

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION  
 :  
 ALAN WOMACK : NO. 16-218-13  
 :

**MEMORANDUM**

**SURRICK, J.**

**FEBRUARY 24, 2020**

Presently before the Court are Defendant’s Motion for New Trial Pursuant to Federal Rule 33(a)(2) or Judgment of Acquittal Pursuant to Federal Rule 29 (ECF No. 949) and Defendant’s Supplemental Rule 33 and Rule 29 Motion (ECF No. 973). For the following reasons, Defendant’s Motions will be denied.

**I. BACKGROUND**

On August 7, 2019, after an eight-day trial, a jury found Defendant Alan Womack guilty of conspiracy to distribute 1,000 kilograms or more of marijuana and conspiracy to commit money laundering. (ECF No. 937.) The convictions are related to Defendant’s involvement in a conspiracy to transport bulk amounts of marijuana from the west coast to locations on the east coast. Defendant and his co-conspirators employed the assistance of truck drivers to assist in the transport of drugs and money. The Government presented 15 witnesses and over 300 exhibits to support their theory that Defendant was a member of the drug conspiracy that spanned from spring 2005 through May 2016. Defendant concedes that he was at one time a member of the conspiracy to distribute marijuana. He testified at his trial that his role for the organization was to provide quality control of the marijuana. He alleges, however, that he affirmatively withdrew from the conspiracy sometime prior to August 2012. The statute of limitations for this case was

August 9, 2012. The jury did not believe Defendant's withdrawal defense and convicted him on both conspiracy counts. Defendant now contends that he is entitled to an acquittal, or in the alternative, a new trial. There is no justification for either.

## **II. LEGAL STANDARDS**

Defendant seeks an acquittal under Federal Rule of Criminal Procedure 29. In the alternative, he seeks a new trial under Federal Rule of Criminal Procedure 33.

Rule 29 permits the court to set aside a guilty verdict based on insufficient evidence. *See* Fed. R. Crim. P. 29(a)-(c). When presented with a Rule 29 motion, the court must "review 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." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (citation omitted). Evidence is viewed as a whole and "not in isolation." *Id.* In addition, there must be "substantial evidence" to uphold the jury's decision on guilt. *Id.* The court "must be ever vigilant in the context of [Rule 29] not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). "A finding of insufficiency should be confined to cases where the prosecution's failure is clear." *Id.* (citation and internal quotation marks omitted).

Rule 33 permits a court to vacate any judgment and grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). District courts should only grant a new trial when an error or errors that occurred during the trial "so infected the jury's deliberations that they had substantial influence on the outcome of the trial." *United States v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994) (citation omitted).

### **III. DISCUSSION**

#### **A. Motion for Acquittal**

Defendant makes two arguments in support of his Motion for Acquittal. First, he contends that there was insufficient evidence that he was part of the charged drug conspiracy after August 9, 2012, the date of the five-year statute of limitations. In addition, Defendant contends that acquittal is required because the Court failed to instruct the jury that, in order to find him guilty of the drug conspiracy charge, they must have found that he conspired to distribute 1,000 kilograms or more of marijuana in a “single unit” as opposed to considering the sum of the amounts possessed over the course of the conspiracy. We address each argument.

##### *1. Evidence was Sufficient to Support Conspiracy Conviction*

Defendant does not dispute that he was at one point a part of the conspiracy to distribute marijuana. Indeed, he was arrested in March 2006 with over 2,000 pounds of marijuana. (Aug. 6 Tr. 66-68, ECF No. 946.) Defendant contends, however, that after a friend was murdered and after the organization suffered losses—marijuana seized, and co-conspirators imprisoned—he no longer wanted to distribute marijuana and withdrew from the conspiracy. (*Id.* at 77.) Defendant argues that acquittal is warranted because there was insufficient evidence of his involvement in the conspiracy after he withdrew and thus after the date of the applicable five-year statute of limitations, which was on August 9, 2012. *See* 18 U.S.C. § 3282.

The Court instructed the jury as to Defendant’s defense of withdrawal:

Ladies and gentlemen, as you know, the defendant in this case has contended that he is not guilty of this conspiracy because he withdrew from the conspiracy. Now, ladies and gentlemen, if you find that based upon the evidence that Alan Womack withdrew from the conspiracy before August 9, 2012, which is five years before the government obtained the indictment charging the conspiracy, then you must find the defendant not guilty of the conspiracy.

You should understand that in order to withdraw from the conspiracy, the defendant must have taken some clear, definite and affirmative action to terminate his participation, to abandon the illegal objective and to disassociate himself from the agreement. Ladies and gentlemen, withdrawal requires proof that the defendant changed his intent about participating in the agreement. If the evidence only shows that the defendant stopped activities in furtherance of the conspiracy or stopped cooperating with the conspiracy or merely was inactive for a period of time, that is not enough to find that the defendant withdrew from the conspiracy.

You should understand that the defendant has the burden of proving by a preponderance of the evidence that he withdrew from the conspiracy before August 9, 2012. You should understand that preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not. Now, ladies and gentlemen, if you put the credible evidence that is favorable to the defendant and the credible evidence that is favorable to the government on opposite sides of a balance scale, the scale would have to tip somewhat on the defendant's side in order for you to find that the defendant is not guilty because of his withdrawal on August 9 of 2012.

(Aug. 7 Tr. 56-57, ECF No. 947.)

By finding Defendant guilty of both conspiracy counts, the jury implicitly determined that he did not prove his withdrawal from the conspiracy. Defendant nevertheless argues that there was not enough evidence showing his involvement in the conspiracy after August 9, 2012. Defendant's argument is not supported by the law or the factual record.

Defendant's argument reveals his misunderstanding about the law of conspiracy. "[A] defendant is liable for his own and his co-conspirators' acts for as long as the conspiracy continues unless he withdraws prior to the conspiracy's termination." *United States v. Kushner*, 305 F.3d 194, 198 (3d Cir. 2002); *Smith v. United States*, 568 U.S. 106, 107 (2013) ("Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws."). In *Smith*, the Supreme Court explained the rationale for a defendant's continuing liability in a conspiracy:

Having joined forces to achieve collectively more evil than he could accomplish alone, [the defendant] tied his fate to that of the group. His individual change of

heart (assuming it occurred) could not put the conspiracy genie back in the bottle. We punish him for the havoc wreaked by the unlawful scheme, whether or not he remained actively involved. It is his withdrawal that must be active, and it was his burden to show that.

*Smith*, 568 U.S. at 114.

Here, Defendant failed to convince the jury that he actively withdrew from the conspiracy. Therefore, he is liable for his acts and the acts of his co-conspirators for as long as the conspiracy continued, which in this case, was until May 2016. Defendant contends that there is no evidence in the record showing that, after August of 2012, he possessed or packaged marijuana or was otherwise involved in the conspiracy. However, Defendant's limited involvement in the marijuana distribution activities is of no consequence. "Passive nonparticipation in the continuing scheme is not enough to sever the meeting of minds that constitutes the conspiracy." *Id.* at 112. Rather, "to avert a continuing criminality there must be affirmative action to disavow or defeat the purpose of the conspiracy." *Id.* (citation and internal quotation marks omitted). The jury found that Defendant failed to prove an affirmative action constituting his withdrawal. As a result, Defendant is liable for the acts of his co-conspirators until the conspiracy ended in 2016, even if there is no evidence of his active participation in the conspiracy. *Id.*

Although the Government was under no obligation to prove Defendant's active participation in the conspiracy after August 2012, the record contains more than sufficient evidence that Defendant did, in fact, continue to be involved. Special Agent Kevin Lewis testified that, on three occasions, Defendant was seen on poll camera footage entering and leaving a known drug "stash house" for the organization on West Harold Street in West Philadelphia. Specifically, Defendant was observed on the poll camera footage on November 7, 2014, March 16, 2015, and June 5, 2015. (Aug. 5 Tr. 73-83, 89-105, 110-13, ECF No. 945.)

During each of these occasions, Defendant is observed with co-conspirator Norris Jackson, who is subsequently surveilled engaging in money or marijuana exchanges with truck driver Vernon Addison. (*Id.*) Agent Lewis also testified about the numerous telephone contacts between Defendant and Norris Jackson on significant dates of known marijuana exchanges. (*See, e.g.*, Aug. 5 Tr. 58-64.) In addition, cooperating co-conspirator James Estelle, who was a “major player” in this marijuana distribution ring out of Arizona from 2012 until his arrest in 2017, testified that Defendant—nicknamed “Mal”—was a “customer” of his marijuana business out of Phoenix, and that Defendant, together with other co-conspirators, came to visit him in Phoenix in 2014 or 2015 in relation to the drug business. (July 31 Tr. 166, ECF No. 943; Aug. 1 Tr. 155, 159-63. ECF No. 944.) Flight records corroborate Estell’s testimony that Defendant traveled to Phoenix during this time frame. Based upon this evidence, any reasonable juror could have found that Defendant participated in the conspiracy after August 2012. Accordingly, Defendant’s Motion for an Acquittal on the basis of insufficient evidence must be denied.

2. *The Government Did Not Have to Prove 1,000 Kilograms was Distributed in a Single Unit*

Defendant also argues that his convictions should be set aside because the Court did not instruct the jury that the Government must prove that Defendant conspired to distribute 1,000 kilograms of marijuana in a “single unit” as opposed to aggregating amounts of the drug over the duration of the conspiracy. The Court instructed the jury with respect to their determination of drug quantities as follows:

Now, ladies and gentlemen, the jury interrogatory for Count 1 asks that you determine the weight or quantity of the marijuana which was involved in the conspiracy. The first question asks whether you unanimously find beyond a reasonable doubt that the weight or quantity of the marijuana that was involved in the conspiracy was 1,000 kilograms or more. In making this decision, you should consider all of the marijuana that the defendant himself actually possessed with the intent to distribute or distributed or intended to distribute and all of the

marijuana that the members of the conspiracy possessed with the intent to distribute, distributed or intended to distribute and which was reasonably foreseeable to the defendant.

(Aug. 7 Tr. 48-49.)

Defendant contends that this instruction was in error because it did not require the jury to find that Defendant specifically possessed 1,000 kilograms or more at one time. Defendant relies on the recent case, *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019), which held that the quantities from separate drug transactions are not aggregated to determine the quantity for a substantive drug possession charge under 21 U.S.C. § 841(a). *Id.* at 759-61. The defendant in *Rowe* was charged with possession with intent to distribute 1,000 grams or more of heroin. The government did not present evidence that 1,000 grams was ever possessed in “a single unit,” and instead attempted to prove its case by combining several distributions. *Id.* at 756. The Third Circuit rejected the Government’s aggregation attempts and reasoned that, although possession with intent to distribute is a “continuing offense,” that offense “begins when a defendant has the power and intention to exercise dominion and control over all 1000 grams, and ends when his possession is interrupted by a complete dispossession . . . .” *Id.*

Defendant’s reliance on *Rowe* is misplaced. Most notably, *Rowe* involved a possession with intent to distribute charge, and not a drug conspiracy charge. Defendant’s argument “confuses the relevance of evidence for a substantive offense, versus that for a conspiracy offense, which requires no completed act.” *United States v. Whitted*, 436 F. App’x 102, 104 (3d Cir. 2011). The rationale underlying the Third Circuit’s decision in *Rowe* to forbid aggregating separate drug transactions to determine the quantity element of a substantive possession charge does not translate to the law of conspiracy. A conspiracy is a single unified offense. Under the law of conspiracy, “the jury [is required] to find only the drug type and quantity element as to the

conspiracy as a whole, and not the drug type and quantity attributable to each co-conspirator.” *United States v. Phillips*, 349 F.3d 138, 142-43 (3d Cir. 2003); *see also United States v. Perez*, 280 F.3d 318, 353 (3d Cir. 2002) (“[T]he defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.” (quoting U.S. Sentencing Guidelines Manual § 1B1.3(a)(1) cmt. n. 2)). With these long-standing principles of conspiracy law in mind, the Third Circuit has rejected Defendant’s argument. *See United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003) (holding that a Sixth Circuit case’s “holding disallowing aggregation of multiple drug transactions for § 841(b) purposes did not extend to multiple drug transactions as part of a conspiracy”); *see also, e.g., United States v. Kendrick*, No. 17-143-4, 2019 WL 2248631, at \*1-2 (W.D. Pa. May 17, 2019) (rejecting defendant’s argument that *Rowe* applies to drug conspiracy count for purposes of determining quantity of drugs involved in conspiracy); *United States v. Perrin*, No. 14-205-2, 2019 WL 3997418, at \*2-4 (W.D. Pa. Aug. 23, 2019) (same).<sup>1</sup>

We note that even if *Rowe* did change the law as it applies to drug conspiracy charges, Defendant suffered no prejudice here. The Government presented evidence that Defendant possessed over 1,000 kilograms of marijuana in a single unit. Specifically, on March 25, 2006, Defendant was arrested when law enforcement discovered 2,332 pounds of marijuana (1,058 kilograms) hidden in a basement in West Philadelphia. (July 29 Tr. 68-70, ECF No. 941; Gov. Ex. 302.) When Defendant was arrested, police officers recovered a drug tally sheet on him. (July 29 Tr. 65.) Defendant does not dispute that he was involved in this drug transaction. (Aug. 6 Tr. 65-67.) Defendant’s Motion for acquittal must therefore be denied.

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<sup>1</sup> The case *United States v. Kendrick*, is currently on appeal at the Third Circuit. *See United States v. Kendrick*, Case No. 19-2282 (3d Cir.).

## **B. Motion for a New Trial**

Defendant raises two arguments in support of his request for a new trial, both of which relate to comments made by Government counsel during his closing arguments. First, Defendant argues that Government counsel committed misconduct by opining on Defendant's credibility. Second, Defendant contends that Government counsel misspoke about the quantity of marijuana the jury was required to find in order to determine that a special interrogatory was met. We address each argument.

### *1. Prosecutor's Comment About Defendant's Credibility Was Not Error*

Defendant requests a new trial based on what he contends was prosecutorial misconduct during closing arguments. Specifically, during the Government's rebuttal, Government counsel made the following statement about Defendant's testimony, which was interrupted by Defense counsel's objection:

[Government]: We also certainly didn't put him up to testifying in this case and telling you a story, a bogus story about things –

[Defense counsel]: Objection, Your Honor

(Aug. 7 Tr. 5, ECF No. 948.) The Court overruled Defense counsel's objection.

Defendant contends that the statement about a "bogus story" was inappropriate because it represented Government counsel's opinion on the veracity of Defendant's testimony.

Prosecutors generally may not offer an opinion on the credibility of a defendant if it implies that the opinion was informed by the prosecutor's personal belief and not evidence contained in the record. *See United States v. Zehrbach*, 47 F.3d 1252, 1265 n.11 (3d Cir. 1995); *Gov't of Virgin Islands v. Joseph*, 770 F.2d 343, 349 (3d Cir. 1985). However, even if an improper comment was made, "[p]rosecutorial misconduct does not always warrant the granting of a mistrial." *Id.* at 1265; *see also United States v. Hasting*, 461 U.S. 499, 508-09 (1983) ("[T]here can be no such

thing as an error-free, perfect trial.”). A new trial will be granted, however, when the prosecutor’s misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted).

When determining whether to grant a new trial based on a prosecutor’s remarks during closing argument, courts in the Third Circuit employ a harmless error analysis. *United States v. Gambone*, 314 F.3d 163, 177 (3d Cir. 2003). Under this standard, “[i]mproper statements of a constitutional magnitude must be harmless beyond a reasonable doubt, while statements of a non-constitutional magnitude need only leave us with a sure conviction that they did not prejudice the defendant.” *United States v. Stephens*, 612 F. App’x 107, 109 n.5 (3d Cir. 2015); *see also United States v. Molina-Guevara*, 96 F.3d 698, 703 (3d Cir. 1996). If the remarks regarding a defendant’s guilt or credibility are based on information outside of the record, it constitutes “reversible error per se.” *United States v. Swinehart*, 617 F.2d 336, 339 (3d Cir. 1980). However, if the remarks are based on evidence in the record, a new trial is warranted only if the defendant was prejudiced by the remarks. *Id.*; *see also United States v. Gatto*, 995 F.2d 449, 453 (3d Cir. 1993).

Defendant does not allege that Government counsel’s remarks were “of a constitutional magnitude.” *Stephens*, 612 F. App’x at 109. Nor did Government counsel’s remarks address information outside of the evidentiary record. Rather, the comment related to Defendant’s defense in this case. Therefore, a new trial will only be granted if Government counsel’s remarks, “taken in the context of the trial as a whole, prejudiced” Defendant. *United States v. Rich*, 326 F. Supp. 2d 670, 681 (E.D. Pa. 2004). Courts consider three factors when determining if improper comments are prejudicial: “the scope of the improper comments in the overall trial

context, the effect of any curative instructions given, and the strength of the evidence against the defendant.” *United States v. Mastrangelo*, 172 F.3d 288, 297 (3d Cir. 1999).

With regard to the first factor—the scope of the comment in the overall trial context—Government counsel’s comment that Defendant’s story was “bogus” came in the middle of the Government’s summary of all of the evidence in this case. Government counsel’s statement was immediately interrupted by Defense counsel’s objection. Government counsel then proceeded to outline the evidence presented during the trial that served to undermine and contradict Defendant’s testimony. (Aug. 6 Tr. 185-210.) The comment was brief in the context of an eight-day trial, did not involve a false assertion of evidence or any information outside of the record. Rather, the comment—although representative of Government counsel’s opinion on the veracity of Defendant’s defense—was minor when placed in context of the entire closing argument, which thoroughly outlined all of the evidence that pointed to Defendant’s guilt, and all of the evidence that negated the testimony Defendant provided.

With regard to the second factor—the effect of any curative instructions given—because the objection was overruled, no specific curative instruction was given at the time the comment was made. However, other remedial jury instructions were given. After the closing arguments, the Court instructed the jury that it should examine and evaluate Defendant’s testimony as it would the testimony of any other witness. The jury was also instructed—when the trial began and after the closing arguments of counsel—to consider only evidence seen and heard in the courtroom, and that the statements and arguments of the lawyers are not evidence.

Finally—as to the third factor, the strength of evidence against Defendant—we have already discussed above that the evidence in this case was substantial and “clearly support[ed] the government’s burden of proving” Defendant’s guilt. *Zehrbach*, 47 F.3d at 1267. Defendant

did not dispute that he was part of this conspiracy. Indeed, he was arrested for his involvement in the largest seizure of marijuana associated with the conspiracy. Defendant's defense was that his involvement ended and that he withdrew from the conspiracy. The Court instructed the jury with regard to this defense and that the burden was on Defendant to show that he affirmatively withdrew from the conspiracy. The jury did not believe that Defendant withdrew from the conspiracy. After seven days of testimony from 15 Government witnesses, and after observing hours of video and audio recordings and over 300 exhibits, the jury found Defendant guilty of the drug conspiracy with which he was charged. We are satisfied that Defendant did not suffer prejudice from Government counsel's remarks. *See Joseph*, 770 F.2d at 349 (finding prosecutor's comments during closing argument about the defendant's credibility and that defendant's story was "absolutely ridiculous" and "incredible" were not reversible error where comments were limited to evidence of record, the court instructed the jury that statements by attorneys are not evidence, and the evidence of the defendant's guilt was "ample"). Accordingly, Defendant's request for a new trial based on Government counsel's remarks during rebuttal closing argument will be denied.

2. *Prosecutor's Misstatement about Drug Calculations Was Not Error*

Finally, Defendant argues that he is entitled to a new trial because, during Government counsel's closing argument, counsel misstated the required drug quantities that the jury needed to find. The jury had to determine the amount of marijuana attributable to the conspiracy in a special interrogatory—a determination intended to aid the Court in sentencing. Government counsel attempted to convert the kilograms of marijuana to pounds, and in doing so, stated an inaccurate amount. Specifically, Government counsel stated: "There are two charges that I need to prove to you: Conspiracy to traffic over 1,000 kilograms of marijuana or, roughly, if we do

the math, that's only 454 pounds of marijuana." (Aug. 6 Tr. 187.)<sup>2</sup> This was a miscalculation. The amount of 1,000 kilograms of marijuana actually converts to roughly 2,205 pounds of marijuana. Defendant argues that this misstated quantity was confusing to the jury and rendered unreliable the amount for which the jury found Defendant responsible.

Because Defendant did not object to Government counsel's mistake at the time it was made, his objection is subject to a plain error standard. "In order to demonstrate prosecutorial misconduct under a plain error standard, the review must reveal egregious error or a manifest miscarriage of justice." *United States v. Brennan*, 326 F.3d 176, 182 (3d Cir. 2003) (internal quotation marks and citations omitted). Error is plain if it is "clear" and it "affects the defendant's substantial rights." *United States v. Nappi*, 243 F.3d 758, 768 (3d Cir. 2001). The comment at issue must be evaluated in light of the entire closing argument. *Gov't of Virgin Islands v. Edwards*, 233 F. App'x 167, 173 (3d Cir. 2007) (citation omitted).

Government counsel's miscalculation did not affect Defendant's substantial rights. Most significantly, the Government presented evidence that over 7,500 pounds of marijuana were seized by law enforcement over the course of the conspiracy. This included the 2,332 pounds of marijuana (1,058 kilograms) that were seized in West Philadelphia in 2006. (July 29 Tr. 68-70; Gov. Ex. 302.) Defendant was present during this seizure and was taken into custody. (July 29 Tr. 70-71.) The police officers recovered a drug tally sheet on him when he was arrested. (*Id.* at 65.) The seizure was touted in a Philadelphia newspaper article as the largest marijuana bust in the City's history. (July 31 Tr. 88-89; 96-97.) This seizure in and of itself exceeded the amount the jury was asked to find in the special interrogatory.

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<sup>2</sup> Government counsel again refers to the miscalculation later during his closing argument, when he begins to summarize the evidence: "Let's look at some of the evidence. Well, we all know that we far surpass the 454-pound threshold. We know that in the beginning of the conspiracy, in 2006, 2,300 pounds of marijuana were seized from the basement in West Philly. Largest marijuana seizure in Philadelphia history." (Aug. 6 Tr. 189.)

The Government also presented evidence of other large quantities of marijuana seized by law enforcement during the conspiracy. Specifically, in 2006, approximately 655 pounds were seized in Arizona from Kristy Bentley, a woman who agreed to transport loads of marijuana and money for the organization. (July 31 Tr. 208-11.) In 2006, approximately 2,117 pounds of marijuana were seized from truck driver Levy Ford when he was transporting a load for the organization in Arkansas. (July 30 Tr. 8, 12-13, 42; Gov. Ex. 34A.) Approximately 730 pounds were seized from Scott Savage, a truck driver, in New Mexico. (Aug. 2 Tr. 44, ECF No. 945; July 31 Tr. 47; July 30 Tr. 171-72.) In 2012, approximately 634 pounds were seized from truck driver Christopher Williams in Missouri. (July 30 Tr. 236, ECF No. 942; Aug. 1 Tr. 26, 28-29, 30-32, 50.) In 2013, approximately 911 pounds were seized from truck driver Ricki Purnell in Arizona. (July 31 Tr. 227, 243; Aug. 1 Tr. 4; Gov. Ex. 54p.) Approximately 180 pounds of marijuana were seized from truck driver Kevin Willoughby in Virginia in 2014. (July 31 Tr. 138; Aug. 2 Tr. 27.) Also, truck driver Vernon Addison testified that he was arrested in May of 2016 for transporting 282 pounds of marijuana for the organization in Virginia. (Aug. 2 Tr. 47-48, 90, 154-55; Gov. Ex. 67cc.)

Finally, these amounts—totaling over 7,500 pounds of marijuana—represent the drugs attributable to this drug conspiracy that were *actually seized*. Evidence was admitted during trial that numerous other transactions took place that did not result in seizure and that “hundreds and hundreds of pounds of marijuana” were known to exist that were not seized by law enforcement. (Aug. 2 Tr. 199-202.) Indeed, multiple truck drivers testified that prior to being caught, they had transported many large loads of marijuana in amounts exceeding 100 pounds.

The evidence at trial showed that this drug conspiracy involved massive quantities of marijuana. The jury was asked to determine the weight or quantity of marijuana involved in the

conspiracy. Specifically, the Court instructed them that they must “unanimously find beyond a reasonable doubt that the weight or quantity of marijuana that was involved in the conspiracy was 1,000 kilograms or more” and that they should consider all the marijuana that Defendant actually possessed with intent to distribute in addition to all marijuana that members of the conspiracy possessed with intent to distribute. (Aug. 7 Tr. 48-49.) The jury found unanimously that the amount exceeded 1,000 kilograms or more. During the trial, the jury heard evidence about amounts that far exceeded the threshold of 1,000 kilograms (or 2,205) pounds. The fact that Government counsel misstated the number of pounds did not in any way prejudice Defendant.

In addition, the Court instructed the jury that what the attorneys say is not evidence. After the closing arguments, the jurors were specifically instructed that they had to make their decision “based only on the evidence that they saw and heard in [the] courtroom” and that “the statements and the arguments of counsel are not evidence.” (Aug. 7 Tr. 19-20.) The jury was provided with a copy of the Court’s instructions when they began their deliberations. (*Id.* at 63.) When we evaluate Government counsel’s mistake in light of his entire closing argument, we are satisfied that his error did not affect Defendant’s substantial rights.

Defendant’s request for a new trial on this basis will be denied.

**III. CONCLUSION**

For the foregoing reasons, Defendant's Motion for Acquittal and Motion for New Trial will be denied.

An appropriate Order follows.

**BY THE COURT:**

A handwritten signature in black ink, appearing to read 'R. Surrick', is written over a horizontal line.

**R. BARCLAY SURRICK, J.**

