

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : NO. 15-455
 v. :
 :
 ANDREW CARR :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

August 1, 2016

On May 18, 2016, a jury found Defendant Andrew Carr guilty of conspiracy to distribute 50 or more grams of methamphetamine, in violation of 21 U.S.C. § 846 (Count One). Defendant has moved for judgment of acquittal under Rule 29, or in the alternative, a new trial under Rule 33. For the reasons that follow, the Court will deny both motions.

I. BACKGROUND

A summary of the evidence produced at trial is provided below to set the backdrop for Defendant's motion.

A grand jury returned an Indictment against Defendant Andrew Carr, containing three counts: one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846 (Count One), and two counts of possession with intent to distribute methamphetamine, in violation of 21 U.S.C.

§ 841(a)(1) and (b)(1)(C) (Counts Two and Three). See generally ECF No. 1.

The Indictment alleged that Andre Trombetta bought methamphetamine from Lamar Behlon and then re-distributed it to Defendant and others, sometimes in exchange for cash and sometimes on consignment. Id. at 1-2. Defendant then re-sold the methamphetamine to his customers. Id. at 2. Defendant and Trombetta regularly communicated by phone and met at Trombetta's business, West Philly Tattoos, for deliveries and payments. Id. Defendant worked together with Trombetta to collect drug debts from Trombetta's customers by use of force and threats of force. Id. at 2-3. In exchange, Trombetta would pay a portion of the collected money to Defendant. Id. at 3.

A jury trial began on May 9, 2016. The Government called the following witnesses: FBI Special Agent Luke Church, Trombetta, Justin Pilon, Behlon, James Nocentino, Patrick Sordi, and FBI Special Agent Eric Young. Agent Church was the case's original agent, and Agent Young later took over the case. Trombetta, Pilon, Behlon, Nocentino, and Sordi are cooperating co-defendants.

At the close of the Government's case, Defendant moved for judgment of acquittal pursuant to Federal Rule of Criminal

Procedure 29(a). The Court reserved judgment on the motion.

In his case in chief, Defendant called the following fact and/or character witnesses: William G. Price, Mary Beth Resch, Koleen Seits, and Frank Sullivan. Defendant also took the stand and denied the allegations in the Indictment.

On May 17, 2016, the jury began deliberating. The following day, on May 18, 2016, the jury sent a note to the Court indicating that it had reached a verdict on Counts 1 and 2, but it had reached an impasse on Count 3. With the parties' consent, the Court provided a partial verdict form to the jury¹ with the express instruction that the verdict would be final as to those charges. ECF No. 52. Thereafter, the jury returned a partial verdict of guilty as to Count 1 for conspiracy to distribute methamphetamine, and a verdict of not guilty as to Count 2 for possession with intent to distribute methamphetamine. ECF No. 53. The Government then made an oral motion to dismiss Count 3 of the Indictment with prejudice, which the Court granted. ECF No. 54.

¹ Under Federal Rule of Criminal Procedure 31(b), "[i]f the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed." Fed. R. Crim. P. 31(b)(2). The Third Circuit has recognized that the trial court's discretion extends to taking partial verdicts. United States v. Fiorilla, 850 F.2d 172, 177 (3d Cir. 1988).

Following conviction, Defendant orally renewed his motion for judgment of acquittal, and the Court ordered further briefing on the motion. ECF No. 55. Defendant then filed a written motion and supporting memorandum for judgment of acquittal, or in the alternative, a new trial, ECF Nos. 59, 60, which the Government opposed, ECF No. 61. Defendant's motion is now ripe for disposition.

II. MOTION FOR JUDGMENT OF ACQUITTAL

Defendant first moves for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29.

A. Legal Standard

Rule 29 provides that "[a]fter the government closes its evidence . . ., 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." Fed. R. Crim. P. 29(a). A district court considering a Rule 29 motion must "review the record in the light more favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." United States v. Bobb, 471 F.3d 491, 494 (3d Cir. 2006) (quoting United States v. Smith, 294 F.3d 473, 476 (3d Cir. 2002)). The Court must "review the evidence as

a whole, not in isolation,” United States v. Boria, 592 F.3d 476, 480 (3d Cir. 2010), and should not weigh the evidence or determine the credibility of witnesses, United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998).

Notably, however, in conspiracy cases, the court “must closely scrutinize the Government’s evidence because (1) slight evidence of [a defendant’s] connection to the conspiracy is not sufficient to support guilt and (2) guilt must remain individual and personal.” Boria, 592 F.3d at 480.

B. Discussion

Defendant argues that (1) the weight of the evidence at trial was insufficient to sustain his conviction and (2) there was a prejudicial variance between the Indictment and the Government’s proof at trial. Each argument is discussed in turn.

1. Weight of the evidence

Defendant first moves for judgment of acquittal based on the weight of the evidence. In reviewing a motion for judgment of acquittal pursuant to Rule 29, the Court “must be ever vigilant . . . not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury.” United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005) (citing United

States v. Jannotti, 673 F.2d 578, 581 (3d Cir. 1982)). “[A] finding of insufficiency 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)).

In the instant case, the jury convicted Defendant of conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 846. Section 846 provides, in pertinent part, that “[a]ny person who . . . conspires to commit any offense defined in this subchapter shall be subject to the same penalties for the offense, the commission of which was the object of the . . . conspiracy.” 21 U.S.C. § 846.

To establish a violation of § 846 in this case, the Government must prove beyond a reasonable doubt that (1) the defendant agreed with one or more persons; (2) to distribute, or possess with intent to distribute, a controlled substance, in this case, 50 or more grams of a mixture or substance containing a detectable amount of methamphetamine; and (3) that he did so knowingly. See Indictment at 1; 21 U.S.C. § 846.

Defendant contends that the Government failed to satisfy the knowledge element, because no rational jury could find beyond a reasonable doubt that he knowingly and

intentionally joined the drug conspiracy. In support of his argument, Defendant relies heavily on the Third Circuit's decision in United States v. Cooper, 567 F.2d 252 (3d Cir. 1977). But Cooper is distinguishable. In Cooper, the defendant was convicted of conspiracy to possess marijuana with intent to distribute. Id. at 253. On appeal, the Third Circuit reversed the conviction, holding that the evidence was insufficient to sustain the conviction. Id. at 255. The Third Circuit explained that there was no evidence that the defendant knew marijuana was in the padlocked rear compartment of the truck in which the defendant traveled from Colorado to Pennsylvania. Id. at 254-55. Moreover, there was no evidence that the defendant engaged in any "communication of a conspiratorial nature." Id. at 254. And the Government introduced no co-conspirator statements implicating the defendant. Id. at 255 n.3. Therefore, because no factfinder could find beyond a reasonable doubt that the defendant was a member of the drug conspiracy, the Third Circuit held that the trial court should have entered a judgment of acquittal on the conspiracy charge. Id. at 255.

Here, in contrast to Cooper, there was sufficient evidence for a rational factfinder to find beyond a reasonable doubt that Defendant knowingly and intentionally joined the drug

conspiracy. Defendant knew Trombetta dealt methamphetamine. Tr. 26:9-16, May 16, 2016. Defendant would often travel with Trombetta to meet Trombetta's supplier of methamphetamine. Tr. 27:23-28:8, May 16, 2016. Defendant testified that he regularly purchased methamphetamine from Trombetta for personal use and that the two would use methamphetamine together. Tr. 32:14-33:5, May 11, 2016; Tr. 4:5-14, May 16, 2016 (Q: You testified on Friday that you were buying from Andre Trombetta. A: Yes, I was. Q: Methamphetamine. A: Yes, I was. Q: I think your exact words were he offered you a very thick line of methamphetamine, you used it and were up for five days. And then he had you after that. A: That's correct.); see also id. 24:15-25, 53:6-24; Gov't Ex. 25. And Defendant knew that others owed Trombetta money for methamphetamine. Tr. 50:16-51:2, May 16, 2016.

Also, unlike the lack of communication in Cooper, there was substantial evidence that Defendant engaged in communications related to the conspiracy. Wiretap recordings presented at trial replayed conversations between Trombetta and Defendant during which Trombetta instructed Defendant to "see" several of Trombetta's customers, which Defendant did. See, e.g., Gov't Ex. 10 (Trombetta: "And ah . . . you should be seeing Pat."); Gov't Ex. 11 (Carr: "I'm headed over to Pat's

now."); Gov't Ex. 26 (Trombetta: "Hey, Andy, you have to go see Pat or something."); Gov't Ex. 28 (Trombetta: "[W]hy don't you go down and see fucking Pat." Carr: "That's fine." . . . Trombetta: "He'll think it's me when you pull in with that car. You know what I mean?" Carr: "I know, I know."). And the recordings were replete with references to methamphetamine. See, e.g., Gov't Exs. 6, 7, 14-4, 16, 17, 21, 25, 30, 34.

Furthermore, unlike the absence of co-conspirator statements in Cooper, several co-conspirators in this case testified that Defendant was readily involved in the methamphetamine distribution scheme spearheaded by Trombetta. Behlon, Pilon, and Nocentino testified that they understood Defendant to be Trombetta's collector and "muscle." Tr. 115:15-25, 118:14-119:12, May 12, 2016 (Pilon); Tr. 161:17-22, May 12, 2016 (Behlon); Tr. 195:2-11, May 12, 2016 (Nocentino); Tr. 251:21-252:2, May 12, 2016 (Sordi); Tr. 35:21-25, May 13, 2016 (Sordi). And Sordi testified that Defendant and Trombetta visited Sordi's home on three occasions to collect money owed to Trombetta. Tr. 254:16-20, 255:15-18, 256:17-262:11, May 12, 2016.

The facts behind the Third Circuit's decision in United States v. Boria, 592 F.3d 476 (3d Cir. 2010), are more

analogous to this case. In Boria, an informant received a tip that several individuals were searching for a place to unload a tractor-trailer carrying one hundred kilograms of cocaine, which had been hidden in boxes buried among pallets of rotten fruit. Id. at 478. After working with the smugglers to find a location to unload the truck, the informant received a phone call from the operation's leader, who advised the informant that the defendant "was supposed to take the tractor-trailer from [the informant] and take it to a garage to unload the drugs that were in the back of the tractor trailer." Id. at 479. Later, DEA Agents observed the defendant climbing into the passenger side of the truck while talking on his cell phone. Id. Although there was no evidence about the substance of the conversations, phone records showed that all nine of the outgoing calls and five of the incoming calls that occurred during the transaction were to an individual who, according to the informant's testimony, "supplie[d] people with drugs." Id. at 479 n.5.

The Third Circuit held that the statements by the informant/co-conspirator were "decisive." Id. at 485. The defendant's role imputed the requisite knowledge to sustain the verdict because, in conjunction with circumstantial evidence, it established that the defendant "knew something criminal was

afoot.” Id. at 486.

Here, the evidence at trial showed that Defendant’s role in the drug conspiracy was to serve as a collector alongside the conspiracy’s leader, Trombetta. Trombetta testified that Defendant owed him a considerable amount of money after Trombetta supplied Defendant with drugs, money for mortgage payments, and money for motorcycle insurance. Tr. 84:9-20, May 10, 2016; see also Gov’t Ex. 60 at 3 (Trombetta’s ledger indicating different type of debt owed by Defendant). To satisfy Defendant’s rising debt, Trombetta proposed that Defendant work for him by collecting money from “[a]ll the people that [Trombetta] had for bad debts.” Tr. 84:24-85:6, May 10, 2016. During a phone call between Trombetta and Defendant, Trombetta said he told the leader of Defendant’s Warlocks chapter that he last saw Defendant when he “went down there to go collect money with [him].” Gov’t Ex. 4. Defendant responded, “Okay.” Id. During another phone call, Trombetta asked Defendant if they were “going to go out collecting some money.” Gov’t Ex. 7. Defendant responded, “Ya,” and the two planned on a time and place to meet. Id.

But the evidence was not limited to communications between Defendant and Trombetta. In a recording played in court,

the jury heard Defendant telling Clark Turner to “[g]et [Trombetta] paid” because Trombetta was “driving [Defendant] fucking crazy.” Gov’t Ex. 24; Tr. 253:10-24, May 13, 2016. Defendant also testified that he heard Trombetta refer to him as his “muscle” in front of Sordi, yet Defendant claims that he thought Trombetta was joking. Tr. 221:3-19, May 13, 2016. Therefore, like in Boria, based on evidence of Defendant’s role in the conspiracy, and in conjunction with the various co-conspirator’s testimonies, a reasonable jury could find that Defendant “knew something criminal was afoot” when he continued to engage in collection activity for Trombetta.

Defendant argues that the Court should conclude that “not a single word by Trombetta should have been believed by the jury” due to “each and every lie Trombetta spouted over the course of his testimony.” Def.’s Mot. 18. But the credibility of the witnesses is a matter for the jury, not for the court. Dent, 149 F.3d at 187.

In sum, viewing the evidence in the light most favorable to the Government, a rational jury could have found beyond a reasonable doubt that Defendant knowingly and intentionally joined and participated in the conspiracy.

Defendant next argues that the Government failed to

prove that he intended to further the substantive offense of methamphetamine distribution. "One of the requisite elements the government must show in a conspiracy case is that the alleged conspirators shared a 'unity of purpose[,]' the intent to achieve a common goal, and an agreement to work together toward the goal." United States v. Cartwright, 359 F.3d 281, 286 (3d Cir. 2004) (quoting United States v. Wexler, 838 F.2d 88, 90-91 (3d Cir. 1988)). And where "an enforcement role is part of a conspiracy to distribute drugs," the Government must show "that the enforcer shared the goal of the overarching drug-distribution conspiracy." United States v. Korey, 472 F.3d 89, 95 (3d Cir. 2007).

For example, in United States v. Gonzalez, 918 F.2d 1129 (3d Cir. 1991), the Third Circuit considered whether a defendant was part of a conspiracy to distribute cocaine in light of his role as the "muscle" for the operation. Id. at 1135. In the context of a challenge to the sufficiency of the evidence supporting a conviction, the Third Circuit explained:

Considering the placement of [the defendant's] gun, the fact that he was in the kitchen with [the co-conspirators] at the time of the arrest and his act of blocking the Detective's way out of the apartment, it was reasonable for the jury to conclude that [the defendant] was the "muscle" of the group and he was there to

protect the money and the cocaine. In addition, [the defendant] was present the night before the transaction when [the co-conspirators] tried to store the cocaine at [another's] apartment, and [one of the co-conspirators] "invited" him to be present at the apartment again the next day while the transaction was taking place in the back bedroom.

Id. at 1136. Thus, in Gonzalez, the defendant's specific role was to provide the "muscle" to protect the transactions, but his overarching goal was identical to the other members of the conspiracy: distribution of cocaine.

Here, like in Gonzalez, there was sufficient evidence for a reasonable jury to conclude that Defendant intended to achieve the shared goal of methamphetamine distribution. During one wiretap call played for the jury, Trombetta insisted that he and Defendant would not be "dry" for a few days, meaning without methamphetamine, to which Defendant responded, "Good boy, I got people waiting so I can make some money again." Gov't Ex. 16. Trombetta also provided Defendant with bags for packaging methamphetamine. Tr. 126:14-127:17, May 10, 2016; Gov't Ex. 6. Trombetta testified that he "showed [Defendant] how to package" the methamphetamine for sale. Tr. 83:6-84:5, May 10, 2016. And Defendant accompanied Trombetta on various trips to buy or sell drugs or to collect owed money. Tr. 116:24-117:2, 162:21-163:5,

165:6-16, 197:17-198:17, May 12, 2016; Tr. 27:5-28:12, May 16, 2016.

Defendant's relationship with Trombetta surpassed a mere buyer-seller relationship. "[E]ven an occasional supplier (and by implication an occasional buyer for redistribution) can be shown to be a member of the conspiracy by evidence, direct or inferential, of knowledge that she or he was part of a larger operation." United States v. Gibbs, 190 F.3d 188, 198 (3d Cir. 1999) (quoting United States v. Price, 13 F.3d 711, 728 (3d Cir. 1994)). Whether a defendant-buyer was a member of a seller's conspiracy depends on such factors as "the length of affiliation between the defendant and the conspiracy," the existence of "an established method of payment," "the extent to which transactions are standardized," "whether there is a demonstrated level of mutual trust," and whether the "transactions involved large amounts of drugs." Id. at 199.

In this case, Defendant's regular purchases of significant quantities of methamphetamine from Trombetta demonstrate that he was more than a mere buyer "without any prior or contemporaneous understanding beyond the sales agreement itself." Id. at 197. Defendant and Trombetta established credit as a method of payment, Tr. 128:19-129:9, May

10, 2016, which the Third Circuit has stated is relevant to establishing participation in a conspiracy because it "often evidences the parties' mutual stake in each other's transactions." Gibbs, 190 F.3d at 200.

Moreover, wiretap conversations between Defendant and Trombetta demonstrated the "length of affiliation" between them as well as "[a] demonstrated level of mutual trust." Defendant and Trombetta met in the summer of 2013, Tr. 80:9-19, May 10, 2016, and remained close until Defendant's arrest in May 2014. During the Government's surveillance period, Defendant and Trombetta were together on the following dates: February 7, 14, 19, 20, and 21, 2014; and March 5, 7, 17, 21, 22, 23, 24, 25, 27, and 28, 2014. See Gov't Ex. 85b; see also Tr. 60:14-16, May 10, 2016 (Q: He was at your tattoo shop almost on a daily basis, wasn't he, Mr. Trombetta? A: Yes.); Tr. 46:21, May 12, 2016 (Trombetta: "Andy was at my shop every day."); Tr. 22:1-19, May 16, 2016. Trombetta would leave Defendant a key to Trombetta's tattoo shop because he trusted him. Tr. 33:3-34:10, 37:16-38:15, May 11, 2016. As to the dates of wiretap calls and texts, the communication between Defendant and Trombetta was just as frequent: February 15, 17, 23, and 27 2014; March 6, 7, 8, 12, 14, 15, 16, 17, 19, 21, 22, and 29, 2014; April 5, 16, and 17,

2014. See Gov't Exs. 6-7; 9-1; 10-11; 14-4; 16-18; 21; 23-30; 32-34; 37; 40; 43-1; 43-2. And co-conspirators testified that Defendant and Trombetta were often together. See Tr. 162:24-25, 254:18-20, 257:25-258:1, May 12, 2016.

Therefore, viewed in the light most favorable to the Government, there was sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that Defendant intended to further the substantive offense of methamphetamine distribution. Defendant's motion for judgment of acquittal on sufficiency grounds will therefore be denied.

2. Variance

Defendant next argues that there was a prejudicial variance between the Indictment and the Government's proof presented at trial. "A conviction must be vacated when (1) there is a variance between the indictment and the proof presented at trial and (2) the variance prejudices a substantial right of the defendant." United States v. Kelly, 892 F.2d 255, 258 (3d Cir. 1989). "[W]hen a single conspiracy is charged in the indictment and the evidence at trial proves only the existence of multiple, unrelated conspiracies, there is a variance," or an impermissible discrepancy, between the charged conduct and the proven conduct. United States v. Perez, 280 F.3d 318, 346 (3d

Cir. 2002). "To establish a single conspiracy," however, "the prosecutor need not prove that each defendant knew all the details, goals or other participants." Id. at 347 (quoting United States v. Padilla, 982 F.2d 110, 114 (3d Cir. 1992)). Rather, the prosecution need only establish that a defendant was aware that he or she was part of a broader operation. Id.

Here, the Indictment charges a single conspiracy. The Indictment alleges that Trombetta bought methamphetamine from Behlon and then re-distributed it to Defendant and others, sometimes in exchange for cash and sometimes on consignment. Indictment at 1-2. Defendant then re-sold the methamphetamine to his customers. Id. at 2. Defendant and Trombetta regularly communicated by phone and met at Trombetta's business, West Philly Tattoos, for deliveries and payments. Id. The two also worked together to collect drug debts from Trombetta's customers by use of force and threats of force. Id. Trombetta would then pay a portion of the money they collected on these debts to Defendant. Id. at 3.

The proof presented at trial did not vary from these allegations. Trombetta testified that he purchased methamphetamine from his source and redistribute it to Defendant. Tr. 96:15-98:21, 125:15-23, May 10, 2016. The

recorded phone calls and surveillance indicated that Defendant and Trombetta regularly communicated and met at Trombetta's tattoo shop. Furthermore, Trombetta testified that he paid portions of the collected debts to Defendant. Tr. 132:22-133:6, May 10, 2016. And wiretap recordings played for the jury indicated the same. Gov't's Ex. 1-2. Finally, the evidence showed that Defendant and Trombetta visited customers together and threatened use of force to encourage payment of past debts. Tr. 258:6-260:21, 261:11-262:11, May 12, 2016. Therefore, there was no variance between the Indictment and proof presented at trial.

Even assuming *arguendo* that Defendant had demonstrated a variance, he must also show prejudice to a substantial right. United States v. Kemp, 500 F.3d 257, 291 (3d Cir. 2007). "Unlike a constructive amendment, a variance can result in a reversible error only if it is likely to have surprised or otherwise has prejudiced the defense." United States v. Daraio, 445 F.3d 253, 262 (3d Cir. 2006). A variance does not prejudice a defendant's substantial rights if: (1) "the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be surprised at trial;" or (2) "the variance is not such that it will present a danger that the defendant may

be prosecuted a second time for the same offense." Id. Here, the indictment put Defendant on notice of the charges he faced at trial, and Defendant asserts no reason for the Court to find a danger that he will be prosecuted again for the same offense. Therefore, there is no basis for a finding of reversible error.

Moreover, the Court's jury instructions "dispel the concerns of prejudice" to Defendant. Perez, 280 F.3d at 347. The Court instructed the jury that it was "to determine whether the government has proven the guilt[] of Defendant Carr for the charges in the indictment beyond a reasonable doubt" and not "to return a verdict as to the guilt or innocence of any other person or persons." Jury Charge Tr. 43:13-17, May 17, 2016. The Court further instructed the jury that "[e]vidence which shows that the defendant only knew about the conspiracy or only kept 'bad company' by associating with members of the conspiracy or was only present when it was discussed or when a crime was committed is not sufficient to prove that the defendant was a member of the conspiracy, even if the defendant approved of what was happening or did not object to it." Id. at 28:15-22. Therefore, even if a variance did occur, it did not prejudice the defense.

In sum, Defendant has failed to demonstrate a variance

between a single conspiracy as charged in the Indictment and the evidence offered at trial to prove the conspiracy. And, regardless of whether a variance occurred, Defendant failed to demonstrate that he suffered any prejudice as a result of the Government's proof at trial. Therefore, Defendant's motion for judgment of acquittal will be dismissed on this basis.

III. MOTION FOR NEW TRIAL

In the alternative, Defendant moves for a new trial pursuant to Federal Rule of Criminal Procedure 33.

A. Legal Standard

Upon a defendant's motion under Rule 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Motions for a new trial in the interest of justice are committed to the sound discretion of the district court. United States v. Brennan, 326 F.3d 176, 189 (3d Cir. 2003). Under Rule 33, the court does not view the evidence in the light most favorable to the government, but rather must exercise its own judgment in assessing the government's case. United States v. Silveus, 542 F.3d 993, 1004 (3d Cir. 2008). Motions for new trials "are not favored and should be 'granted sparingly and only in exceptional cases.'" Id. at 1005 (quoting Gov't of Virgin Islands v. Derricks, 810

F.2d 50, 55 (3d Cir. 1987)).

B. Discussion

Defendant contends that a new trial is warranted because (1) the jury's verdict was against the weight of the evidence and (2) the errors over the course of the trial had a substantial influence on the trial's outcome. Defendant's arguments are addressed in turn.

1. Weight of the evidence

First, Defendant recasts his Rule 29 sufficiency argument in the light of Rule 33. He again contends that no rational jury could find beyond a reasonable doubt that he knowingly and intentionally joined the drug conspiracy. He spends twelve pages of his post-trial memorandum "briefly examin[ing] the weight of the Government's evidence and the credibility of each witness." Def.'s Mot. 17-28. Defendant argues that his "[s]ummary of the evidence" shows "that the Government's case rested on the quantity of its evidence, not on quality." Id. at 29. And the jury "conflat[ed] mere presence around Trombetta with specific intent," such that a new trial is warranted. Id. The Court disagrees.

"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. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (quoting United States v. Santos, 20 F.3d 280, 285 (7th Cir. 1994)).

As discussed with respect to Defendant's motion for acquittal, the jury's verdict is not contrary to the weight of the evidence. Exercising its own judgment in assessing the Government's case, the Court does not "believe that there is a serious danger that a miscarriage of justice has occurred." Johnson, 302 F.3d at 150. And Defendant's summary of the evidence presents the Court with no basis for determining that this is an "exceptional case" warranting a new trial. See Silveus, 542 F.3d at 1005. Therefore, the Court will deny the Defendant's motion for a new trial on this ground.

2. Cumulative errors

Defendant next argues that "there were errors over the course of the trial, that, when considered individually or together, infected the jury's deliberations as to have a substantial influence on the trial's outcome, warranting a new trial." Def.'s Mem. 29-30.

"Individual errors that do not entitle a petitioner to

relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process.” Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008). Reversal is warranted only when “the[] errors, when combined, so infected the jury’s deliberations that they had a substantial influence on the outcome of the trial.” United States v. Hill, 976 F.2d 132, 145 (3d Cir. 1992).

The alleged errors in the instant case include the prosecutor’s comments during closing argument and the Government’s evidence as to Defendant’s membership in the Warlocks motorcycle club.² The Court will address each allegation in turn.

a. Prosecutor’s comments

As to the prosecutor’s closing argument, Defendant points to two remarks: (1) the prosecutor characterized Defendant’s character and fact witnesses as “desperate measures” constituting evidence of Defendant’s guilt; and (2) the prosecutor said “we can all agree on one thing, Andy Carr is a

² The Government argues that the jury’s acquittal on Count 2 does not demonstrate insufficient evidence as to Count 1. Gov’t’s Mem. 16-17. However, Defendant does not make this argument, so the Court need not address the issue.

big guy” and described him as “huge.”³ Def.’s Mot. 30. According to Defendant, the prosecutor’s comments made his “witnesses seem like mere makeweight, resulting in a violation of Defendant’s due process rights,” and her characterizations “implied that defendant’s mere physical appearance was enough for him to constitute Trombetta’s ‘muscle.’” Id. at 30-31.

The Fifth Amendment’s Due Process Clause secures a defendant’s right to a fair trial. See United States v. Liburd, 607 F.3d 339, 343 (3d Cir. 2010) (citing United States v. Agurs, 427 U.S. 97, 107 (1976)). When confronted with a claim that a prosecutor’s remarks violated this right, the court first determines whether those remarks constituted misconduct. See United States v. Berrios, 676 F.3d 118, 134-36 (3d Cir. 2012); United States v. Lee, 612 F.3d 170, 194 (3d Cir. 2010). If so, the court then determines whether that misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). “[A] criminal conviction is not to be lightly

³ The Government also argues that “the wiretap calls before the jury indicated that the defendant was perfectly capable of hearing on the telephone,” and “[t]he prosecutor properly commented” that “the defendant’s desperation to explain away the calls with a hearing impairment was indicative of his guilt.” Gov’t’s Mem. 18. But again, Defendant does not make this argument, so the Court need not address the issue.

overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." United States v. Young, 470 U.S. 1, 11 (1985).

Here, because defense counsel did not object to the prosecutor's closing remarks, the propriety of those remarks is reviewed for plain error. United States v. Hakim, 344 F.3d 324, 333 (3d Cir. 2003); see also Fed. R. Crim. P. 52(b). A court can correct an error that was not raised at trial, if there is "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (alteration in original) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)).

Here, Defendant has not identified any error, much less a plain one. First, the prosecutor's description of Defendant's witnesses as "desperate measures" was, at most, an "attack[]" on the opposing advocate's arguments and tactics," which the Third Circuit has deemed "acceptable" on the grounds that "attacking and exposing flaws in one's opponent's arguments is a major purpose of closing argument." United States v. Rivas, 493 F.3d 131, 139 (3d Cir. 2007); see also United States v. Lore, 430 F.3d 190, 213 (3d Cir. 2005) ("Though personal attacks on the character of defense counsel in some instances can rise

to the level of misconduct, the single remark here regarding defense tactics falls far short of that level.”). Moreover, other circuits to have addressed a prosecutor’s use of the “desperate” adjective during closing have held that its use does not mandate a new trial. See, e.g., United States v. Williams, 690 F.3d 70, 75 (2d Cir. 2012) (characterizations of defense arguments as “desperate” or “attempts to ‘grasp at straws’” are not improper); United States v. Vazquez-Botet, 532 F.3d 37, 57-58 (1st Cir. 2008) (explaining that the prosecutor’s characterization of defense counsel as “desperate lawyers” seeking to “cloud the issues” did not constitute misconduct).

Second, the prosecutor’s characterization of Defendant as “a big guy” and “huge” does not rise to the level of misconduct. A prosecutor “may state his views of what the evidence shows and the inferences and conclusions that the evidence supports.” United States v. Zehrbach, 47 F.3d 1252, 1265 n.11 (3d Cir. 1995) (en banc). “The prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence.” United States v. Werme, 939 F.2d 108, 117 (3d Cir. 1991).

Here, the prosecutor’s characterization of Defendant as a “big guy” and “huge” impressed upon the jury Trombetta’s

testimony that, due to the Defendant's physical size, he knew people were intimidated by Defendant's stature. Tr. 93:23-94:2, 108:16-109:3, May 10, 2016. As such, the prosecutor's use of the words "big guy" and "huge" was a fair summation of the evidence presented.

But even if the prosecutor's remarks constituted misconduct, Defendant has not shown how the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. The denial of due process occurs only where the misconduct amounts to a "failure to observe that fundamental fairness essential to the very concept of justice." Id. at 642.

Finally, any prejudice flowing from the prosecutor's statements was cleansed by the Court's instruction to the jury that the lawyers' statements are neither evidence nor binding and it is the jury's own recollection and interpretation of the evidence that controls. Jury Charge Tr. at 6:3-4, 8:11-9:4, May 17, 2016. As such, the prosecutor's statements, considered within the context of the entire trial, including the Court's instructions, did not "infect[] the trial with unfairness." Donnelly, 416 U.S. at 643. Defendant has not identified a plain error warranting a new trial.

b. Warlocks jacket

Defendant next argues that the Government's use of Defendant's Warlocks membership "tainted the proceedings with improper propensity evidence." Def.'s Mot. 31. Defendant contends that "[t]he Government misused this evidence by making the trial about propensity evidence--that because Defendant was a Warlock, he was a criminal, and thus more likely to have committed the crimes with which he was charged." Id. at 32.

Prior to the trial, the Government moved in limine to introduce evidence of Defendant's Warlocks membership as intrinsic to the charges. ECF No. 36. Defendant opposed the motion. ECF No. 39. After the Court ruled on the Government's motion, defense counsel reconsidered their position concerning references to Defendant's Warlocks membership. Defense counsel agreed with the Government that Defendant's Warlocks membership was admissible and waived the original objection to its use. Tr. 3:6-4:6, May 10, 2016. Given this waiver, there was no restriction as to the Government's use of relevant Warlocks evidence during the trial.

Moreover, defense counsel stated during his opening that "Andy was a Warlock, he was in that motorcycle club." Tr. 26:1-2, May 10, 2016. Then, when Defendant took the stand, he

testified extensively as to his membership. Tr. 264:10-267:8, May 13, 2016; Tr. 5:17-10:5, 51:19-52:18, 60:11-15, May 16, 2016. Defendant cannot now be heard to complain that the admissibility of his own evidence constitutes error warranting a new trial.

Finally, there was not a single objection to the Government's use of Warlocks-related evidence during trial. See United States v. Gatto, 995 F.2d 449, 457 (3d Cir. 1993) (finding that the district court did not err in permitting the use of evidence by the government when the defense did not object because the court was "not given the opportunity to exercise its discretion"). The only pertinent limitation was on use of evidence that Defendant attended the murder trial of a fellow Warlocks members in Florida, and the Court sustained the objection. Tr. 36:5-37:19, May 16, 2016.

Because the Court finds no error, much less a plain one, the Court will deny Defendant's cumulative error argument in totum. United States v. Balter, 91 F.3d 427, 442-43 (3d Cir. 1996) (rejecting cumulative error argument in the absence of any reversible error). There is no basis for granting a new trial.

IV. CONCLUSION

For these reasons, the Court will deny Defendant's

motion for judgment of acquittal and motion for a new trial. An appropriate order follows.

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : NO. 15-455
 v. :
 :
 ANDREW CARR :

O R D E R

AND NOW, this **1st** day of **August, 2016**, upon consideration of Defendant's Motion for Judgement of Acquittal and New Trial (ECF No. 59) and the Government's Response thereto (ECF No. 64), it is hereby **ORDERED** that Defendant's motion is **DENIED**.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.