

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES :
 :
 : CRIMINAL ACTION
 :
 v. :
 :
 :
 : NO. 05-CR-702
 EUGENE PARKER :

SURRICK, J.

JUNE 9, 2006

MEMORANDUM & ORDER

Presently before the Court is Defendant's Motion For Judgment Of Acquittal And/Or New Trial (Doc. No. 52) and the Government's response thereto (Doc. No. 53). For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

Defendant Eugene Parker was indicted on charges of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (Counts 1 and 5); possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) (Counts 2 and 4); possession with intent to distribute cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count 3); possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) (Count 6); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e) (Count 7). (Indictment, Doc. No. 2.) On April 18, 2006, the jury returned a verdict of guilty on Counts 3, 4, 5 and 6.¹ The Court then found Defendant guilty of Count 7 in a bifurcated, stipulated nonjury trial. Defendant now seeks relief pursuant to Federal Rule of Criminal Procedure 29(c), asserting that the evidence was insufficient to support a guilty verdict on Counts

¹ Counts 1 and 2 were dismissed upon motion by the Government. (Doc. No. 50.)

3, 4, 5, and 6. Defendant also seeks a new trial pursuant to Federal Rule of Criminal Procedure 33.

II. LEGAL STANDARD

In considering a postverdict motion for judgment of acquittal under Rule 29,² we must determine “whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The evidence must be examined as a whole in the light most favorable to the jury verdict, with the presumption that the jury properly evaluated credibility of the witnesses, found the facts, and drew rational inferences. *See United States v. Iafelice*, 978 F.2d 92, 94 (3d Cir. 1992). The verdict of the jury must be upheld unless, viewing the evidence in this fashion, no rational jury could have found the defendant guilty beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984).

Rule 33(a) of the Federal Rules of Criminal Procedure provides that the court may exercise its discretion to grant a defendant a new trial if required in the interest of justice.³ Such

² Federal Rule of Criminal Procedure 29(a) provides, in pertinent part: “The court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” The “sole foundation upon which a judgment of acquittal should be based is a successful challenge to the sufficiency of the government’s evidence.” *United States v. Frumento*, 426 F. Supp. 797, 802 n.5 (E.D. Pa. 1976), *quoted in United States v. Carter*, 966 F. Supp. 336, 340 (E.D. Pa. 1997); *see also* 2A Charles Alan Wright, *Federal Practice and Procedure* § 466 (3d ed. 2000) (“There is only one ground for a motion for a judgment of acquittal. This is that the evidence is insufficient to sustain a conviction of one or more of the offenses charged in the indictment or information.” (internal quotation omitted)).

³ Federal Rule of Criminal Procedure 33(a) provides, in pertinent part: “Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”

motions should be granted sparingly and only where the failure to do so would result in a miscarriage of justice. *See United States v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994). In considering a motion under Rule 33, “[t]he court may weigh the evidence, but may set aside the verdict and grant a new trial only if it determines that the verdict constitutes a miscarriage of justice, or if it determines that an error at trial had a substantial influence on the verdict.” *United States v. Enigwe*, Crim. A. No. 92-00257, 1992 WL 382325, at *4 (E.D. Pa. Dec. 9, 1992) (citation omitted). In contrast to motions for judgment of acquittal under Rule 29, a motion for a new trial does not require the court to view the evidence in the light most favorable to the government. Rather, the court must weigh the evidence and evaluate the credibility of witnesses. *See United States v. Rennert*, No. Crim. A. 96-51, 1997 WL 597854, at *17 (E.D. Pa. Sept. 17, 1997) (citing *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985)).

III. LEGAL ANALYSIS

A. Defendant’s Motion For Acquittal

As discussed above, we consider Defendant’s Rule 29 Motion viewing the evidence in the light most favorable to the prosecution. *See Iafelice*, 978 F.2d at 94. We must sustain the verdict unless “no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant’s guilt beyond a reasonable doubt.” *United States v. Stratton*, No. Crim. A. 99-326, 2000 WL 892840, at *3 (E.D. Pa. July 6, 2000) (quoting *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (citation omitted)). “The evidence need not unequivocally point to the defendant’s guilt as long as it permits the jury to find the defendant guilty beyond a reasonable doubt.” *United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir. 1990).

According to Defendant, the evidence presented at trial was insufficient to prove that Defendant possessed the narcotics with the intent to distribute them. (Doc. No. 52 at 5-6.) Specifically, Defendant contends that Defendant's own testimony regarding his drug use was not contradicted and that his testimony is "inherently more reliable than the testimony of a law enforcement agent," namely, Detective Charles Meissler, "concerning hypothetical drug usage." (*Id.* at 6.) At trial, Charles Meissler, a thirty-two year veteran of the Philadelphia Police Department, testified that he has worked in the Department's Narcotics Unit for approximately twenty-one years. (Apr. 17, 2006 Trial Tr. at 124.) Meissler has participated in hundreds of narcotics arrests and has appeared as an expert in the areas of narcotics packaging and sales in federal and state courts. (*Id.*) Based on the evidence and circumstances of Defendant's arrest, Meissler, testifying as an expert, offered the opinion that the drugs in Defendant's possession were more consistent with possession with the intent to distribute than with possession for personal use. (*Id.* at 126.) Meissler stated that the three different drugs found in Defendant's possession—heroin, cocaine, and crack—were consistent with possession for the purposes of sale because, in his experience, an individual drug user does not ingest all three drugs. Meissler carefully explained to the jury why this is so. (*Id.* at 127-30.) In addition, Meissler testified that the absence of drug paraphenalia in Defendant's possession supported his opinion that possession of the drugs was not intended for personal use but rather was consistent with intention to distribute. (*Id.* at 130.) Finally, the fact that Defendant had \$1,170 cash, in small bills, and a gun on his person at the time of his arrest also supported Meissler's conclusion that Defendant intended to sell the narcotics. (*Id.* at 130-31.) As Meissler indicated, drug trafficking, guns and cash go together.

Meissler, as an experienced narcotics officer, was qualified to offer expert testimony regarding drug trafficking. *See United States v. Watson*, 260 F.3d 301, 307 (3d Cir. 2001) (“[E]xperienced narcotics agents may testify about the significance of certain conduct or methods of operation to the drug distribution business, as such testimony is often helpful in assisting the trier of fact understand the evidence. Thus, the operations of narcotics dealers have repeatedly been found to be a suitable topic for expert testimony because they are not within the common knowledge of the average juror.” (internal quotations omitted)); *United States v. Atkins*, Crim. No. 99-633, 2004 WL 2567216, at * 3 (E.D. Pa. Nov. 8, 2004) (experienced police officer offered expert testimony on issue of possession with intent to distribute); *United States v. Davis*, 233 F. Supp. 2d 695, 697 (E.D. Pa. 2002) (same); *see also United States v. Rich*, 326 F. Supp. 2d 670, 678 (E.D. Pa. 2004) (no error in qualifying federal narcotics agent as expert in packaging and distribution of crack and cocaine). While Defendant did testify that he ingested heroin with cocaine and also ingested heroin with crack, (Apr. 18, 2006 Trial Tr. at 6), it is the province of the jury to determine the credibility and weight of the testimony offered by Defendant and by Meissler. *See United States v. Greenlee*, 517 F.2d 899, 903 (3d Cir. 1975); *United States v. Brown*, 471 F.2d 297, 298 (3d Cir. 1972). We are satisfied that there was more than sufficient evidence to support the jury’s verdict. Accordingly, we will deny Defendant’s Rule 29 Motion with respect to Counts 3-5.

Similarly, we reject Defendant’s Motion with respect to Count 6. Defendant argues that the trial testimony of the police officers who arrested Defendant was insufficient to prove that Defendant was in possession of a firearm. (Doc. No. 52 at 6-7.) According to Defendant, the testimony of Officers Lemard and Johnson was contradictory, (*id.* at 7). Defendant implies that

because of these purported contradictions in testimony, there is no logical connection between the facts presented and the conviction for possession of a firearm. (*Id.* at 6.) As an initial matter, we note that the testimony of Lemard and Johnson was not inconsistent with respect to the issue of the firearm. Both Lemard and Johnson testified that on the night of his arrest, Defendant had a gun in his waistband. (Apr. 17, 2006 Trial Tr. at 59, 101.) In addition, it was for the jury to decide whether to believe the testimony of the police officers. We cannot conclude that no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. *See Stratton*, 2000 WL 892840, at *3. We will therefore deny Defendant's Motion with respect to Count 6.

B. Defendant's Motion For New Trial

Defendant also contends that the Court should grant a new trial pursuant to Rule 33. First, Defendant argues that the Court erred in permitting the Government to use Defendant's prior convictions as impeachment evidence under Federal Rule of Evidence 609. The Government filed a motion in limine seeking to use three of Defendant's prior drug convictions. (Doc. No. 20.) In our April 14, 2006 Memorandum and Order, the Court denied the Government's motion but indicated that we would reconsider the motion at trial if appropriate. (Doc. No. 42.) At trial, Defendant's counsel represented to the Court that he intended to present several witnesses who would testify that Defendant was a known drug user. (Apr. 17, 2006 Trial Tr. at 3-5.) The Court then advised Defendant that if those witnesses took the stand and testified that Defendant was a drug user and not a drug dealer, then we would permit cross-examination of the witnesses as to their knowledge of Defendant's prior criminal history of selling drugs. (*Id.* at 6.) Defendant now argues that by allowing the Government to introduce the convictions under

such circumstances, the Court prevented Defendant from offering these witnesses who would have supplied Defendant's testimony that he was a drug user. (Doc. No. 52 at 7-8.)

Since Defendant's witnesses did not testify, the ruling of the motion in limine in question cannot be addressed upon postconviction review. *See Luce v. United States*, 469 U.S. 38, 41 (1984) ("Any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds"); *id.* at 43 ("Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole"); *United States v. DiPaolo*, 804 F.2d 225, 233 (2d Cir. 1986) ("It is now established that a trial court's *in limine* ruling concerning impeachment of a witness with a prior criminal conviction is not subject to review on appeal if the witness does not testify."). Because Defendant's counsel chose not to call these witnesses, there is no way of knowing exactly what their testimony would be or whether the use of Defendant's prior convictions would be appropriate. In any event, we are satisfied that the ruling that permitted the use of defendant's prior drug trafficking convictions to impeach these witnesses under the circumstances was perfectly proper under the Federal Rules of Evidence. *See Fed. R. Evid.* 404, 405, 609(a)(1); *United States v. Apfelbaum*, 621 F.2d 62, 65 (3d Cir. 1980); *see also Krogmann v. United States*, 225 F.2d 220, 226 (6th Cir. 1955) ("when a defendant in a criminal case introduces evidence tending to prove his good reputation he throws open the entire subject and prosecution may cross-examine the defendant's character witnesses to test their credibility, which cross-examination may include questions as to their knowledge of prior criminal offenses if such offenses actually existed"). Defendant's argument fails.

Defendant next argues that the involvement of Officer Johnson in the arrest is “new evidence” that should be analyzed under the standard for a new trial as set forth in *United States v. Jasin*, 280 F.3d 355, 361 (3d Cir. 2002). (Doc. No. 52 at 8.) To determine whether a new trial based on “newly discovered evidence” should be granted, we apply the following five-part test:

- (a) the evidence must be[,] in fact, newly discovered, i.e., discovered since trial;
- (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) evidence relied on[] must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Jasin, 280 F.3d at 361 (quoting *United States v. Iannelli*, 528 F.2d 1290, 1292 (3d Cir. 1976)).

Defendant’s claim fails on the first prong of this test. In a January 5, 2006 discovery letter to Defendant’s counsel, the Government advised that Officer Johnson assisted Officer Lemard in the arrest. (Doc. No. 53 at Ex. A.) Thus, Johnson’s testimony at trial concerning his involvement in the arrest is not “newly discovered evidence.” Moreover, in *Jasin*, the defendant contended that the testimony of a codefendant who invoked his Fifth Amendment privilege and did not testify at trial qualified as newly discovered evidence. *Jasin*, 280 F.3d at 362. The Third Circuit disagreed and concluded that “evidence known but unavailable at trial does not constitute ‘newly discovered evidence’ within the meaning of Rule 33.” *Id.* In this case, Johnson did in fact testify, and Defendant knew of Johnson’s involvement in the arrest through discovery. Thus, this evidence was both known and available to Defendant. After hearing Johnson’s testimony in addition to Lemard’s testimony, the jury found Defendant guilty despite the purported

inconsistencies in the officers' testimony. We perceive no miscarriage of justice here.

Accordingly, Defendant's Motion for judgment of acquittal or a new trial will be denied.

An appropriate Order follows.

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EUGENE PARKER	:	

ORDER

AND NOW, this 9th day of June, 2006, upon consideration of Defendant's Motion For Judgment Of Acquittal And/Or New Trial (Doc. No. 52), and all papers filed in support thereof and in opposition thereto, it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

/s R BARCLAY SURRICK

R. Barclay Surrick, Judge