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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
	:	
v.	:	NO. 02-403
	:	
	:	
KOURTNEY DWAYNE KAMA	:	

SURRICK, J. **DECEMBER 12, 2005**

MEMORANDUM & ORDER

Presently before the Court is Defendant's Motion For Judgment Of Acquittal Pursuant To Rule 29 And Motion For A New Trial Pursuant To Rule 33 Of The Federal Rules Of Criminal Procedure (Doc. No. 88) and the Government's response thereto (Doc. No. 91). For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

Defendant Kourtney Dwayne Kama was indicted on charges of distribution of cocaine base ("crack"), in violation of 21 U.S.C. § 841(a)(1) (Count 1); conspiracy to engage in the business of dealing in firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A) (Count 2); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e) (Count 3). (Indictment, Doc. No. 1.) On February 25, 2005, the jury returned a verdict of guilty on all counts. Defendant now seeks relief pursuant to Federal Rule of Criminal Procedure 29(c), asserting that the evidence was insufficient to support a guilty verdict on Count 2 because the Government failed to demonstrate that Defendant participated in a conspiracy. (Doc. No. 88.) Defendant also seeks a new trial pursuant to Federal Rule of Criminal Procedure 33,

alleging that the Government withheld favorable evidence from Defendant in violation of *Brady v. Maryland*, 373 U.S. 82 (1963).

II. LEGAL STANDARD

In considering a post-verdict motion for judgment of acquittal under Rule 29,[1] we 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 evidence must be examined as a whole in the light most favorable to the jury verdict, with the presumption that the jury properly evaluated credibility of the witnesses, found the facts, and drew rational inferences. *See United States v. Iafelice*, 978 F.2d 92, 94 (3d Cir. 1992). The verdict of the jury must be upheld unless, viewing the evidence in this fashion, no rational jury could have found the defendant guilty beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984).

Rule 33(a) of the Federal Rules of Criminal Procedure provides that the court may exercise its discretion to grant a defendant a new trial if required in the interest of justice.[2] Such

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[1] Federal Rule of Criminal Procedure 29(a) provides, in pertinent part: "[t]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The "sole foundation upon which a judgment of acquittal should be based is a successful challenge to the sufficiency of the government's evidence." *United States v. Frumento*, 426 F. Supp. 797, 802 n.5 (E.D. Pa. 1976) *quoted in United States v. Carter*, 966 F. Supp. 336, 340 (E.D. Pa. 1997); *see also* 2A Charles Alan Wright, *Federal Practice and Procedure* § 466 (3d ed. 2000) ("There is only one ground for a motion for a judgment of acquittal. This is that the evidence is insufficient to sustain a conviction of one or more of the offenses charged in the indictment or information." (internal quotation omitted)).

[2] Federal Rule of Criminal Procedure 33(a) provides, in pertinent part: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."

motions should be granted sparingly and only where the failure to do so would result in a miscarriage of justice. *See United States v. Copple,* 24 F.3d 535, 547 n.17 (3d Cir. 1994). In considering a motion under Rule 33, "[t]he court may weigh the evidence, but may set aside the verdict and grant a new trial only if it determines that the verdict constitutes a miscarriage of justice, or if it determines that an error at trial had a substantial influence on the verdict." *United States v. Enigwe*, Crim. A. No. 92-00257, 1992 WL 382325, at *4 (E.D. Pa. Dec. 9, 1992) (citation omitted). In contrast to motions for judgment of acquittal under Rule 29, a motion for a new trial does not require the court to view the evidence in the light most favorable to the government. Rather, the court must weigh the evidence and evaluate the credibility of witnesses. *See United States v. Rennert,* No. Crim. A. 96-51, 1997 WL 597854, at *17 (E.D. Pa. Sept. 17, 1997) (citing *United States v. Martinez,* 763 F.2d 1297, 1312 (11th Cir. 1985)).

III. LEGAL ANALYSIS

As discussed above, we consider Defendant's Rule 29 Motion viewing the evidence in the light most favorable to the prosecution. *See Iafelice,* 978 F.2d at 94. We must sustain the verdict unless "'no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt.'" *United States v. Stratton*, No. Crim. A. 99-326, 2000 WL 892840, at *3 (E.D. Pa. July 6, 2000) (quoting *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (citation omitted)). "The evidence need not unequivocally point to the defendant's guilt as long as it permits the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir. 1990).

Defendant argues that there is insufficient evidence to find him guilty on Count 2 of the indictment, which charged him with conspiracy to willingly engage in the business of dealing in firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A). (Doc. No. 88 at 1-2.) According to Defendant, the Government did not identify by name any other person who agreed to participate with Defendant in the unlawful conduct of dealing in firearms. (*Id.*) Defendant concludes that because he cannot conspire with himself or with a Government informant, the jury could not have found him guilty based upon the evidence and testimony presented at trial. (*Id.*)

Defendant concedes that an individual can be convicted of a conspiracy with unknown persons. (*Id.* at 4.) *See United States v. Obialo*, 23 F.3d 69, 72 (3d Cir. 1994) ("The failure of the government to be able to name and personally identify the other conspirator is not fatal to a conspiracy conviction."); *United States v. Allen*, 613 F.2d 1248, 1253 (3d Cir. 1980) ("'[T]he identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown.'") (quoting *Rogers v. United States*, 340 U.S. 367, 375 (1951)). However, Defendant argues that no evidence was presented independent of his statements to verify that overt acts were done by unknown co-conspirators. Defendant also argues that no evidence was presented that co-conspirators acknowledged or understood that Defendant intended to sell the weapons once he obtained them. (Doc. No. 88 at 4.)

The evidence presented at trial consisted of the testimony of four undercover police officers from the Reading Police Department, videotape surveillance of the contacts between the undercover police officers and Defendant, tape-recorded telephone conversations between Defendant and the undercover officers, and the testimony of a confidential informant who was

working for the Reading Police Department, who introduced Defendant to the undercover officers, and who was present during several of the transactions between Defendant and the officers. The evidence presented by the Government overwhelmingly established that Defendant sold .58 grams of crack cocaine to the undercover officers, sold the officers a .357 Magnum and ammunition, and offered to sell the officers additional firearms. As indicated above, Defendant does not contend that the evidence was insufficient to support the verdict of the jury on Count 1, which charged distribution of cocaine or on Count 3, which charged possession of a firearm by a convicted felon. Defendant argues only that this evidence was insufficient to support a verdict of guilty on Count 2, which charged conspiracy to sell firearms.

A brief review of the evidence reveals that the confidential informant, Warren Mayo, set up a meeting between Defendant and undercover officers Pasquale Leporace and Laz Kismal for June 22, 2001. The purpose of the meeting was for the undercover officers to purchase firearms from Defendant. (Feb. 22, 2005 Trial Tr. at 1.83.) Prior to the meeting, the undercover officers met with Detective Michael Gonbar of the Berks County District Attorney's office to develop a plan. (Feb. 23, 2005 Trial Tr. at 2.8-2.11.) It was determined that the undercover officers would act as drug dealers from out of the county who were seeking to buy firearms. (*Id.*) At approximately 6:17 PM on June 22nd, Leporace, Kismal, and the informant went to the 300 block of North 10th Street in Reading to meet with Defendant for the purpose of buying guns. (*Id.* at 2.13.-2.14.) The officers and Mayo met with Defendant but, as it turned out, Defendant did not have a firearm to sell the officers. (*Id.* at 2.15.-2.16.) Defendant did, however, have crack cocaine and after some haggling Defendant sold Leporace five packets of crack cocaine for $100. After that transaction was completed, Defendant advised Leporace that the person who

supplied him with the firearms was coming to Reading that evening and would be arriving at about 9:00 PM. Defendant gave Leporace his phone number and Leporace told Defendant that he would be in touch. (*Id.* at 2.20- 2.22.) Leporace decided that for safety reasons he would not contact Defendant that night. (*Id.* at 2.29-2.30.)

On June 28, 2001, undercover officers Felix Mateo and Edwin Santiago, along with confidential informant Mayo, went to the 300 block of North 10th Street for the purpose of meeting with Defendant to buy firearms. (*Id.* at 2.93-2.96.) Defendant got into Mateo's car and, with Defendant giving directions, they drove to the Glenside Housing Project in Reading. After they arrived at the project, Defendant and Mayo exited the vehicle and went to the rear of a home in the project. Mayo then returned to the vehicle and told Mateo that Defendant wanted to deal with Mateo alone. (*Id.* at 2.97-2.101.) When Mateo entered the kitchen of the home he saw Defendant standing next to a table. There was a .357 Magnum Ruger sitting on the table. Defendant told Mateo that the price of the gun was $400. (*Id.* at 2.102-2.105.) Mateo asked if there was any ammunition. Defendant said he would sell him the ammunition for $30. Mateo paid Defendant $430 and took the gun and the ammunition. (*Id.* at 2.107.) While this transaction was taking place, Mayo and Santiago were standing in the yard near the back door of the home. (*Id.* at 2.109.)

On two additional occasions, July 9, 2001 and July 11, 2001, Defendant met with undercover officers for the purpose of selling them guns. On both of these occasions Defendant apologized to the officers and advised them that he did not have the guns to sell. (*Id.* at 2.117-2.121.) Finally, on July 17, 2001, Detective Gonbar, posing as Mateo and Santiago's boss, called Defendant to talk about purchasing firearms. Defendant told Gonbar that he had a Tech-9 and

two sawed-off shotguns to sell. Mateo and Santiago again went to the 300 block of North 10th Street to meet with Defendant. Defendant told the undercover officers to go to the A Town Bar located at the corner of 10th and Elm Street. Mateo and Santiago went into the bar and waited. (*Id.* at 2.121-2.123.) Thereafter, Defendant came into the bar and told the officers that his supplier, who he referred to as "the main man," was upset with him for bringing Mateo and Santiago into the area. Defendant then left the bar. When he came back into the bar, Defendant told the undercover officers that "the main man" was uncomfortable. Defendant advised the officers that he had told "the main man" that he had dealt with Mateo and Santiago before but "the main man" said that he had seen an undercover van in the area. (*Id.* at 2.124-2.125.) While Defendant was talking to the officers, a Hispanic male came into the bar and sat down next to Santiago. Defendant told Mateo that this was "the main man" and that he had come into the bar to check out Mateo and Santiago. After about five minutes "the main man" left the bar. Defendant also left the bar. When Defendant returned he told the officers that he was trying to make the deal but that he was only "the middle man" and "the main man" didn't feel comfortable with them. Defendant told them that "the main man" was keeping the guns in his home and he was concerned that the police might get a search warrant for the premises. (*Id.* at 2.126-2.127.)

In a recorded telephone conversation between Defendant and Detective Gonbar, Defendant referred to his "people" several times. Defendant indicated that his people had observed the undercover officers, and that his "people . . . didn't like their appearance." He also stated that "the dude that got everything that I get, he came down and he looked at them too." In another telephone conversation with Detective Gonbar, regarding the other people involved in obtaining the guns for the undercover officers, Defendant stated: "I'm like 50% middle and 50%

myself." (Gov't Ex. 19.) Based upon the testimony of the undercover officers, the testimony of the confidential informant, the surveillance videotapes, and the taped telephone conversations, we are satisfied that the evidence was sufficient to support a finding beyond a reasonable doubt that Defendant knowingly and deliberately entered into an agreement to sell firearms with a person or persons other than the undercover officers and the police informant, specifically "the main man," and that at least one overt act was done in furtherance of the conspiracy.[3] The fact that the identity of "the main man" is unknown and the fact that no guns were transferred on July 17, 2001 is not determinative of whether a conspiracy actually existed. *See Allen*, 613 F.2d at 1253; *United States v. Watkins*, 339 F.3d 167, 178 (3d Cir. 2003) ("A conspiracy charge does not require proof of success in committing the offense (as does a substantive offense), only an agreement to commit it.")

Defendant also contends that the Court should grant a new trial pursuant to Rule 33. Defendant bases his argument on the fact that Warren Mayo testified that Defendant advised him that Defendant intended to "rip off" the undercover officers with respect to the sale of firearms. (Doc. No. 88 at 5.)[4] Defendant argues that because the Government did not inform defense

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[3] The Government contends that we should dismiss Defendant's Motion because it was filed more than seven days after the verdict, and thus is untimely. (Doc. No. 91 at 7.) On March 4, 2005, this Court extended the deadline for filing post-trial motions until March 14, 2005. (Doc. No. 87.) The instant Motion was filed by defense counsel on March 11, 2005. Federal Rule of Criminal Procedure 29(c) provides, in pertinent part: "A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, *or within any other time the court sets during the 7-day period.*" Fed. R. Crim. P. 29(c) (emphasis added). Because the March 4, 2005 Order was issued within seven days of the guilty verdict and the jury's discharge, Defendant's Motion is timely filed.

[4] Defendant testified in his own defense. He told the jury that he never intended to sell cocaine or firearms to the undercover officers and that, in fact, he did not sell the crack or the gun

counsel prior to the trial that this would be Mayo's testimony, the Government violated the mandates of *Brady v. Maryland*, 373 U.S. 83 (1963).[5] (Doc. No. 88 at 5.) *Brady* and its progeny provide "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (citing *Brady*, 373 U.S. at 87). "*Brady* thus envisions two requirements for overturning a verdict: (1) that evidence in the possession of the government was actually suppressed, and (2) that the suppressed evidence was material." *Slutzker v. Johnson*, 393 F.3d 373, 386 (3d Cir. 2004). "Material" means that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. McLaughlin*, 89 F. Supp. 2d 617, 625 (E.D. Pa. 2000) (quoting *Strickler v. Greene*, 527 U.S. 263, 280 (1999)). A reasonable probability is defined as "a probability sufficient to undermine

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to the officers. (Feb. 25, 2005 Trial Tr. 4.57-4.71.) He testified that it was Mayo who sold the crack and the gun to the officers. (*Id.*) In addition, he testified that it was always the plan that he and Mayo would "rip off" the officers, that is take their money and give them nothing. (*Id.* at 4.57-4.71, 4.93.) Obviously, the jury rejected Defendant's testimony.

[5] Defendant also makes the argument that Agent Timothy D. Wilson, in his grand jury testimony, erroneously stated that the undercover police officers purchased both a gun and drugs from Defendant on June 22, 2001, and that this misrepresentation tainted the proceedings such that the grand jury was incapable of returning an unbiased indictment. (Doc. No. 88 at 6.) Agent Wilson testified before the grand jury as follows: "After they purchased the gun and the drugs, Pat Leporace asked Kama about—he referred to them as burners which is basically a street term for guns." (July 9, 2002 Grand Jury Test. at 4-5.) Moments earlier, however, Agent Wilson had stated: "While they were there they met with Kama and purchased .58 grams, which is five packets of crack cocaine, for $100." (*Id.* at 4.) We fail to see how Agent Wilson's misstatement rendered the grand jury incapable of returning an impartial indictment. We are satisfied that there has been no miscarriage of justice based on Agent Wilson's grand jury testimony.

the confidence in the outcome." *Perdomo*, 929 F.2d at 971 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Defendant has failed to satisfy the requirements of *Brady*. At trial, when Defendant raised the same issue, counsel for the Government stipulated that none of the undercover officers could testify that they had ever talked to Mayo about a "rip off." In other words, Mayo had never mentioned a "rip off" to any of the officers. (Feb. 25, 2005 Trial Tr. at 4.3-4.10.) Defendant cannot reasonably argue that the Government suppressed the evidence regarding the alleged "rip off" when the Government was not aware of the existence of any such evidence. Moreover, we fail to see how the outcome of this case would have been any different had Defendant's counsel been able to question the police officers under oath about the alleged statement regarding the "rip off."

Similarly, there is no merit to Defendant's contention that a new trial is warranted because the Government failed to advise Defendant's trial counsel that Mayo had worked as a confidential informant for the Reading Police Department prior to this case.[6] (Doc. No. 88 at 5.) Mayo had been a confidential informant for the police many years prior to his participation in the investigation of Defendant, and also just before this investigation. (Feb. 25, 2005 Trial Tr. at 4.11.) Even assuming that there was such a failure, Defendant has not demonstrated how this evidence is relevant to either his guilt or punishment. *See Perdomo*, 929 F.2d at 970. Moreover, the jury was completely aware of Mayo's relationship with the Reading Police Department. At

[6] Defendant's trial counsel argued a *Brady* violation on these same grounds during trial, and his argument was rejected. (Feb. 25, 2005 Trial Tr. at 4.13.)

best, this evidence may go to Mayo's credibility. There is no reasonable probability that Defendant would have been found not guilty had such evidence been disclosed to his counsel.

We perceive no miscarriage of justice here. Accordingly, Defendant's Motion for judgment of acquittal or a new trial will be denied.

An appropriate Order follows.

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	:	
KOURTNEY DWAYNE KAMA	:	

ORDER

AND NOW, this 12th day of December, 2005, upon consideration of Defendant's Motion For Judgment Of Acquittal Pursuant To Rule 29 And Motion For A New Trial Pursuant To Rule 33 Of The Federal Rules Of Criminal Procedure (Doc. No. 88) and the Government's response thereto it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge