

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

UNITED STATES OF AMERICA)	Criminal Action
)	No. 04-CR-00749-01
vs.)	
)	
ROGEL GRANT,)	
also known as "Bradley",)	
)	
Defendant)	

* * *

APPEARANCES:

ASSISTANT UNITED STATES ATTORNEY
FRANCIS C. BARBIERI, JR.,
On behalf of the United States of America

GLENNIS L. CLARK, ESQUIRE
On behalf of the Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on the Motion for New Trial and Judgment of Acquittal, which motion was filed on January 23, 2006 by defendant Rogel Grant. The Government's response was filed on January 27, 2006. The matter was briefed and argued orally before the undersigned on April 28, 2006.

For the reasons expressed below, we deny defendant Grant's motion. Specifically, we deny defendant Grant's motion insofar as it requests relief in the form of a judgment of acquittal, a new trial or an arrest of judgment.

PROCEDURAL HISTORY

On April 5, 2005, the government filed a Superseding Indictment against ten co-defendants. In the 22-count Superseding Indictment, the defendants are charged with, among other things, conspiracy to distribute crack cocaine in Reading, Berks County, Pennsylvania between January 2002 and March 2005.

The Superseding Indictment alleges that the co-conspirators were Kelvin Welmaker, Jamarr Delmont Welmaker, Julian Acosta, Michael Keith Bowen, Rogel Grant, Dante Jackson, Randy Dale Jackson, Luis Daniel Marerro, Alpha Oumar Sacko and Antoine Lamar Shirley. In addition, the Superseding Indictment alleges that the co-conspirators distributed more than 50 grams of crack cocaine.

Defendant Rogel Grant is named in Counts One and Fourteen through Eighteen, inclusive, of the Superseding Indictment. Count One alleges that defendant Grant engaged in a conspiracy with nine other individuals to distribute more than 50 grams of a mixture or substance containing a detectable amount of cocaine base ("crack") in violation of 21 U.S.C. § 846.

Counts Fourteen through Eighteen allege violations of 21 U.S.C. § 841. Counts Fourteen, Fifteen and Sixteen allege that defendant Grant distributed more than 5 grams of crack each on September 28, October 12 and 14, 2004, respectively. Counts Seventeen and Eighteen allege that defendant distributed more

than 50 grams of crack and possessed with intent to distribute more than 5 grams of crack, each on October 26, 2004.

A jury trial was conducted before the undersigned on the charge against co-defendants Grant and Shirley from January 3 to 11, 2006.¹

On January 10, 2006 at the conclusion of the government's case-in-chief, defendant orally moved for a judgment of acquittal on Counts One and Fourteen. After consideration of defendant's oral motion and the government's response, we granted defendant Grant's motion and dismissed Count One of the Superseding Indictment. However, we denied defendant Grant's motion with regard to Count Fourteen.

On January 11, 2006, the jury convicted defendant of the charges contained in Counts Fifteen, Seventeen and Eighteen, and acquitted him of the charges in Counts Fourteen and Sixteen.

STANDARD OF REVIEW

Defendant's post-trial motion was filed pursuant to Federal Rules of Criminal Procedure 29, 33 and 34. A district court must review a Rule 29 motion for judgment of acquittal for insufficient evidence in the light most favorable to the prosecution. In reviewing such a motion, the court must

¹ Co-defendants Kelvin Welmaker, Jamarr Delmont Welmaker, Michael Keith Bowen, Dante Jackson, Randy Dale Jackson, Luis Daniel Marerro and Alpha Oumar Sacko pled guilty prior to trial. A determination of co-defendant Julian Acosta's competency is pending.

determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based upon the available evidence presented. United States v. Smith, 294 F.3d 473 (3d Cir. 2002).

Furthermore, in deciding whether a jury verdict rests on legally sufficient evidence, we are not permitted to weigh the evidence or to determine the credibility of the witnesses. Moreover, a finding of insufficient evidence to convict should be confined to cases where the prosecution's failure is clear. Id.

Rule 33 of the Federal Rules of Criminal Procedure permits a court to grant a motion for a new trial if the interests of justice so require. We may order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if the court believes that there is a serious danger that a miscarriage of justice has occurred. In other words, we are permitted to grant a new trial only if we are convinced that "an innocent person has been convicted." United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002).

