

12-1373

To Be Argued By:
SARAH P. KARWAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-1373

UNITED STATES OF AMERICA,
Appellee,

-vs-

JASON ROBINSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Robert N. Chatigny, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

Judgment entered on April 4, 2012. Joint Appendix 14 (“A__”). On April 5, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A14.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

- I. Viewing the evidence in the light most favorable to the verdict, was there sufficient evidence to support the jury's verdict as to the conspiracy count?
- II. Did the district court commit plain error in denying the defendant's motion to suppress the confidential informant's pre-trial identification of the defendant where the photo array used was not suggestive and where there was independent evidence of the defendant's identification?
- III. Is the district court's decision not to grant a downward departure on the basis of an overstated criminal history category reviewable by this Court? Even if it is, did the district court abuse its discretion in not granting the departure?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Following a three-day trial, a jury sitting in Hartford, Connecticut, found the defendant, Jason Robinson, guilty of two counts of possession with intent to distribute crack cocaine, and of one count of conspiracy to possess with the intent to distribute crack cocaine.

The evidence at trial included the testimony of a confidential informant who, at the direction of law enforcement officers, had purchased crack

cocaine from the defendant on two occasions, and covert video recordings of those two transactions. The evidence also included the testimony of several law enforcement officers who observed the transactions.

On appeal, the defendant challenges the denial of his motion for a judgment of acquittal with respect to the conspiracy charge. The defendant argues that there was insufficient evidence to show that he had conspired with others to sell drugs. The defendant also challenges the district court's admission of identification testimony by the confidential informant. Finally, the defendant argues that the district court erred at sentencing when it denied his motion for a downward departure on the basis that his criminal history category was overstated.

For the reasons set forth below, the defendant's three challenges all fail. First, as the district court correctly concluded, there was ample evidence to sustain a conviction on the conspiracy count, including the testimony of the confidential informant that a second individual, identified by the defendant as "his man," provided the crack cocaine to the defendant before the defendant sold the drugs to the informant. Next, the district court properly admitted evidence of the pre-trial identification of the defendant because the photograph array used by law enforcement was not improperly suggestive. Finally, the district court's decision not to grant a

downward departure is not reviewable where there is no evidence that the district court misapprehended the scope of its authority to depart. This Court should affirm the judgment below.

Statement of the Case

On October 21, 2009, a grand jury sitting in Bridgeport, Connecticut, returned a two-count indictment charging the defendant with possession with intent to distribute and distribution of crack cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B). A3, A18-20. On March 31, 2011, a grand jury sitting in Hartford, Connecticut, returned a three-count superseding indictment, which added a third count of conspiracy to distribute and to possess with intent to distribute crack cocaine, in violation of Title 21, United States Code, Sections 841(a)(1), 841 (b)(1)(B), and 846. A9, A21-24.

A jury trial was held in Hartford, Connecticut before the Hon. Robert N. Chatigny, United States District Judge. Evidence began on May 18, 2011. A11. On May 23, 2011, the jury found the defendant guilty of all three counts of the superseding indictment. A11.

On April 3, 2012, the district court sentenced the defendant to a term of 60 months of imprisonment and a four-year term of supervised release. A14, A241-43. Judgment entered the fol-

lowing day. A14. On April 5, 2012, the defendant filed a timely notice of appeal. A14, A244.

The defendant is currently serving the sentence imposed by the district court.

**Statement of Facts and Proceedings
Relevant to this Appeal**

In the summer of 2009, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) and the Drug Enforcement Administration, were conducting a narcotics investigation in New London County. GA45. As part of the investigation, officers conducted a series of controlled purchases of narcotics from several individuals, including the defendant, Jason Robinson, using an ATF confidential informant (“CI”). GA45.

ATF Special Agent Daniel Prather testified that before the controlled purchases, agents followed a set of standardized procedures, including searching the CI for contraband, providing the CI with electronic surveillance equipment, providing the CI with pre-recorded cash, and searching the ATF car to be used by the CI during the transaction. GA56-59. In addition, Special Agent Prather testified that during each transaction, agents driving unmarked vehicles maintained surveillance of the CI, while communicating with one another via radio. GA59-60. Special Agent Prather also testified that after each transaction, agents searched the CI, retrieved the drugs purchased by the CI, placed

the electronic surveillance recordings into evidence, and interviewed the CI. GA60-61.

On July 13, 2009, while with an ATF agent, the CI placed a call to the defendant. GA331-32. The CI pretended to know a person in common with the defendant, and arranged to meet the defendant later that day to purchase crack cocaine. GA286-87, GA335-36.

Later on that evening, the CI placed another, recorded call to Robinson, and the two agreed to meet at the Burlington Coat Factory in New London. GA67-72, Gov't Ex. 1 (recorded call). Agents then searched the CI and the ATF car that the CI would be driving, turned on the covert video and audio recorder in the ATF car, and gave the CI \$600 in ATF-funds. GA77-80. Agents followed the CI to the Burlington Coat Factory in New London. GA80-81. Other agents set up surveillance in the area of 25 Grove Street, where agents believed the defendant was staying. GA209-10.

While waiting in the parking lot of the Burlington Coat Factory, the CI made additional calls to the defendant. GA83. The defendant directed the CI to meet him at Mr. G's restaurant on Williams Street in New London. GA83. The CI (followed by agents) drove to the area of Mr. G's restaurant and then, at the direction of the defendant, parked across the street at the Citgo gas station. GA84-86. Mr. G's and the gas station were close to the intersection of Williams

Street and Grove Street, where other officers were already set up on surveillance. GA85-87, Gov't Ex. 2 (map).

A short time later, officers saw the defendant and an unknown man drive down Grove Street in a Chevrolet Cavalier and park in the lot behind Mr. G's. GA212-15, GA228-29. The unknown man got out of the driver's side of the car, looked in several parked vehicles in the lot, and then walked up to the corner of Williams Street across from the gas station lot where the CI was parked. GA213-14. Groton Town Police Officer Bridget Nordstrom, who was parked in an unmarked pick-up truck behind Mr. G's and who has extensive experience in narcotics investigations, testified that it appeared to her that the unknown man was acting as a "lookout," *i.e.*, as counter-surveillance, for the defendant. GA214. The defendant then got out of the passenger side of car, crossed Williams Street to the gas station, and got into the ATF car. GA228-29.

The covert video recording from the ATF car shows the defendant directing the CI to drive around the block, which the CI did. GA88-89. Gov't Ex. 6 (covert video). The CI stated to the defendant, "I got six exact, are we good with that?" to which the defendant replied, "That's all you need. That's all you need." Gov't Ex. 6. The defendant then commented to the CI, "This ain't a direct sale. Put your bread right there[,]" and gestured to the center console of the car. GA294,

Gov't Ex. 6. The CI placed the \$600 in the center console. GA295. The defendant took the money, and set down a bag of crack in its place. GA294-95. As the car approached the intersection of Crystal Avenue and Grove Street, the CI stopped the car and the defendant got out. GA89-90. Officers continued to follow the ATF car to a meeting location, where they found the crack cocaine sold by the defendant. GA91-92, Gov't Ex. 4 (9.9 grams of crack cocaine).

On July 27, 2009, the CI placed another recorded call to the defendant and arranged to meet him the following Saturday to purchase crack cocaine. GA111, Gov't Ex. 5 (recorded call).

The following Saturday, August 2, 2009, officers again searched the CI and gave him \$600 in ATF-funds. GA169-70. The CI and the defendant talked on the phone and agreed to meet at the Citgo gas station on Williams Street. GA172. After the CI arrived at the Citgo gas station in the ATF car, Officer Bridget Nordstrom (parked in an unmarked car on Grove Street) saw the defendant leave 25 Grove Street and walk down the street, towards the gas station. GA218, GA220-21. A few moments later, Officer Nordstrom saw another man leave 25 Grove Street and walk up the street towards Crystal Avenue. GA221.

The covert video recording from the ATF car shows the following: at the gas station, the defendant got into the passenger side of the ATF

car and directed the CI to drive around the block. The defendant then told the CI to stop the car at the intersection of Grove Street and Crystal Avenue. There, the defendant opened the front passenger door of the car as an unknown man approached the car. The CI asked, “Who the fuck is this?” and the defendant replied, “My man.” The video shows the unknown man reach inside of his pants and remove an object, then hand the object to the defendant. GA303-04, Gov’t Ex. 8 (covert video). The defendant then gave the packet, which was a plastic bag containing crack cocaine, to the CI, who, in turn, gave the defendant \$600.¹

The defendant then got out of the car and walked towards Grove Street, following the unknown man. GA187, Gov’t Ex. 8. Officer Nordstrom, who was still parked in front of the defendant’s house on Grove Street, saw the unknown man return to the house, followed shortly thereafter by the defendant. GA222.

Agents followed the CI back to a meeting location and recovered the crack cocaine. GA177-78, Gov’t Ex. 9 (10.8 grams of crack cocaine).

¹ Contrary to the defendant’s assertion that the videos do not show “any drugs or cash,” Gov’t Ex. 8 clearly shows the defendant hand the CI a plastic baggie containing a white substance and then the CI hand the defendant a wad of bills.

Summary of Argument

I. Viewing the evidence in the light most favorable to the government, there was sufficient evidence for a reasonable jury to find that the defendant knowingly participated in a conspiracy with others to distribute crack cocaine. The videotaped evidence and police officer observations showed that the defendant sold crack cocaine to the confidential informant with the assistance of, and in concert with, other individuals.

II. The district court properly denied the motion to suppress the pre-trial identification of the defendant by the confidential informant where the photo array used by law enforcement showed individuals similar in appearance to the defendant, and where there was no evidence that the informant had been directed which photo to select. In addition, there was ample identification evidence from a variety of sources, including two recorded videos, that the defendant was, in fact, the perpetrator of the crimes charged.

III. The district court's decision not to downwardly depart on the basis of an overstated criminal history category is not reviewable given the district court's clear understanding that it had the authority to depart and its discretionary decision not to do so. In any event, even if re-

viewable, the district court did not abuse its discretion in denying a departure because a criminal history category III properly represented the defendant's criminal history, which included ten convictions spanning over a number of years.

Argument

I. There was sufficient evidence for the jury to conclude that the defendant conspired with others to possess and distribute crack cocaine.

A. Relevant facts

Following the conclusion of the government's case, the defendant moved pursuant to Rule 29(a) for the dismissal of count three of the superseding indictment, which charged him with conspiracy to possess with the intent to distribute crack cocaine. GA366.

The district court denied the motion, citing the evidence supporting the August 2nd transaction, from which "the jury could find that the defendant, seated in the car, and the other unidentified person referred to by the defendant as 'my man,' shared a purpose to sell the drugs to the [CI] . . . Viewing the evidence most favorably to the government, I think the jury can infer that the defendant and the third party had an agreement or understanding that these drugs would be sold to the buyer, and that makes it an

appropriate case for a conspiracy charge.”
GA385-86.

B. Governing law and standard of review

1. Sufficiency of the evidence

Rule 29(a) of the Federal Rules of Criminal Procedure provides that the district 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.”

In *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), this Court explained the “heavy burden” faced by a defendant challenging his conviction based upon a claim of insufficient evidence:

In considering such a challenge, we must credit every inference that could have been drawn in the government’s favor, and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt[.] We defer to the jury’s determination of the weight of the evidence and the credibility of the witnesses, and to the jury’s choice of the competing inferences that can be drawn from the evidence. Pieces of evidence must be viewed not in isolation but in conjunction, and the conviction must be upheld if *any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt[.]

Id. at 94-95 (internal citations and quotations omitted); *see also United States v. Pica*, 692 F.3d 79, 86 (2d Cir. 2012) (holding that in reviewing a challenge to sufficiency of the evidence, “we view the evidence in the light most favorable to the prosecution” and that “[u]nder this exceedingly deferential standard of review, we will affirm the conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt” (internal quotations and citations omitted)).

If there are conflicts in the testimony or evidence, the reviewing court “must defer to the jury’s resolution of the weight of the evidence and the credibility of the witnesses, and to the jury’s choice of the competing inferences that can be drawn from the evidence.” *United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003) (internal citations and quotations omitted). “In other words, the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.” *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (internal citations and quotations omitted).

This Court reviews the district court’s denial of a defendant’s motion for acquittal *de novo*. *United States v. Greer*, 631 F.3d 608, 613 (2d

Cir.), *cert. denied*, 131 S. Ct. 1841 (2011). This Court “will not disturb the conviction if, viewing the evidence in the light most favorable to the government, ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* (quoting *United States v. Xiao Qin Zhou*, 428 F.3d 361, 370 (2d Cir. 2005)). Indeed, as this Court has explained, “[t]he ultimate question is not whether [this Court] *believe[s]* the evidence adduced at trial established defendant’s guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find.*” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

2. Conspiracy

“The essence of conspiracy is agreement among two or more persons to join in a concerted effort to accomplish an illegal purpose.” *United States v. Parker*, 554 F.3d 230, 234 (2d Cir. 2009). “To prove a conspiracy, the evidence must show that ‘two or more persons agreed to participate in a joint venture intended to commit an unlawful act.’” *Id.* (quoting *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997)). Once the evidence establishes that a conspiracy existed, the government must also show that the defendant knowingly joined and participated in the conspiracy. *See United States v. Santos*, 541 F.3d 63, 71 (2d Cir. 2008).

While a defendant’s “mere association” with those undertaking criminal activity is not sufficient to establish his membership in a conspiracy, the government need not prove that the defendant knew of all of the details of the conspiracy, or the identifies of his co-conspirators. *United States v. Hawkins*, 547 F.3d 66, 71 (2d Cir. 2008). In addition, the government need not prove the identities of a defendant’s co-conspirators because, while “at least two persons are required to constitute a conspiracy . . . the 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.” *Rogers v. United States*, 340 U.S. 367, 375 (1951).

“When a defendant challenges the sufficiency of the evidence in a conspiracy case, ‘deference to the jury’s findings is especially important . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon’s scalpel.’” *Santos*, 541 F.3d at 70 (quoting *United States v. Morgan*, 385 F.3d 196, 2004 (2d Cir. 2004)). “[T]he conspiratorial agreement itself may be established by proof of a tacit understanding among the participants, rather than by proof of an explicit agreement.” *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997); *see also United States v. Jones*, 30 F.3d 276, 282 (2d Cir.

1994) (“[T]he proof must demonstrate at least a tacit understanding between the parties to further the violation of the law.”).

C. Discussion

As set forth above, at trial the government presented sufficient evidence for the jury to conclude that the defendant conspired with others to distribute crack cocaine to the CI. That is, in viewing the evidence “in the light most favorable to the government,” as this Court must do, it is clear that “a rational trier of fact could have found” that a conspiracy existed, and that the defendant knowingly joined and participated in the conspiracy. *Greer*, 631 F.3d at 613.

First, there was sufficient evidence to show that a conspiracy existed between the defendant and others to distribute crack cocaine—*i.e.*, that the defendant and others had a “tacit understanding” to further a violation of the law. *See Desimone*, 119 F.3d at 223. This evidence included testimony from several witnesses that the defendant sold the CI crack cocaine on the two occasions with the assistance and cooperation of another. Second, this same evidence showed that the defendant was a knowing and willing participant in the conspiracy, as he worked and coordinated with others to distribute crack cocaine to the CI.

For example, during the July 13, 2009 transaction, the defendant arrived at Mr. G’s restau-

rant in a car driven by another man. GA214-215, GA228-29. The car parked in a lot across the street from the Citgo gas station, where the defendant had agreed to meet the CI and where the CI was waiting in the ATF car. GA84-85, GA210-13. Before the defendant got out of the passenger side of the car, the unknown man got out of the car and began to look in several of the cars parked in the lot. GA213-14. This individual then walked to the corner across from the gas station lot where the CI was parked. According to Officer Nordstrom, the man “appeared to be acting as a lookout, which isn’t uncommon in narcotics [transactions.] It’s what we call counter-surveillance . . . sometimes they do it to protect themselves from being robbed or to look out for law enforcement.” GA214. In short, the evidence showed that the defendant and the unknown man worked together to close the narcotics transaction with the CI.

In addition, during the August 2, 2009 controlled purchase, law enforcement officers saw the defendant leave 25 Grove Street and walk down the hill towards where the CI was parked. GA220-21. A few moments later, an unknown man left the same residence and walked up the hill, towards Crystal Avenue. GA221. As the defendant and the CI circled the block in the ATF car, the defendant directed the CI to stop near the intersection of Crystal Avenue and Grove Street, where the unknown man was waiting.

The unknown man then approached the car, removed the crack cocaine from inside of his pants and handed the drugs to the defendant. GA303, Gov't Ex. 8. When the CI asked who the unknown man was, the defendant responded, "My man." Gov't Ex. 8. The defendant then provided the drugs to the CI for \$600, got out of the car, and followed the unknown man back down Grove Street towards the defendant's residence. GA187, GA222.

The actions of the defendant and the unknown man on both occasions demonstrated a level of coordination and an implicit understanding that the unknown man was helping the defendant in his drug-dealing activities.² As the district court noted, the defendant directed the CI to the location where the other person waited, and the unknown man then passed the drugs to the defendant. The court reasoned that, "the jury could find that the defendant, seated in the car, and the other unidentified person referred to by the defendant as 'my man,' shared a purpose to sell the drugs to the buyer" GA385. Moreover, as the district court noted in rejecting the defendant's assertion that the unknown man

² As the CI testified, during the second transaction, the defendant pulled over and there was "an individual, must have had the narcotics on him, and when we got around the corner, pulled over, he was coming towards the car so we can do the transaction." GA303.

could have just been the “seller” of the drugs, and not a co-conspirator, the evidence was to the contrary: “The video shows the defendant directing the [CI] to a location where this other person is waiting and the other person, again referred to by the defendant as ‘my man,’ passes the drugs to the defendant. No money is exchanged. The defendant does not pay for the drugs. Indeed, the third person doesn’t wait. He simply hands the drugs, turns and walks away, and the defendant then passes the drugs on to the [CI] in exchange for cash.” GA385-86.

The defendant’s argument that “the facts surrounding the conspiracy were sketchy at best,” Def. Br. 5, ignores the testimony and the evidence showing that the defendant coordinated with at least one other individual to sell the drugs to the CI. This argument also fails to take into account that on appeal, this Court must “defer to the jury’s determination of the weight of the evidence and the credibility of the witnesses, and to the jury’s choice of the competing inferences that can be drawn from the evidence.” *Reifler*, 446 F.3d at 94-95 (internal quotations omitted).

The defendant faults the government for not providing “photographic surveillance” of the unknown co-conspirator, and for not conclusively identifying this unknown individual, Def. Br. 6-7, but these arguments simply go to “the weight of the evidence, not to its sufficiency, and a chal-

lence to the weight is a matter for argument to the jury, not a ground for reversal on appeal.” *United States v. Diaz*, 176 F.3d 52, 92 (2d Cir. 1999) (internal quotations omitted).

The defendant also suggests that the fact that the government never positively identified the defendant’s co-conspirator somehow calls into question the jury’s verdict. As set forth above, however, “the 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.” *Rogers*, 340 U.S. at 375; *see also United States v. LoRusso*, 695 F.2d 45, 56 n.8 (2d Cir. 1982) (“The fact that [the defendant’s] associates were not identified is no impediment to his conviction of conspiring with them.”); *United States v. Artuso*, 618 F.2d 192, 197 (2d Cir. 1980) (affirming defendant’s conspiracy conviction where defendant made references to his “money people” and “his man.”).

Finally, the defendant’s reliance upon *United States v. Persing*, 436 Fed. Appx. 13 (2d Cir. 2011), is misplaced because the language the defendant quotes from that case involved a challenge to the district court’s evidentiary ruling that certain computer records could be admitted as co-conspirator admissions under Fed. R. Evid. 801(d)(2). This Court held that the record was unclear as to whether the district court had made the requisite findings to admit the documents under the hearsay exception (noting that

the parties had provided only a limited appendix), and thus remanded to the district court to explain the evidentiary foundation for its ruling. Here, in contrast, the record is clear that the defendant conspired with others to further his drug sales.

The defendant's conviction for conspiracy must therefore be affirmed.

II. The district court properly admitted testimony identifying the defendant as the person who sold drugs to the CI.

A. Relevant facts

Prior to trial, the defendant filed a motion seeking to suppress the CI's pre-trial identification of the defendant, as well as the CI's anticipated in-court identification of the defendant. The defendant argued that a photo array shown to the CI (Gov't Ex. 11, GA493) was overly suggestive. GA239-41.

Prior to the CI's testimony, and outside of the presence of the jury, the CI testified on the issue of the photo array. GA240-54. The CI testified that he was shown the photo array on August 1, 2009, and that he identified the defendant from eight photographs as the person from whom he had purchased crack by initialing next to the defendant's picture and by signing the photo array form. GA244, GA493. The CI stated that he was instructed by agents "to identify the person I

was with . . . [j]ust to the best of my recollection, you know, be honest basically.” GA245. The CI further testified that no one told him who to identify, GA245, and that he had made the identification based upon his own observations, GA245.

On cross-examination (and still outside the presence of the jury), counsel for the defendant asked the defendant to stand and inquired of the CI, “Have you ever seen this gentleman before?” to which the CI replied, “Yes . . . [t]hat’s the individual in the lineup.” GA252. The CI added that the defendant no longer had braids, as he did in the photo array. GA252.³

The defendant argued that the CI did not have an adequate opportunity to observe the defendant on July 13th, such that the lineup should be suppressed. GA253-54.

The district court denied the defendant’s motion to suppress. First, the court concluded that there was nothing in the record to suggest that the CI had been told by law enforcement officers which photo to pick.⁴ GA254. Next, as to wheth-

³ The CI identified the defendant in the presence of the jury the following day. GA284-85.

⁴ When the district court remarked that there was no evidence “that the agents told the witness which photo to pick[,]” counsel for the defendant stated that he was not making such a claim. GA254.

er the photo array itself was unduly suggestive, the court noted:

It seems to me that the photo of the defendant does not stand out from all the other photos so as to suggest to the person being called on to make the identification that he is the person. It seems to me that the person depicted in photo number one is younger looking and he has a thin face, and I think that the contrast between that photo and the defendant's photo is noticeable, both with regard to age and in the thinness of the face depicted in photo one. But as for the rest of the photos, I don't see a noticeable difference in age that causes the defendant's photo to stand out as noticeable older.

* * *

We have headshots taken against similar backgrounds of people wearing similar clothing. They have a similar complex. They have similar hairstyles. They have receding hairlines. They do have varying amounts of facial hair. I find it difficult to be critical of the people who used this array with the possible exception of photo one, which I do think is different from the rest in terms of age and the thinness of the person's face.

But as I understand the case law, there's nothing inherently wrong with a seven person photo array, and ultimately I cannot find that the picture of the defendant stands out from all the rest so as to suggest to the identifying witness that this is the picture of the culprit.

GA263-64. In addition, the court held that the CI's interaction with the defendant on July 13th "provides a sufficient basis to permit the government to ask him to try and identify the person in the photo array." GA269.

B. Governing law and standard of review

Identifications made prior to trial, as well as in-court identifications, are generally permitted at trial. Indeed, while such statements are offered for the truth of the matter asserted—that is, that the defendant is the one who committed the crime—they are specifically excluded from the rule against hearsay, as long as the witness making the identification testifies and is subject to cross-examination. *See* Fed. R. Evid. 801(d)(1)(C).

However, "[a] defendant's right to due process includes the right not to be the object of suggestive police identification procedures that make an identification unreliable." *United States v. Douglas*, 525 F.3d 225, 242 (2d Cir. 2008). "A prior identification will be excluded only if the

process that produced the identification is so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law.” *United States v. Salameh*, 152 F.3d 88, 125 (2d Cir. 1998) (internal citations and quotations omitted).

When a defendant raises a challenge to a witness’s previous identification, the district court should engage in a one-step or two-step inquiry, as set out in this Court’s decision in *United States v. Maldonado-Rivera*, 922 F.2d 934 (2d Cir. 1990):

The first question is whether the pretrial identification procedures were unduly suggestive of the suspect’s guilt. If they were not, the trial identification testimony is generally admissible without further inquiry into the reliability of the pretrial identification. In that circumstance, any question as to the reliability of the witness’s identification goes to the weight of the evidence, not its admissibility.

Id. at 973. With respect to this first test, this Court has identified factors to be considered by a Court: “the size of the array, the manner of presentation by the officers, and the array’s contents.” *Id.* at 974. The key question is whether the defendant’s picture “so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to

be the culprit.” *Id.* (internal citations and quotations omitted). If the district court concludes that the photo array is not suggestive, the identification testimony of the witness may proceed without further inquiry. *Id.* at 973; *Douglas*, 525 F.3d at 243.

If, however, the district court concludes that the pre-trial procedures were impermissibly suggestive, the court must proceed with the second step set out in *Maldonado-Rivera*:

[T]he court must then weigh the suggestiveness of the pretrial process against factors suggesting that an in-court identification may be independently reliable rather than the product of the earlier suggestive procedures. The factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

922 F.2d at 973-974 (internal citations and quotations omitted).

This Court reviews “the district court’s determination of the admissibility of identification evidence for clear error.” *Douglas*, 525 F.3d at 242 (quoting *United States v. Mohammed*, 27

F.3d 815, 821 (2d Cir. 1994)). Further, this Court “may review the photographic array itself to assess its fairness.” *Id.*

C. Discussion

Here, the district court properly denied the defendant’s motion to suppress the pre-trial identification because the photo array was not suggestive. Moreover, there was overwhelming evidence, from a variety of sources, that confirmed the defendant’s identification as the person who sold crack cocaine to the CI.

The defendant argues that the photo array shown to the CI on August 1, 2009 was “improper,” Def. Br. 9, but does not specify or explain how the array was deficient. In the statement of facts, the defendant states that the photograph of him was “ancient,” Def. Br. 2, but even if this characterization were true, the defendant does not explain how using an older photograph of the defendant improperly suggested to the CI to pick the defendant’s photo.

Indeed, a review of the photographic array, *see* GA493, confirms the district court’s conclusion that the array was not improperly suggestive. The district court carefully examined the photo array, and concluded that the defendant’s photo “does not stand out from all the other photos so as to suggest to the person being called on to make the identification that he is the person.” GA263. The district court explained its reason-

ing in detail, noting that while one of the photos in the array depicted an individual younger than the defendant and with a thinner face than the defendant, the remaining seven individuals appeared similar in age, clothing, complexion, and hairstyles. GA263-64. Thus, because there was nothing “unduly suggestive” of the defendant’s guilt from the photo array itself, the “trial identification testimony is generally admissible without further inquiry” *Maldonado-Rivera*, 922 F.2d at 973.⁵

The defendant faults the district court for improperly suggesting the identification of the defendant prior to the CI’s testimony before the jury by asking the CI to identify the defendant during the identification hearing, “where, of course, he was sitting next to his counsel and clearly on trial.” Def. Br. 9. The defendant’s argument is not well-founded. It was the defendant’s counsel, not the district court, who asked the defendant to stand, and then inquired of the CI, “Have you ever seen this gentleman before?”

⁵ The defendant did not argue to the district court below, nor presents an argument to this Court, that law enforcement officers suggested to or told the CI which individual to select in the photo array. See GA254, GA269. To the contrary, the record shows that the CI was not told who to pick, but instead was told “to identify the person that I was with . . . [j]ust to the best of my recollection, you know, be honest basically.” GA245.

to which the CI responded, “Yes, that’s the individual in the lineup.” GA252. Moreover, it is clear that the CI recognized the defendant based upon his own memory, and not based upon any questions (proper or improper) posed to him, because the CI was able to articulate how the defendant looked in the summer of 2009 versus his slightly altered appearance at trial. *See* GA249-52.

The defendant also seems to suggest that the CI’s pre-trial and trial identification of him is unreliable because the CI could not identify the defendant in a different, grainy blow-up of the photograph taken at the time of his arrest in October of 2009. *See* Def. Ex. 3, GA326. In contrast to the defendant’s appearance in July and August of 2009, when the defendant had facial hair and braids, in the booking photograph the defendant appears clean shaven. In any event, the jury had the recorded videos of the two transactions, and clearly made its own assessment that the person in the videos was, indeed, the defendant.

The circumstances of the pre-trial identification, coupled with the evidence at trial, leave little room for concern that the “identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384 (1968). Here, the CI was shown the photo lineup approximately two

weeks after meeting the defendant, where the CI was in the ATF car in close proximity to the defendant for several minutes, and the defendant did not wear a mask or other clothing to hide his face. *See id.* (affirming pre-trial identification of bank robbery where victims saw defendant for up to five minutes in a well-lighted bank and where the defendant did not wear a mask).

The defendant's reliance on *United States v. Hemmings*, No. 10-2995-cr, 2012 WL 1872605 (2d Cir. May 24, 2012) (unpublished), is misplaced because in that case, this Court concluded that the identification procedure was not improperly suggestive. Unlike the instant case, the photo shown in *Hemmings* was "flawed" because the defendant was the only individual in the photo facing forward, but this Court nonetheless held that the identification procedure was still not "unduly suggestive." This Court reasoned that there was "ample evidence to support the reliability of the identification[.]" and noted that the jury was provided with surveillance photos from the charged drug transaction, so it could make its own assessment as to the identity of the defendant. *Id.* at *5-*6.

Thus, here, because the photo array was not suggestive, the CI's testimony concerning his pre-trial identification of the defendant, as well as his in-court identification of the defendant, were properly admitted. *See Douglas*, 525 F.3d at 243.

To the extent that the defendant's brief can be read to suggest a sufficiency challenge to the evidence identifying the defendant as the individual who sold drugs to the CI, this challenge also fails. Despite the defendant's contention that the identification of the defendant rested solely upon the testimony of the CI, Def. Br. 9, there was overwhelming evidence to demonstrate that the defendant was, indeed, the culprit.

First, the jury was shown the covert video recordings from the two controlled purchases, along with photographic still shots taken from those videos (Gov't Exs. 3, 3F, 8, and 8A). The jurors themselves were able to compare the recorded images with the defendant himself, who was present in the courtroom.

In addition, ATF Special Agent Daniel Prather testified that he was familiar with the defendant, the defendant's voice, and the defendant's appearance, and that he recognized the defendant's voice on the recorded calls preceding the July 13, 2009 transaction. GA72-76. Special Agent Prather also testified that he identified the defendant as the person he saw leaving the ATF vehicle on the night of July 13, 2009, *see* GA90, and that he also recognized the defendant and the defendant's voice on the recorded video from that night, GA106, GA108.

Similarly, Groton Town Police Officer Bridget Nordstrom testified that she was familiar with

the defendant. GA204-05. Officer Nordstrom stated that she recognized the defendant on July 13, 2009, when he got out of the Chevy Cavalier behind Mr. G's and walked over to the ATF car. GA214-15. Officer Nordstrom also testified that she recognized the defendant as the person leaving 25 Grove Street on August 2, 2009, and walking down the hill towards the ATF car, shortly before the recorded video showed the defendant getting into the car. GA218-20.

Finally, there was evidence that the utilities at the 25 Grove Street residence were in the defendant's name, *see* GA352-53, Gov't Ex. 14, and that a car seen at the residence was registered to the defendant. *See* GA207-08, Gov't Ex. 12.⁶

⁶ In light of this overwhelming evidence, the government submits that the jury simply did not credit the testimony of Leisha Turner, the defendant's girlfriend, that he did not have braids or facial hair during the summer of 2009. Ms. Turner admitted that in 2009, she lived in New York while the defendant lived in Connecticut, and stated that she could not recall what she or the defendant were doing in July and August of 2009. GA380-81. Indeed, as the district court remarked, "[t]he government says that the defendant's girlfriend came here and committed perjury in an effort to help Mr. Robinson . . . I was here and I think the government is right. I think that she deliberately undertook to mislead the jury." A201.

Given the overwhelming evidence that the defendant was the individual who sold crack cocaine to the CI on the two occasions in question, the defendant's challenge to his identification fails.

III. The district court understood its authority to depart downward on the basis of an overstated criminal history category, and its decision not to do so is not reviewable on appeal.

A. Relevant facts

On December 7, 2011, the district court held a sentencing hearing. A178. The court amended the PSR to address the defendant's concerns about references to the number of children that he had, A181-82, but otherwise adopted the statement of facts in the PSR. A183-84. After noting a number of issues that it believed needed to be addressed, A200-201, the district court continued the sentencing hearing to April 3, 2012, when it sentenced the defendant, A208.

The PSR calculated the defendant's base offense level as 22 based upon a total net weight of crack cocaine from the two controlled purchase as of 20.7 grams. PSR ¶ 14. With no applicable enhancements or reductions, the total offense level was 22. PSR ¶ 21.

The PSR determined that the defendant's criminal history category was III, *see* PSR ¶ 33,

based upon the defendant's previous conviction for sale of narcotics, PSR ¶ 25, and his two prior convictions for assault in the third degree, PSR ¶¶ 31, 32, which resulted in five total criminal history points. PSR ¶ 33. While not counted in the criminal history category calculation, the PSR noted the defendant's several prior convictions for: disorderly conduct (two convictions), *see* PSR ¶¶ 23, 27; criminal trespass, *see* PSR ¶ 24; failure to appear (two convictions), *see* PSR ¶¶ 26, 30 and another assault in the third degree, *see* PSR ¶ 29.⁷

With a total offense level of 22, and a criminal history category of III, the PSR set forth the advisory Guidelines range as 51 to 63 months, PSR ¶ 65.⁸ The district court adopted the statement

⁷ The government also provided the court with information about the defendant's 2008 arrest in Florida following the report of shots fired near a motel. Police found the defendant handcuffed in the back of a car with another individual who was armed. The defendant had \$20,000 cash on him. During the December 7, 2011 sentencing hearing, the defendant represented to the district court that he had traveled to Florida to purchase a car, and was handcuffed during a botched robbery attempt. A195-97. The defendant could not account, however, for the fact that he had only minimal reported earnings or assets, *see* PSR ¶ 60, yet had \$20,000 cash available to him.

⁸ While the PSR set out that that a mandatory minimum term of five years was applicable to the de-

of facts in the PSR, and adopted the Guidelines calculation, absent objection of the parties. A182-85.

The defendant moved for a downward departure on the basis that criminal history category III overstated the seriousness of his criminal history. The district court denied this motion, stating that “I don’t think that Criminal History Category III does overstate the seriousness of your record or your likelihood of recidivism, and I’m sure that it does not significantly do so.” A229. The district court went on to note:

You have I believe it’s ten prior convictions spanning a long period of time. You received points for only a few of them. It’s true that the drug conviction dates to 1993, but again, you appear to have continued in your drug dealing activity right up through 2009 at the time of the events underlying the conviction here, notwithstanding the fact that you’d been shot a couple of times along the way.

And the assault convictions are serious considering the information that I have about the victims’ accounts.

defendant, both the defendant and the government agreed that the five-year mandatory term was no longer applicable in light of the Fair Sentencing Act.

Again, the attempted robbery in Florida where shots were fired from your car cannot be ignored.

So your request for a departure is denied.

A229.

The district court set forth its analysis of the section 3553(a) factors, A224-33, stating that the defendant “by [his] own words and conduct, showed [himself] to be an experienced and relatively sophisticated drug dealer,” A225, but also noting the defendant’s difficult upbringing, A226, and the fact that the defendant had recently assisted another inmate who was choking, A228. The district court cited to the defendant’s compliance with the conditions of his pretrial release, explaining “I think that it shows that if you are on supervision with us, you may be able to avoid further criminal activity, and I take that into account.” A232.

The court sentenced the defendant on each count to a Guidelines sentence of 60 months of imprisonment (to run concurrently), a four year term of supervised release, and a \$300 special assessment. A233-34.

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United

States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). See *Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. See *id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines “effectively advisory.” *Booker*, 543 U.S. at 245.

After the Supreme Court’s holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. See *Rita v. United States*, 551 U.S. 338, 341 (2007); *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011); *Fernandez*, 443 F.3d at 26-27. Reasonableness review has generally been divided into procedural reasonableness (the procedure employed in arriving at the sentence) and substantive reasonableness (the length of the sen-

tence). *See Cossey*, 632 F.3d at 86; *see also United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). For a sentence to be procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *Cavera*, 550 F.3d at 190.

U.S.S.G. § 4A1.3(b)(1) permits the district court to depart downward in limited circumstances “if reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes[.]” As an example, the Commentary to that section notes the departure may be warranted if “the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of criminal behavior in the intervening period.” “This type of departure is most frequently used when a series of minor offenses, often committed many years before the instant offense, results in a CHC that overstates the seriousness of the defendant’s prior record.” *United States v. Carrasco*, 313 F.3d 750, 757 (2d Cir. 2002).

This Court has explained that “a refusal to downwardly depart is generally not appealable.” *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and ci-

tation omitted); *see also United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Ekhtator*, 17 F.3d 53, 55 (2d Cir. 1994) (“When a district has discretion to depart from the sentencing range prescribed by the Guidelines and has declined to exercise that discretion in favor of a departure, its decision is normally not appealable.”); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001).

A narrow exception to this general rule exists “when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.” *Stinson*, 465 F.3d at 114 (quotation marks and citation omitted). Absent “clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,” however, this Court presumes that the judge understood the scope of his authority. *Id.*; *see also United States v. Sero*, 520 F.3d 187, 193 (2d Cir. 2008) (per curiam) (noting that the “presumption that a district court understands its authority to depart may be overcome only” in a “rare situation”) (quotation marks and citation omitted). Such a substantial risk may arise “where the available ground for departure was not obvious and the sentencing judge’s remarks made it unclear whether he was aware of his options.” *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (quotation marks and citation omitted).

In addressing motions for downward departures, this Court “does not require that district judges by robotic incantations state ‘for the record’ or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it.” *United States v. Diaz*, 176 F.3d 52, 122 (2d Cir. 1999) (quotation marks and citation omitted); *see also United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam) (“Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat judges as automatons.”).

C. Discussion

The district court’s decision not to depart on the basis of an overstated criminal history category is not reviewable in this Court. The experienced district court was well aware that it had the legal authority to depart pursuant to U.S.S.G. § 4A1.3(b)(1), and clearly decided that no such departure was warranted here. Indeed, the district court expressly stated that the defendant was making a “request for a departure from Criminal History Category III to II,” A228, and went on to give a detailed explanation why it did not believe that “Criminal History Category III overstates the seriousness of [the defendant’s] record or [the defendant’s] likelihood of recidivism” A229. Where, as here, the district court fully apprehended its authority to depart—and the defendant does not argue otherwise—its

decision not to “downwardly depart is generally not appealable.” *Stinson*, 465 F.3d at 114.⁹

In any event, the district court correctly denied the criminal history departure. U.S.S.G. 4A1.3(b)(1) permits a departure in limited circumstances if the defendant’s criminal history category “substantially” overstates the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit another crime. Here, the defendant was properly within criminal category III.

As the district court noted, the defendant had ten prior convictions covering a lengthy period of time from 1988 through 2003. *See* A229, PSR ¶¶ 25-33. However, only three of these convictions counted in terms of criminal history points, including a conviction for sale of narcotics, PSR ¶ 25, and two convictions for assault in the third degree, PSR ¶¶ 31, 32.¹⁰ While the defendant

⁹ The district court’s comments stand in contrast to the case of *United States v. Preacely*, 628 F.3d 72, 80-81 (2d Cir. 2010), where the district court expressed an inability to depart from a criminal history VI category.

¹⁰ The sentences for both assault convictions were suspended and therefore each received one criminal point, *see* PSR ¶¶ 31, 32; had the sentences not been suspended, the defendant would have received two criminal points for each conviction, which would have resulted in a criminal history category IV. *See* U.S.S.G. § 4A1.1.

characterizes his latter two convictions as merely “domestic situations[,]” Def. Br. 10, the PSR sets forth violent accounts where the victim described being “hit in the face, thrown to the ground, and had a portion of her hair pulled out” by the defendant. PSR ¶ 32.

The district court clearly understood its authority to depart, and therefore its decision to impose a Guidelines sentence is not appealable. Moreover, the district court’s conclusion to apply a criminal history category III was well-founded, and appropriately took into account the breadth, number, and seriousness of the defendant’s prior convictions. On this record, then, the district court’s decision to impose a Guidelines sentence was not an abuse of discretion.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 6, 2012

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Sarah P. Karwan", written in a cursive style.

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,028 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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SARAH P. KARWAN
ASSISTANT U.S. ATTORNEY

Addendum

U.S.S.G. 4A1.3, Departures Based on Inadequacy of Criminal History Category

(b) Downward Departures.--

(1) Standard for Downward Departure.--If reliable information indicates that the defendant's criminal history category substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.