UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	ELECTRONICALLY FILED
	:	
v.	:	
	:	Criminal Number:
	:	07-459 (RBK)
MOHAMAD SHNEWER	:	

BRIEF OF DEFENDANT, MOHAMAD SHNEWER, IN SUPPORT OF MOTION PURSUANT TO FED. R. CRIM. R. 29(c) AND IN SUPPORT OF POST-VERDICT MOTION PURSUANT TO FED. R. CRIM. R. 33

On the brief:

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FACTUAL BACKGROUND

The Grand Jury, in and for the District of New Jersey, sitting in Camden, charged defendant, Mohamad Shnewer, in a seven-count Superseding Indictment, (hereinafter "the Indictment"), with the following three offenses:

- Count 1 -- **Conspiracy to Murder Members of the United States Military** in alleged violation of 18 U.S.C. § 1117;
- Count 2 -- **Attempt to Murder Members of the United States Military** in alleged violation of 18 U.S.C. § 1114 and 18 U.S.C. § 2; and
- Count 4 – **Attempted Possession of Firearms in Furtherance of a Crime of Violence** in alleged violation of 18 U.S.C. § 924 (c).

Defendant Shnewer was found not guilty of Count 2 and guilty on Count 1 and Count 4 by a jury on December 22, 2008.

At the conclusion of the government's case, Defendant Shnewer moved for dismissal of the indictment pursuant to Rule 29(a). Defendant respectfully renews his motion for a verdict judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c).

Defendant also submits this brief in support of his post-verdict motion that the verdict was against the weight of the evidence, pursuant to Federal Rule of Criminal Procedure 33.

LEGAL ARGUMENT

I. Count 4 – Attempted Possession of Firearms in Furtherance of a Crime of Violence

Applicable Legal Standard as to Rule 29 Motion

Viewing the evidence in the light most favorable to the government, as the Court must on a motion pursuant to Federal Rule of Criminal Procedure 29[1], no reasonable fact-finder could have convicted Mr. Shnewer of attempted possession of a firearm as alleged in Count 4 of the Indictment.[2] Rule 29(a) requires a court to enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).

In adherence to these legal principles, the Court should grant Mr. Shnewer's motion for a judgment of acquittal pursuant to Federal Rules of Criminal Procedure 29.

[1]*United States v. Feldman*, 425 F.2d 688, 692 (3d Cir. 1970)("On a motion for judgment of acquittal, the evidence and the inferences to be drawn from it must be taken in the light most favorable to the Government.").

[2]The defendant made an oral motion pursuant to Federal Rule of Criminal Procedure 29, at the conclusion of the government's case in chief. Defendant hereby renews the motion for acquittal post-verdict.

Applicable Legal Standard as to Rule 33 Motion

Federal Rule of Criminal Procedure 33 permits a defendant to move for a new trial. The Rule provides that a court may grant such a motion "if the interest of justice so requires." Fed. R. Crim. P. 33. A court should grant a new trial if the verdict constitutes a miscarriage of justice. *United States v. Rhines*, 143 Fed. Appx. 478, 484 (3d Cir. 2005).

ARGUMENT

In Count 4 of the indictment, defendant Shnewer was charged with attempted possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). As outlined in the jury instructions submitted to the jury in this case, to find defendant Shnewer guilty of Count 4, the jury had to find that the government had proved each of the following elements beyond a reasonable doubt:

- First: That the defendant committed either the crime of conspiracy to murder(Count 1) or attempted murder (Count 2) of the United States uniformed services; and
- Second: That with respect to Count 4, defendant Shnewer attempted to possess a firearm in furtherance of this crime; and

- Third: That if the jury finds the defendant knowingly attempted to possess the firearm, the attempted possession was in furtherance of the crimes charged in Count 1 or Count 2 of the Indictment.

Final Jury Instructions, *United States v. Shnewer*, Case 1:07-cr-00459-RBK, Docket No. 353, page 63.

No reasonable trier of fact could have found that as required by the second element, Mr. Shnewer attempted to possess a firearm. To prove the elements of attempt beyond a reasonable doubt, the government must prove that (1) the defendant intended to possess the object firearm(s), and (2) the defendant knowingly and willfully performed an act constituting a substantial step toward the possession of the firearm. Final Jury Instructions, Docket No. 353, page 67. *See also U.S. v. Cruz-Jiminez*, 977 F.2d 95, 101 (3d Cir. 1992) (outlining elements of criminal attempt). Further, as outlined in the jury instructions, a jury may not find that defendant Shnewer committed a substantial step merely because he made plans or some preparation for committing a crime. Final Jury Instructions, Docket No. 353, pages 57 and 67.

To be guilty of attempt, Mr. Shnewer must have taken some "firm, clear, undeniable action to accomplish his intent" to possess the alleged object firearm(s) in furtherance of the alleged crime of violence (the conspiracy charged in Count 1).

Final Jury Instructions, Docket No. 353, pp. 57-58. There was no evidence of a "firm, clear, undeniable action" from which a reasonable fact-finder could find that a substantial step was taken by Mr. Shnewer to possess any of the alleged object firearms in furtherance of a crime of violence.

The substantial step element of attempt requires something beyond mere preparation, *U.S. v. Smith* 264 F.3d 1012, 1016 (10th Cir. 2001), and must be "strongly cooborative of the firmness of a defendant's criminal intent." *United States v. Buffington*, 815 F.2d 1292, 1301 (9th Cir. 1980). *See also Cruz-Jiminez*, 977 F.2d 95, at 101-02 (holding the same). The government must prove beyond a reasonable doubt that the defendant's mental process went beyond just thinking or talking about the crime, and that "the physical process of the defendant, what he was doing, what he did, went beyond and passed from the state of mere preparation to some firm, clear and undeniable <u>action</u> to accomplish the intent of the offense." *See U.S. v. Earp*, 84 Fed. Appx. 228, 234 (3d. Cir 2004)(citing with approval the above quoted jury instructions).

Moreover, a substantial step is described as an overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime. *Smith*, 264 F.3d at 1016. *See also United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980); *United*

States v. Vigil, 523 F.3d 1258, 1267-68 (10th Cir. 2008). Courts have held that for attempt, the substantial step must be an appreciable fragment of a crime and an action of such substantiality that, unless frustrated, the crime would have occurred. *Smith*, 264 F.3d at 1016. *See also U.S. v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997)("A substantial step is conduct such that if it had not been extraneously interrupted would have resulted in a crime.").

In *United States v. Gladish*, 536 F.3d 646 (7th Cir.2008), the Seventh Circuit held that explicit sexual talk does not, by itself, amount to the kind of "substantial step" needed to prove an attempt to violate 18 U.S.C. § 2422(b), which forbids knowingly persuading, inducing, enticing, or coercing a person under the age of 18 to engage in criminal sexual activity. In *Gladish*, the defendant was caught impersonating a 14-year old girl in an Internet chat room, where he solicited "Abagail" to have sex with him. *Gladish*, 536 F.3d at 648. "Abagail" ostensibly agreed, and in later conversations the defendant discussed the possibility of traveling to meet her in a couple of weeks. However no arrangements were made, and the defendant then was arrested. *Gladish*, 536 F.3d at 648.

The Seventh Circuit reversed the attempt conviction pursuant to 18 U.S.C. § 2422(b) finding that no substantial step was taken, explaining by analogy that a defendant should not be

punished for just "saying that you want or even intend to kill someone, because most such talk doesn't lead to action . . . [y]ou have to do something that makes it reasonably clear that had you not been interrupted or made a mistake . . . you would have completed the crime." *Gladish*, 536 F.3d at 648. Simply talking about the object of the alleged attempt is not enough to constitute attempt.

Courts have found that a substantial step occurred when overt acts were taken such that a reasonable observer could conclude beyond a reasonable doubt that it was undertaken to commit the crime regarding which attempt is charged, and that in taking those steps the defendant was prepared to complete the transaction. *U.S. V. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000). In *U.S. v. Barnes*, the Seventh Circuit held that defendant took a substantial step toward money laundering where he called and set up a meeting with an attorney to organize a real estate closing to receive the proceeds of what he believed to be an illegal narcotics sale, and was on the way to that same meeting at the time of his arrest. *Barnes*, 230 F.3d at 315. The Court reasoned that these actions constituted substantial steps and that but for the arrest, the transaction would have been completed. *Barnes*, 230 F.3d at 315.

Similarly, in *United States v. Earp*, the Third Circuit held that a rational juror could have believed that defendant's

attempted possession of cocaine was abandoned only after he concluded that he was under surveillance. *Earp*, 84 Fed. Appx. at 234. The Third Circuit concluded that conduct such as traveling to and entering the location where the defendant was to receive the cocaine, at the agreed upon time, among many other overt acts, was sufficient to satisfy the "substantial step" requirement. *Earp*, 84 Fed. Appx. At 235. *See also Gladish*, 536 F.3d at 649 (forecasting that had the defendant taken actions such as making arrangements to meet with the undercover cop posing as a minor, made a hotel reservation, or purchased a bus ticket to visit her, a substantial step would have been taken); *U.S. v. Davey*, 550 F.3d 653, 658 (7th Cir. 2008) (substantial step criteria met where defendant took actions, such as making arrangements to meet a minor and drove to the meeting location); *U.S. v. Ramirez*, 348 F.3d 1175, 1181 (10th Cir. 2003) (substantial step taken where defendant agreed upon a time and place for a drug transaction, and then went to the agreed upon location).

In contrast to the situation in *Barnes* and *Earp*, Mr. Shnewer only talked about obtaining weapons but did nothing beyond talk that would constitute an attempt. Similar to the defendant in *Gladish*, Mr. Shnewer did not take any steps, either substantial or minimal, toward possessing the alleged object weapons in furtherance of a crime of violence. The government in

this case did not present evidence to prove that the "physical process of [defendant Shnewer], what he was doing, what he did, went beyond and passed from the state of mere preparation to some firm, clear and undeniable action to accomplish the intent of the offense." *Earp*, 84 Fed. Appx. at 234 (emphasis added). No evidence of an overt act was presented to the jury to demonstrate a substantial step to possess the alleged object weapon. For example, there is no evidence that:

- at any point in time Mr. Shnewer made specific arrangements to meet with someone to obtain weapons;
- Mr. Shnewer was en route to obtain weapons, or purchased a bus, train, or airplane ticket to travel to obtain weapons;
- at any point in time Mr. Shnewer provided money, either directly to a weapon supplier or to an intermediary, for the purpose of obtaining weapons.

To substantiate that Mr. Shnewer attempted to possess weapons in furtherance of a crime of violence, the Government relied on transcripts of conversations mainly between defendant Shnewer and government informant Mahmoud Omar (hereinafter "Omar"). Through the use of this highly unreliable informant who received approximately $238,000 to testify and has a substantial criminal history, the Government attempted to piece together the elements of attempt. However Omar admitted that

defendant Shnewer took no substantial step toward possession of a weapon, and that defendant Shnewer was all talk. Omar testified to the following:

- that defendant Shnewer indicated the plot could not be executed because they needed weapons; upon Omar's suggestion that he could obtain weapons, Shnewer rejected Omar's weapon suggestions and stated that they need heavier weapons like RPGs. N.T. 11-06-08 at 3191 20 to 3192 15.
- that Omar never saw Shnewer try to make guns or weapons, including an RPG head or a missile that could be packed with explosives. N.T. 11-10-08 at 3331 10 to 3331 22.
- that Omar never saw Shnewer attempt to make a nail bomb. N.T. 11-10-08 at 3339 24 to 3340 1.
- that Omar never saw Shnewer attempt to make a pipe bomb. N.T. 11-10-08 at 3340 20 to 3340 23.
- that Shnewer did not agree with Omar's suggestion to rob an ammunition store for weapons. N.T. 11-10-08 at 3377 22 to 3378 25.
- that defendant Shnewer never gave Omar any money to purchase guns or weapons for him, including those

delivered by Omar to others on May 7, 2007. N.T. 11-13-08 at 3542 7 to 3542 15.

- that Shnewer was not in Omar's apartment on May 7, 2007, and did not arrive to take weapons from Omar. N.T. 11-10-08 at 3368 25 to 3369 5. Indeed, there was no evidence that defendant Shnewer even knew about the meeting, and certainly no evidence (in contrast to *Earp* and *Barnes*) that he ever even attempted to attend that meeting.

The lack of demonstrable proof of Shnewer doing anything but talk about obtaining weapons, requires a determination that no reasonable trier of fact could have found the "substantial step" element required to convict Mr. Shnewer of the attempted possession of a weapon in furtherance of a crime of violence as charged in Count 4. Mr. Shnewer at most – viewing the evidence in the light most favorable to the government, only stated non-specific purchasing opportunities without making any arrangements such as setting up a meeting location, making a payment toward the purchase of a weapon, or traveling to or attending any meeting for the purpose of making a purchase.[3]

[3] As the Court will recall from the jury charge conference, as to Mr. Shnewer and Count 4, the government conceded that a vicarious liability theory regarding the actions of his co-defendants was not applicable to analysis of the charge contained in Count 4 against Mr. Shnewer.

The Government failed to put forth any evidence that defendant Shnewer took a substantial step toward possessing the weapons specified in Count 4. As such, a reasonable fact-finder could not find that Mr. Shnewer attempted to possess weapons as charged in Count 4 of the Indictment.

II. Count 1 – Conspiracy to Murder Members of the United States Military

Each of the co-defendants Serdar Tatar, Shain Duka and Eljivir Duka (as of this drafting)[4] filed post-verdict motions pursuant to Fed. R. Crim. P. 29(c) and Fed. R. Crim. P. 33, arguing that (1) the evidence presented by the government was insufficient to sustain a conviction pursuant to Count 1 of the Superseding Indictment, and (2) a new trial should be granted because the convictions imposed pursuant to Count 1 were against the weight of the evidence and constituted a miscarriage of justice. Defendant Shnewer joins in these motions filed by these co-defendants as it relates to the aforementioned arguments under Count 1 of the Superseding Indictment. For the same reasons that each of those defendants argue that there was no competent evidence from which a trier of fact rationally could find him to be involved in a conspiracy, so too they could

[4] If defendant Dritan Duka files a similar motion, defendant Shnewer requests to be considered as having joined therein to the extent the arguments would be equally applicable to him.

not have found Mr. Shnewer to be

involved in a conspiracy with his co-defendants.

Respectfully submitted,

Law Offices of Rocco C. Cipparone, Jr.

/s/ Rocco C. Cipparone, Jr.

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