Additionally, unlike an insufficiency of the evidence claim, when we evaluate a Rule 33 motion, we do not view the evidence in the light most favorable to the government. Instead, the we must exercise its our judgment in assessing the government's case. Johnson, 302 F.3d at 150.

For the reasons discussed below in the Defense Contentions section, we need not address the standard of review for a Rule 34 motion for arresting judgment.

CONTENTIONS OF THE PARTIES

Defense Contentions²

Defendant Grant's motion requests relief pursuant to Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure.³ These rules concern judgment of acquittal, new trial and arresting judgment, respectively.

The issues raised in Defendant Grant's motion are as follows:

- (1) the verdict was against the weight of the evidence;
- (2) there was insufficient evidence to support the

² The argument section of defendant's memorandum has five sections. Those sections are Weight of the Evidence, Insufficient Evidence, Judgment of Acquittal, Jury Instructions, and Timeliness. Some of these sections argue for specific relief, i.e., a judgment of acquittal or a new trial. Other sections do not appear to argue for any specific relief. Rather, they simply contain arguments regarding how this court allegedly erred.

Neither defendant Grant nor the government cited the record or any particular testimony in support of their contentions.

³ Defendant's motion, cites Rules 28, 33 and 34 of the Federal Rules of Criminal Procedure. Federal Rule of Criminal Procedure 28, however, governs the use of interpreters, not applicable here.

Defendant Grant's motion does not mention an interpreter, and there is no indication in the record or otherwise that defendant Grant requires an interpreter. Therefore, because defendant Grant moves for, among other things, a judgment of acquittal and because his Memorandum in Support of Defendant's Motion for New Trial and Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29, 33 and 34 cites Rule 29, we construe this portion of his motion as being made pursuant to Fed.R.Crim.P. 29, which governs a "Motion for a Judgment of Acquittal".

verdict”;

(3) there was insufficient evidence to support the indictment;

(4) this court erred in summarizing evidence, because the summary unfairly highlighted facts in the indictment and the government’s version of the facts;

(5) the prosecutor committed official misconduct in causing defendant’s arrest and subsequent trial;

(6) there was prosecutorial misconduct because there was no evidence to support the charges contained in the Superseding Indictment;

(7) it was improper and unlawful to include defendant Grant in the alleged criminal conspiracy to distribute crack cocaine; and

(8) it was improper and unlawful to present misleading testimony to the Grand Jury suggesting that defendant Grant was involved in a major drug distribution organization.

Defendant Grant’s memorandum in support of his motion does not address all of the issues raised in his motion. Specifically, his memorandum does not address his request for relief pursuant to Fed.R.Crim.P. 34, which rule governs arrest of

judgment. Therefore, we do not address defendant's motion as it relates to arresting judgment because although defendant's motion cited the rule, he has not briefed the issue as required by Rule 47.1 of the Rules of Criminal Procedure for the United States District Court for the Eastern District of Pennsylvania.⁴

Additionally, defendant's memorandum does not address issues 3, 5, 6 and 8. Further, we note that at oral argument, defense counsel withdrew those issues.⁵ Accordingly, we consider issues 3, 5, 6 and 8 withdrawn and do not address them.

However, we address issues 1, 2, 4 and 7, below, as they relate to the relief of a judgment of acquittal and a new trial as requested by defendant.

The crux of defendant Grant's contentions is that there was insufficient evidence introduced at trial to convict him. He also asserts that he was severely prejudiced by certain events

⁴ Rule 47.1 of the Rules of Criminal Procedure for the United States District Court for the Eastern District of Pennsylvania ("Local Criminal Rules") requires that post-trial motions for a judgment of acquittal, a new trial or an arrest of judgment pursuant to Fed.R.Crim.P. 29, 33 or 34 be supported by brief or memorandum filed within the time provided by the respective rules.

In considering whether the court can depart from this rule, we note that a district court "can depart from the strictures of its own local rules where (1) it has a sound rationale for doing so, and (2) so doing does not unfairly prejudice a party who has relied on the local rule to his detriment." United States v. Eleven Vehicles, 200 F.3d 203, 215 (3d Cir. 2000). As applied to this rule, failure to file a brief in accordance with Local Criminal Rule 47.1 is sufficient grounds to dismiss defendants motion. United States v. Vitillo, Crim. No. 03-555, 2005 U.S. Dist. LEXIS 7558, (E.D.Pa. January 31, 2005)(Surrick, J.).

⁵ Notes of Hearing before the undersigned April 8, 2006 [sic], page 13. The document is a transcript of an argument, not a hearing, which was held before the undersigned on April 28, 2006, not April 8, 2006.

both before and during his criminal trial. Defendant argues that these prejudicial events, as outlined below, satisfy the legal standard entitling him to receive a judgment of acquittal or, in the alternative, a new trial.

Defendant alleges that he suffered prejudice in the following ways: the government improperly charging him with being a participant in the Welmaker [drug] Organization; the government presenting false evidence against him through the testimony of Berks County Detective David Wright; being tried together with co-defendant Antoine Lamar Shirley, who was convicted of participating in the drug conspiracy; the court making a ruling at trial which permitted the jury to hear testimony regarding defendant Grant's arrest with one of the Welmaker co-defendants and other members of the conspiracy; the trial court unfairly summarizing the contentions of the parties; and the government failing to turn over an exculpatory audio recording during discovery.

Additionally, defendant asserts that the testimony of Berks County Detective Camilla Karns along with videotape evidence of defendant Grant's drug sales to Detective Karns and a confidential informant is insufficient to convict him.

Government Contentions

Initially, the government contends that defendant Grant's motion was filed late. Nonetheless, in the Government's

Supplemental Memorandum in Opposition to the Defendant's Motion for New Trial and Judgment of Acquittal, filed April 21, 2006, as well as at oral argument, the government conceded that defendant's motion was timely filed. Because the government has conceded that the motion was timely and because defendant's filing conformed to the applicable Federal Rules of Criminal Procedure,⁶ we find that defendant Grant's post-trial motion was timely.

⁶ Federal Rule of Criminal Procedure 29(c)(1), which governs motions for a judgment of acquittal after a jury verdict or discharge, states, in pertinent part, that "[a] defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later...." Federal Rule of Criminal Procedure 33, which governs motions for new trials, allows a defendant to move for a new trial. Further, the court may vacate any judgment and grant defendant a new trial if the interest of justice so requires. Fed.R.Crim.P. 33. Nevertheless, Fed.R.Crim.P. 33(b)(2) states, in pertinent part, that "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty...."

Federal Rule of Criminal Procedure 45 governs computation of time. Specifically, Fed.R.Crim.P. 45(a)(1)and(3) requires that, when computing time, the day of the act that begins the computed period is excluded, although the last day of the time period is to be included in the computed period. Further, Saturdays, Sundays, and legal holidays, which include Martin Luther King, Jr.'s Birthday, are to be excluded in the time computation. Fed.R.Crim.P. 45(a)(2) and (4)(A)(ii).

In this case, on January 11, 2006 the jury returned its verdict finding defendant Grant guilty on Counts Fifteen, Seventeen and Eighteen of the Superseding Indictment, but not guilty on Counts Fourteen and Sixteen. The court accepted that verdict, and the court discharged the jury on that same day. The defendant filed his motion on January 23, 2006. Twelve calendar days elapsed between the return of the jury verdict and the filing of defendant's motion. Nevertheless, pursuant to Fed.R.Crim.P. 45, we must exclude, the first day, January 11, 2006, Saturday January 14, Sunday January 15, Saturday January 21, Sunday January 22, and Monday January 16, 2006, the Martin Luther King, Jr. Birthday federal holiday. Accordingly, we conclude that only seven countable days elapsed between the jury verdict of January 11 and the filing of defendant's post-trial motion on January 23, 2006. Therefore, defendant's post-trial motion was timely.

Regarding defendant's argument that he is entitled to a judgment of acquittal, the government argues that the weight and sufficiency of the evidence in this case was more than sufficient to support the verdict, and therefore, the court should deny defendant's motion. More specifically, the government asserts that the weight of "overwhelming" evidence supports the jury's verdict of guilty.

The government also contends that we should deny defendant's motion for a new trial because the interests of justice do not require a new trial, and there is no danger that a miscarriage of justice has occurred.

Regarding defendant's contention that the trial court erred in its charge, the government contends that the court's summary of the contentions of the parties was fair and balanced to both sides. In addition, the government argues that it is inappropriate to focus on a specific part of the charge, and instead the charge as a whole must be considered. Thus, the government argues that taken as a whole, the charge was appropriate.

DISCUSSION

Judgment of Acquittal

Defendant argues that there was insufficient evidence to convict him on Counts Fifteen, Seventeen and Eighteen, and he therefore is entitled to a judgment of acquittal. We disagree.

All of the charges of which defendant Grant was convicted are violations of 21 U.S.C. § 841. The pertinent provisions of section 841 are as follows:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to...distribute,...or possess with intent to...distribute,... a controlled substance....

Count Fifteen alleges that defendant Grant distributed more than 5 grams of crack in Reading Pennsylvania, on October 12, 2004. Count Seventeen alleges that he distributed more than 50 grams of crack on October 26, 2004.

In order for defendant to be guilty, the government must prove the following three elements beyond a reasonable doubt: (1) that defendant knowingly or intentionally (2) distributed; (3) a controlled substance, crack. 21 U.S.C. § 841. See United States v. Wehner, 970 F.2d 1280 (3d Cir. 1992).

Count Eighteen alleges that on October 26, 2004, defendant possessed more than 5 grams of crack with the intent to distribute it.

The four elements necessary for conviction on Count Eighteen are that: (1) defendant knowingly or intentionally; (2) possessed; (3) with the intent to distribute; (4) a controlled

substance, crack. 21 U.S.C. § 841. United States v. Lacy, 446 F.3d 448, 454 (3d Cir. 2006).

The testimony elicited by the government at trial, which the jury apparently believed, together with the exhibits and the stipulations of the parties, was sufficient to establish each of the elements of these offenses beyond a reasonable doubt.

Berks County Detective Camilla Karns, who was acting in an undercover capacity during the investigation, testified that in the early evening of October 12, 2004 she drove confidential police informant Scott Fitzcharles in an unmarked vehicle to the parking lot of a Burger King fast food restaurant in Reading, Pennsylvania. It was light outside and was not raining at the time.

Mr. Fitzcharles placed a cell phone call to "Bradley", which was an alias or street name of defendant Rogel Grant. A short time later a vehicle entered the parking lot with defendant Grant sitting in the passenger seat. Defendant exited that vehicle and walked over to the driver's side door of the vehicle driven by Detective Karns, who was sitting behind the steering wheel.

While standing next to the driver's side door of the Karns vehicle, defendant reached across Detective Karns and gave Mr. Fitzcharles a clear plastic bag containing 5.2 grams of crack

cocaine, and Mr. Fitzcharles handed defendant Grant \$250 of marked currency.

Defendant Grant then returned to the vehicle in which he arrived, got into the front passenger side, and departed the Burger King lot.

From the witness stand during her trial testimony, Detective Karns identified the defendant, Rogel Grant.

Detective Karns also testified that during the daylight hours of the early evening of October 26, 2004 she drove to the same Burger King lot with Scott Fitzcharles in the passenger seat of her vehicle. Mr. Fitzcharles made several cell phone calls to defendant Grant. A little while later Detective Karns observed defendant walk into the parking lot and get into the backseat of her car.

Defendant Grant took a clear plastic bag containing three smaller clear plastic bags out of his jacket pocket. The three smaller bags each contained crack cocaine. The total weight of the crack in the three smaller bags was later determined to be 86.4 grams.

Previously the parties had agreed to a purchase price of \$950 for the crack. Detective Karns told defendant that she had the money in the trunk of her vehicle.

