

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION  
 :  
 MICHAEL GREEN : NO. 14-159  
 :

**MEMORANDUM**

**SURRICK, J.**

**DECEMBER 11, 2015**

Presently before the Court are Defendant's post-trial Motions pursuant to Federal Rules of Criminal Procedure 29 and 33. (ECF Nos. 65, 75, 78 and 91.) For the following reasons, Defendant's Motions will be denied.

**I. BACKGROUND**

On July 23, 2014, a jury found Defendant Michael Green guilty of one count of carjacking, in violation of 18 U.S.C. § 2119, and of one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1). Defendant moves for a judgment of acquittal under Federal Rule of Criminal Procedure 29. In the alternative, Defendant moves for a new trial under Federal Rule of Criminal Procedure 33.

**A. Factual Background**

On December 5, 2012, Osvaldo Ortega attended a funeral for his brother. Following the funeral service, a family function was held at his sister's home. (July 21, 2014 Trial Tr. 38, ECF No. 82.) Ortega left that function with his brother-in-law, Juan Saez, and Saez's brother, Luis Rosado. (*Id.* at 38-39.) The men were traveling in Ortega's Chevrolet Silverado pickup-truck to Rosado's residence on McMenemy Street in Philadelphia. (*Id.* at 39-40.) Ortega was driving. (*Id.*) As they approached McMenemy Street, Ortega observed a dark colored sedan. (*Id.* at 42.)

Flashing blue and red lights suddenly emanated from the sedan. (*Id.* at 43.) Upon seeing the flashing lights, Ortega pulled his vehicle over to the side of the road. (*Id.*) Ortega observed a man exit the sedan. (*Id.* at 44-45.) He was wearing a badge around his neck, had the words “Police” written across the front of his dark clothing, and he was carrying a handgun. (*Id.* at 44-46.) The man approached Ortega, ordered him to get out of his truck, and advised that he was under arrest. (*Id.* at 47.) Ortega asked why he had been stopped and when he refused to comply with the order to get out of the truck, the man opened the driver-side door, threw Ortega out of the truck onto the ground, and struck him with the handgun. (*Id.* at 49.) The man then handcuffed Ortega while pointing the handgun at his head. (*Id.*) A second man got out of the sedan and assisted in placing handcuffs on Saez and Rosado. (*Id.* at 50-51, 53.) Ortega, Saez, and Rosado were then thrown into the backseat of the truck. (*Id.*) The second man proceeded to get in the driver-side of the truck. The first man drove a short distance in the sedan. (*Id.* at 53-55.) Ortega, Saez, and Rosado were driven by the second man around the corner where the first man parked the sedan. (*Id.* at 55-56.) The first man then got into the passenger seat of the truck. (*Id.*) The victims began conversing in Spanish planning an escape. (*Id.* at 58-59.) This enraged the first man, who threatened the victims, shouting “I’ll kill you” and striking them with the handgun. (*Id.*) Rosado proceeded to jump out of the moving truck, which led the first man to issue more homicidal threats and strike Ortega and Saez with his handgun. (*Id.* at 60-63.) As a result of jumping out of the moving vehicle, Rosado suffered serious injury. Eventually, Ortega and Saez saw an opportunity and jumped out of the truck. (*Id.* at 64-65.) They ran around knocking on doors seeking assistance, all while they remained handcuffed. (*Id.* at 66-67.) Police were called, and Officer Kenneth Devaney was the first officer to arrive on scene. (*Id.* at 232-33.) Upon inquiring what happened, Ortega and Saez relayed the story of the carjacking and

kidnapping. (*Id.* at 67-69, 232-34.)

