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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CR 92-10369-Z

ZOBEL, D. J.

UNITED STATES OF AMERICA

v.

ALFRED TRENKLER

Twentieth Day of Trial

Verdict

APPEARANCES:

For the Government:

Paul V. Kelly, Esq., and Frank A. Libby, Jr., Esq.,
Assistant United States Attorneys, Federal Courthouse,
Boston MA 02109.

For the Defendant:

Terry Philip Segal, Esq., Scott Lopez, Esq.,
and Brenda R. Sharton, Esq., SEGAL & FEINBERG,
210 Commercial Street, Boston, MA. 02109.

Courtroom 3
Federal Courthouse
Boston, Massachusetts

November 29, 1993

Computer-Aided Transcription

P R O C E E D I N G S

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THE COURT: Good morning, please be seated.

[Whereupon, the jury entered the courtroom.]

THE COURT: Good morning, members of the jury. I do hope that you had a good holiday and that you are now refreshed and able to carry on with your work in this case.

Again, I ask you please to review the evidence carefully and to tell us when you have a verdict or when you have a question, and we will attempt then to answer the question or assist you in any way that we can.

When do you want to have lunch, 12:30 again or 1:00?

THE FOREPERSON: 12:30.

THE COURT: Lunch at 12:30.

You are now charged to continue your deliberations.
Thank you.

[Recess.]

[Whereupon, there was a question from the jury at 2:11 p.m.]

[Conference at the bench, as follows:

THE COURT: Have you seen the note?

MR. SEGAL: Yes, your Honor.

MR. LOPEZ: Yes.

THE COURT: What do you want me to tell the jury?

MR. LOPEZ: Well, your Honor, I believe that the charge is accurate with respect to --

1 THE COURT: Well, they want elucidation, they want to
2 be reassured, so what do I tell them?

3 MR. LOPEZ: That they have to be convinced by each
4 chain in the link of circumstantial evidence in order to find
5 a fact beyond a reasonable doubt.

6 MR. KELLY: Your Honor, there seems to be two
7 issues. One is the relative importance, the importance of or
8 difference between --

9 THE COURT: The jury's question is as follows:

10 One, we are having difficulty weighing the difference
11 between and relative importance of direct and indirect, paren,
12 or circumstantial, end paren, evidence. Would it be possible
13 for us to receive a clarification of these concepts vis-a-vis
14 the law? How tight does the web of circumstantial evidence
15 have to be?

16 Two, we anticipate ceasing deliberations at 6 p.m.

17 MR. KELLY: Your Honor, it seems to us, the
18 government, that there are effectively two issues. One is the
19 importance of or difference between direct and circumstantial
20 evidence.

21 And the second --

22 THE COURT: None.

23 MR. KELLY: Right, none.

24 And the second is this, how tight does the web of
25 circumstantial evidence have to be?

1 You spoke to both of those issues. You've
2 already spoken to the first in the charge that you gave at
3 Page 17-11, where you talked about the chain of circumstantial
4 evidence must be reasonable, must be consistent, must be
5 proven by direct evidence. I think that the way the Court
6 framed the circumstantial evidence charge was in fact
7 accurate.

8 Now I understand that they are looking for some --
9 THE COURT: Let me suggest that we think up an
10 example of a series of facts, I mean, maybe the cat with the
11 fish, but maybe another one, think up an example that I can
12 give to them.

13 And then I will simply explain to them in terms of
14 the example that the government would have to prove Fact A,
15 Fact B, Fact C, and only then can they infer Fact D. If, you
16 know, if you can think up an example, then perhaps that's the
17 way to do it.

18 MR. LIBBY: If I may, there seems to be a couple of
19 different types of scenarios that would be at work here.

20 One is where there are -- there is a chain, okay, for
21 example, the milkman with the snow and the footprints, I think
22 that's perfect for a chain, you know, they went to bed, there
23 wasn't anything on the ground, you woke up and saw footprints,
24 you saw milk in the container. That's a chain type of
25 scenario.

1 There's also a singular type scenario where you see
2 one fact, where you see one thing and you may deduce certain
3 things from it. And I'll give you an example. This is the
4 turtle and the tree stump example.

5 THE COURT: What's that?

6 MR. LIBBY: If you see -- you're in the woods and you
7 see a turtle, a box turtle on stump, you can deduce that it
8 didn't get there by itself. You can deduce that. Something
9 or somebody put it on the stump. So that's a singular fact
10 from which you may deduce something.

11 MR. SEGAL: Because turtles can't climb, is that it?

12 MR. LIBBY: Because they can't climb. Now, you may
13 joke, but it points out the notion that it is separate and
14 apart from a chain of inferences.

15 THE COURT: Then we should explain that, that
16 inferences may be drawn from one fact known or from a series
17 of facts, known facts.

18 MR. LIBBY: For the record, your Honor, that was
19 standard circumstantial type example where I clerked in
20 Virginia.

21 Now the second thing is, your Honor, I think --

22 THE COURT: I think it is correct to say that,
23 whether the inference is drawn from one fact or whether a
24 series of facts are given from which an ultimate fact can be
25 deduced, in each instance the fact, the single fact or series

1 of facts have each to be proven beyond a reasonable doubt.

2 MR. LIBBY: I don't know that that's -- well, let's
3 see if we can be a bit more precise, your Honor, if I may.
4 First of all, the first notion, the first issue is the Court's
5 spoke to specifically in the instructions saying that
6 circumstantial evidence is as good as direct evidence.

7 THE COURT: Do we have any jurors from our other case
8 here? Has somebody told them to go into the room next door?

9 THE CLERK: I don't think so, but I don't see anyone.

10 THE COURT: Are any of you jurors in the case that
11 we're currently impaneling?

12 (Pause.)

13 THE COURT: Which is also a criminal case, so I'm
14 concerned about shouting about circumstantial evidence.

15 MR. LIBBY: The first question dealt with relative
16 importance. When I saw that term, relative importance,
17 between the --

18 THE COURT: That one dis --

19 MR. LIBBY: Just as good, just as the Court has
20 pointed out.

21 Secondly, how tight does the web have to be? To me
22 it speaks of a concern as to, is there a different burden or
23 standard of proof when you're using circumstantial as opposed
24 to direct?

25 THE COURT: What's the answer?

1 MR. LIBBY: There isn't. It's the same burden of
2 proof as to the essential elements of the offenses charged,
3 your Honor.

4 THE COURT: If the jury isn't persuaded of each fact,
5 if it isn't persuaded that the turtle what was on the stump,
6 then it can't deduce that somebody put the turtle on the
7 stump.

8 MR. LIBBY: And you spoke to that in the
9 instructions.

10 THE COURT: But I have to tell them something now.
11 And you cavil with my suggestion that the government has to
12 prove every underlying fact in order for the -- beyond a
13 reasonable doubt -- in order for the jury to be able to draw
14 an inference of the ultimate fact. And I just don't know why
15 that's correct. I think it's not correct for you to cavil
16 with that because I think the government does have to prove
17 every fact.

18 MR. LOPEZ: The direct fact -- if I might, the
19 direct --

20 THE COURT: I'm with you, so let him try to argue me
21 out of it.

22 Why is that incorrect?

23 MR. LIBBY: More precisely, your Honor, regardless of
24 how many different underlying predicate facts or circumstances
25 the jury has to take into account, the government's burden is

1 to establish elements of the charged offenses. That's it.

2 They look at the evidence as a whole as you
3 instructed them --

4 THE COURT: What do I tell them? What do I tell them
5 in answer to this question? That's what I want to know.

6 MR. LIBBY: Let me talk to Mr. Kelly.

7 [Pause.]

8 MR. LIBBY: May I make a couple of points, your
9 Honor?

10 THE COURT: Just tell me what to say to them.

11 MR. LIBBY: In a round about way let me see if I
12 can --

13 THE COURT: Well, please tell me directly. What do
14 you want me to tell them?

15 MR. LIBBY: First of all, there's two concerns,
16 one is, if we start telling the jury that they have to
17 determine --

18 THE COURT: Tell me what you want me to tell them.

19 MR. LIBBY: That they are to determine the essential
20 elements of the charged offenses beyond a reasonable doubt.
21 Beyond that, however, whatever facts underlie their assessment
22 of those elements, has no precise or has no formal burden
23 associated with it. Otherwise, your Honor, the jury would be
24 inclined to look at Witness A, do we believe everything he
25 says beyond a doubt, and if so, if not then it is --

1 THE COURT: When they have -- assume for the moment
2 there are Facts 1 through 3 from which the jury infers X.

3 MR. LIBBY: Right.

4 THE COURT: If in fact -- can the jury infer X from
5 Facts 1 through 3 that have only been proven at most by a
6 preponderance of the evidence?

7 MR. LIBBY: I think that's where we're getting bogged
8 down. I think if the Court says, give weight to the
9 particular evidence, testimony, exhibits, documents, whatever
10 it may be, as you see fit, in the totality of all of that
11 evidence, you then determine whether the government has proven
12 each essential element beyond a reasonable doubt.

13 THE COURT: I think that's correct.

14 MR. KELLY: That is.

15 THE COURT: I think that's also correct.

16 MR. LOPEZ: Your Honor, I would also suggest that in
17 explaining this, that there would be another restatement of
18 the jury's obligation that in the event there are inferences
19 which can be drawn with respect to innocence, that they are
20 obligated to do that; that the defendant is --

21 THE COURT: I'm going to answer their question and no
22 more. My inclination -- restate it again.

23 MR. LOPEZ: In light of the fact that we're talking
24 about circumstantial evidence here, in the light of the
25 government's statement that, and I believe what they're saying

1 is that there's no obligation in which to prove the subsidiary
2 facts upon which an inference is based beyond a reasonable
3 doubt.

4 THE COURT: We're not saying that. We're not saying
5 that at all. I think what we're saying in response to the
6 second part of the question, is that the government has the
7 burden of proving every element beyond a reasonable doubt.

8 MR. LOPEZ: That's a fair statement.

9 MR. KELLY: Every element of the three charged
10 offenses.

11 THE COURT: Of each of the three charged offenses.

12 MR. LIBBY: Viewing the evidence underlying
13 that --

14 THE COURT: Hold it.

15 MR. LIBBY: Sorry.

16 THE COURT: I want to get this right.

17 And in deciding whether it has proven each element,
18 you should consider all of the evidence.

19 MR. LIBBY: For example, testimony, exhibits.

20 THE COURT: Draw reasonable inferences from all of
21 the evidence. And you may draw.

22 MR. LOPEZ: But are not required to.

23 THE COURT: You may draw reasonable inferences from
24 all evidence.

25 What else did you say, Mr. Libby?

1 MR. LIBBY: I think that was it, your Honor. I mean,
2 just you view it in the totality and you may give it such
3 weight as you see fit, each piece of evidence.

4 THE COURT: All of the evidence viewing it in its
5 totality.

6 And giving such weight to each piece as you deem it
7 deserves.

8 MR. LIBBY: That's right.

9 MR. LOPEZ: Your Honor, if I may, that is
10 inconsistent with the charge that you had given earlier.

11 THE COURT: How?

12 MR. LOPEZ: Well, your Honor, their question goes to
13 how tight of a chain or a logical link does there have to be.
14 In your earlier charge, you specifically referenced that
15 inferences can only be from direct facts that they find.

16 And this seems to lessen that burden by saying that
17 now they don't have to look at whether or not the facts are
18 proven but whether looking at the totality of the
19 circumstances, they believe the ultimate fact is proven beyond
20 an a reasonable doubt.

21 That's a very different -- with circumstantial
22 evidence, they have to be convinced that the direct fact from
23 which they are drawing a reasonable and rationale inference --

24 THE COURT: I didn't say that before. I don't think
25 I said that before. I said that the facts had to be proven by

1 direct evidence. I did not say they had to be proven beyond a
2 reasonable doubt.

3 MR. LOPEZ: No, I'm not saying that they have to, but
4 they have to find that fact before they can -- they can only
5 -- in other words, you can't draw an inference from an
6 inference. You can only draw an inference from a fact that
7 they find to be -- that they find.

8 THE COURT: And having in mind that you have to find
9 the underlying --

10 MR. LOPEZ: You may draw inferences from facts that
11 they find.

12 THE COURT: So confusing.

13 MR. LIBBY: That guts it, your Honor. What is
14 important --

15 THE COURT: I did say something like that before.

16 MR. LOPEZ: Yes, you did, your Honor.

17 MR. LIBBY: What's important to keep in mind is the
18 standard of proof bears solely on the essential elements of
19 each charged offense. What we're talking about beyond that is
20 an evidentiary matter.

21 THE COURT: But I think it's correct to say that they
22 can't draw an inference from an inference; that inferences
23 must be drawn from facts.

24 MR. LIBBY: Okay. And they find the facts based on
25 the evidence, your Honor.

1 THE COURT: Understand, you cannot draw inferences
2 from inferences, but inferences must be drawn from facts you
3 find.

4 MR. LIBBY: As you find them. And that's from the
5 evidence.

6 MR. KELLY: Not all inferences arise from a chain of
7 circumstances.

8 MR. LIBBY: Which are the two examples.

9 MS. SHARTON: Your honor, if I might have a shot. The
10 question is directly asking about circumstantial evidence and
11 to give such a general answer back, I think might confuse
12 them.

13 THE COURT: I'll give them examples. Inferences may
14 be drawn from a single fact, turtle on the stump, or from a
15 chain of facts.

16 MR. KELLY: A series of facts.

17 THE COURT: Or a series of facts.

18 MR. LIBBY: Right.

19 THE COURT: The example of the cat and the fish.

20 MS. SHARTON: Each chain in the link.

21 MR. KELLY: Mailman or the milkman in the snow.

22 MR. LIBBY: Your Honor has used that successfully.

23 MR. LOPEZ: Newspaper in the snow. Footprints in the
24 snow with the newspaper.

25 THE COURT: And footprints going the other way.

1 MS. SHARTON: I think your Honor was correct
2 originally in the bare position that each chain in the link
3 has to be proven beyond a reasonable doubt.

4 THE COURT: I didn't say that. I never said that.
5 The time I talked about reasonable doubt was in connection can
6 the identity evidence. Only.

7 And that was not -- and that was in my view, not
8 circumstantial evidence, but was direct evidence that, if
9 believed, would convict the defendant; if not, then it is just
10 something that doesn't go. That is why I thought the
11 government was wrong in the letter it wrote and that's why I
12 think you're wrong now.

13 Insofar as I understand the question to be in two
14 parts, there is no difference in the weight to be given direct
15 and circumstantial evidence.

16 Two, insofar as you are seeking guidance about the
17 concept, the government has the burden of proving each element
18 of each of the three charged offenses beyond a reasonable
19 doubt.

20 In deciding whether the government has proven each
21 element beyond a reasonable doubt, consider all of the
22 evidence, and you may draw reasonable inferences from all of
23 the evidence -- that's the circumstantial -- from all of the
24 evidence viewing it in its totality. Understand that you
25 cannot draw inferences from inferences, but inferences must be

1 drawn from facts you find.

2 Now, inferences may be drawn from a single fact,
3 turtle, or they may be drawn from a series of facts,
4 footprints and newspaper.

5 So, hopefully, that will do it.

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

7 (Pause.)

8 [Whereupon, the jury entered the courtroom at
9 2:33 p.m.]

10 THE COURT: Please be seated.

11 Members of the jury, you have sent a note which reads
12 as follows:

13 We are having difficulty weighing the difference
14 between and relative importance of direct and indirect, in
15 parentheses, or circumstantial evidence. Would it be possible
16 for us to receive a clarification of these concepts vis-a-vis
17 the law? How tight does the web of circumstantial have to be?

18 First, I see the question as in two parts. And the
19 answer to the first question which is, is there a difference
20 in relative importance, the answer is, no. As I told you
21 during the charge, where Perry Mason always says, oh, it's
22 just circumstantial evidence, Perry Mason is just plain
23 wrong. There is no difference in the weight that may be given
24 to direct or circumstantial evidence.

25 The second part of the question asks for

1 clarification of the concept of circumstantial evidence in the
2 context of this case.

3 Let me tell you, first, that the government has the
4 burden of proving each element of each of the three offenses
5 charged beyond a reasonable doubt.

6 In deciding whether the government has proven each
7 element beyond a reasonable doubt, you should consider all of
8 the evidence, and you may draw from all of the evidence,
9 reasonable inferences, viewing the evidence in its totality.

10 Understand that you cannot draw inferences from
11 inferences, but you have to draw inferences from facts that
12 you find.

13 Now you may draw an inference from a single fact.
14 And the example that counsel suggest, which I confess I had
15 not heard before, is the famous example of the turtle on the
16 tree stump. If you walk in the woods and it is shown, the
17 witness testifies, that there was a turtle on a tree stump
18 three feet high, then you may infer from that that somebody
19 put the turtle there because we know, at least in this example
20 we know that turtles can't climb trees.

21 So this is an inference drawn, an inference that
22 somebody put the turtle there, drawn from the single fact that
23 there is a turtle on tree stump. Or inferences may be drawn
24 from a series of facts.

25 If the witness were to tell you that the witness

1 observed footprints in the snow going toward the house and
2 observed a newspaper by the back door, and then observed
3 footprints going away from the house, that is a series of
4 facts from which you may infer that the newspaper person came
5 and delivered the newspaper.

6 So you may draw inferences from a single fact, you
7 may draw inferences from a series of facts that you find, but
8 you may not draw inferences from inferences.

9 Does that help?

10 You may now continue your deliberations. And I am
11 aware of Part 2 of your note which says that you anticipate
12 ceasing deliberations at 6, and will at that time excuse you,
13 if you do not have a verdict before then.

14 Thank you.

15 [Whereupon, the jury was excused at 2:37 p.m.]

16 THE COURT: This case is now recessed.

17 [Whereupon, the jury entered the courtroom.]

18

19 Verdict

20 THE COURT: Please be seated, except for your
21 foreperson who should kindly remain standing. You may be
22 seated.

23 Madam foreperson, has the jury agreed upon its
24 unanimous verdict?

25 THE FOREPERSON: Yes, we have, your Honor.

1 THE COURT: Please hand it up to the Court.

2 Please be seated.

3 Thank you.

4 Members of the jury, hearken to your verdict as the
5 Court has recorded it: We the jury find the defendant Alfred
6 Trenkler guilty on Count 1, guilty on Count 2, guilty on Count
7 3.

8 So say you Madam Foreperson?

9 THE FOREPERSON: Yes, your Honor.

10 THE COURT: So say you all?

11 THE JURY: Yes.

12 MR. LOPEZ: Your Honor, at this time, we'd ask that
13 the jury be polled.

14 THE COURT: As I call your names would you please say
15 whether you agree or disagree with the verdict.

16 Ms. Kasirer?

17 JUROR: Yes.

18 THE COURT: Ms. Lapson?

19 A JUROR: Yes.

20 THE COURT: Mr. Thomas?

21 A JUROR: Yes.

22 THE COURT: Ms. O'Hare?

23 A JUROR: Yes.

24 THE COURT: Ms. Spinelli?

25 A JUROR: Yes.

1 THE COURT: Mr. O'Rourke?

2 A JUROR: Yes.

3 THE COURT: Mr. Ramond?

4 A JUROR: Yes.

5 THE COURT: Ms. Hanlon?

6 A JUROR: Yes.

7 THE COURT: Mr. Anderson?

8 A JUROR: Yes.

9 THE COURT: Ms. Mitchell?

10 A JUROR: Yes.

11 THE COURT: Ms. Tisdale?

12 A JUROR: Yes.

13 THE COURT: Mr. Woods?

14 A JUROR: Yes.

15 THE COURT: Members of the jury, I cannot say how
16 much I thank you for the long time that you've spent here, for
17 your attention to the evidence and the responsible way in
18 which you've gone about sifting it and ultimately reaching
19 your verdict.

20 It's been a privilege to try this case with you. But
21 I do want you to understand that you, too, have been
22 privileged. It was a well-presented case. Counsel all did
23 this in a most professional way, and for that I thank all of
24 them.

25 You are now excused with the thanks of the Court. If

1 it wouldn't be too much of an inconvenience, I would very much
2 appreciate your waiting for moment so I can thank you
3 individually and give you your certificates of appreciation.

4 Members of the jury, you are now excused.

5 [Whereupon, the jury was excused at 5:23 p.m.]

6 THE COURT: Please be seated.

7 The government has filed a motion for revocation of
8 defendant's release and for an issuance of an immediate
9 detention order. I don't see that I have any choice but to
10 allow it, do I?

11 MR. LOPEZ: Your Honor, for the record, we would note
12 our objection to this. There will be motions filed with
13 respect to this, although the conviction stands.

14 THE COURT: I understand that.

15 Government's motion is allowed.

16 Mr. Marshal, the defendant is in your custody
17 pursuant to that order.

18 Disposition, this is necessarily a tentative date
19 because I don't have all my calendars here.

20 Tentatively February 15th at 2 clock, but I need to
21 confirm that, and I will asks Mrs. Dello Russo to confirm it.

22 Thank you.

23 Court is in recess.

24 [Whereupon, the jury trial was concluded at
25 5:25 p.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

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