Detective Karns got out of her car and opened the trunk, which was a prearranged signal; after which members of the

Berks County Detectives and the Reading Drug Task Force moved in and arrested defendant.⁷

Berks County Detective Michael Gombar testified that when the arrest was being made, defendant was taken out of the back seat, placed on the parking lot surface and handcuffed. At that time Detective Gombar observed a clear plastic bag containing 27.8 grams of crack next to defendant Grant's right leg.⁸

Detective Matthew Meitzler testified that Government Exhibit 14 was the 5.2 gram bag of crack purchased from defendant on October 12, 2004, which Detective Karns handed to Detective Meitzler on that day after the sale.⁹

Detective Meitzler also identified Government Exhibit 18 containing two items turned over to him by Detective Karns and Detective Gombar on October 26, 2004.

Item 1 of Government Exhibit 18 consisted of 3 clear bags containing 86.4 grams of crack cocaine which defendant delivered to Detective Karns during the October 26 sale. Item 2 of Government Exhibit 18 consisted of one clear bag containing

⁷ Notes of Testimony ("N.T.") of the Jury Trial, January 5, 2006, pages 96-106.

⁸ N.T., January 6, 2006, at 36-37.

⁹ N.T., January 5, 2006, at 46-47.

27.8 grams of crack which Detective Gombar found next to defendant's leg during his arrest.¹⁰

Further, at trial defendant Grant entered two stipulations pertinent to the within motion. The first provided that

[i]f called as a Government witness, Roscoe G. Bennet, who is a qualified Pennsylvania State Police Forensic Scientist, would testify that Government Exhibit 14 consists of one clear plastic bag containing an off-white chunky substance, which he analyzed, and found to contain 5.2 grams of cocaine base.¹¹

The second stipulation provided that

[i]f called as a Government witness, Rebecca C. Patrick, who is a qualified Pennsylvania State Police Forensic Scientist, would testify that she analyzed Government Exhibit 18, which consists of two items; she would testify that Item 1 contained three clear bags containing an off-white substance. She would testify that she analyzed Item 1, and found it to contain 86.4 grams of cocaine base. She would also testify that Item 2, in Government Exhibit 18, is one clear bag containing an off-white substance, and she analyzed it, and found it to contain, Item 2 to contain, 27.8 grams of cocaine base.¹²

Reviewing the forgoing evidence in the light most favorable to the prosecution without weighing it or making credibility determinations, which we are not permitted to do on a Rule 29 motion, yields more than sufficient evidence to support

¹⁰ N.T., January 5, 2006, at 59-61, 109.

¹¹ N.T., January 10, 2006, at 81.

¹² N.T., January 10, 2006, at 82.

defendant Grant's conviction.

Regarding Count Fifteen, the testimony of Detectives Karns and Meitzler, in conjunction with the stipulation, establishes that on October 12, 2004 defendant sold 5.2 grams of crack in Reading. In particular, it establishes Grant's identity together with the location, date, and nature of the criminal conduct. Regarding the elements of the crimes, detective Karns's testimony establishes that defendant Grant entered a Burger King Parking lot and sold crack to a confidential police informant who was in a car with Detective Karns.

We conclude that a rational jury could have found beyond a reasonable doubt that Rogel Grant was guilty of Count Fifteen of the indictment. Therefore, we deny defendant Grant's request for acquittal on Count Fifteen of the Superseding Indictment.

Concerning Count Seventeen, the testimony of Detectives Karns and Meitzler, in conjunction with the stipulation of the parties, establishes that on October 26, 2004, defendant Grant again sold crack in Reading. This evidence also establishes Grant's identity, as well as the location, date and nature of the criminal conduct. Regarding defendant Grant's criminal conduct, this evidence establishes that defendant Grant sold three baggies of crack containing 86.4 grams of crack to a confidential police informant who was accompanied by undercover detective Karns. The

purchase price for this crack was \$950.

Therefore, we conclude that a rational jury could have found beyond a reasonable doubt that Rogel Grant was guilty of Count Seventeen of the indictment. Accordingly, we deny defendant Grant's request for acquittal on Count Seventeen of the Superseding Indictment.

Regarding Count Eighteen of the Superseding Indictment, the testimony of detectives Karns, Meitzler and Gombar, in conjunction with the stipulation of the parties, establishes that on October 26, 2004 defendant was engaged in a sale of crack. Just after that transaction, defendant Grant was arrested, and during his arrest, a small bag containing 27.8 grams of crack was found next to his right leg.

As a result, we conclude that a rational jury could have found beyond a reasonable doubt that Rogel Grant was guilty of Count Eighteen of the Superseding Indictment. Therefore, we deny defendant Grant's request for acquittal on Count Fifteen of the Superseding Indictment.

Finally, defendant Grant's argues that the testimony of Detective Karns was insufficient to convict him because she could not hear the negotiations between the confidential police informant and defendant Grant, which negotiations set up the drug transactions. We disagree.

While these negotiations may have been pertinent to

defendant's Conspiracy charge (of which he was acquitted), they were not pertinent to the delivery and possession charges (of which he was convicted). Although defendant Grant was initially charged with conspiracy in Count One, his motion for acquittal on Count One was granted by the undersigned on January 10, 2006 at the conclusion of the government's case-in-chief.

In contrast to the conspiracy charge (some portions of which the officers had not observed), Counts Fifteen, Seventeen and Eighteen of the Superseding Indictment charged illegal conduct which the Berks County Detectives had personally observed. Therefore, insofar as defendant Grant seeks an acquittal on Counts Fifteen, Seventeen and Eighteen of the Superseding Indictment, his motion is denied.¹³

New Trial

Defendant Grant argues that the verdict was contrary to the weight of the evidence, and that he is therefore entitled to a new trial. We disagree.

¹³ In his memorandum in support of his post-trial motion, defendant makes four additional arguments in support of both his requests for a judgment of acquittal and a new trial.

Briefly, these arguments are that (1) he was prejudiced by being charged in the Welmaker conspiracy; (2) he was prejudiced by Detective Wright's false identification testimony; (3) he was prejudiced by the court's ruling allowing testimony regarding his arrest in March 2005 with one of the Welmakers and other Welmaker conspirators; and (4) an audiotape of the conversation which took place during the October 26, 2004 drug transaction is exculpatory.

These arguments go to the weight of the evidence and not to its sufficiency. Therefore, they will be discussed below in our analysis of defendant's motion for a new trial.

Defendant Grant makes five arguments why he should be awarded a new trial. Those arguments are as follows:

(1) although acquitted of the conspiracy charge, being charged and tried as part of the Welmaker conspiracy prejudiced him in the eyes of the jury;

(2) Detective Wright testified falsely that he could identify the defendant on September 28, 2004, and this prejudiced defendant in the eyes of the jury;

(3) our ruling, which permitted the jury to hear testimony regarding defendant Grant's arrest with one of the Welmakers and other members of the Welmaker conspiracy in March 2005, prejudiced him in the eyes of the jury;

(4) an audiotape of the conversation that took place during the drug transaction on October 26, 2004 is exculpatory; and

(5) Detective Karns's testimony together with the videotape evidence was insufficient because Detective Karns was not a party to the negotiations which preceded the drugs sales.

Conspiracy

We reject defendant Grant's first argument that being charged and tried in the conspiracy prejudiced him. Initially,

defendant Grant has not provided any authority for the proposition that being jointly tried for conspiracy, together with an alleged co-conspirator, and then acquitted of the conspiracy charge, is sufficient grounds for a new trial.

Further, defendant's argument is unsupported by any evidence of actual prejudice. Without such support, it is equally likely that the government was prejudiced by the acquittal because the jury may believe that the government's entire case lacks merit because the judge dismissed one of the most serious charges.

Moreover, the undersigned's charge to the jury, specifically stated that defendant Grant is not included in the conspiracy. Specifically, the jury was instructed that "[t]he alleged co-conspirators, Kelvin Welmaker, Jamarr Welmaker, Julian Acosta, Michael Bowen, Dante Jackson, Randy Jackson, and Luis Marerro, and Antoine Shirley, but not Rogel Grant, are accused of participating in a conspiracy...."¹⁴ This instruction mitigates any potential prejudice.

Identification Testimony

Defendant Grant next argues that Detective Wright testified falsely that he could identify defendant Grant on September 28, 2004 even though it was raining and the videotape

¹⁴ N.T., January 11, 2006, at 108.

was blurry. For the following reasons, we disagree. First, defendant Grant has not provided any evidence that Detective Wright perjured himself. Therefore, this is a credibility argument for the jury to determine.

Second, this credibility argument was made by defense counsel during his closing argument.¹⁵ Moreover, the jury acquitted defendant Grant of Count Fourteen, a count of distribution of crack on September 28, 2004. The acquittal would support the interpretation that the jury did not find Detective Wright credible with regard to the September 28, 2004 incident. Accordingly, because the jury apparently disregard Detective Wright's testimony, defendant Grant was not prejudiced by it.

Arrest

Next defendant Grant argues that he was prejudiced by a trial ruling which allowed irrelevant and prejudicial evidence of

¹⁵ Defense counsel's argument that Detective Wright was not a credible witness is as follows:

Now, ladies and gentlemen, let's look at the night of September the 28th. Raining, windy, you couldn't see anything on that video. The detective comes in and says, Oh, yeah, oh, you know, the lights are hitting it all funny, and, you know, you know, my eyes are better than the video.

Do you believe that? Do you believe that? You know, Detective Karns can't see anything. She said the person opened the door, they distracted her for a moment, and you know, she couldn't identify anybody. They didn't call in Mr. Fitzcharles to identify anybody.

So on that particular count, where's the credible evidence? You saw Detective Wright, he's like me, he's a bit of an older man, and he's wearing his glasses. He didn't have 22 year old eyes anymore.

N.T., January 11, 2006, at 33-34.

his arrest with one of the Welmaker co-defendants and others involved in the conspiracy. We reject this argument for the following reasons. First, defendant does not identify where in the trial record this alleged ruling occurred. Nor does he identify any defense objection to the ruling on the record. Therefore, he has failed to perfect the record regarding any error.

Second, this argument is essentially a variation on defendant's first argument that he was prejudiced by being tried as part of the Welmaker conspiracy. Defendant Grant was charged with engaging in a conspiracy with the Welmakers until he was acquitted by the undersigned. We incorporate our analysis in the Conspiracy subsection, above.

Third, we note, as we did when addressing defendant's first argument, that defendant has not articulated any authority which would entitle him to a new trial simply because he was acquitted of conspiracy. Thus, we deny defendant's motion on this point.

Audiotape

Defendant's fourth argument is that there is an unredacted audiotape which contains exculpatory evidence. For the following reasons, we reject this argument. First, this allegation is based on facts not on the record. There is no evidence that a judge or jury could examine to determine whether

or not such a tape exists.

Second, defendant does not articulate what exculpatory information is contained on the audiotape. Moreover, although not stated by defense counsel, the tape presumably recorded conversations which occurred while Detective Karns was in the car, and defense counsel had an opportunity to cross-examine her. Therefore, defendant's motion for new trial is denied on this point.

Sufficiency of Testimony

Defendant next argues that without confirming testimony of the confidential informant, the testimony of Detective Karns is insufficient. We disagree for the reasons articulated in the Judgment of Acquittal section, above. Accordingly, we deny defendant's motion for new trial on this point.

Therefore, after a review of the record, after considering defendant's arguments both individually and cumulatively,¹⁶ and for all the reasons articulated above, we conclude that the interests of justice do not require a new trial. In other words, we do not believe that an innocent person has been convicted.

¹⁶ As stated above, defendant Grant has not referred the court to any evidence in the record, either by specific citation or by general reference to testimony, or otherwise, which would support his position.

Jury Charge

In the charge to the jury, the undersigned summarized some of the contentions of the government and some of the contentions of the defense.¹⁷ Defendant Grant argues that the court "abused its discretion in drawing attention to the government's arguments far more than it referred to the defendant's position." A review of this portion of the charge will reveal that the court's review of the contentions of the parties was even, balanced, impartial, objective, fair and comprehensive.

At the outset of the jury charge the court cautioned the jury that if the court reviews any testimony with the jury, the juror's memories control and that the jury must still independently recall and consider the evidence.¹⁸

At the beginning of the court's review of the contentions of the parties, the undersigned stated

I'm not going to review all of the evidence with you, or attempt to summarize it, or attempt to summarize all of it. The trial was relatively short, and you have been an attentive jury. Moreover, the attorneys have extensively reviewed the evidence in their closing. It is your duty to recall all of the admissible evidence, which has been presented, and I instruct you to do so.

However, I will review with you some of the contentions - - I will review with you some of the contentions of the parties in this case, in order

¹⁷ N.T., January 11, 2006, at 92-102.

¹⁸ N.T., January 11, 2006, at 67.

to give you a context in which to better understand the principles of law, which must guide you in your deliberations, and in which I will instruct you.

I do not intend to summarize all of the contentions and counter-contentions of the parties, but only some of the contentions of each party. Time will not permit me to discuss in detail each and every major and minor contention of the parties in this case. If I do not cover some of the contentions, that does not mean that those contentions are unimportant. It is your duty to recall, as best you can, all of the contentions and admissible evidence which has been presented, and I instruct you to do so.

If your recollection of any of the contentions of the parties, or any portions of the evidence differs with my summary, disregard what I have said, and rely upon your own memory of those contentions and that evidence, not mine.

* * *

Finally, in summarizing the contentions of the parties, I am not attempting to indicate, by inference or otherwise, which contentions to accept or reject, which evidence to believe or disbelieve, or what verdict to render. Determining each of those things is your function, not mine, and you would be mistaken if you felt I were indicating any preference in those regards.¹⁹

It is unclear from the defendant's memorandum what form of relief he seeks. In particular, his argument is in a section that is separate from the sections on the weight of the evidence, insufficiency of the evidence, and judgment of acquittal; and it does not state what relief is requested.

Additionally, a court's charge to the jury is not reviewed on an instruction-by-instruction basis. Instead, the

¹⁹ N.T., January 11, 2006, at 92-93.

"charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury." United States v. Fischbach and Moore, Inc., 750 F.2d 1183, 1195 (3d Cir. 1984)(quoting Ayoub v. Spencer, 550 F.2d 164, 167 (3d Cir. 1977)). The jury charge in this case comports with that standard.

Here, pursuant to Federal Rule of Criminal Procedure 30(d), the court gave defendant Grant an opportunity to object to the jury instructions out of the jury's hearing immediately after the jury charge and before the jury began to deliberate.²⁰ Defense Counsel, while at sidebar, objected on these grounds.

More specifically, defense counsel argued that the court's summary of contentions "tends to bolster the position of the Government, and unfairly highlights the allegations against our clients, with particularity." The court then overruled defendant's objection and stated our reasons on the record.²¹ We incorporate those reasons here.

As part of that articulation, we stated that our summary of the contentions of the parties did not prejudice either party; but if it did, any prejudice would have been mitigated by

the numerous disclaimers I made [to the jury when I told them that"]when I'm discussing the

²⁰ N.T., January 11, 2006, at 157.

²¹ N.T., January 11, 2006, at 160-164.

contentions of the parties with you, I am not intending to indicate my view, in any fashion, as to how you should decide this case or come out on any particular question. Indeed, if your recollection is different from what I say, disregard my summary, and rely on your own recollections.["]²²

We conclude that when taken in its entirety, the charge to the jury was fair and accurate. Therefore, we conclude that we did not abuse our discretion or unfairly prejudice defendant Grant. Moreover, the interests of justice do not require that defendant Grant receive a new trial because we do not believe that an innocent person has been convicted.

CONCLUSION

For all the foregoing reasons, we deny defendant Grant's Motion for New Trial and Judgment of Acquittal.

²² N.T., January 11, 2006, at 163.

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

UNITED STATES OF AMERICA)	Criminal Action
)	No. 04-CR-00749-01
vs.)	
)	
ROGEL GRANT,)	
also known as "Bradley",)	
)	
Defendant)	

O R D E R

NOW, this 19th day of September, 2006, upon consideration of defendant's Motion for New Trial and Judgment of Acquittal, which motion was filed on January 23, 2006; upon consideration of the Government's Response to Defendant's Motion for New Trial and Judgment of Acquittal, which response was filed on January 27, 2006; upon consideration of the briefs of the parties; after oral argument held before the undersigned on April 28, 2006; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that defendant's Motion for New Trial and

Judgment of Acquittal is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge