

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-20331-Cr-SCOLA

UNITED STATES OF AMERICA,

vs.

IZHAR KHAN,

Defendant.

**ORDER ON DEFENDANT IZHAR KHAN'S *ORE TENUS*
MOTION FOR JUDGMENT OF ACQUITTAL**

This Court will not allow the sins of the father to be visited upon the son. The Court has already determined that the evidence of guilt against the father, Hafiz Muhammad Sher Ali Khan (Hafiz Khan), is overwhelming. Thus, the Court has denied the father's *ore tenus* motion for a judgment of acquittal under Rule 29 in open court on January 16, 2013. But after carefully reviewing the evidence in the light most favorable to the Government, the Court finds that no rational trier of fact could find all the essential elements of the crimes beyond a reasonable doubt. The Court therefore **GRANTS** the son's *ore tenus* motion for judgment of acquittal as to all three counts.

Legal standard under Rule 29

Federal Rule of Criminal Procedure 29(c) "tests the sufficiency of the evidence against a defendant, and avoids the risk that a jury may capriciously find him guilty though there is no legally sufficient evidence of guilt." *United States v. Collantes*, 2011 WL 2784266, at *4 (S.D. Fla. July 13, 2011) (Altonaga, J.) (citation omitted). Under Rule 29(c), "a district court should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction." *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999). "Any conflicts in the evidence are resolved in favor of the Government, and all inferences that tend to support the Government's case must be accepted." *Collantes*, 2011 WL 2784266, at *4. In short, the Court must determine whether, based on the evidence, a reasonable jury could find the defendant guilty

beyond a reasonable doubt. *Ward*, 197 F.3d at 1079. That is to say, when “viewing the evidence in the light most favorable to the prosecution, would any rational trier of fact [find] all the essential elements of the crime beyond a reasonable doubt”? See *United States v. Lopez*, 403 F. App’x 362, 370-71 (11th Cir. 2010).

Summary of the charges and their elements

The Government charged Izhar Khan with three counts: (1) violating 18 U.S.C. § 2339A by participating in a conspiracy to provide material support to terrorists; (2) violating 18 U.S.C. § 2239B by participating in a conspiracy to provide material support to a designated foreign terrorist organization; and (3) violating 18 U.S.C. § 2339A by providing, or attempting to provide, material support to terrorists. (DE 103.) Under Count 1, the Government must prove beyond a reasonable doubt that Izhar Khan conspired to provide material support or resources—or to conceal or disguise the nature, location, source, or ownership of material support or resources—knowing or intending that that support or resources were to be used in preparation for, or in carrying out, a conspiracy to murder, kidnap, or maim persons outside the United States in violation of 18 U.S.C. § 956(a)(1). Under Count 2, the Government must prove beyond a reasonable doubt that Izhar Khan conspired to knowingly provide material support or resources to a Designated Foreign Terrorist Organization—namely, the Pakistani Taliban—knowing that the Pakistani Taliban has engaged and engages in terrorist activity, as that term is defined in 8 U.S.C. § 1182(a)(3)(B). Under Count 3, the Government must prove that Izhar Khan provided or attempted to provide material support or resources—or to conceal or disguise the nature, location, source, or ownership of material support or resources—knowing or intending that that support or resources were to be used in preparation for, or in carrying out, a conspiracy to murder, kidnap, or maim persons outside the United States in violation of 18 U.S.C. § 956(a)(1). Under Counts 1 and 3, the Government does not have to prove that the conspiracy to murder, kidnap, or maim persons outside the United States existed at the time that the material support or resources was provided because § 2239A criminalizes the providing of material support or resources knowing or intending that they are to be used *in preparation for* such a conspiracy. As the Eleventh Circuit explained,

the Government need not prove all the elements of § 956, the object offense, in order to satisfy the elements of the substantive § 2339A charge. By its elements, § 2339A

criminalizes material support given “in preparation for” the object offense—clearly, the object offense need not even have been completed yet, let alone proven as an element of the material support offense. To meet its burden under § 2339A, the Government must at least prove that the defendants provided material support or resources knowing that they be used in preparation for the § 956 conspiracy

United States v. Hassoun, 476 F.3d 1181, 1188 (11th Cir. 2007).

Because neither § 2239A nor § 2239B require an overt act, the Government can secure a conspiracy conviction by establishing (1) an agreement by two or more persons to achieve an unlawful objective and (2) the defendant's knowing and voluntary participation in the agreement.

The existence of the

agreement may be proven with circumstantial evidence, but inferences are only permitted when human experience indicates a probability that certain consequences can and do follow from basic circumstantial facts. Charges of conspiracy are not to be made out by piling inference upon inference. The ultimate burden on the government is the ability to draw a reasonable inference, and not a speculation, of guilt. Knowledge of the criminal act must be clear, not equivocal.

United States v. Campa, 529 F.3d 980, 1023 (11th Cir. 2008) (brackets, internal citations, and internal quotation marks omitted). With respect to the defendant's participation in the agreement, “mere association with persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy.” *United States v. Pintado*, 715 F.2d 1501, 1504 (11th Cir. 1983) (quoting *United States v. DeSimone*, 660 F.2d 532, 537 (5th Cir. 1981)). Another principle of conspiracy law is that a person whose conduct furthers the object of a conspiracy is not guilty of conspiracy when that person has no knowledge of the conspiracy. *United States v. Falcone*, 311 U.S. 205, 210-11 (1940).

Summary of the facts relating to Izhar Khan's guilt

Hafiz Khan, an Imam at a Miami mosque, was recorded during his conversations with numerous individuals on scores of phone calls and during in-person meetings with a confidential human source (CHS). Hafiz Khan spoke openly and brazenly about his support for the following: Jihad (holy war), the Taliban, the Mujah ideen (fighters), the death of American soldiers, the death of the Pakistani Assembly and its members, and the death of Pakistani army soldiers and police officers. He spoke of raising money that would be used to support the Taliban in its efforts to violently overthrow the Pakistani government and impose Sharia law in

Pakistan. He actually did send money to friends and family in Pakistan knowing that the money was going to be directed to support the Pakistani Taliban. He praised many of the Taliban's violent acts, including the use of suicide bombers who killed troops and police officers, the attempted bombing in Times Square, the bombing of a hotel in Islamabad, and numerous other acts of violence in the name of Jihad.

In contrast to the overwhelming evidence against the father, the evidence against the son, Izhar Khan, falls short of the amount needed to sustain a conviction. Izhar Khan, an Imam at a Miramar mosque, was recorded during six telephone calls with his father; one brief, in-person meeting with the CHS; and an in-person conversation with his father while they sat in a police vehicle after being arrested. Although the father spoke openly and brazenly about the Taliban, Jihad, and the Mujahideen with numerous other individuals, he never mentioned those terms during the phone calls with his son. Nor did the father talk to his son about supporting the violent overthrow of the Pakistani government or the killing of American or Pakistani soldiers. Although the father was recorded talking openly with others about his daughter Amina Khan's support of the Taliban, he was never recorded telling anyone that Izhar Khan supported the Taliban. Moreover, in Izhar Khan's one conversation with the CHS, there is absolutely nothing incriminating discussed either by Izhar Khan or in his presence.

Though there was evidence that Izhar Khan had participated in two transactions in which monies were sent to Pakistan, the only evidence that the Government presented that would directly establish that Izhar Khan had knowledge that the monies were sent for illicit purposes was a voicemail the father left on Izhar Khan's cell phone in which the father asked Izhar Khan to pick up a \$300.00 check from Dr. Zakia Subhani to be sent to Pakistan for the "Mujahideen." Yet even in the light most favorable to the Government, the evidence does not establish that Izhar Khan ever listened to that voicemail. The voicemail was one minute, fifty-seven seconds long. Nineteen seconds after the voicemail was left, Izhar Khan called his father back. Thus, he could not have listened to the voicemail before he spoke to his father. The phone call to the father was recorded. The father asks Izhar Khan to pick up money from Dr. Subhani but never tells him the purpose of the money. During the time period of this call, the Taliban and Pakistan army were engaged in many battles in the Swat Valley during which innocent villagers' homes were destroyed and many Pakistanis were displaced. FBI Special Agent Michael Ferlazzo

testified that many Pakistani-Americans were sending money to their families and friends in Pakistan—not to assist the Taliban—but to help the families who were displaced or whose homes were damaged because of the war there. In fact, there was evidence in the trial that Western Union waived its fees for people sending money to that area of Pakistan due to the humanitarian efforts of those senders. Significantly, Izhar Khan is recorded in other conversations talking about sending money to help needy people in Pakistan.

The Government claims that one can reasonably infer that Izhar Khan listened to the voicemail after he spoke to his father and before he picked up the money from Dr. Subhani. The Government first points out that Izhar Khan did not know where Dr. Subhani lived because he asked his father where she lived during the actual phone conversation. In response, the father told Izhar Khan to call Dr. Subhani to find out where she lived. Though the father gave Dr. Subhani's phone number to Izhar Khan three times during the actual phone conversation, the Government contends that Izhar Khan must have listened to the voicemail because the father did not give Izhar Khan the area code. Perhaps if Izhar Khan was in Florida and Dr. Subhani was in Colorado, then such an inference might be reasonable. But Izhar Khan lived and worked in Broward County and his father told him in the phone call that Dr. Subhani lived in Broward County. There is only one area code in Broward County, so Izhar Khan would not have to listen to the voicemail to learn her area code. The Government further argues that Izhar Khan told the father that he did not have a pen when the father first gave him the number, but the father repeated the number two more times later in the conversation and each time Izhar Khan responded "O.K." The Government could have obtained the records from the cellular-service provider and determined whether the voicemail was ever retrieved by Izhar Khan. But the Government delayed its request for the records until after the records were no longer available from the provider. Because Izhar Khan spoke to the father 19 seconds after the voicemail was left and obtained all the information he needed from the father in order to contact Dr. Subhani, one cannot infer beyond a reasonable doubt that Izhar Khan ever listened to the voicemail. Consequently, a reasonable jury cannot find beyond a reasonable doubt that Izhar Khan's participated in this \$300 transaction knowing or intending that the money would be used to support the Taliban or a violent conspiracy.

Izhar Khan also sent \$900 to his sister, Amina Khan. Once again, though there is ample evidence that Amina Khan was a Taliban supporter, there is no evidence that Izhar Khan knew that his sister was a Taliban supporter or that the money he was sending was going to be used to support the Taliban. In fact, in the recorded conversation Izhar Khan has with his father concerning this transaction, there is no discussion of the Taliban, Jihad, or the Mujahideen. The Government argues that the father mentioned to Izhar that some of the money was going to be used to help someone that was injured during the fighting. But there was evidence during the trial that innocent people were injured during the fighting. Although there is overwhelming evidence that the father and Amina knew that the person was injured while fighting for the Taliban, there is no evidence that Izhar knew the injured person's identity or his association with the Taliban. So a reasonable jury cannot find beyond a reasonable doubt that Izhar Khan knew that the \$900 he sent was going to be used to support the Taliban or that this money was intended to support the Taliban.

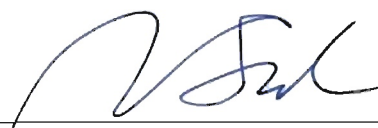
Finally, the Government points to a secretly recorded statement made by Izhar Khan while in a police vehicle with his father after the arrest. At an earlier point in the conversation, the father tells Izhar Khan that the agents asked the father if he sent money to or if he was associated with the Taliban. Later the father states, "They are talking rubbish. They have written the whole statement. They have no proof in this; absolutely no proof. But someone must have complained or done some mischief." Izhar Khan responds, "Yeah, did you mention those names or not?" The father responds, "Whose?" Izhar Khan then states, "That name – name For that – that you have said that 'I am sending money to them.'" In the entire conversation, this is the only passage the Government points to as being incriminating of Izhar Khan. The Court disagrees. While that discussion may inculcate the father, it does not establish any guilt of the son. The father had already told Izhar Khan that the agents had accused him (the father) of sending money to the Taliban or supporting the Taliban. Izhar Khan's question as to whether the father mentioned the name can reasonably be interpreted as referring to mentioning the name "Taliban." But it does not follow that this question is evidence of Izhar Khan's guilt. His father has told him that the father was accused of supporting the Taliban and Izhar Khan is simply asking the father if the father used the name Taliban which, if he had, would incriminate the father. Izhar Khan never admits that he ever used the name or had any connection to the Taliban.

So a reasonable jury cannot find beyond a reasonable doubt that Izhar Khan possessed the requisite knowledge or intent.

Conclusion

Although the Court finds that the Government has prosecuted Izhar Khan earnestly and in good faith, the Court concludes that no reasonable jury could find Izhar Khan guilty beyond a reasonable doubt of the charged crimes. The Court therefore grants Izhar Khan's *ore tenus* motion for judgment of acquittal under Rule 29.

DONE AND ORDERED in chambers at Miami, Florida on January 17, 2013.

A handwritten signature in blue ink, appearing to read 'R. Scola', is written over a horizontal line.

ROBERT N. SCOLA, JR.
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record