11-2234

To Be Argued By:
SARAH P. KARWAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2234

UNITED STATES OF AMERICA,

Appellee,

-vs-

LAMONT MULLER, aka Dell, aka Cuz, MARCUS COLVIN, JOSEPH ELLIS, LYNDON GORDON, aka Panama, JAVON PRAYLOU,

Defendants,

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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DONALD GATLIN, aka Jitt,

Defendant-Appellant.

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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 June 1, 2011. Joint Appendix 20 ("A__"). On May 26, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A20.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue Presented for Review

The defendant moved for a mistrial when the case agent testified about his observations of a suspected narcotics transaction between the defendant and a co-defendant. Did the district court abuse its discretion when it denied the defendant's motion where the testimony was arguably proper opinion testimony and where the court gave proper and comprehensive limiting instructions to eliminate any prejudice from the testimony?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2234

UNITED STATES OF AMERICA,

Appellee,

-vs-

DONALD GATLIN, a.k.a. Jitt,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Following a two-week trial, a jury sitting in Hartford, Connecticut found the defendant, Donald Gatlin, guilty of six counts of possession with intent to distribute and distribution of various amounts of crack cocaine and cocaine. At the same time, the jury acquitted the defendant and three co-defendants of conspiracy to possess with intent to distribute narcotics.

The evidence against the defendant included the testimony of a confidential informant who, at the direction of law enforcement officers, had purchased crack cocaine and cocaine from the defendant on six occasions. The evidence also included covert video and audio recordings of those six transactions.

On appeal, the defendant challenges the denial of the motion for a mistrial that he made when a co-defendant's counsel elicited from the case agent testimony related to the agent's observations during one of the controlled purchases. For the reasons set forth below, the district court did not abuse its discretion in denying the mistrial motion. The testimony was properly admitted as the agent's personal observations of the transaction. But even if the testimony was improper opinion evidence, the district court cured any harm by giving two limiting instructions to the jury, and thus properly denied the motion for a mistrial. This Court should affirm the judgment below.

Statement of the Case

On April 8, 2010, a grand jury sitting in New Haven, Connecticut, returned a sixteen-count second superseding indictment charging the defendant and others with various narcotics offenses. The defendant was charged with conspiracy to possess with intent to distribute cocaine base (crack cocaine), cocaine, marijuana, and

Oxycodone, in violation of Title 21, United States Code Section 846 (Count One), and six substantive counts of possession with intent to distribute and distribution of crack cocaine and cocaine, in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(B), and (b)(1)(C) (Counts Four, Five, Six, Eight, Nine and Ten).[1]

A jury trial was held in Hartford, Connecticut before the Hon. Robert N. Chatigny, United States District Judge. Evidence began on September 16, 2010. A10. On October 6, 2010, the jury found the defendant guilty of the six substantive counts of the second superseding indictment, and acquitted the defendant on the narcotics conspiracy charged in Count One. A12.

On May 26, 2011, the district court sentenced the defendant to a term of 66 months of imprisonment and a four-year term of supervised release. A20. That same day, the defendant filed a timely notice of appeal. A20, A1584.

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

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[1] In the course of preparing this brief, the government discovered that the current version of the docket sheet fails to show the indictment and superseding indictments. The government is filing a motion to correct the record in the district court.

Statement of Facts and Proceedings Relevant to this Appeal

The defendant went to trial in September 2010 with three co-defendants: Marcus Colvin, Joseph Ellis, and Gerjuan Tyus. The defendant faced six substantive narcotics counts related to the transactions described below. In addition, he and the others faced a narcotics conspiracy charge. Gatlin and Colvin were convicted on the substantive counts that they were charged with, and all four were acquitted of the conspiracy charge. A12-13. The evidence at trial related to the defendant's counts of convictions showed the following:

In the winter of 2009, a federal task force compromised of agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") and the Drug Enforcement Administration ("DEA"), together with state and local officers, initiated an investigation into narcotics trafficking in New London County, Connecticut. A70. As part of that investigation, task force agents conducted a series of six controlled purchases of narcotics from the defendant, Donald Gatlin, utilizing a confidential informant ("CI"). A116-117, A745.

During the trial, ATF Special Agent Rossin Marchetti testified that members of the task force followed standard procedures during those controlled purchases, which included searching the CI for unaccounted for contraband prior to

the transaction, searching the ATF unmarked vehicle used by the CI, providing the CI with recorded government funds, and outfitting the CI and/or the unmarked ATF vehicle with covert audio/video recording devices. A418.20-418.23. In addition, Special Agent Marchetti testified that members of the task force conducted surveillance of the CI before, during and after the transaction. A418.23. The controlled purchases occurred in and around the defendant's residence of 481 Williams Street in New London, *see* A418.30-418.31, and the transactions were arranged in recorded telephone calls made by the CI to two telephone numbers subscribed to in the defendant's name. *See* Exs. 7C and 7D (telephone records).

The first controlled purchase occurred on March 9, 2009, and was preceded by a call placed by the CI to the defendant on March 6, 2009. A418.31-418.33, A475, Ex. 21 (recorded call). In that call, the CI asked the defendant if she could see him the following week "to get some basketballs," and the two agreed to meet. Ex. 21. The CI explained that the term "basketball" was a reference to an "eightball," A745-46, or an eighth-ounce of crack. A574. On March 9, 2009, law enforcement officers searched the CI, provided her with $350 in marked funds, and activated the recording equipment in the ATF vehicle that the CI would be driving. A418.37-418.38. The CI then spoke to the defendant on

the telephone and agreed to meet to conduct the transaction. A418.34-418.36, Ex. 22 (recorded call). The officers followed the CI to the area of 481 Williams Street, where the defendant came out of the house, got into the ATF vehicle and provided the CI with 6.2 grams of crack cocaine in exchange for the $350. A419-422, A1293, Ex. 23 (video recording), Ex. 24 (crack cocaine).[2]

On April 1, 2009, the CI placed a recorded call to the defendant and asked to meet him for a "half ounce" of "the hard," which the CI testified was a reference to crack. A423-424, A748, Ex. 25A (recorded call). Shortly after that, the defendant called the CI back and told her the price would be "680." A423-424, Ex. 25B (recorded call). The two agreed to meet on Friday. Ex. 25A.

Two days later, on Friday, April 3, 2009, the CI placed another recorded call to the defendant and told him she was "heading over there right now." A424-425, Ex. 26 (recorded call). Law enforcement officers then followed the CI, who was driving an ATF vehicle outfitted with a covert recorder, to the defendant's house on Williams Street. Officers observed the defendant exit the house, meet for a few moments with co-

[2] The weights of the controlled substances discussed herein are the net weights of the mixture and substance containing the controlled substance, without packaging materials, as determined by the DEA chemists who testified at trial.

defendant, Gerjuan Tyus, and then enter the ATF vehicle. A468-476. The covert video from the vehicle shows the defendant enter the passenger side of the car and sit down. The defendant then hands the CI a small object, and the CI counts out $680, which she hands to the defendant. A477-479, Ex. 27(video recording). After the defendant exited the car, law enforcement officers followed the CI back to a pre-determined meeting location, where they recovered 13.1 grams of crack cocaine from ATF car. A475-476, A1294, Ex. 29 (crack cocaine).

On May 1, 2009, law enforcement officers directed another controlled purchase by the CI from the defendant, following the same protocols described above. A584-585. The transaction was set up in a recorded call with the defendant, *see* Ex. 30, and the CI purchased approximately 6.7 grams of cocaine from the defendant. A584-595, 1295, Ex. 32(crack cocaine). The transaction was covertly recorded. A592, Ex. 31(video recording).

On May 29, 2009, the CI had a series of calls with the defendant and arranged to meet the defendant to purchase cocaine and a firearm. A595-598, Ex. 41(recorded call). The CI was provided with $880 in ATF funds and traveled to the area of 481 Williams Street, where she met with the defendant in the ATF vehicle. A-599-600. After the transaction, law enforcement officers recovered 6.8 grams of cocaine and a firearm from the ATF car. A600-601, A1296, Ex. 43

(cocaine). The transaction was covertly recorded from a device within the ATF vehicle. A601-602, Ex. 42 (video recording).

On June 19, 2009, the CI again met with the defendant to purchase drugs. A605. Officers provided the CI with $300 in marked ATF funds, and observed the CI as she met with the defendant in an ATF vehicle. A605-608. After the CI met with the defendant and returned to a predetermined meeting location, officers searched the car and recovered 6.3 grams of crack cocaine from the car. A609-609, A1296, Ex. 46 (crack cocaine). The covert video recording from inside the ATF vehicle shows the defendant hand the CI an object, and then take a stack of money from the CI. Ex. 45 (video recording).

Finally, on August 24, 2009, the CI placed a call to the defendant and asked for "half" of "hard." The defendant asked, "fourteen?" and the CI affirmed. The defendant responded that he would text the CI back with the number. A620-624, Ex. 50 (recorded call). The following day, on August 25, 2009, a text message was sent from the defendant's phone to the ATF telephone that the CI had been using, which stated "IGOT 7 HARD 7 SOFT BABYGURL." A630, Ex. 7 (intercepted wiretap communications). Later that day, officers provided the CI with $600 in ATF funds and the ATF vehicle that she was operating was outfitted with a surveillance device. A633-634. The video recording from that device shows the

defendant hand the defendant a small object, which he identifies as "the hard" and another small object that he identifies as "the soft." A634, Ex. 51 (video recording). After the CI met with the defendant, officers recovered two bags of suspected narcotics. A635, Exs. 52, 53. One of the bags did not contain any controlled substances, but the other contained 6.2 grams of cocaine base. A1397-1400.

On October 6, 2010, the jury found the defendant guilty of the six substantive counts related to the controlled purchases described above, and acquitted the defendant on the narcotics conspiracy charged in Count One. A12.

Summary of Argument

The district court did not abuse its discretion when it denied the defendant's motion for a mistrial. The defendant's motion was based on allegedly improper testimony elicited from the case agent on cross-examination by counsel for a co-defendant. This testimony was arguably admissible evidence, however, and the defendant's failure to lodge a timely objection to the testimony suggests that it was not the sort of "urgent circumstance" requiring a mistrial. In any event, the admission of the testimony—which went to the narcotics conspiracy charge on which the defendant was acquitted—did not prejudice the defendant on the six substantive charges on which he was convicted. And to the extent there was

any prejudice to the defendant, the district court limited its impact with two sets of comprehensive limiting instructions that ultimately instructed the jury to disregard the testimony. On this record, the district court properly denied the motion for a mistrial.

Argument

I. The district court appropriately exercised its discretion when it denied the motion for a mistrial.

A. Relevant facts

ATF Special Agent Rossin Marchetti, one of the case agents, testified during the government's case-in-chief. In his direct examination, Special Agent Marchetti testified generally about the procedures followed during the controlled purchases of narcotics, and then testified specifically about the March 9, 2009 and April 3, 2009 controlled purchases from the defendant. A418.14-427, A466-479.

With respect to the April 3, 2009 transaction, Special Agent Marchetti testified that he conducted surveillance that day of the 481 Williams Street address, and testified that he observed the defendant leave his house, meet with a co-defendant, Gerjuan Tyus, for a few minutes, and then enter the ATF car that was being operated by the CI. A470-473. The government also offered a surveillance video made by officers of the

481 Williams Street location, Ex. 28, which Special Agent Marchetti described. A470-473.[3]

Special Agent Marchetti also testified that before he saw the defendant meet with Gerjuan Tyus and the CI, he believed that Tyus had caught him conducting surveillance. Special Agent Marchetti explained that while he was holding a pair of binoculars and looking at 481 Williams Street, "Mr. Tyus was exiting the [gas station across the street] in the white Chevy Trailblazer and the two of us looked—well, I believe he was looking directly at me. I certainly was looking directly at him and realized that maybe I hadn't picked the best surveillance position." A474-475.

Following direct examination of Special Agent Marchetti, counsel for Gerjuan Tyus began his cross-examination of the witness:

> Q. You said that prior to [Tyus] appearing at or arriving at 481 Williams Street, you said that you believed he had seen you prior to that at a gas station?

---

[3] With respect to the events on April 3, 2009, the defendant was only charged in connection with the transaction involving the CI; the government offered the video from that day of the defendant and co-defendant Gerjuan Tyus because, in its view, the video provided evidence related to the narcotics conspiracy charged against the defendant and Tyus in Count One of the Indictment.

A. Yes, sir.

Q, And you believe that he had blown your cover?

A. Yes, sir.

Q. But at the same time he still continued on with what you perceive as a drug transaction?

A. He continued up to the residence at 481 Williams Street, yes, sir.

Q. In your opinion, having already had his cover blown?

A. My cover blown, yes, sir.

Q. Your cover blown.

A492-493. Counsel then played a portion of the surveillance video (Ex. 43), paused it, and continued with cross-examination:

Q. And you say that's Mr. Gatlin there, correct?

A. That's correct.

Q. What do you see them doing right now? Could I have this paused for a second. In your observations, what are they doing now?

A. I believe that both of them are looking at my vehicle which is parked further down the street from where this video was being—taking place and in my opi-

nion most likely discussing the fact that there's a police officer or some type of law enforcement down the street in the blue Trailblazer.

Q. Okay. So in your opinion, they are looking for you because they know that you're going to observe them engage in a drug transaction, correct?

A. In my opinion, Tyus is telling Gatlin that there's a law enforcement vehicle parked further down the street.

Q. And yet they, in your opinion, consummate a drug transaction?

A. They do consummate a drug transaction, yes, sir.

A493-494. Counsel then played the video again, and continued:

Q. And in your opinion, was it unlawful for Mr. Tyus to meet Mr. Gatlin at 481 Williams Street?

A. For them just to meet there?

Q. Yes.

A. No, I don't believe that's unlawful.

(Video played)

Q. Okay, let's stop. All right, now, who was giving whom something on this video?

A. Donald Gatlin was giving Gerjuan Tyus something on this video.

Q. Okay. Donald Gatlin was giving something to Gerjuan Tyus on the video, not the other way around, correct?

A. That's correct.

Q. Can we continue?

(Video played)

Q. And then Donald Gatlin goes and gets into the vehicle of the confidential informant?

A. Yes, that's correct.

A494-495. No objection was made by any counsel during the above colloquy.

Following this cross-examination, counsel for the defendant asked the district court if it would take a break, which the court did. A497-498. Counsel for the defendant then moved for a mistrial on the basis of the questions posed during the cross-examination:

> [Counsel for Gerjuan Tyus], in front of the jury, just elicited testimony from Agent Marchetti that my client was engaged in a drug transaction and asked him specifically: In your opinion is Mr. Gatlin selling drugs in that video? And his response was yes. And not only once, but I think he did it twice.

A498. Counsel for the government opposed the motion on the basis that no objection had been made to the questions posed, and that counsel for the defendant would have an opportunity to cross examine the witness. A498-499. The district court remarked that the defendant was "asking me to do something extraordinary . . . [and] I'm not sure that it qualifies sufficient as to warrant a mistrial under these circumstances." A499.

After a recess, the district court re-visited the issue. The defendant's attorney argued that "the ultimate issue before the jury has been elicited by a co-counsel as to the guilt of my client . . . [a]nd [the witness] was asked to render an opinion as to my client's guilt, and I don't know how I remedy that." A501. The district court stated that it had reviewed the transcript of the witness's testimony during the break "and, having done so, I'm satisfied that there is no basis for a mistrial." A501. The court explained:

> On cross examination, [counsel for Gerjuan Tyus] mentions that the witness has testified about what he, the witness, perceived to be a drug transaction. The word 'perceived' or 'perceive' is used . . .
>
> * * *
>
> So at no point did he say: Is it your opinion that it was a drug transaction? In fact, that was already established on his

> direct examination. At no time did he say: So we can agree that it was Mr. Gatlin who is guilty as charged? There was nothing like that. Instead at the end he said, contrasting the role of Mr. Tyus, his client, in this video with that of Mr. Gatlin, he says again:
>
> Question: So at best we have a picture of Mr. Tyus shaking hands and getting something from Mr. Gatlin?
>
> Answer: Yes, sir.
>
> Question: Yet it was Mr. Gatlin who made the drug transaction?
>
> Answer: That's correct.
>
> That's not grounds for a mistrial. If there is an instruction you'd like me to give the jury, I'll be happy to consider it.

A501-503. Counsel for the defendant then asked that a transcript of the cross-examination be prepared by the court reporter "so that I could take a look at it for tomorrow morning?" A503. Counsel added "I still don't think that . . . it can be cured by an instruction and so therefore . . . I'm not waiving my objection by saying I don't want a curative instruction because I don't think it can be cured by that." A503-504.

When the jury returned from the break, the district court gave the following instruction:

You, the jury, as I have told you before, are the sole judges of the facts of the case. You and you alone decide what actually happened. In making that determination, you are to rely on the evidence that is presented to you, including the videotape evidence, the audio recordings and the testimony and other exhibits that are presented to you.

Ordinarily witnesses are limited in their testimony to explaining what the witness saw, heard, or did. Ordinarily witnesses are not permitted to state expressly or by implication the witness's opinion about what happened because the witness's opinion doesn't count. You are the sole judges of the facts of the case. The witnesses get to tell you what they saw, what they heard, what they did, and it's up to you to decide based on all the evidence in the case what actually happened.

If in addition to telling you what was seen or heard or done, a witness said "and in my opinion this was a controlled purchase of narcotics," you could disregard that opinion because that opinion doesn't count. It would be up to you as jurors to assess the evidence concerning what was actually observed, what was seen, what was heard, what was done. It would be up to you to decide, well, was that a controlled

> purchase of narcotics? That's up to you to decide. It's not up to the witness to tell you what in his or her opinion happened. It's your obligation under the law to decide what happened.
>
> So please bear that in mind. You and you alone are the sold judges of the facts, okay?

A516-517.

Two days later, the defendant renewed his motion for a mistrial. A876. At the end of testimony that day, the district court once again denied the motion, but agreed to give another limiting instruction to the jury. A1036-1037. The court again instructed the jury:

> I instructed you earlier that if a law enforcement officer testifying as a witness before you were to express an opinion that a drug transaction occurred, you could disregard that opinion because you are the sole judges of the facts.
>
> You may remember I reminded you that witnesses are permitted to testify about what they saw, what they heard and what they did, but ordinarily we do not permit witnesses to testify as to their opinions.

In any case, whether a drug transaction occurred is for you to decide, not the witness.

You hear from the witness about the facts of the case. The witness tells you what he claims to have seen. He tells you what he claims to have heard. He tells you what he claims to have done. Then it's up to you, as the sole judges of the facts, to decide whether, for example, a drug transaction occurred. It's not for the witness to tell you that, in his opinion, that's what happened.

Consistent with that instruction, I want to focus your attention on certain testimony that was offered earlier in the week while Special Agent Marchetti was on cross-examination.

He was asked the following question: And yet they—referring to Mr. Tyus and Mr. Gatlin—in your opinion consummate a drug transaction?

Answer: They do consummate a drug transaction, yes, sir.

This is an opinion by a witness that you should disregard. The opinion testimony doesn't count, and again it's up to you as jurors to decide what happened based on the testimony and the exhibits. So please disregard that opinion.

> In giving you this instruction, I'm not casting aspersions on anybody, but I'm just trying to be clear with regard to how the Rules of Evidence work, and I want to remind you about the important difference between the role of the witness and the role of the jury, okay?

A1043-1044.

B. Governing law and standard of review

1. Motions for mistrial

"Courts have the power to declare a mistrial 'whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.'" *United States v. Klein*, 582 F.2d 186, 190 (2d Cir. 1978) (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)). "The decision to declare a mistrial is left to the 'sound discretion' of the judge, but 'the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.'" *Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010) (quoting *Perez*, 22 U.S. at 580).

A district court's denial of a mistrial motion is reviewed for abuse of discretion. *See United States v. Rodriguez*, 587 F.3d 573, 583 (2d Cir. 2009). In order to find such an abuse of discre-

tion, this Court must conclude that the "trial judge ruled in an arbitrary and irrational fashion." *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (internal quotations omitted).

2. Opinion testimony

Federal Rule of Evidence 701 provides that a witness may give opinion testimony if it is: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge . . . ." Opinion testimony is not objectionable merely because it "embraces an ultimate issue," Fed. R. Evid. 704(a), but such testimony "is not properly received merely to tell the jury what result to reach." *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005) (internal quotations omitted).

C. Discussion

The district court did not abuse its discretion when it denied the defendant's motion for a mistrial based on his claim that the agent's testimony unduly prejudiced him. As the Supreme Court has cautioned, the decision to declare a mistrial is left to the discretion of the district court "but the power ought to be used with the greatest of caution, under urgent circumstances, and for very plain and obvious causes." *Renico*, 130 S. Ct. at 1863 (internal citations omitted).

This case did not present such extraordinary circumstances.

First, the challenged testimony by Special Agent Marchetti was arguably admissible evidence and thus provided no basis for a mistrial. The testimony elicited by defense counsel concerned Special Agent Marchetti's opinion about what he had observed on April 3, 2009 just prior to the defendant's transaction with the CI—specifically, what Special Agent Marchetti had observed the defendant and Gerjuan Tyus do as they were standing outside of the 481 Williams Street residence. Rule 701 permits this type of opinion evidence because it was rationally based upon what Special Agent Marchetti saw, it was helpful to the jury in understanding a fact at issue—*i.e.*, the nature of the defendant's relationship with Tyus, and it was not based upon specialized knowledge. Fed. R. Evid. 701. While the opinion solicited by defense counsel certainly was relevant to an ultimate issue before the jury—whether the defendant and Tyus were engaged in a narcotics conspiracy together—that fact alone does not make it objectionable. Fed. R. Evid. 704. Special Agent Marchetti opined that he believed he had witnessed a drug transaction, but, in so doing, did "not tell the jury what result to reach." *Garcia*, 413 F.3d at 210 (internal quotation omitted).

The defendant's failure to make a timely objection during the cross-examination further

demonstrates that the testimony did not create an "urgent circumstance" requiring a mistrial. *See Renico*, 130 S. Ct. at 1863. "To be timely, an objection . . . must be made as soon as the ground of it is known, or reasonably should have been known to the objector." *United States v. Yu-Leung*, 51 F.3d 1116, 1120 (2d Cir. 1995) (internal quotations omitted); *see also* Fed. R. Evid. 103(a)(1). The requirement that a defendant lodge a timely objection to allegedly improper evidence "arises from the practice of appeal for error and the policy of allowing the trial judge to avoid or correct the error efficiently." Wright, *Federal Practice and Procedure, Evidence* § 5037 (2d ed. 2011). "When a defendant has been made fully aware of the response which a question is bound to elicit, he should object when the question is asked, rather than delay with the hope of inviting error and laying the foundation for a mistrial." *United States v. Armedo-Sarmiento*, 545 F.2d 785, 795 (2d Cir. 1976). Here, the defendant raised an objection to the testimony following the cross-examination, but his failure to object immediately to the question when it was posed demonstrates that the neither the question nor the answer were so obviously improper as to create an urgent circumstance require a mistrial.[4]

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[4] When the defendant first raised the objection after the cross-examination had been completed, the district court admonished counsel: "I thought I was very

Even assuming, however, that the testimony was admitted in error, the admission did not affect the defendant in such a way as to warrant a mistrial. Special Agent Marchetti's testimony about what he believed to be a drug transaction between the defendant and Tyus related only to the narcotics conspiracy charged in Count One, a charge on which the jury acquitted both the defendant and Tyus. While the defendant now argues that the testimony "created extreme prejudice to Mr. Gatlin's defense[,]" Def. Br. 14, the defendant has not explained the nature of any such prejudice, nor reconciled any alleged prejudice with the fact that he was acquitted of the narcotics conspiracy.

Moreover, the testimony about the defendant's interactions with Tyus—which was relevant to the narcotics conspiracy on which he was acquitted—did not create any prejudicial spillover for the six counts of conviction. As described above, the evidence for the six substantive

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clear before, but no lawyer should refrain from objecting because of anything that I have said directly or indirectly at any time. You have an obligation to object." A504. Indeed, a review of the transcript of just the first day of testimony reveals that defense counsel were well aware of—and perfectly adept at exercising—their obligation to object contemporaneously to a question posed, or an exhibit offered. *See, e.g.*, A72, A82, A83, A87-88, A89, A94, A104, A130, A133, A208, A249.

counts was overwhelming and included: recorded telephone calls with the defendant preceding the deals; covert video recordings from inside the ATF vehicle during each of the purchases, which show the defendant inside of the car; the testimony of law enforcement officers who observed the transactions; the testimony of the confidential informant who purchased the drugs from the defendant; and the seized crack cocaine and cocaine from each of the six occasions. *See* Statement of Facts at 3-8. There can be no doubt that, in light of this ample evidence, Special Agent Marchetti's testimony did not cause any type of "spillover" prejudice that unfairly led the jury to convict the defendant on the six sale counts. The jury's verdict shows that the jury was able to weigh the evidence, and make independent determinations with respect to each count charged. *See United States v. Hamilton*, 334 F.3d 170, 183 (2d Cir. 2003) ("The absence of such [prejudicial] spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others.").

The defendant argues that the opinion testimony was "particularly harmful" because it was elicited by a co-defendant's counsel. Def. Br. 14. But this argument ignores the fact that defense counsel's questions related directly to matters that had already been presented to the jury. Special Agent Marchetti had testified at length on direct examination about the April 3, 2009

controlled purchase of drugs between the confidential informant and the defendant and the district court remarked that the "plain meaning of the witness's testimony" was that a drug transaction had taken place. A500.

