

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

UNITED STATES OF AMERICA

v.

NAKIA ADAMS

CRIMINAL
NO. 15-0580

MEMORANDUM

SCHMEHL, J. /s/ Jeffrey L. Schmehl

JANUARY 16, 2019

Defendant Nakia Adams moves for Judgment of Acquittal under Federal Rule of Criminal Procedure 29 and New Trial under Federal Rule of Criminal Procedure 33(b)(2). Mr. Adams argues: 1) the Government failed to prove a single conspiracy as alleged in the Superseding Indictment; 2) Mr. Adams suffered prejudice as a result of the multiple conspiracies in Count I of the Superseding Indictment; 3) The Government violated Mr. Adams' Speedy Trial Act rights; 4) the Court impermissibly admitted evidence under Federal Rules of Evidence 404(b), 801, and 902(13); and 5) Mr. Adams suffered prejudiced when the jury inadvertently received the bifurcated verdict form when deliberating Counts I-XII. The Government argues Mr. Adams failed to meet his burden under Rules 29 and 33; that this Court did not abuse its discretion in admitting certain evidence; and, this Court certainly cured any potential defect that existed regarding the verdict slip. For the reasons below, this Court will deny Mr. Adams' motion in its entirety.

I. STANDARD OF REVIEW

Federal Rule of Criminal Procedure 29 provides, in part: "[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), (c)(1). When considering a Rule 29 motion, the court “review[s] the record in the light most 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. Alejandro Sotelo Francisco Gonzalez Jose*, 2016 WL 4650617, at *2 (E.D. Pa. 2016) (citing *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (quoting *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001)). Under Rule 29, the court must “draw all reasonable inferences in favor of the jury’s verdict,” and finding against the jury’s verdict should “be confined to cases where the prosecution’s failure is clear.” *Id.* (citing *Smith*, 294 F.3d 473, 476 (quoting *United States v. Anderskow*, 88 F.3d 245, 251 (3d Cir. 1996)); see also *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). “‘We do not reweigh evidence or assess witness credibility,’ and ‘we must sustain the verdict ‘if a rational trier of fact could have found [the] defendant guilty beyond a reasonable doubt, and the verdict is supported by substantial evidence.’” *Id.* (citing *United States v. McKee*, 506 F.3d 225, 232 (3d Cir. 2007)). Review under Federal Rule of Criminal Procedure 29 is plenary. *United States v. Jasin*, 280 F.3d 355, 360 (3d Cir. 2002).

Federal Rule of Criminal Procedure 33 gives the court authority to vacate a criminal judgment and grant a new trial “if the interest of justice so requires.” Fed. R. Crim. P. 33(a). “Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government’s case.” *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) (citing *United States v. Lacey*, 219 F.3d 779, 783-84 (8th

Cir. 2000)). “If the interest of justice so requires” can be defined as: whether “serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.” *United States v. Meehan*, 2016 WL 4901128, at *10 (E.D. Pa. 2016). However, “such motions are not favored and should be granted sparingly and only in exceptional cases.” *Id.* (citing *United States v. Silveus*, 542 F.3d 993, 1004-05 (3d Cir. 2008). Review under Federal Rule of Criminal Procedure 33 is for abuse of discretion. *Jasin*, 280 F.3d 355, 360 (3d Cir. 2002).

II. FACTS

On December 8, 2015, the Government filed a twelve-count Indictment charging Mr. Adams with multiple violations of federal firearms laws. (ECF Docket No. 1.) On February 2, 2016, the Government filed a Superseding Indictment charging Mr. Adams with eight additional violations. (ECF Docket No. 15.) Specifically, the Government charged Mr. Adams with: 1) conspiracy to make false statements to a federal firearms licensee (“FFL”) with respect to information required to be kept in the records of the FFL, in violation of 18 U.S.C. § 371 (Count I); 2) making, and aiding and abetting the making of, false statements to an FFL regarding information required to be kept in the records of the FFL, in violation of 18 U.S.C. §§ 924(a)(1)(A) and (2) (Counts II-XII); and 3) unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Counts XIII-XX). (*Id.*)

The Government alleged Mr. Adams utilized individuals to straw purchase semi-automatic handguns and falsely claim they were buying the firearms for themselves. (ECF Docket No. 173, at 2.) Mr. Adams specifically targeted defendants Elvin Reyes, Jr., Jessica Gonzalez, Malachi Kelchner, and Sitara Rathod to straw purchase these weapons at

numerous FFLs. (Id.) “While amassing these firearms, Adams made several trips from Lancaster, Pennsylvania to Newark, New Jersey, occasionally with straw purchasers, and transferred the firearms to another individual or individuals in exchange for guns, drugs, or both.” (Id.) Because of his prior felony convictions, Mr. Adams needed these individuals to straw purchase the guns. (Id.)

Mr. Adams’ CJA Appointed attorney, Mr. Carlos Martir, Jr., requested a continuance following the Government’s Superseding Indictment. (ECF Docket No. 16.) This Court granted Mr. Adams’ continuance. (ECF Docket No. 17.) Two months later, Mr. Adams moved to dismiss Mr. Martir as counsel. (ECF Docket No. 23.) This Court granted Mr. Adams’ request to remove Mr. Martir as counsel. (ECF Docket No. 32.) On June 9, 2016, this Court appointed Mr. James M. Polyak as Mr. Adams’ second CJA Appointed attorney. (ECF Docket No. 34.) Mr. Adams once again moved for dismissal of his second counsel, Mr. Polyak, citing Mr. Polyak’s failure to “perform to the norm.” (ECF Docket No. 49.) Following Mr. Polyak’s waiver of removal and a full colloquy on the issue, this Court granted Mr. Adams’ request to continue *pro se*. (ECF Docket No. 59.) While this Court granted Mr. Polyak’s motion to withdraw (ECF Docket No. 54), this Court required Mr. Polyak continue as standby counsel. (ECF Docket No. 63.) On March 13, 2017, this Court once again appointed Mr. Polyak – involved as standby counsel – as Mr. Adams’ formal counsel upon request by Mr. Adams.

On April 28, 2017, this Court granted Mr. Adams’ counseled request to bifurcate the trial to minimize the risk of prejudice “only as to the issue of Adams’ prior conviction relating to the eight (8) counts of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1).” (ECF Docket No. 91.) This Court scheduled Mr. Adams’ trial for June 12,

2017. (ECF Docket No. 92.) Mr. Adams' trial commenced with jury selection on June 12, 2017, in Philadelphia, Pennsylvania. On June 13, 2017, as the trial continued in Reading, Pennsylvania, a dispute arose between Mr. Polyak and Mr. Adams where Mr. Polyak felt threatened by Mr. Adams. (Trial Tr. 159:17-169:24, June 13, 2017, PM.) Because of this dispute, Mr. Polyak could no longer represent Mr. Adams and orally moved this Court to withdraw as counsel effective immediately. (ECF Docket No. 112.) On June 14, 2017, this Court granted Mr. Polyak's motion to withdraw as Mr. Adams' counsel and after a colloquy, adjourned the trial. (ECF Docket No. 113.) Following the adjournment, this Court appointed Mr. Luther Weaver, III, as Mr. Adams' third and final counsel. (Id.) Given Mr. Adams' conduct since the Superseding Indictment, the Government petitioned this Court to colloquy Mr. Adams. (ECF Docket No. 113.) This Court agreed and colloquied Mr. Adams on the record informing him that Mr. Weaver would be his final attorney if his actions caused another dismissal of counsel or mistrial. (Id.) This Court scheduled Mr. Adams' new trial for July 31, 2017. Given the volume of documents and time required to prepare, Mr. Weaver requested a continuance. (ECF Docket No. 117.) This Court granted Mr. Weaver's request and continued Mr. Adams' trial to October 10, 2017. (ECF Docket No. 124.)

On October 10, 2017, Mr. Adams' second trial commenced with jury selection and continued uninterrupted until closing arguments on October 18, 2017. (ECF Docket No. 153, 162.) At the conclusion of the trial, both parties privately convened with this Court to finalize the jury verdict slips. Unbeknownst to both this Court and counsel, both verdict slips -- bifurcated Counts XIII-XX and Counts I-XII -- were included in the same envelope given to the jury for deliberation. After realizing this error, but before this Court and

counsel could address the issue, the jurors returned with a question regarding the additional Counts included in the verdict slip. This Court informed the jury that it distributed the additional verdict slips in error. The jury returned the unmarked bifurcated verdict slips. A few minutes after the jury returned the bifurcated verdict slip, the jury notified this Court that it reached a verdict. Before the jury could read the verdict, this Court and counsel agreed it should question the jury foreperson about the verdict slip and whether the jury saw the instructions before concluding their initial deliberations on Counts I-XII. Following this Court's extensive inquiry on the record – addressed more fully below – this Court concluded the jurors did not see the bifurcated verdict slip while deliberating and deciding Counts I-XII. As stated by the jury foreperson when questioned, the jurors completed Counts I-XII – almost in sequential order – and then turned the page and noticed charges that were not addressed by either side at trial. Also, no changes or marks were made to the original Counts I-XII after the jurors noticed bifurcated Counts XIII-XX. Mr. Adams moved for a mistrial claiming prejudice; this Court denied the motion. (ECF Docket No. 162.) The jury found Mr. Adams guilty on the first twelve counts of the Superseding Indictment. (ECF Docket No. 166.) Following that verdict, the jury deliberated the remaining bifurcated counts and again returned a guilty verdict on the remaining bifurcated counts of the Superseding Indictment. (Id.)

On October 27, 2017, Mr. Adams moved for a new trial and judgment of acquittal under Rule 29 and Rule 33. Following multiple attempts to sentence Mr. Adams after the jury's guilty verdict, and after several attempts by Mr. Adams to fire his third counsel, this Court allowed Mr. Weaver to file a supplemental brief to his original motion for a new trial and judgment of acquittal. Each argument is addressed below.

III. ANALYSIS

Mr. Adams raises a number of arguments in his first and supplemental briefs: 1) the Government did not prove a single conspiracy as alleged in the Superseding Indictment; 2) Mr. Adams suffered prejudice as a result of the multiple conspiracies in Count I of the Superseding Indictment; 3) The Government violated Mr. Adams' Speedy Trial Act rights; 4) the Court impermissibly admitted evidence under Federal Rules of Evidence 404(b), 801, and 902(13); and 5) Mr. Adams suffered prejudiced when the jury inadvertently received the bifurcated verdict form when deliberating Counts I-XII. This Court will address each in order.

A. The Government proved a single conspiracy to make false statements to a federal firearms licensee in connection with the purchase of firearms.

According to our Court of Appeals, a single conspiracy exists if “there is one overall agreement among the parties to carry out those objectives” even if the objectives are numerous and diverse. *United States v. Freeman*, 763 F.3d 322, 343 (3d Cir. 2014). “[A] single conspiracy is proved when there is ‘evidence of a large general scheme, and of aid given by some conspirators to others in aid of that scheme.’” *Id.* (citing *United States v. Perez*, 280 F.3d 318, 494-95 (3d Cir. 2002); quoting *United States v. Reyes*, 930 F.2d 310, 312-13 (3d Cir. 1991)). The court also stated, “[a] single drug conspiracy ‘may involve numerous suppliers and distributors operating under the aegis of a common core group’ and the government must prove the ‘defendant knew that he was part of a larger drug operation.’” *Id.* (quoting *United States v. Quintero*, 38 F.3d 1317, 1337 (3d Cir. 1994)). The issue of single or multiple conspiracies is a question of fact for the jury to decide. *Id.*

Mr. Adams argues, as he did in his pre-trial motions (ECF Docket No. 127), the evidence presented at trial “at best . . . proved three or more conspiracies as opposed to a

single conspiracy” as put forth in the Superseding Indictment. (ECF Docket No. 171, ¶ 14.) Specifically Mr. Adams argues, “[t]he Government has alleged that there was one grand conspiracy involving the Defendant and his alleged purchasers. However, there are certain critical facts which establish, according to evidence, that there was not one single conspiracy, but multiple conspiracies . . .” (Id. at ¶ 15.) Mr. Adams claims the Government failed to prove a single conspiracy because the individuals involved in the scheme did not overlap and the evidence presented only established something resembling “an employer hiring temporary employees on an as-needed basis.” (Id. at ¶ 15.a.) In his supplemental brief, Mr. Adams re-argues “the Government must show that the various spokes either knew [the others] or knew of the others.” (ECF Docket No. 213, at 6; ECF Docket No. 215, at 3).

Mr. Adams maintains the Government failed to prove – and did not allege in the Superseding Indictment – joint activity between the three separate groups of individuals that assisted Mr. Adams in furtherance of the crime.¹ Mr. Adams argues in his first brief:

As these alleged pawns of the Defendant came and went, there are no allegations that the Defendant had even one constant or steady partner who was knowingly involved in this scheme throughout, *to make false statements regarding information required to be kept in the records of federally licensed firearms dealers . . . other than himself*. He alone was the core of the alleged conspiracy.

(Id. at ¶ 15.c.) Mr. Adams’ supplemental brief continues: “where the ‘spokes’ of a conspiracy have no knowledge of or connection with any other, dealing independently with

¹ Mr. Adams provides this Court with dates the individuals were allegedly involved with Mr. Adams: Elvin Reyes, Jr.: May 6, 7, 13, 19, of 2015; Jessica Gonzalez, Malachi Kelchner, and Randy Johnson: June 19, 20, 21, 22, of 2015; and Sitara Rathod: July 9, 10, 29, of 2015. Mr. Adams argues, because none of these dates overlap, the Government failed to meet its burden proving a single conspiracy beyond a reasonable doubt.

the hub conspirator, there is not a single conspiracy, but rather as many conspiracies as there are spokes.” (ECF Docket No. 213, at 7.)

While the Government proved a “hub-and-spoke” conspiracy between Mr. Adams and the co-conspirators at trial, Mr. Adams argues the Government did not establish “a rim connecting each spoke” and failed to prove a single conspiracy. (Id. at ¶ 17.) As a result, Mr. Adams argues he suffered prejudice as a result of the “duplicity on Count One.” (Id. at ¶ 18.) Specifically, he claims:

(a) the general verdict for the Defendant on Count One does not reveal whether the jury found him not guilty of one crime or not guilty of both which could prejudice the defendant in protecting himself against double jeopardy; (b) the general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or of both, which could prejudice the defendant in sentencing and in obtaining appellate review; (c) the defendant has been prejudiced with respect to evidentiary ruling during the trial; (d) the Defendant suffered prejudicial spillover effect from three or more separate conspiracies being tried together and (e) there is no way of knowing with a general verdict on multiple separate offenses joined in a single count whether the jury was unanimous with respect to any of the separate conspiracies.

