

Presently before the court is the defendant's motion for acquittal pursuant to Federal Rule of Criminal Procedure 29. In his motion, Drummond contends that the evidence adduced at trial was insufficient to prove that he was the person who sold drugs to the undercover operatives. Thus, the defense argues that the jury verdict was not reasonable and must be overturned. The Government responds that there was sufficient evidence - including the testimony of the police officers - from which a reasonable jury could find that Drummond sold the drugs on the dates in question.

The court finds that the evidence presented at trial was sufficient to establish that Drummond was the individual who participated in the drug distribution and sale on both of the dates in question. Therefore, the court will deny the defendant's motion for acquittal. The court will now explain the reasons for its decision.

II. BACKGROUND AND FACTS

On December 11, 2001, the United States Attorney's Office for the District of Delaware issued an indictment against Alvin Drummond. The indictment accused Drummond of knowingly distributing a mixture and substance containing more than five grams of cocaine base ("crack cocaine") in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Drummond was charged with distributing the drugs on December 7, 2000 and January 18, 2001. He plead not guilty to both counts on January 31, 2002. On April 3, 2002, the court scheduled the trial to begin on July 11, 2002.

The trial began as scheduled on July 11, 2002. In his opening statement, defense counsel indicated that the theory of the defense case was that the defendant did not commit the crimes in question. Rather, the defense stated that the evidence would tend to demonstrate that the defendant had many friends and relatives who resembled him, and that these friends and relatives had access

to his vehicle, which is where the alleged drug sales took place.

The Government began its presentation of evidence by calling Officer Marvin Charles Mailey. Officer Mailey is a police officer in the Dover, Delaware police department. Prior to the arrest in this case, he had served as a detective in the Drug, Vice, and Organized Crime Unit. (Trial Tr. at 90.) During the investigations in question, Officer Mailey also served as a task force officer with the DEA. (*Id.*) He had served in that capacity for three years. (*Id.* at 90-91.) Mailey testified that during these three years, he had made at least fifty undercover drug purchases and had been involved with a least one hundred drug investigations. (*Id.* at 91.) He also testified that his training had familiarized him with the distinguishing features of crack cocaine. (*Id.*)

Mailey further testified that he was involved in the investigation of a person named Alvin Drummond. (*Id.* at 92.) He stated that prior to beginning his investigation, he reviewed photographs of Drummond. He also stated that he met Alvin Drummond in person on June 16, 2000. (*Id.*) Mailey testified that on that date, a passenger in his vehicle signaled to a person on the street who then approached the passenger side of Mailey's vehicle. (*Id.* at 93.) According to Mailey, his passenger introduced the approaching man as Alvin Drummond. (*Id.*) Mailey testified that the approaching man also "acknowledged that his name was Alvin." (*Id.*) Mailey then stated that he, "Alvin," and the passenger engaged in a fifteen minute conversation. (*Id.* at 94.) Mailey further testified that during this conversation, the man who identified himself as Alvin was kneeling such that he was "at face level" with the vehicle. (*Id.*) Mailey testified that he was able to see the kneeling man's face, and that he got a good look at the face for at least seven to eight minutes while he was no farther than two to three feet away. (*Id.*) Mailey also testified that the lighting on the day in question was sufficient to enable him to see the kneeling person's face. (*Id.*)

After testifying that he was able to observe a person calling himself “Alvin” on June 16, 2000, Mailey was asked if the person he saw that day was in the courtroom. (*Id.* at 95.) Mailey identified the defendant. (*Id.*) He testified that he had “no doubt” that the person in the courtroom was the same person he observed on June 16, 2000. (*Id.*)

Mailey was then questioned about the events of December 7, 2000. Mailey testified that on that day, he was working as an undercover agent in Laurel, Delaware. (*Id.* at 97.) He stated that he expected to purchase crack cocaine from Alvin Drummond that day. (*Id.*) Mailey testified that the defendant arrived at the designated location in a blue Ford Taurus. He said that after talking briefly with the defendant, he took out a digital scale to weigh the drugs. He testified that the weight of the drugs was nine grams. (*Id.* at 99.) Mailey testified that because the drugs were lighter than expected, the price was lowered. (*Id.* at 100.) He stated that he paid the defendant, who then placed the money under the sun visor on the driver’s side of the Taurus. (*Id.*)

The final line of questioning in the Government’s direct examination of Mailey concerned the events of January 18, 2001. Mailey testified that, as an undercover officer, he had arranged to purchase one ounce of crack cocaine from the defendant at a gas station in Hardscrabble, Delaware. (*Id.* at 101.) Mailey stated that a blue Ford Taurus - the same Ford Taurus he had previously seen the defendant operating - arrived at about 4:00 p.m. He indicated that after a brief conversation, the drugs were weighed and a sale was arranged. (*Id.*) Mailey testified that he paid \$600 for the drugs, and that the defendant placed the money under the sun visor on the driver’s side of the car, similar to the previous sale. (*Id.* at 103.) Mailey further indicated that at the January 2001 sale, the defendant went into the trunk of the Taurus and retrieved the cover for Mailey’s digital scale, which he had left in the car during the December sale. (*Id.*) When asked if the person that sold him the

drugs in December 2000 and January 2001 was the same person he previously observed on June 16, 2000, Mailey answered in the affirmative. (*Id.* at 104.) He again stated that he had “no doubt” that the defendant was the person who sold him the drugs.

