

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

3 CR 92-10369-Z

ZOBEL, D. J.

4
5
6 UNITED STATES OF AMERICA

7 v.

8 THOMAS A. SHAY
9

10 Twentieth Day of Trial
11

12 APPEARANCES:

13 For the Government:

14 Paul V. Kelly, Esq., and Frank A. Libby, Jr., Esq.,
15 Assistant United States Attorneys.

16 For the Defendant:

17 Nancy Gertner, Esq., and Ann Baron-Evans, Esq.,
18 DWYER COLLORA & GERTNER, 400 Atlantic Avenue, Boston,
MA 02110, and
19 Jefferson W. Boone, Esq., BOONE & HENKOFF,
20 138 Brighton Avenue, Allston, MA 02134.

21
22 Courtroom 3
23 Federal Courthouse
24 Boston, Massachusetts

25 July 26, 1993

Computer-Aided Transcription

1 (In the absence of the jury.)

2 THE COURT: What do you understand the question about
3 conspiracy and silence to mean?

4 MS. GERTNER: Well, let me put --

5 THE COURT: I guess, in order to put this in context,
6 let me put on the record what the questions are:

7 The jury has asked for a copy of the indictment for
8 each of the members of the jury, and we will supply that.

9 Then it asks: Does conspiracy ~~and~~^{of} silence apply to
10 any of these?

11 Could you review the indictment as to how Alfred
12 Trenkler is a codefendant. We are not considering Al Trenkler
13 here?

14 MS. GERTNER: Again, this is a defense lawyer's
15 narcissism, forgive me. One of the things we argued is that
16 there was no evidence against Trenkler; and that unless the
17 Government proved the Trenkler-Shay conspiracy, there couldn't
18 be a guilty here. So, I'm wondering if what they're deciding
19 is, although Trenkler is not a codefendant, what the nature of
20 his role is. And I wonder if, perhaps, the best thing you can
21 do is review your instructions with respect to conspiracy.

22 THE COURT: Well, but it applies to the other thing
23 as well. I think what I need to tell them is that this
24 indictment, as they can see, charges two people, Mr. Shay and
25 Mr. Trenkler, and that they have heard evidence about two

1 people, Mr. Shay and Mr. Trenkler; never the less, the only
2 person before them on trial right now, is Mr. Shay. And
3 therefore, although they must consider the evidence against
4 Trenkler, because the Government has charged these two
5 defendants with having worked together in various ways, agreed
6 together and participated together in these offenses, that the
7 only person on trial before them is Mr. Shay, and they must
8 determine on the evidence whether Mr. Shay has done anything,
9 has violated the criminal law in any of the ways in which I
10 had explained to them. In doing that, they obviously have to
11 consider Mr. Trenkler because the Government's theory is that
12 they did work together.

13 MS. GERTNER: Well, the only thing, I argued in my
14 closing, that if they believed that Shay wasn't somehow
15 involved, may have been involved with someone else, that's a
16 not guilty, too. That's essentially --

17 THE COURT: Then I need to add that if they determine
18 that, in fact, Mr. Shay and Mr. Trenkler did not do anything
19 together, then, the suggestion is that they didn't do what the
20 Government has charged, then, obviously, they need to return a
21 verdict of not guilty.

22 MS. GERTNER: Yes, the ambiguity of not being on
23 trial, but, nevertheless, the government's theory has to be
24 proved beyond a reasonable doubt.

25 MR. KELLY: I'm not sure that's the Government's

1 case.

2 THE COURT: The Government has to prove Mr. Shay and
3 Mr. Trenkler agreed to commit this offense and that they
4 participated together in committing this offense, and, in
5 particular, that Mr. Shay participated with Mr. Trenkler.

6 MR. KELLY: One of the things you can -- no one
7 really knows what they mean by the phrase "conspiracy ^{of} and
8 silence." It is quite possible what they are referring to is
9 the instruction which the Court gave on tacit understanding,
10 that you don't have to find the written agreement, you don't
11 have to find the words, that there can be this expression,
12 which is tacitly and by their actions and the other, that
13 could be what they are referring to.

14 THE COURT: Well, why don't I just -- let's bring
15 them down, and let me explain to them. I think what I would
16 like to tell them is that this indictment, they can see from
17 the face of it, charges two people with having committed an
18 offense and the Government has offered evidence of two people
19 committing these offenses: one, it has said that they agreed
20 together to violate the law in respect to what I outlined;
21 and, two, that Mr. Shay participated with Mr. Trenkler in
22 building and placing the bomb and receiving an explosive and
23 causing malicious destruction of the car; that although
24 Mr. Trenkler is not now on trial, the Government has to prove
25 that Mr. Shay did agree with Mr. Trenkler to do this and that

1 Mr. Shay did participate with Mr. Trenkler to receive an
2 explosive and to destroy the car. I think that's it.

3 MR. BOONE: Your Honor, if the words "reasonable
4 doubt" could be put in there next to the word "prove."

5 THE COURT: Don't be technical.

6 MR. LIBBY: Following up on what Mr. Kelly mentioned,
7 the "conspiracy ~~and~~^{of} silence" language, that they may find all
8 those things from inferences drawn from the behavior, the
9 evidence, or behavior of the defendant and Mr. Trenkler as
10 introduced in the case. I think that may cut right to we
11 haven't seen any direct evidence of conversations between the
12 two whether they were speaking about this.

13 THE COURT: And I'll add the reasonable doubt.

14 MS. BARON-EVANS: Your Honor, by conspiracy of
15 silence, in the tape, Tom says my crime is guessing that this
16 happened and not saying anything about it.

17 THE COURT: Let me give the instruction as I want to
18 give it, and ask them whether that answers their question. If
19 it doesn't, I will ask them to recast the question in writing,
20 so that we can better understand.

21 MR. KELLY: That's better, your Honor.

22 MR. LIBBY: That's fine.

23 THE COURT: I think it is a mistake to guess what
24 they mean and guess wrong. So I would prefer to do it this
25 way. It may just answer their problem, and if it doesn't they

1 can tell us.

2 MR. LIBBY: We made arrangements to have a television
3 with remote control.

4 ...end of conference at the bench.]

5 [Whereupon, the jury entered the courtroom.]

6 THE COURT: Members of the jury, while you didn't
7 work this weekend, I do suspect you thought about this case
8 because already I have difficult questions from you.

9 Let me, before responding to your questions, let me
10 just ask you:

11 Has each of you complied with the, I would say, order
12 I gave you not to read about the case and not to listen to
13 anything about it?

14 The record will reflect that all nodded
15 affirmatively.

16 Second, you will again today deliberate either until
17 you have a verdict or until you decide that you're too tired
18 to go on. Let me tell you, however, that if you decide to go
19 beyond 4 or 5 o'clock this afternoon, do not feel you have to
20 leave in order to get home because your transportation is
21 leaving. I can assure you we can get you home even if you
22 want to stay later and your bus or boat has left. Don't feel
23 that you have quit at a particular time because of
24 transportation needs.

25 Third, the Government tells me that there is

1 available a remote control device for the television, so that
2 you can sit down and turn it on and turn it off, as you wish.

3 Now, you have sent some questions. And the first of
4 it, the first part, is very easy. You each would like to have
5 a copy of the indictment. And we have made copies so that
6 each of you can have a copy of the indictment.

7 Second, counsel have agreed, and the reporter has now
8 completed -- well, first, the reporter has completed
9 transcribing the instructions I gave you. If you wish them,
10 we're happy to send you the transcript of the instructions to
11 the jury room. Only one copy, though, because it is
12 reasonably lengthy. So he will need to review that together,
13 but we will bind it separately from everything else, and will
14 send it up as soon as that is done.

15 Finally, let me attempt to respond to the questions
16 that you have put, some of which I'm not altogether sure I
17 fully understand. You have asked:

18 Does conspiracy ^{of} and silence apply to any of these?
19 Could you review the indictment as to how Alfred Trenkler is a
20 codefendant. We are not considering Al Trenkler here? That
21 is, it is not a statement, it is a question.

22 The indictment, as you see, has charged two people,
23 Mr. Shay and Mr. Trenkler, with three separate offenses: one,
24 conspiracy to commit the offenses that are charged in
25 Counts 2 and 3, namely, conspiracy to receive explosives in

1 interstate commerce and, two, conspiracy to destroy the car;
2 and it charges both of them with participating in receiving
3 the explosive in interstate commerce, and it charges both of
4 them in participating in destroying the car, maliciously.

5 The Government, having charged both, will ultimately
6 have to prove both guilty of these offenses. But before you
7 now is only Mr. Shay. So that although you have evidence that
8 the Government says, suggests, that Mr. Shay and Mr. Trenkler
9 did this, only Mr. Shay is before you. And you will have to
10 review all of the evidence, including that which appears to
11 implicate Mr. Trenkler, in deciding whether Mr. Shay and
12 Mr. Trenkler, first, agreed to commit these offenses and,
13 second, participated with each other in committing these
14 offenses.

15 And I am not sure how else I can explain this to
16 you. Mr. Trenkler is not on trial before you now, only
17 Mr. Shay is. But because they are charged with agreeing with
18 each other and because they are charged with participating
19 with each other, you have evidence of the conduct and
20 statements of both.

21 Does that answer the question?

22 Not really?

23 No?

24 MS. GERTNER: Your Honor, can we be heard at side
25 bar?

1 THE COURT: The Government, in charging a conspiracy,
2 as I told you, what the Government has to do is to show that
3 there was some agreement. Now, the Government hasn't shown
4 you that there was a written document or that they got
5 together and said: I agree, I agree. You will have to look
6 at all of the evidence and draw reasonable inferences from all
7 of the evidence to determine whether there was such an
8 agreement and whether the Government has proven such an
9 agreement and Mr. Shay's willful participation beyond a
10 reasonable doubt.

11 And with respect to Counts 2 and 3, you have to look
12 at all of the evidence and all of the reasonable inferences
13 that you would draw from that evidence to determine whether
14 Mr. Shay participated, again, willfully, with the intent to
15 violate the law in these other offenses, having in mind the
16 elements of these other offenses. And again, the Government
17 has to prove that beyond a reasonable doubt.

18 Does that answer? Is that clear?

19 Let me see counsel, in case counsel have some
20 suggestions how I might clarify. If it is not clear, talk to
21 each other now and see if you can ask me a question that
22 suggests wherein what I've told you is unclear.

23 [Conference at the bench, as follows:

24 THE COURT: I was trying to figure out who the
25 foreperson was. It is Juror No. 5.

1 MS. GERTNER: What I suggest, I just wrote out, I
2 think the core of the problem here is that even though only
3 Shay is on trial, in practical effect, what they have to do,
4 it is irrelevant, it doesn't matter who is on trial, as a
5 practical --

6 THE COURT: They have to decide whether they did it.

7 MS. GERTNER: One of the things I suggest, although
8 only Shay is on trial, in practicality, you have to decide if
9 Shay and Trenkler did the things alleged by the Government
10 beyond a reasonable doubt. I think that's the problem.
11 Because when you tell them that only Shay is on trial, I think
12 they believe, then, it doesn't matter what Trenkler did, and
13 that's just not true.

14 MR. KELLY: Your Honor.

15 THE COURT: She's right.

16 MR. KELLY: As long as they understand we're, in this
17 particular case, given that Trenkler is not on trial, we don't
18 have to prove Trenkler's participation beyond a reasonable
19 doubt, although, we have to prove there was a conspiracy, and
20 you've already covered that. I would just ask --

21 THE COURT: Except, I mean, it's not possible for the
22 jury to say: We don't believe beyond a reasonable doubt that
23 Trenkler was involved, but we do believe beyond a reasonable
24 doubt that Shay was involved. Because necessarily, conspiracy
25 and participation, you only have two. It means that both of

1 them are.

2 MS. GERTNER: That's right. The indictment is not
3 other persons unknown.

4 THE COURT: There are only two.

5 MR. KELLY: I would ask that the Court say to the
6 jury that, you know, take the transcript of the instructions,
7 review it, if you feel a need to review it. If you have
8 further questions, after having done so, reduce them to
9 writing.

10 THE COURT: But this is appropriate to give which
11 Ms. Gertner asks.

12 (Pause.)

13 It may cut through problem they have, we're being
14 legalistic.

15 MR. KELLY: As long as --

16 MR. LIBBY: This is not precise.

17 MR. KELLY: That's true. This is true, with respect
18 to the conspiracy charge.

19 THE COURT: It is also true on the other one. I
20 mean, the Government's theory is that Trenkler did it and Shay
21 helped.

22 MS. GERTNER: This is also the kind of thing, Shay
23 lacked the ability to do any of it without Trenkler's
24 participation. So you can't -- there's not a Shay only
25 theory.

1 MR. KELLY: I don't have a problem with that, your
2 Honor, as long as the Court says what I previously asked
3 about -- excuse me Mr. Boone.

4 If they would have the opportunity to review the
5 transcript of the instructions and if they have further
6 questions, if they would reduce them to writing.

7 MS. BARON-EVANS: Can they have this portion of the
8 transcript?

9 THE COURT: No, that one will take a while.

10 ...end of conference at the bench.]

11 Members of the jury, stay where you are.

12 Counsel suggested one other thing I might say that
13 might help, and then I will ask you if you have additional
14 questions.

15 Counsel suggested that although it is only Mr. Shay
16 who is now on trial, in practical effect, you really have to
17 decide whether Mr. Shay and Mr. Trenkler did the things that
18 the Government has said they did and whether the Government
19 has proven that they did it beyond a reasonable doubt. Because
20 only two people are charged. So really, you have to decide
21 whether those two did what they did, even though only one of
22 them is now on trial before you.

23 Now, I suggest, also, that when we send you the
24 transcript of the instructions, if you have any additional
25 questions, by all means, ask them, and I will attempt to

1 answer them.

2 Do you have any further questions now?

3 A JUROR: Yes. The general consensus, there's
4 concern whether or not Charges 2 and 3 relate to Charge 1. If
5 there are guilty charges in 2 and 3, does that infer guilt in
6 Charge No. 1?

7 THE COURT: No. Each is a separate accusation, each
8 needs to be dealt separately, they are not interdependent. It
9 is entirely possible for two people to agree, but then not to
10 participate in doing what they agreed to do, for instance. It
11 is equally possible for two people to participate somehow in
12 doing it but not coming to an understanding that they would,
13 in fact, violate the law.

14 So that there are separate charges. You need to
15 address them separately and come to a separate verdict. And
16 you will recall that, as I outlined to you, each of them has
17 different elements, and you will need to run through the
18 elements on each and determine whether the Government has
19 proven each of the elements for each of the counts beyond a
20 reasonable doubt.

21 Do you want me to review those with you?

22 A JUROR: yes.

23 THE COURT: All right. Although, you will have them
24 in outline form, in the written instructions. And perhaps
25 that would be the better way for you to go about reviewing

1 them. Let me suggest that. We will send to you a copy of the
2 instructions. And I have tried very hard, in giving the
3 instructions, to do it one, two, three for each, and then
4 elaborate on each of them. And you should not have any
5 difficulty finding where the elements are given for each of
6 the counts.

7 A JUROR: When you say parts 1, 2 and 3 of the
8 indictment, of a particular charge, if we find that we don't
9 find, one way or the other, guilty or not guilty on all three,
10 does that mean we have to give the reasonable doubt?

11 THE COURT: You have to look at each element of each
12 charge. And unless the Government has proven each element
13 beyond a reasonable doubt, you cannot find the defendant
14 guilty on that count.

15 So, if, for example, on Count 1, the Government has
16 to prove, one, there was an agreement; two, that the defendant
17 willfully joined into that agreement; and three, that there
18 was an overt act. If you are not convinced beyond a
19 reasonable doubt that the Government has proven every one of
20 those three, then you cannot find him guilty. But if you are
21 convinced beyond a reasonable doubt that each one of the three
22 has been proven, then you may find him guilty of that count,
23 and the same with every one of the others. But you've got to
24 look at each count separately and run through the elements on
25 each count.

1 Does that all make sense to you now?

2 MS. GERTNER: Your Honor, one more word. I hate --
3 can we be seen at side bar, for just one second?

4 [Conference at the bench, as follows:

5 THE COURT: I'm ready to return your notes.

6 MS. GERTNER: Ms. Baron-Evans suggested something
7 which I think is of significance. The theory of how they can
8 be convicted of -- how he could be convicted of two and three
9 and but not one. Take the Channel 56 tape, and say: He seems
10 to be involved in some way. There is no agreement. And then,
11 Trenkler did something unbeknownst to him. In that regard, it
12 is not only a conspiracy issue, but we asked for an aiding
13 abetting instruction to suggest that Shay had to know that the
14 crime was being committed, knowingly did some act --

15 THE COURT: I gave all of that, and I'm not going to
16 take it out of context. You have it there.

17 ...end of conference at the bench.]

18 Members of the Jury, you may now continue your
19 deliberations. And by all means, if you have a question let
20 me know.

21 [Whereupon, the jury retired at 9:31 to continue its
22 deliberations.]

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25

AFTERNOON SESSION

1
2 MR. KELLY: It strikes me that this is not more than
3 another effort by Ms. Baron-Evans to get you to do what you
4 refused to do this morning, and add in this specific intent
5 language.

6 THE COURT: I think there are two issues before me.
7 One of them is whether I should send a transcript of the
8 supplemental instructions to the jury, and the other, whether
9 I should give them a second set of supplemental instructions,
10 sort of the way the Government has a second superseding
11 indictment. I think I will decline to do both.

12 MS. GERTNER: Your Honor, one is an act issue and two
13 is an intent issue. Looking only at the substantive offenses,
14 two and three, the remark we have quoted here it is equally
15 possible for two people to participate somehow in doing the
16 illegal act but not coming to an understanding that they
17 would, in fact, violate the law, is not the right standard
18 with respect to the intent.

19 THE COURT: Which is why I'm not going to send them
20 these instructions. They have the instructions I gave them,
21 outlining each of the elements, and I think it would not be a
22 good idea to send these, admittedly, not most artfully put.

23 MS. GERTNER: Well, the other is the issue of the act
24 part of it. And that really wasn't -- we walked away from
25 this, this morning, believing that that had to be made more

1 clear. And you did clarify it, but your first version is not
2 as clear as the second version; and that is, to all intents
3 and purposes, the trial of Tom Shay sans Alfred Trenkler is
4 exactly the same thing as a trial of Fred Trenkler would be,
5 except they are going to decide on Shay. And really, the
6 Government's theory here is that Trenkler was the means by
7 which Shay committed the offense. So that in the litany of
8 things, acts that comprise Counts 2 and 3, it is true that
9 they have to find that either Shay or Trenkler did each and
10 every one of them. And that was essentially what we have
11 asked for when we said --

12 THE COURT: Essentially what I gave them.

13 MS. GERTNER: You did so with respect to the
14 intent -- and intent and knowledge in your first version, that
15 is, what you gave on Friday, but you did not give the act
16 part, which is, the Government must prove that Mr. Shay and
17 the person the Government alleges Mr. Shay aided and abetted,
18 between the two of them, committed each of the essential
19 elements of the offense.

20 THE COURT: But I didn't intend to recharge them in
21 the entirety, which is why I gave them the written charge.
22 I'm not inclined to do anything now to muddy the waters. I
23 will not send them the transcript of this because it may
24 confuse them if they read it. They have the charge, which is
25 a complete charge as to which I believe states the law

1 accurately. And we have heard nothing from them now, so I
2 don't really see any reason to disturb them and raise
3 additional questions.

4 MS. GERTNER: Then, with respect to your original
5 charge, I do want to put on the record that not -- I don't
6 believe that the charge covered this notion of they really
7 have to find that either Trenkler or Shay did these acts.
8 Then, I suggest, since they were so tied up this morning, at
9 least appeared to be, that at least your answer to the first
10 question, where you said that -- this is the one that we
11 suggested -- that, in practical effect, the case against Shay
12 is the same as against Trenkler. If that portion of this
13 transcript can go to them, that's what we would ask for.

14 MR. KELLY: I would object, for the same reason the
15 Court just outlined, taking it out of context doesn't make any
16 sense.

17 THE COURT: I think we'll wait for the next
18 question. Your objection is now on the record. If you wish,
19 we will even mark the piece of paper as part of the record as
20 an exhibit for identification.

21 **[Whereupon, Defendant's Jury Deliberation**
22 **Exhibit 1 was marked for identification.]**

23 Court is in recess.

24 [Recess.]

25

1 [Whereupon, the jury entered the courtroom at
2 5:56 p.m.]

3 THE COURT: Please be seated.

4 Members of the jury, you indicated earlier that you
5 wished to quit at 6. And again, as I told you I would, I'm
6 honoring your request.

7 Three of you, I think it was three, had asked for
8 transportation. That transportation is waiting on Congress
9 Street over here, right?

10 Down here, on that end of the building. The Marshal
11 will help you out of the building and show you where. And I'm
12 instructed to tell you that you need pay the taxi driver
13 nothing, it's all taken care of, and that you should not be
14 intimidated if the taxi driver asks you for anything; you're
15 to pay nothing.

16 You're now excused until tomorrow morning at
17 9 o'clock. And again, please follow the routine that we
18 established today: Do not begin your deliberations until I
19 tell you you may, and have a good evening.

20 Thank you.

21 [Whereupon, the jury was excused.]

22 THE COURT: Court is in recess.

23 [Whereupon, the jury trial was adjourned at
24 6:01 p.m., to be resumed on Tuesday, July 27, 1993, commencing
25 at 9 o'clock a.m.]

CERTIFICATE

We certify that the foregoing is a correct transcription of our computer-aided stenographic notes of the proceedings in the above-entitled matter.

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James E. McLaughlin

Laura K. S. Walker

I N D E X

E X H I B I T S

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<u>Number</u>	<u>Description</u>	<u>Ident.</u>	<u>Evid.</u>
<u>Jury Deliberation</u>			
1	(See Clerk's Notes.)	18	