

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA            )  
  )  
                  v.                        )  
  )  
WILLIAM KINJO SMITH                 )  
  )  
                  Defendant                )

Crim. No. 00-421-A

DEFENDANT'S REPLY TO GOVERNMENT'S  
RESPONSE TO MOTION FOR ACOUITTAL

The Government states that Mr. Lyles testified that a range member "must also fill out a range card each time one actually enters the range to shoot, which Mr. Smith did on June 12, 1998, using GEX-33." (emphasis added). Response 4. On cross-examination, Mr. Lyles was asked:

So if you - if someone wanted to go out to observe and did not sign one of these forms similar to Government Exhibit 33, you would not let him or her out on the range?

Tr. 140.

He responded: "Correct." Tr. 140. Thus, it is not an accurate characterization of Mr. Lyles' testimony that Mr. Smith entered the range to shoot. Mr. Smith's completion of GEX-33 is as consistent with him shooting on the range as with merely observing his companion shooting on the range.

The Government further asserts that the jury "reasonably could have found, someone coming to the gun range simply to observe need not (and reasonably would not) have rented a rifle and purchased ammunition." Response 4. While the Government is correct that the jury could reasonably have found that someone coming to the gun range simply to observe need not have rented a rifle and purchased

ammunition, it does not follow, as the Government's parenthetical statement asserts, that the person would reasonably not have rented a rifle and purchased ammunition simply to observe. On the contrary, because Mr. Smith was with a companion for whom he rented eye and ear protection, it is reasonable to conclude that he would have rented a rifle and purchased ammunition for his companion.

The Government makes much of Gilbert's policy that, because Mr. Smith paid for the rental, if the "gun showed up missing" (Response 4), Gilbert's would "go to [Mr. Smith] to find my gun." Response 4. Gilbert's policy concerning financial liability of renters does not "show a degree of control over the weapon" (Response 4) nor does it give rise to a reasonable inference of possession of the firearm by Mr. Smith. Indeed, Gilbert's policy is wholly irrelevant to whether Mr. Smith possessed the firearm.

The Government also asserts that the presence of the Special Weapons rifle in Mr. Smith's apartment on July 7, 2000 allows the "reasonable inference" that he possessed the H&K rifle more than two (2) years earlier because the Special Weapons rifle was "knock-off" or "copy" of the H&K rifle. Response 5. Inferences, however, must be based:

on probabilities, not on possibilities; must be reasonably drawn from and supported by the facts on which they purport to rest, and may not be the result of mere surmise and conjecture . . . .

Kentwood Lumber Co. v Illinois Cent R. Co., 65 F.2d 663, 665 (5<sup>th</sup> Cir. 1933).

Similarly, Wilson v. Winstead, 470 F.Supp. 263 (E.D.Tn. 1978) held that a fact may be inferred only where the inference:

"is a probable and natural explanation of the fact, and logically flows from the fact. Inferences may not be

drawn from one transaction to another that is not specifically connected with it, merely because the two resemble each other, but must be linked together by the chain of cause and effect and common experience." (citation omitted).

470 F.Supp. at 269.

From the fact that, on July 7, 2000, a rifle similar to the one rented on June 12, 1998 was found in Mr. Smith's apartment does not logically flow the fact that, more than two years earlier, Mr. Smith wanted to "test out" the "original version" of the rifle. The Government's attempted explanation of the nexus between the two rifles turns the concept of a reasonable inference on its head and is not only nothing more than mere surmise and conjecture, but is not remotely reasonable.

The Government also contends that:

given Mr. Smith's obvious and extreme affinity for firearms, it would be wholly unreasonable for him to have gone to Gilbert, filled out the paperwork and paid for range time, rented the H&K rifle and purchased ammunition, and not actually have fired the H&K rifle on the range.

Response 5.

In fact, given that Mr. Smith rented ear and eye protection for another person, it was not unreasonable for him to have rented the rifle for that other person's use. The principle set forth in United States v. Campion, 560 F.2d 751 (6<sup>th</sup> Cir. 1977) thus governs:

[W]here the jury is called upon to choose between "reasonable probabilities" of equal weight, one innocent and the other criminal, a conviction cannot stand.

560 F.2d at 754.

Finally, the evidence that Mr. Smith possessed the rifle on

June 12, 1998 is not "substantially stronger than that found to be sufficient for conviction in United States v. Rahman, 83 F.3d 89, 92-93 (4<sup>th</sup> Cir.), cert. denied 519 U.S. 998 (1996)." Response 6. In Rahman, there was no evidence that another person was present. Indeed, the forms that Rahman admitted completing and signing were Firearms Transaction Records. 83 F.3d at 93. Those forms are completed for the sole purpose of identifying the purchaser of a firearm and require that the person signing the form be the actual purchaser. 27 CFR 178.124(c)(3). By contrast, in the case at bar, Mr. Lyles testified that someone who wished to go on the range simply to observe had to fill out a range card and had to have eye and ear protection, that someone could complete a range card and not take possession of a firearm, and that one person could complete the range card and another could take possession of the firearm. Thus, unlike in Rahman, a rational jury could not have concluded, beyond a reasonable doubt, that Mr. Smith possessed the H & K rifle on June 12, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION FOR ACQUITTAL was mailed, first class postage prepaid, to Michael Rich, Assistant United States Attorney, 2100 Jamieson Avenue, Alexandria, VA 22314 this 23<sup>rd</sup> day of March, 2001.

  
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