On cross examination, defense counsel asked whether Officer Mailey had been trained in the proper method of writing a police report. (*Id.* at 107.) Despite this training, Mailey testified that he did not include the defendant’s height or weight in his final report. (*Id.* at 109.) The cross-examination further revealed that Mailey did not use a photographic array to identify the defendant and left out other identifying details. (*Id.* at 111,113.) He also testified that he did not verify the defendant’s name by pursuing his pager records. (*Id.* at 113-116.) However, when defense counsel continued to press the issue, Mailey stated that he had not done this things because he “had already looked at a picture of Mr. Drummond on [a] previous occasion and the person I spoke to was identical with the picture I had reviewed.” (*Id.* at 119.) Mailey continued, “What I’m saying is that we weren’t dealing with an unknown person. I had looked at a picture of Mr. Drummond on [a] previous occasion and I believe I had reviewed a height and weight sheet, so the subjects you brought up about the height and weight not being in my report, that was already a predisposed fact . . .” (*Id.*)

The Government then called Detective Ron Marzec of the Delmar Police Department. Marzec testified that he had been involved in over fifty crack cocaine purchases. (*Id.* at 128.) Regarding the meeting between Mailey and Drummond on June 16, 2000, Marzec testified that his role on that day was to observe the meeting from a remote location. (*Id.*) He testified that on that day, he observed Mailey and Drummond with binoculars. (*Id.*) Marzec testified that he saw the person he believed to be Alvin Drummond riding a motorcycle in the area where he was to meet

Officer Mailey. (*Id.* at 129-130.)¹ He stated that at that point, he observed him with his naked eye from a distance of approximately twenty yards. (*Id.* at 130.) However, he testified that he could not see the defendant's face at that time. (*Id.* at 131.) Nevertheless, he stated that he was able to see the defendant's face through the binoculars at a distance of about 100 yards. (*Id.* at 130, 131.) Marzec then identified the defendant as the person he observed on June 16, 2000. (*Id.* at 131.)

Marzec then testified about the drug purchase on December 7, 2000. He stated that his role was to observe the potential sale. (*Id.* at 132.) He again observed with binoculars from a remote location. (*Id.* at 132.) Marzec testified that although the light was poor that day, "I'd say, probably with 95-percent certainty, that I believed it was Alvin Drummond in the vehicle." (*Id.* at 132, 133.)

Marzec testified that he was also assigned to observe the January 18, 2001 meeting between Mailey and the defendant. (*Id.* at 134.) Marzec stated that at approximately 4:00 p.m. that day, he saw a person pull into a gas station and signal to Officer Malley, who had already arrived. (*Id.* at 134.) Marzec testified that he was anywhere from 15 to 75 yards away from the vehicle at the time he observed the sale. He stated that as he monitored the transaction, he observed Alvin Drummond. (*Id.* at 135.) Marzec then identified the defendant as the person he saw on January 18, 2001. (*Id.*) Marzec then testified that Mailey gave him the substance he had purchased from the defendant, and the substance was crack cocaine. (*Id.* at 137-43.) On cross examination, Marzec admitted that although he had tried to obtain the registration information for the pager number used by the seller in the drug transactions, he abandoned the effort after his attempts proved futile. (*Id.* at 150-55, 179.) Furthermore, although the defense also attacked the completeness of Marzec's report, on redirect, he testified that such detailed descriptions of defendants are only used "in situations where

¹ Mailey also testified that on June 16, 2000, he observed the person known as Alvin operating a motorcycle. (*Id.* at 96.)

we are unsure of [the] identity of the suspect.” (*Id.* at 178-79.) However, Marzec testified that this case was unlike those cases because he had seen photographs of Drummond from the Department of Motor Vehicles (“DMV”) prior to his investigation. (*Id.* at 178.) Upon the Government’s request, the court admitted one of the DMV photos into evidence without objection from the defendant.

The Government also introduced a videotape into evidence. That videotape, which was taken by Officer Marzec on January 18, 2001, showed two African American men getting into and out of a blue Ford Taurus. The video showed that one of the men was officer Mailey. However, the second man’s face was shown for only a second or two before the camera cut to a different angle. Although the second person’s entire face could not be seen, it is clear that the person has a skin complexion that is similar to the defendant’s. Additionally, the person in the video was observed reaching into his trunk and retrieving what was later discovered to be a digital scale cover. He was also seen placing an object behind the sun visor on the driver’s side of the blue Taurus.

As its final witness, the Government called Ms. Stacey Turner, a forensic chemist with the DEA in New York. (*Id.* at 186.) Turner testified regarding the identity of the substance, and further helped to establish the chain of custody. (*Id.* at 181.) After Turner’s testimony, the Government rested its case.

On the second day of trial, the defense presented its case. The defense witnesses were Cheryl Denise Drummond, the defendant’s sister, George W. Drummond, the defendant’s brother, and Sol Feliciano, a family friend. The testimony of these three witnesses can be summarized as follows: Cheryl Drummond testified that although Alvin Drummond is her brother, they have different fathers. (Second Day Trial Tr. at B8.) She testified that Alvin’s father, Jesse Norton, had many

children by several different women. (*Id.* at B9-10.) She then went on to state that many of Alvin Drummond's brothers, half-brothers, and friends bore a striking resemblance to him. She testified that one of these friends even called himself "Alvin" or "Al" on occasion. (*Id.* at B21.) Ms. Drummond also stated that these individuals lived in Southern Delaware or were present there at the time of the events in question. She further testified that she and Alvin Drummond co-owned a "blueish gray" Ford Taurus, and that Alvin would let any of his friends or family use the car at any time. (*Id.* at B13.) She also testified that although she and her brother also co-owned a motorcycle, he did not drive it very often. (*Id.* at B14.) Cheryl Drummond also indicated that the family was a close one. (*Id.* at B40.) The testimony of both George Drummond and Sol Feliciano served to corroborate Ms. Drummond's statements that several family members resembled Alvin and drove his vehicles with his permission.

During Ms. Drummond's examination, the defense introduced several pictures of various African American males. Cheryl Drummond testified that the persons in the pictures were the friends and relations that she had previously mentioned. The photographs depicted the defendant as well. Some of the men were the same age, height, weight and complexion as the defendant. Others were different ages and weights. (*See* Defense Exhs. 1-6.) George Drummond and Sol Feliciano verified the identities of the persons in the pictures.

The defense then rested. After the reading of the jury instructions and closing arguments, the jury was excused to deliberate at 11:54 a.m. (Second Day Tr. at B127.) At 1:50 p.m., the jury announced that it had reached a verdict. The jury found the defendant guilty on both counts. (*Id.*) The jury was polled, and the verdict was unanimous among all jurors. (*Id.* at 127-28.) The court then excused the jury and set a date for the sentencing. The defense then filed the present motion.

III. STANDARD OF REVIEW

In reviewing a motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, 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.” *U.S. v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (citing *U.S. v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001)). Furthermore, the court is required to “draw all reasonable inferences in favor of the jury’s verdict.” *See Id.* (citing *U.S. v. Anderskow*, 88 F.3d 245, 251 (3d Cir. 1996)). Thus, a finding of insufficiency should “be confined to cases where the prosecution’s failure is clear.” *See Id.* (citing *U.S. v. Leon*, 739 F.3d 885, 891 (3d Cir. 1984)).

IV. DISCUSSION

At the outset, the court notes that the evidence clearly establishes - and the parties do not dispute - that on December 7, 2000 and January 18, 2001, a person sold more than five grams of cocaine base or crack cocaine to an undercover officer. The chain of custody is also clearly established. Therefore, the only remaining issue is the identity of the person who sold drugs to the undercover operative on the dates listed in the indictment. Despite the defendant’s protestations, the court finds that given the evidence presented at trial, a reasonable jury could find beyond a reasonable doubt that the person involved in the drug transactions was the defendant, Alvin Drummond.

First, although the defense places great weight on the fact that neither Officer Mailey nor Detective Marzec placed a detailed description of the defendant in their reports, the court does not find that this omission necessarily leads to the conclusion that Drummond did not commit the crimes

in question. Although both officers admitted that they did not include a description of the individual they observed in their reports, each officer also testified that such detailed descriptions are only used where law enforcement is unfamiliar with the person for whom they are searching. The officers testified that in a case such as this, where they had previously received photographs and height and weight information regarding the potential subject, there was no need to include such information in the report. In light of the identifying information the officers possessed prior to investigating Drummond, the court finds that it was reasonable for them not to include further identifying information in the actual reports. The court further finds that the identifying information gave the officers a reasonable basis to believe that the person they encountered was Alvin Drummond, and that a reasonable jury could also hold this view.

