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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 16-403-01
	:	
v.	:	
	:	
	:	
SHAMIR KANE	:	

O R D E R

AND NOW, this **25th** day of **October, 2018**, upon consideration of Defendant's Motion for a Judgment of Acquittal (ECF No. 297) and Motion for a New Trial (ECF Nos. 298, 372) and the Government's response thereto (ECF No. 382), it is hereby **ORDERED** that:

1. Defendant's Motion for a Judgment of Acquittal (ECF No. 297) is **DENIED**.[1]

[1] Rule 29 of the Federal Rules of Criminal Procedure provides that "the [C]ourt on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). When faced 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 based on the available evidence." United States v. Wolfe, 245 F.3d 257, 261 (3d Cir. 2001) (citing Jackson v. Virginia, 443 U.S. 307,

Appendix D-1

318-19 (1979)). 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) (citing United States v. Jannotti, 673 F.2d 578, 581 (3d Cir. 1982)). To that end, all reasonable inferences must be drawn in favor of the jury's verdict. United States v. Anderskow, 88 F.3d 245, 251 (3d Cir. 1996). Thus, the defendant seeking relief under Rule 29 bears "a very heavy burden." United States v. Anderson, 108 F.3d 478, 481 (3d Cir. 1997). "'[A] finding of insufficiency should 'be confined to cases where the prosecution's failure is clear.'" United States v. Smith, 294 F.3d 473, 477 (3d Cir. 2002) (quoting United States v. Leon, 739 F.2d 885, 891 (3d Cir. 1984)).

Here, Defendant moves for a judgment of acquittal with respect to Counts Five and Six of the Fourth Superseding Indictment (Hobbs Act robbery and conspiracy to commit Hobbs Act robbery) because of insufficient evidence. Def.'s Mot. Acquittal at 1, ECF No. 297. Specifically, Defendant argues that two witnesses to the robbery on August 22, 2016 were "equivocal at best" as to whether the T-Mobile store was robbed and never identified Defendant. Id. Defendant also argues that the security video of the robbery does not clearly show Defendant or that Defendant was in possession of a firearm. Id. According to Defendant, Lamar Griffin's prior testimony that he committed the August 22 robbery with Defendant was improperly admitted as substantive evidence, and Amber Alexander's testimony that Defendant supplied her with cell phones identified as the stolen phones does not show that Defendant stole them. Id. The Court disagrees.

In its response, the Government describes the evidence produced at trial. To start, Mr. Griffin testified at his guilty plea hearing that Defendant was one of the robbers, and as discussed in footnote two to this order, that testimony was properly admitted as substantive evidence. As the Government observes, the security video corroborates Mr. Griffin's statement. Gov't's Resp. at 16-17, ECF No. 382. Additionally, the man in the security video has a tattoo on the right side of his neck similar to the tattoo observed in Defendant's 2012 arrest photo, which the Government offered and the Court admitted into evidence. Id. at 17. Ms. Alexander also testified that Defendant contacted her about selling cell phones shortly after the August 22 robbery, and co-defendant Ashley Sterling testified that Defendant sent her a link about the August 22 robbery. Id. As such, when taken in the light most favorable to the Government, the Court concludes that there was sufficient evidence for the jury to find Defendant guilty of Counts Five and Six (Hobbs Act robbery and conspiracy to commit Hobbs Act robbery). Accordingly, the Court denies Defendant's motion.

Appendix D-2

2. Defendant's Motion for a New Trial (ECF No. 298) and Supplemental Motion for a New Trial (ECF No. 372) are **DENIED.**[2]

---

[2] Upon a defendant's motion under Rule 33, "the [C]ourt may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A motion for a new trial in the interest of justice is committed to the sound discretion of the district court. United States v. Brennan, 326 F.3d 176, 189 (3d Cir. 2003). Under Rule 33, the Court does not view the evidence in the light most favorable to the Government but rather must exercise its own judgment in assessing the Government's case. United States v. Silveus, 542 F.3d 993, 1004 (3d Cir. 2008). But "[a] district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it 'believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.'" United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (quoting United States v. Santos, 20 F.3d 280, 285 (7th Cir. 1994)).

In his Motion for a New Trial and Supplemental Motion for a New Trial, Defendant raises two primary arguments: (1) Mr. Griffin's prior testimony during Mr. Griffin's plea hearing that he committed the robbery with Defendant was improperly admitted as substantive evidence, and (2) evidence of the robbery on August 6 was inadmissible as evidence of the August 22 robbery. Def.'s Supp. Mot. New Trial at 2-3, 6-7, ECF No. 372. The Court disagrees and discusses each issue in turn.

1. Mr. Griffin's Testimony at His Plea Hearing was Properly Admitted as Substantive Evidence

Under Federal Rule of Evidence 801(d)(1)(A), a declarant-witness's prior statement is not hearsay "if the declarant testifies and is subject to cross-examination about [the] prior statement," and the prior statement "is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." Fed. R. Evid. 801(d)(1)(A). Mr. Griffin's testimony at his plea hearing meets the requirements of Rule 801(d)(1)(A) as described below.

Here, Mr. Griffin, as the declarant-witness, made a statement at his guilty plea hearing assenting to the Government's factual summary that he committed the August 22 robbery with Defendant and then later recanted that statement as a witness at Defendant's trial. Trial Tr., 23-30, Apr. 13, 2018, 11:35 a.m., ECF No. 303. At

Appendix D-3

trial, Mr. Griffin was subject to cross-examination regarding his prior statement. The prior statement was inconsistent with Mr. Griffin's trial testimony where he recanted his plea hearing testimony that he committed the August 22 robbery with Defendant. Additionally, the prior statement was given under penalty of perjury at his guilty plea hearing. As such, the prior statement was properly admitted as substantive evidence.

Defendant, however, argues that because Mr. Griffin's prior statement was made at his guilty plea hearing it was only admissible to "(1) help the jury evaluate the witness's credibility, (2) to show that the defendant was not singled out for prosecution, [or] (3) to explain how the witness has knowledge of the events." Def.'s Supp. Mot. New Trial at 3. But the Third Circuit case law Defendant cites in support of his position is inapposite because the cases he cites concern the admission of the guilty plea or plea agreement—not statements made during the plea hearing that are later recanted. See, e.g., United States v. Jackson, 849 F.3d 540, 555-56 (3d Cir. 2017).

In the instant case, Mr. Griffin's testimony at his plea hearing was a sworn statement that it is true that he committed the robbery on August 22 with Defendant. See United States v. Cisneros-Gutierrez, 517 F.3d 751, 758-79 (5th Cir. 2008) (discussing a third party's assent to the factual resume during his guilty plea hearing as substantive evidence that the defendant delivered drugs). Although the Third Circuit has not specifically addressed this issue, many sister circuits have done so and come to the conclusion that a third party's testimony at the third party's guilty plea hearing may be introduced as substantive evidence after the third party gives inconsistent testimony at the defendant's trial. See, e.g., United States v. Cervantes, 646 F.3d 1054, 1060 (8th Cir. 2011); Cisneros-Gutierrez, 517 F.3d at 758-59; United States v. Meza-Hurtado, 351 F.3d 301, 303-04 (7th Cir. 2003); United States v. Valiente, 392 Fed. App'x 844, 851 (11th Cir. 2010); see also Gov't's Resp. at 20-21. Accordingly, the Court concludes that the sister circuit decisions and the plain language of Rule 801(d)(1)(A) support the decision to admit Mr. Griffin's guilty plea hearing testimony as substantive evidence.

2. Evidence of the August 6 Robbery was Admissible as Evidence of the August 22 Robbery under Federal Rule of Evidence 404(b)

In his Motion for Severance, Defendant raised this same issue—that evidence of the August 6 robbery should not be admissible at trial for the August 22 robbery. For the same reasons that the Court found there that evidence of the August 6 robbery would be admissible under Federal Rule of Evidence 404(b) to show common plan and identity for the August 22 robbery, the Court reaches the same conclusion here.

Appendix D-4

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

Order Denying Mot. Severance at 4-5, ECF No. 272. Evidence of the August 6 robbery was not admitted to show a mere propensity and so was admissible under Rule 404(b).

As the Court previously observed in its order denying Defendant's Motion for Severance, "[a]lthough Defendant has identified some differences between the two robberies, the two incidents have many similar elements, including the type of store, type of merchandise stolen, number of accomplices, use of a gun, and the robbers' method of arriving when the store was empty of customers and forcing the employees to the back of the store at gunpoint to load the phones into a gym bag." Id. The two robberies also share close geographic and temporal proximity. See id. at 5. Finally, the Government alleged that the phones were later sold through the same individual for both robberies. See id. at 5. Given these similarities, evidence of one would be admissible in a trial relating to the other under Rule 404(b) in order to prove that the same person committed both robberies and that the robberies were part of a common plan.

As Mr. Griffin's prior testimony and the evidence of the August 6 robbery were both properly admitted into evidence, the Court concludes that there is no miscarriage of justice warranting a new trial. Accordingly, the Court denies Defendant's motion.

Appendix D-5