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U.S. v. Dungy, 2002 WL 1714308 (N.D. Iowa Feb. 14, 2002)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MONTREAIL DEAN DUNGY,

Defendant.

No. CR01-3038-MWB

**ORDER REGARDING DEFENDANT’S
MOTION FOR JUDGMENT OF
ACQUITTAL AND MOTION FOR
NEW TRIAL**

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I. INTRODUCTION AND BACKGROUND

On July 19, 2001, the United States Grand Jury for the Northern District of Iowa returned a three-count indictment against defendant Montreail Dean Dungy, charging him with conspiring to distribute cocaine base (“crack cocaine”), in violation of 21 U.S.C. § 846; possessing cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and, possessing with intent to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

On November 6, 2001, this case proceeded to trial before a jury. At trial, the government called cooperating witnesses Ira Shivers, Mark Shivers, Ricky Foy, and Patrick Preston. Each named defendant Dungy as the source of their supply of crack cocaine. The government also called Jeremy Altman and Teri Altman. Each testified that Dungy had sold Jeremy Altman cocaine at Teri Altman’s home. Fort Dodge Police Officers Chuck Guthrie, Michael Boekelman and Dennis Mernka were also called by the government to testify about the investigation and execution of a search warrant at the residence of Teri Altman. Officers Boekelman and Mernka also testified about the results of a search of the residence of Sharon Altman. Fort Dodge Police Officer Ryan Doty was called by the government to testify about the execution of a search warrant at defendant Dungy’s residence. The government also called defendant Dungy’s aunt, Sharon Altman, to testify that Dungy lives next door to her and has often been to her house. She further testified that on the morning of the day law enforcement officers executed a search warrant at her home that she saw Dungy go upstairs in her house carrying a black bag. The government also offered the testimony of Officer Roger Timko of the Iowa Department of Public Safety, Iowa Division of Narcotics Enforcement, regarding drug trafficking. The government offered an Iowa Department of Criminal Investigation’s laboratory report on the analysis of the contents of packages found in Sharon Altman’s home which indicated that the packages contained 547 grams of powder cocaine and 44 grams of crack cocaine.

At the close of the government's evidence, defendant Dungy moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 on each of the three counts of the indictment. The court reserved ruling on this motion. Defendant Dungy called three witnesses, his mother Vera Altman, his father Barry Dungy, and Makinzy Barkhaus. Vera Altman testified about defendant Dungy's educational and work history as well as her financial support of her son. Barry Dungy testified about defendant Dungy's personal background and Barry Dungy's financial support of defendant Dungy. Makinzy Barkhaus, defendant Dungy's former girlfriend, testified that Dungy was with her the entire evening of February 21, 2001. At the conclusion of all the evidence, defendant Dungy renewed his motion for judgment of acquittal, and the court once again reserved ruling. On November 9, 2001, the jury returned a verdict of guilty as to the conspiracy charge but verdicts of not guilty on each of the possession charges. On November 16, 2001, defendant Dungy filed a motion for judgment of acquittal, pursuant to Federal Rule of Criminal Procedure 29(c), and a motion for a new trial, pursuant to Federal Rule of Criminal Procedure 33. In his post-trial Motion for Judgment of Acquittal, defendant Dungy contends that: (1) his conviction was secured through the use of perjurious testimony; (2) the evidence introduced at trial was insufficient for a reasonable jury to return a verdict against him on the charge set forth in the indictment; (3) the introduction of evidence related to the possession counts prejudiced the jury toward him on the conspiracy charge; and (4) that his trial counsel provided ineffective assistance of counsel. Defendant Dungy makes the same contentions as the basis for his post-trial Motion for New Trial.¹ The government filed a timely resistance to each motion. The court turns initially to the standard of review governing motions for judgment of acquittal under Federal Rule of Criminal Procedure 29, and then

¹Defendant Dungy's trial counsel did not brief his claims of ineffective assistance of counsel. Instead, alternative counsel was appointed to represent defendant Dungy with respect to those claims.

to a legal analysis of the issues raised by defendant Dungy in his motion for judgment of acquittal. After which, if necessary, the court will address defendant Dungy's motion for new trial.

II. LEGAL ANALYSIS

A. Dungy's Motion for Judgment of Acquittal

1. Standards applicable to motions for judgment of acquittal

The court has considered in detail the standards applicable to motions for judgment of acquittal, *see United States v. Ortiz*, 40 F. Supp. 2d 1073 1078-79 (N.D. Iowa 1999) and *United States v. Saborit*, 967 F. Supp. 1136, 1138-40 (N.D. Iowa 1997), and will set forth the highlights of those discussions, as well as some more recent case law, here. Rule 29 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

FED. R. CRIM. P. 29(a). Although Rule 29 specifically provides for such eventualities, it is well-settled that “[j]ury verdicts are not lightly overturned.” *United States v. Hood*, 51 F.3d 128, 129 (8th Cir. 1995); *accord United States v. Burks*, 934 F.2d 148, 151 (8th Cir. 1991). Rather, the case law governing motions for judgment of acquittal confirms that a significant restraint is placed on a district court's authority to overturn a jury's verdict. *See United States v. Gomez*, 165 F.3d 650, 654 (8th Cir. 1999) (observing that a judgment of acquittal should only be granted “if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt”); *United States v. Perkins*, 94 F.3d 429, 436 (8th Cir. 1996) (“[t]he standard of review of an appeal concerning the sufficiency of the evidence is very strict, and the verdict of the jury should

not be overturned lightly.’”) (quoting *Burks*, 934 F.2d at 151), *cert. denied*, 519 U.S. 1136 (1997).

The United States Court of Appeals for the Eighth Circuit has therefore instructed that “[t]he jury’s verdict must be upheld if there is an interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt.” *United States v. Moore*, 108 F.3d 878, 881 (8th Cir. 1997); *Perkins*, 94 F.3d at 436 (“‘The jury’s verdict must be upheld if there is an interpretation of the evidence that would allow a reasonable-minded jury to conclude guilt beyond a reasonable doubt.’”) (quoting *United States v. Erdman*, 953 F.2d 387, 389 (8th Cir.), *cert. denied*, 505 U.S. 1211 (1992)). Here, Dungy contends that his motion for judgment of acquittal should be granted because the government’s evidence at trial would not permit a reasonable jury to find him guilty beyond a reasonable doubt of the offense the alleged conspiracy.

In considering a motion for judgment of acquittal based on the sufficiency of the evidence, the court must “view the evidence in the light most favorable to the guilty verdict, giving the government the benefit of all reasonable inferences that may be drawn from the evidence.”² *United States v. Basile*, 109 F.3d 1304, 1310 (8th Cir.), *cert. denied*, 522 U.S.

²In *Saborit*, 967 F. Supp. at 1140-43, the court discussed the existence of two apparently inharmonious lines of Eighth Circuit authority regarding the standard to be applied when considering a challenge to the sufficiency of the evidence to sustain a conviction. *Id.* (referring to *United States v. Baker*, 98 F.3d 330, 338 (8th Cir. 1996), *cert. denied*, 520 U.S. 1179 (1997) ((observing that if the evidence reasonably supports two conflicting hypotheses—guilt and innocence—the reviewing court must not disturb the jury’s finding) and *United States v. Davis*, 103 F.3d 660, 667 (8th Cir. 1996), *cert. denied*, 520 U.S. 1258 (1997) (holding that “[w]here the government’s evidence is equally strong to infer innocence of the crime charged as it is to infer guilt, the verdict must be one of not guilty . . .”) quoting *United States v. Kelton*, 446 F.2d 669, 671 (8th Cir. 1971)). Once again, the court observes, as it did in *Saborit*, that in the past decade, the Eighth Circuit Court of Appeals has overwhelmingly applied the *Baker* standard—that is, if the evidence (continued...)

866 (1997); accord *United States v. Madrid*, 224 F. 3d 757, 761-62 (8th Cir. 2000) (stating that “in reviewing the District Court’s denial of the motion for acquittal, we view the evidence in the light most favorable to the verdict and will reverse only if no reasonable jury could have found beyond a reasonable doubt that the defendant is guilty of the offense charged”) (citation omitted); *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999) (observing that “[w]e review the district court’s denial of a motion for judgment of acquittal based on the sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict.”). The court can overturn a jury’s verdict only if “‘a reasonable fact-finder must have entertained a reasonable doubt about the government’s proof’” of one of the essential elements of the crime charged. *United States v. Kinshaw*, 71 F.3d 268, 271 (8th Cir. 1995) (quoting *United States v. Nunn*, 940 F.2d 1128, 1131 (8th Cir. 1991)). Furthermore, “[t]his standard applies even when the conviction rests entirely on circumstantial evidence.” *United States v. Davis*, 103 F.3d 660, 667 (8th Cir. 1996), *cert. denied*, 520 U.S. 1258 (1997).

In addition to allowing a conviction to be based on circumstantial and/or direct evidence, the Eighth Circuit Court of Appeals has instructed that “[t]he evidence need not exclude every reasonable hypothesis except guilt.” *United States v. Baker*, 98 F.3d 330, 338 (8th Cir. 1996), *cert. denied*, 520 U.S. 1179 (1997). The court can neither weigh the evidence nor assess the credibility of the witnesses; these tasks belong exclusively to the jury. *United States v. Ireland*, 62 F.3d 227, 230 (8th Cir. 1995) (noting it is the jury’s job

²(...continued)

reasonably supports two contrary theories, the reviewing court must not disturb the jury’s determination. *Id.* (citing *Baker*, 98 F.3d at 338); see also *United States v. Butler*, 238 F.3d 1001, 1004 (8th Cir. 2001) (noting apparent discrepancy and following *Baker* line of authority) (citing *United States v. Turner*, 157 F.3d 552, 556 n.5 (8th Cir. 1998)). Here, regardless of the standard applied in this case, the court concludes that the result as to the defendant’s motion for judgment of acquittal would be the same.

to judge the credibility of witnesses and to resolve contradictions in evidence).

2. Perjurious testimony

Although defendant Dungy asserts in his motion for judgment of acquittal that the government offered perjurious testimony at his trial, he has not briefed this issue nor has he indicated in his brief precisely what government witnesses he believes committed perjury.³ Because defendant Dungy has not identified that testimony which he believes to be perjurious, the court finds that he has failed to establish this ground. Moreover, assuming, *arguendo*, that Dungy had established that government witnesses had indeed committed perjury, before a conviction may be vacated on the ground of perjured testimony, defendant must show that the government knowingly presented such testimony.

See United States v. Slaughter, 128 F.3d 623, 630 (8th Cir. 1997); *United States v. Perkins*, 94 F.3d 429, 432 (8th Cir. 1996), *cert. denied*, 519 U.S. 1136 (1997); *United States v. Martin*, 59 F.3d 767, 770-71 (8th Cir. 1995); *see also Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir. 1998); *United States v. Wolny*, 133 F.3d 758, 763 (10th Cir. 1998); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). Defendant Dungy does not contend, nor has he demonstrated that the government knowingly offered perjured testimony. Accordingly, the court denies this portion of defendant Dungy's motion for judgment of acquittal.

3. Sufficiency of the evidence

Count 1 of the indictment charges that, between about January 1992, through and including February 23, 2001, defendant Dungy conspired to commit one or more of the following offenses: (a) distributing 50 grams or more of crack cocaine; (b) possessing with intent to distribute 50 grams or more of crack cocaine; and (c) manufacturing or attempting

³The court notes that while defendant Dungy does point out discrepancies in the trial and grand jury testimony of several government witnesses, Dungy does not indicate in his brief which of these discrepancies he believes to be perjurious.

to manufacture 50 grams or more of crack cocaine. The jury only found defendant Dungy guilty of conspiring to distribute 50 grams or more of crack cocaine. In order to convict Dungy of conspiracy, the government had to show beyond a reasonable doubt, that: (1) between about January 1992 and February 23, 2001, two or more persons reached an agreement or came to an understanding to commit the offense of distributing crack cocaine; (2) Dungy voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and (3) at the time Dungy joined in the agreement or understanding, he knew the purpose of the agreement or understanding. See *United States v. White*, 241 F.3d 1015, 1022 (8th Cir. 2001) (“To convict a defendant of conspiracy, the government must prove beyond a reasonable doubt the following elements: (1) there was a conspiracy with an illegal purpose; (2) the defendant knew about the conspiracy; and (3) the defendant knowingly became a part of it.”) (citing *United States v. Mosby*, 177 F.3d 1067, 1069 (8th Cir. 1999) and *United States v. Bass*, 121 F.3d 1218, 1220 (8th Cir. 1997)); *United States v. Jiminez-Perez*, 238 F.3d 970, 973 (8th Cir. 2001) (same); *United States v. Holloway*, 128 F.3d 1254, 1257 (8th Cir. 1997) (“To be guilty of conspiracy, a defendant must be shown to have knowingly entered into an agreement with at least one other person to violate the law.”). Thus, the government had to prove that Dungy knowingly and voluntarily participated in an agreement to distribute crack cocaine. See *United States v. Parker*, 32 F.3d 395, 399 (8th Cir. 1994).

Defendant Dungy asserts that the court should grant his motion for judgment of acquittal based on an alleged variance between the indictment and the evidence at trial. Dungy contends that the evidence failed to reveal a complete "wheel conspiracy." He argues that although the government's cooperating witnesses were "spokes" of the wheel, substantial evidence does not connect each of the "spokes" with the others. The Eighth Circuit Court of Appeals has instructed that such a claim warrants a reversal “if the evidence does not support the single conspiracy and the defendant was prejudiced by the

variance between the indictment and the proof.’” *United States v. Nicholson*, 231 F.3d 445, 452 (8th Cir. 2000) (quoting *United States v. Pullman*, 187 F.3d 816, 821 (8th Cir. 1999), *cert. denied*, 528 U.S. 1081 (2000)), *cert. denied*, 121 S. Ct. 1244 (2001).