The court also concludes that Officer Mailey's testimony provides a second reason for rejecting the defendant's argument that the "faulty" police reports prove his innocence. Mailey's testimony demonstrated that he did not rely solely on the pictures. The evidence established that on June 16, 2000, prior to any drug deal being arranged, Mailey observed a man who responded to the name Alvin, and who Mailey later identified as the defendant. The officer's testimony establishes that on June 16, the area of the encounter was well-lit, he was only three feet away from the defendant, and the defendant was kneeling such that he was at face-level with Mailey, who was seated in a car. Thus, the evidence established that Mailey had an adequate opportunity to observe the defendant and determine whether the person he saw on June 16, 2000 was the same person he saw depicted in the photographs. The defense adduced absolutely no evidence as to why Officer Mailey could not reasonably conclude that they were the same person. In other words, although the defense suggested that the drug vendor could have been any number of people, the defense provided

no evidence as to why the defendant could not also be one of those persons. Mailey testified that he had “no doubt” that person he saw on June 16, 2000 was the same person that he saw on December 7, 2000 and January 18, 2001. Detective Marzec substantially corroborated this testimony. The jury was entitled to believe the officers’ account of the events, and the defense has presented no compelling argument to the contrary.

The defense further contends that the jury’s finding of guilt was erroneous due to the extensive testimony by Drummond’s witnesses that there were many friends and relations that resembled Drummond, and any one of them could have sold Mailey the drugs. The court also rejects this contention for four reasons.

First, as previously noted, there was substantial evidence from which the jury could find that Mailey had sufficient knowledge of Alvin Drummond to know that he was the person that he encountered on December 7, 2000 and January 18, 2001. Second, although the court acknowledges that the jury could have found that some of Drummond’s family and friends bore a strong resemblance to him, the defense produced absolutely no evidence from which the jury could infer that any of these persons had a motive to expose the defendant to the danger of prosecution by using his car to sell drugs.² Indeed, all evidence established that the Drummonds were a close-knit family, and a jury could reasonably find that members of a close-knit family would not place one another

² The court is aware that in a criminal trial, the defendant has no burden to present evidence. However, where the defendant does chose to testify or present evidence, the court may consider such evidence in ruling on a motion for a judgment of acquittal. *See United States v. Lazcano-Villalobos*, 175 F.3d 838, 844 (10th Cir. 1999) (“Because Mr. Lazcano-Villalobos testified on his own behalf, the district court could examine all the evidence in ruling on his renewed motion for acquittal at the close of the evidence, rather than limit its review to the evidence presented in the government’s case-in-chief.”) (citations omitted); *United States v. Gasomiser Corp.*, 7 F.R.D. 712, 720 (D. Del. 1948) (noting that where motion for acquittal is made at the close of evidence, the court is not limited to the Government’s evidence.)

in jeopardy of criminal charges. Third, and most telling, none of Drummond's witnesses testified that Drummond did not drive his blue Taurus on December 7, 2000 or January 18, 2001. Similarly, they did not testify that another relative or friend *did* drive the car on the dates in question. In the absence of any evidence to the contrary, a reasonable jury was free to find that the defendant operated the car on the dates in question.

Finally, there was other circumstantial evidence from which the jury could conclude that Alvin Drummond - and not some other individual - was the person who sold the drugs to Officer Mailey on December 7, 2000 and January 18, 2001. The same car was used during both drug purchases. Although it is possible that a person borrowing the car would twice engage in a drug sale, a reasonable jury could also find that it is more likely that the owner of the car has greater access to the car and could use it repeatedly, whereas a person who had to borrow a car might appear in a different vehicle. Moreover, Mailey testified that during both drug purchases, the driver of the blue Taurus placed money behind the sun visor on the driver's side of the car. Although this act is innocent in itself, placing money in the car - as opposed to on one's person, for instance - could lead a reasonable jury to find that the person who took the money owned the car, and did not borrow it as suggested by Drummond's witness. Additionally, the person in the January video retrieved the scale cover from the December sale which had occurred more than one month before. Although it is possible that a person who borrowed a car would store things in it for over a month, again, a reasonable jury could conclude that storing items in a car was indicative of (1) ownership of the car and (2) use of the car for drug sales on both dates. Since the defendant owned the car, and items related to the drug sale were found stored in the car, a reasonable jury could find that the defendant committed the crimes in question.

V. CONCLUSION

For all of the foregoing reasons, the court finds that based upon the evidence adduced at trial, a reasonable jury could find that the defendant, Alvin Drummond, did in fact distribute more than five grams of cocaine base on December 7, 2000 and January 18, 2001 as charged in the indictment. The court finds that the evidence was sufficient for a reasonable jury to reach this conclusion although the officers did not have detailed descriptions of the defendant in their reports and there were other persons who resembled the defendant. For these reasons, the court will deny the defendant's motion for acquittal.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The defendant's Motion for Acquittal (D.I. 41) is DENIED.

Dated: September 4, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE