Appendix A

U.S. Court of Appeals Decision

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of November, two thousand twenty-three.

PRESENT:

JOHN M. WALKER, JR.,
REENA RAGGI,
RICHARD J. SULLIVAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 22-50

DALVON CURRY, a.k.a. DALE, a.k.a. DALO,

Defendant-Appellant.[*]

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[*] The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

For Defendant-Appellant: ANDREW H. FREIFELD, New York, NY.

For Appellee: MONICA J. RICHARDS, Assistant United States Attorney, *for* Trini E. Ross, United States Attorney for the Western District of New York, Buffalo, NY.

Appeal from a judgment of the United States District Court for the Western District of New York (Lawrence J. Vilardo, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the December 22, 2021 judgment of the district court is **AFFIRMED**.

Dalvon Curry appeals from his judgment of conviction following a jury trial in which he was convicted of nine counts stemming from his involvement in the "Cash Been Long"/"Brothers for Life" ("CBL/BFL") gang, including one count of racketeering conspiracy (Count One); one count of narcotics conspiracy (Count Two); one count of possession of firearms in furtherance of a drug-trafficking crime (Count Three); two counts of murder in aid of racketeering activity (Counts Four and Seven); two counts of discharge of a firearm in furtherance of a crime of violence (Counts Five and Eight); and two counts of discharge of a firearm causing death in furtherance of a crime of violence (Counts Six and Nine). Following the

jury's verdict, Curry moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 or, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33. The district court denied Curry's posttrial motions and sentenced him to a statutorily mandated term of life imprisonment on each of Counts Four and Seven, to run concurrent with a sentence of 300 months on each of Counts One and Two and to be followed by consecutive terms of 60 months on Count Three and 120 months on each of Counts Six and Nine, for a total aggregate term of life plus 300 months.

On appeal, Curry asserts that he is entitled to judgments of acquittal on all counts except for Count One, as to which he nonetheless challenges the special factor findings relevant to that count.[1] With regard to those counts related to the shooting of Jacquan Sullivan – namely, Counts Four, Six, and Special Factor Two under Count One (the "Sullivan Counts") – Curry argues that the district court erroneously charged the jury on three exceptions to Curry's justification defense. As to the remaining counts (concerning the shooting of Xaiver Wimes and the CBL/BFL narcotics conspiracy), Curry argues that the government's evidence was

[1] In entering judgment, the district court dismissed Counts Five and Eight as lesser included offenses of Counts Six and Nine, respectively. Curry accordingly does not advance any arguments pertaining to Counts Five or Eight on appeal.

is justified in using 'deadly physical force' upon another only if that defendant 'reasonably believes that such other person is using or about to use deadly physical force.'" *People v. Brown*, 33 N.Y.3d 316, 320 (2019) (quoting N.Y. Penal Law § 35.15(2)). This justification defense is not available, however, "if [a] defendant is the 'initial aggressor'" – *i.e.*, "the first person in an altercation who uses or threatens the imminent use of deadly physical force." *Id.* at 320–21 (quoting N.Y. Penal Law § 35.15(1)(b)).

Here, we cannot say that the district court committed plain error in instructing the jury as to the initial-aggressor exception to justification. A witness testified that gunshots came from "the people on the porch" of the house where Curry was temporarily staying, while the individual on the street simply ran away. App'x at 676. Another witness testified that Curry told him how, upon seeing Sullivan's car drive past the porch, Curry walked *towards* the car, pulled out his gun before Sullivan could reach his, and continued to shoot even as Sullivan ran away. In light of this evidence, the district court was wholly justified in giving the initial-aggressor instruction. The fact that other evidence may have allowed Curry to argue that he was not the initial aggressor did not preclude an instruction advising the jury as to this exception to justification. *Cf. Harris v.*

O'Hare, 770 F.3d 224, 238 n.9 (2d Cir. 2014) ("All that a party needs to show is that there is some evidence supporting the theory behind the instruction so that a question of fact may be presented to the jury." (internal quotation marks omitted)).

We turn next to Curry's argument that there was insufficient evidence to justify the failure-to-retreat instruction. New York law prohibits an individual from "us[ing] deadly physical force if he knows that he can with complete safety . . . avoid the necessity of doing so by retreating." *Matter of Y.K.*, 87 N.Y.2d 430, 433 (1996) (internal quotation marks omitted). Thus, if a defendant faced with deadly physical force knows he can safely retreat and fails to do so, the justification defense "is lost." *Id.* at 434.

Again, the district court did not plainly err in giving the failure-to-retreat instruction. As noted above, there was sufficient evidence to support a finding that Curry walked *towards*, rather than away from, Sullivan when he saw him drive by. And, given the evidence indicating that Curry was on the porch of a house when the encounter began (as well as the lack of any evidence suggesting that the house was locked), a reasonable juror could have concluded that Curry was capable of retreating inside the house to avoid the encounter.

Finally, we turn to Curry's challenges to the district court's combat-by-agreement instruction, which Curry claims was both inadequately supported by the record and legally insufficient.

As an initial matter, we discern no error in the content of the district court's combat-by-agreement instruction, which was entirely consistent with New York law. *Compare* App'x at 2437, *with* N.Y. Penal Law § 35.15(1)(c), *and* N.Y. Crim. Jury Instructions, Penal Law § 35.15(2) (2d ed.).

Turning next to Curry's challenge to the evidentiary basis for the instruction, New York law is clear that a justification defense is negated when the "physical force involved is the product of a combat by agreement not specifically authorized by law." N.Y. Penal Law § 35.15(1)(c). New York courts have held that the combat-by-agreement exception to the justification defense "is generally limited to agreements to combat between specific individuals or small groups on discrete occasions." *People v. Anderson*, 180 A.D.3d 923, 924 (2d Dep't 2020), *aff'd*, 36 N.Y.3d 1109 (2021). Nevertheless, "[a]n agreement to engage in combat not authorized by law" need not be express and may be "a tacit agreement." *People v. Agosto*, 203 A.D.3d 841, 842 (2d Dep't 2022). For example, a combat-by-agreement instruction may be warranted where "there [is] evidence to support a

conclusion that [the] defendant and the victim were members of 'rival groups that tacitly agreed, pursuant to an unwritten code of macho honor, that there would be mutual combat.'" *People v. Young*, 33 A.D.3d 1120, 1124 (3d Dep't 2006) (alterations omitted) (quoting *People v. Russell*, 91 N.Y.2d 280, 288 (1998)); *see also People v. Rosario*, 292 A.D.2d 324, 325 (1st Dep't 2002) (upholding combat-by-agreement instruction when "there was adequate proof to establish that defendant and his opponent had tacitly agreed to engage in a gun battle").

Here, contrary to Curry's suggestion, the government's evidence demonstrated more than a generic rivalry between local gangs. *Cf. Anderson*, 180 A.D.3d at 923 (concluding that there was insufficient evidence to support a combat-by-agreement charge when the record only contained "generalized evidence that the defendant was a member of a gang which had a rivalry with other local gangs"). The government introduced exchanges on social media between Sullivan and Curry, including an exchange approximately one week before the shooting, in which the two traded insults and threatened in-person altercations at specific locations, as well as evidence suggesting that each was aware that the other was in possession of firearms.

Having determined that the district court did not err as to any of the challenged jury instructions, we reject Curry's claim that he is entitled to judgments of acquittal or a new trial on the Sullivan Counts.

II. Wimes Counts

We next address Curry's argument that the evidence was insufficient to sustain his convictions in connection with the fatal shooting of Xavier Wimes – Counts Seven, Nine, and Special Factor Three under Count One (the "Wimes Counts") – because the government failed to establish that Curry shot Wimes in order to maintain or increase his position in CBL/BFL.

We review *de novo* the district court's denial of a motion challenging the sufficiency of the evidence pursuant to Federal Rule of Criminal Procedure 29, *see United States v. Capers*, 20 F.4th 105, 113 (2d Cir. 2021), and must decide whether, "after viewing the evidence in the 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); *see also United States v. White*, 7 F.4th 90, 98 (2d Cir. 2021) (explaining that a reviewing court must "credit[] every inference that could have been drawn in the government's favor, and defer[] to the jury's assessment of witness credibility and its assessment of the

weight of the evidence" (internal quotation marks omitted)). A defendant challenging the sufficiency of the evidence "bears a heavy burden," as this standard of review is "exceedingly deferential." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (internal quotation marks omitted).

For a defendant to be convicted of a violent crime in aid of racketeering, the government must prove, among other things, that the defendant committed the alleged crime of violence in order "to maintain or increase his position in the [racketeering] enterprise." *White*, 7 F.4th at 101 (internal quotation marks omitted). A defendant's desire to maintain or increase his position need not be his "sole or principal motive" in order for this element to be satisfied. *Id.* (internal quotation marks omitted). Instead, the jury need only be able to "properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *Id.* (internal quotation marks omitted).

Here, we agree with the district court that the government offered sufficient evidence for a rational juror to conclude that Curry killed Wimes, at least in part, to preserve his position in CBL/BFL. The government introduced evidence demonstrating that violent acts were celebrated by CBL/BFL members, that such

acts were necessary to maintain CBL/BFL's status, and that Curry himself recognized the importance of these violent acts to a member's status in the gang. More specifically, the evidence showed that, earlier on the day of the shooting, Curry and Wimes engaged in a Facebook exchange in which Curry insulted Wimes's cousin, a rival gang member who was killed, and questioned Wimes's loyalty to CBL/BFL. The evidence also demonstrated that, after Wimes hit Curry in the head with a bottle in front of his fellow CBL/BFL members, a fellow CBL/BFL member threatened that Wimes was not going to "leav[e] [the] building alive," App'x at 428, and that at least some CBL/BFL members interpreted Wimes's attack on Curry as him "taking up" for a rival gang, *id.* at 1571, 1575.

What is more, the record reflects that, within one month of the Wimes shooting, Curry posted on Facebook that someone had "tr[ied] to take [his] life[,]" so he was "supposed to shoot," and that he "put in that work[,] that's how [he] blew up," alongside an emoji of a smiley face wearing sunglasses. *Id.* at 2529. At trial, witnesses explained that "putting in work" meant "[r]ob[bing], steal[ing], kill[ing], shoot[ing] [or fighting] somebody" for the benefit of the gang. *Id.* at 785; *see also id.* at 1405 (explaining that the term "putting in work" was used to describe gang-related shootings). Based on this evidence, we cannot say that no

reasonable trier of fact could have determined that Curry killed Wimes in order to maintain or increase his position in CBL/BFL.

III. Narcotics Counts

As to the remaining counts related to the CBL/BFL narcotics conspiracy – Counts Two, Three, and Special Factors 1.b and 1.c under Count One (the "Narcotics Counts") – Curry contends that the government failed to demonstrate the existence of a conspiracy or his membership in it.

To affirm a conviction for narcotics conspiracy, the record must permit a rational jury to find "(1) the existence of the conspiracy charged; (2) that the defendant had knowledge of the conspiracy; and (3) that the defendant intentionally joined the conspiracy." *United States v. Barret*, 848 F.3d 524, 534 (2d Cir. 2017) (internal quotation marks omitted). With regard to the knowledge element, a defendant need not know "all of the details of the conspiracy, so long as he knew its general nature and extent." *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008) (internal quotation marks omitted).

Curry claims that he must be acquitted on the Narcotics Counts because the government failed to prove that members of CBL/BFL who sold drugs participated in a criminal conspiracy, as opposed to merely acting as "independent contractors

vis-à-vis each other." Curry Br. at 56. Curry additionally argues that, even if the government did prove the existence of the narcotics conspiracy, the government failed to demonstrate that Curry joined it simply by virtue of being a "shooter who called himself BFL." *Id.* at 57. Neither of these contentions has merit.

Curry himself concedes that CBL/BFL members engaged in daily sales of marijuana, heroin, crack, and fentanyl at the same location in the Towne Gardens Plaza. And the evidence at trial amply demonstrated that gang members cooperated with one another to sell drugs, including by alerting each other to the presence of police and by hiding and sharing firearms to protect their territory. Moreover, trial testimony confirmed that individuals played different roles in CBL/BFL – while some were "killers" and "shooter[s]" to keep the gang and its territory protected, others were tasked with earning money for the gang by dealing drugs. App'x at 1092–93; *see also id.* at 813–23 (explaining how CBL/BFL members protected and encouraged the drug-dealing activities at Towne Gardens).

Here, the record indicates that Curry was aware of CBL/BFL's participation in drug trafficking, took actions to protect the gang and its territory where drug dealing occurred, and even sold drugs himself. We therefore reject Curry's contention that the evidence was insufficient to support the Narcotics Counts.

* * *

We have considered Curry's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Appendix B

District Court Decision

UNITED STATES OF AMERICA, v. DALVON CURRY, Defendant.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
542 F. Supp. 3d 197; 2021 U.S. Dist. LEXIS 107517
17-CR-103-LJV-HKS-7
June 8, 2021, Decided
June 8, 2021, Filed

Editorial Information: Subsequent History

Reconsideration denied by United States v. **Curry**, 2021 U.S. Dist. LEXIS 207643, 2021 WL 4987923 (W.D.N.Y., Oct. 27, 2021)Decision reached on appeal by United States v. **Curry**, 2023 U.S. App. LEXIS 30910 (2d Cir. N.Y., Nov. 21, 2023)

Editorial Information: Prior History

United States v. Woods, 2019 U.S. Dist. LEXIS 193172, 2019 WL 7630758 (W.D.N.Y., Aug. 30, 2019)

Counsel **{2021 U.S. Dist. LEXIS 1}**For **Dalvon Curry**, also known as, Dale, also known as, Dalo, Defendant (7): Kevin W. Spitler, LEAD ATTORNEY, Buffalo, NY.

For USA, Plaintiff: Paul C. Parisi, LEAD ATTORNEY, Seth T. Molisani, U.S. Attorney's Office, Federal Centre, Buffalo, NY.

Judges: LAWRENCE J. VILARDO, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: LAWRENCE J. VILARDO

Opinion

{542 F. Supp. 3d 200} DECISION & ORDER

INTRODUCTION

On February 24, 2020, a jury convicted the defendant, **Dalvon Curry**, on all nine counts charged against him in the superseding indictment: one count of racketeering conspiracy; one count of narcotics conspiracy; one count of possession of a firearm in furtherance of a drug trafficking crime; two counts of murder in aid of racketeering activity; two counts of discharge of a firearm in furtherance of a crime of violence; and two counts of discharge of a firearm causing death in furtherance of a crime of violence. *See* Docket Item 597. The convictions stemmed from Curry's involvement in the CBL/BFL gang, including by selling drugs; the December 5, 2015 murder of Jaquan Sullivan; and the January 1, 2017 murder of Xavier Wimes.

On April 1, 2020, **Curry** moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 or, in the alternative, a new trial under Federal Rule of Criminal Procedure 33. Docket Item 660. He argues**{2021 U.S. Dist. LEXIS 2}** that the evidence was insufficient to convict him on all counts. *See id.* On May 6, 2020, the government responded, Docket Item 698, and on June 5, 2020, **Curry** replied, Docket Item 762. After the Court heard oral argument on Curry's motions, *see* Docket Item 848, **Curry** filed two supplemental letters, Docket Items 854, 857; the government responded,

Docket Item 875; and Curry replied, Docket Item 878.

For the following reasons, Curry's motions for a judgment of acquittal and for a new trial are denied.

DISCUSSION

I. RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL

After a jury verdict, a defendant may challenge the sufficiency of the evidence presented at trial by moving for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c)(1). Convincing a court to set aside a verdict, however, is **{542 F. Supp. 3d 201}** no easy task. A jury's verdict will withstand a Rule 29 challenge so long as "any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see also United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001). The court views the evidence in the light most favorable to the government, *see United States v. Coté*, 544 F.3d 88, 98 (2d Cir. 2008), and draws all inferences in the government's favor, *see United States v. Puzzo*, 928 F.2d 1356, 1361 (2d Cir. 1991). And the court may not substitute its own judgment on credibility or the weight of the evidence for what the jury**{2021 U.S. Dist. LEXIS 3}** decided. *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000).

A. RICO Conspiracy (Count 1)

Count 1 charged **Curry** with racketeering conspiracy. *See* Docket Item 596 at 1-11. To convict a defendant of racketeering conspiracy, the government need prove only that the defendant "agreed with others (a) to conduct the affairs of an enterprise (b) through a pattern of racketeering." *United States v. Applins*, 637 F.3d 59, 77 (2d Cir. 2011) (internal quotation marks omitted). Notably, proof of a conspiracy to commit predicate acts is not required. *See United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987). In fact, the government must prove only that two racketeering acts were, or were intended to be, committed as part of the conspiracy-not that the defendant himself committed or agreed to commit any of the acts. *United States v. Yannotti*, 541 F.3d 112, 121-122 (2d Cir. 2008). And the government must establish that the defendant participated in some manner in the overall objective of the conspiracy. *Id.*

Curry argues that the evidence against him was insufficient to support his conviction on the racketeering conspiracy (as well as on Counts 2 and 3, discussed below) because "the government failed to prove [] that [] **Curry** agreed to join the racketeering scheme, and that he knowingly engaged in the scheme with the intent that its overall goals be effectuated." Docket Item 660 at 3. But contrary to Curry's assertion,**{2021 U.S. Dist. LEXIS 4}** the government offered more than enough evidence to support a rational juror's conclusion that **Curry** knowingly and willfully joined CBL/BFL and, through that involvement, participated in a racketeering conspiracy.

For example, multiple witnesses-including members of the CBL/BFL gang and Curry's girlfriend-identified **Curry** as a member of the gang. Moreover, **Curry** prominently identified himself as a member of CBL/BFL in the music videos that he produced and on his social media. The government also introduced evidence that Curry's usernames on social media included the initials "Dtw" and phrase "5gang"-two known identifiers of CBL/BFL gang membership.

And the gang itself was undoubtedly an enterprise engaged in racketeering activity. Many witnesses testified about drug trafficking by gang members and how other members helped to protect the territory where members of the gang, and only members of the gang, sold drugs. The gang was involved in turf wars with other gangs in and around the City of Buffalo, with shootings that became commonplace, eventually involving **Curry** himself. Indeed, the testimony at trial related numerous predicate acts-including drug sales, intimidation, and shootings-that**{2021 U.S. Dist. LEXIS 5}**

promoted the gang and about which a rational juror might have found **Curry** conspired.

One witness-a former gang member himself-testified about the different roles that different members played:

> **{542 F. Supp. 3d 202}** Q: Now, I want to ask you some questions about roles within the gang. Did everyone in the CBL/BFL gang have a role to play?
>
> A: Um-hum. Yes.
>
> Q: And generally speaking, what were some of those roles?
>
> A: You got some people that just work. You got people that sell drugs. You got shooters.
>
> Q: Were there guys that were able to get girls?
>
> A: Yes.
>
> Q: Were there guys in the gang that were rappers?
>
> A: Yes.Docket Item 610 at 50. Based on the trial testimony, a rational juror might well have concluded that **Curry** was a "rapper[]," a "shooter[]," and sometimes a drug dealer.

The evidence demonstrated that **Curry** not only was a prominent member of CBL/BFL but that he actively supported the gang and benefited from his membership. **Curry** produced rap music videos that promoted CBL/BFL, threatened rival gangs, and highlighted the gang's access to weapons; he posted about weapons and made threats on social media to intimidate rival gang members, such as by posting online photos and videos of him in rival gang territory; and**{2021 U.S. Dist. LEXIS 6}** he possessed and shared firearms with other gang members to help keep the gang safe and protect its territory. The government also introduced evidence that **Curry** benefited from his participation in CBL/BFL by being permitted to sell marijuana in its territory.

Based on all that, a rational trier of fact could have found that **Curry** knowingly participated in a racketeering conspiracy. *See Jackson*, 443 U.S. at 319; *Desena*, 260 F.3d at 154. This Court will not-indeed, it cannot-second guess the jury's verdict.

B. Charges Related to Narcotics Conspiracy (Counts 2 and 3)

Counts 2 and 3 charged **Curry** with narcotics conspiracy and possession of a firearm in furtherance of a drug trafficking crime. *See* Docket Item 596 at 11-13. "To prove [a narcotics] conspiracy, the government must show that the defendant agreed with another to commit the offense; that he 'knowingly' engaged in the conspiracy with the 'specific intent to commit the offenses that were the objects of the conspiracy'; and that an overt act in furtherance of the conspiracy was committed." *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999) (quoting *United States v. Salameh*, 152 F.3d 88, 145-46 (2d Cir. 1998)). "[T]he 'existence of and participation in a conspiracy may be established through circumstantial evidence.'" *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984) (emphasis omitted) (quoting *United States v. Sanzo*, 673 F.2d 64, 69 (2d Cir. 1982)). "However, there must be some evidence**{2021 U.S. Dist. LEXIS 7}** from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *Id.*

To prove possession of a firearm in furtherance of a drug trafficking crime, the government must show that the defendant used or carried a firearm during and in relation to a drug trafficking crime or that he possessed a firearm in furtherance of a drug trafficking crime. *See* 18 U.S.C. § 924(c)(1)(A); *United States v. Lewter*, 402 F.3d 319, 321-22 (2d Cir. 2005).

For some of the same reasons addressed above, the government offered enough evidence at trial to support the jury's convictions on Counts 2 and 3. Many witnesses, including CBL/BFL members {542 F. Supp. 3d 203} and law enforcement, testified about the gang's drug trafficking. The proof at trial showed that **Curry** was a member of CBL/BFL; that he knew about CBL/BFL's drug trafficking; that he helped to protect the gang's territory in which it sold drugs; and that he supported CBL/BFL's broader efforts through social media and rap music. In fact, the jury heard testimony that **Curry** himself sold drugs in territory reserved for CBL/BFL members. The jury also heard that **Curry** possessed firearms, shared firearms with other gang members to keep themselves {2021 U.S. Dist. LEXIS 8} and their territory safe, and used firearms to promote the gang and his position in it.

The evidence therefore was more than sufficient to support the convictions on Counts 2 and 3.

C. Charges relating to Xavier Wimes (Counts 7-9)

Counts 7 through 9 charged **Curry** with murder in aid of racketeering activity, discharge of a firearm in furtherance of a crime of violence, and discharge of a firearm causing death in furtherance of a crime of violence. *See* Docket Item 596 at 16-18.

As this Court instructed the jury, before **Curry** could be found guilty on Counts 7 through 9, the government needed to prove that: (1) for the purpose of maintaining and increasing his position within CBL/BFL-an enterprise engaged in racketeering activity-**Curry** intentionally caused the death of Xavier Wimes, Docket Item 795 at 144-45, 152; (2) that **Curry** knowingly used and discharged a firearm during and in relation to that crime of violence, *id.* at 154-55; and (3) that in doing so, **Curry** caused Wimes's death "with malice aforethought," *id.* at 165-66.1 The proof at trial was adequate to find all that beyond a reasonable doubt.

The proof at trial showed that on December 31, 2016, **Curry** and Wimes fought on social media {2021 U.S. Dist. LEXIS 9} and, during that fight, **Curry** made fun of Wimes's deceased cousin, a member of a rival gang. Later that night, Wimes attacked and injured **Curry** at a New Year's Eve party by hitting **Curry** in the head with a bottle. After CBL/BFL members attacked Wimes in retaliation, he barricaded himself in an apartment and eventually jumped out a window to escape. Meanwhile, a fellow CBL/BFL gang member retrieved a gun and told **Curry** that Wimes should not leave the party alive. **Curry** then took the gun and, after Wimes had jumped out the window and broken his leg, shot Wimes multiple times at close range. Days after killing Wimes, **Curry** posted on Facebook, "I put in the work. That's how I blew up."

Curry argues that the government did not sufficiently establish that he killed Wimes to maintain or increase his position in CBL/BFL. Docket Item 878-2 at 5. He says that "there were no rules or regulations within BFL/CBL gang, [and] members were not expected to murder or commit any violent acts." *Id.* On the contrary, **Curry** argues, the "trial testimony proved that Wimes was killed because he hit [**Curry**] in the head with a bottle." *Id.*

Curry may well be correct that what immediately preceded and precipitated {2021 U.S. Dist. LEXIS 10} the shooting was Wimes's hitting him with a bottle. But the government still offered enough evidence for rational jurors to conclude that **Curry** killed Wimes because it was expected of him and to preserve his position in CBL/BFL. For example, the government introduced evidence that gang members engaged in violence {542 F. Supp. 3d 204} against rival gangs and those who "took up" for rival gangs; that Wimes's deceased cousin was a member of a rival gang; and that the night Wimes was killed, Wimes defended his cousin by attacking **Curry** and, in doing so, "took up" for a rival gang.

Moreover, and even more to the point, **Curry** was encouraged by a fellow gang member to kill

Wimes because Wimes had disrespected and embarrassed **Curry** in front of other gang members-something that would have hurt Curry's standing in CBL/BFL. Because of their dispute involving Wimes's cousin, Wimes struck **Curry** with a bottle and injured him in front of CBL/BFL gang members. Letting that pass without consequence would have diminished **Curry** in the eyes of his fellows. And a rational juror therefore could have found that **Curry** intentionally and unlawfully caused Wimes's death by shooting him for the purpose of maintaining and increasing**{2021 U.S. Dist. LEXIS 11}** his position within CBL/BFL.

The government was not required to prove that maintaining or increasing Curry's standing in CBL/BFL was his sole motive in killing Wimes. Rather, evidence is sufficient to show that a defendant committed a violent crime "for the purpose of maintaining and increasing [his] position [in an organization] . . . if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *United States v. Burden*, 600 F.3d 204, 220 (2d Cir. 2010) (citation omitted). The evidence was sufficient to meet that standard here and therefore adequate to support the guilty verdicts on Counts 7 through 9.

D. Charges relating to Jaquan Sullivan (Counts 4-6)

The only issue that gives the Court pause involves Counts 4 through 6 charging the murder of Jaquan Sullivan. Like Counts 7 through 9, these counts charged **Curry** with murder in aid of racketeering activity, discharge of a firearm in furtherance of a crime of violence, and discharge of a firearm causing death in furtherance of a crime of violence. Docket Item 596 at 13-16. What gives the Court pause is Curry's argument of self-defense.**{2021 U.S. Dist. LEXIS 12}**

The proof at trial showed that Sullivan and his gang, the Guys, were in a long-standing and violent feud with CBL/BFL; that members of CBL/BFL were in a so-called "shoot-on-sight" rivalry with Sullivan and the Guys; that **Curry** and Sullivan exchanged threats on social media-threats that escalated in the weeks leading up to Sullivan's killing; that **Curry** went into rival gang neighborhoods with weapons to assert his gang's power and courage and to provoke violence; and that **Curry** posted on social media about killing his rivals, predicting "ALOT [sic] OF HOMICIDES" in 2015. The government also introduced evidence that on the night of Sullivan's killing, **Curry** went into Sullivan's neighborhood with a gun; that when he saw **Curry**, Sullivan said "you boys know what time it is"; that Sullivan shot at **Curry**; and that **Curry** shot at Sullivan, including once in the back as Sullivan was running away.

Curry argues that he was justified; more precisely, he argues that the evidence was insufficient to show that he was not justified in shooting Sullivan. Docket Item 660 at 11-14, 16. As this Court instructed the jury, a person is justified in using deadly force against another under New York law2 if: (1)**{2021 U.S. Dist. LEXIS 13}** the person **{542 F. Supp. 3d 205}** using deadly force believed that it was necessary to defend himself or someone else from what he believed to be the use or imminent use of such force, and a reasonable person in his same position would have believed that, too; (2) the person using deadly force was not the initial aggressor of deadly force; (3) the person using deadly force could not have avoided using deadly force by safely retreating; and (4) the deadly force was not the product of a combat by agreement unauthorized by law. Docket Item 795 at 146-150; *see also* N.Y. Penal L. § 35.15. **Curry** argues that because he and Sullivan engaged in a gun fight, and because the evidence showed that Sullivan shot first, no rational juror could have found that **Curry** was not justified in defending himself. *See* Docket Item 660 at 16.

For several reasons, Curry's argument is unavailing. First, in New York, "[a] justification defense may be negated by proof that '[t]he physical force involved is the product of a combat by agreement not

specifically authorized by law." *People v. Young*, 33 A.D.3d 1120, 1124, 825 N.Y.S.2d 147, 151 (3d Dep't 2006) (second alteration in original) (citing N.Y. Penal L. § 35.15[1][c]). A "combat by agreement" can be shown by evidence that the "defendant and the victim were members of 'rival groups that tacitly agreed,{2021 U.S. Dist. LEXIS 14} pursuant to an unwritten code of [] honor, that there would be mutual combat.'" *Id.* (citing *People v. Russell*, 91 N.Y.2d 280, 288, 693 N.E.2d 193, 670 N.Y.S.2d 166 (1998)); *see also People v. Rosario*, 292 A.D.2d 324, 325, 740 N.Y.S.2d 23, 24 (1st Dep't 2002) (finding a combat-by-agreement jury instruction proper where the evidence showed that "shortly before the incident, [the] defendant's opponent used an expression constituting, in the local parlance, a challenge to a gunfight").

The government introduced enough evidence here to support the conclusion that **Curry** and Sullivan were members of warring gangs who "tacitly agreed" to a shoot-on-sight rivalry. Furthermore, the jury could have rationally found that Sullivan's saying "you boys know what time it is" was an "expression constituting . . . a challenge to a gunfight," *see id.*, or otherwise signaled the start of the shoot-on-sight rivalry in which **Curry** agreed to participate.

If the jury found that **Curry** and Sullivan were engaged in a shoot-on-sight rivalry or other combat by agreement, "[t]he fact that [Sullivan] may have fired first is irrelevant since the gun battle was illegal from its inception." *See id.* Moreover, to be justified in using deadly physical force, **Curry** needed to reasonably believe that such force was necessary to protect himself or someone else. A rational juror{2021 U.S. Dist. LEXIS 15} could have found that once Sullivan started running away, **Curry** no longer reasonably believed that continuing to shoot was necessary. And Nicole Yarid, M.D., the medical examiner who conducted the autopsy, testified that one of the shots **Curry** fired struck Sullivan in the back and exited Sullivan's front hip, Docket Item 749 at 33, 26, consistent with Curry's shooting Sullivan as he ran away.

What is more, contrary to Curry's argument, the jury was not required to find that Sullivan shot first and that **Curry** did not start the shooting. The only eyewitness to the murder who testified at trial said that (1) she heard two men on the porch where **Curry** was standing arguing with a man in the street, (2) she heard gunshots {542 F. Supp. 3d 206} that she believed came from the porch, and (3) the man in the street then ran away. Law enforcement found five cartridge cases on the porch and only three on the street in the path Sullivan ran, which might well be consistent with Curry's shooting Sullivan first and Sullivan's shooting back as he ran. And because **Curry** was on his friend's porch when Sullivan approached, the jury also might have concluded that **Curry** could have avoided using deadly force by safely retreating,{2021 U.S. Dist. LEXIS 16} thereby negating self-defense. *See* N.Y. Penal L. § 35.15(2)(a).

Although this issue presents a closer call than the others **Curry** raises, this Court cannot say that *no* rational juror could have rejected Curry's justification defense. Stated another way, a rational juror might well have found that **Curry** and Sullivan engaged in combat by agreement or that **Curry** was not justified in shooting Sullivan for some other reason.

Curry also argues that the government did not offer sufficient evidence to show that **Curry** killed Sullivan to increase his standing in CBL/BFL. *See* Docket Item 878-2 at 4. As noted above, evidence is sufficient to show that a defendant committed a violent crime "for the purpose of maintaining and increasing [his] position [in an organization] . . . if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *Burden*, 600 F.3d at 220. The jury easily could have drawn that inference here.

For example, the evidence showed that CBL/BFL had a party to celebrate Sullivan's death and

Curry's role in the shooting; that CBL/BFL members who had taunted and disrespected{2021 U.S. Dist. LEXIS 17} **Curry** before Sullivan's death no longer did so; and indeed respected him afterward; and that the month after Sullivan's death **Curry** posted on social media that he now "Run[s] The Guyz," Sullivan's gang. Moreover, some of the same reasons that the Wimes shooting maintained or increased Curry's standing in CBL/BFL, *see supra*, apply here. In sum, the evidence was sufficient to support the convictions involving Sullivan's death.

II. RULE 33 MOTION FOR A NEW TRIAL

"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). "A district court should grant a new trial motion if it is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *United States v. Landau*, 155 F.3d 93, 104 (2d Cir. 1998) (quotation omitted). When considering a motion for a new trial, a district judge "is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *Id.* (quotation omitted); *see also United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992) (stating that a court also may make determinations as to witness credibility). But while courts have greater discretion under Rule 33 than Rule 29, they still must exercise their authority under Rule 33 "sparingly" and only in "the most{2021 U.S. Dist. LEXIS 18} extraordinary of circumstances"; in other words, there must be a real concern that an innocent person may have been convicted. *Sanchez*, 969 F.2d at 1414.

The Court has no such concern here. For the reasons that this Court found the evidence sufficient on all nine counts, *see supra*, it does not find Curry's Rule 33 arguments persuasive. **Curry** therefore is not entitled to a new trial on **{542 F. Supp. 3d 207}** those grounds, nor is he entitled to a new trial in the interest of justice.

CONCLUSION

For all those reasons, Curry's Rule 29 and Rule 33 motions, Docket Item 660, are DENIED. The Court will set a date for sentencing.

SO ORDERED.

Dated: June 8, 2021

Buffalo, New York

/s/ Lawrence J. Vilardo

LAWRENCE J. VILARDO

UNITED STATES DISTRICT JUDGE

Footnotes

1

The Court gave the same instructions-substituting Jaquan Sullivan for Wimes-with respect to Counts 4 through 6. Docket Item 795 at 144-45, 155-59, 165-66.

2

New York law applies to the justification defense because Count 4 (like Count 7) charged murder under the New York Penal Law as the crime of violence in aid of racketeering. More specifically, Count 4 charged Curry with the murder of Jaquan Sullivan in aid of racketeering. Count 7 charged

the same as to the

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of February, two thousand twenty-four.

United States of America,

Appellee,

v.

Dalvon Curry, AKA Dale, AKA Dalo,

Defendant - Appellant.

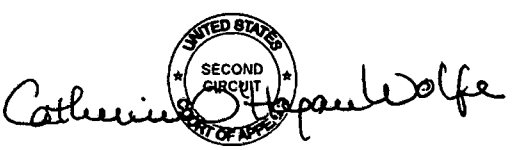
ORDER

Docket No: 22-50

Appellant, Dalvon Curry, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



Additional material from this filing is available in the Clerk's Office.