Ira Shivers testified that starting in 1991 he purchased “dubs” of crack cocaine from Dungy for the purpose of reselling half of the crack cocaine.⁴ Tr. at 70-71, 74-77, 90-91. After being out of the drug trade for a period of time, Ira Shivers resumed distributing crack in 1997 but generally obtained his crack cocaine from Robert Pate a/k/a “Flossy Floss.” Tr. at 75. However, in the spring of 2000, Ira obtained an ounce of crack cocaine from Dungy.⁵ Tr. at 76-77. Ira also testified that he acted as a middleman in two or three drug sales between Dungy and patrons of a Fort Dodge bar where Ira was a disc jockey. Tr. at 79-80.

Ira’s brother, Mark Shivers, testified that Dungy became his supplier of crack cocaine in 1992. Tr. at 134. Shivers purchased the crack cocaine from Dungy for distribution in packages of one-eighth of an ounce, one-quarter of an ounce, or one-half an ounce. Tr. at 138. In the spring of 1996, Mark switched suppliers and he started to obtain most of his crack cocaine from Robert Pate a/k/a “Flossy Floss.” Tr. at 146. Mark, however, would still on occasion obtain crack cocaine from Dungy for distribution. Tr. at 147. Mark testified that he obtained one ounce of crack cocaine from Dungy in late 1998 or early 1999. Tr. at 148-50. Dungy would contact Mark to sell crack cocaine because Dungy knew that Mark had a large customer base due to parties thrown by Mark and his

⁴A “dub” of crack cocaine is an amount of crack cocaine in which the purchaser uses one-half of the amount and resells the remaining one-half of the amount for the original purchase price. Tr. at 63, 75.

⁵Ira testified that although Dungy was supposed to sell him one ounce of crack cocaine, the amount that was actually delivered was several grams less than that amount. Tr. at 77.

brothers. Tr. at 152.

Ricky Lee Foy, a cousin of Dungy, testified that he purchased and resold crack cocaine obtained from Dungy twice between February of 2000 and May 15, 2000. Tr. at 201. First, he purchased a \$100 dub of crack cocaine in April of 2000 and then he bought a \$40 bag of crack cocaine on May 1, 2000. Tr. at 202-203. Patrick Lee Preston testified that he tried crack cocaine with Ira Shivers in 1996 or 1997. Tr. at 235. Later, after being injured in a workplace accident, Preston started to sell crack cocaine after Ira introduced him to Robert Pate. Tr. at 238. Between February 2000 and June 2000, Preston testified that he obtained crack cocaine on a weekly basis from Dungy. Tr. at 239-40. Jeremy Altman testified to having purchased powdered cocaine and marijuana from Dungy. TR. at 323. He also testified that he had watched Dungy prepare or “cook” crack cocaine. Tr. at 330.

The government also offered the testimony of several law enforcement officers concerning their investigation of Dungy and the results of several searches. Officer Ryan Doty testified that during a search of Dungy’s residence the officers found two digital scales of the type used in drug trafficking to measure out quantities of drugs. Tr. at 418-21. The simultaneous execution of a search warrant for the residence of Sharon Altman, Dungy’s aunt who had the residence next door to Dungy, revealed amounts of marijuana, ecstasy, powdered cocaine and crack cocaine. Tr. at 459, 473. The crack cocaine was found located in a black bag. Tr. at 459. Sharon Altman testified that she had seen Dungy going upstairs in her home carrying a black bag. Tr. at 402.

Although the cooperating witnesses may have been unaware of each other's activities, substantial evidence places Dungy as the hub of the conspiracy. As the Eighth Circuit Court of Appeals has instructed:

"[T]o prove a single conspiracy it is not necessary to show that all the conspirators were involved in each transaction or that all the conspirators even knew each other." [*United States v.*]

Rosnow, 977 F.2d at 405. "A single conspiracy may be found when the defendants share a common overall goal. . . ." [*United States v.*] *McCarthy*, 97 F.3d at 1571 (quoting *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995)). "It is sufficient that the jury finds the co-conspirators were aware of the general nature and scope of the conspiracy and knowingly joined in the overall scheme." *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987).

Pullman, 187 F.3d at 821. Thus, viewing the totality of the evidence in the light most favorable to the government, as it must on a judgment of acquittal, the court concludes that the evidence is sufficient for the jury to have found that Dungy was guilty beyond a reasonable doubt of conspiracy to distribute crack cocaine. Moreover, assuming, *arguendo*, that the evidence failed to establish that there was only one conspiracy, Dungy has not demonstrated that this variance was prejudicial to him. See *Nicholson*, 231 F.3d at 452.

4. Ineffective assistance of counsel

Defendant Dungy also asserts that the court should grant his judgment of acquittal because his trial counsel provided ineffective assistance by: 1) failing to adequately review and object to a proposed jury instruction which made reference to prior convictions for drug offenses; 2) permitting the jury to hear the instruction which made reference to prior convictions for drug offenses; and, 3) failing to call certain defense witnesses who could have rebutted the government's evidence. The standard for judging ineffective assistance of counsel was articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 698 (1984): namely, whether counsel's performance fell below the objective standard for professional conduct and whether the performance prejudiced the outcome of the proceedings. *Id.* Thus, under *Strickland*, Dungy must make a two-part showing. First, Dungy must establish that his trial counsel's performance was deficient, that is, that counsel's performance "'fell below an objective standard of reasonableness,'" see *United States v. Craycraft*, 167 F.3d 451, 455 (8th Cir. 1999) (quoting *Strickland*, 466 U.S. at 688).

In gauging counsel's performance, the Supreme Court emphasized that,

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (citations omitted).

The second required showing under *Strickland* is actual prejudice resulting from the deficient performance, that is, that there is "'a reasonable probability that, but for counsel's errors,' the result would have been different." See *Craycraft*, 167 F.3d at 455 (quoting *Strickland*, 466 U.S. at 688); accord *Johnson v. United States*, ___ F.3d ___, 2002 WL 105774, at *1 (8th Cir. Jan. 29, 2002) (same two-prong test); *United States v. Bryson*, 268 F.3d 560, 561 (8th Cir. 2001) (same test); *United States v. Sera*, 267 F.3d 872, 874 (8th Cir. 2001) (same test); *United States v. Villaplando*, 259 F.3d 934, 938 (8th Cir. 2001) (same test); *McGurk v. Stenberg*, 163 F.3d 470, 473 (8th Cir. 1998) (same test); *Young v. Bowersox*, 161 F.3d 1159, 1160 (8th Cir. 1998) (same test), *cert. denied*, 528 U.S. 880 (1999). Both the Supreme Court and the Eighth Circuit Court of Appeals have noted that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Young*, 161 F.3d at 1160 (quoting *Strickland*, 466 U.S. at 697).

Here, the court finds it unnecessary to discuss the reasonableness of Dungy's trial counsel's conduct because he has not demonstrated that he was prejudiced by his counsel's performance. First, with respect to Dungy's claim that his counsel was ineffective for failing to call three witnesses for the defense, Dungy does not indicate the importance of these witnesses to his defense nor what these witnesses' testimony would have been if called to testify on his behalf. Rather, Dungy makes the conclusory argument that: "These witnesses' testimony would have countered the government's witnesses and helped show that Defendant was not guilty of conspiracy." Defendant's Supplemental Br. at p. 2. Federal courts of appeal have remarked on the shortcomings of such a claim and noted that "complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States*, 575 F.2d 515, 520 (5th Cir. 1978) (citing *United States v. Doran*, 564 F.2d 1176, 1177-78 (5th Cir. 1977)); accord *Sayre v. Anderson*, 239 F.3d 631, 635 (5th Cir. 2001) ("Where the only evidence of a missing witnesses' testimony is from the defendant, this Court views claims of ineffective assistance with great caution.") (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986)). This is precisely the deficiency in Dungy's showing here; he has not indicated the substance of these missing witnesses's testimony, let alone demonstrated how these witnesses' testimony would have "countered" the testimony of the government's witnesses. Thus, the court concludes that Dungy has failed to demonstrate that but for the absence of their testimony, the result in the trial would be different. Therefore, Dungy has not demonstrated that he was prejudiced by his counsel's performance and that the decision not to call these witnesses was ineffective assistance of counsel.

Defendant Dungy also takes issue with his counsel's failure to object to the court reading a jury instruction which made reference to Dungy's prior convictions for drug offenses. A jury instruction regarding impeachment was read to the jury which provided in

pertinent part:

You have also heard evidence that the defendant was previously convicted of a felony drug offense and engaged in similar, but uncharged, drug transactions. You may *not* use this evidence to decide whether the defendant carried out the acts involved in the crime charged in the indictment in this case. However, if you are convinced beyond a reasonable doubt, on other evidence introduced, that the defendant did carry out the acts involved in the crime charged in the indictment, then you may use this evidence of his prior conviction of a similar offense and evidence that he engaged in similar transactions to help you consider the defendant's intent, knowledge, motive, and lack of mistake or accident in carrying out those acts involved in the crime charged in the indictment in this case. Remember, even if you find that the defendant may have committed a similar act in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. The defendant is on trial only for the crime charged in the indictment in this case, and you may consider the evidence of prior acts only on the issues of the defendant's intent, knowledge, motive, and lack of mistake or accident in carrying out the acts involved in the crime charged in the indictment in this case.

Final Instruction No. 10. The reading of this portion of the instruction was an oversight because no evidence had been admitted with respect to defendant Dungy having prior drug convictions.

This instruction could hardly have come as a surprise to the parties as the court provided the parties with a version of it in both its proposed Preliminary and Final Instructions of October 31, 2001, and revised Preliminary and Final Instructions of November 5, 2001. No objections were lodged with respect to this instruction because the parties assumed that defendant Dungy was going to testify in his own defense. Subsequently, defendant Dungy decided not to testify. After the parties had rested, the court directed the

parties to again review the instructions and notify it of any necessary changes that needed to be made to the instructions as a result of the events at trial. No party notified the court of the need to change the impeachment instruction to reflect the fact that Dungy had not testified. Thus, in the absence of any notice by the parties that a change in the instruction was necessary, the court proceeded to give the impeach instruction without further modification.

After the final instructions were read to the jury, the Assistant United States Attorney representing the government proceeded to give his initial closing argument in the case. Immediately after the government's initial closing argument, having noticed the mistake in Instruction No. 10 while reading it, the court sent the jury out of the courtroom and advised the parties of the mistake in the instruction. The court then discussed with the parties several possible options in how to respond to the problem. Tr. at 596-599. The parties agreed with the court that the best approach would be to tell the jury that the prior criminal convictions language in the instruction was stock language that was erroneously left in the instructions. Tr. at 600. The court then advised the jury as follows:

THE COURT: Members of the jury, please be seated. I've made a huge mistake. And I'm not – we've had some humor in the case, and it's always okay to have some humor in even serious matters, but I've made a huge mistake in instructions. And, you know, one of the great things about word processing is I borrow from all my previous sets and I can put a set of instructions together very quickly, but I made a huge mistake, and I want to go over it with you because it really is huge. And I'm going to correct it.

And if you'd turn to the bottom of page 38 and the top of page 39, I'm actually going to go down to the document camera just to make sure we're all in the right place, and I don't know if you can tell my voice changed when I got to that because here's what happened. It's stock language just from my general impeachment instruction, and it has no application to this case. It was taken from another case where the defendant did have a

prior criminal conviction that I let in, and obviously in this case there was no evidence of a prior criminal conviction of the defendant.

So if you'd just follow along with me on the document camera – let's go out – it would be on page 38. The first sentence at the very bottom of the page, You have also heard evidence that the defendant was previously convicted, that goes out because that has no application in this case. And then it's a long paragraph on the next page. And you can just cross all of that out. And so the next sentence should be, You should treat the testimony of certain witnesses with greater care than that of others, and that's – again now we're on page 39. So you just take that whole paragraph that deals with the defendant's prior conviction because, as I've indicated, there is no prior conviction of the defendant in evidence in this case.

And it was a huge mistake on my behalf. I noticed it immediately when I read it. You know, I thought I had gone over these, but I missed it, and that's all I can tell you. So cross it out. Disregard it. It has absolutely no application whatsoever in this case, and it would obviously be totally inappropriate to have that language in the instruction in this case and to have you consider something that isn't true. And so I think you all understand my point.

And again, I apologize, and I work hard, but we all make mistakes. I just wish I hadn't made this mistake because obviously a trial of a federal criminal case is as serious as anything we do in this courtroom. So hopefully we've cured that mistake.

Tr. at 600-02. After defense counsel made his closing argument and the government's counsel made his rebuttal closing argument, the court handed out a substitute set of final jury instructions with the language quoted above deleted. The case was then submitted to the jury.

The court finds that defendant Dungy was not prejudiced by the court's reading the impeachment instruction with the prior criminal convictions language. First, although the instruction was read to the jury, the court took immediate corrective measures. The court

instructed the jury that the language in the instruction was a mistakenly inserted, that it had no application whatsoever to the case and to disregard completely the prior criminal convictions language. “It is presumed that a jury will follow a curative instruction unless there is ‘an overwhelming probability’ that it was unable to do so.” *United States v. Uphoff*, 232 F.3d 624, 625 (8th Cir. 2000) (citing *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987)); accord *United States v. Gordon*, 173 F.3d 761, 769 (10th Cir.) (“Absent evidence to the contrary, we assume the jury follows a curative instruction.”), *cert. denied*, 528 U.S. 886 (1999); *United States v. Hall*, 989 F.3d 711, 717 (4th Cir. 1993) (“The normal presumption is that the jury will follow a curative instruction.”); see also *United States v. Powell*, 469 U.S. 57, 66 (1984) (“Jurors . . . take an oath to follow the law as charged, and they are expected to follow it.”); *United States v. Carter*, 236 F.3d 777, 786 (6th Cir. 2001) (“As a general matter, juries are presumed to understand and follow directions from the court.”); *United States v. Canthadara*, 230 F.3d 1237, 1250 (10th Cir. 2000) (“Generally, we assume that jurors follow the judge's instructions.”), *cert. denied*, 122 S. Ct. 457 (2001). Here, there is nothing to suggest that the curative instruction was not followed by the jury. Indeed, because no evidence of defendant Dungy’s prior convictions was admitted as evidence, the curative instruction given here was more likely to be followed because there was no actual evidence to disregard. Thus, the court concludes that Dungy has failed to demonstrate that but for the giving of the instruction with the prior criminal convictions language, the result in the trial would be different. Therefore, Dungy has not demonstrated that he was prejudiced by his counsel’s performance and has not proven that his counsel’s failure to object to the giving of the instruction was ineffective assistance of counsel. Accordingly, Dungy’s motion for judgment of acquittal is denied.

B. Dungy's Motion for New Trial

Dungy has also moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Because the standards governing motions for new trial differ substantially from those applied to a motion for judgment of acquittal, the court will begin by discussing those standards, and will then turn to its consideration of Dungy's motion for new trial.

1. Standards applicable to motions for new trial

In *Saborit*, this court also had occasion to consider in some detail the standards applicable to motions for new trial. *Saborit*, 967 F. Supp. at 1144-45. Rather than repeat that discussion in its entirety here, the court will again set forth the highlights of these standards.

Federal Rule of Criminal Procedure 33 provides in relevant part as follows: "The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." FED. R. CRIM. P. 33. District courts have broad discretion in passing upon motions for new trial and such rulings are subject to reversal only for a clear abuse of discretion. See *United States v. Wilkins*, 139 F.3d 603, 604 (8th Cir. 1998); *United States v. Brown*, 108 F.3d 863, 866 (8th Cir. 1997); *United States v. Blumeyer*, 62 F.3d 1013, 1015 (8th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996).

A court evaluates a Rule 33 motion from a different vantage point than it evaluates a Rule 29 motion for judgment of acquittal. *Ortiz*, 40 F. Supp. 2d at 1082. Indeed, "[a] district court's power to order a new trial is greater than its power to grant a motion for acquittal." *United States v. Ruiz*, 105 F.3d 1492, 1501 (1st Cir. 1997); accord *United States v. Bennett*, 956 F.2d 1476, 1481 (8th Cir. 1992) ("This narrowly constricted power of review [applicable to motions for judgment of acquittal] is in contrast to the district court's broad discretion in ruling upon a motion for new trial."); *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992) ("A district court's power to grant a

motion for a new trial is much broader than its power to grant a motion for judgment of acquittal.”). In assessing whether a defendant is entitled to a new trial on the ground that the verdict is contrary to the weight of the evidence, “the district court weighs the evidence and evaluates anew the credibility of the witnesses to determine if a miscarriage of justice may have occurred.” *Davis*, 103 F.3d at 668; accord *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1232 (8th Cir. 1992); *United States v. Brown*, 956 F.2d 782, 786 (8th Cir. 1992). As the United States Court of Appeals for the Eighth Circuit has explained:

“When a motion for a new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different from those raised by a motion for judgment of acquittal. The question is whether he is entitled to a new trial. In assessing the defendant’s right to a new trial, the court must weigh the evidence and in doing so evaluate for itself the credibility of the witnesses.” *United States v. Lincoln*, 630 F.2d [1313,] 1316 [(8th Cir. 1980)]. The court will only set aside the verdict if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred.

United States v. Rodriguez, 812 F.2d 414, 417 (8th Cir. 1987). The authority to grant new trials, however, “should be used sparingly and with caution.” *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980). Having examined the appropriate standard of review, the court turns now to its consideration of Dungy’s motion for new trial.

2. Perjurious testimony

Although defendant Dungy again asserts in his motion for new trial that the government offered perjurious testimony at his trial, he has not briefed this issue nor has he indicated in his brief precisely what government witnesses he believes committed perjury. As noted above, because defendant Dungy has not identified that testimony which he believes to be perjurious, the court finds that he has failed to establish that a new trial should be granted on this ground. Accordingly, the court denies this portion of defendant Dungy’s motion for new trial.

3. Sufficiency of the evidence

Defendant Dungy has also moved for a new trial in the interests of justice, alleging that the verdict is against the weight of the evidence. “A motion for a new trial should be granted if there is insufficient evidence to support the verdict.” *United States v. Willis*, 277 F.3d 1026, 2002 WL 87644 (8th Cir. Jan. 24, 2002). The decision to grant or deny a motion for new trial based on the weight of the evidence is within the sound discretion of the trial court. *United States v. Huerto-Orozco*, 272 F.3d 561, 565 (8th Cir. 2001); accord *United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997). While the court's discretion is quite broad, there are limits to it. Where a defendant moves for a new trial on the grounds that the verdict is contrary to the weight of the evidence, the district court should grant the motion if

“the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred. . . . In making this determination, the court need not view the evidence in the light most favorable to the government, but may instead weigh the evidence and evaluate for itself the credibility of the witnesses.”

