APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-50005

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JUSTIN MARQUES HENNING, aka J-Stone,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
No. 8:16-cr-00029-CJC-7
Hon. Cormac J. Carney, District Judge, Presiding

Argued and Submitted November 4, 2019
Pasadena, California
Filed November 21, 2019
ECF Document 76-1
NOT FOR PUBLICATION

MEMORANDUM[*]

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: MURGUIA and HURWITZ, Circuit Judges, and GUIROLA,** District Judge.

A jury found Justin Henning guilty of conspiracy to commit Hobbs Act robbery, Hobbs Act robbery, and brandishing a firearm in furtherance of a crime of violence in connection with a "smash-and-grab" robbery at a jewelry store in the Del Amo mall ("the Del Amo Mall Robbery") in Los Angeles, California. The district court then granted Henning's motion for acquittal on all charges and conditionally granted a new trial. We have jurisdiction over the government's appeal under 28 U.S.C. § 1291. We reverse the judgment of acquittal but affirm the grant of a new trial.

1. Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found that Henning was guilty of Hobbs Act robbery. *See United States v. Nevils*, 598 F.3d 1158, 1164-65 (9th Cir. 2010) (en banc). Two co-conspirators testified that Henning was the "emergency pickup" or "extra driver" for the robbery, and that he attended a planning meeting shortly before the Del Amo Mall Robbery at which individual roles were discussed. *See United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) ("The uncorroborated testimony of an accomplice is sufficient to sustain a conviction unless it is incredible or insubstantial on its face."). In addition, cell phone records showed that Henning's car was in the vicinity of the Del Amo mall at the time of

** The Honorable Louis Guirola, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

the robbery and he was in contact with several of the co-conspirators.

2. The evidence, viewed in the light most favorable to the prosecution, was also sufficient to support Henning's conspiracy conviction. *See United States v. Si*, 343 F.3d 1116, 1123-24 (9th Cir. 2003). A co-conspirator testified that Henning attended two meetings at which the robbery was planned. Henning drove to the Del Amo mall on one occasion with co-conspirators when the robbery was aborted and was near the mall and in contact with co-conspirators when the robbery occurred. This evidence established both a conspiratorial agreement and Henning's knowledge of the conspiratorial goal. *See United States v. Mesa-Farias*, 53 F.3d 258, 260 (9th Cir. 1995) ("Agreement may be shown by evidence of coordinated activity between the defendant and the alleged coconspirators.").

3. There was also sufficient evidence to support Henning's 18 U.S.C. § 924(c) conviction for brandishing a firearm in furtherance of a crime of violence. *See United States v. Allen*, 425 F.3d 1231, 1234 (9th Cir. 2005) (stating that a defendant may be criminally liable for a § 924(c) violation as a conspirator if the use of a gun was "reasonably foreseeable" and "in furtherance of the conspiracy") (internal quotation marks omitted). A co-conspirator testified that Henning attended the first planning meeting where a gun was present and its potential use in the robbery was discussed. *See Rosemond v. United States*, 572 U.S. 65, 77 (2014) (holding that a defendant can also be convicted of aiding and abetting a § 924(c) violation when he actively participates in

the crime of violence and "knows that one of his confederates will carry a gun").

4. The district court did not "clearly and manifestly" abuse its discretion in granting Henning a new trial on all three counts. *See United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1212 (9th Cir. 1992) (internal quotation marks omitted). "[D]espite the abstract sufficiency of the evidence to sustain the verdict," *id.* at 1211 (internal quotation marks omitted), the district court accurately recited the legal standard for granting a new trial, and identified significant issues with the evidence underlying the verdict. The primary pickup driver for the Del Amo Mall Robbery testified that he did not know where Henning was during the robbery and did not have Henning's phone number. Henning's name and number were not written on a piece of paper listing the robbery participants found in the primary pickup driver's car. There was no footage of Henning's car in the parking lot of the mall around the time of the robbery, and there was conflicting testimony about whether Henning even attended the first planning meeting. "Given the district judge's familiarity with the evidence and his ability to evaluate the witnesses, and in light of the deferential standard of review we are bound to apply in reviewing an order granting a new trial, we cannot say the district judge abused his discretion." *Id.* at 1213.

REVERSED IN PART AND AFFIRMED IN PART.

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. SACR 16-00029-CJC

UNITED STATES OF AMERICA,
Plaintiff,
v.
JUSTIN MARQUES HENNING,
Defendant.

Filed December 20, 2017
ECF Document 1126

ORDER GRANTING DEFENDANT HENNING'S MOTION FOR A JUDGMENT OF ACQUITTAL

I. INTRODUCTION

On September 22, 2017, after a four-week trial, a jury found Defendant Justin Marques Henning guilty of the following charges: (1) aiding and abetting or conspiring with others to commit Hobbs Act robbery at Ben Bridge Jeweler in Torrance, California ("the Del Amo robbery"); (2) aiding and abetting or conspiring with others, who knowingly brandished a firearm during and in relation to the Del Amo robbery; and (3) conspiracy to commit Hobbs Act robbery. Henning now moves to set aside the jury's guilty verdict for conspiracy, robbery, and brandishing a

firearm, arguing that there was insufficient evidence to support that verdict. The Government opposes Henning's motion, contending that Henning's presence at two planning meetings for the Del Amo robbery, his presence in the general vicinity of the robbery, his affiliation with those involved in that robbery, and his knowledge that the robbery was going to occur are sufficient to support the jury's guilty verdict. The Court disagrees with the Government. Mere presence, affiliation and knowledge are not sufficient to prove guilt beyond a reasonable doubt. More evidence is needed to support a criminal conviction for conspiracy, robbery, or brandishing a firearm. Specifically here, the Government was required to present evidence that Henning said or did something to prove that he intentionally participated or joined in the conspiracy, or said or did something to prove that he knowingly aided and abetted the Del Amo robbery at which a firearm was brandished. Because the Government failed to present such evidence, the Court must set aside the jury's guilty verdict and enter a judgment of acquittal on all three counts.

II. BACKGROUND

The operative Third Superseding Indictment charged Henning with conspiracy to commit Hobbs Act robbery (Count One), four counts of Hobbs Act robbery (Counts Two [Rolex Boutique Geary's, Los Angeles], Six [Manya Jewelry, Woodland Hills], Nine [Westime, West Hollywood], and Eleven [Ben Bridge Jeweler, Torrance]), and two counts under 18 U.S.C. § 924(c) with brandishing enhancements (Counts Ten [Westime, West Hollywood] and Twelve [Ben Bridge

Jeweler, Torrance]). (Dkt. 537.) The grand jury returned Henning's indictment along with indictments for several co-defendants who were charged with similar counts. The charges arose from a series of "smash and grab" robberies that occurred at jewelry stores across Southern California. After a four-week jury trial, the jury convicted Henning of the three counts pertaining to the Del Amo robbery (Counts One, Eleven, and Twelve), and acquitted Henning of all other counts.

Viewed in the light most favorable to the Government, evidence at trial showed the following related to Henning and the Del Amo robbery:

On February 26, 2016, Robert Johnson, Jameson LaForest, Evan Scott, Michael Germeille, Cornell Stephen, and Wilson Elima met at Morningside Park in Inglewood, California. (Dkt. 1045 [Transcript 8/23/17 Vol. I] at 38, 42; Dkt. 1046 [Transcript 8/29/17 Vol. I] at 99, 114.) Elima testified at trial that Henning was present at this meeting, (Transcript 8/23/17 Vol. I at 38, 42), but Stephen testified that Henning was not present, (Transcript 8/29/17 Vol. I at 99, 114).

During this meeting, Johnson discussed the robbery of Ben Bridge Jeweler at the Del Amo mall in Torrance. (Transcript 8/23/17 Vol. I at 38.) Johnson assigned the following roles for the robbery: Elima would be the getaway driver, Scott would be the gunman, and Stephen, with another man named Shane Lewis, would smash the glass cases in the store. (*Id.* at 38–39.) Elima testified that Henning was present for the entire meeting, but said nothing during the meeting. (*Id.* at 41.) At some point, Elima was told that Johnson assigned Henning the role of "emergency

pick up." (*Id.*) Elima testified that that an "emergency pick up" would be used if something happened to the getaway driver during the robbery. (Dkt. 923 [Transcript 8/22/17 Vol. II] at 64–65.) There was no testimony presented at trial that Henning acknowledged, accepted, or responded to Johnson assigning the role of "emergency pick up." Nor was there testimony that Johnson assigned Henning the role of "emergency pick up" at this meeting.

Johnson had a firearm at the meeting, and told Elima that it would be "the element of surprise." (Transcript 8/23/17 Vol. I at 40–41.) LaForest gave Stephen and Lewis each a backpack, hammer, ski mask, and gloves, and to Scott gloves and a ski mask, to use for the robbery. (Transcript 8/29/17 Vol. I at 106–07.) There was no testimony presented at the trial suggesting that Henning saw the firearm or any of the materials for the robbery, nor was there any testimony even suggesting that he heard others discussing these items.

After the meeting, many of the meeting participants traveled to the Del Amo mall, planning to commit the robbery. (Transcript 8/23/17 Vol. I at 42.) Henning was not in this group. (*Id.*) At the mall, the group met with Stanley Ford and Shane Lewis. (*Id.*) Johnson circled around the mall in his motorcycle and LaForest parked his car in another parking lot. (Transcript 8/29/17 Vol. I at 108.) Most of the men waited outside while Ford went inside the mall to scope out the Ben Bridge store. (Transcript 8/23/17 Vol. I at 43.) Johnson then told Elima he was going to make sure no police were around. (*Id.*) At that point, Johnson handed Elima the firearm, and Elima handed

the firearm to Lewis. (*Id.* at 43–44.) When Ford returned to the group, he reported that a girl was sitting right by the store. (*Id.* at 44.) After some deliberation, the robbery was called off. (*Id.* at 45.)

Three days later, on the morning of February 29, 2016, Johnson, LaForest, Henning, Scott, Ford, Lewis, Stephen, and Germeille met at Morningside Park. (Transcript 8/23/17 Vol. I at 49; Transcript 8/29/17 Vol. I at 113, 115.) Elima testified that Johnson said there was no need for further discussion. (Transcript 8/23/17 Vol. I at 50.) Stephen testified that Johnson spoke at the meeting and they discussed "the same thing we discussed on Friday . . . just making sure everybody knows their position to take." (Transcript 8/29/17 Vol. I at 114.) Again, Henning said nothing at the meeting and there was no testimony that he heard Johnson or anybody else say anything about the robbery. Elima and Stephen testified that Henning was supposed to be the "emergency pick up." (Transcript 8/23/17 Vol. I at 51; Transcript 8/29/17 Vol. I at 113, 115.) Stephen testified that LaForest told him that Henning would be an extra driver, (Transcript 8/29/17 Vol. I at 115),[1] and "to [his] knowledge" Henning was an extra driver, (*id.* at 90).[2]

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[1] Stephen stated in his plea agreement that LaForest explained to him that Henning was the "back up driver." (Case No. 8:16-cr-00037-CJC-2 Dkt. 97 at 15–16.) At his Change of Plea Hearing, on June 17, 2016, Stephen also said that LaForest had told him that Henning was an emergency pick up driver, and that he did not know this fact on his own. (Transcript 8/29/17 Vol. II at 70–71.)

[2] Stephen testified that he had never met Henning prior to this meeting. (Transcript 8/29/17 Vol. I at 114.)

Stephen also testified he did not know why an extra driver was needed. (*Id.*)

All of the individuals from the meeting then supposedly traveled to the Del Amo mall. (Transcript 8/23/17 Vol. I at 51; Transcript 8/29/17 Vol. I at 116.) Although Elima testified that Henning traveled to the Del Amo mall, (Transcript 8/23/17 Vol. I at 51), he also testified that he did not know where Henning was during the robbery, (Transcript 8/24/17 at 231). Stephen testified that Henning arrived at the meeting in his own car, a black Infiniti truck. (Transcript 8/29/17 Vol. I at 116.) Stephen also testified that when the men traveled to the Del Amo mall, they took the same positions as they did on Friday, which meant that Germeille drove Scott, Lewis, and Stephen, while Elima, Ford, Johnson, and LaForest traveled alone. (*Id.* at 115–16.) Thus, Henning presumably drove by himself from the meeting. Elima's testimony corroborates this inference, as Elima testified that Henning drove away from the Friday meeting alone in his black Infiniti truck. (Transcript 8/23/17 Vol. I at 52.) There was no testimony presented at trial that Henning drove anyone from the meeting to the Del Amo mall or that Elima or Stephen saw Henning or his car ever again after the meeting. In fact, both Elima and Stephen testified that they had no idea where Henning was during the robbery. Elima testified that he did not know where Henning was during the robbery, (Transcript 8/24/17 at 231), but that he was "somewhere around" the mall, (*id.* at 216). Stephen testified that he never saw Henning at the mall during the robbery. (Transcript 8/29/17 Vol. II at 71.)

Germeille drove Scott, Lewis, and Stephen to the mall, where they parked next to Elima and waited for a phone call. (Transcript 8/29/17 Vol. I at 108, 116.) Once Ford arrived at the mall, he walked into the Ben Bridge jewelry store, then came out and gave "the green light" to go forward with the robbery. (Transcript 8/23/17 Vol. I at 52.) Elima did not specify who Ford gave the green light to, however, Stephen testified that "they," meaning Germeille, Scott, Lewis, and Stephen, "got a phone call from whoever was inside the mall." (Transcript 8/29/17 Vol. I at 116.) Once they got the phone call, Germeille dropped off the three other men outside the mall and Scott, Lewis, and Stephen went directly into the Ben Bridge jewelry store. (*Id.*) When the robbers reached the store, Scott pulled out a firearm, got the workers to the back of the store, and kept them on the ground. (*Id.* at 116–17.)[3] Lewis and Stephen followed Scott in, smashed the glass cases containing Rolex watches, and grabbed the watches. (Transcript 8/29/17 Vol. I at 116–17.) The time of the crime was approximately 10:36 a.m., (Dkt. 1054 [Transcript 9/12/17 Vol. I] at 55), and Stephen testified that the robbery lasted less than a minute, (Transcript 8/29/17 Vol. I at 117).

Scott, Lewis, and Stephen left the store and got into Elima's car, which was waiting outside the mall by the door. (Transcript 8/23/17 Vol. I at 52–53; Transcript 8/29/17 Vol. I at 119.) Elima testified that he waited three to five minutes outside of the mall waiting for the robbers to come out. (Transcript

[3] Stephen testified that he did not know it was going to be an armed robbery prior to Scott pulling out the firearm. (Transcript 8/29/17 Vol. I at 117–18.)

8/23/17 Vol. I at 52.) Elima drove to a designated switch-off spot, where the men met with LaForest, who was waiting in a different car, and gave him the stolen goods. (Transcript 8/23/17 Vol. I at 55–57.) Stephen testified that the switch-off spot was in another parking lot. (Transcript 8/29/17 Vol. I at 120.) From there, Elima drove to a grocery store and stopped to pull off the paper license plate covering his real plate. (*Id.*) At the grocery store, Scott took the backpack from Stephen, which contained the gun, and left Elima's car to get into Germeille's car, which was behind Elima's car. (*Id.* at 120–21.) Elima then drove Stephen and Lewis to the South Bay Galleria, where they waited for about a minute, then drove onto the freeway back to Inglewood. (*Id.* at 121.) While on the freeway, the state police pulled over Elima's car while Elima, Stephen, and Lewis were inside. (*Id.* at 122; Transcript 8/23/17 Vol. I at 58–59.) All three men were arrested. (*Id.*; Transcript 8/29/17 Vol. I at 122.)

At the time of his arrest, Elima had a note in his car, provided by LaForest, which contained the names and phone numbers of people who were supposed to participate in the Del Amo robbery. (*Id.* at 62–63, 64–65.) Henning was not listed on the note. (*Id.*) Neither Elima nor Stephen knew or had Henning's phone number in his phone. (Dkt. 928 [Transcript 8/24/17] at 231; Transcript 8/29/17 Vol. II at 71.)

The Government submitted into evidence a video of the Del Amo parking lot during the time of the robbery. (Transcript 8/24/17 at 213.) Elima viewed the video and identified his own car and Germeille's car. (*Id.* at 214–25.) Stephen testified that the spot where he met up with Johnson could be seen in the video, but

his actual meeting with Johnson was not captured on the video. (Dkt. 966 [Transcript 8/29/17 Vol. II] at 133–34.) Both Elima and Stephen testified that Henning was not in the video. (Transcript 8/24/17 at 215–16; Transcript 8/29/17 Vol. II at 10–11.)

Elima was one of the defendants charged in connection with the Del Amo robbery. Elima entered into a plea agreement, which was filed with the Court on June 27, 2016. Elima did not mention Henning in the factual basis of his plea agreement, (Transcript 8/24/17 at 222), nor in his Change of Plea Hearing on June 28, 2016, (*id.* at 226). Elima first mentioned that Henning was the "emergency driver" for the Del Amo robbery during a meeting with the Government on July 26, 2017. (*Id.* at 230.) Stephen was also charged in connection with the Del Amo robbery. Stephen entered into a plea agreement, which was filed with the Court on June 7, 2016. Stephen's plea agreement listed Henning amongst many others who agreed to commit the Del Amo robbery, (Transcript 8/29/17 Vol. II at 69–70), and stated therein that LaForest explained to him that Henning was the "back up driver," (Case No. 8:16-cr-00037-CJC-2 Dkt. 97 at 15–16). At his Change of Plea Hearing, on June 17, 2016, Stephen said that LaForest had told him that Henning was an emergency pick up driver. (Transcript 8/29/17 Vol. II at 70–71.)

The Government presented evidence that Henning was connected to a cell phone number, "the 0121 number." Henning's moniker was "J-Stone," and the 0121 number was saved in LaForest's phone as J-Stone's number. (Ex. 136B at 832–33 & entry 25, 29–31.) In addition, the 0121 number was saved in

Henning's girlfriend's phone as the number for "Mi Love." (Ex. 133B at 30–41.) Other telephone numbers associated with Henning were also stored on his girlfriend's phone as the number for "Mi Love." (Ex. 133E.)

FBI Special Agent Kevin Boles testified that the 0121 number connected to a cell tower within the vicinity of the Del Amo mall from 10:05 a.m. to 10:40 a.m. on February 29, 2016. (Transcript 9/12/17 Vol. I at 54–57, 61–63.) Boles also testified that there were multiple calls between phone numbers associated with LaForest, Johnson, and the 0121 number between 10:04 a.m. and 10:43 a.m. (*Id.* at 55–59, 61–63.) Boles did not testify about any subscriber information for the 0121 number that would associate it with Henning, and did not perform an extraction report on the 0121 number. (*Id.* at 102–04.) Boles did testify, however, that between January 26, 2016, and March 1, 2016, the 0121 number most frequently connected to a cell site that was 260 yards from Henning's residence, (*id.* at 53–54), and that Henning's girlfriend frequently called the 0121 number, (Ex. 133B at 30–41).

III. DISCUSSION

Henning claims that his convictions rest on insufficient evidence. On a motion for judgment of acquittal, the Court will uphold a conviction if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Reed*, 575 F.3d 900, 923 (9th Cir. 2009) (quoting *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir.

2001)). "When viewing the evidence in the light most favorable to the government," the Court "may not usurp the role of the finder of fact by considering how [the Court] would have resolved the conflicts, made the inferences, or considered the evidence at trial." *United States v. H.B.*, 695 F.3d 931, 935 (9th Cir. 2012) (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc)). "Therefore, in a case involving factual disputes and credibility determinations," the Court "must presume ... that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* (citations omitted). "Circumstantial evidence 'can be used to prove any fact,' although 'mere suspicion or speculation does not rise to the level of sufficient evidence.'" *United States v. Dinkane*, 17 F.3d 1192, 1196 (9th Cir. 1994) (quoting *United States v. Stauffer*, 922 F.2d 508, 514 (9th Cir. 1990)).

A. Count Eleven — The Del Amo Robbery

In Count Eleven, Henning was charged with aiding and abetting or conspiring with others to commit the Del Amo robbery. The elements of a Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) are: (1) the defendant made or induced the victim to part with property by the wrongful use of actual or threatened force, violence, or fear; (2) the defendant acted with the intent to obtain property; and (3) commerce from one state to another was affected in some way. (Dkt. 961 (Jury Instructions — Given), Court's Instruction No. 33; Ninth Circuit Model Criminal Jury Instruction No. 8.143A.) The jury was instructed that a defendant may be found guilty of Hobbs Act robbery even if the defendant personally

did not commit the act or acts constituting the crime, but aided and abetted in its commission. (Jury Instructions — Given, Court's Instruction No. 36.) The elements of aiding and abetting a Hobbs Act robbery are: (1) interference with commerce by robbery was committed by someone; (2) the defendant aided, counseled, commanded, induced or procured that person with respect to at least one element of interference with commerce by robbery; (3) the defendant acted with the intent to facilitate interference with commerce by robbery; and (4) the defendant acted before the crime was completed. (*Id.*; Ninth Circuit Model Criminal Jury Instruction No. 5.1.)

The jury was instructed on the aiding and abetting theory of responsibility as follows:

> [I]t is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit interference with commerce by robbery. A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime and having acquired that knowledge when the defendant still had a realistic opportunity to withdraw from the crime.

(Jury Instructions — Given, Court's Instruction No. 36.) The jury was also instructed as follows:

> Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed the crime. The defendant must be a participant and not merely a knowing spectator. The defendant's presence may be considered by the jury along with other evidence in the case.

(*Id.*, Court's Instruction No. 51.)

The evidence shows that Henning was present at one or two planning meetings for the Del Amo robbery and then in the general vicinity of the Del Amo mall during the robbery. At most, a rational trier of fact could conclude that Henning was a knowing spectator of the crime. This is simply not sufficient for a rational trier of fact to find beyond a reasonable doubt that the essential elements of a Hobbs Act robbery have been met under an aiding and abetting theory of responsibility.

The Government presented no evidence that Henning was an active participant in either planning meeting. Indeed, Henning never spoke during either planning meeting.[4] There also was no evidence that Henning helped select the target of the crime or plan its commission. There was no evidence that Henning aided the robbery by providing advice or directions. There was no evidence that Henning counseled any robbery participant or assigned roles. There was no

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[4] The cooperating witnesses' testimony was contradictory as to whether Henning was even at the first planning meeting.

evidence that Henning gave any orders or commands. And there was no evidence that Henning encouraged any of the robbery participants, recruited them to conduct the robbery, or provided them any equipment. Without such evidence, Henning's robbery conviction based on an aiding and abetting theory of responsibility cannot stand. *Compare Ramirez v. United States*, 363 F.2d 33, 34 (9th Cir. 1966) (vacating the defendant's conviction for two counts regarding drug smuggling on an aiding and abetting theory of responsibility where the court found "in the record no action, by word or act, on the part of [the defendant] to make the crime succeed except [the defendant's] knowledge that a crime was to be committed, and that he was present at the scene.") *with United States v. Tibbs*, 685 F. App'x 456, 466 (6th Cir. 2017), *cert. denied*, No. 17-5099, 2017 WL 2909378 (Oct. 2, 2017) (holding there was sufficient evidence of the defendant's intent to facilitate the robbery where the government presented evidence that the defendant "was present when the Vice Lords were planning the robbery, provided advice on how to commit the offense, and used some of the proceeds to pay for the principals' tattoos and a Vice Lords meeting in Chicago.")

The Government argues that the evidence demonstrates that Henning acted as an emergency pick up driver while other men committed the Del Amo robbery. Elima and Stephen did testify that Henning was the emergency pick up driver for the robbery, but the Government presented no evidence that Henning accepted or acknowledged this role. Indeed, the Government presented no evidence that Henning even heard Johnson assign him the role of

emergency pick up driver.[5] *See United States v. Hill*, 464 F.2d 1287, 1289 (8th Cir. 1972) (holding that the evidence was insufficient to sustain the conviction of aiding and abetting the commission of a bank robbery where the defendant nodded in assent while present at one conversation where roles of the participants were discussed and who departed in a participant's vehicle on the day of the robbery, noting that "passive assent without affirmative action under those circumstances was insufficient. The mere fact that [the court] may speculate that [the defendant] ultimately would have participated is not enough.")

The Government also argues that the cell tower data for the 0121 number corroborates that Henning performed his role in the robbery. The cell tower data demonstrates that the 0121 number associated with Henning was in the vicinity of the Del Amo mall during the robbery. This corroborates Stephen's testimony that Henning traveled to the Del Amo mall after the February 29, 2016, planning meeting. However, neither Elima nor Stephen knew where Henning was during the robbery, and neither contacted him, or even could contact him, because they did not have his phone number. Henning was also not visible in the surveillance video that captured the meet-up spot for the robbery participants. Further, even though the cell phone data supports the Government's argument that Henning spoke with

[5] Further, Stephen testified that LaForest told him that Henning would be an extra driver, indicating that Johnson did not assign Henning's role in everyone's presence at either planning meeting.

LaForest and Johnson around the time of the robbery, there is no evidence about what was discussed.

The Government's evidence only established that Henning was present during the commission of the robbery and affiliated with the robbery participants. Evidence that Henning traveled from the meeting to the vicinity of the Del Amo mall and evidence that he spoke with LaForest and Johnson during the robbery raise the inference that he acted in a manner consistent with an emergency pick up driver. Based on this evidence, however, a rational trier of fact could only speculate whether Henning knew he was the emergency pick up driver, accepted or understood that role, and drove to the vicinity of the Del Amo mall in order to fulfill the role.

Simply put, the evidence does not demonstrate that Henning was an active participant in the Del Amo robbery or did anything to aid and abet it.[6] *See United States v. Andrews*, 75 F.3d 552, 555–56 (9th Cir. 1996) (holding that no rational jury could conclude that the defendant intentionally participated in a shooting where the evidence showed that the defendant and two other men accompanied the shooter to the scene of the crime, but no evidence showed that the defendant gave the shooter the gun, drove her to the scene, encouraged her to shoot, or in any other obvious way assisted her in shooting the victims.); *United States v.*

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[6] The insufficiency of the evidence is underscored by the facts that Henning's name did not appear on Elima's list of Del Amo robbery participants, the two sole cooperating witnesses who testified about Henning's role never spoke with Henning about his role, and Elima did not mention Henning's role in his original plea agreement nor at his Change of Plea hearing.

Pena, 983 F.2d 71, 72–73 (6th Cir. 1993) (holding there was insufficient proof that the defendant aided and abetted the possession of cocaine with the intent to distribute where the government "presented no evidence of [the defendant's] participation in the crime other than her presence as a passenger in the car").

The Government also argues that the jury nevertheless could have found Henning guilty under a conspiracy theory of responsibility. This alternative theory of responsibility, however, fares no better. The jury was instructed that a defendant may be found guilty of Hobbs Act robbery based on conspiracy responsibility. (Jury Instructions — Given, Court's Instruction No. 37.) The elements required to prove conspiracy responsibility for Hobbs Act robbery are: (1) a person committed the crime of interference with commerce by robbery as alleged in the count under consideration; (2) that person was a member of the conspiracy charged in Count One; (3) that person committed the crime of interference with commerce by robbery in furtherance of the conspiracy; (4) defendant was a member of the same conspiracy charged in Count One at the time the offense charged in the count under consideration was committed; and (5) the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement. (*Id.*; Ninth Circuit Model Criminal Jury Instruction No. 8.25.)

Henning's mere presence is insufficient to support his conviction for the Del Amo robbery based on his participation in a conspiracy. The Ninth Circuit has held that mere "presence at the location of a

conspiracy's activities, while the activities are taking place, knowing that they are taking place, without proof of *intentional participation* in the conspiracy, cannot support a conspiracy conviction . . . [O]ur line of 'mere presence' cases requires acquittal in the absence of evidence of *intentional participation*." *Herrera-Gonzalez*, 263 F.3d at 1097–98 (emphasis added); *see United States v. Lopez*, 625 F.2d 889, 896 (9th Cir. 1980) (holding the evidence insufficient to support the drug conspiracy conviction of the defendant who was arrested while in the same car as two major conspirators, where there was no evidence that the defendant participated in any negotiations concerning, or delivery of, heroin, or that heroin was ever discussed in his presence).

Consequently, Henning's presence at the two planning meetings and in the vicinity of the Del Amo mall during the robbery are insufficient to prove intentional participation in the conspiracy to commit the Del Amo robbery. *See United States v. Ocampo*, 937 F.2d 485, 489 (9th Cir. 1991) (holding that mere acquaintance with a conspirator, and geographical proximity to drugs, will not suffice to prove even a "slight connection" to a conspiracy). To convict Henning based on a conspiracy theory of responsibility, the Government had to present evidence beyond presence to prove that Henning in fact intentionally participated or agreed to join in the conspiracy. The Government clearly failed to do so.[7]

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[7] The Government argues that Henning may also held liable under a conspiracy theory of responsibility because the evidence showed that Henning was a member of the "robbery conspiracy" long before the Del Amo robbery and remained a part of it

See United States v. Penagos, 823 F.2d 346, 349 (9th Cir. 1987) (conspiracy conviction reversed despite evidence that the defendant, who was supposedly a lookout, was at crime scene scanning up and down the street; the government did not produce sufficient evidence that the defendant committed any act in furtherance of the conspiracy because the evidence showed that the police saw the defendant engage in alleged counter-surveillance activities only once, not during a drug sale or transfer, and without focusing on "any particular persons or activities" that a lookout would be interested in; the court noted that the "defendant's behavior was perfectly consistent with that of an innocent person having no stake or interest in drug transactions"); *United States v. Cloughessy*, 572 F.2d 190, 191 (9th Cir. 1977) (conspiracy conviction reversed, although defendant was an acquaintance of conspirators and present in a car with the conspirators during a heroin deal, because there was no direct evidence of the defendant's participation in the conspiracy and his codefendants testified that he was not a party to the conspiracy and that he did not participate in any of the negotiations or discussions with the conspirators).

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through that time, and that the Del Amo robbery was committed by some members of the conspiracy who he associated with in the days leading up to the robbery. The Government's evidence relates to robberies other than the Del Amo robbery and robberies other than those charged against Henning. The Court explains why this evidence does not provide a sufficient basis for upholding Henning's conviction for the robbery count in its analysis below of Henning's conviction for Count One.

B. Count Twelve: Section 924(c)

In Count Twelve, Henning was charged with aiding and abetting or conspiring with others, who knowingly brandished a firearm during and in relation to the Del Amo robbery. The elements of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence, under 18 U.S.C. § 924(c) are: (1) the defendant committed the crime of robbery, which is a crime of violence; (2) the defendant knowingly possessed a firearm in furtherance of, or used or carried a firearm during and in relation to the crime of robbery. (Jury Instructions — Given, Court's Instruction No. 38; Ninth Circuit Model Criminal Jury Instruction No. 8.72.)

As the Court finds there is insufficient evidence to support Henning's conviction on Count Eleven for robbery, there is also insufficient evidence to prove the first element of Count Twelve, that Henning committed the crime of robbery by aiding and abetting or as a co-conspirator. *See United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (holding that "[t]he relation between the firearm and the underlying offense is an essential element of the crime . . . ."); *United States v. Mendoza*, 11 F.3d 126, 128 (9th Cir. 1993) (same). Again, the Government failed to present evidence that Henning said or did something to prove that he intentionally participated in the conspiracy to commit the Del Amo robbery during which a firearm was brandished or that he said or did anything to aid and abet that robbery.

C. Count One: Conspiracy to Commit Hobbs Act Robbery

In Count One, Henning was charged with conspiracy to interfere with commerce by robbery in violation of 18 U.S.C § 1951(a). The elements for conspiracy to interfere with commerce by robbery were as follows: (1) beginning on an unknown date and ending no later than or about June 3, 2016, there was an agreement between two or more persons to commit the crime of robbery; (2) the defendant joined in the agreement knowing of its purpose and intending to help accomplish that purpose; and (3) the robbery contemplated by the agreement would affect interstate or foreign commerce in some way. (Jury Instructions — Given, Court's Instruction No. 28; Ninth Circuit Model Criminal Jury Instruction No. 8.20.) The jury instructions in this case specifically instructed that, "[i]t is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit *at least one of the crimes alleged in the indictment* as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit." (*Id.*, Court's Instruction No. 31 [emphasis added].) The jury was also instructed that, "[y]ou are here only to determine whether each defendant is guilty or not guilty of the charges in the Third Superseding Indictment. The defendants are not on trial for any conduct or offense not charged in the Third Superseding Indictment." (*Id.*, Court's Instruction No. 25; Ninth Circuit Model Criminal Jury Instruction No. 3.10.) The jury was also instructed that, "[a] separate crime is charged against

one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately." (Jury Instructions — Given, Court's Instruction No. 26; Ninth Circuit Model Criminal Jury Instruction No. 3.13.)

The Government argues that the Court should consider all of the evidence introduced at trial to determine whether there was sufficient evidence to support Henning's convictions. The Government would have the Court consider evidence related to robberies that Henning was acquitted of committing, specifically the robbery of Rolex Boutique Geary's. To support this argument, the Government cites *United States v. Powell*, 469 U.S. 57 (1984) and *United States v. Hart*, 963 F.2d 1278 (9th Cir. 1992). In both cases, a criminal defendant moved for acquittal of a conviction on the grounds that the jury's verdict was inconsistent. In *Powell*, the defendant was acquitted of both conspiracy to possess cocaine with the intent to distribute and possession of cocaine, but convicted of using a telephone in "committing and in causing and facilitating" the alleged conspiracy and possession. *Powell*, 469 U.S. at 59–60, 67. In *Hart*, the defendant was convicted of conspiracy to distribute cocaine, but acquitted of distributing or aiding and abetting the distribution of cocaine. *Hart*, 963 F.2d at 1280. The Government cites *Powell* for the unremarkable proposition that sufficiency of the evidence review "should be independent of the jury's determination that evidence on another count was insufficient." *Powell*, 469 U.S. at 68. The Government cites *Hart* to demonstrate that the Ninth Circuit considered the evidence underlying the acquitted count for

distributing or aiding and abetting the distribution of cocaine when it reviewed the sufficiency of the evidence to support the defendant's conviction for conspiracy to distribute cocaine. *Hart*, 963 F.2d at 1282.

This case presents fundamentally different circumstances from *Powell* and *Hart*. In those cases, the defendant challenged as inconsistent a guilty verdict on one charge when the jury acquitted on a *different* charge.[8] Those courts held that the jury's guilty verdict in such cases is insulated from review because courts are reluctant to inquire into the jury's rationale and the Government is unable to seek review of acquittals. *Hart*, 963 F.2d at 1281; *Powell*, 469 U.S. at 64–65. Here, a defendant is not challenging a guilty verdict as being inconsistent with a jury's verdict of acquittal. To the contrary, the Government is trying to do an end-run around a jury's verdict of acquittal. Henning was charged with four Hobbs Act robberies based on an aiding and abetting theory *and a conspiracy theory of responsibility*. The jury acquitted Henning of the robberies at Rolex Boutique Geary's, Los Angeles, Manya Jewelry, Woodland Hills, and Westime, West Hollywood. By acquitting Henning of these three robberies, the jury specifically acquitted Henning of *conspiracy to commit those robberies*. To

[8] The Government also cites *United States v. Christensen*, 828 F.3d 763 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 628 (2017), where the defendant challenged his RICO conspiracy conviction on the basis that it was inconsistent with his acquittal of the related substantive offenses for which he was charged. Like *Hart* and *Powell*, the defendant in *Christensen* challenged the jury's verdict where they found guilt on one charge and acquitted the defendant of a *different* charge.

now find Henning guilty of conspiracy on Count One based on these three robberies would completely contradict the jury's verdict. Due Process prohibits such an unjust result. *See United States v. Rivera*, 411 F.3d 864, 866 (7th Cir. 2005) ("Once the jury has spoken, its verdict controls unless the evidence is insufficient or some procedural error occurred."); *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (recognizing "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons"); *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1201–02 (9th Cir. 2000) (when reviewing for sufficiency of the evidence, "any conflicts in the evidence are to be resolved in favor of the jury's verdict").

The Government also argues that the Court should consider evidence of Henning's alleged involvement in the attempted robbery at Ben Bridge Santa Monica. This robbery was alleged in Count One of the Third Superseding Indictment as an overt act in furtherance of the conspiracy. At trial, the only evidence concerning Henning's alleged involvement in this attempted robbery was the testimony of another cooperating witness, Darrell Dent. Dent testified that after the attempted robbery, Henning told him that the participants were from the Bounty Hunters, a Bloods sect from Watts, California, and that Johnson told him that Henning "got the players," or robbery participants. (Dkt. 1048 [Transcript 8/31/17 Vol. I] 106.) The Government argues that this testimony proves that Henning recruited the participants for the attempted robbery in Santa Monica. The Court disagrees. Dent's testimony, at best, proves that Henning had knowledge of and an affiliation with the alleged participants in the attempted robbery. It does

not prove beyond a reasonable doubt that he intentionally participated as a recruiter in the attempted robbery in Santa Monica. Specifically, Dent never testified that Henning told him that he recruited the alleged participants, and, more importantly, neither Dent nor any other witness testified at trial who the participants were that were recruited, how they were recruited, where they were recruited, or when they were recruited. Much more is required to prove beyond a reasonable doubt that Henning was a co-conspirator involved in the attempted robbery in Santa Monica. *See Cloughessy*, 572 F.2d 190; (*see* Jury Instructions — Given, Court's Instruction Nos. 36, 51.)

The Government also argues that the Court should consider evidence of Henning's involvement in robberies that were not charged against any defendant in the Third Superseding Indictment and evidence about Henning's involvement in activities with no connection to any specific robbery. (Dkts. 970 [Transcript 8/31/17 Vol. II] at 50–51, 1047 [Transcript 8/30/17 Vol. II] at 128–29.) Because none of this evidence is related to a robbery charged against Henning, the Court will not consider it as evidence of the conspiracy charged in Count One. It is a well-established principle of criminal law that a defendant cannot be convicted for any uncharged conduct or offense. *See United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014) (holding that it was reversible error to permit the jury to convict on counts of aggravated identity theft against two victims named in indictment based on evidence presented at trial of uncharged conduct against identity-theft victims not named in indictment, noting that the court "needs

some way of assuring that the jury convicted the defendant based solely on the conduct actually charged in the indictment. Typically, that assurance will be provided by jury instructions requiring the jury to find the conduct charged in the indictment before it may convict."); (Jury Instructions — Given, Court's Instruction Nos. 25, 26; Ninth Circuit Model Criminal Jury Instruction Nos. 3.10, 3.13.)

The bottom line is that the Government's evidence only showed that Henning was present at the planning meetings and in the vicinity of the Del Amo mall during the robbery. To be sure, these facts may give rise to some suspicion that he was involved in the conspiracy to commit the Del Amo robbery, but they do not prove it beyond a reasonable doubt. The Court is left to speculate that Henning actually participated in or joined in the conspiracy and, if he did participate or join in it, how he did so. Without any evidence that Henning said or did anything at the planning meetings or during the robbery to participate in its commission, the Government's evidence adds up to mere presence and nothing more. Henning's presence, without any affirmative action or statements on his part, is simply insufficient as a matter of law to support his conviction for conspiracy. Therefore, the Court must set it aside.

IV. CONCLUSION

For the foregoing reasons, Defendant Henning's motion for acquittal is GRANTED.[9] Defendant

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[9] Henning has also filed a motion to dismiss the case for prosecutorial misconduct or, in the alternative, for new trial. (Dkt. 1104.) Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any

Henning's motion for release from custody, (Dkt. 1064), is DENIED as moot.

DATED: December 20, 2017

s/
CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

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judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A motion for a new trial is "directed to the discretion of the district judge," and should be granted "only in exceptional cases," *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981), such as where "despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred," *United States v. Alston*, 974 F.2d 1206, 1211–12 (9th Cir. 1992). Justice demands that Henning be granted a new trial as the Government has failed to present sufficient evidence to prove Henning did anything to participate in or conspire to commit the Del Amo robbery. The Court conditionally GRANTS Henning's motion for new trial.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-50005

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JUSTIN MARQUES HENNING, aka J-Stone,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California, Santa Ana
No. 8:16-cr-00029-CJC-7

Filed February 5, 2020
ECF Document 82

ORDER

Before: MURGUIA and HURWITZ, Circuit Judges, and GUIROLA,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Murguia and Hurwitz have voted to

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* The Honorable Louis Guirola, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

deny the petition for rehearing en banc, and Judge Guirola so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. 81, is DENIED.

Appendix D

Relevant Excerpts of Constitutional Provision, Statutes, & Rule

U.S. Const. amend. V

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924(c)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be

sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

18 U.S.C. § 1951(a)
Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Fed. R. of Crim. P. 29.
Motion for a Judgment of Acquittal

(a) *Before Submission to the Jury.* After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) *Reserving Decision.* The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) *After Jury Verdict or Discharge.*

(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) *Conditional Ruling on a Motion for a New Trial.*

(1) *Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) *Finality.* The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) *Appeal.*

(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.