

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

Case No. CR 08-50079

vs.

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR ACQUITTAL**

VINE RICHARD MARSHALL, a.k.a.
RICHARD VINE MARSHALL, a.k.a.
DICK MARSHALL,
Defendant.

The defendant Richard Marshall has moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, on the grounds that, even if the jury were to credit all testimony of all government witnesses, no reasonable jury could conclude that the evidence presented in trial proves beyond a reasonable doubt that Richard Marshall knew, before engaging in any conduct, that Theda Clarke or Looking Cloud or Graham would use the gun to murder Anna Mae Pictou Aquash. Recognizing that juries can find intent by means of circumstantial evidence and can draw reasonable inferences from the evidence, in this trial, the jury could only reach such a conclusion on the basis of surmise, rather than circumstantial facts presented in evidence.

“A motion for acquittal should be granted only where the evidence, viewed in the light most favorable to the government, is such that a reasonably minded jury must have a reasonable doubt as to the existence of any of the essential elements of the crime charged.” United States v. Brim, 630 F.2d 1307 (8th Cir. 1980), quoting United States v. Anziano, 606 F.2d 242, 244 (8th

Cir. 1979); United States v. White, 562 F.2d 587, 589 (8th Cir. 1977).

A motion for judgment of acquittal must be granted when the evidence, viewed in the light most favorable to the government, is so scant that the jury could only speculate as to the defendant's guilt. United States v. Herbeman, 583 F.2d 222 (5th Cir. 1978).

It is true that the government is entitled to the benefit of all reasonable inferences to be drawn from the evidence. However, where 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 and the court has a duty to direct an acquittal. United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971).

Here, if the jury credits all testimony of government witnesses, including that of Arlo Looking Cloud that Marshall gave a handgun to Theda Clarke, a reasonable jury must have a reasonable doubt as to whether Richard Marshall knew that Clarke and her confederates would use that gun to murder Aquash.

In fact, if Looking Cloud's entire testimony were credited by the jury, a reasonable jury must have a reasonable doubt as to Marshall's specific intent to murder: Looking Cloud testified that he had no idea that Anna Mae Aquash was going to be murdered until the moment of her murder, because neither Theda Clarke or anyone else told him of any such intent or plan. He also testified that nobody said anything about Aquash or murdering Aquash at the home of Marshall, not when they were in the bedroom or at any other time. If Theda Clarke did not at any time reveal to Arlo Looking Cloud a plan or intent to murder Aquash, no reasonable jury could conclude that she revealed any such plan or intent during the few minutes she was alone with Marshall in the bedroom outside the presence of Looking Cloud.

Even if the jury were to find that Marshall gave a gun to Clarke and that that gun was

used later that night to kill Aquash, no reasonable jury could conclude that Marshall knew that the gun would be used to kill Aquash after they left the Marshall home.

There is no direct evidence or testimony that Arlo Looking Cloud, John Graham or Theda Clarke, or anyone else, ever told or communicated to Marshall that they intended, desired or were even considering murdering Anna Mae Aquash either before or at any time during brief stop at Marshall's home in Allen.

Government witness Cleo Gates, former wife of Richard Marshall, testified that there was no discussion or statements made in her presence of any hostile intent of any kind toward Aquash.

The only substantive circumstantial evidence that the government put forth to prove specific intent is evidence from Cleo Marshall that Marshall said he had seen a note that said "Please take care of this luggage" and Serle Chapman's testimony that Marshall said the notes said "Take care of this baggage." Chapman gave conflicting testimony on this point. On cross-examination, he stated that Marshall said the note referred to "keeping this baggage."

Marshall contends that a jury could only find that Marshall had prior knowledge of Aquash's murder and specific intent to help commit that murder by resorting to surmise, speculation and imaginative guesswork.

ISSUE TO BE DECIDED

The issue to be decided is whether the evidence presented, viewed in the light most favorable to the government, is such that a reasonably minded jury could conclude that the evidence proved beyond a reasonable doubt that Richard Marshall knew, before that Theda

Clarke, John Graham and / or Looking Cloud were going to or intended to murder Anna Mae Aquash.

I

To Prove Guilt for Aiding and Abetting Murder in the First Degree, the Government

Must Prove that Richard Marshall Acted with the Specific Intent to Murder Anna Mae

Aquash.

A conviction as an aider or abettor, 18 U.S.C. § 2 (1976), requires the same intent as a conviction for first degree murder under 18 U.S.C. § 1111 (1976). United States v. Wilson, 665 F.2d 825 (8th 1981), cert. denied, 456 US 994 (1982).

The essential elements of the charge may be proved by either direct or circumstantial evidence since circumstantial evidence is intrinsically as probative as direct evidence. The jury may not, however, be permitted to convict based upon mere conjecture or to conclude upon pure speculation. United States v. Knife, 592 F.2d 472, 475 (8th Cir. 1977).

Thus, here, the element of specific intent to murder Anna Mae Aquash may be proven by circumstantial evidence, but the jury cannot find that specific intent to murder has been proven by relying on conjecture or surmise. The “evidence must do more than merely raise suspicion or possibility of guilt. “Surmise cannot be committed in a criminal case.” United States v. Jones, 545 F.2d 1112, 1115 (8th Cir. 1976). See also: United States v. Grey Bear, 828 F.2d 1286 (8th Cir. 1987).

Even assuming the truth of the Government's evidence and giving the government the benefit of all reasonable inferences that may logically be drawn from the evidence, no reasonable jury could conclude that the evidence presented proved beyond a reasonable doubt that Richard Marshall knew, before the occurrence, that the objective of his actions in giving a gun to Clarke was Anna Mae Aquash's murder.

The legal irony of this case is that the Government's case rests almost entirely on Looking Cloud's credibility, but in order to find Marshall guilty, the jury would have to conclude that Looking Cloud is lying about his own lack of prior knowledge of a plan to murder. If Theda Clarke and John Graham were so secretive that they did not confide in Looking Cloud, if Looking Cloud was unaware of any intent or plan to kill Aquash, how could Marshall possibly have been aware of any such plan or intent, in the absence of any direct evidence that such an intent was expressed to him by anyone?

Considered as a whole, the evidence of guilty knowledge and specific intent to aid in murder as it pertains to Marshall is so tenuous as to amount to mere speculation. Because such a conclusion would be based on pure conjecture, the defendant is entitled to a judgment of acquittal under Rule 29.

Simply stated, to sustain a conviction for aiding and abetting murder in the first degree, the evidence must prove beyond a reasonable doubt that Marshall intended to participate in Aquash's murder. Specifically, the evidence must prove beyond a reasonable doubt that Marshall knew that Clarke intended to murder Aquash.

The defendant relies on two 8th Circuit cases to support his motion for judgment of

acquittal: United States v. Wilson, 665 F2d 825 (8th 1981) and United States . v. Darden, 70 F.3d 1507, (8th Cir. 1995),

In Darden, citing Wilson, the 8th Circuit held that, to convict a person as an aider and abettor of first degree murder, there must be proof that the person knew, before engaging in any conduct, that the objective of defendant's actions was to murder an individual.

In United States v. Wilson, 665 F2d 825 (8th 1981), the 8th Circuit ruled that a judgment of acquittal should have been order in a case where a prisoner helped another prisoner create a flammable weapon that was shortly thereafter used to burn another prisoner to death, because there was insufficient evidence to prove beyond a reasonable doubt that the defendant knew that the other prisoner was going to use the substance to murder the individual who was murdered.

In Wilson, The Government initially indicted Wilson, Scott, and Alvin Freeman for murder and conspiracy to murder Tandy on December 14, 1979, alleging that they set fire to prisoner Tandy and his quarters at a federal detention facility.

Apparently Scott became angry upon discovering that a poncho he made at the prison was missing. Scott suspected that Tandy was the thief. He vowed to kill Tandy if his suspicions were confirmed. At one point Scott obtained a knife from another inmate, but he later returned it saying that he had something better. Both Wilson and Freeman helped Scott squeeze alcohol from alcohol pads commonly available at the jail and also helped cut the heads from a box of matches. Early the following morning, Scott ignited the mixture and poured it over Tandy as he slept in his cell. Tandy later died from the burns, which covered sixty percent of his body. Wilson was convicted of aiding and abetting Scott in the murder of Tandy.

On appeal, Wilson argued that the evidence was insufficient to convict him of conspiracy to murder Tandy because the Government failed to prove that he had knowledge of the conspiracy and its intended objective. Although this challenge focused on the conspiracy conviction, the Court ruled it amounted to an attack on his first degree murder conviction because both require Wilson's intention to participate in Tandy's murder.

The validity of Wilson's convictions rested on whether the Government proved that Wilson knew before the occurrence that the objective of his actions in aiding Scott was Tandy's murder.

The Court of Appeals ruled that the evidence that Wilson knew that Scott intended to kill Tandy was insufficient to sustain Wilson's convictions: "While Freeman's testimony shows that Wilson helped to make the mixture ultimately used by Scott to set Tandy afire, there is no evidence that Wilson knew beforehand of Scott's intention to kill Tandy. Montgomery, who overheard a conversation between Wilson and Scott concerning other prison burnings, stated that he never heard them talk about killing Tandy. Wilson's statements to Freeman and Montgomery after Tandy's death indicating that Wilson knew how Tandy had been burned show only that Wilson knew what happened, not that he planned to kill Tandy with Scott and took action to that end."

The Court ruled that:

"Evidence, which showed that one defendant helped to make mixture ultimately used by codefendant to set victim afire but which did not show that defendant knew beforehand of codefendant's intention to kill victim, was insufficient to show that defendant knew that codefendant intended to kill victim or knowingly acted in pursuit of same objection, and

thus was insufficient to sustain defendant's conviction of first-degree murder and conspiracy to murder."

United States . v. Darden, 70 F.3d 1507, (8th Cir. 1995) involved a sentencing issue, in which the Court of Appeals held that the mere transportation of guns that were later used in a murder was not a sufficient basis on which to sentence a defendant for murder. The Court found there was no evidence in the record that it was defendant Seals' conscious purpose in delivering guns that anyone be killed, or that she deliberated on anyone's death for any period of time. The Court ruled that *since there was no evidence as to what Seals knew about the guns or their intended use*, there was simply no evidence of Seals' intent to kill either of the two men as required for first degree murder.

Both cases stand for the proposition that one who provides a lethal weapon to someone who later uses the weapon to commit murder is not guilty of aiding and abetting murder unless the evidence proves beyond a reasonable doubt that at the time the defendant provided the weapon, he knew the weapon was going to be used to murder the intended victim.

In Wilson, the evidence showed that the defendant knew that prisoner Scott had a motive to murder Tandy and he had vowed to kill him. Wilson obviously knew that he was created a flammable weapon whose only purpose would be to seriously injure or kill another person. There was evidence that Wilson had spoken with Scott about other prison burnings.

In fact, the circumstantial evidence in Wilson of Wilson's specific intent to aid Scott in murdering Tandy was stronger than the evidence of Marshall's prior knowledge or specific intent to murder. If the evidence in Wilson was insufficient to prove the defendant's prior knowledge of Scott's intent to kill Tandy, then here, the evidence that Marshall knew Theda Clarke intended to

kill Aquash is even more insufficient; in fact, it is non-existent.

The defendant is entitled to a judgment of acquittal as a matter of law.

DATED: 21 APRIL 2010

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna
Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion was electronically served upon the other parties in the case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

Dated this 21st day of April, 2010.

/s/ Dana L. Hanna
Dana L. Hanna