with “sufficient definiteness that ordinary people can
9 understand what conduct is prohibited,” or if its vagueness makes the law
10 unacceptably vulnerable to “arbitrary enforcement.” *See Kolender v. Lawson*,
11 461 U.S. 352, 357-58 (1983).

12 We recognize that making criminality depend on the “substantial
13 similarity” of a substance to an expressly prohibited substance inevitably
14 involves a degree of uncertainty. *Accord United States v. Makkar*, 810 F.3d 1139,
15 1143 (10th Cir. 2015) (“It’s an open question, after all, what exactly it means
16 for chemicals to have a ‘substantially similar’ chemical structure—or effect.”).
17 However, as the Supreme Court has recently explained, such “non-numeric,”
18 “qualitative standard[s]” abound in our law, and are not so inherently

13-3410 (L)

United States v. Demott

1 problematic as to independently render a statute void for vagueness. *Sessions*
 2 *v. Dimaya*, 138 S. Ct. 1204, 1215 (2018) (internal quotation marks omitted).
 3 Further, the viability of Defendants’ argument is substantially undercut by
 4 the fact that the Supreme Court, our court, and other circuits have upheld the
 5 Analogue Act against vagueness challenges.

6 In *McFadden v. United States*, the Supreme Court rejected a vagueness
 7 challenge to the Analogue Act, characterizing the statute as “unambiguous.”
 8 135 S. Ct. 2298, 2307 (2015). This court, as well, has upheld the Analogue Act
 9 against similar vagueness challenges. *See Roberts*, 363 F.3d at 125-26; *United*
 10 *States v. Ansaldi*, 372 F.3d 118, 123-24 (2d Cir. 2004). Other circuits have
 11 reached the same conclusion.³³ *See United States v. Turcotte*, 405 F.3d 515, 531-

³³ Although the wording of the statutory definition in § 802(32)(A) is arguably unclear on this point, we assume for purposes of this opinion, as have all the parties, that the requirement of substantial similarity in pharmacological effect is in addition to the requirement of substantial similarity in chemical structure. *See United States v. Roberts*, 363 F.3d 118, 121 (2d Cir. 2004) (assuming that these elements are conjunctive, rather than disjunctive, requirements). Concern for whether a criminal statute gives adequate notice of what conduct is prohibited is alleviated if a conviction is sustainable only if the defendant knows that his conduct is illegal. *See id.* at 123 (“Because the statute at issue here contains a scienter requirement, the defendants’ vagueness challenge must be met with some measure of skepticism.” (citation omitted)). In light of the Supreme Court’s explanation of the Act’s knowledge requirement in *McFadden*, however, the persuasiveness of that proposition is

13-3410 (L)

United States v. Demott

32 (7th Cir. 2005) (collecting cases), *abrogated on other grounds by United States v. Novak*, 841 F.3d 721, 729 (7th Cir. 2016).

Defendants seek to distance their case from those precedents by arguing that the Analogue Act is unconstitutionally vague as applied to their case because, at the time of the alleged conspiracy, there had been no controlled, published human testing of 4-MMC and 4-MEC. They contend for that reason that they had no notice that 4-MMC and 4-MEC were substantially similar in pharmacological effect to any scheduled controlled substance and that the statute was susceptible to an arbitrary, guesswork approach to enforcement. The argument is not persuasive. Controlled human testing is not required for an ordinary person to understand the similarity in

open to question. As described more fully below, according to *McFadden's* explanation of the Act's knowledge requirement, it appears that a conviction under the Analogue Act could be sustained notwithstanding a finding that the defendant reasonably believed his conduct was lawful. *McFadden* explained that the Analogue Act would be satisfied if a jury found the defendant knew of the substantial similarity of his drug to a listed substance in chemical structure and pharmacological effect, even if he also believed his substance was legal. 135 S. Ct. at 2305. Thus, the Act's knowledge requirement, at least in some circumstances, is arguably not the sort of "scienter requirement" that tends to "mitigate a law's vagueness." *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-500 (1982) (relying in part on an ordinance's scienter requirement that an item be "marketed for use with illegal cannabis or drugs" to uphold the ordinance against a vagueness challenge).

13-3410 (L)

United States v. Demott

1 “stimulant, depressant, or hallucinogenic effect,” 21 U.S.C. § 802(32)(A)(ii), of
2 one substance to another.

3 Defendants argue further that their theory of the susceptibility of the
4 statute to arbitrary enforcement is borne out by the Government’s assertion in
5 this case that a substance can satisfy the statutory definition of an analogue if
6 its chemical structure is substantially similar to the chemical structure of one
7 scheduled drug, while its pharmacological effect is substantially similar to the
8 pharmacological effect of another scheduled drug. The Government’s theory
9 of the case allowed for a finding that 4-MMC and 4-MEC were controlled
10 substance analogues because they were substantially similar in chemical
11 structure to one listed drug (methcathinone) and substantially similar in
12 pharmacological effect to another listed drug (MDMA). Defendants contend
13 that such a hybrid basis is not permissible under the terms of the statute and
14 that the Government’s use of it shows that the vagueness of the statute invites
15 arbitrary prosecution.

16 We disagree. What Defendants characterize pejoratively as a “hybrid”
17 theory of interpretation of the Act is clearly contemplated by the statute’s

13-3410 (L)

United States v. Demott

1 words. The Analogue Act defines a “controlled substance analogue” in

2 § 802(32)(A). It states:

3 Except as provided in subparagraph (C) [listing exceptions not
4 here relevant], the term “controlled substance analogue” means a
5 substance—

6 (i) the chemical structure of which is substantially similar to the
7 chemical structure of a controlled substance in schedule I or II;

8 (ii) which has a stimulant, depressant, or hallucinogenic effect on
9 the central nervous system that is substantially similar to or
10 greater than the stimulant, depressant, or hallucinogenic effect on
11 the central nervous system of a controlled substance in schedule I
12 or II; or

13 (iii) with respect to a particular person, which such person
14 represents or intends to have a stimulant, depressant, or
15 hallucinogenic effect on the central nervous system that is
16 substantially similar to or greater than the stimulant, depressant,
17 or hallucinogenic effect on the central nervous system of a
18 controlled substance in schedule I or II.
19

20 The statute addresses chemical structure and pharmacological effect in

21 separate provisions. Clause (i), the provision referring to chemical structure,

22 instructs that the chemical structure of the substance must be substantially

23 similar to the chemical structure of a controlled substance in Schedule I or II.

24 Clauses (ii) and (iii) relate to pharmacological effect—the stimulant,

25 depressant, or hallucinogenic effect of the substance on the central nervous

26 system. They state that the stimulant, depressant, or hallucinogenic effect on

13-3410 (L)

United States v. Demott

1 the central nervous system, either actual, or as intended or represented, must
2 be substantially similar to or greater than the stimulant, depressant, or
3 hallucinogenic effect on the central nervous system of *a* controlled substance
4 in Schedule I or II. Nothing in the language of the Act suggests that the drug
5 listed in Schedule I or II that is substantially similar in chemical structure to
6 the analogue must be the same listed drug that is substantially similar to the
7 analogue in pharmacological effect. *Accord United States v. Carlson*, 810 F.3d
8 544, 553 (8th Cir. 2016) (“While an analogue substance must have a similar
9 chemical structure as a controlled substance, its physiological effects may be
10 similar to a different controlled substance.”). Defendants’ argument that this
11 aspect of their prosecution showed unacceptable vagueness of the Analogue
12 Act is not persuasive.

13 II. Whether the Government Proved the Substances were Controlled
14 Substance Analogues

15
16 Snell and Gambuzza next argue that the evidence was insufficient for
17 the jury to conclude that 4-MMC and 4-MEC were controlled substance
18 analogues. Conceding that the evidence established the chemical similarity of
19 the substances to methcathinone, Defendants argue that the evidence was
20 insufficient to establish their similarity in pharmacological effect to a

13-3410 (L)

United States v. Demott

1 Schedule I or II controlled substance. To succeed, Snell and Gambuzza must
2 meet the “heavy burden” of “show[ing] that no rational trier of fact could
3 have found all of the elements of the crime beyond a reasonable doubt.”
4 *United States v. Caracappa*, 614 F.3d 30, 43 (2d Cir. 2010) (internal quotation
5 marks omitted).

6 We reject the argument. The Government presented evidence from
7 which a reasonable juror could have concluded that 4-MMC and 4-MEC were
8 substantially similar in pharmacological effect to a Schedule I or II controlled
9 substance, as well as that the conspirators represented this to be so. First,
10 there was expert testimony that 4-MMC and 4-MEC produced a stimulant
11 effect similar to methcathinone and MDMA (both Schedule I controlled
12 substances). Second, there was testimony from cooperating co-conspirators
13 that the experience of using 4-MMC and 4-MEC was similar to the experience
14 of using MDMA. In addition, cooperating co-conspirators testified that while
15 selling 4-MMC and 4-MEC, they would “pass it off as Molly,” App. 260, or
16 would tell customers it was “just like E [meaning ecstasy],” *id.* at 586-87,
17 referring to street names for MDMA. The evidence amply supported a finding
18 that the pharmacological effects of 4-MMC and 4-MEC were, and were

13-3410 (L)

United States v. Demott

1 represented by the conspirators to be, substantially similar to the effects of
2 methcathinone or MDMA.

3 III. Sufficiency of Evidence of Gambuzza's Involvement in the
4 Conspiracy
5

6 Gambuzza also challenges the sufficiency of the evidence with respect
7 to his involvement in the conspiracy. He argues that the evidence showed
8 only that he purchased from Chang, not that he ever sold. The argument is
9 frivolous. There was ample evidence from which a rational jury could have
10 concluded that Gambuzza conspired with named co-conspirators to import
11 the analogues, distribute them, and possess them with intent to distribute.

12 Harper testified that he and Gambuzza had used the substance together.

13 When Gambuzza required increasingly large quantities of it, he taught
14 Gambuzza how to order the substance directly from Chang. There was ample
15 evidence of distribution by Gambuzza, including the large volume of his
16 importations from Chang (multi-kilo quantities for which he paid \$72,800 in a
17 one-year period) and the seizure by law enforcement authorities at his
18 residence of a shipping receipt for a package sent to a co-conspirator, a digital
19 scale, and baggies. Furthermore, there was substantial evidence of his
20 conspiratorial undertaking with Chang, who was also a charged co-

13-3410 (L)

United States v. Demott

1 conspirator, to import and distribute the analogue substances. This evidence,
2 considered together, was sufficient for a rational jury to conclude that
3 Gambuzza was a participating member of the charged conspiracy.

