

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
 v.)
)
THOMAS A. SHAY)
)

CRIMINAL NO. 92-10369-Z

GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT OF ACQUITTAL

Defendant Thomas A. Shay ("Shay Jr." or "defendant"), moves pursuant to Fed. R. Crim. P. 29(c) for judgment of acquittal. The government opposes this motion as failing to meet the applicable legal standard for Rule 29 motions in this Circuit; the evidence was certainly sufficient to sustain the jury's discriminating verdict.

I. Legal Standards

In this jurisdiction, the standard applicable to Rule 29 motions claiming insufficiency of evidence is that the evidence at trial must be viewed in the light most favorable to the prosecution. United States v. Clifford, 979 F.2d 896 (1st Cir. 1992); see also United States v. Torres Lopez, 851 F.2d 520 (1st Cir. 1988). Further, the Court must 'draw all legitimate inferences and resolv[e] all credibility determinations in favor of the verdict." United States v. Anqiulo, 897 F.2d 1169, 1197 (1st Cir. 1990).

The government need not "disprove every reasonable hypothesis of innocence." Torres Lopez, 851 F.2d at 527-27. The determinative inquiry is whether, "after viewing the evidence in the light most favorable to the prosecution any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Barnes, 890 F.2d 545, 549 (1st Cir. 1989), cert. denied, 494 U.S. 1019 (1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

II. ARGUMENT

A. THE EVIDENCE WAS CLEARLY SUFFICIENT FOR THE JURY TO FIND SHAY JR. GUILTY OF CONSPIRACY¹

1. The jury found Shay Jr. guilty of conspiring with Alfred W. Trenkler ("Trenkler") (1) to receive explosives with the knowledge and intent that the same would be used to kill, injure or intimidate Shay Sr. or cause damage to his real or personal property; and/or (2) to attempt to maliciously destroy Shay Sr.'s Buick automobile by means of explosives, in violation of 18 U.S.C. §371.

2. As instructed by the Court, in order to find Shay Jr. guilty of the conspiracy charge, the jury had to find that the government had proven each of three (3) essential elements beyond a reasonable doubt:

... one, that there was an agreement at about the time alleged by two persons, here, Mr. Shay, Jr., and Mr. Trenkler, to accomplish some unlawful purpose, here, to receive the explosives and/or to destroy the car; two, that the defendant knowingly and willfully became a member of the conspiracy; and three, that one of the conspirators, during the existence of the conspiracy, willfully committed at least one overt act at

¹ For the benefit of the Court, this Opposition will attempt to generally track Shay Jr.'s motion in terms of the sequence of points raised.

or about the time alleged.

T. 19-104.

3. Shay Jr. makes the point that the Court observed "on the ninth day of trial" that the government had not yet adduced evidence of the connection between Shay Jr. and Trenkler. **T. 9-2.** The government does not dispute this fact. The government did not commence this aspect of its case (demonstrating the association between the two co-defendants) until the eleventh day of trial (on July 13, 1993). When the evidence adduced thereafter is viewed in the light most favorable to the government, as it must for purposes of this motion, there is no doubt that sufficient evidence was offered to establish the association between the defendants and their unlawful agreement.

**The Relationship Between Shay Jr. And
Trenkler Was More Than A Passing Acquaintance
Or "Frivolous Association"**

4. Taking pieces of evidence in isolation, and not viewing them "in the light most favorable to the government", supra, Shay Jr. argues that the evidence showed no more than a "frivolous association" between Shay Jr. and Trenkler. **Defendant's Motion at 2.** The defense made the same argument to the jury in closing, to no avail. There has been no showing that the jury acted irrationally in reaching a conclusion that was at odds with the defense's theory on this point.

5. In order to establish the framework for the unlawful agreement between Shay Jr. and Trenkler, the government set out to demonstrate that, in fact, the two defendants not only knew

one another, but had a relationship which dated back to at least 1989. The evidence of this relationship derived from several witnesses, including Shay Jr. himself. It was Shay Jr.'s own statements on the October 17, 1992 Channel 56 videotape which most clearly summed-up the association between Shay Jr. and Trenkler. Among those statements were the following:

- A. "I met Al Trenkler in late 1989, possibly early 1990."
- B. Trenkler is a "very good friend" (Shay Jr. also described Trenkler on the same tape as an "acquaintance")
- C. "We have the same feelings ... we cried together ... we talked ... he was there if I ever needed him."

See Transcript of 10-17-92 videotape.

6. As the Court will recall, the foregoing description of the relationship by Shay Jr. was confirmed and corroborated by several trial witnesses, including Edward Carrion, Richard Brown, John Cates, Nancy Shay and Larry Plant. It was further corroborated by Shay Jr.'s own address book, wherein appeared Trenkler's name and current beeper number as of October, 1991.

**Consistent With The Court's Instructions,
The Jury Found The Existence Of An Unlawful
Agreement Between Shay Jr. and Trenkler**

7. As the Court instructed the jury, the government did not have to prove the existence of a written contract between Shay Jr. and Trenkler. It needed only to show that "the conspirators in some way, either explicitly or tacitly, came to an

understanding to accomplish their unlawful plan." T. 19-105.

Conspiracy is by nature usually secret. It may be shown by the conduct of the alleged conspirators, conduct that evidences a shared purpose to violate the law; it may be inferred from the movements the conspirators, what they did, how they acted, how they acted, how they interacted. It may be inferred from their statements, what they said to each other, what they said to others, what the context was in which they spoke.

The government does not have to prove that both conspirators played an equal role or that the defendant initiated the conspiracy. It merely has to prove that Mr. Shay and Mr. Trenkler came to some understanding to carry out the offenses that are charged in Counts 2 and 3.

T. 19-105.

8. Shay Jr. argues that the only evidence of an agreement between he and Trenkler "was the testimony of two inmates (Robert Evans and Larry Plant) who related that Shay Jr. had made certain statements to them; the details of these statements were not corroborated by independent evidence." **Defendant's Motion at 5.** Shay Jr. is obviously mistaken; not only was there powerful evidence of the agreement from Shay Jr.'s own lips (on the Channel 56 videotape), but there was also corroboration for the credible testimony of Evans and Plant.²

9. The jury heard Shay Jr. state the following on the Channel 56 videotape (while having the opportunity to observe him and assess his rationality and credibility):

A. "I purchased the Radio Shack stuff for Al Trenkler. Then the stuff's found in the bomb that killed the

² Again, witness credibility determinations are to be resolved in favor of the verdict. Angiulo, 897 F.2d at 1197.

cop."

- B. "I did make purchases of electronic goods at a number of stores for Trenkler, but my knowledge of what I was buying was for Trenkler's work. After the explosion, I knew who built it because he said in September, early October of 1991 that he was building me a surprise. I really didn't know what it was. I thought it was a remote control car."
- C. "I'm guilty of knowing who built the bomb after the fact."

Transcript of 10-17-92 videotape.

10. Witness Robert Evans testified that Shay Jr. asked him how much time he could get for a murder charge. T. 11-143. Shay Jr. went on to tell Evans that his father had disowned him "five years prior" and that he and his father "didn't get along." T. 11-144-45. Shay Jr. also told Evans that he didn't make the bomb, "he had to have someone else make it." T. 11-145. Contrary to Shay Jr.'s assertion, the foregoing testimony is consistent with similar statements made by Shay Jr. to other witnesses (including Larry Plant), and corroborated by the Channel 56 videotape, as well as by the testimony of his father, Thomas Shay Sr.

11. Witness Larry Plant provided credible and compelling testimony concerning numerous incriminating statements made to him by Shay Jr. For example:

- A. "He told me that they [he and Trenkler] did it [the Roslindale bombing] T. 13-58.
- B. Shay Jr. talked about his history with DSS and in foster homes and places like the Baird Center in Plymouth. T. 13-59.
- C. Shay Jr. told him that Trenkler agreed to "help him" to "get even with his father", who was "abusive" towards

him. T. 13-61, 13-79.

- D. Shay Jr. stated that Trenkler wanted the money and that there was a "\$500,000 life insurance policy" that was somehow involved. T. 13-63.

The jury heard evidence of the abusive relationship between Shay Sr. and Shay Jr., and about Shay Jr.'s difficult upbringing. They also heard evidence of \$400,000 or \$500,000 worth of insurance being at stake in the litigation between Shay Sr. and Dedham Service Center. Plant described this figure as "life insurance) (quoting Shay Jr.), but the jury reasonably could have interpreted this inconsistency as a twisting of the message by Shay Jr. (in his conversations with Plant), or the lack of a precise articulation of this point by Plant. Other than Shay Jr.'s direct and clear admission to Plant of his knowing and willful involvement in the plot, Plant's testimony is completely consistent with Shay Jr.'s own statements on the Channel 56 videotape.

12. In sum, there was ample evidence of the existence of the unlawful agreement between Shay Jr. and Trenkler, an agreement which evolved out of a friendly (and perhaps intimate) relationship between the two defendants which spanned almost three years.³

³ Shay Jr. argues that there exists inconsistencies between Shay Jr.'s statements and the physical evidence, such as the lack of any C-4 explosive in the bomb. Such contradictions and inconsistencies are, in fact, consistent with the government's theory of the case -- and the jury's ultimate verdict. The government alleged and argued that Trenkler designed and constructed the bomb, without active assistance or participation by Shay Jr. (beyond his acquiring certain necessary components). Hence, Shay Jr. is unlikely to know what type of explosive was

B. THE EVIDENCE DEMONSTRATING THAT SHAY JR. AIDED AND ABETTED TRENKLER'S ATTEMPT TO MALICIOUSLY DESTROY SHAY SR.'S AUTOMOBILE

13. The jury found Shay Jr. guilty of aiding and abetting Trenkler's attempted malicious destruction of Shay Sr.'s 1986 Buick (in an effort to kill Shay Sr.), resulting in the death of Officer Hurley and serious personal injury to Officer Foley, in violation of 18 U.S.C. §§844(i) and 2.

14. As instructed by the Court, in order to find Shay Jr. guilty of this charge the jury had to find that each of three essential elements had been proven:

One, that the defendant participated in using an explosive in an attempt to damage or destroy the Buick; two, that the Buick was either used in interstate commerce or used in an activity affecting interstate commerce, and, three, that the defendant acted maliciously.

T. 19-102. Since the charge in Count Three against Shay Jr. was "aiding and abetting" the commission of the substantive offense, the Court correctly charged the jury concerning the legal requirements thereof. T. 19-95-97.

15. Shay Jr. now argues that there was a lack of any direct evidence (1) that Trenkler built the bomb, (2) that Shay Jr. or Trenkler planted it, or (3) that "Shay Jr. took a substantial

actually used or how the components were configured. In other words, Trenkler kept this information to himself. This best explains the discriminating verdict of the jury, and why they acquitted Shay Jr. on Count Two (the receiving explosives, ie. dynamite and blasting caps, charge). The jury apparently concluded that Shay Jr. may never have had actual possession of any explosive material -- such was Trenkler's contribution to the scheme.

step towards accomplishing destruction of the Buick." To the surprise of no one, including the jury, this was a case built largely on circumstantial evidence. As the Court instructed the jury, however, "circumstantial evidence is just as good as direct evidence ... it is entitled in law to the same weight as direct evidence." T. 19-89.

16. The circumstantial evidence that Trenkler was the builder of the device included evidence of his extensive training and experience in electronics, his experience with woodworking and circuitry work (including soldering), his detailed knowledge of explosives (including dynamite and blasting caps), his possession of a roll of duct tape that was consistent in "construction and composition" to duct tape used in the actual bomb, his difficult financial situation, and his relationship to Shay Jr. Most importantly, it included Shay Jr.'s recorded statements (on the Channel 56 videotape) and further statements to Larry Plant that Trenkler built the bomb.

17. With respect to who planted the bomb and when, the only reasonable inference to be drawn by the jury was that Trenkler -- perhaps assisted by Shay Jr. or someone else -- surreptitiously affixed the device to Shay Sr.'s Buick sometime Saturday evening or early Sunday morning, October 26/27. Since there was no eyewitness testimony or direct evidence on this point, Shay Jr.'s arguments concerning his or Trenkler's whereabouts that weekend are unavailing. Neither defendant has an alibi which convincingly explains his presence or activities throughout the

entire relevant time frame prior to the bombing.

18. Finally, Shay Jr.'s claim of a lack of any "substantial step" on his part is truly frivolous. The unrefuted evidence of Shay Jr.'s purchase of the Radio Shack components ten days prior to October 28, 1991 -- at Trenkler's direction (according to Shay Jr.), coupled with his admissions to Larry Plant, Robert Evans and others, clearly established that he knowingly and willfully associated himself with the illegal venture and "participated in some way" to help bring the result about. **T. 19-96.**

19. In sum, the evidence was plainly sufficient for the jury to find Shay Jr. guilty of aiding and abetting the attempted malicious destruction of property as charged in Count Three.

III. Conclusion

Shay Jr.'s motion for judgment of acquittal should be denied.


Respectfully submitted,

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By:



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CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
August 31, 1993

I, PAUL V. KELLY, Assistant U.S. Attorney, do hereby certify that I have served a copy of the foregoing by first-class mail, to Nancy Gertner, Esquire, Dwyer, Collora & Gertner, 400 Atlantic Avenue, Boston, Massachusetts 02110 and Jefferson Boone, Esquire, 138 Brighton Avenue, Allston, Massachusetts 02165.



PAUL V. KELLY
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