

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 :
 : NO. 19-402
 KHAIYRI BURGESS :
 SHAQUAN JOHNSON :

MEMORANDUM

SURRICK, J.

FEBRUARY 24, 2020

Presently before the Court are Defendant Khaiyri Burgess's Motion for Judgment of Acquittal (ECF No. 107) and Defendant Shaquan Johnson's oral Motion for Judgment of Acquittal. For the following reasons, Defendants' Motions will be denied.

I. BACKGROUND

On the night of August 7, 2018, seventeen-year-old Katharine Dinh was asleep in her bed. Her parents were down the street working at their family-owned bar. Around midnight, two men broke into her bedroom through a window. One of the men beat Katharine and held a gun against her head. The two men demanded to know where Katharine's parents kept their money, but Katharine resisted, knowing that her family's life savings were at risk. After ransacking the house for the better part of an hour, the two men, with the assistance of a third individual, took two safes out of the house and made off with them. The safes contained over \$1 million in cash and jewelry. Because the men wore clothing that covered their faces, Katharine could not identify them.

On July 11, 2019, a grand jury returned a two-count Indictment charging Defendants Khaiyri Burgess and Shaquan Johnson with: (1) interference with commerce by threats or

violence, and aiding and abetting, in violation of 18 U.S.C. § 1951(a) (“Hobbs Act robbery”) and 18 U.S.C. § 2; and (2) brandishing a firearm during and in relation to a crime of violence, and aiding and abetting, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. § 2. (ECF No. 16.)

On November 21, 2019, the Government filed a Superseding Indictment adding a third count against Burgess, for knowingly possessing a stolen firearm, in violation of 18 U.S.C. § 922(j). (ECF No. 66.) Defendants’ trial commenced on December 2, 2019. (ECF No. 89.) At the close of the Government’s case, both Defendants moved orally for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (ECF No. 120.) Burgess argued that the Government failed to establish the interstate commerce element of the Hobbs Act robbery charge. Burgess also asserted that because the Government could not establish a predicate crime of violence, namely Hobbs Act robbery, the Government could not prove the brandishing charge under 18 U.S.C. § 924(c). Johnson argued that the Government failed to establish that he possessed, used, or otherwise had anything to do with the firearm allegedly used during the robbery, so he could not be found guilty under § 924(c). Pursuant to Rule 29(b), the Court reserved decision on the Motions. (ECF No. 120.) Later that day, Burgess filed his Motion in writing. (ECF No. 107.) The Government responded in opposition the following day. (ECF No. 108.) Johnson stood on his oral motion.¹

After another day and a half of trial, the case was submitted to the jury for deliberations. (ECF Nos. 121-22.) When the jurors unanimously reported to the Court that they were irreconcilably deadlocked, the Court, with the consent and agreement of the parties, declared a

¹ Motions for judgment of acquittal pursuant to Rule 29 may be made orally. *See United States v. Navarro Viayra*, 365 F.3d 790, 792 (9th Cir. 2004); *see also* Fed. R. Crim P. 47(b) (“A motion--*except when made during a trial or hearing*--must be in writing....”) (emphasis added).

mistrial for reasons of manifest necessity. (ECF No. 122); *see also* Mod. Crim. Jury Instr. 3rd Cir. 9.06 cmt. (2018) (discussing mistrial based on deadlocked jury).

On January 16, 2020, the Government filed a Second Superseding Indictment. (ECF No. 126.) The Second Superseding Indictment included all of the charges from the Superseding Indictment and added the following additional charges and Defendants: (Count One) conspiracy to commit Hobbs Act robbery, against Defendants Burgess, Johnson, and Demetrius Ceasar, who presumably was the unidentified individual referred to in the original Indictment; (Count Two) Hobbs Act robbery and aiding and abetting, against Burgess, Johnson, and Ceasar; (Count Three) brandishing a firearm during and in relation to a crime of violence and aiding and abetting, against Burgess, Johnson, and Ceasar; (Count Four) knowingly possessing a stolen firearm, against Burgess; (Count Five) knowingly assisting Burgess in order to hinder and prevent Burgess's apprehension, trial, and punishment, in violation of 18 U.S.C. § 3, against Khaiyri Burgess's father, Defendant Edward Burgess; and (Count Six) obstruction of justice and aiding and abetting, against Khaiyri Burgess and Edward Burgess. (*Id.*)²

On February 18, 2020, Burgess requested that we rule on his outstanding Motion for Judgment of Acquittal, since a ruling in his favor would trigger Double Jeopardy and bar his retrial on certain counts of the Second Superseding Indictment. (ECF No. 163.) Although Johnson did not join in this request or otherwise raise the issue, Burgess's argument applies equally to him.

² Defendant Edward Burgess is not the subject of the present Motions. Therefore, "Burgess" in this Memorandum refers to Defendant Khaiyri Burgess.

II. DISCUSSION

A. Legal Context and Standard of Review

“[T]he Double Jeopardy Clause forbids the retrial of a defendant who has been *acquitted* of the crime charged.” *Bullington v. Missouri*, 451 U.S. 430, 437 (1981) (emphasis in original); *see also Burks v. United States*, 437 U.S. 1, 11 (1978) (holding that the Double Jeopardy Clause “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding”). Typically, “a retrial following a ‘hung jury’ does not violate the Double Jeopardy Clause.” *Richardson v. United States*, 468 U.S. 317, 324 (1984). There is an exception to this rule, however. If, after a hung jury mistrial, a court determines pursuant to a Rule 29 motion that the evidence is insufficient to sustain a conviction for an offense, Double Jeopardy principles treat that determination as an acquittal and prohibit the defendant from being retried on that offense. *See United States v. Recio*, 371 F.3d 1093, 1104 (9th Cir. 2004) (recognizing that “a second trial following a hung-jury mistrial does not violate the Double Jeopardy Clause if, at the time the second trial begins, *no court has ruled the government’s first-trial evidence insufficient*” (citing *Richardson*, 468 U.S. at 325-26) (holding that a “court’s finding of insufficient evidence to convict . . . is for double jeopardy purposes, the equivalent of an acquittal”)) (emphasis added); *see also Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (stating that “we have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict”); *Burks*, 437 U.S. at 10-11 n.5 (holding that when a court enters a judgment of acquittal on an offense, the defendant cannot be retried for the same offense); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977) (noting

that “Rule 29 recognizes no legal distinction between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause”) (internal quotations omitted).³

We now address Defendants’ Rule 29 Motions and determine whether the Government’s evidence was insufficient as to the Hobbs Act robbery and § 924(c) counts, so that the Double Jeopardy Clause precludes retrial of Burgess and Johnson on those counts. Because we reserved decision on Defendants’ Motions, we “must decide the motion on the basis of the evidence at the time the ruling was reserved,” i.e., at the close of the Government’s case. *See* Fed. R. Crim. P. 29(b). Accordingly, we “must determine whether any rational trier of fact could find proof of Defendants’ guilt beyond a reasonable doubt” based on the Government’s evidence. *See United States v. Menendez*, 291 F. Supp. 3d 606, 612 (D.N.J. 2018) (citing *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002)). “In making that determination, the Court must view the evidence in its entirety and in the light most favorable to the Government.” *Id.* (citing *United States v. Hoffecker*, 530 F.3d 137, 146 (3d Cir. 2008)). “That includes giving ‘the benefit of inferences that may be drawn from the evidence,’ which ‘may be considered probative even if it is circumstantial.’” *Id.* (quoting *United States v. Pecora*, 798 F.2d 614, 618 (3d Cir. 1986)). “[A] finding of insufficiency should be confined to cases where the prosecution’s failure is clear.” *Id.* (quoting *Smith*, 294 F.3d at 477).

³ The Government’s filing of the Second Superseding Indictment, which includes the charges already tried as well as new charges against Burgess and Johnson, does not create a separate Double Jeopardy issue or otherwise change the analysis here. *See United States v. Meiner*, No. 08-213, 2008 WL 4916409, at *2 (W.D. Okla. Nov. 14, 2008) (noting that “[c]ourts have recognized that the government may, following a mistrial, file a superseding indictment that alters or adds charges, and such prosecution will not violate the Double Jeopardy Clause” (collecting cases)).

B. A Rational Juror Could Have Found that the Government Proved the Interstate Commerce Element of the Hobbs Act Robbery Charge Beyond a Reasonable Doubt

“[A] conviction under the Hobbs Act requires proof beyond a reasonable doubt that (1) the defendant knowingly or willfully committed, or attempted or conspired to commit, robbery or extortion, and (2) the defendant’s conduct affected interstate commerce.” *United States v. Powell*, 693 F.3d 398, 401 (3d Cir. 2012). With regard to the interstate commerce element, “‘proof of a *de minimis* effect on interstate commerce is all that is required’ for conviction under the Hobbs Act.” *Id.* at 402 (quoting *United States v. Walker*, 657 F.3d 160, 180 (3d Cir. 2011)). Even a “potential” effect on interstate commerce is sufficient. *See id.* at 404. Indeed, the Third Circuit deems the interstate nexus satisfied in cases where the defendants “target[] interstate businesses and [steal] business proceeds,” even when the subject amounts are “comparatively small” or are taken from the home of a business owner, rather than from a storefront or office. *See id.* at 405-06.

Consistent with these principles, the Third Circuit Model Jury Instruction on the interstate commerce element of a Hobbs Act charge states as follows:

The third element that the government must prove beyond a reasonable doubt is that [defendant’s] conduct affected or could have affected interstate commerce. Conduct affects interstate commerce if it in any way interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states. The effect can be minimal.

It is not necessary to prove that [defendant] intended to obstruct, delay or interfere with interstate commerce or that the purpose of the alleged crime was to affect interstate commerce. Further, you do not have to decide whether the effect on interstate commerce was to be harmful or beneficial to a particular business or to commerce in general. You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the offense potentially caused an effect on interstate commerce to any degree, however minimal or slight.

Mod. Crim. Jury Instr. 3rd Cir. 6.18.1951-7 (2018). At trial, our instructions to the jury on interstate commerce were substantially the same as the model instruction.

Burgess's interstate commerce argument depends on a myopic view of this case. According to Burgess, this case is ultimately about a home invasion robbery during which the perpetrators took two safes belonging to a family that "happened to own a business." (*See* Burgess Br. at 6, ECF No. 107.) Viewing the evidence and inferences to be drawn from the evidence in the light most favorable to the Government, however, a rational juror could find:

- Based on the victims' testimony, that the victims owned a bar that was within a few minutes' walking distance from their home, and that the victims transported proceeds from their bar to their home, late at night after closing;
- Based on the victims' testimony, that the victims stored cash proceeds from their business in their home, in two safes, and that collectively, there was over \$1 million in cash in the safes;
- Based on the victims' testimony, that the victims' bar sold products that were manufactured out of state;
- Based on testimony by his employers, that Johnson worked a late shift at a nearby gas station, from which he could see the route by which the victims traveled to and from their bar;
- Based on testimony by the victims and law enforcement, that the perpetrators stole only the safes from the victims' home, even though other valuable items, such as a mobile phone, were present; and
- Based on Katharine's testimony, that the perpetrators demanded to know where the family kept their money and when her parents would be returning home.

Based on these findings, a rational juror could conclude beyond a reasonable doubt that the perpetrators targeted the victims in this case because the victims owned a business and the perpetrators expected that there would be business proceeds at the victims' home. Under *Powell*, that is a sufficient basis on which to find in favor of the Government on the interstate commerce element.

Accordingly, Burgess's Motion as to the Hobbs Act robbery charge will be denied. Moreover, because Burgess's argument regarding the § 924(c) charge presumes an acquittal on the Hobbs Act robbery charge, his Motion will also be denied as to the § 924(c) charge.

C. A Rational Juror Could Have Found that the Government Proved Johnson Guilty Beyond a Reasonable Doubt under 18 U.S.C. § 924

At trial, the Government presented evidence that Burgess stole a firearm and used that firearm during the home invasion robbery. The gist of Johnson's Motion is that even if the Government has tied Burgess to the firearm, it has not made a connection between the firearm and *Johnson*. Johnson was charged with brandishing a firearm during and in relation to a crime of violence, and aiding and abetting, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. § 2. Section 924(c)(1)(A) makes it a crime to use or carry a firearm "during and in relation to any crime of violence" or possess a firearm "in furtherance of any such crime." Section 2(a), in turn, states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." The Third Circuit permits defendants to be convicted under § 924(c) on an aiding and abetting theory. *See United States v. Price*, 76 F.3d 526, 529 (3d Cir. 1996). Pursuant to that theory, "an individual who does not personally use or carry a firearm may still be found guilty of violating 18 U.S.C. § 924(c)(1) ... if the actions of the defendant who did not use or carry a firearm 'were sufficiently intertwined with, and his criminal objectives furthered by the actions of the participant who did carry and use the firearm.'" *United States v. Moreta*, 310 F. App'x 534, 536 (3d Cir. 2009) (internal quotations omitted) (quoting *United States v. Gordon*, 290 F.3d 539, 547 (3d Cir. 2002)).

Consistent with these principles, the Third Circuit Model Jury Instruction on accomplice liability states in relevant part that:

In order to find (name of defendant) guilty of (state offense(s)) because (he)(she) aided and abetted (name of alleged principal) in committing (this)(these) offense(s), you must find that the government proved beyond a reasonable doubt each of following four (4) requirements:

First: That (name of alleged principal) committed the offense(s) charged by committing each of the elements of the offense(s) charged, as I have explained those elements to you in these instructions. ((Name of alleged principal) need not have been charged with or found guilty of the offense(s), however, as long as you find that the government proved beyond a reasonable doubt that (he) (she) committed the offense(s)).

Second: That (name of defendant) knew that the offense(s) charged (was)(were) going to be committed or (was)(were) being committed by (name of alleged principal), and

Third: That (name of defendant) knowingly did some act for the purpose of [aiding][assisting][soliciting][facilitating][encouraging](name of alleged principal) in committing the specific offense(s) charged and with the intent that (name of alleged principal) commit that [those] specific offense(s), and

Fourth: That (name of defendant) performed an act(s) in furtherance of the offense(s) charged.

Mod. Crim. Jury Instr. 3rd Cir. 7.02 (2018). Moreover, pursuant to the *Pinkerton* doctrine, even where, as here, conspiracy is not charged in the indictment, the Government may “prove the guilt of one defendant through the acts of another committed within the scope of and in furtherance of a conspiracy of which the defendant was a member, provided the acts are reasonably foreseeable as a necessary or natural consequence of the conspiracy.” *United States v. Lopez*, 271 F.3d 472, 480 (3d Cir. 2001) (citing *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946)); *see also United States v. Whitted*, 734 F. App’x 90, 94 n.4 (3d Cir. 2018) (holding that “[a] *Pinkerton* conviction under § 924(c) is proper [where] the § 924(c) violation was a reasonably foreseeable

consequence of the ... conspiracy”).⁴ The Third Circuit Model Jury Instruction on *Pinkerton* liability states in relevant part that:

The government may also prove (name) guilty of (this)(these) offense(s) based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to (name) as a necessary or natural consequence of the agreement. In other words, under certain circumstances the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by any one or more of them, even though they did not all personally participate in that crime themselves.

Mod. Crim. Jury Instr. 3rd Cir. 7.03 (2018). We instructed the jury in accordance with the model instructions on both accomplice liability and *Pinkerton* liability.

Johnson is correct that the Government has not established that he physically possessed the gun. However, viewing the evidentiary record in the light most favorable to the Government, the Government has established:

- Based on various pictures and social media, that Johnson and Burgess were friends or were otherwise closely associated;
- Based on cell site location data, that Johnson and Burgess were both in the vicinity of the robbery at the time of the robbery;
- Based on cell phone records, that Johnson’s and Burgess’s cell phones were communicating extensively at the time of the robbery;
- Based on Katharine’s testimony, that one of the perpetrators held a gun up to her head during the robbery;
- Based on eyewitness testimony, that Burgess purchased a gun before the robbery;
- Based on DNA evidence, that Burgess’s and Katharine’s DNA were on the gun purchased by Burgess;

⁴ Conspiracy was not charged in the Superseding Indictment, which was the operative charging document at the time of the first trial. A conspiracy charge has since been added via the Second Superseding Indictment.

- Based on Katharine's testimony, that at least two men were in her home at the time of the robbery and that towards the end of the robbery, an additional individual had approached or entered the home;
- Based on cell site location data, that Johnson and Burgess were both leaving the area of the robbery at the same time and travelling in the same direction;
- Based on video surveillance and the testimony of a locksmith, that Burgess stole a Cadillac by falsely claiming to the locksmith that he owned the vehicle and needed a replacement key;
- Based on video surveillance, that the stolen Cadillac was in the vicinity of the robbery at the time of the robbery and was being driven relatively quickly;
- Based on eyewitness testimony, that several young African American adult men (like Johnson and Burgess) were seen standing next to the stolen Cadillac within a week after the robbery, and that the Cadillac was subsequently found burned-out in a field near where the young men were seen with the vehicle; and
- Based on various pictures, social media, and business records, that Johnson and Burgess purchased expensive items following the robbery and that on at least one occasion following the robbery, they purchased those items together.

In addition, there was no evidence that any of the perpetrators in the home at the time of the robbery expressed surprise or disagreement regarding the use of the gun.

Based on this evidence, a rational juror could conclude beyond a reasonable doubt that there was a conspiracy to commit robbery between Johnson, Burgess, and at least one other individual, and that Johnson's criminal objectives were furthered by Burgess's use of the gun. A rational juror could also conclude beyond a reasonable doubt that even if Johnson did not wield the firearm himself, he knew that the firearm would be or was being used and condoned its use, or, alternatively, could reasonably foresee that the firearm would be used during the robbery as a necessary or natural consequence of the conspiracy. A rational juror could similarly conclude beyond a reasonable doubt that even if Johnson did not know about the gun beforehand, he continued to assist in the perpetration of the robbery after learning that a gun was involved.

Under both the *Pinkerton* doctrine and accomplice liability theory, there was sufficient evidence

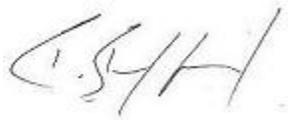
to support a conviction against Johnson under § 924(c). *See Moreta*, 310 F. App'x at 537 (holding that even if defendant “did not have advance knowledge of the plan to use a firearm, his continued participation after the gun was being used is enough to support an aiding and abetting conviction” (citing *Price*, 76 F.3d at 529-30)); *United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990) (finding that a jury could have determined beyond a reasonable doubt, based on conspicuous placement of gun in coconspirator’s waistband, that the coconspirator would be carrying a gun during a drug transaction, such that defendants could be liable for use of gun under *Pinkerton*). Accordingly, Johnson’s Motion will also be denied.

III. CONCLUSION

For the foregoing reasons, Defendants’ Motions for Judgment of Acquittal will be denied. Finally, because we conclude that the evidence was sufficient to sustain convictions against Burgess and Johnson for the Hobbs Act robbery and brandishing charges, retrial of Burgess and Johnson on those counts does not violate the Double Jeopardy Clause. *See Recio*, 371 F.3d at 1104.

An appropriate order follows.

BY THE COURT:



R. BARCLAY SURRECK, J.

IN THE UNITED STATES DISTRICT COURT
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	:	CRIMINAL ACTION
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SHAQUAN JOHNSON	:	

ORDER

AND NOW, this 24th day of February 2020, upon consideration of Defendant Khaiyri Burgess's Motion for Judgment of Acquittal (ECF No. 107), Defendant Shaquan Johnson's oral Motion for Judgment of Acquittal, and the Government's Response in Opposition (ECF No. 108), it is **ORDERED**, consistent with the accompanying Memorandum, that the Motions are **DENIED**.

IT IS SO ORDERED.

BY THE COURT:



R. BARCLAY SURRICK, J.