4 IV. Jury Instructions on Knowledge

5 Defendants argue their convictions must be set aside because of two
6 alleged errors in the jury instructions:⁴

7 (1) They contend that under *McFadden*, courts must give a jury
8 instruction that requires the jury to find that a defendant knew that
9 the substances were controlled “under the CSA or Analogue Act, as
10 opposed to any other federal or state laws,” 135 S Ct. at 2306 n.3,
11 and that the district court here failed to so instruct.

12 (2) They contend the district court violated the requirements of
13 *McFadden* by telling the jury that “knowledge of, or intent to violate
14 the law is not an element of the offense.” App. 978.

⁴ This court considers a jury instruction erroneous “if it misleads the jury as to the correct legal standard or does not adequately inform the jury of the law. When conducting this review, we examine the charges as a whole to see if the entire charge delivered a correct interpretation of the law.” *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017) (citations, footnote, and internal quotation marks omitted).

13-3410 (L)

United States v. Demott

1 We address each in turn.

2 i. The District Court's Failure to Charge that Defendants Needed to
3 Know the Substances were Controlled "under the CSA or Analogue
4 Act."

5
6 In *McFadden*, the Supreme Court rejected the conclusion of the Court of
7 Appeals that the sole knowledge requirement for conviction under the
8 Analogue Act was the "inten[t] for human consumption." 135 S. Ct. at 2306
9 (internal quotation marks omitted). The Court held that "the Government
10 must prove that a defendant knew that the substance with which he was
11 dealing was 'a controlled substance,' even in prosecutions involving an
12 analogue." *Id.* at 2305. Accordingly, the Court held that the jury charge at
13 issue in that case ("McFadden had to knowingly and intentionally distribute a
14 mixture or substance that has an actual, intended, or claimed
15 [pharmacological effect] substantially similar to that of a controlled
16 substance") failed to "fully convey the mental state required by the Analogue
17 Act." *Id.* at 2307 (internal quotation marks and brackets omitted).

18 The Court explained that the Analogue Act requires that an analogue
19 intended for human consumption "be treated, for the purposes of any Federal
20 law as a controlled substance in schedule I," 21 U.S.C. § 813, so that the

13-3410 (L)

United States v. Demott

1 knowledge requirement for prosecutions under the Analogue Act is derived
2 from the CSA. *McFadden*, 135 S. Ct. at 2304-05. The CSA, in 21 U.S.C.
3 § 841(a)(1), makes it unlawful “for any person knowingly or intentionally to
4 manufacture, distribute, or dispense, or possess with intent to manufacture,
5 distribute, or dispense, a controlled substance,” and other provisions prohibit
6 “knowingly or intentionally” importing “a controlled substance.” *Id.* § 960(a);
7 *see also id.* § 952(a) (defining “[u]nlawful acts” to include a person “knowingly
8 or intentionally import[ing] or export[ing] a controlled substance”). The
9 CSA’s knowledge requirement applies both to the particular prohibited verbs
10 (*e.g.*, distribute, import, etc.) and to the object of the verbs (“a controlled
11 substance”). *McFadden*, 135 S. Ct. at 2304. Accordingly, in a prosecution under
12 the CSA, the Court held, “the Government [must] prove that a defendant
13 knew he was dealing with a ‘*controlled substance*,’” and an analogous
14 requirement applies “in prosecutions involving an analogue.” *Id.* at 2305
15 (emphasis added). Because the trial court had not instructed the jury in that
16 manner, the Supreme Court remanded for consideration of whether the error
17 was prejudicial or harmless.

13-3410 (L)

United States v. Demott

1 The *McFadden* Court rejected the government's contention that the
2 knowledge requirement would be satisfied by proof that "the defendant
3 knew he was dealing with an illegal or regulated substance *under some law*."
4 *Id.* at 2306 (emphasis added) (internal quotation marks omitted). The Court
5 explained, "Section 841(a)(1) . . . requires that a defendant knew he was
6 dealing with 'a controlled substance.'" *Id.* Citing the CSA's definition of a
7 controlled substance ("a drug or other substance . . . included in schedule I, II,
8 III, IV, or V of part B of this subchapter," 21 U.S.C. § 802(6)), the Court said,
9 "That term includes only those drugs listed on the federal drug schedules or
10 treated as such by operation of the Analogue Act. It is not broad enough to
11 include all substances regulated by any law." *Id.* (internal citations omitted).

12 The Supreme Court noted that circumstantial evidence may be used to
13 prove the requisite knowledge. In footnote 1, the Court noted that, in
14 undertaking to prove *mens rea*, the Government frequently, and properly,
15 offers circumstantial evidence, such as of "a defendant's concealment of his
16 activities, evasive behavior with respect to law enforcement, knowledge that a
17 particular substance produces a 'high' similar to that produced by controlled
18 substances, and knowledge that a particular substance is subject to seizure at

13-3410 (L)

United States v. Demott

1 customs.” *Id.* at 2304 n.1. In footnote 3, referring to prosecutions in which the
2 government offers the types of circumstantial evidence previously mentioned
3 in footnote 1, the Court announced, “In such cases, *it will be left to the trier of*
4 *fact* to determine whether the circumstantial evidence proves that the
5 defendant knew that the substance was a controlled substance under the CSA
6 or Analogue Act, as opposed to under any other federal or state laws.” *Id.* at
7 2306 n.3 (emphasis added). The Court thus stated that circumstantial
8 evidence, such as furtive conduct, may be legally sufficient to establish the
9 requisite knowledge under the Analogue Act.

10 The Court went on to say that there are two ways for the Government
11 to establish the requisite knowledge. *Id.* at 2305. As to the first alternative, for
12 prosecutions involving a listed substance (*i.e.*, prosecutions directly under the
13 CSA), the government can prove the defendant knew the substance was a
14 “controlled substance . . . actually listed on the federal drug schedules.” *Id.*
15 Analogously, in prosecutions involving an analogue, the Government can
16 prove the defendant knew the substance was “treated as such by operation of
17 the Analogue Act,” *id.*, *i.e.*, the defendant knew that the substance was treated
18 as a controlled substance actually listed on the federal drug schedules. In

13-3410 (L)

United States v. Demott

1 either case, the Government does not need to show that the defendant knew
2 the identity of the substance. *Id.* The Court explained that proof under this
3 alternative could include, for example, “past arrests that put a defendant on
4 notice of the controlled status of a substance.” *Id.* at 2304 n.1.

5 As to the second way of proving the required knowledge for
6 prosecutions under the CSA (involving listed substances), the Court said that
7 the Government can prove a defendant knew the identity of the listed drug
8 he was distributing (for example, heroin), even if he did not know that the
9 drug was listed in the schedules. *Id.* at 2304.⁵ The analogous method for drugs
10 covered by the Analogue Act, however—unlike the case of a listed drug such
11 as heroin—would require more than simply proving that the defendant knew
12 what substance he was dealing in (such as “4-MMC” or “mephedrone”). The
13 Court explained that because analogues are not actually listed in the federal
14 drug schedules, a defendant who knows he is distributing mephedrone,
15 unlike a defendant who knows he is distributing heroin, does not know “all

⁵ As Chief Justice Roberts observed, this theory of knowledge is most appropriate for “well-known drugs such as heroin,” where “a defendant’s knowledge of the identity of the substance can be compelling evidence that he knows the substance is controlled.” *McFadden*, 135 S. Ct. at 2307 (Roberts, C.J., concurring in part and concurring in judgment). Lesser known drugs will not necessarily give rise to the same inference.

13-3410 (L)

United States v. Demott

1 of the facts that make his conduct illegal.” *Id.* at 2305. To know all of the facts
2 that make his conduct illegal, the defendant must know the *characteristics* of
3 the substance that qualify that substance as an analogue—that is, its
4 substantial similarity to a Schedule I or II controlled substance in chemical
5 structure *and* actual, intended, or represented effect on the central nervous
6 system. *Id.*

7 Although clarifying in some respects, *McFadden* also created ambiguity
8 regarding the particular showing required under the first permissible method
9 of proving knowledge. *McFadden* made clear that the defendant must know
10 that the drug at issue was “controlled.” *Id.* But a requirement to know that a
11 substance was “controlled” could mean different things. For example, it could
12 mean knowing that the substance was generally illegal (without knowing
13 whether federal or state law controlled); knowing that the substance was
14 illegal specifically under *federal law* (as opposed to state law); or knowing that
15 the substance was illegal under the *particular controlling statute*, such as the
16 CSA or Analogue Act. *McFadden* expressly rejected the first proposition, *id.* at
17 2306, but was unclear as between the second two. The opinion variously
18 described the mental state requirement as: knowledge that “the substance in

13-3410 (L)

United States v. Demott

1 question was a ‘controlled substance’ under federal law,” *id.* at 2306 n.3;
 2 knowledge that “[the defendant] was dealing in some controlled substance—
 3 that is, one actually listed on the federal drug schedules or treated as such by
 4 operation of the Analogue Act,” *id.* at 2305; and knowledge “that the
 5 substance was a controlled substance *under the CSA or Analogue Act, as opposed*
 6 *to any other federal or state laws*,” *id.* at 2306 n.3 (emphasis added); *see also id.* at
 7 2302 (“[The] knowledge requirement is met if the defendant knew that the
 8 substance was controlled under the CSA or the Analogue Act, even if he did
 9 not know its identity.”);⁶ *id.* at 2305 (“A defendant need not know of the
 10 existence of the Analogue Act to know that he was dealing with ‘a controlled
 11 substance.’”).

⁶ Which of these alternative formulations was correct was an issue going beyond the holding of the case, as it had no possible effect on the outcome of case before the court. *McFadden’s* holding, as explained above, is that the instruction given at trial “did not fully convey the mental state required,” *id.* at 2307; and that the government must establish that the defendant “knew he was dealing with ‘a controlled substance,’” *id.* at 2302. As to the Court’s further discussions of how the knowledge element might be proved—whether requiring a showing of knowledge that the substance was (i) listed on the federal drug schedule or treated as such by operation of the Analogue Act, or (ii) controlled “under the CSA or Analogue Act, as opposed to under any other federal or state laws,” *id.* at 2306 n.3—the Court’s disposition of the case would have been the same regardless of which specification was the correct one.

13-3410 (L)

United States v. Demott

1 Defendants challenge the district court's failure to charge in accordance
2 with *McFadden's* narrowest formulation, that, under the first alternative,
3 Defendants must be shown to have known that their substances were
4 "controlled under the CSA or the Analogue Act." *Id.* at 2302, 2306 n.3.
5 Defendants point out that the district court did not instruct the jury precisely
6 in accordance with that formulation. Instead, the district court instructed the
7 jury that the Government had to prove that Defendants knew the substances
8 with which they dealt were "controlled or regulated by federal drug abuse
9 laws." App. 978.

10 Defendants are correct that *McFadden* did at times describe the
11 knowledge element as knowledge that a substance is "controlled under the
12 CSA or the Analogue Act." 135 S. Ct. at 2302, 2306 n.3. But, as noted above,
13 the Court did not adhere consistently to this narrow articulation.

14 Furthermore, in stating that circumstantial evidence may suffice to
15 establish knowledge, the Court explicitly approved examples of
16 circumstantial evidence that would not support a logical inference that the
17 defendant knew anything about the CSA or Analogue Act ("a defendant's
18 concealment of his activities, evasive behavior with respect to law

13-3410 (L)

United States v. Demott

1 enforcement, knowledge that a particular substance produces a ‘high’ similar
2 to that produced by controlled substances, and knowledge that a particular
3 substance is subject to seizure at customs,” *id.* at 2304 n.1). Ordinarily,
4 circumstantial evidence can prove only what can be logically inferred from
5 the facts shown. “[E]vasive behavior,” knowledge that a substance produces a
6 high, and knowledge that a substance is subject to seizure at customs, simply
7 do not show that a defendant knows the identity of the statute he is violating.
8 *Id.*

9 Given *McFadden’s* deviations from this narrow articulation of the
10 knowledge requirement and other factors discussed below, we believe that
11 the formulation requiring knowledge of *the CSA or Analogue Act* was not the
12 Supreme Court’s intended standard. It seems highly unlikely that the
13 Supreme Court could have believed that Congress intended its drug
14 prohibitions to apply only to defendants who are aware of the identity of the
15 statute that makes their conduct illegal. Such a requirement would have
16 created very substantial problems for many conventional trials of traffickers
17 in drugs that are listed on the CSA’s schedules. It is a rare case in which a
18 drug dealer is shown to have known he was violating the CSA. Many

13-3410 (L)

United States v. Demott

1 prosecutions would need to be dismissed—and convictions vacated on
2 appeal—for absence of evidence showing either awareness of the CSA or
3 knowledge of the identity of the illegal substance being trafficked. In
4 addition, numerous convictions would need to be overturned by reason of
5 faulty jury instructions because, prior to *McFadden*, few (if any) trial courts
6 instructed juries that the government needed to prove the defendant knew
7 the substance he dealt in was controlled expressly by the CSA. The same
8 would be true for many prosecutions under the Analogue Act.

9 In light of all these considerations, we understand *McFadden*’s first
10 method not to require proof that the defendant knew the substance was
11 controlled *by the CSA or Analogue Act*, but rather to require proof that the
12 defendant knew that the substance in question was a “controlled substance,”
13 *i.e.*, was controlled by federal drug laws. *Id.* at 2305. Other courts have
14 applied *McFadden* similarly. *See United States v. Al Haj*, 731 Fed. App’x 377,
15 378-79 (5th Cir. 2018) (per curiam) (holding that evidence of the defendant’s
16 “evasive behavior,” including his use of code names and the false labeling of
17 packages, was sufficient to prove that the defendant “knew he was
18 distributing a controlled substance” as required by *McFadden*); *United States v.*

13-3410 (L)

United States v. Demott

1 *Anwar*, 880 F.3d 958, 967-68 (8th Cir. 2018)), *reh'g denied* 880 F.3d 958 (March
2 2, 2018) (holding that evidence of the defendant's furtive conduct, and of his
3 knowledge that the substance produced a high, was sufficient to support a
4 conviction for distribution of a controlled substance or controlled substance
5 analogue); *United States v. Louis*, 861 F.3d 1330, 1333-34 (11th Cir. 2017)
6 (holding that the "government's evidence of presence and flight" was
7 insufficient to support a conviction for conspiracy to deal in a controlled
8 substance).

9 Here, the district court's instruction that the government had to that
10 Defendants knew the substances were "controlled or regulated by federal
11 drug abuse laws" complies with the Analogue Act and with *McFadden*. While
12 the charge did not explicitly name the CSA, neither did it charge in the
13 manner that the *McFadden* Court explicitly rejected, *i.e.*, that a defendant must
14 know the substance is controlled by "some law." *McFadden*, 135 S. Ct. at 2306.
15 We also observe that, while, technically, "the federal drug abuse laws" is a
16 broader term than "the CSA," the two terms mean virtually the same thing, as
17 the CSA is the central provision of the federal drug abuse laws. The district
18 court's instruction came very close to literal conformity to what the *McFadden*

13-3410 (L)

United States v. Demott

1 Court said, even in its narrowest characterization of the knowledge
 2 requirement. We find no error in the jury instruction that, to prove
 3 knowledge, the government must prove that Defendants knew the substances
 4 were “controlled or regulated by federal drug abuse laws.” App. 978.

5 ii. The District Court’s Instruction that “Knowledge of . . . the Law is
 6 not an Element of this Offense.”

7
 8 Snell and Gambuzza next argue that their convictions must be vacated
 9 because some of the court’s instructions—either given during the presentation
 10 of evidence, in the jury charge at the close of the evidence, or in response to
 11 jury questions—conveyed to the jury, contrary to the Supreme Court’s later
 12 elaborations in *McFadden*, that knowledge of the law was not an element of
 13 the offense. Examples of the problematic instructions are as follows:

14 (a) To prove this element [of a defendant’s knowledge], the government
 15 need not show . . . that the defendant knew that he might be
 16 involved in some sort of criminal activity. This is because *knowledge*
 17 *of or intent to violate the law, is not an element of this offense.* App. 978
 18 (emphasis added).

19
 20 (b) [O]ne or both [defendants] may have been told that this substance
 21 was legal. *That is not a defense to these charges.* I can tell you that
 22 heroin is legal, [and ask you to] go out in the street and sell it. If you
 23 go out in the street and sell heroin and you get arrested, it’s not a
 24 defense to say that guy told me it was legal. App. 1023 (emphasis
 25 added).

13-3410 (L)

United States v. Demott

1 To the extent that these instructions communicated (or might have
2 communicated) to the jury that knowledge of the law is not an element of the
3 offense so that a defendant's belief that the substance was not controlled by
4 law is not a defense, these instructions were not compatible with the analysis
5 set forth in *McFadden*. They effectively deprived Defendants of the ability to
6 defend against the Government's evidence on the knowledge element.

7 As described above, *McFadden* stated that a conviction under the
8 Analogue Act requires the government to prove that a defendant "knew he
9 was dealing with 'a controlled substance,'" 135 S. Ct. at 2302. It is readily
10 apparent that the district court's instruction that knowledge of the law is not
11 an element was inconsistent with this requirement. To the extent the jury
12 might have found Defendants guilty under the first alternative way of
13 proving knowledge, the jury would have been required to find that
14 Defendants knew that the substances they dealt in were "controlled
15 substances," meaning that they were controlled under federal drug laws. The
16 jury was thus required to find, under this alternative, that Defendants knew

13-3410 (L)

United States v. Demott

- 1 some law. It therefore cannot be, as the district court instructed, that
- 2 “knowledge of . . . the law is not an element of the offense.”⁷

⁷ Our finding of error in the district court’s charge that knowledge of the law is not an element of the offense appears inconsistent with our pre-*McFadden* ruling in *Ansaldi*, 372 F.3d at 128, which upheld the trial court’s rejection of the defendants’ request to charge that they should be acquitted if they did not know they were breaking the law. The inconsistency, however, is not with the substance of *Ansaldi*’s rejection of the requested charge, but with the explanation given. The two-pronged standards enunciated by the Supreme Court in *McFadden* demonstrate the impropriety of both the charge requested by the *Ansaldi* defendants and the charge here given by the district court.

McFadden explained that there are two alternative ways of proving the requisite knowledge under the Analogue Act. The first alternative (showing that the defendant knew that the substance he dealt in was treated as controlled by the law) requires proof that the defendant knew some law; the second alternative (showing the defendant knew the substance’s features) does not. The instruction requested by the *Ansaldi* defendants was defective because it was not restricted to the first alternative. The *Ansaldi* court was thus consistent with *McFadden* in refusing to give the overbroad charge.

The charge given by the district court in our case—that ignorance of the law is no defense—would have been consistent with *McFadden* if it had been limited to the second alternative. But, just as the *Ansaldi* defendants erred in failing to limit their request to the first alternative, the trial court here erred in failing to limit its charge to the second alternative. Had the charge been restricted to proof of guilt based on the second alternative, it would have been permissible, because, according to *McFadden*, ignorance of the law is not a defense when guilt is shown by proving the defendants’ awareness of the substantial similarity of the analogue substance to a listed substance. 135 S. Ct. at 2306. *But see id.* at 2308 (Roberts, C.J., concurring in part and concurring in judgment) (“But when there is a legal element in the definition of the offense, a person’s lack of knowledge regarding that legal element *can* be a defense. And here, there is arguably a legal element in Section 841(a)(1)—that the substance be controlled.” (internal citations and quotation marks

13-3410 (L)

United States v. Demott

1 The district court’s analogy to heroin, which was offered to elucidate
 2 the concept that mistake of law was not a defense, was also misleading. It
 3 suggested to the jury that the knowledge requirement with respect to
 4 Defendants’ dealings in analogue substances was the same as it would have
 5 been had they been dealing in heroin, which is a listed substance. But, under
 6 *McFadden*, evidence of dealing in heroin with the knowledge that it is heroin
 7 is sufficient to support a conviction. As for analogue substances, in contrast,
 8 more is required. *McFadden* stated that a defendant’s knowledge of the
 9 identity of an analogue substance he dealt in (e.g., 4-MMC or 4-MEC) would
 10 not be sufficient. Under the second alternative, the government would be
 11 required to prove the defendant knew the *features* that brought the analogue

omitted)). Because the district court did not so restrict the charge, the charge applied equally to the first alternative—which, contrary to the court’s instruction, *does* require proof of knowledge of law. Our rejection of the district court’s instruction in this case is thus consistent with the *Ansaldi* court’s rejection of the defendants’ requested charge in that case.

On the other hand, *Ansaldi*’s explanation of its ruling—that “[k]nowledge of, or intent to violate, the law is simply not an element of [an Analogue Act violation],” 372 F.3d at 128—was irreconcilable with *McFadden* (and with this opinion) because it was not limited to the second alternative. Had *Ansaldi* explained its ruling by saying that “knowledge of, or intent to violate, the law is not an element *under the second alternative means of proof*” of an Analogue Act violation, it would have been consistent with *McFadden* and with this opinion.

13-3410 (L)

United States v. Demott

1 substance within the scope of the Act—its substantial similarity to a listed
2 drug, both as to chemical composition and pharmacological effect.

3 These erroneous instructions were not harmless. “Instructional error is
4 harmless only if it is ‘clear beyond a reasonable doubt that a rational jury
5 would have found the defendant guilty absent the error.’” *United States v.*
6 *Moran-Toala*, 726 F.3d 334, 344 (2d Cir. 2013) (quoting *Neder v. United States*,
7 527 U.S. 1, 18 (1999)). On the record before us, we cannot conclude, beyond a
8 reasonable doubt, that the verdicts for Snell and Gambuzza would have been
9 the same absent these errors. Knowledge of the illegality of 4-MMC and 4-
10 MEC was one of the central contested issues at trial. A key aspect of Snell’s
11 defense was a co-conspirator’s testimony that he told Snell the substances
12 were legal. Gambuzza’s attorney focused nearly exclusively on knowledge in
13 summation, pointing out that Gambuzza used his real address and bank
14 account when ordering the substances from China, and that co-conspirators
15 had represented the drugs to be legal.

16 It is true that the Government produced considerable circumstantial
17 evidence suggesting that Snell and Gambuzza knew of the drugs’ illegality
18 under federal law—for example, that they spoke in coded language about

13-3410 (L)

United States v. Demott

1 their shipments and knew the packages were subject to seizure at Customs.

2 However, given the existence of contrary evidence, and the centrality of this

3 issue at trial, we cannot conclude beyond a reasonable doubt that a rational

4 jury would have convicted Snell and Gambuzza were it not for the erroneous

5 instructions that “knowledge of . . . the law is not an element of the offense”

6 and belief that the substance was legal is “not a defense to these charges.”

7 Judged by the standards later announced by the Supreme Court in

8 *McFadden*, those instructions failed to explain the law correctly as to the

9 element of guilty knowledge, and Defendants were prejudiced by the errors.

10 Snell and Gambuzza are therefore entitled to a new trial on Counts One and

11 Two.

12 V. Sufficiency of Evidence of Defendants’ Knowledge

13
14 We next consider the contention by Snell and Gambuzza that the trial

15 evidence was insufficient to show they possessed the requisite knowledge to

16 sustain their convictions. We reject their argument. There was substantial

17 circumstantial evidence to support a finding that they knew that their

18 dealings violated federal drug laws.

13-3410 (L)

United States v. Demott

1 As described in footnote 1 of *McFadden*, there was evidence of
2 Defendants’ “concealment of [their] activities, . . . and [of their] knowledge
3 that [their] substance [was] subject to seizure at customs.” *McFadden*, 135 S.
4 Ct. at 2304 n.1. Intercepted text messages between Snell and Harper
5 communicated in coded language about packages that had been seized at
6 customs. In intercepted communications between Gambuzza and Harper,
7 Gambuzza asked in code for “extra tanning sessions” —referring to
8 mephedrone. App. 378. And Chang’s shipments from China were falsely
9 labeled as metal corrosion inhibitor or camphanic acid, and were
10 accompanied by invoices reflecting false prices.

11 VI. Hearsay

12 Gambuzza contends also that his conviction must be vacated because
13 his trial was prejudiced by inadmissible, prejudicial hearsay evidence. At the
14 start of trial, Detective Shane LaVigne, who investigated the conspiracy, was
15 asked by the prosecutor to tell the jury how he got involved in an
16 investigation of dealings in “Molly” in Syracuse. He answered that “a source”
17 came to him and advised him that “there’s a new type of Molly in Syracuse,”
18 and clarified that “Molly” signifies the “purest form powder MDMA.” App.

13-3410 (L)

United States v. Demott

1 141-42. He recounted that the source had told him that Harper was the
2 “primary distributor” of the Molly, that “Rosario Gambuzza was also on
3 approximately the same level as [Harper],” and that “Gerry Gero, Vincent
4 Cizenski, [and] Johnny May” “were also involved in this organization that
5 was trafficking Molly.” *Id.* at 145.

6 The detective further quoted his source as having told him “that there
7 was going to be a narcotics transaction slash robbery in the 300 block of
8 Montgomery Street,” where “there would be a black Cadillac owned by
9 Rosario Gambuzza and there was a kilo of cocaine in the trunk. . . . [D]uring
10 the transaction where that kilo was going to be sold, . . . a third-party would
11 be conducting a robbery.” *Id.* at 142-43.

12 LaVigne explained that “[an] informant is someone we build credibility
13 to, based on their information. We have to corroborate things they tell us to
14 make sure they are telling us correct information and to deem them reliable
15 and credible.” *Id.* at 144. He then confirmed that he was “able to make use of
16 this informant,” *id.*, apparently meaning that he had confirmed the
17 informant’s reliability. He added that such tips were a sort of information
18 “often relied upon by law enforcement regarding investigations.” *Id.* at 141.

13-3410 (L)

United States v. Demott

1 LaVigne's testimony relaying the statements he had heard from the
2 informant was inadmissible hearsay to the extent it might be considered by
3 the jury "for the truth of the matter asserted" in the informant's quoted
4 statements. Fed. R. Evid. 801(c) ("Hearsay' means a statement that: (1) the
5 declarant does not make while testifying at the current trial or hearing; and
6 (2) a party offers in evidence to prove the truth of the matter asserted in the
7 statement."). When Defendant objected on hearsay grounds, the prosecutor
8 argued, and the district court agreed, that the evidence was permissible
9 because it was offered not for the truth of the informant's statements but as
10 "background of what [LaVigne] did, why he went to this location." App. 143.

11 In a trial of Gambuzza for conspiracy to deal in analogues of Molly
12 (MDMA), the content of the informant's statements about Gambuzza's high-
13 level involvement in trafficking "a new type of Molly" (as well as other
14 drugs) was highly prejudicial to Gambuzza, especially as the unnamed
15 informant, who was the source of the information, was not present on the
16 witness stand to be cross-examined by Gambuzza's lawyer as to his basis for
17 making those statements. The prejudice was intensified by the detective's
18 assurances to the jury that the informant's reliability had been verified and

13-3410 (L)

United States v. Demott

1 that such information is “often relied upon by law enforcement,” which was
2 difficult to reconcile with the Government’s contention that this evidence was
3 not offered for the truth of the informant’s assertions.

4 The Government now wisely concedes that this evidence was hearsay.
5 It should not have been offered. How LaVigne got involved in an
6 investigation of dealings in Molly in Syracuse had little or no relevance to any
7 issue before the jury. To the extent the informant’s statements to LaVigne
8 might have had some slight insignificant relevance, as explaining why the
9 detective went to the 300 block on Montgomery, this could have been
10 adequately conveyed by eliciting that an informant had given information
11 about expected activities at that location, without repeating the information
12 about Gambuzza’s dealings in the new form of Molly, of the kilo of cocaine in
13 his trunk, or of the planned “narcotics transaction slash robbery.” The vast
14 majority of LaVigne’s report of his source’s tips had no proper role in the
15 Government’s evidence other than to communicate to the jury incriminating
16 hearsay information about Gambuzza.

17 While hearsay may at times be received to explain relevant background
18 circumstances, *see United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994)

13-3410 (L)

United States v. Demott

1 (collecting cases), we explained in *Reyes* that the propriety of resort to such
2 hearsay depends heavily on “whether the probative value of this evidence for
3 its non-hearsay purpose is outweighed by the danger of unfair prejudice
4 resulting from the impermissible hearsay use of the declarant’s statement.” *Id.*
5 In this instance, the value of the non-hearsay use to explain LaVigne’s actions
6 was practically nil, while the prejudice flowing from the jury’s consideration
7 of the content of the informant’s tip was substantial and obvious.

8 The Government nonetheless argues that the receipt of the hearsay
9 evidence was harmless in the context of the evidence against Gambuzza. We
10 disagree. “In order to uphold a verdict in the face of an evidentiary error, it
11 must be highly probable that the error did not affect the verdict.” *United States*
12 *v. Dukagjini*, 326 F.3d 45, 61 (2d Cir. 2003) (internal quotation marks omitted).
13 “A district court’s erroneous admission of evidence is harmless ‘if the
14 appellate court can conclude with fair assurance that the evidence did not
15 substantially influence the jury.’” *United States v. Al-Moayad*, 545 F.3d 139, 164
16 (2d Cir. 2008) (quoting *United States v. Garcia*, 291 F.3d 127, 143 (2d Cir. 2002)).
17 Here, we cannot conclude “with fair assurance” that the hearsay evidence did
18 not “substantially influence the jury.” *Id.* (internal quotation marks omitted).

13-3410 (L)

United States v. Demott

1 The testimony, which was offered at the very beginning of the trial, indicated
2 that Gambuzza was a “primary distributor” of Molly and that he would be
3 involved in a “narcotics transaction slash robbery” involving a kilo of cocaine
4 in the truck of his car. The Government, in addition, sought to bolster the
5 credibility of the hearsay by eliciting LaVigne’s testimony that he had
6 personally assessed and verified the informant’s credibility. The potential
7 prejudice of this testimony was substantial. Although it is true that the
8 Government offered ample additional evidence against Gambuzza, we cannot
9 conclude—given the highly prejudicial nature of the testimony—that the
10 testimony did not have a “substantial and injurious effect or influence on the
11 jury’s verdict.” *United States v. Groysman*, 766 F.3d 147, 155 (2d Cir. 2014)
12 (internal quotation mark omitted).

13 The Government argues that Gambuzza did not make a timely
14 objection to the introduction of this hearsay. We disagree. When the
15 Government began this line of inquiry, Gambuzza objected on the ground of
16 hearsay; the district court overruled the objection without explanation. As the
17 questioning proceeded, Gambuzza renewed the objection. The district court
18 overruled the objection again, notwithstanding that LaVigne had already

13-3410 (L)

United States v. Demott

1 quoted the informant to the effect that “there’s a new type of Molly in
2 Syracuse,” and that “there was going to be a narcotics transaction slash
3 robbery in the 300 block of Montgomery Street” involving “William Harper,
4 and . . . Rosario Gambuzza,” and had validated the informant’s tip as “a form
5 of information often relied upon by law enforcement.” App. 141-42.
6 Gambuzza had objected sufficiently. He was not obliged to repeat the
7 objection for every further iteration of this prejudicial hearsay.⁸

8 CONCLUSION

9 Demott’s conviction on his guilty plea is AFFIRMED. The convictions of Snell
10 and Gambuzza are VACATED. Their cases are REMANDED for further
11 proceedings consistent with this opinion.⁹

⁸ We have considered Defendants’ other challenges to the conduct of the trial and find them to be without merit. We express no view on Snell’s and Gambuzza’s challenges to their respective sentences.

⁹ In view of footnote 7, *supra*, prior to publication, this opinion has been circulated among the active judges of this court.