The Philadelphia Police Department immediately began an investigation into the carjacking. They recovered a 2013 Chevrolet Malibu sedan, charcoal gray in color with window tinting, which was positively identified by Ortega and Saez as the dark colored sedan used by the carjacker. (*Id.* at 238-40.) The Malibu sedan was registered to Enterprise Car Rental. At the time the vehicle was rented to Michael Green. (*Id.* at 282.) Police recovered fingerprints, cellular phones, and a wallet, containing state issued photo identification and credit cards, all belonging to Michael Green. (July 22, 2014 Trial Tr. 13-14, 20-23, 27-28, ECF No. 83.) Approximately three hours after the carjacking the police showed Ortega a photo array consisting of eight photographs for the purpose of a possible identification of the carjacker. (July 21 Trial Tr. 70-73, 285-87.) Immediately upon viewing the photo array, Ortega positively identified Defendant Michael Green as the carjacker. (*Id.*)

## **B. Procedural Background**

On April 1, 2014, a federal grand jury returned an Indictment charging Defendant with one count of carjacking, in violation of 18 U.S.C. § 2119, and of one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1). (Indictment, ECF No. 1.) Dana Bazelon, Esquire was appointed to represent Defendant, and Ross Miller, Esquire served as Co-Counsel. (ECF No. 19.) Defendant filed a motion to suppress any out-of-court or in-court identification by Ortega. (ECF No. 38.) Following a hearing, the motion was denied by Memorandum and Order dated July 21, 2014. *See United States v. Green*, No. 14-159, 2014 WL 3572891 (E.D. Pa. July 21, 2014). A jury trial was held beginning July 21, 2014, and continuing through July 23, 2014. (Minute Entries, ECF Nos. 59, 60, 61.) On July 23, 2014, the jury returned a verdict finding Defendant guilty on both Counts. (Verdict Form, ECF No. 62.)

The jury also made a factual finding on the Verdict Form that Defendant had brandished a firearm during the carjacking. (Id.)

On August 13, 2014, Defendant filed a *pro se* Motion For Judgment of Acquittal or For New Trial. (ECF No. 65.) On August 15, 2014, Attorney Bazelon filed a motion to withdraw as Counsel, citing irreconcilable differences with her client. (ECF No. 66.) Attorney Ross Miller filed a similar motion. (ECF No. 68.) Bazelon and Miller were permitted to withdraw (ECF Nos. 67, 69), and David Rudenstein, Esquire was appointed to represent Defendant on post-trial motions (ECF No. 70). On October 27, 2014, and December 2, 2014, Counsel filed a first and second supplemental memorandum of law, in support of post-trial motions. (ECF Nos. 75, 78.) On January 13, 2015, Cheryl Sturm, Esquire entered her appearance as private counsel for Defendant. (ECF No. 81.) Attorney Rudenstein was permitted to withdraw as court appointed counsel on January 20, 2015. (ECF No. 89.)

On February 6, 2015, Defendant, through his new Counsel, was permitted to file a Third Supplemental Motion For Judgment of Acquittal and For New Trial. (ECF No. 91.) After receiving an extension of time within which to respond, the Government filed its response in opposition on April 3, 2015. (ECF No. 98.) On April 9, 2015, Defendant filed a reply to Government's response. (ECF No. 99.)

## **II. LEGAL STANDARD**

Rule 29 provides that “[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.” Fed. R. Crim P. 29(c)(2). When considering motions for judgment of acquittal, the court must view the evidence in the light most favorable to the prosecution, and must uphold the verdict if any rational trier of fact could have found guilt beyond a reasonable doubt given the available evidence. *United States v. Brodie*, 403 F.3d 123,

133 (3d Cir. 2005). Motions under Rule 29 are judged under a “highly deferential standard.” *United States v. Carbo*, 572 F.3d 112, 119 (3d Cir. 2009). Challenges to the sufficiency of the evidence supporting a jury verdict “should ‘be confined to cases where the prosecution’s failure is clear.’” *United States v. Smith*, 294 F.3d 473, 477 (3d Cir. 2002) (quoting *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984)). Defendant bears the burden of proving that the Government’s evidence was not sufficient to convict. *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990).

Rule 33 permits a court to vacate any judgment and grant a new trial “if the interest of justice so requires.” Fed. R. Crim. P. 33(a). When considering a Rule 33 motion, “the 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. Parrott*, No. 09-245, 2010 WL 760388, at \*2 (E.D. Pa. Mar. 4, 2010) (internal quotation marks omitted). “A new trial is required on the basis of evidentiary errors only when the ‘errors, when combined, so infected the jury’s deliberation that they had a substantial influence on the outcome of the trial.’” *Id.* (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993)). Rule 33 Motions should be “granted sparingly and only in exceptional cases.” *Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987).

### **III. DISCUSSION**

Defendant moves for judgment of acquittal under Rule 29, challenging the sufficiency of the evidence. He also moves for a new trial under Rule 33, arguing that the verdict is against the weight of the evidence and that trial counsel was ineffective.

**A. Motion for Judgment of Acquittal Under Rule 29**

Defendant seeks acquittal on the carjacking charge in Count 1. He contends that there was insufficient evidence to prove that he was the carjacker. Defendant also contends that there is insufficient evidence to show that he acted “with intent to cause death or serious bodily harm,” a required element of the carjacking offense.

*1. Evidence that Defendant Committed the Carjacking*

Defendant argues that the evidence was insufficient to establish that he was the individual who committed the crime. Specifically, he contends that the witness identification fails to establish beyond a reasonable doubt that he was the carjacker. The Government responds that there was more than sufficient direct and corroborating circumstantial evidence to establish Defendant’s guilt beyond a reasonable doubt. In reviewing the sufficiency of the evidence, “we review the evidence in the light most favorable to the Government as verdict winner.” *United States v. Applewhaite*, 195 F.3d 679, 684 (3d Cir. 1999).

Defendant’s contention that the Government failed to establish that he was the individual who committed the carjacking is belied by the record. At trial, Ortega made a positive in court identification of Defendant as the individual who committed this carjacking. (July 21 Trial Tr. at 79-80.) The identification was supported by Ortega’s testimony that he had a clear view of the carjacker’s face throughout the entire ordeal. (*Id.* at 47-48, 51-52, 56-57, 63-64.) He also identified Defendant as the carjacker when viewing a photo array at the police station just three hours after the incident. (*Id.* at 70-73, 285-87.) In addition, Ortega testified that he recognized the carjacker when he saw Defendant’s photo displayed on television during a news story about the carjacking. (*Id.* at 78-79.)

Ortega’s first-hand account implicating Defendant was supported by other evidence

presented during the trial. Officer Devaney testified that, upon encountering Ortega and Saez, the two men were handcuffed, frantic, and relayed a story that they were carjacked by a man exiting a dark colored sedan with flashing red and blue lights. (*Id.* at 232-34.) Officer Devaney took the men back to the scene of the carjacking on McMenemy Street to investigate further. He then drove them around the area looking for the sedan that the carjacker was driving. (*Id.* at 238-39.) A short distance from the scene of the carjacking, they came upon a Chevrolet Malibu sedan with tinted windows, which was identified by Ortega and Saez as the sedan used by the carjacker. (*Id.* at 239-40.) Detective John Palmiero, the detective assigned to this matter, testified that the Malibu was charcoal-gray in color. (*Id.* at 279-81.) The vehicle was registered to Enterprise Car Rental. At the time of the carjacking, the vehicle was rented to Michael Green. (*Id.* at 282.) Defendant stipulated at trial that during the time period of November 10, 2012 through December 10, 2012, he had rented a Chevrolet Malibu sedan from Enterprise Car Rental. (*Id.* at 242-43.)

An investigation into the Malibu sedan identified by Ortega and Saez confirmed that it was Defendant's car. Fingerprints were retrieved from the vehicle which matched those of Defendant. (July 22 Trial Tr. 13-14.) Between the time that Defendant rented the sedan from Enterprise and the time of the carjacking on December 5, 2012, window tinting had been applied to the vehicle. (*Id.* at 15.) After executing a search warrant for the sedan, police retrieved two cellular telephones belonging to Defendant (*id.* at 20-23), and a wallet bearing Defendant's initials that held Defendant's state-issued photo identification cards and credit cards (*id.* at 27-28).

Defendant attempted to rebut the eyewitness identification testimony of Ortega by presenting expert testimony from Michael Leippe, Ph.D., a professor in social psychology. Dr.

Leippe was qualified as an expert in the field of eyewitness identification and he testified regarding the reliability of eyewitness identification testimony. (*Id.* at 93-94, 97.) He identified the problems and difficulties with eyewitness identification testimony. (*Id.* at 97-134.) He also testified regarding the stress placed on an individual who is being held at gunpoint, and the impact that this may have on accurate eyewitness identification. (*Id.* at 169-71.)

Defendant also attempted to rebut the Government's evidence by offering evidence that another individual, Julian Collins, was the carjacker. Defendant presented testimony from Officer Lawrence Leissner, who had arrested Collins on December 5, 2012, for illegally pulling over another vehicle. (July 23, 2014 Trial Tr. 9-15, ECF No. 84.) Officer Leissner testified that he believed Collins was white (*id.* at 16-17), that the strobe lights in Collins' vehicle were clear (*id.* at 16), that Collins did not have a firearm (*id.*), that Collins wore a badge around his belt (*id.* at 18), and that the sedan Collins was using was silver (*id.* at 20). Officer Leissner also testified that the incident involving Collins took place just three miles from where the instant carjacking occurred. (*Id.* at 15.) In response, the Government called Julian Collins as a witness. Collins testified that he was driving a Toyota Camry on December 5, 2012 when he made a traffic stop, and that he employed white lights to effectuate the stop. (*Id.* at 31.) Collins pulled a vehicle over to tell that driver to slow down. (*Id.* at 32-34.) There was no indication that Collins forcibly removed the driver from the vehicle, used a firearm during the incident, or kidnapped the individuals inside the vehicle. (*Id.* at 33-34.)

The guilty verdict was based upon overwhelming evidence. Ortega provided an eyewitness account of the events, and a positive eyewitness identification of Defendant as the carjacker. The vehicle used by the carjacker was linked to Defendant by his rental agreement with Enterprise, his fingerprints, and his personal effects (including his cellular phones and

wallet) found in the vehicle. The vehicle matched the description provided to police immediately after the carjacking, and was in fact positively identified by Ortega and Saez as the vehicle used by the carjacker. The evidence was more than sufficient for a rational jury to conclude that Defendant was the carjacker.

The jury was free to accept or reject the testimony of Ortega. *See United States v. Richardson*, 658 F.3d 333, 337 (3d Cir. 2011) (noting that “it is the jury’s province (and not ours) to make credibility determinations and to assign weight to the evidence”) (citation omitted); *United States v. John-Baptiste*, 747 F.3d 186, 208-09 (3d Cir. 2014) (same) (collecting cases). Clearly, they accepted Ortega’s identification of Defendant as the carjacker notwithstanding Professor Lieppe’s testimony challenging the accuracy of identification testimony. The jury was also free to accept or reject the testimony of the police officers and the testimony related to Defendant’s contention that it was Julian Collins and not Defendant who committed the carjacking.

The jury found that the evidence and testimony presented by the Government was credible. Considering this evidence in the light most favorable to the Government, it is clear that any rational trier of fact could have found Defendant guilty beyond a reasonable doubt. Accordingly, Defendant’s Motion under Rule 29 must be denied.

## 2. *Evidence that Defendant Possessed the Requisite Mental State*

Defendant next argues that there was insufficient evidence to establish that he possessed the required mental state to convict under 18 U.S.C. § 2119. “In order to be convicted of carjacking under 18 U.S.C. § 2119, the Government must prove that the defendant (1) with intent to cause death or serious bodily harm (2) took a motor vehicle (3) that had been transported, shipped or received in interstate or foreign commerce (4) from the person or presence of another

(5) by force and violence or intimidation.” *United States v. Augustin*, 376 F.3d 135, 139-40 (3d Cir. 2004) (citation omitted). “The intent requirement of § 2119 is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver’s automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car).” *Id.* at 140 (quoting *Holloway v. United States*, 526 U.S. 1, 12 (1999)).

In *United States v. Lake*, 150 F.3d 269 (3d Cir. 1998), a defendant convicted of violating 18 U.S.C § 924(c)(1) argued on appeal that the evidence was insufficient to show that he used a firearm during a carjacking. *Id.* at 271. The carjacking victim testified that the defendant waived a gun in front of her, and ordered her to give-up the keys to her vehicle. *Id.* at 272. When the victim waivered, the defendant placed the gun close to her head and ordered her to surrender her keys. *Id.* The court concluded that, “[b]ased on this testimony, a rational jury could find that [the defendant] has the intent to kill or cause serious bodily injury to [the victim] if she did not comply with his demands.” *Id.* The court continued,

We agree that these facts suggest that [the defendant] was at least reluctant to fire his gun, but we do not agree that a rational jury was compelled to infer that [the defendant] would not have fired the gun in the end if [the victim] had not given up the keys. On the contrary, we hold that the evidence amply supported the jury’s finding that [the defendant] possessed the requisite conditional intent to cause death or serious bodily injury.

*Id.*

The evidence presented at trial in this case was more than compelling in establishing that Defendant possessed the requisite intent at the time of the carjacking. As the carjacking began, Defendant approached Ortega’s vehicle with a visible semiautomatic handgun. (July 21 Trial Tr. 46.) Defendant ordered Ortega out of the car but Ortega failed to comply. (*Id.* at 45-46.) Defendant then opened the driver’s door, grabbed Ortega and threw him to the ground, striking

him with the gun. (*Id.* at 49-50.) Defendant then threatened Ortega by pointing the gun at Ortega's head, and handcuffing him. (*Id.*) Based upon the testimony, the jury made a factual finding that the Government indeed established beyond a reasonable doubt, not only that Defendant "brandished the firearm when committing" this carjacking, but that Defendant had the required intent. (*See* Verdict Form (indicating a "Yes" response to the following Interrogatory: "Do you unanimously find that the Government proved beyond a reasonable doubt that the defendant, Michael Green, brandished the firearm when committing this offense?").)

The fact that Defendant did not actually fire the gun at Ortega is of no consequence. Moreover, it is of no consequence that the Government did not produce the firearm used in the carjacking. Ortega's testimony more than supports the jury's finding that Defendant possessed the requisite intent at the time of the carjacking. Indeed, this testimony is stronger than that presented in *Lake*. In *Lake*, the evidence consisted of verbal threats and commands, coupled with the defendant pointing his gun at the victim. 150 F.3d at 271. Defendant here did that and more. He physically assaulted Ortega, threw him to the ground, and struck him with the handgun. The testimony was more than sufficient to permit a rational jury to conclude that Defendant "possessed the intent to seriously harm or kill the driver if necessary to steal the car" at the time the carjacking commenced.<sup>1</sup> *Augustin*, 376 F.3d at 139. We reject Defendant's argument that the Government failed to prove the requisite intent under § 2119. Defendant's Rule 29 Motions will be denied.

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<sup>1</sup> It is worth noting Defendant's actions after he took possession of Ortega's truck, and while he was holding Ortega, Saez, and Rosado hostage in the back seat. While riding in the front passenger seat of Ortega's truck, Defendant continued to strike Ortega, Saez, and Rosado with his handgun while shouting "I'll kill you." (July 21 Trial Tr. 57-59.) After Rosado jumped out of the truck, Defendant turned to Ortega and Saez, repeatedly struck them with his handgun, and threatened to kill them if they jumped. (*Id.* at 63.) Obviously, Defendant demonstrated an intent to seriously harm or kill if necessary to accomplish his goal.

## **B. Motion for New Trial Under Rule 33**

Defendant moves in the alternative for a new trial under Rule 33. He argues that the verdict was against the weight of the evidence. Defendant also raises an ineffective assistance of counsel argument.

### *1. Weight of the Evidence*

Defendant argues that the verdict was against the weight of the evidence, and that he is entitled to a new trial. The Third Circuit has described a motion under Rule 33 based upon a weight of the evidence argument as follows:

A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence *only* if it believes that there is a serious danger that a miscarriage of justice has occurred—*that is, that an innocent person has been convicted.*

*United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003) (emphasis added) (internal quotation marks and citations omitted). The defendant carries a “heavy burden” to establish that he is entitled to relief under Rule 33. *United States v. Saada*, 212 F.3d 210, 216 (3d Cir. 2000) (citation omitted).

As discussed above, the evidence submitted at trial was more than sufficient to support the jury's verdict. There is no reason to disturb this verdict. There was no miscarriage of justice here. *See United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) (noting that in analyzing a Rule 33 motion, the district court exercises “its own judgment in assessing the Government's case”). The record firmly establishes Defendant's guilt beyond a reasonable doubt. The jury found Ortega's testimony credible. In addition, the jury made a separate finding that Defendant possessed a firearm and was brandishing it during the course of the carjacking. Moreover, the evidence irrefutably links Defendant to the Malibu sedan used in the course of the carjacking. The suggestion that “an innocent person has been convicted” here is ludicrous. Defendant's

Motion under Rule 33, as to his weight of the evidence argument, will be denied.

2. *Ineffective Assistance of Counsel*

Finally, Defendant raises a Sixth Amendment claim that his trial counsel was ineffective. He raises numerous ways in which his counsel failed to adequately represent him at trial. The Government responds that such a claim is not proper at this stage and should be reserved for a collateral challenge under 28 U.S.C. § 2255.

It has long been the preference of the Third Circuit that claims of ineffective assistance of counsel be brought in under § 2255 motions. *United States v. Chew*, 284 F.3d 468, 470 (3d Cir. 2002). As explained by the Third Circuit:

Attempting to shoehorn [an ineffective assistance of counsel] claim into a Rule 33 newly discovered evidence motion is not an easy task . . . [This attempt] must confront the fact that our test for newly discovered evidence requires that the evidence must be such, and of such nature, as that, on a new trial, the newly discovered evidence would *probably produce an acquittal*. This language certainly suggests that newly discovered evidence must generally, if not always, be evidence related to the issues at trial, not evidence concerning separate legal claims such as ineffective assistance of counsel.

*United States v. DeRwal*, 10 F.3d 100, 104 (3d Cir. 1993) (emphasis in original) (internal quotation marks and citations omitted). “The rationale behind this practice is that collateral review allows for adequate factual development of the claim, especially because ineffective assistance claims frequently involve questions regarding conduct that occurred outside the purview of the district court and therefore can be resolved only after a factual development at an appropriate hearing.” *United States v. Morena*, 547 F.3d 191, 198 (3d Cir. 2008) (internal quotation marks omitted).

In this case, Defendant raises 10 specific areas in which he contends trial counsel was ineffective. (Def.’s Second Supp. Mem. of Law 12-15.) All of these issues concern counsel’s trial strategy and conversations which occurred outside the courtroom. These issues are best

resolved on collateral review under § 2255.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant's post-trial Motions for judgment of acquittal and for new trial will be denied.

An appropriate Order follows.

**BY THE COURT:**

**/s/R. Barclay Surrick**  
**U.S. District Judge**

