

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MICHAEL KATZIN	:	NO. 11-226-2
	:	

MEMORANDUM

PRATTER, J.

APRIL 18, 2016

Five years ago, a grand jury returned a two-count indictment charging Michael Katzin, and his brothers, Harry and Mark Katzin, with one count of pharmacy burglary and one count of possession with intent to distribute controlled substances. On September 17, 2015, Michael Katzin was charged in a superseding indictment with one count of conspiracy to commit pharmacy burglary in violation of 18 U.S.C. § 2118(d), one count of conspiracy to possess with the intent to distribute controlled substances in violation of 21 U.S.C. § 846, one count of pharmacy burglary in violation of 18 U.S.C. § 2118(b); and one count of possession with the intent to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1). Following a jury trial this past January, Mr. Katzin was convicted of all four counts. He is now seeking a judgment of acquittal under Federal Rule of Criminal Procedure 29 as to Counts I and II (the conspiracy counts), and he claims he should have a new trial under Federal Rule of Criminal Procedure 33 as to Counts III and IV. For the reasons discussed below, the Court will deny the motion in its entirety.

I. BACKGROUND

Michael Katzin was arrested in the early morning hours of December 16, 2010, along with his two brothers, Harry and Mark Katzin. His arrest followed the burglary of a Rite Aid pharmacy in Hamburg, Pennsylvania. The three brothers were stopped on Pennsylvania I-76 in

Harry Katzin's 2001 Dodge Caravan, driving away from Hamburg and toward Philadelphia with certain tools, stolen pharmaceutical drugs and other merchandise which was later identified as having been taken from the Hamburg Rite Aid. Both of Mr. Katzin's brothers pleaded guilty to charges related to the burglary.

At trial, the Government argued that Mr. Katzin remained in the van and acted as a look-out while his two brothers entered and burglarized the Hamburg Rite Aid. Mr. Katzin did not dispute that the pharmacy was burglarized by his two brothers, but claimed that he was unaware of the crime, having been rendered unconscious due to his abuse of prescription Xanax. To disprove Mr. Katzin's allegation that he was unconscious throughout the robbery, the Government introduced evidence indicating that Mr. Katzin was not asleep as he claimed, including cell phone logs showing that calls were placed between Mr. Katzin's phone and the phone of one of his brothers, during the commission of the burglary.

In addition to evidence regarding the December 16, 2010 Hamburg burglary, however, at trial the Government also introduced evidence and testimony regarding an incident which took place in Feasterville-Treose, Pennsylvania, several weeks earlier, on November 18, 2010, adjacent to a different Rite Aid pharmacy. In the early morning hours of November 18th, a Southampton Township police officer noticed Harry Katzin's van parked behind the Feasterville-Treose shopping center where the Rite-Aid pharmacy was located. A nearby motorcycle dealership had been recently burglarized and so, suspicious of their presence at that time of night, the officer questioned the three individuals in the van: Michael Katzin, his brother Harry, and a third individual. The three indicated they had dropped a friend at his home nearby and then stopped behind the shopping center to allow Michael Katzin to urinate. The officer also asked to search the vehicle, to which the driver, Harry Katzin, acquiesced. The search uncovered various tools, similar to the ones later used in the Hamburg burglary. When asked, however,

Harry Katzin indicated that they were his tools and that he used them in his work as an electrician. Seeing nothing else of note in the car, the officer let Michael, Harry and the third individual to go on their way.

In the September 2015 superseding indictment against Michael Katzin, the Government alleged that the defendant's presence at the Feasterville-Trevoise Rite Aid consisted of an overt act in furtherance of a conspiracy to both burglarize pharmacies and possess with the intent to distribute controlled substances. Before trial, Mr. Katzin filed a motion seeking to strike allegations from the superseding indictment regarding the Feasterville-Trevoise incident. *See* Doc. No. 200. The Court denied that motion, explaining that a motion alleging a defect in the indictment was not an appropriate vehicle for challenging the sufficiency of the Government's evidence. Doc. No. 225. At the close of the Government's case, Mr. Katzin's counsel made an oral motion for acquittal under Rule 29, again arguing that evidence of the Feasterville-Trevoise incident has been improperly admitted. The Court denied the motion, finding that the Government had presented sufficient evidence of a conspiracy to both burglarize pharmacies and possess with the intent to distribute controlled substances in order to sustain a conviction on both Counts I and II of the indictment.

II. STANDARD OF REVIEW

In reviewing a Rule 29 motion, the Court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "The essence of a Rule 29 motion for judgment of acquittal is a challenge by the moving defendant to the sufficiency of the evidence presented against him." *United States v. Williams*, No. 13-CR-00014, 2015 WL 224380, at *1 (E.D. Pa. Jan. 14, 2015); *accord United States v. Carter*, 966 F. Supp. 336, 340 (E.D. Pa.1997). "A motion for judgment of acquittal

under Rule 29 of the Federal Rules of Criminal Procedure may only be granted where the evidence is insufficient to sustain the conviction” *United States v. Henry*, No. CRIM.A. 06-33-01, 2007 WL 2458555, at *2 (E.D. Pa. Aug. 24, 2007) (citing *United States v. Gonzales*, 918 F.2d 1129, 1132 (3d Cir. 1990)). The Court must evaluate all the evidence in the light most favorable to the Government, and draw all inferences in favor of the Government. *Henry*, 2007 WL 2458555, at *2 (citing *United States v. Wasserson*, 418 F.3d 225, 237 (3d Cir. 2005)). “[The] Court must affirm the convictions if a rational trier of fact could have found the defendant[] guilty beyond a reasonable doubt and the convictions are supported by substantial evidence.” *Gonzalez*, 918 F.2d at 1132 (citing *Government of Virgin Islands v. Williams*, 739 F.2d 936, 940 (3d Cir. 1984)).

Whether to grant a motion for a new trial lies within the district court’s discretion. *Henry*, 2007 WL 2458555, at *2 (citing *United States v. Polidoro*, 1998 WL 634921, at *4 (E.D. Pa. Sept. 16, 1998)). “Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a); *United States v. Crim*, No. 06-CR-00658-1, 2008 WL 2764974, at *3 (E.D. Pa. June 11, 2008), *aff’d*, 451 F. App’x 196 (3d Cir. 2011). “Although the standard of review for a motion for a new trial is broader than that for acquittal, motions for new trials are disfavored and are only granted with great caution and at the discretion of the trial court. *Crim*, 2008 WL 2764974, at *3 (citing *United States v. Martinez*, 69 Fed. App’x 513, 516 (3d Cir.2003)). The court may grant a new trial if it finds errors occurred during trial and that it is “reasonably possible” that these errors “substantially influenced the jury’s decision.” *Id.* (citing *United States v. Copple*, 24 F.3d 535, 547 n. 17 (3d Cir. 1994)).

III. MOTION FOR JUDGMENT OF ACQUITTAL

Mr. Katzin first argues that the Court should enter a judgment of acquittal on Counts I and II of the superseding indictment, related to the two charged conspiracies. His arguments fail because, rather than address the standard for acquittal under Rule 29, he chooses to reargue his previously unsuccessful pretrial motion to strike allegations from the superseding indictment. *United States v. Young*, No. CRIM.A. 05-CR-307, 2008 WL 58878, at *1 (E.D. Pa. Jan. 2, 2008), *aff'd*, 334 F. App'x 477 (3d Cir. 2009); *United States v. Rivers*, 406 F. Supp. 709, 711 (E.D. Pa. 1975), *aff'd*, 544 F.2d 513 (3d Cir. 1976) (holding that Rule 29 applies only to challenging the sufficiency of the evidence, not to challenge due process or jury instructions). In both the briefing and at oral argument, defense counsel failed to explain how the evidence presented at trial, taken in the light most favorable to the prosecution, could not establish the existence of a conspiracy to either engage in pharmacy burglary or possess narcotics with the intent to distribute.

Mr. Katzin asserts that the inclusion of Counts I and II in the superseding indictment by the Government was done without a “good faith basis in fact to make the allegations in support of the conspiracies alleged in Counts I and II” and motivated by the Government’s desire to avoid exclusion of evidence regarding the Feasterville-Trevoise incident under Federal Rule of Evidence 404(b). Under this theory, the superseding indictment “magically transformed”¹ the otherwise excludable evidence of the Feasterville-Trevoise incident into admissible evidence intrinsic to the counts alleged against Mr. Katzin. This assertion is presented without authority and is contrary to the significant weight of evidence presented at trial.

As a preliminary matter, the Government was required to prove the commission of an overt act in furtherance of *only* the conspiracy to engage in pharmacy burglary; the Government

¹ Zealousness in the defense of one’s client is something which should be commended, particularly in the context of representing a criminal defendant whose freedom is at stake. Hyperbole, on the other hand, can detract from proper argument and, most often, highlights weaknesses.

was not required to establish an overt act with regards to the conspiracy to possess controlled substances with intent to distribute. *United States v. Bey*, 736 F.2d 891, 895 (3d Cir. 1984); *United States v. Kale*, No. 09-264-3, 2010 WL 1718291, at *4, n.3 (E.D. Pa. Apr. 26, 2010), *aff'd*, 445 F. App'x 482 (3d Cir. 2011) (“[N]o overt act requirement for drug conspiracies under Controlled Substances Act.”). Therefore, the argument attacking the Government’s good faith basis for asserting that the Feasterville-Trevoise incident constituted an unlawful act in furtherance of the conspiracy could only be relevant to Count I, not Count II.

Moreover, this entire line of argument is premised on the faulty assertion that in order to charge an overt act in furtherance of a conspiracy, the Government must have a good faith basis to claim the act was independently unlawful. The defendant argues that the superseding indictment “might have been permissible if the government had an adequate factual basis that a crime had been committed at Trevoise, or at a minimum, an adequate factual basis to claim that a conspiracy to burglarize the Hamburg pharmacy started on the day of the Trevoise Incident.”² Def. Br. at 7 (Doc. No. 248). As stated previously, however, an overt act in furtherance of a conspiracy need not itself be independently unlawful. *See* Doc. No. 245; *United States v. Wright*, 936 F. Supp. 2d 538, 553 (E.D. Pa. 2013) (“The overt act itself need not be criminal.”)(citing *United States v. Montour*, 944 F.2d 1019, 1026 (2d Cir. 1991); *United States v. Palmeri*, 630 F.2d 192, 203–04 (3d Cir. 1980)). “As long as the act follows and tends toward the accomplishment of the plan or scheme and is knowingly done in furtherance of some object or

² At the hearing, defense counsel’s arguments implied that the indictment obligated the Government to establish at trial that the conspiracy itself started on November 18, 2010, in conjunction with the Feasterville-Trevoise incident. This argument notably lacks authority. There is no requirement that the Government prove that the conspiracy started on the day of the Feasterville-Trevoise incident. The indictment did not allege the conspiracy was necessarily conceived on November 18th, only that the first overt act in furtherance of the conspiracy occurred on that day. Moreover, “[u]ncertainty regarding a conspiracy’s beginning and ending dates does not render an indictment fatally defective so long as overt acts alleged in the indictment adequately limit the time frame of the conspiracy.” *United States v. Rawlins*, 606 F.3d 73, 79 (3d Cir. 2010) (citing *United States v. Forrester*, 592 F.3d 972, 983 (9th Cir.), *opinion withdrawn and superseded*, 616 F.3d 929 (9th Cir. 2010)). While the overt acts in November and December 2010 provided a temporal bound for the allegedly unlawful conduct, the Government did not need to prove the conspiracy was formed on November 18th specifically.

purpose of the conspiracy charged in the indictment, it satisfies the overt act requirement.” *United States v. Blackwell*, 954 F. Supp. 944, 958 (D.N.J. 1997) (citing *Palmeri*, 630 F.3d at 200-01).

Therefore, whether the Government had a good faith basis to believe that a crime had occurred at Feasterville-Trevoise is irrelevant—rather the question is whether the Government had a good faith basis to believe that the defendant’s presence at the Feasterville-Trevoise shopping center constituted an overt act in furtherance of a conspiracy to burglarize pharmacies. And in light of the evidence presented at trial, the Court finds that the Government had such a good faith basis. Given the proximity in time between the Hamburg burglary and the Feasterville-Trevoise incident, as well as similarities between the two events, such as the defendant’s presence near a suburban Rite Aid pharmacy at a significant distance from his home in Philadelphia in the late night/early morning hours with certain tools which could facilitate the commission of a burglary and accompanied by two other individuals—including his brother Harry with whom he was later arrested—the Court cannot say that the Government lacked a good faith basis to include the Feasterville-Trevoise incident as an overt act in furtherance of the same conspiracy to burglarize pharmacies which culminated in the defendant’s arrest following the Hamburg burglary. Michael Katzin’s uncited and unsupported assertions to the contrary are not compelling.

The defendant’s conduct vis-à-vis the Feasterville-Trevoise pharmacy, if viewed only in isolation, may very well have not risen to the level of an attempt to burglarize. But an attempt to burglarize that pharmacy was not charged and as such need not have been proven. When viewed in the context of the fact that the brothers were arrested a month later for burglarizing a Rite Aid under circumstances largely similar to those evident on November 18th, their presence at the Rite Aid on November 18th could reasonably be considered an act in furtherance of an unlawful

agreement to burglarize pharmacies. “An overt act is any act performed by any conspirator for the purpose of accomplishing the objectives of the conspiracy” and therefore, an otherwise innocuous act such as visiting a possible or anticipated crime scene, can be an overt act in furtherance of the conspiracy. *See United States v. McKee*, 506 F.3d 225, 243 (3d Cir. 2007); *United States v. Manetti*, 323 F. Supp. 683, 687 (D. Del. 1971). For example, in *Manetti*, the district court noted that a properly charged overt act could consist of something as simple as traveling from a specific point in Delaware to a specific point in Maryland.

Even if the Court was to find that the evidence adduced at trial failed to establish the Feasterville-Trevese incident constituted an overt act in furtherance of a conspiracy to commit pharmacy burglary, “the Government is under no obligation to prove every overt act alleged.” *United States v. Adamo*, 534 F.2d 31, 38 (3d Cir. 1976) (citing *United States v. Williams*, 474 F.2d 1047 (5th Cir. 1973); *United States v. Fellabaum*, 408 F.2d 220, 223 (7th Cir.), *cert. denied sub nom. Pyne v. United States*, 396 U.S. 818, 90 S.Ct. 55, 24 L.Ed.2d 69 (1969)). The Third Circuit has found that proof of an overt act *not alleged* in the complaint may be sufficient to uphold a conviction. *Adamo*, 534 F.2d at 38 (“Consequently, we think the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance.”) (citing *United States v. Negro*, 164 F.2d 168, 173 (2d Cir. 1947)). Here, there were other overt acts in furtherance of the alleged conspiracy proven at trial. And the Government is only required to prove a single overt act in furtherance of the conspiracy, and this act may have been taken by his co-conspirators and not Michael Katzin himself. *See McKee*, 506 F.3d at 243. Ultimately, viewed in the light most favorable to the prosecution, the evidence related to the Hamburg burglary alone could very well establish the existence of an agreement between Mr. Katzin and his two brothers to engage in pharmacy burglary as well as the overt act in furtherance of that

conspiracy. Mr. Katzin does not challenge this evidence. For all these reasons, the Rule 29 motion fails.

IV. MOTION FOR NEW TRIAL

The motion for a new trial is premised upon the Court granting the Rule 29 motion which the Court has found meritless. A court may grant a motion for new trial if it finds errors occurred during the trial and these errors, “when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial.” *United States v. MacInnes*, 23 F. Supp. 3d 536, 541 (E.D. Pa. 2014) (citing *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir.1993); see Fed. R. Crim. P. 33; *United States v. Silveus*, 542 F.3d 993, 1004 (3d Cir. 2008). The Court, however, finds no errors at trial. The only basis articulated by the defendant for granting a new trial on Counts III and IV is the alleged “prejudicial spillover” which the defendant contends resulted from the improper admission of evidence regarding the Feasterville-Trevose incident. As the Court has found that there was no error in allowing this evidence, there was no prejudicial spillover. The Court therefore denies the motion for a new trial on Counts III and IV.

V. CONCLUSION

For the above reasons the Court will deny the motion for a judgment of acquittal as to Counts I and II and a new trial as to Counts III and IV.

* * *

An appropriate Order reflecting the above will follow.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge

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ORDER

AND NOW, this 18th day of April, 2016, upon consideration of the defendant Michael Katzin’s motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 and motion for a new trial pursuant to Federal Rule of Criminal Procedure 33 (Doc. No. 248), the Government’s response thereto (Doc. No 252), and oral argument on the motions held on February 25, 2016, it is hereby **ORDERED** that the defendant’s motions are **DENIED**.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge