

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	No. 17-208-1, 6, 7, 8
v.	:	
	:	
BASIL BEY	:	
REGINALD WHITE	:	
TYRIK UPCHURCH	:	
AMIN WADLEY	:	

McHUGH, J

JANUARY 24, 2019

MEMORANDUM

This is a prosecution for conspiracy to distribute heroin and crack cocaine. Ten defendants were indicted. Five of the alleged co-conspirators have pleaded guilty. One fled and was only recently apprehended. This memorandum addresses post-trial motions of the four defendants who proceeded to trial and were found guilty.

Motions are pending under both Rule 29 and Rule 33 of the Federal Rules of Criminal Procedure. The motions overlap to a significant extent, and I have also granted motions to join in the arguments of co-defendants. For purposes of efficiency, I will address the substance of the motions overall, without trying to differentiate specific arguments on behalf of each defendant except when necessary. Oral argument has not been granted because, having presided over the trial, I am highly familiar with the evidence and legal arguments raised, and counsel collectively have submitted comprehensive briefs that address the issues of this case quite effectively.

I. Factual Background

The Indictment charged that Defendants engaged in a conspiracy beginning around April 2015 and lasting until March 2017. The Government’s investigation in this case centered upon

Defendants' joint use of two cell phones over a period of several months, referred to as Phone One and Phone Two. From the beginning of April 2014 through the beginning of September 2016, the first phone at the center of this case—Phone One—received almost 400,000 calls and text messages. (Tr. 12/5 at 77, 89-90.) During that timeframe, approximately 96% of the phone calls lasted less than one minute. (*Id.* at 89-90.) Some of the evidence showed Defendant Bey resorting to the use of headphones to cope with the volume of calls. (Gov't Ex. 5, 6.) The FBI arranged drug sales to confidential sources who called that phone, and its continued use led the FBI to obtain a wiretap starting in September 2016. That wiretap ended on November 4, 2016, when Defendants began using a second phone—Phone Two—which was then also subject to an authorized wiretap. That surveillance lasted a period of approximately three weeks. Typically, the phones were intercepted between 6 o'clock in the morning and 9 o'clock at night, though there were some instances in which the FBI monitored the phones for twenty-four hours straight. (Tr. 12/6 at 113.) The communications intercepted during the overnight surveillance further confirmed that Defendants were engaged in the business of selling heroin and crack.

The Government presented evidence that control over the phone was vested in Defendant Basil Bey. For example, when one of the confidential sources used by the Government, identified as CS-2, expressed interest in purchasing a larger quantity of drugs than usual, Bey was captured on the intercept stating, "when you come down, just say you need to speak with Black" because "they going to do whatever I tell them to do." (Tr. 12/5 at 171.) Black was the nickname by which Bey was commonly known. In another conversation, Bey was discussing the phone with a customer, boasting that "I have the best jack in the city, hands down." (Tr. 12/6 at 36.) When Defendant Reginald White was arrested by the police in April 2016, while driving a

car registered to Bey, the Government presented evidence that Bey went to the city impound lot to recover the cell phone from the car. (Tr. 12/8 at 123-168; Tr. 12/15 at 16-29.)

In challenging their conviction for conspiracy, the core of Defendants' argument is that the Government has proven only that they shared the use of the phone. There is, however, evidence in the record that the relationship among Defendants was far more extensive. For example, in one captured conversation, Defendant Bey discussed the quality of the drugs purchased in the transaction the night before. In describing his relationship with the direct seller, Bey stated, "anything he get, he get it from me. He don't, that's my shit he running on." Bey went on to explain: "no, what I'm trying to tell you is that, I bag it. He gives me all the money back. Like he works for me." (Tr. 12/18 at 16.) In another conversation, Bey can be heard criticizing Wadley for falling asleep while in possession of the phone during the "graveyard" shift, lamenting that this neglect was hurting Bey's business. (Tr. 12/6 at 78-79.) Bey further addressed the length of time Wadley would be allowed to use the phone, suggesting that his hours might be cut from eight to four and that he could get another of the charged co-conspirators, Dassan Cornish, to cover the time instead. (*Id.*)

Bey was also intercepted calling Phone One on one occasion and expressed surprise about having reached Defendant Tyrik Upchurch, who explained that he was about to meet another codefendant, Jerome Lyles, in order to pass the phone. (Tr. 12/11 at 164-65.) The Government presented evidence from a Philadelphia police officer who conducted surveillance and witnessed one defendant meeting another and passing the phone. (Tr. 12/15 at 58; Tr. 12/8 at 18-123.) In two instances on November 22, 2016, Upchurch was heard speaking in the background while Defendant Wadley was speaking to the purchaser of drugs on Phone Two.

The record also reflected that customers calling the phones came to recognize the shift system. In a call intercepted on September 26, 2016 a prospective buyer expressed surprise that she reached Bey:

SG: Why are you working the phone this early?

BB: You don't even know who you talking to.

SG: Ha ha. I'm fucking with you. It's Black.

BB: Yeah.

SG: I know every one of your voices.

BB: Every day.

SG: I know every one of you voices. What? What's with D? He don't work no more?

BB: Yeah. He gets off at 10.

SG: He only works fucking four hours? 6 to 10? That's crazy.

BB: Everybody do.

(Tr. 12/18 at 17.)

The wiretap also recorded members of the conspiracy transferring orders from one shift to another. On October 14, 2016, Defendant Wadley took an order from a purchaser identified as "Ment" and promised that it would be filled immediately at the start of the next shift:

AW: Alright. I'm about to give the phone to D, D about to be to you in like 10 minutes.

I'm gonna tell him to go straight to you.

ME: Who's getting the phone?

AW: D.

ME: D.

AW: You'll see him when you see his face, you definitely know who he is.

(*Id.* at 44.)

The defendants discussed among themselves how busy different shifts were. For example, in a conversation intercepted on September 14, 2016 Mr. Upchurch and Mr. White were heard discussing certain hours that were particularly hectic, with co-defendant Jerome Lyles selling the most. (*Id.* at 30.)

In another call intercepted on December 2, 2016, Defendant Upchurch listened to a purchaser complaining, “I bought some off D last night at like 3 o’clock in the morning and it was garbage.” Upchurch does not deny any connection to the previous night’s sale, but attempts to placate the caller by asking “do you, do you like that dark stuff we got?” (*Id.* at 39.)

Forensic analysis revealed that multiple contacts were stored in the phones, and when Defendants moved from using Phone One to using Phone Two, they announced the switch to their customer base by a text message that read, “Black's New Phone 215-609-7945.” (Tr. 12/6 at 27; Gov’t Ex. P-210.) Soon thereafter, Wadley answered Phone Two stating, “this Black's phone . . . we doing shifts.” (*Id.* at 31.) The Government also introduced a photo of three of the Defendants posing for the camera. (Gov’t Ex. SP-10.) Together, this evidence revealed a relationship among Defendants more significant than merely sharing a phone.

The Government also presented intercepts demonstrating that Bey remained involved in the operation of the organization even when he was, as the parties stipulated “out of the area.” In a conversation between Defendants Bey and Upchurch, Bey instructed him, “Just keep it the same bro, far as that weekly.” (Tr. 12/18 at 21.) Upchurch reassured him, “Yeah, yeah, we cool. We gone be cool. I’ma keep everything how it was,” further reassuring Bey, “That’s all gone come back to you. You feel me?” (*Id.*) Less than a half-hour later, the Government intercepted

a call between Bey and a female accomplice, in which Bey gave orders as to how operation should continue:

BB: When they give you their pay, you pay it off with that.

SJ: Yeah.

BB: Make sure you stay on Rome, do it on Friday. Don't do it on Sunday because they party. I realized something with these guys. They party throughout the weekend and you can't find them til Monday or Tuesday. So stay on their ass. Get on their ass on Friday. Yo where that's at? Naw we need that Friday now, it use to be Sunday but be on it Friday. Mean you ain't gone have no problem out of, Reeky ain't gone have no problem out of, but Rome you gone a have a problem out of him. Just stay on his top. Just stay on they top. Get it Friday from here on out. So fuck Sunday, nobody gone feel like chasing them on then they partying again on Sunday. Rome a real big sports guy so he gone, just get it Friday from here on out.

(*Id.*) With respect to the intercept discussed above, the Government had presented evidence that “Mean” was a nickname for Defendant Wadley; Reeky was a nickname for Defendant Upchurch; and Rome was a nickname for co-defendant Lyles.

The jury heard multiple phone conversations of Defendants discussing drugs and saw multiple videotapes of controlled buys from Defendants and their co-conspirators. As is typically the case in narcotics investigations, the FBI made controlled purchases from each of the Defendants, including six from Bey, four from Upchurch, two from White, and two from Wadley. All these purchases were arranged by calling either Phone One or Phone Two. The same phones were also used to make controlled purchases from various codefendants, including four from Sidney Cornish, six from Dassan Cornish, one from Jerome Lyles, one from Rhasul Lucas, one from Jihad Thorne, and one from Quaadir Crawford. (Tr. 12/5 at 83-84.)

Although typically sellers of illegal narcotics brand their product with some form of “stamp” on the packaging, in this case, all of the sales connected to the investigation were wrapped in a blue-tinted paper that had no label. In effect, the lack of a “stamp” was its own

identifying characteristic. In support of this point, the jury heard a phone intercept in which Defendant Bey could be heard stating “we don’t do stamps” on the packaging. (Tr. 12/6 at 48.) In another call, a prospective purchaser wanted to know what brand was available and asked Defendant Upchurch about the stamp on the drugs he was selling. Upchurch replied: “You know we don’t got no stamp cuz. Who you think you called?” (Tr. 12/18 at 37.)

Hundreds of blue glassine packets were purchased and seized during the investigation, and when Defendant Wadley was arrested, similar packaging was seized from his residence. As the investigation continued, the FBI used a pole camera on the 1800 block of Ringgold Street. At one point, that camera captured Bey, Upchurch, and Wadley entering and leaving a rowhouse on that block. During the afternoon hours, Bey was observed removing a white plastic trash bag and depositing it in a trashcan down the street. The agents maintained surveillance on the can, and later retrieved the trash bag, finding empty blue glassine packets and other paraphernalia related to the drug trade. (Tr. 12/1 at 170-192.) When Defendant White was arrested by Philadelphia police on September 7, 2016, following a traffic stop, the heroin seized was packaged similarly. (Tr. 12/8 at 131-135.) On December 8, 2016, when Defendants Wadley and Upchurch were arrested, the heroin seized was again contained in blue glassine packets. (*Id.* at 37-38.)

With respect to the weight of the narcotics involved, the Government presented testimony from two of the case agents, who conducted a systematic review of the evidence from the wiretaps and controlled buys and created a model from which to extrapolate the total quantities that were dealt through the conspiracy, which was presented to the jury.¹

¹ The details of Defendants’ challenges to this testimony are set forth below.

The jury convicted all the Defendants on all counts but did not blindly adopt the Government's view of the evidence. In special interrogatories addressed to the question of the weight of the narcotics dealt, it refused to attribute a kilogram of heroin to Mr. Bey and refused to attribute 280 grams of cocaine base to Mr. Wadley.

II. Motions for New Trial under Rule 33

A district court can order a new trial if it “believes that ‘there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.’” *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003) (citation omitted). Unlike a Rule 29 motion, “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.” *Id.* (citations omitted). Counsel here have advanced various reasons why a new trial should be granted, some grounded on the admission of evidence and some based on the contention that the jury's verdict is not supported by the evidence.

As to the latter, “[m]otions for a new trial based on the weight of the evidence are not favored. Such motions are to be granted sparingly and only in exceptional cases.” *Gov't of Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987) (citations omitted). In resolving motions for a new trial on these grounds, a district court may look to whether the defendant raised the issues at trial through evidence or argument and evaluate whether the jury was in a position to consider them. *See United States v. Salahuddin*, 765 F.3d 329, 346, 348 (3d Cir. 2014). I first address Defendants' objections on these sufficiency grounds and then turn to their challenges based on opinion testimony, the alleged intoxication of a confidential source, purported *Brady* violations, and concerns about the indictment.

A. *Sufficiency*

Defendants first challenge the sufficiency of the evidence, asserting 1) that the Government failed to prove conspiracy, proving only that Defendants shared a phone, and 2) that the Government's method for proving quantity was flawed and speculative.

As to the first, overall challenge, the evidence reviewed above provided more than ample proof that Defendants worked in concert as part of a coordinated effort to sell narcotics, organizing their business around the use of a central number for efficient marketing. I see no danger that innocent parties have been convicted.

As to the next objection, to the Government's method for proving weight, the Government sought to present testimony by means of a summary chart prepared under Federal Rule of Evidence 1006. It bears emphasis that, before any testimony was presented to the jury, the Court, recognizing the importance of the issue, took the unusual step of conducting a lengthy hearing into how the agents constructed the model for estimating the quantities of narcotics attributable to Defendants. In anticipation of the hearing, the Government produced the agents' work product in the form of underlying spreadsheets. (Tr. 12/13 at 131.) At the end of the trial day on December 13, the Court outlined ten specific questions for the Government to answer, a non-exhaustive list that defense counsel was invited to supplement. (*Id.* at 232-35.)

The jury was excused at 11:30 a.m. on December 14, and a lengthy hearing was held at which three agents testified. Although a member of the prosecution team conducted the direct examination of the agents, the Court frequently interposed questions. (*E.g., id.* at 131, 134, 138, 141, 148, 153, 154, 162, 164-170.) In addition, the Court solicited questions from defense counsel to be put to the agent. (*Id.* at 150-54.) At the close of the hearing, which consumed the entire afternoon, defense counsel was invited to offer any remaining questions necessary to

explore the foundation for the Government's methodology. (*Id.* at 172.) At that juncture, I concluded that the Government had employed a "coherent and intellectually sound" methodology; I was satisfied that defense counsel had received sufficient disclosure; and consequently I granted leave for the Government to proceed. *Id.*

The Government first presented FBI Agent Leslie Maxwell, who described how she prepared a pertinent call log and address book based on the wiretaps. (Tr. 12/15 at 32.) Agent Maxwell estimated that she had listened to thousands of intercepted phone calls, testified that she had eight years of experience investigating the sale of narcotics in Philadelphia, and noted that she used both her "common sense and expertise" in quantifying the weight of heroin and crack cocaine sold as part of the conspiracy. (*Id.* at 32, 37.) Agent Maxwell then reviewed multiple factual scenarios, some where the specific amount of drugs sold was known and some where it was not. (*Id.* at 38.) When the amount of drugs in a particular sale was unknown, Agent Maxwell explained that either it was omitted or a weight was estimated. (*See* Tr. 12/15 at 41-44.) According to Agent Maxwell, estimates were deliberately conservative. As one example, Agent Maxwell noted that some repeat customers were known to order a bundle (13 packets) of heroin or more, but unless a bundle was specifically requested on the wiretap for that transaction, the FBI counted these customer orders as only one packet. (*Id.* at 63.) The agent further testified that the numbers were necessarily low, because only 15 out of 24 hours were monitored, with the result that any drug sales between 9:00 p.m. and 6:00 a.m. were not included in the total weight. (*Id.* at 62.) Further, she testified that all sales made via text message or through a FBI controlled source were excluded from their computations. (*Id.* at 66.) The agent calculated that Phone One was responsible for selling to "roughly 80-100 customers per day." (Tr. 12/15 at 34.) She

further observed that, over the preceding year, the phone had a high call volume, which “was completely consistent with the period of the wiretap.” (*Id.* at 47.)

Agent Maxwell and her fellow agent, Agent Kreiger, listened to all calls on 19 of the 76 days the wiretap ran, chosen as a representative sample. (*Id.* at 36.) Each day of the week, *i.e.* Monday, Tuesday, etc., and at least one day from each week of the wiretap, was included in the 19 days analyzed. (*Id.* at 44.) This constituted approximately 25% of the duration of the wiretap. Agent Maxwell testified she was “extremely confident” in the results of the FBI’s analysis, noting that every benefit was given to Defendants by virtue of using the lowest possible weight. (*Id.* at 62.) The agents calculated an average weight based upon the weight of the drugs obtained through purchases by confidential sources and police seizures. This resulted in an average weight of 0.04 grams of heroin (per packet) and 0.3 grams of crack (per baggie). That average weight was then multiplied by the number of items a customer ordered. (Tr. 12/15 at 141-42.) Based on these calculations, the agents concluded that the conspiracy sold an average of 4.418 grams of heroin and 12.55 grams of crack cocaine per day. (*Id.* at 156, 161.) The weights attributed to each Defendant individually were calculated based on how long each Defendant was part of the conspiracy. (*Id.* at 158-161.)

Under Federal Rule of Evidence 701, a lay witness’s “testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.” Agent Maxwell listened to all of the phone calls from the 10 days of the wiretap that she analyzed. This provided her a rational basis upon which to determine whether a sale was in fact made and, if so, how much heroin and/or crack was delivered in that sale. This fulfills the requirement that a lay

witness offer testimony “based on the witness’s perception and ‘firsthand knowledge of the factual predicates that form the basis for the opinion.’” *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 225 (3d Cir. 2008) (quoting *Gov’t of Virgin Islands v. Knight*, 989 F.2d 619, 629 (3d Cir. 1993)). The same would be true of the other agents.

Circuit courts have recognized the ability of agents rely to on their experience in offering testimony. “Time and again we have stated that Rule 701 lets in ‘testimony based on the lay expertise a witness personally acquires through experience, often on the job.’” *United States v. Belanger*, 890 F.3d 13, 25 (1st Cir. 2018) (citation omitted). “[U]nderstanding, interpreting, and translating purposefully confusing drug lingo is just that—a skill picked up and fostered by a law enforcement officer on the job.” *Id.*

It should also be noted that, given the volume of evidence in the case, the Government faced a daunting challenge in how to present it to the jury in a way that was both efficient and coherent. The Committee Note to Rule 1006 specifically recognizes that summaries are often the “only practicable means” by which to do so, and the Government’s use of such an approach was entirely appropriate under the circumstances here.

The Defense is correct that the total amount of drugs actually seized was 38.7 grams of crack and 89.986 grams of heroin. (Def.’s Mot. New Trial at 8, ECF No. 293 at 14.) But their objection on this ground ignores the law of conspiracy and ignores the fact that each defendant is responsible for all sales made by his co-conspirators during his membership in the conspiracy. Agent Maxwell testified there were “80-100” sales a day on the wiretap. The jury saw multiple examples of drug deals where a Defendant/dealer answered Phones One or Two—taking calls from customers seeking to purchases narcotics—while they were selling heroin and/or crack cocaine to a confidential source. They saw Defendants Bey, Upchurch, and Wadley entering and

leaving an apparent stash house—as demonstrated by the trash discarded from within. They heard Defendants discussing schedules and shifts and observed the phone being passed. From this evidence, the jury concluded that Defendants were part of the conspiracy, making them responsible for all sales made during their membership.

Defendants argue that the agents arbitrarily assumed that all 600 days were the same as those 19 days in the Government’s sample. This ignores testimony by the agents that there was an overall pattern of the phone being used consistently. It also ignores other testimony important to context, including Mr. Bey’s boast that he had the “best jack” in the City and Mr. Upchurch’s remark that drug sales were “all this phone rings for.” (Tr. 12/11 at 85.) It also ignores the many instances the jury saw or heard where multiple calls were coming into the phone at the same time. The Government made full disclosure of the assumptions on which the model was based, and defense counsel skillfully pointed out its potential flaws through both cross-examination and argument, a fact that the Third Circuit deems significant in deciding a motion for new trial. *See Salahuddin*, 765 F.3d at 348 (“[Defendant’s] arguments about credibility and challenges to portions of the Government’s evidence were made to the jury, who were free to reject them.”).

The Defense further contends that the agents’ testimony as to weight “not only usurped from the jury its role as the factfinder, but also failed to provide the jury with a clear understanding of the facts at issue.” (Def.’s Mot. New Trial at 5, ECF No. 293 at 11.) As to the “facts at issue,” the painstaking way in which the Government explained its calculations satisfies me that the jury had a clear understanding of how the evidence was being summarized. As to the jury’s prerogatives, in accordance with *United States v. Pelullo*, 964 F.2d 193, 204 (3d Cir. 1992), the chart setting forth the calculations was not admitted as evidence or sent out with the jury. Moreover, the jury clearly rejected the Government’s model both when it found Defendant

Wadley guilty of conspiring to distribute a lower drug weight than charged by the indictment and when it declined to attribute a kilogram in weight of heroin to Defendant Bey, despite the Government's calculation that he was responsible for 1,668 grams. In short, the jury exercised its own independent judgement in deciding the issue of weight.

B. Improper Opinion Testimony

A separate challenge, principally advanced by Mr. White, is that Agent James Krieger was improperly permitted to give opinion testimony, because he “testified as a ‘summary witness’ offering conclusions based on inadmissible hearsay, as well as facts not in evidence, . . . evidence that had not yet been presented to the jury that directly related to the alleged conspiracy.” (Def.’s Mot. New Trial at 10, ECF No. 294.) Counsel cites multiple opinions standing for the proposition that law enforcement agents may not opine on the ultimate issue in a case or usurp the role of the jury, but aside from the agents’ testimony as to weight, addressed above, fails to point to specific instances in the record where the testimony was improper.

Agent Krieger was the first prosecution witness, and the Defense strenuously objected to his being permitted to summarize the overall evidence gathered and the theory the agents developed during the course of the investigation. I ruled that the Government could begin with a summary of what the investigation revealed but would be proceeding at its own peril should it fail to introduce admissible evidence consistent with that summary. (Tr. 12/14 at 173.)

When the issue first arose, the jury was given a cautionary instruction: “members of the jury, the agent is giving you the premise of the investigation, that is, what the FBI’s theory of the investigation is. Obviously, it will be up to you as you hear the testimony underneath the premise of the investigation to determine whether or not the government’s proven its case beyond a reasonable doubt . . . So this is just for purposes of orientation at this point . . . And

then the specifics will be the evidence that's presented by the government." (*Id.* at 76.) As the examination of the witness progressed, the instruction was repeated. For example, shortly after the first instruction, the jury was reminded that "what will matter is the evidence [the Government] presents" (*Id.* at 77.) At a later point, as the agent was testifying as to his understanding of an intercepted conversation, the jury was again cautioned: "I just repeat what I've said before. As the agent has testified, he's giving—drawing certain conclusions and making certain inferences in connection with his investigation. By no means have I permitted or will I permit him to testify to anybody's state of mind—that's not his role here. And to the extent that he's telling you the path of the investigation, when all is said and done you and you alone decide the facts of this case, all right, based upon all of the evidence that you're going to hear." (*Id.* at 187.)

At the end of the first day of testimony, having denied a motion for mistrial, the Court specifically invited defense counsel to renew such a motion later in the trial if the Government failed to introduce specific evidence supporting the summary presented to the jury at the outset. (*Id.* at 233-34.) As the Government correctly points out, Mr. White can cite no instance where a fact to which the agent referred during the summary was not substantiated by the evidence presented over the course of the trial. As one example, defense counsel objected to Agent Krieger's use of the word "shifts" in describing how the phone was passed among Defendants, (*id.* at 223), yet the Government later introduced multiple instances where Defendants themselves used such terminology. (*See, e.g.*, Tr. 12/6 at 31; *id.* at 78-79; *id.* at 27.) Furthermore, even when the agent was permitted to state his conclusion that an intercepted conversation represented an example of a "shift change," the jury was reminded that "ultimately you have to decide whether you credit that or not." (*Id.* at 55.) The Court on multiple occasions

sustained objections where the agent's testimony would go too far, including instances where the jury was capable of assessing the evidence without assistance. (*See, e.g., id.* at 25, 32, 74, 87, 133.)

As a further precaution to ensure that any lay opinion or interpretive statement made by any of the agents would not carry undue weight, the charge to the jury included the following example meant to place such testimony in proper perspective: “imagine you're on a group tour and one of the stops is a famous museum. And one of the travelers in your group—you've never met them before—has actually been to that museum many times before. Now, this person is not an art historian and not a professional guide, but someone with an interest who spent a lot of time studying the works of art at the museum on her own. As you go through the museum, she offers you some background on different paintings and pieces of art, and her perspective on what it is the artist is trying to communicate. You might find this helpful or you might conclude you're equally capable of understanding the artwork on your own. In the end, you must come to your own decision about what any particular piece of art means to you. The same is true of the evidence in this case. The background provided from the agents is something for your consideration but only you can decide what the evidence means.” (Tr. 12/19 at 26.)

Defendant White further argues that Agent Krieger relied upon “inadmissible hearsay.” This argument lacks merit because the Court made a pre-trial ruling that Defendants' statements captured on the wiretap constituted admissions of a party-opponent or statements made in furtherance of the conspiracy. In making that ruling, I concluded that the buyers' statements recorded on the wiretap and during controlled purchases were properly offered for a non-hearsay purpose. *See Fed. R. Evid.* 801(d)(2)(E), 801(d)(2)(A), 801(c). The jury was carefully instructed while the agent was testifying as to the difference between statements made by Defendants

themselves and statements overheard on the wiretaps and recordings, including those from confidential sources, which were not being offered for the truth of the matter but only to provide context. (Tr. 12/5 at 109-110.) At a later point, again while the agent was testifying, the jury was instructed as to the rules of hearsay concerning statements by co-conspirators. (Tr. 12/6 at 62-63.)

White also objects to the agent being permitted to interpret various terms from intercepts, arguing that “[n]othing about the recorded conversations captured by the confidential sources, the text messages or phone conversations captured by the wiretap was unclear, coded, or in need of interpretation.” (Def.’s Mot. New Trial at 14, ECF No. 294.) This is simply not the case. Here, as in many drug prosecutions, the use of slang and coded language was widespread. Among other things, the witness interpreted the meaning of terms such as “hard,” (Tr. 12/5 at 117), “D” or “Dope,” (*Id.* at 118), “three Bs,” (*Id.* at 138-39), “bean of hizzard,” (*Id.*), “the Sub,” (*Id.* at 142), “rizzack,” (*Id.* at 149), “that shit,” (*Id.* at 159), the “dog,” (*Id.* at 163), “dove,” (*Id.* at 167-68), and “log.” (*Id.* at 169-70.) Testimony explaining such terms from an experienced agent is clearly permissible. *See United States v. De Peri*, 778 F.2d 963, 977-78 (3d Cir. 1985); *United States v. Santiago*, 560 F.3d 62, 66 (1st Cir. 2009).

C. Alleged Intoxication of a Confidential Source

As part of its investigation, the Government used a confidential source known as “Ace.” Ace was not called as a witness by the prosecution, and the Defense did not formally move for his production. During an exchange with Defendant Wadley on October 31, 2016, Ace made reference to being drunk. (Tr. 12/11 at 120.) Agent Krieger conceded that confidential sources are not permitted to conduct operations if they are under the influence of alcohol. (Tr. 12/6 at

146.) But he and Agent Chlebowski, the other agent involved in supervising Ace, further testified that they never perceived him as being intoxicated.

There had been an earlier controlled purchase, on August 17, 2016, from Defendant Bey. Agent Chlebowski acknowledged that, as he followed standard protocol to search the source's vehicle for contraband, he observed a six-pack of Coors Light in a cooler on the backseat of Ace's vehicle. (Tr. 12/11 at 129-30.) This did not concern him because the beer was unopened and in the back seat. After hearing cross-examination of his colleague Agent Krieger on the subject of alcohol, he used a weekend break in the trial to further review the August 17 videotape. Upon further scrutiny, Agent Chlebowski, admits that he heard the sound of Ace opening a can and observed a can moving near the front console area of the vehicle. Defendants argue that, taken in combination, this evidence proves Ace was intoxicated during his service as a confidential source. They further argue that such a breach of protocol renders the evidence gathered as a result of Ace's participation as an informant unlawful, requiring a new trial. I disagree.

First, and most importantly, there is no evidence in the record that Ace was, in fact, intoxicated. By definition, confidential sources make false or misleading statements to the targets of an investigation. Given the context in which the subject of intoxication arose in Ace's interaction with Mr. Wadley, it is equally likely that he was playacting. The Defense paints with a broad brush, but I can recall no reference to intoxication aside from the October 2016 controlled purchase. When counsel argued this issue at trial, I contemporaneously noted for purposes of the record that, having listened to Ace on multiple recordings, "the Court discerned no slurred speech, no disorientation, nothing about the tone or the pace of what the confidential source said on the tape that would in any way indicate that he was impaired." (Tr. 12/14 at 70.)

Of equal importance, even if Ace were intoxicated, it would not in any way undermine the validity of the evidence. Each controlled buy was captured on audiotape and videotape. There simply is no dispute as to what the confidential source or any of the Defendants said or did because it was contemporaneously recorded. A sale of narcotics is a violation of federal law regardless of whether the purchaser is sober or drunk. The Third Circuit has cautioned that the critical issue is “not the culpability of the prosecutor but the fairness of the trial.” *United States v. Liburd*, 607 F.3d 339, 344 (3d Cir. 2010) (internal quotation marks and citation omitted).

Any breach of protocol that may have occurred either as a result of Ace actually being intoxicated or ingesting alcohol while participating in the investigation has no bearing on what the jury saw and heard in connection with any of the controlled purchases. His credibility was not at issue, because the recorded evidence of an unlawful sale of narcotics was objectively beyond dispute. Finally, the Defense had the opportunity to attack the Government’s case on the basis of this alleged misconduct both on cross-examination and in closing argument. The jury was not moved, and nothing in the record as to this issue warrants setting aside its verdict.

D. Purported Brady Violations

The standard for establishing a violation of the prosecution’s obligation to turn over exculpatory evidence is set forth in *Pelullo*, 399 F.3d at 209. A defendant must prove that “(1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment.” *Id.* (citations omitted). Defendants allege that “the Government repeatedly and willfully failed to timely disclose *Brady* material favorable to the defense.” (Def.’s Mot. New Trial at 17, ECF No. 293 at 23.) That broad allegation is not supported by specific citation to the record.

The Defense is correct that the evidence in this case was voluminous, presenting a challenge for both sides. But there is no basis on which to conclude that the Government failed to make disclosures. For these purposes, it is important to draw a distinction between the Government's legal obligation to produce as part of discovery under the Criminal Rules, and the Court's directive at the beginning of trial that the prosecution should identify specific materials to be introduced into evidence the night before a trial session. I have identified no instances where the Government failed to provide discovery.

Defense counsel is correct that they faced the problem of the proverbial "needle in a haystack," culling out from a voluminous production specific items the prosecution intended to use. (Tr. 12/12 at 70.) Counsel is also correct that specific identification of trial evidence to the lawyers is only one part of the equation, because each counsel also needs the opportunity for his client, in custody at the Federal Detention Center, to review the evidence as well. (*Id.* at 66-67.) These logistical challenges were discussed in a lengthy colloquy mid-way through the trial. (*Id.* at 53-78.) In that specific instance, involving phone records, the Court addressed the needs of defense counsel by having Chambers make clean copies for use on cross-examination. (*Id.* at 73.) As a general matter, however, the Government complied with the Court's request to provide defense counsel with as much notice as possible of the specific documents, calls, videos, and photos the prosecution intended to use.

Only two specific instances merit further discussion, neither implicating *Brady*. First, the Government's mid-trial production of the summary exhibit it intended to use to establish the weight of the drugs involved put the Defense at a significant disadvantage. This was addressed by the lengthy hearing the Court conducted, the night before which all counsel were in possession of the relevant documents, allowing them time to prepare. Because the hearing on

methodology filled an entire afternoon, and presentation of the chart to the jury did not proceed until the following day, defense counsel had both full disclosure and sufficient time to prepare.

Second, the Defense specifically objects to the Government's late disclosure that Agent Chlebowski concluded, based upon further scrutiny of the videotape, that Ace may have opened and consumed a beer before the controlled buy on August 17, 2016. This does not constitute the withholding of exculpatory evidence, because the full videotape in question had been produced to Defendants. Thus, to the extent that Ace's actions were in some way exculpatory, that information was equally available to the Defense. That fact, standing alone, defeats a *Brady* claim. But even assuming that the Government was obligated to share the agent's impression of the video, it did so once the agent formed that impression. In context, the "late disclosure" was the product of the exigencies of trial. What the record makes clear is that after Agent Krieger was cross-examined on Ace's claim of intoxication during the October 2016, controlled purchase, Agent Chlebowski went back and re-watched the entirety of the August videotape—not just the brief portion involving the controlled purchase—to prepare for his own cross-examination. When the agent identified a potential vulnerability, the Government decided to address the issue preemptively on direct examination, lest the jury first hear about it on cross, and notified defense counsel in advance.

Finally, even assuming some failure to disclose, I have already determined that any consumption of alcohol by Ace was not material to innocence, because the recording of the controlled purchase objectively establishes the facts.

E. Bey's Arguments Based Upon the Indictment

Mr. Bey argues that the Government constructively amended the Indictment at trial, or, at a minimum, fatally varied from it in the proof presented. (Def.'s Mot. New Trial at 12, ECF No.

293 at 18.) The core of Mr. Bey's argument is that the Indictment charged him with a leadership role in the conspiracy, but the Government failed to prove that at trial. Preliminarily, I must note some uncertainty as to the legal foundation for this argument, as the factual description of Mr. Bey's role in the Indictment was not the basis for a separate or greater charge: he was charged with conspiracy the same as his co-defendants, and his conviction was for conspiracy, not for being the "leader" of the conspiracy. To that extent, this argument appears to be a restatement of his arguments with respect to sufficiency of the evidence. I will nonetheless address this issue as framed by the Defense.

Under the Fifth Amendment, a Grand Jury must review and approve of criminal charges. It is therefore unlawful for a defendant to be convicted of a crime beyond what was charged in the Indictment. *United States v. Centeno*, 793 F.3d 378, 389 (3d Cir. 2015). With respect to constructive amendment of an Indictment, the question is whether the "evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *United States v. Daraio*, 445 F.3d 253, 259-60 (3d Cir. 2006). Here, Bey was charged with conspiracy and convicted of conspiracy. Whether he was the leader of the conspiracy was not an element of the offense, and therefore it cannot be said that he was convicted of a crime beyond the crime charged by the Indictment.

A variance occurs "where the charging terms of the indictment are not changed but when the evidence at the trial proves facts materially different from those alleged in the indictment." *Id.* at 259. The question then becomes whether that variance "prejudiced some substantial right." *Id.* at 262. *Daraio* further provides that "[a] variance does not prejudice a

defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, [or] (2) if 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.* (quoting *United States v. Schoenhut*, 576 F.2d 1010, 1021-22 (3d Cir. 1978)). Here, even if one were to assume the existence of a variance as that term is defined by the case law, there is no prejudice. The Defense does not point to any fear of double jeopardy, and Defendant Bey certainly understood that he was charged with the crime of conspiracy to distribute narcotics. His defense at trial was that there was no conspiracy, and I cannot conceive of any way in which his defense would have been different even if the Government did not assert he held a leadership role. The extent of his role will undoubtedly be an issue at sentencing but has no relevance in determining whether he is entitled to a new trial.

III. Motions for Judgment of Acquittal under Rule 29

Rule 29 authorizes courts to set aside a jury's verdict or enter an acquittal upon a defendant's timely post-trial motion. Fed. R. Crim. P. 29(c)(1). In reviewing a Rule 29 motion, courts apply "a particularly deferential standard of review, viewing '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. Silveus*, 542 F.3d 993, 1002 (3d Cir. 2008) (citations omitted) (explaining that this standard governs Rule 29 determinations by the Third Circuit and district courts alike). Such a claim, alleging insufficiency of the evidence, places a "very heavy burden" on the defendant. *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998) (citations omitted).

Defendants' arguments under Rule 29 essentially mirror their arguments under Rule 33. For the reasons set forth above, these arguments lack merit, particularly under the more deferential standard that governs under Rule 29. There was sufficient evidence from which the jury could reasonably conclude that Defendants were engaged in a conspiracy to distribute unlawful narcotics, and the Government presented its competent and sufficient evidence as to the weight of the narcotics involved.

I will however address arguments raised by Defendant Bey, who cites specific precedent in support of his contention that the evidence with respect to weight was inadequate. First, he relies upon *United States v. Pauling*, 256 F. Supp. 3d 329 (S.D.N.Y. 2017). In *Pauling*, the government sought to convict the defendant of conspiracy to distribute 100 grams or more of heroin, in an attempt to invoke a mandatory minimum sentence. There was no question that the defendant actively dealt in drugs, but he was known to have multiple suppliers. *Id.* at 334-35. The record was virtually devoid of evidence that there was any connection between the various suppliers, *id.* at 335, and in closing argument to the jury, the government did not argue such a connection. *Id.* at 336. In fact, the court noted that even in opposition to the Rule 29 motion, the government still failed to bring forth evidence that there was such connection. *Id.* The trial judge was sufficiently concerned about fairness to the defendant that he charged the jury on the doctrine of multiple conspiracies. *Id.* Because the government had taken none of the steps necessary to connect any of the other suppliers, so as to aggregate the quantities the defendant may have received from them, the sole focus of the trial was the defendant's relationship with a single supplier over a limited period of time. *Id.*

The specific evidence of record was sufficient to support a quantity of 89 grams of heroin, as opposed to the 100 grams necessary for the mandatory minimum sought. *See id.* The

government attempted to bridge the gap by relying upon a conversation intercepted by a wiretap, in which reference was made to the defendant receiving the same quantity as a prior transaction. *Id.* at 336-37. The problem for the government was that by any fair reading of the record, that transaction had been limited to a single gram. *Id.* at 337. Furthermore, the defendant was known to purchase both heroin and cocaine from that supplier, rendering the probative value of the conversation even weaker. Metaphorically, the evidence in *Pauling* was but a drop of rain compared to the thunderstorm of proof in this case.

Nor does *United States v. Collado*, 975 F.2d 985 (3d Cir. 1992) provide a basis for setting aside the jury's verdict. In *Collado*, a Presentence Investigation Report charged two defendants with a weight of 62.5 grams of heroin based upon two intercepted phone calls in which no weight was discussed. *Id.* at 998. As noted by the Court of Appeals: "The presentence investigation report observes that based on other telephone calls related to this transaction, the government stated that this conversation is referring to 62.5 grams of heroin . . . the report does not explain what those other calls were, nor did any trial testimony establish that these calls referred to 62.5 grams of heroin." *Id.* at 998 (internal quotation marks omitted). In short, *Collado* was a case where the appellate court was faced with a record containing no clear evidentiary support for a fact that was critical to sentencing. Here, there was an abundance of evidence gathered over a sustained period of time that was analyzed and presented in a logical way. In fact, the Third Circuit in *Collado* took care to "recognize that in calculating the amounts involved in drug transactions, some degree of estimation must be permitted, for the government usually cannot seize and measure all the drugs that flow through a large drug distribution conspiracy." *Id.* The calculations employed in this case embody the sort of permissible

estimations the Third Circuit considered. Defendant Bey's additional Rule 29 arguments are thus without merit.

For the foregoing reasons, I will deny Defendants' Rule 29 motions for acquittal and Rule 33 motions for a new trial.

/s/ Gerald Austin McHugh
United States District Judge

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	No. 17-208-1, 6, 7, 8
v.	:	
	:	
BASIL BEY	:	
REGINALD WHITE	:	
TYRIK UPCHURCH	:	
AMIN WADLEY	:	

ORDER

This 24th day of January, 2019, upon consideration of Defendants White, Wadley, and Upchurch's Motions to Join in Co-Defendants' Motions (ECF Nos. 294, 296, 301), **ORDERED** that all Defendants' Motions are **GRANTED**. Upon consideration of Defendants' Motions for a New Trial (ECF Nos. 293, 294 296, 302), Defendants' Motions for Judgment of Acquittal (ECF Nos. 292, 294, 295, 300), and the Government's Responses (ECF Nos. 317, 318), it is further **ORDERED** that all Defendants' Motions are **DENIED**.

/s/ Gerald Austin McHugh
Gerald Austin McHugh
United States District Judge