In short, even if the testimony of Special Agent Marchetti on cross-examination had been admitted in error, this testimony did not change the fact that there was overwhelming evidence—aside from the agent's testimony—that a drug transaction with the CI took place that day. This evidence included recorded telephone calls between the confidential informant and the defendant before the meeting, in which the CI requests a "half ounce" of "the hard." Ex. 25B. It also includes the covertly recorded video from inside of the ATF vehicle, which shows the defendant get into the car, hand the confidential informant a small object, and take a fold of money from the informant. Ex. 27. Officers recovered 13.1 grams of crack from the car. Ex. 29, A476. Any prejudice caused by the opinion testimony is slight compared to the overwhelming evidence of the defendant's activities that day.

Finally, to the extent that Special Agent Marchetti's testimony created any prejudice, the district court appropriately and sufficiently addressed this concern when it gave two sets of limiting instructions. First, as soon as the jury returned from its break, the district court gave the first instruction. A516-517. At this point, the

court specifically instructed the jurors that it was "up to you as jurors to assess the evidence concerning what was actually observed, what was seen, what was heard, what was done. It would be up to you to decide, well, was that a controlled purchase of narcotics? That's up to you to decide. It's not up to a witness to tell you what in his or her opinion happened. It's your obligation under the law to decide what happened." A517.

In addition, two days later, the district court again instructed the jury, this time specifically directing the jurors to disregard Special Agent Marchetti's opinion testimony. A1043-1044. The court directed the jury's attention to the specific question posed to Special Agent Marchetti about his opinion, then instructed the jury as follows: "This is an opinion by a witness that you should disregard. That opinion testimony doesn't count, and again it's up to you as jurors to decide what happened based on the testimony and the exhibits. So please disregard the opinion." A1044.

As the case law makes clear, these limiting instructions were the appropriate remedy to address any concerns raised by the testimony.

For example, in *Armedo-Sarmiento*, this Court held that the district court properly denied a defendant's motion for a mistrial, where the defendant argued that an improper question of a police officer had elicited inadmissible information harmful to him. This Court noted that

the defendant failed to object to the question, but instead objected only after the witness had answered. Moreover, this Court noted that any prejudicial effects from the answer were addressed by the district court's "careful admonitions" to the jury to disregard the answer. 545 F.2d at 795. Similarly, in *United States v. Levy*, 578 F.2d 896, 902 (2d Cir. 1978), this Court held that a curative instruction by the district court, not a mistrial, was the appropriate remedy where a government witness inadvertently testified that the defendant had been in prison. Finally, in *United States v. Watson*, 599 F.2d 1149, 1158 (2d Cir. 1979), this Court held that the district court properly denied a motion for a mistrial when a witness expressed fear about testifying and abruptly left the stand during cross-examination. The court found that the curative instruction given by the district court sufficiently addressed any prejudice to the defendants.

The defendant argues that the "prejudicial affect of the testimony could not be cured by the Court's limiting instruction[,]" Def. Br. 14, but does not explain why the two separate sets of instructions by the district court were insufficient to remedy any concerns. "Where an inadmissible statement is followed by a curative instruction, the court must assume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be

unable to follow the court's instructions, . . . and a strong likelihood that the effect of the evidence would be devastating to the defendant." *United States v. Elfgeeh*, 515 F.3d 100, 127 (2d Cir. 2008) (internal citations omitted).

Here, there is no basis for concluding that the jury could not follow the court's instructions. Indeed, the jury's split verdict shows that it carefully followed all of the court's instructions and carefully weighed the appropriate evidence in reaching its verdict. The allegedly improper testimony related to the charged narcotics conspiracy, and the jury acquitted the defendant of this count. Moreover, the nature of the testimony—the agent's observations about the defendant's activities on a single day—was not the kind of prejudicial evidence that a jury would be unable to disregard, especially given the other evidence presented at trial. While the jury convicted the defendant of six counts of possession with the intent to distribute narcotics, there was overwhelming evidence to support those counts including the covert recordings made from the inside of the ATF car and the CI's testimony that she purchased the drugs from the defendant. In short, there is no reason to believe that the court's limiting instructions would be ineffective on this record.

In sum, the district court properly exercised its discretion when it denied the defendant's motion for a mistrial. Even if Special Agent Mar-

chetti's challenged testimony was admitted improperly, the district court appropriately addressed that evidence through careful and thorough limiting instructions.

Conclusion

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

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Respectfully submitted,

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