(Id.) (citing *United States v. Starks*, 515 F.2d 112, 116-17 (3d Cir. 1975). Mr. Adams contends the Government did not introduce enough evidence for the jury to conclude the existence of a single conspiracy beyond a reasonable doubt. (Id. at ¶ 19.)

Both the Government and Mr. Adams – in his first brief – rely on *United States v. Kelly* to analyze the existence of a conspiracy. (ECF Docket No. 171, at ¶ 13; ECF Docket No. 173, at 8) (citing *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989)). In *Kelly*, our Court of Appeals established a non-exhaustive three-step inquiry to determine whether “a series of events constitutes a single conspiracy or separate and unrelated conspiracies.” *Id.* (citing *United States v. DeVarona*, 872 F.2d 114 (5th Cir.1989)). *Kelly* requires this Court examine: 1) “whether there was a common goal among the conspirators”; 2) “the

nature of the scheme to determine whether ‘the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators’”; and 3) “the extent to which the participants overlap in the various dealings.” *Id.* (citing *United States v. DeVarona*, 872 F.2d 114, 118-19 (5th Cir. 1989)).

The *Kelly* factors are useful to show the existence of a single conspiracy, but the absence of one *Kelly* factor is not indicative of multiple conspiracies.² *United States v. Padilla*, 982 F.2d 110, 115 (3d Cir. 1992). As the Government correctly notes, “[a] single conspiracy is not transformed into a series of unrelated, multiple conspiracies merely through a change in its membership.” *Kelly*, 892 F.2d at 259. Likewise, “sub-schemes within a larger conspiracy do not necessarily transform that single conspiracy into multiple smaller ones.” (ECF Docket No. 173, at 8) (citing *Kelly*, 892 F.2d at 259).

First, the common goal among all participants here centered on unlawfully straw purchasing guns for Mr. Adams. Although Mr. Adams used multiple individuals throughout his straw purchasing scheme, the central purpose remained constant and pervasive. During Mr. Adams’ trial, his straw purchasers – Mr. Reyes, Ms. Gonzalez, Mr. Kelchner, and Ms. Rathod – all testified they participated in Mr. Adams’ scheme from beginning to end. (ECF Docket No. 173, at 9.) “As they testified during trial, they were enlisted by Adams; vetted for any criminal records; furnished with cash and instructions as to the firearms to purchase; and transported to a host of federal firearms dealers to consummate the illegal purchases.” (*Id.*) The witnesses testified Mr. Adams would travel

² “For example, the agreement by five vandals to deface storefronts under cover of night is no doubt a simple single conspiracy, yet it may lack the second *Kelly* factor since the continuation of the endeavor does not depend on ‘the continuous cooperation of the conspirators.’ Similarly, an actor with knowledge of the entire conspiracy may be part of a single conspiracy even though he has contact with only one member.” *United States v. Padilla*, 982 F.2d 110, 115 n.6 (3d Cir. 1992) (citing *United States v. Adams*, 759 F.2d 1099, 1114 (3d Cir. 1985)) (internal citations omitted).

with them to Newark, New Jersey, in exchange for drugs or cash following the straw purchase of guns. (Id.) While Mr. Adams disputes the co-conspirators' level of knowledge, no requirement exists where all conspirators must know and agree to all details of the conspiracy or know what others in the conspiracy are doing. According to the Government, however, Mr. Adams is factually inaccurate when he claims none of the co-conspirators knew anything or anyone:

Gonzalez and Kelchner testified that they learned that Randy Johnson – someone unknown to them before becoming ensnared in Adams' scheme – also straw purchased firearms for Adams. Rathod, too, testified that Adams told her others separately bought him guns. Finally, both Samantha Keller and Patrick Corcoran testified that Adams asked them or they observed Adams ask others to buy him guns.

(Id. at 10.) The common goal among the co-conspirators to straw purchase guns for Mr. Adams establishes the “common goal among conspirators” prong in *Kelly*.

Second, the nature of the scheme, the success and failure of Mr. Adams' Newark operation, depended on the cooperation and continuous stream of straw purchasers and guns. The activities of the straw purchasers in relation to Mr. Adams were “necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture.” *Kelly*, 892 F.2d at 259 (citing *DeVarona*, 872 F.2d at 118). The overall success of the venture – exchanging guns in Newark for cash or drugs – required straw purchasers with clean records. While Mr. Adams used a number of individuals to straw purchase the guns and carry out his scheme, this did not diminish his need for individuals who could purchase guns and deliver them to Newark with him. As we stated: “[a] single conspiracy is not transformed into a series of unrelated, multiple conspiracies merely through a change in its membership.” *Id.* (citing *United States v. Vila*, 599 F.2d 21, 24 (2d Cir.), *cert. denied*, 444 U.S. 837 (1979)). “From Reyes to Johnson to Gonzalez, and Kelchner to Rathod, this

continuous stream of straw purchasers was designed to continue uninterruptedly Adams' acquisition of firearms to traffic to his confederate or confederates in Newark.” (ECF Docket No. 173, at 10.) Similar to *Kelly*, where members of the conspiracy were cut out or double-crossed and Kelly remained the one constant, Mr. Adams remained the constant during the course of the overall conspiracy.

And third, regarding overlapping participants, “the government need not prove that each defendant knew all the details, goals, or other participants” to find a single conspiracy. *Kelly*, 892 F.2d at 260 (citing *United States v. Theodoropoulos*, 866 F.2d 587, 599 (3d Cir. 1989), *overruled on other grounds by United States v. Price*, 76 F.3d 526 (3d Cir. 1996)).

As argued by the Government:

Although knowledge of the *existence*, as opposed to the *identity*, of other co-conspirators in a hub-and-spoke conspiracy is one factor a jury may consider, it is not a *sine qua non* of a single hub-and-spoke conspiracy Adams so desperately wishes it were. Instead, what matters is whether the parties to the agreement agreed to achieve a common criminal objective.

(ECF Docket No. 215, at 3) (citing *Kelly*, 892 F.2d at 259; *United States v. Freeman*, 763 F.3d 322, 345 (3d Cir. 2014); *United States v. Hornick*, 491 Fed. App'x 277, 285 (3d Cir. 2012); *United States v. Norman*, 465 F. App'x 110, 119 (3d Cir. 2012) (not precedential); *United States v. Lee*, 359 F.3d 194, 207–08 (3d Cir. 2004); *United States v. Williams*, 464 F.3d 443, 446 (3d Cir. 2006); *United States v. Boyd*, 595 F.2d 120, 123 (3d Cir. 1978)).

According to Ms. Rathod's testimony, Mr. Adams told her he used others to unlawfully purchase firearms, “including her friend and fellow addict Samantha Keller, who refused the request.” (ECF Docket No. 173, at 11.) As noted, the Government need not prove each co-conspirator knew of the “details, goals, or other participants” to find a single conspiracy. As the Government argues, citing our Court of Appeals:

[I]n *Hornick*, [the court] found the defendant and his coconspirators shared a common purpose of burglarizing retail stores and transporting the stolen loot across state lines for resale on the black market, regardless of whether separate burglary and retail theft crews overlapped or even know of each other's role in the conspiracy . . . [and] both Hornick and the fence remained constant through the conspiracy, 'despite the substitution of auxiliary coconspirators.'

(ECF Docket No. 173, at 12.) Although Mr. Adams argues his use of numerous individuals in different groups reveals multiple conspiracies, the evidence presented points to a single conspiracy where Mr. Adams recruited multiple individuals for a common goal. There was one single conspiracy and it was all to the benefit of Mr. Adams.

Now, Mr. Adams' supplemental brief repeats much of what was argued in his original brief: the straw purchasers were part of an unconnected string of conspiracies. (ECF Docket No. 213.) First, Mr. Adams relies on *Dickson v. Microsoft Corp.* for the premise that a "rimless wheel conspiracy" is not a single, general conspiracy, but instead a series of conspiracies between the defendant and multiple parties. (ECF Docket No. 213, at 7) (citing *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002)). In *Dickson*, multiple defendants entered into separate agreements with a common defendant. Although *Dickson* established a rimless wheel was incapable of supporting a single conspiracy, *Dickson* involved a class action lawsuit alleging violations under the Sherman Antitrust Act. Specifically, the court stated:

A single criminal conspiracy generally is demonstrated by an 'overlap of key actors, methods, and goals.' . . . Because Gravity does not argue its allegations are sufficient to demonstrate this type of overlap but instead only advocates our adopting the concept of a rimless wheel conspiracy, we need not decide whether the same test that applies to demonstrate a single criminal conspiracy would apply in the context of the Sherman Act.

Dickson, 309 F.3d 193, 204 n.12. And while *Dickson* involved a conspiracy in the context of the Sherman Act, the Government in Mr. Adams' trial presented evidence that the co-

conspirators were enlisted by Mr. Adams and demonstrated an overlap of key “actors, methods, and goals.” (ECF Docket No. 215, at 4-5.) As noted above, the Government proved the straw purchasers entered into an agreement to further Adams’ illegal firearms trafficking scheme. (Id. at 5.) “In other words, the proverbial ‘rim’ was forged by Adams and the purchaser or purchasers of his straw-purchased firearms.” (Id.)

Also, Mr. Adams’ supplemental brief cites *United States v. Chandler* for the premise that “those people who form the wheel’s spokes must have been aware and must do something in furtherance of some single, illegal enterprise.” (ECF Docket No. 215, at 5) (citing *United States v. Chandler*, 388 F.3d 796 (11th Cir. 2004)). The court in *Chandler* provided it “never upheld a conspiracy conviction where a single key man moved alone from spoke to spoke, agreeing with no one else common to more than one spoke.” *United States v. Chandler*, 388 F.3d 796, 808 (11th Cir. 2004). *Chandler* concluded no connection existed between the defendants and the main conspirator’s scheme; the government conceded the defendants did not know of the main conspirator or the underlying theft and no other person moved with him from spoke to spoke. *Id.* at 808. But Mr. Adams’ reliance on *Chandler* is again misguided. Each of the co-conspirators knew he or she played a critical role for Mr. Adams in obtaining firearms which he then trafficked to New Jersey. (ECF Docket No. 215, at 5.) As the Government proved at trial, many of the straw purchasers overlapped with each other and had knowledge of the scheme to unlawfully acquire firearms for Mr. Adams. (Id. at 7.)

The evidence presented at trial and considered by the jury was sufficient for the jury to conclude the Government proved a single conspiracy. This Court will deny Mr. Adams’ request for judgment of acquittal and new trial with regards to Count I.

B. Mr. Adams did not suffer prejudice from “multiple conspiracies” because the weight of the evidence and the jury’s verdict established a single conspiracy.

Mr. Adams moves this Court for a judgment of acquittal and new trial on all Counts because of the prejudicial effect from the multiple conspiracies in Count I of the Superseding Indictment. Given this Court’s conclusion that the evidence presented at trial and considered by the jury was sufficient to find a single conspiracy, Mr. Adams did not suffer prejudice on Counts II-XX. In fact, how else would the Government prove its case except to call all of these individuals as witnesses? This Court will deny Mr. Adams’ request for judgment of acquittal and new trial with regards to Count II-XX.

C. Mr. Adams’ Speedy Trial Act rights were not violated.

The Speedy Trial Act under 18 U.S.C. § 3161 requires that a defendant’s trial commences within seventy days “from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever last date occurs.” 18 U.S.C. § 3161. The Speedy Trial Act contemplates certain periods of delay which are excluded in computing the time within which trial must commence that result “from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.” 18 U.S.C. § 3161(h)(1)(D). Mr. Adams argues his Speedy Trial Act rights were violated when this Court did not schedule his trial within seventy days following the denial of his *pro se* Motion to Dismiss on January 24, 2017. Mr. Adams is incorrect for a number of reasons.

Before addressing the merits of Mr. Adams’ argument, this Court must examine the procedural history of this case prior to the October 2017 trial. Mr. Adams’ argument begins

after the Government's Superseding Indictment of February 2, 2016. (ECF Docket No. 15.) Following the Superseding Indictment, Mr. Adams' attorney, Mr. Carlos A. Martir, moved to continue the February 16, 2016, trial date. (ECF Docket No. 16.) On March 16, 2016, this Court granted Mr. Martir's request and continued the trial to May 16, 2016. (ECF Docket No. 21.) On April 4, 2016, Mr. Adams *pro se* moved this Court to dismiss Mr. Martir as counsel while still represented by Mr. Martir. (ECF Docket No. 23.) "On account of Adams' motion to dismiss his attorney, the Court entered an order on April 8 that excludable time be computed from April 4 (the date Adams delivered his motion to the Court) until a hearing on the matter would be concluded or the motion otherwise disposed of." (ECF Docket No. 73, at 14) (citing ECF Docket No. 22.) This Court held a hearing on Mr. Adams' request to withdraw Mr. Martir as counsel; this Court granted Mr. Adams' request. (ECF Docket No. 73, at 14.) On June 9, 2016, the Court appointed Mr. James M. Polyak to represent Mr. Adams. (ECF Docket No. 34.) Motions were filed and argued between June 20, 2016 and September 28, 2016. On September 16, 2016, this Court scheduled Mr. Adams' new trial for November 30, 2016. (ECF Docket No. 46.)

Continuing what would become a recurring theme, on September 30, 2016, Mr. Adams again *pro se* moved – while still represented by Mr. Polyak – requesting Mr. Polyak's dismissal; but now Mr. Adams wished to continue *pro se*. (ECF Docket No. 54) Mr. Polyak also moved to withdraw from the case. (*Id.*) On November 7, 2016, this Court concluded Mr. Adams knowingly and voluntarily sought to proceed *pro se* and granted his request. (ECF Docket No. 63.) This Court again continued Mr. Adams' trial. (ECF Docket No. 61-62.) Mr. Adams *pro se* filed a series of motions on November 9, 2016, and November 21, 2016, again moving to dismiss the Superseding Indictment for violation of

his Speedy Trial Act rights. (ECF Docket No. 64-67, 69.) On December 8, 2016, Mr. Adams then moved to quash the Indictment. (ECF Docket No. 70.) On December 12, 2016, this Court scheduled a final hearing/oral argument on Mr. Adams' pre-trial motions for January 11, 2017. (ECF Docket No. 71.) On January 25, 2017, this Court denied Mr. Adams' pre-trial motions. (ECF Docket No. 75.)

Following a telephone conference with Mr. Adams regarding his desire to discontinue his *pro se* status, on March 13, 2017, this Court once again appointed Mr. Polyak as counsel of record. (ECF Docket No. 81.) Mr. Adams continued filing *pro se* and counseled motions from April 7, 2017, to April 27, 2017. (ECF Docket No. 85-88.) On April 27, 2017, this Court scheduled a final pre-trial conference for May 15, 2017, and, on April 28, 2017, granted Mr. Adams' counseled request for a bifurcated trial. (ECF Docket No. 90-91.) During the May 15, 2017, pre-trial conference, this Court set Mr. Adams' new trial date to June 12, 2017. (ECF Docket No. 92.) During the first full day of trial, but after this Court impaneled the jury, an issue arose between Mr. Polyak and Mr. Adams. (ECF Docket No. 110.) This Court determined the issue severe enough to withdraw Mr. Polyak as counsel. (*Id.*) Following this issue, on June 15, 2017, this Court appointed Mr. Luther E. Weaver, III, as Mr. Adams' new counsel of record. (ECF Docket No. 111.) This Court scheduled a new trial for July 12, 2017. (ECF Docket No. 115.) On July 7, 2017, Mr. Weaver moved to continue the trial to familiarize himself with the facts of the case and adequately prepare Mr. Adams' defense. (ECF Docket No. 117.) This Court granted Mr. Weaver's reasonable request and rescheduled Mr. Adams' trial for October 10, 2017. (ECF Docket No. 117, 121.) The trial commenced on October 10, 2017, and the jury found Mr. Adams guilty on all counts.

This Court will not now allow Mr. Adams to use the Speedy Trial Act as a shield for his obstreperous behavior. Mr. Adams' conduct has produced numerous continuances, unnecessary motions, and representation by three different attorneys. Indeed, this trial was anything but "speedy," but all the delays are directly attributable to Mr. Adams. Again, the time in which a trial must commence (seventy days) is excluded from computation if the delay "result[s] from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D). To determine whether a defendant's right to a speedy trial is violated, the Supreme Court uses a balancing test weighing the conduct of both the prosecution and defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The four factors in *Barker* are: 1) the length of delay; 2) the reason for the delay; 3) the defendant's assertion of his right; and 4) the prejudice to the defendant. *Id.*

Under *Barker*, the first factor is "to some extent a triggering mechanism." *Id.* "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* Certain delays are tolerated over others. For example, "the First Circuit concluded a delay of nine months was overly long, absent good reason, in a case that depended on eyewitness testimony." *Barker*, 407 U.S. at 530 n.31. While the imposition of a speedy trial is imprecise according to the Supreme Court, the delay in Mr. Adams' case was not "presumptively prejudicial" as most of the delays were caused by Mr. Adams' conduct. *Id.* at 530-531.

Closely related to the first *Barker* factor is the second factor – the reason for the delay. "[D]ifferent weights should be assigned to different reasons." *Id.* at 531. For example, a deliberate attempt to delay a trial to hamper the defense should be weighted

heavily against the government, while a missing witness or negligence should serve to justify appropriate delay. *Id.* The delay in Mr. Adams' case is purely the product of his actions. Besides the Government's Superseding Indictment resulting in Mr. Martir's request for a continuance, the numerous delays were all manufactured by Mr. Adams. Mr. Adams caused numerous delays when he: fired Mr. Martir as counsel; fired Mr. Polyak as counsel; attempted to proceed *pro se*; asked this Court to reappoint Mr. Polyak as counsel; forced Mr. Polyak to withdraw as counsel during the first full day of trial; caused a new trial; and then forced this Court to appoint Mr. Weaver as his third and final counsel which required additional continuances. And now Mr. Adams' conduct towards Mr. Weaver has caused delays in Mr. Adams' sentencing.

Although Mr. Adams' delay was not presumptively prejudicial, this Court will briefly address the third and fourth *Barker* factors. The third factor under *Barker* is the "defendant's responsibility to assert his right." *Id.* at 531. "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned." *Id.* While Mr. Adams asserted his right to a speedy trial, his actions alone caused the delay. The fourth factor under *Barker* is the amount of prejudice to the defendant. "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Id.* at 532. The Supreme Court identifies the defendant's three interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* The most serious of the three interests is the last one because "the inability for the defendant to prepare his case skews the fairness of the entire system." *Id.* Mr. Adams clearly did not suffer any prejudice because of the delay. Mr. Adams presented no case

and called no witnesses. His defense was that the Government's case was insufficient. But, cases usually get worse with time, not better. If anything, the delay was to the benefit of Mr. Adams. Notwithstanding Mr. Adams' actions following the Superseding Indictment (e.g. firing two different attorneys and countless distractions), Mr. Weaver was able to adequately prepare Mr. Adams' defense at trial.

While the *Barker* factors are not "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial," they must be considered in the totality of the circumstances. *Id.* at 533. "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." This Court recognizes the right to a speedy trial is a fundamental right of the accused set forth in the United States Constitution. *Id.* However, absent extraordinary circumstances, Mr. Adams was not denied this constitutional right following a record which strongly indicates he alone caused the delays of which he now complains.

D. This Court did not Abuse its discretion.

"An abuse of discretion occurs only where the district court's decision is 'arbitrary, fanciful, or clearly unreasonable' – in short, where 'no reasonable person would adopt the district court's view.'" *United States v. Starnes*, 583 F.3d 196, 214 (3d Cir. 2009). The court reviews evidentiary rulings on an abuse of discretion standard; but review is plenary "to the extent [the court's rulings] are based on a legal interpretation of the Federal Rules of Evidence." *Complaint of Consolidation Coal Co.*, 123 F.3d 126, 131 (3d Cir. 1997). "This includes plenary review 'of whether evidence falls within the scope of Rule 404(b).'" *United States v. Cruz*, 326 F.3d 392, 394 (3d Cir. 2003).

- i. *This Court did not abuse its discretion admitting evidence under Federal Rule of Evidence 404(b).*

Mr. Adams argues this Court erred in admitting evidence of “alleged straw purchase transactions outside of the Eastern District of Pennsylvania, and other alleged bad acts on the part of the Defendant which the Government never introduced into evidence during the trial.” (ECF Docket No. 171, ¶ 43.) Mr. Adams contends the Government only admitted this evidence to establish propensity on the part of the Defendant and did not comply with any exception under Rule 404(b). (Id. at ¶ 44.) But the Government argues the evidence was not offered or admitted under Rule 404(b); rather, the evidence was offered and admitted as intrinsic to the conspiracy. (ECF Docket No. 173, at 18.) This Court will review those allegations for an abuse of discretion.

Federal Rule of Evidence 404(b) prohibits “evidence of a crime, wrong, or other act to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b). This evidence, however, may be admissible for another purpose, such as “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2). The Supreme Court created a four-part test to determine admissibility under Rule 404(b): 1) whether the evidence is offered for a proper purpose under Rule 404(b); 2) whether the evidence is relevant under Rule 402; 3) whether the probative value of the evidence substantially outweighs the potential prejudice under Rule 403; and 4) whether the prejudice can be cured by the trial court with a limiting instruction. *United States v. Shelow*, 2011 WL 6130974, at *4 (E.D. Pa. 2011) (citing *Huddleston v. United States*, 485 U.S. 681, 691 (1988)).

But, Rule 404(b) does not apply to “evidence of acts which are ‘intrinsic’ to the offense charged.” Fed. R. Evid. 404(b) advisory committee note to 1991 amendments.

Our Court of Appeals categorizes “intrinsic evidence” as: 1) evidence of uncharged acts that “directly prove” the charged offense; and 2) “uncharged acts performed contemporaneously with the charged crime that facilitate the commission of the charged crime.” *United States v. Green*, 617 F.3d 233, 248-49 (3d Cir. 2010).

Mr. Adams argues that two straw purchases and one attempted straw purchase which took place outside the Eastern District of Pennsylvania – included as overt acts in the conspiracy charges – were impermissibly admitted under Federal Rule of Evidence 404(b). (ECF Docket No. 171, ¶¶ 43-44.) Mr. Adams also argues the Government offered evidence that on June 4, 2015, Mr. Adams drove Randy Johnson, an individual charged separately by the Government for making false statements to a FFL in connection with the purchase of firearms, to straw purchase several firearms for Mr. Adams from Backwoods Outfitters, an FFL located in Columbia, Pennsylvania. (ECF Docket No. 171, ¶ 46.) However, Mr. Adams argues this alleged incident did not appear in the Government’s Superseding Indictment and Randy Johnson never testified during trial. (Id. at ¶¶ 47-48.) Mr. Adams claims the Government introduced this evidence “solely for propensity purposes” and was not relevant. (Id. at ¶ 54.) Specifically, Mr. Adams argues:

As an example, at best the Government’s evidence established that the Defendant drove Johnson to the gun store. There is no evidence that he counseled Johnson on filling out the FFL forms. There is no evidence that the Defendant gave Johnson the money with which to purchase the weapons, and there is no evidence that Defendant kept the weapons. Therefore, this evidence was not relevant to modus operandi, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Id.) Mr. Adams contends the Government failed to articulate how this evidence fits into “a chain of logical inference relevant to any issue in the case besides propensity.” (Id. at ¶ 55.)

The Government argues the evidence of Mr. Adams' involvement with Mr. Johnson in the June 4, 2015, firearms purchase "was offered by the government as intrinsic to Adams' overall conspiracy to illegally acquire firearms, or alternatively, under Rule 404(b)." (ECF Docket No. 173, at 18-19.) Moreover, the Government argued during trial that this evidence was admissible under Rule 404(b) for non-propensity purposes, "specifically to establish the identity of Adams as Johnson's driver to Backwoods Outfitters." (Id. at 19.) The Government contends the June 4 purchase established Mr. Adams' knowledge, plan, preparation, and intent "both as to how to oversee a straw purchased [sic] and how to evade capture by staying away from the dealer outside the store." (Id.) This, the Government argues, falls under non-propensity purposes.

Under *Green*, the intrinsic acts – three out-of-district illegal straw purchases – offered to prove the conspiracy were properly admitted by this Court because they fell into one of the two categories established by our Court of Appeals. This Court agrees the Government did not introduce the above evidence as propensity. Rather, the evidence introduced by the Government demonstrated "the lengths Adams began to go after May 19, 2015 to hide his responsibility for straw purchasers, having his straws walk down remote country roads to meet him at a corner outside the line of sight at Backwoods Outfitters." (Id.)

The evidence admitted fits within the second prong of our Court of Appeals "intrinsic" acts test "because each was performed contemporaneously with other straw purchases during the Summer [of] 2015, and further facilitated the sum total of straw purchases coordinated by Adams." (ECF Docket No. 96, at 7.) The evidence also fits within Rule 404(b) for non-propensity purposes; its probative value is outweighed by any

potential prejudice under Rule 403. Accordingly, this Court did not abuse its discretion in admitting evidence of the conspiracy or evidence of other acts.

ii. This Court did not abuse its discretion admitting evidence under Federal Rule of Evidence 801 and Proposed Federal Rule 902(13).

Mr. Adams argues this Court abused its discretion by admitting certified records generated by an electronic process or system in violation of the Confrontation Clause. (ECF Docket No. 171, ¶¶ 60-62.) Mr. Adams contends the Government improperly relied on proposed Federal Rule of Evidence 902(13) to introduce evidence of text messages recovered from Mr. Adams' cell phone "without calling a qualifying witness." (Id. at ¶ 64.) Mr. Adams raises three issues regarding the Government's use of Rule 902(13): 1) this Court violated the Confrontation Clause by admitting evidence under Rule 902(13) without allowing Mr. Adams to confront the witness; 2) this Court lacked authority to accept evidence under Rule 902(13) because the rule took effect after Mr. Adams' trial commenced; and 3) admission of the evidence did not comply with certification required in Rules 902(11) and 902(12). This Court disagrees with Mr. Adams.

Federal Rule of Evidence 902 corresponds to self-authenticating evidence not requiring extrinsic evidence of authenticity to be admitted (e.g. testimony of forensic technicians). Fed. R. Evid. 902. Mr. Adams argues the Government improperly relied on proposed Rule 902(13) because the rule took effect after Mr. Adams' trial concluded and this Court lacked authority to accept certification instead of testimony. (ECF Docket No. 171, ¶ 67.) Rule 902(13) states:

(13) Certified Records Generated by an Electronic Process or System.

A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Fed. R. Evid. 902(13). While Rule 902(13) was not in effect at the time of Mr. Adams' October 2017 trial, the Rules Committee of the Judicial Conference unanimously approved Rule 902(13), which took effect on December 1, 2017. (ECF Docket No. 173, at 22 n.4.)

Mr. Adams claims this Court violated the Confrontation Clause under the Sixth Amendment by admitting evidence without affording Mr. Adams the opportunity to confront the witness. (ECF Docket No. 171, ¶ 67.) Mr. Adams argues because Rule 902(13) took effect after his trial commenced, this Court lacked authority to admit this evidence without calling a qualifying witness. (Id. at ¶ 64.) According to Mr. Adams, this Court should have allowed him to confront a qualifying witness and erred in accepting the Government's certification instead of testimony. (ECF Docket No. ¶¶ 61-67.) Mr. Adams further argues certification under Rule 902(13) requires the moving party comply with the certification requirements under Rules 902(11) and 902(12) because the certification requirements under 902(11) and 902(12) "relate respectively to certified domestic records of a regularly conducted activity and certified foreign records of regularly conducted activity, which the subject text messages clearly are not." (Id. at ¶ 68.)

The Government moved to admit evidence of text messages recovered from "one of the four cellular phones in Adams' possession at the time of his December 2015 arrest." (ECF Docket No. 173, at 21.) "Those text messages were recovered from the phone by a Digital Media Collection Specialist employed as a special agent for ATF, Stephen Rhoades," and were extracted with forensic software widely used in law enforcement. (Id.) The Government moved to admit the evidence of text messages from Mr. Adams' phone authenticated by the certification of Agent Rhoades "to minimize the number of records custodian witnesses at trial." (Id.) Agent Rhoades' certification provided the "Cellbrite

software generates a file of the extracted data which is then used to generate a report of the data, ultimately which law enforcement uses to analyze the extracted data.” (Id. at 22.) Specifically, Agent Rhoades “routinely determines the accuracy of the report generated by the [Universal Forensic Extraction Device] software by comparing the data in the report to the data on the device from where it came.” (Id.) The Government argued in its pre-trial motion, “the proffered certification . . . attests to the foundational requirements cited in these rules with respect to the government exhibits at issue.” (ECF Docket No. 134, at 6.)

Regarding Mr. Adams’ first argument, the Sixth Amendment grants the accused certain rights, one of which is the right to confront witnesses against him. U.S. Const. amend. VI. The Sixth Amendment, elaborated in *Crawford v. Washington*, prohibits use of testimonial hearsay at trial from unavailable declarants absent prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court defines a testimonial statement as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact, such as an affidavit, custodial examination, or prior testimony at a preliminary hearing.” *United States v. Campbell*, 743 F.3d 802, 806 (11th Cir. 2014) (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). But, as our Court of Appeals notes, “*Crawford* presents no bar to the admission of statements of Defendants or their coconspirators made in the conversations with [a confidential informant] that he surreptitiously recorded,” also known as party admissions, which are nontestimonial and not considered hearsay. *United States v. Hendricks*, 395 F.3d 173, 184 (3d Cir. 2005).

Although Mr. Adams attempts to invoke his Sixth Amendment right to confrontation, the admission of the text messages and the messages themselves are

nontestimonial which does not trigger the Confrontation Clause of the Sixth Amendment. Also, Mr. Adams' text messages are not subject to the Confrontation Clause because they are admissions of a party opponent and not considered hearsay under Federal Rule of Evidence 801(d)(2)(A). *Id.* "The Confrontation Clause protects a defendant's trial right to confront testimony offered against him to establish his guilt, and the Supreme Court has never extended the reach of the Confrontation Clause beyond the confines of a trial." *Campbell*, 743 F.3d at 808 (concluding the pretrial determination of extraterritorial jurisdiction does not implicate the Confrontation Clause). Additionally, because the inquiry is whether the evidentiary rules have been satisfied under Rule 104 and not whether the proponent of the evidence wins or loses the case on the merits, "the evidentiary standard is unrelated to the burden of proof on the substantive issues." *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Therefore, the right to confront a witness at trial has no relation to the pre-trial determination of admissibility under Rule 104. *Id.* at 175-76.

Regarding Mr. Adams' second argument, although Rule 902(13) took effect after Mr. Adams' trial, this Court still had the authority to admit Agent Rhoades' certification authenticating the electronic records on other grounds outside of Rule 902(13). This Court is afforded wide latitude under Federal Rule of Evidence 104 regarding preliminary questions as to the admissibility of evidence.

And regarding Mr. Adams' third argument, Rule 902(13) only requires certification comply with the certification requirements of Rule 902(11) and 902(12), and not the business or foreign record requirements of those rules. The advisory notes under Rule 902(13) state:

The reference to the 'certification requirements of Rule 902(11) or (12)' is only to the procedural requirements for a valid certification. There is no

intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

Fed. R. Evid. 902(13) advisory committee note to 2017 amendment. Therefore, Mr. Adams's argument that certification relates "respectively to certified domestic records of regularly conducted activity and certified foreign records of a regularly conducted activity" is incorrect. The notes make clear the business or foreign record requirements of Rule 902(11) and (12) do not apply here. *Id.*

Accordingly, this Court did not abuse its discretion in permitting the Government to introduce Agent Stephen Rhoades' certification authenticating the text messages from Mr. Adams' cell phone.

iii. This Court did not abuse its discretion denying Mr. Adams' motion for a mistrial following the inadvertent delivery of the bifurcated verdict slips.

Before Mr. Weaver entered his appearance in this case, Mr. Adams' former counsel, Mr. Polyak, moved to bifurcate the trial. Mr. Polyak argued Mr. Adams would suffer undue prejudice if the Felon in Possession counts were joined with the other offenses in the Superseding Indictment. (ECF Docket No. 52, at 2.) "Permitting evidence of Defendant's conviction record would be unfairly prejudicial and would likely bias the jury against him." (*Id.*) This Court agreed and bifurcated the trial "only as to the issue of Adams' prior conviction relating to the eight (8) counts of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1)." (ECF Docket No 87.) It should be noted, however, the Government vigorously opposed bifurcating the trial and argued that the evidence of Mr. Adams' prior felony conviction is independently admissible as "evidence of Mr. Adams' motivation to use several straw purchasers to buy him firearms given that his

felony convictions precluded him from lawfully purchasing the firearms himself.” (ECF Docket No. 73 *SEALED*, at 7.) The Government did make a valid point, but this Court chose to bifurcate the trial anyway in an abundance of caution.

As discussed in detail above, the jury inadvertently received the verdict slips for all charges, including the bifurcated charges – Felon in Possession of a Firearm (Counts XIII-XX). After realizing the error, this Court went on the record to address the issue and cure the defect. (Trial Tr. 4:19-5:8, Oct. 17, 2017, PM.) At around the same time, the jury sent a note asking for guidance as to the bifurcated counts (Counts XIII-XX). (Id.) Following the jurors’ question, this Court stated: “I think we need to at least bring the jury foreman in there and asking [sic] questions regarding the deliberations and how they took place in order to make a proper record for this case.” (Trial Tr. 5:3-6, Oct. 17, 2017, PM.) After argument on the record as to the appropriate line of questioning, or whether the jury should be questioned, this Court stated: “I think it’s our obligation to know whether or not they viewed it prior to reaching a verdict or not. Because if they did, then we know. If they didn’t, then we know. And if they did, then we know and we go from there.” (Trial Tr. 10:11-14, Oct. 17, 2017, PM.) The jury formally sent a note asking: “We have a supplemental jury verdict form with eight additional counts, 13 through 23, regarding possession of firearms.” (Trial Tr. 12:11-13, Oct. 17, 2017, PM.) This Court formally responded: “[M]embers of the jury, please ignore the supplemental jury verdict form. Remove it and return it to me, then continue your deliberations on Counts 1 through 12.” (Trial Tr. 12:17-20, Oct. 17, 2017, PM.)

Mr. Weaver then moved to immediately question the jury regarding its consideration of the improper information. (Trial Tr. 13:4-6, Oct. 17, 2017, PM.) This

Court granted Mr. Weaver's request. However, before the parties and Court could agree on the timing of the inquiry, the jury returned with a verdict on Counts I-XII. (Trial Tr. 13:7-14:22, Oct. 17, 2017, PM.) This Court decided to conduct the inquiry prior to announcing the verdict. (Trial Tr. 15:3-9, Oct. 17, 2017, PM.) The inquiry continued as follows:

THE COURT: All right. After -- what happened to the verdict form when you went into the jury deliberation?

[THE JURY FOREPERSON]: We decided who was going to be foreperson, which was me. So then everything was handed to me. And we went in order of the counts.

THE COURT: That anybody look -- did any other jurors look at the verdict form before it was handed to you?

[THE JURY FOREPERSON]: I think they look [sic] at the first page. I don't think they paged through it.

THE COURT: So I'm just going to let you know. Obviously, what you returned to me was sent out to you in error. So what were [sic] trying to inquire now is whether or not any jurors saw this -- saw these three pages before you reached the verdict.

[THE JURY FOREPERSON]: Yes. Oh, before we reached a verdict, no. It was after we got through all of them that we turned the page and realized that was next.

THE COURT: All right. I'm going to allow Defense counsel to query the foreperson.

[MR. WEAVER]: All right. Thank you. The entire verdict sheet that you received, all of the pages, was that ever passed around among all of the jurors?

[THE JURY FOREPERSON]: No.

[MR. WEAVER]: And you maintained that in your possession?

[THE JURY FOREPERSON]: Yes.

[MR. WEAVER]: And which one of you discovered that after the first 12 counts, which one discovered that there were [sic] additional information after that?

[THE JURY FOREPERSON]: I did.

[MR. WEAVER]: And did you read the additional information?

[THE JURY FOREPERSON]: As far as what the counts were?

[MR. WEAVER]: As you got past the first 12 counts, when you saw there was additional information, did you read that information?

[THE JURY FOREPERSON]: No, I didn't read it out loud. I just said hold on. We have additional counts that we're no -- I don't think were [sic] supposed to have. So at that point, we stared at each other like what are we supposed to do. And at that point, yes, other -- a couple people look at it, but we had already finished 1 through 12. That's when we asked the officers what we should do.

...

[MR. WEAVER]: All right. Did you -- when you look [sic] at it, what did it say to you? What did you understand it to be when you read the additional information?

[THE JURY FOREPERSON]: To me, my feeling is it was additional charges that weren't really discussed during our trial.

...

[MR. BODEN]: Just a few, Your Honor. So I want to make sure that the record is clear that I understand your answer. You filled out the first -- the verdict form up to the first 12 counts; is that correct?

[THE JURY FOREPERSON]: That's correct.

[MR. BODEN]: And at the point -- you went in order?

[THE JURY FOREPERSON]: Yes. Well, kind -- we started 2 -- we went 2 to 12 and then back to 1. But you know, that was still (Indiscernible Words).

[MR. BODEN]: At the point you completed the 12, whichever one that was, all 12 of the first counts on the verdict form were filled in by you on the verdict form?

[THE JURY FOREPERSON]: Uh-huh.

[MR. BODEN]: At that point, had you seen the supplemental verdicts -- verdict forms involving, as you described it, the felony for the possession count?

[THE JURY FOREPERSON]: Did I see that before we filled the 12 in?

[MR. BODEN]: Yes.

[THE JURY FOREPERSON]: No.

[MR. BODEN]: Did anyone else see those verdict -- did you lend that verdict form out to anyone else before you reached the 12?

[THE JURY FOREPERSON]: No, I mean, it wasn't like right in front of me, but nobody -- I mean, I turned the pages. So, I mean, I might -- I mean, nobody saw that until we were, you know -- till I got to that next one.

[MR. BODEN]: And were any marks made to the previous 12 counts after you learned of these additional verdict forms? Was anything changed?

[THE JURY FOREPERSON]: No.

(Trial Tr. 15:19-19-17, Oct. 17, 2017, PM.) Following this inquiry, the jury reached a unanimous guilty verdict on Counts I-XII.

Our Court of Appeals provides, in the absence of a misstatement of the law, the court reviews for abuse of discretion. *United States v. Moreno*, 727 F.3d 255, 262 (3d Cir. 2013) (quoting *United States v. Hoffecker*, 530 F.3d 137, 173–74 (3d Cir. 2008)). Because this case involves a bifurcated jury verdict form inadvertently distributed to the jurors and not a misstatement of the law, this Court reviews for abuse of discretion. The Government argues this Court did not abuse its discretion and cites a case from our Court of Appeals where the court accidentally read the bifurcated Section 922(g) count from the indictment, which stated “unlawful possession of a firearm after having been convicted of a felony offense.” *United States v. Shannon*, 715 Fed.Appx. 187, 190 (3d Cir. 2017).

In *Shannon*, the plaintiff argued the court denied him a fair trial in violation of the Sixth Amendment because he was irreparably prejudiced when the District Court read the bifurcated § 922(g) count to the jury as part of the preliminary instructions. *Shannon*, 715 Fed.Appx. 187, 191. Our Court of Appeals disagreed with the plaintiff because the District Court did not reveal the nature of the plaintiff’s prior conviction, “but simply stated in its initial reading that he was charged with ‘unlawful possession of a firearm after having been convicted of a felony offense.’” *Id.* Our Court of Appeals further concluded the District Court remedied the misstatement explaining that it misread one section and should be disregarded and given no further consideration. *Id.* Given the presumption that juries follow instructions given by the District Court, our Court of Appeals concluded the trial court’s curative instruction immediately followed the initial misreading and did not mention the felony offense again. *Id.* (citing *United States v. Hakim*, 344 F.3d 324, 326 (3d Cir. 2003); *see also United States v. Newby*, 11 F.3d 1143, 1147 (3d Cir. 1993). Our Court of Appeals found no abuse of discretion in *Shannon*. *Id.* (citing *United States v. Moreland*, 703 F.3d 976, 989 (7th Cir. 2012) (finding the District Court’s reading of the unredacted indictment listing appellant’s felony convictions after closing arguments was harmless where overwhelming evidence against the defendant existed and “the judge [promptly] realized her mistake, collected the instructions, and gave the jurors new copies containing the redacted indictment.”); *United States v. Dortch*, 696 F.3d 1104, 1110-11 (11th Cir. 2012) (concluding submission of an unredacted indictment “that referenced several of [the appellant’s] previously undisclosed felony convictions” was harmless where the district court instructed the jury that “the indictment was not evidence of guilt” and included strong evidence against the defendant)).

This Court promptly recognized the error, instructed the jury to disregard the bifurcated verdict slip, and questioned the jury foreperson to determine whether the jury read the bifurcated verdict slip (Counts XIII-XX) before reaching a verdict on Counts I-XII. This Court’s questioning of the jury foreperson – which included questioning by both Mr. Weaver and Mr. Boden – clarified whether the jurors were aware of Mr. Adams’ prior felony convictions before they collectively reached a verdict on the first twelve counts. The jurors answered the first twelve questions on the verdict slip before realizing the additional counts “weren’t really discussed during [the] trial” and immediately notified this Court of the issue. Accordingly, because this Court sufficiently cured the defect, and because the jurors found Mr. Adams guilty on Counts I-XII before discovering the additional charges, this Court finds no abuse of discretion.

However, had the jury discovered the bifurcated verdict slip identifying charges for felon in possession of a firearm, it would still be considered harmless error. The Supreme Court has repeatedly stated a valid conviction should not be set aside “if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577 (1986) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)); *see also Chapman v. California*, 386 U.S. 18, 87 (1967). “The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual questions of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.” *Rose*, 478 U.S. at 577 (1986) (internal citations omitted). Similar to *Moreland* where the Seventh Circuit concluded harmless error given the “overwhelming” evidence against the

defendant, here the jury determined overwhelming evidence existed against Mr. Adams and found Mr. Adams guilty on all counts.

Accordingly, this Court did not abuse its discretion denying Mr. Adams' motion for a mistrial following the inadvertent delivery of the bifurcated verdict slips.

IV. CONCLUSION

In the accompanying order, this Court denies Defendant Nakia Adams' post-trial motion for judgment of acquittal and motion for new trial.

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

UNITED STATES OF AMERICA

v.

NAKIA ADAMS

CRIMINAL
NO. 15-0580

ORDER

AND NOW, this 16th day of January, 2019, after considering Defendant Nakia Adams' Post-Trial Motion for Judgment of Acquittal and/or for a New Trial (Docket No. 171), Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29(a) and for a New Trial Pursuant to Fed. R. Crim. P. 33 (Docket No. 213), the Government's responses in opposition, and for the reasons more fully stated in the accompanying memorandum, it is hereby **ORDERED** as follows:

1. Defendant Nakia Adams' Post-Trial Motion for Judgment of Acquittal and/or for a New Trial (Docket No. 171), and Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29(a) and for a New Trial Pursuant to Fed. R. Crim. P. 33 (Docket No. 213), are **DENIED**.
2. Defendant Nakia Adams' *pro se* motions (Docket No. 212, 216, 217, 218, 219, 222, and 223) are **DENIED**. Because Mr. Adams is still represented by Luther E. Weaver, III, Mr. Adams may not file *pro se* motions at the present time.

BY THE COURT:

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.