Huerto-Orozco, 272 F.3d at 565 (quoting *United States v. Lacey*, 219 F.3d 779, 783-84 (8th Cir. 2000)). In *Huerto-Orozco*, the Eighth Circuit Court of Appeals went on to note that:

If, "despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, [the district court] may set aside the verdict, grant a new trial, and submit the issues for determination by another jury."

Huerto-Orozco, 272 F.3d at 565 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

Although the court has reviewed and considered the record as a whole, it will not

reiterate the testimony and other evidence submitted at trial. As noted above, the court concluded earlier, regarding Dungy's motion for judgment of acquittal, that there was sufficient evidence presented by the government to support Dungy's conviction. While that result was reached when construing the evidence in the light most favorable to the guilty verdict, giving the government all reasonable inferences that may be drawn from the evidence, when applying the less restrictive standard for review applicable to motions for new trial, the court concludes that the evidence does not weigh heavily enough against the verdict for the court to conclude that a miscarriage of justice may have occurred in this case. Therefore, the court denies Dungy's motion for new trial on the ground that the verdict is against the weight of the evidence.

4. *Ineffective assistance of counsel*

Defendant Dungy also asserts that the court should grant his motion for new trial on the ground that his trial counsel provided ineffective assistance. The decision to grant or deny a motion for new trial based on a claim of ineffective assistance of counsel is within the sound discretion of the trial court. *See Villaplando*, 259 F.3d at 938. *United States v. Jackson*, 204 F.3d 812, 815 (8th Cir. 2000). As discussed above, in order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonable competence, and that the deficient performance prejudiced the defendant. *See Strickland*, 466 U.S. at 687; *Johnson*, ___ F.3d ___, 2002 WL 105774, at *1; *Bryson*, 268 F.3d at 561; *Sera*, 267 F.3d at 874; *Villaplando*, 259 F.3d at 938; *McGurk*, 163 F.3d at 473; *Young*, 161 F.3d at 1160.

As discussed above with respect to Dungy's motion for judgment of acquittal, the court found that Dungy had not proven that his counsel was ineffective. Although that result was reached when construing the evidence in the light most favorable to the guilty verdict, giving the government all reasonable inferences that may be drawn from the evidence, even when applying the less restrictive standard for review applicable to motions for new trial, the

court reaches the same conclusion. As discussed above, upon noticing the mistake in the instruction, the court took the immediate corrective measure of instructing the jury that the language in the instruction was mistakenly inserted, that it had no application whatsoever to the case and to disregard completely the language. Thus, the facts of this case are quite unlike that found in *United States v. Schneider*, 157 F. Supp.2d 1044 (N.D. Iowa 2001), where the court granted a motion for new trial based on prosecutorial misconduct even though the court had given an curative instruction to the jury after the prosecutor's improper comment. *Id.* at 1068. In *Schneider*, the court was concerned that a delay of almost two days between the time of the prosecutor's comment and the giving of the curative instruction rendered that instruction ineffective "particularly because the prosecutor's comment clearly misled the jury." *Id.* Here, by contrast, the curative instruction was given promptly thus preventing any prejudice to defendant Dungy. Moreover, because no evidence of defendant Dungy's prior convictions was actually presented at trial, the curative instruction given here was more likely to be followed because there was no actual evidence for the jury to disregard. Thus, there is nothing to suggest that the jury did not follow the curative instruction in this case. As a result, the court concludes that Dungy has failed to demonstrate that but for the giving of the jury instruction containing the prior criminal convictions language, the result in the trial would be different. As such, Dungy has not proven that his counsel's failure to object to the giving of the instruction constituted ineffective assistance of counsel. Therefore, the court will not set aside the verdict in this case and grant Dungy's motion for new trial on the ground of ineffective assistance of counsel.

III. CONCLUSION

The court concludes that based upon its review of the evidence, and viewing the evidence in the light most favorable to the government, that Dungy has not proven that his

conviction was secured through perjured testimony nor that his counsel provided ineffective assistance. The court further finds that a reasonable jury could have found defendant Dungy knowingly and voluntarily participated in an agreement with other persons to commit the offense of distribution of crack cocaine. Consequently, the court **denies** Dungy's motion for judgment of acquittal. The court further concludes, when applying the less restrictive standard for review applicable to motions for new trial, that Dungy has not demonstrated that his conviction was secured through perjured testimony nor that his counsel provided ineffective assistance. Moreover, the court finds that a reasonable jury could have found defendant Dungy knowingly and voluntarily participated in an agreement with other persons to commit the offense of distribution of crack cocaine. Consequently, the court **denies** Dungy's motion for new trial.

IT IS SO ORDERED.

DATED this 14th day of February, 2002.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA