IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
PHYLLIS VIZZACHERO	:	**NO. 95-395**

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. **SEPTEMBER 17, 1997**

Ms. Vizzachero was convicted by a jury of harboring and concealing a person from arrest in violation of 18 U.S.C. §§ 2, 1071; she has moved to acquit. Because the essential elements of the crime were not proved from the evidence adduced at trial, the motion is granted.

FACTS

On a motion for acquittal, the Court must "view the evidence in the light most favorable to the government," United States v. Jenkins, 90 F.3d 814, 817 (3d Cir. 1996); the facts of this case are presented accordingly.

Adrian Mastrangelo, Jr., was a fugitive from arrest. Mr. Mastrangelo was Ms. Vizzachero's boyfriend; he is the father of her child. She had known him for 28 years but had not been in an intimate relationship for the entire 28 years; in May, 1995, they had been dating continuously for at least two years.

Detective James Nelson, assigned to the Drug Enforcement Administration, showed Ms. Vizzachero a copy of the arrest warrant for Mr. Mastrangelo on December 19, 1994. After learning of the arrest warrant, Ms. Vizzachero did not allow Mr.

Mastrangelo into her house. Ms. Vizzachero urged him to surrender and arranged for two attorneys to meet with him and counsel him to surrender.

Ms. Vizzachero's sister, Mary Santone, testified that Ms. Vizzachero and Mr. Mastrangelo stayed overnight at her home on three occasions in April and May, 1995. The last night they were there together was Friday, May 19, 1995, the night Mr. Mastrangelo and Ms. Vizzachero were arrested by federal authorities. Ms. Vizzachero arrived at her sister's home around 9:00 p.m. after having telephoned to ask if Mrs. Santone would be there. Later that evening, Mr. Mastrangelo arrived. After Mr. and Mrs. Santone, Ms. Vizzachero and Mr. Mastrangelo had tea and cookies, the couples went to different rooms for the night.

Ms. Vizzachero had been under surveillance on May 19, 1995. She was observed leaving her place of employment and going to her car. Before driving home, she picked up and dropped off an elderly woman, and visited Methodist Hospital. Ms. Vizzachero remained at home for only a short time before making several stops in the Delaware County area. She stopped at a gasoline station to make a telephone call before going to Ms. Santone's house. Marshal Plitt testified she arrived around 8:30 or 8:40 p.m. Ms. Santone's house was placed under surveillance; at 11:40 p.m., Ms. Vizzachero was seen outside with Mr. Mastrangelo. Marshal Plitt testified the couple went to Ms. Vizzachero's car and retrieved two or three garment bags; Ms. Santone testified

that Ms. Vizzachero went to her car to retrieve a toaster and a coffee maker she bought for her sister and mother.

Shortly after midnight, federal agents called the house and instructed Mrs. Santone to get everyone to leave the house. Mrs. Santone woke her sister and then left the house with her husband. A second call to the house instructed Mrs. Santone and Ms. Vizzachero's mother to leave the house and she did. A third and fourth call were placed to the house; agents told Ms. Vizzachero and Mr. Mastrangelo that the house was surrounded and ordered them out; after five or ten minutes, they also left. Mr. Mastrangelo and Ms. Vizzachero were both placed on the ground, handcuffed and arrested.

After being read her rights, Ms. Vizzachero asked, "Am I being locked up?" Marshal Plitt answered, "Phyllis, you know what you're being locked up for." Ms. Vizzachero replied, "Yeah, because I was with Adrian." Marshal Plitt nodded his head affirmatively. Ms. Vizzachero was taken back into her sister's house to get her shoes and her purse. While in the house, a Deputy Marshal found a paper in Ms. Vizzachero's purse with the notation:

> US Marshal
> Conrad ? Hotchkiss
> - Conn. resident with accent

US Marshal Gordon Hotchkiss is from Connecticut and attended the University of Pennsylvania. Ms. Vizzachero told Marshal

Hotchkiss that she was given his name by a law enforcement agent who came to her house to arrest Mr. Mastrangelo.

After being read her rights twice on the occasion of her arrest, Ms. Vizzachero told Marshal Plitt she and Mr. Mastrangelo prearranged their meeting at her sister's house because it was a safe place for them to be intimate.

Ms. Vizzachero was subsequently charged with and convicted of charges of harboring or concealing a fugitive and aiding and abetting the harboring of a fugitive.

DISCUSSION

A jury verdict must be upheld, "if there is substantial evidence, taking the view most favorable to the Government, to support it." United States v. Schramm, 75 F.3d 156, 159 (3d Cir. 1996), citing, Glasser v. United States, 315 U.S. 60, 80 (1942). A claim of insufficiency of the evidence places a heavy burden on the movant as "[a] verdict will only be overturned 'if no reasonable juror could accept the conclusion of the defendant's guilt beyond a reasonable doubt.'" Id., citing, United States v. Coleman, 811 F.2d 804, 807 (3d Cir.1987).

The government prosecuted under two statutes, 18 U.S.C. § 1071 and 18 U.S.C. § 2. The former statute states:

> Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined under this title or imprisoned not more than

> one year, or both; except that if the warrant or process issued on a charge of felony, or after conviction of such person of any offense, the punishment shall be a fine of [sic] under this title, or imprisonment for not more than five years, or both.[1]

The latter statute provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The government proceeded under three theories in charging under the two statutes: 1) Ms. Vizzachero herself harbored and concealed under 18 U.S.C. § 1071; 2) Ms. Vizzachero aided Mrs. Santone in harboring and concealing under 18 U.S.C. § 2(a); and 3) Mrs. Santone was used by Ms. Vizzachero to harbor and conceal under 18 U.S.C. § 2(b). At trial, the government acknowledged that Mrs. Santone did not have the requisite intent to be a principal so that Ms. Vizzachero could not be convicted

---

[1] The Federal Sentencing Guidelines treat one who harbors a fugitive as an accessory to the fugitive's offenses. Section 2X3.1, entitled Accessory After the Fact, is the only section of the Sentencing Guidelines addressing the offense of harboring; it provides the following formula:

> (a) Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30. Provided, that where the conduct is limited to harboring a fugitive, the offense level shall not be more than level 20. United States Sentencing Commission, Guidelines Manual, § 2X3.1 (1995). Offense Level 20, at Criminal History Category I provides for 33 to 41 months imprisonment.

Angelo Mastrangelo, Jr., has been convicted of the underlying offense, but has not been sentenced yet (Criminal Action No. 94-522-05).

for aiding her in harboring and concealing under 18 U.S.C. § 2(a).

In order to convict Ms. Vizzachero for a violation of 18 U.S.C. § 1071, the government had to prove beyond a reasonable doubt that Ms. Vizzachero: 1) knew a federal warrant had been issued for Mr. Mastrangelo's arrest; 2) engaged in physical acts that aided Mr. Mastrangelo in avoiding detection and apprehension; and 3) intended to prevent Mr. Mastrangelo's detection. United States v. Zerba, 21 F.3d 250, 252 (8th Cir. 1994); United States v. Lockhart, 956 F.2d 1418, 1423 (7th Cir. 1992); United States v. Udey, 748 F.2d 1231, 1235-36 (8th Cir. 1982)

In order to convict Ms. Vizzachero for a violation of 18 U.S.C. § 2, the government must prove beyond a reasonable doubt that Ms. Vizzachero: 1) knew a federal warrant had been issued for Mr. Mastrangelo's arrest; 2) caused Mrs. Santone to engage in physical acts that aided Mr. Mastrangelo to avoid detection and apprehension; and 3) intended to prevent Mr. Mastrangelo's detection. See United States v. Bryan, 483 F.2d 88, 92 (3d Cir. 1973) ("A crime, however, may be performed through an innocent dupe;" criminal intent may reside in the person who causes the forbidden act to be done.).

Ms. Vizzachero knew that a warrant had been issued for Mr. Mastrangelo's arrest; the questions presented are whether Ms. Vizzachero harbored or concealed, or caused Mrs. Santone to

harbor or conceal Mr. Mastrangelo, and whether Ms. Vizzachero had the requisite criminal intent.

Not every action taken by a person affiliated with a fugitive may be considered harboring or concealing. "Harbor" and "conceal" "must be construed narrowly, not to include all terms of assistance. 'These are active verbs, which have the fugitive as their object.'" United States v. Foy, 416 F.2d 940 (7th Cir. 1969), quoting United States v. Shapiro, 113 F.2d 891, 892 (2d Cir. 1940); quoted in United States v. Lockhart, 956 F.2d at 1423.

In order to be convicted of the crime, the defendant must have taken some affirmative, physical action "providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension." United States v. Yarbrough, 852 F.2d 1522, 1543 (9th Cir. 1988); United States v. Silva, 745 F.2d 840, 849 (4th Cir.1984), quoting United States v. Kutas, 542 F.2d 527, 528 (9th Cir. 1976). "Failure to disclose a fugitive's location and giving financial assistance do not constitute harboring. . ." United States v. Lockhart, 956 F.2d at 1423, quoting United States v. Stacey, 896 F.2d 75, 77 (5th Cir. 1990); United States v. Yarbrough, 852 F.2d at 1543; United States v. Foy, 416 F.2d at 941.

A distinction must be drawn between cases where no affirmative acts calculated to harbor or conceal were committed and those where the defendant committed affirmative acts "calculated to obstruct the efforts of authorities to effect

arrest of the fugitive," id. Ms. Vizzachero's actions did not rise to the level of harboring or concealing.

The defendant's conviction of harboring or concealing a fugitive was reversed on appeal in United States v. Foy, 416 F.2d 940 (7th Cir. 1969), because the conduct was not sufficient to support a conviction. In Foy, FBI agents were searching for a fugitive in an apartment where the defendant was present. The defendant told FBI agents that he had not seen the fugitive that day, id. at 941; the FBI agents discovered the fugitive hiding on a ledge outside the bedroom window. The Court of Appeals for the Seventh Circuit considered whether the false statement failing to disclose the fugitive's hiding place was the type of assistance contemplated by § 1071 and held it was not. A false statement alone does not violate the statute because, "[t]he statute is intended to punish acts 'calculated to obstruct the efforts of the authorities to effect arrest of the fugitive....'" Id. Foy distinguished cases where the defendant commits affirmative acts intended to prevent the arrest of the fugitive.

In contrast to the mere failure to aid the authorities in arresting a fugitive, defendant in United States v. Zerba, 21 F.3d 250 (8th Cir. 1994), lived with an admitted drug dealer, Deborah Benson, discussed her court date, her failure to appear and places they could flee to evade Benson's arrest. After these discussions, the two fled the state before they were arrested; defendant's conviction of harboring a fugitive was upheld on appeal.

In United States v. Andruska, 964 F.2d 640 (7th Cir. 1992), defendant knew her boyfriend was a fugitive and engaged in a series of affirmative acts calculated to prevent his arrest. She drove the fugitive from Illinois to Florida and used her credit cards to pay for their lodging. Her intent to facilitate her boyfriend's escape from the police was unquestionable; after being stopped by the police with the fugitive in her car, she suddenly sped away, forced the authorities to give chase, and upon apprehension for the second time, allowed the fugitive to flee on foot and then lied to the police about the identity of her passenger and whether he was armed. An appeal was taken concerning the district court's downward departure from the sentencing guidelines, but her conviction was not reviewed.

The defendant in United States v. Bortels, 962 F.2d 558 (6th Cir. 1992), helped the fugitive evade arrest by engaging the police in a high speed chase with the fugitive in her car. The chase ended when Ms. Bortels crashed into a police car and an unmarked US Marshal Service car. Bortels was charged with harboring or concealing a fugitive under 18 U.S.C. § 1071, and assaulting, resisting or interfering with a United States Deputy Marshal in violation of 18 U.S.C. § 111; Bortels pleaded guilty to the § 111 violations and the § 1071 violations were not prosecuted.

In United States v. Lockhart, 956 F.2d 1418 (7th Cir. 1992), defendant was business partner of Mr. Matthews and remained his business partner after learning Matthews was a

fugitive. To aid Matthews in escaping arrest, defendant arranged for him to obtain a driver's license with Matthew's alias, gave Matthews his own driver's license, and actively lured the FBI away from a house where he believed Matthews was hiding. Defendant's conviction for harboring or concealing was upheld on appeal.

The defendant in United States v. Erdman, 953 F.2d 387 (8th Cir. 1992), and 998 F.2d 1019, 1993 WL 245982 (8th Cir. 1993)(unpublished table decision), painted the fugitive's van to make it harder to recognize, gave him a place to stay for an extended period of time, and attempted to cash checks drawn on the fugitive's account after the fugitive was unable to do so. The conviction was upheld on appeal

In United States v. Yarbrough, 852 F.2d 1522 (9th Cir. 1988), two defendants took affirmative action to aid a fugitive escape arrest. Defendants, knowing a member of their white-supremacist group had been wounded in a shoot-out with the police, picked up the fugitive and planned to get him medical treatment without arousing suspicion of the authorities. In order to effectuate this plot, they purchased a car and fled with the fugitive from Oregon to Whitby Island, Washington. Defendants' convictions under 18 U.S.C. § 1071 were affirmed on appeal.

In United States v. Gros, 824 F.2d 1487 (6th Cir. 1987), the defendant was convicted of harboring a fugitive where there was evidence that he went "underground" with defendant for

six years; defendant had blank social security cards, drivers' licenses, and birth certificates in a suitcase together with an FBI "wanted" flyer with their photographs; and Gros used many different names and identities in her years "underground."

In two related cases, United States v. Udey, 748 F.2d 1231 (8th Cir. 1984), and United States v. Faul, 748 F.2d 1204 (8th Cir. 1984), three people were convicted of harboring or concealing a fugitive. These convictions arose out of the prosecution of seven individuals connected with the February 13, 1984, Medina, North Dakota shootout in which two United States marshals were killed and three law enforcement officers were injured. Five people were convicted under 18 U.S.C. § 1071: David Broer was present at the shootout and drove a getaway car, United States v. Faul, 748 F.2d, at 1208-10; Arthur Russell hid one of the murderers, Gordon Kahl, in his home for two months after the shootout, United States v. Udey, 748 F.2d at 1235-36; Leonard and Norma Ginter hid Kahl in their home for a month, they lied when law enforcement officers came to their house looking for Kahl, and their home was the scene of a second shootout which resulted in the death of Kahl, id. at 1235, 40-41; Ed Udey was involved in moving Kahl from the Russell home to the Ginter home to prevent the FBI from finding him, id. at 1236-37.

The inference that the defendant was harboring and concealing a fugitive was also strong in United States v. Silva, 745 F.2d 840 (4th Cir. 1984). Defendant Silva was in the company of a prison escapee the day of his escape and then traveled from

Florida to South Carolina to meet the fugitive. In South Carolina he checked into a hotel room using an alias, arranged to meet the fugitive, and was apprehended in the motel room with the fugitive, two guns, wigs and other materials for creating a disguise. This was active conduct intended to harbor and conceal.

Active conduct intended to harbor and conceal was also found in United States v. Bissonette, 586 F.2d 73 (8th Cir. 1978). Gladys Bissonette's grandson, James Eagle, was arrested for murder with Bissonette's son, Thomas Allen, and Makes Shine. Allen escaped en route to the jail and recruited Black Smith to release Eagle and Shine from jail. After the jail break, all four went to Bissonette's house; while there they told Bissonette of the jail break. Eagle and Allen stayed in Bissonette's house for several days; during those days she instructed them to stay in the basement with the blinds drawn and the doors locked, she bought and prepared food for them, she cashed a check for them, and she discouraged them from contacting friends because she did not want them to be discovered. When the police came to her home, she called Allen up from the basement, but concealed the fact that Eagle was also there.

In United States v. Whitman, 480 F.2d 1028 (6th Cir. 1973), the defendant was convicted of harboring or concealing two fugitives; the Court of Appeals upheld the conviction as to one fugitive but acquitted as to the other. Where there was evidence the defendant, using an alias, rented a cabinin another state and

provided shelter for a fugitive for an extended period of time, the conviction was upheld because a jury could conclude it was done with the intention of preventing the fugitive's arrest. But where there was no evidence from which a jury could reasonably infer the second fugitive had been to the cabin, defendant was acquitted.

The conviction of the defendant in Stamps v. United States, 387 F.2d 993 (8th Cir. 1967), was upheld where defendant actively sought to prevent the fugitive's arrest by lying to the police and telling him he was not at her apartment, arranging for the fugitive to stay in a neighbor's apartment while law enforcement officers were watching her building, arranging to meet the defendant in a borrowed car after he left the neighbor's apartment unnoticed by the police. These actions were taken to help the fugitive avoid arrest.

In United States v. Giampa, 290 F.2d 83 (2d Cir. 1961), the defendant was found guilty of harboring or concealing in violation of 18 U.S.C. § 1071, after the evidence at trial showed that he rented an apartment for a fugitive under an assumed name, shopped for him several times a week, and attempted to bar federal agents from the fugitive's apartment while saying, "Run, Nick. It's the Feds." Giampa's behavior was seen as an effort to harbor and conceal.

The defendants in Kremen v. United States, 231 F.2d 155 (9th Cir. 1956), rented a secluded cabin under false names and false pretenses, and altered their appearance as well as the

fugitive's. They lied about the fugitive's identity and helped the fugitive assume a new identity. From these acts, a reasonable inference could be drawn that they acted in a concerted manner to help the fugitive avoid arrest. Their convictions were upheld on appeal.

In United States v. Stacey, 896 F.2d 75 (5th Cir. 1990), federal marshals were searching for the defendant's estranged husband, Roger Horodecky. Ms. Stacey was told of the charges against Horodecky; she denied knowledge of his whereabouts. After receiving an anonymous call stating where the fugitive was hiding (a residence that belonged neither to Stacey or Horodecky), the police drove by and made eye contact with Stacey standing in the doorway. Upon seeing the officers, she closed and locked the door. The officers searched the area around the house and then saw Stacey driving away with a man they thought was Horodecky. The conviction was upheld because, "[g]iven that Stacey knew the officers and knew why they were driving by the house, her locking them out was enough to sustain a conviction for harboring." United States v. Stacey, 896 F.2d at 77.

In United States v. Donaldson, 793 F.2d 498 (2d Cir. 1986), defendant was seen scanning the neighborhood from his apartment on the third floor of a three-flat house. Secret Service agents knew the fugitive was in the house, but not on the first or second floor. The Secret Service Agents knocked on Donaldson's door, identified themselves, and showed Donaldson the

fugitive's arrest warrant. They asked if the fugitive was there and Donaldson said no; he refused to let them into the apartment without a search warrant. Donaldson physically blocked the door to prevent the agents from entering. His conviction was upheld on appeal.

Locking or blocking a door is not alone sufficient to constitute aiding a fugitive evade arrest. However, Ms. Stacey and Mr. Donaldson's actions were taken in response to law enforcement efforts to arrest a fugitive. Otherwise innocent acts, such as locking a door or refusing to allow law enforcement entry without a warrant, can be criminal if taken for the purpose of aiding a fugitive avoid detection and arrest.

At the trial of Ms. Vizzachero, no evidence was presented that Ms. Vizzachero knew federal agents were outside her sister's house; no evidence was presented that Ms. Vizzachero or her sister did anything they would not normally have done if Mr. Mastrangelo were not a fugitive. In fact, Ms. Vizzachero stepped out of the house with Mr. Mastrangelo in plain view when the two of them retrieved garment bags from her car; there was no evidence of the contents of the garment bags.

There was no sign of harboring or concealing. Ms. Vizzachero did not use an alias or attempt to provide Mr. Mastrangelo with an alias as in United States v. Lockhart, United States v. Gros, United States v. Whitman, United States v. Giampa, or Kremen v. United States. There was evidence that Ms. Vizzachero and Mr. Mastrangelo retrieved three garment bags from

her car, but that is not enough to draw the inference that those garment bags held disguises or any other items to help him avoid capture as in United States v. Silva. Unlike the convictions in United States v. Yarbrough, United States v. Whitman, United States v. Silva, and Stamps v. United States, where the defendants went to great pains to meet the fugitive, no evidence was presented showing Ms. Vizzachero's visit to her sister and mother's house was out of the ordinary. In contrast to United States v. Zerba, States v. Andruska, United States v. Bortels, United States v. Yarbrough, United States v. Silva, or Stamps v. United States, there was no evidence that Ms. Vizzachero intended to drive away with Mr. Mastrangelo.

Much was made of the fact that Ms. Vizzachero had a piece of paper with information about a US Marshal Hotchkiss who was seeking Mr. Mastrangelo; however, the court fails to see the relevance of this to harboring and concealing. While the court must infer that Ms. Vizzachero's explanation of how she came to have the information on that piece of paper was not credible, the fact that she had the information or she lied about how she got it is not probative of intent to harbor Mr. Mastrangelo or aid his flight.

Even viewing the evidence in the light most favorable to the prosecution, although the acts of giving Mr. Mastrangelo tea, cookies, companionship, and a bed for the night, can be viewed formalistically as physical actions providing food and shelter, they were not acts intended to provide assistance or aid

to Mr. Mastrangelo in avoiding detection and apprehension. The government proved only that Ms. Vizzachero knew there was a warrant outstanding for her boyfriend's arrest. That alone did not obligate her to inform on him or turn him in. The government failed to establish facts from which a jury could find beyond a reasonable doubt that she engaged or caused others to engage in physical acts aiding Mr. Mastrangelo with the intent to prevent his detection and apprehension. The verdict will be set aside and the motion for acquittal must be granted.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
PHYLLIS VIZZACHERO	:	**NO. 95-395**

ORDER

AND NOW this 17th day of September, 1997, upon consideration of Plaintiff's Motion for Judgment of Acquittal, the Government's Opposition, and in accordance with the Memorandum filed on this date, it is **ORDERED** that Plaintiff's Motion for Acquittal is **GRANTED**.

Norma L. Shapiro, J.