

defendant argues that the Government's evidence is insufficient to show an active employment of a firearm. Second, relying upon, United States v. Price, 76 F.3d 526 (3d Cir. 1996), the defendant argues that the Government's evidence is insufficient for a jury to infer that the defendant aided and abetted the use of a firearm.

I. LEGAL STANDARD UNDER RULE 29

Federal Rule of Criminal Procedure 29 provides that the trial court "shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction" Fed. R. Crim. P. 29(a). Based on the clear language of Rule 29(a), "[t]he sole foundation upon which a judgment of acquittal should be based is a successful challenge to the sufficiency of the Government's evidence." United States v. Frumento, 426 F. Supp. 797, 802 n.5 (E.D. Pa. 1976), aff'd, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978). Accord United States v. Rivers, 406 F. Supp. 709, 711 n.1 (E.D. Pa. 1975), aff'd, 544 F.2d 513 (3d Cir. 1976). See also 2 Charles A. Wright, Federal Practice and Procedure: Criminal § 466, at 654 (2d ed. 1982) ("There is only one ground for a motion for judgment of acquittal. This is that 'the evidence is insufficient to sustain a conviction' of one or more of the offenses charged in the indictment or information.").

In determining the sufficiency of the Government's evidence, the Court "must view the evidence in the light most

favorable to the jury verdict and presume that the jury properly evaluated credibility of witnesses, found the facts, and drew rational inferences." United States v. Iafelice, 978 F.2d 92, 94 (3d Cir. 1992). Thus, as stated by the Supreme Court, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

II. TIMELINESS OF THE MOTION FOR JUDGMENT OF ACQUITTAL

As a preliminary matter, the Court must resolve whether this Court has jurisdiction to consider the defendant's motion for judgment of acquittal. Rule 29 requires that the motion be filed "within 7 days after the jury is discharged or within such further time as the Court may fix during the 7-day period." Fed. R. Civ. P. 29(c). The defendant's motion was not filed within seven days of the jury's discharge nor did the Court fix a longer period for filing Rule 29 motions. Given the untimeliness of the defendant's motion, the Court may properly decline to consider the motion. United States v. Wright-Barker, 784 F.2d 161, 170 (3d Cir. 1987). However, the defendant's untimeliness need not be fatal.

The Third Circuit has held that "a district court may enter a judgment of acquittal 'sua sponte under its inherent power, 'without regard to the seven-day requirement of Rule 29.'" United States v. Coleman, 811 F.2d 804 (3d Cir. 1987)(citing United States v. Giampa, 758 F.2d 928, 936 n.1 (3d Cir. 1986)).

Therefore, while counsel has not advanced any justification for his delay in filing the motion, given the absence of prejudice to the Government and in the interest of justice, the Court will consider the issues raised by the defendant in his motion for judgment of acquittal, despite the motion having been filed out of time.

III. ACTIVE EMPLOYMENT OF A FIREARM

The Court concludes that the evidence on the record is sufficient to show that Terry's co-defendant, Louis Palmer, actively used a firearm. In Bailey v. United States, the Supreme Court held that "the Government must show active employment of the firearm to prove that a defendant used a gun in a . . . crime of violence." 116 S.Ct. at 506. Active employment or "use" is defined to include "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." Id. at 508.

Here, both Mr. Kelly, the driver of the Stroehman's delivery truck, and Mr. Horton, the owner of the store next to which the Stroehman's delivery truck was parked during the robbery, testified that Mr. Palmer, brandished a gun while demanding money from Mr. Kelly, and attempted to fire the gun into Mr. Kelly's abdomen. (Tr. 1/30/98, 89-92, 126, 127). Based on this testimony, the Court concludes that viewing the evidence in the light most favorable to the prosecution, any trier of fact could have found the essential element of [active employment or

use of a firearm] beyond a reasonable doubt." Jackson, 443 U.S. at 319.

IV. AIDING AND ABETTING

Having determined that there was sufficient evidence for the jury to find that defendant's co-conspirator, Mr. Palmer, actively employed a firearm, the remaining issue is whether the Government has presented sufficient evidence to support a finding that defendant aided and abetted Mr. Palmer in the active employment of the firearm. In United States v. Price, the Third Circuit held that an individual can be found guilty of aiding and abetting another's firearm offense if that individual either: (1) knows in advance that his confederate intends to use a firearm in the crime in which he participates; or (2) knows that his confederate uses a gun and continues to participate in the crime despite that knowledge. Price, 76 F.3d at 530; see also United States v. Mallory, 1997 WL 230790 at *1 (E.D.Pa. April 29, 1997).

Here, there is evidence on the record to support the conclusion that the defendant continued to participate in the crime in question despite his knowledge that Mr. Palmer was using a gun. Mr. Kelly testified that, during the robbery, he was engaged in a struggle inside the Stroehman's delivery truck with Mr. Palmer who was holding a gun in his hand. (Tr. 1/30/98, 91-92). Mr. Kelly also testified that, during the struggle, the defendant approached and attempted to punch him. Id. The Court concludes that, from this testimony and viewing the evidence in

the light most favorable to the prosecution, any trier of fact could have found beyond a reasonable doubt that the defendant joined in and continued to participate in the robbery with the knowledge that Mr. Palmer was using a gun. Therefore, the evidence presented by the Government is sufficient to sustain a conviction for aiding and abetting. See Jackson, 443 U.S. at 319.

It is true that Mr. Horton's testimony conflicted with Mr. Kelly's testimony in some important respects. Mr. Horton testified that he removed the gun from Mr. Palmer's hand and then, carrying the gun with him, he went inside his store to summon the police. (Tr. 1/30/98, 127-28). He further testified that upon exiting the store, he saw the defendant attempting to punch Mr. Kelly. Id. at 128. According to Mr. Horton, the defendant saw the gun in Mr. Horton's hand and ran away. Id. at 129. In deciding a motion for judgment of acquittal, the Court's role is not to weigh the testimony of Mr. Horton against that of Mr. Kelly or to determine their credibility. Iafelice, 978 F.2d at 94; United States v. McGlory, 968 F.2d 309, 321 (3d Cir. 1992). Rather, the Court must presume that "the jury properly evaluated credibility of witnesses, found the facts, and drew rational inferences." Iafelice, 978 F.2d at 94 (3d Cir. 1992). Therefore, because Mr. Kelly's testimony is sufficient to support a jury's finding that defendant aided and abetted Mr. Palmer in the use of a firearm, and because the jury reasonably may have concluded that Mr. Kelly's testimony was more credible than Mr. Horton's, the inconsistencies between Mr. Horton's testimony and Mr. Kelly's

testimony, do not warrant a judgment of acquittal under Rule 29. See United States v. Scarfo, 711 F.2d 1315, 1334 (E.D.Pa. 1989)("This Court may not grant a motion for acquittal based on conflicting testimony . . . it is up to the jury to weigh conflicting testimony, determine credibility, and ultimately draw factual inferences.").²

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

² In opposition to the defendant's motion, the Government cites testimony regarding a prior robbery committed on July 7, 1997 by the defendant and an unidentified accomplice, along the same Stroehman delivery route and in the same manner as the instant robbery. The evidence cited was admitted at trial pursuant to Federal Rule of Evidence 404(b) for the purpose of rebutting the defendant's argument that he was merely passing by the crime scene and was not a participant in the crime. When the evidence of the prior robbery was admitted, the Court gave the following instruction:

Evidence that the Defendant Tyree Terry may have committed the July 7th robbery is not admissible to prove the character of Defendant Terry in order to show that he acted in conformity with that act in this case. However, you may consider evidence of the July 7th robbery solely as evidence of the state of mind, knowledge or intent with which Defendant Terry is alleged to have committed the crimes charged in the Indictment, and may be considered by you as evidence of absence of mistake or accident. Now, the evidence of the July 7th robbery is not admissible and may not be considered for any purpose against the Defendant Palmer.

(Tr. 2/2/98, 39-40). In light of the conclusion that Mr. Kelly's testimony is sufficient to support a verdict, the Court need not reach the issue of whether the evidence of a July 7th robbery is properly chargeable against defendant on the issue of whether he knew in advance that Mr. Palmer intended to use a firearm during the robbery. Therefore, the Court did not take such evidence into account in reaching its determination on the defendant's motion.