

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH**

UNITED STATES	:	Case No: 08 CF1 27068
	:	08 CF1 26996
v.	:	08 CF1 26997
	:	
JOSEPH R. PRICE,	:	Judge Lynn Leibovitz
VICTOR J. ZABORSKY, and	:	
DYLAN M. WARD	:	

ORDER

This case arises from the tragic stabbing death of 32-year old Robert Wone in the second floor guest bedroom of 1509 Swann Street, N.W., on August 2, 2006. The defendants, Joseph Price, Victor Zaborsky and Dylan Ward, each of whom was a resident of 1509 Swann Street, N.W. at the time of Mr. Wone’s death, are charged with obstruction of justice and conspiracy to obstruct justice upon the government’s claim that each participated in a scheme to prevent the police from learning the true circumstances of Mr. Wone’s death; Mr. Price faces a charge of tampering with evidence at the crime scene. None of the defendants faces murder charges in this case.

Others who have followed this case may have had a very human, normal reaction to it in thinking about the facts that surfaced on August 2, 2006. This reaction might have been to develop a belief about how Mr. Wone died and to suppose that the occupants of 1509 Swann Street must have been involved in some way, or must have chosen to cover for the person or persons who were involved. As fact finder, I have not approached the case from that point of view. I have started with the presumption that each of the three defendants is innocent, a presumption to which each is entitled under the law. I therefore began with the presumption that the death of Robert Wone is unexplained and that none of the defendants knew the true circumstances of his death in the course of their conduct on August 2, and 3, 2006. Further, I

have held the government to the burden of proof beyond a reasonable doubt. My function has been to decide, therefore, without sympathy, favoritism, prejudice or passion of any kind, whether the evidence in this case establishes beyond a reasonable doubt, as to each defendant, each of the elements of the offenses of obstruction of justice and conspiracy to obstruct justice, and as to Mr. Price, each of the elements of the offense of tampering with evidence.

The defendants' bench trial began on May 17, 2010, and I took the case under advisement following closing arguments on June 24, 2010. The government called over 30 witnesses, including one in its rebuttal case, and the defense called eight witnesses. Both sides offered hundreds of exhibits and numerous facts were stipulated. None of the defendants testified. At the close of the government's case, I granted defendants Zaborsky and Wards' motions for judgment of acquittal on charges of tampering with evidence.

In a bench trial the function of the judge as fact finder is to listen to the evidence, understand the law and decide the case based solely on the evidence. I have reviewed all of the evidence and testimony admitted at this trial carefully and at length, and I have done so without reference to any matter or purported fact that was not introduced at trial. I have considered the well-prepared arguments of talented counsel for all parties on the issues before me. I have applied the law as it relates to each of the charges, to the evidence in this record. Based on the testimony presented, the evidence admitted, and the entire record, I make the following findings.

The Facts

On the night of August 2, 2006, sometime between 11:08 pm and 11:49 p.m., Robert Wone was stabbed three times in the chest and abdomen by an attacker wielding a knife. The wounds were unusually uniform in dimension, orientation and depth. Mr. Wone was, for reasons that were not explained by the evidence admitted at trial, apparently entirely immobile as he was

stabbed. One stab wound perforated his heart at the aortic root and transected his left anterior descending coronary artery, causing acute cardiac tamponade which effectively shut down his heart and caused him to become unconscious within 60 seconds of the injury. He was pronounced dead of his injuries at the George Washington University Hospital Emergency Room at 12:24 a.m. on August 3, 2006.

Robert Wone was 32 years old when he died. He and Kathy Wone married in 2003 and were living together in Oakton, Virginia. Kathy Wone testified that Mr. Wone had no enemies and that they had no financial troubles. Ms. Wone testified that she and her husband were happily married and looking forward to their future together. Kathy and Robert Wone traveled to work into the District of Columbia together by Metro on the morning of August 2, 2006, and kissed goodbye on Connecticut Avenue at about 8:45 a.m. Ms. Wone never saw her husband alive again.

Two weeks earlier, Mr. Wone had told his wife that he was thinking of making arrangements to spend the night in the District of Columbia on August 2, 2006. He had recently begun a new job as General Counsel of Radio Free Asia. He planned to introduce himself to the night shift employees at Radio Free Asia and also to attend a Continuing Legal Education course that was being given on the same evening in the District of Columbia. Mr. Wone told his wife that, instead of making the commute back to Oakton afterward, he planned to see if he could stay in the District of Columbia that night. He contacted defendant Joseph Price, as well as another friend, to see if either could house him for the night. Both were friends he had known from their years together at the College of William and Mary. Mr. Price responded by e-mail that he would be happy to have Mr. Wone stay with him and his housemates at 1509 Swann Street, N.W., and on July 31, 2006, they e-mailed plans that Mr. Wone would arrive by taxi at about 11 p.m. after

his visit with the late shift employees at Radio Free Asia. Kathy Wone knew and approved of her husband's plan to stay with Mr. Price and his housemates on August 2, 2006.

Mr. Wone first met defendant Joseph Price when Mr. Wone was an applicant to the College of William and Mary. Mr. Wone graduated from William and Mary in 1996, and received his law degree from the University of Pennsylvania law school in 1999. He remained friends with Mr. Price as he met and married Kathy Wone, and as Price became involved in a committed romantic relationship with defendant Victor Zaborsky in 2001, and as Dylan Ward also became a romantic partner of Price's in 2003, and a housemate of Mr. Price and Mr. Zaborsky after that. Price and Zaborsky attended the Wones' wedding and all three defendants hosted Mr. Wone's thirtieth birthday party in 2004 at their townhouse on Capitol Hill. The Wones socialized with the defendants approximately 2-4 times per year and visited them at home on three occasions after they moved from Capitol Hill to their shared townhouse residence at 1509 Swann Street, N.W.

At 9:30 p.m. on August 2, 2006, Mr. Wone telephoned his wife to tell her that he was en route from his CLE class to Radio Free Asia's offices to meet the late shift. He arrived at Radio Free Asia, located at 20th and M Streets, N.W., at 9:40 p.m. and telephoned defendant Price from his desk at 10:24 p.m., after meeting with employees there. Mr. Wone arrived at 1509 Swann Street, N.W. sometime thereafter. His Blackberry reflected a final e-mail transmission at 11:08 p.m. At that time, the District of Columbia was experiencing a heat wave.

Robert Wone was a fastidious man. He routinely hung up or folded his clothes after removing them, or put them in a basket for laundering. Ms. Wone knew him always to hang wet towels on a towel rack to dry after he used them and never to leave them on the floor. Ms. Wone knew her husband to sleep in a t-shirt and shorts at night, and to put a dental night guard into his

mouth each night after brushing his teeth and before going to bed. She testified that he was somewhat self conscious about the fact that he tended to sweat profusely and that, on hot nights, he would often kick off his sheets or occasionally sleep without any sheet or cover.

The only accounts of what happened inside 1509 Swann Street between 11:08 and 11:49 p.m. on August 2, 2006, are the defendants' statements about this time period given later to police and others. At 11:49 p.m., Mr. Zaborsky called 9-11 from 1509 Swann Street, N.W., reporting that that Mr. Wone had been stabbed inside the house. Paramedics arrived at 1509 Swann Street within five minutes, at 11:54, to find Mr. Wone lying on his back on a fold-out bed in the second floor guest room at the front of the house. He was suffering from three apparent stab wounds to the chest and abdomen, and was pulseless, unresponsive, pale and cold to the touch. Police arrived within minutes thereafter. The paramedics removed Mr. Wone from the house and departed the residence at 11:59 p.m. At 12:04 a.m., Ms. Wone received a telephone call from Mr. Price in which she recalls that he informed her that Mr. Wone had been stabbed in the back and was being transported to the hospital. The Medic unit arrived at George Washington Hospital Emergency Room at 12:06 a.m. on August 3, 2006. Mr. Wone was pronounced dead at 12:24 a.m. after resuscitative efforts failed. At the time of his death, Mr. Wone was wearing green nylon gym shorts and a grey and white William and Mary t-shirt. He was later found by the medical examiner to have a night guard in his mouth.

The defendants openly shared a three-way, committed, "polyamorous" relationship, in which Mr. Price and Mr. Zaborsky were paired at times and in which Mr. Price and Mr. Ward were paired at times. Some or all of the three engaged in relations outside the threesome, with the others' apparent general knowledge. They referred to themselves as a "family."

The defendants moved together to 1509 Swann Street, N.W. in 2005, from their prior shared residence on Capitol Hill. The Swann Street house was a three-story row house with a basement unit that was being rented on August 2, 2006, by the defendants' friend, Sarah Morgan. The house was a well-appointed, extremely neatly-kept, modern home. The first floor was laid out on an open floor plan. To get to the back of the house after entering the front door, one walked about 45 feet straight ahead, passing through a living room, a dining area, passing, on the left, the staircase to the second floor, and then, at the back of the house, arriving in the kitchen. At the back of the kitchen there was a rear door leading to an outdoor patio.

The rear patio was flag-stoned, with table, chairs and grill, enclosed by an approximately 8-foot wooden fence. Nicely landscaped plants and lighting inside brick borders spanned most of the inside of the rear fence and some of the sides of it. There were steep brick stairs that descended to the locked basement door along the right wall of the patio as one faced the house from the alley. A heavy metal gate the same height as the fence led to the rear alley which ran parallel to Swann Street. The patio was accessed from outside by a key.

The second floor of the townhouse was up a somewhat steep flight of stairs. Mr. Ward's bedroom door was at the very top of the stairs, at the rear of the house. If one then turned to the right at the top of the stairs, one traveled toward the front of the house, along a brief corridor that hugged the open railing overlooking the staircase downstairs, passing, on the left, a bathroom and an open sitting area. At the front of the house on the second floor was a study, also used as a guest room, in which there were a desk and a pull-out couch. This was the room in which Mr. Wone was found fatally stabbed by paramedics on August 2, 2006. The staircase to the third floor was immediately outside the guest room door. The third floor consisted of the master bedroom suite, which Mr. Price and Mr. Zaborsky shared.

The floors of the townhouse, throughout the entire house, including the staircases to the second and third floors, consisted of uncarpeted hardwood flooring. The house was secured by an alarm system that caused the front and rear doors on the first floor to “chime” when they were being opened from a closed position. The rear door which led from the kitchen to the patio was a large, windowed door with a deadbolt lock that aligned horizontally when locked and vertically when unlocked.

On the kitchen counter, to the left as one entered through the patio door, there was a wooden knife block filled with knives. There was a small flat screen television mounted on a wall also in the kitchen, visible as one entered from the rear patio. On the night of August 2, 2006, a lap top computer rested on the floor against the back of the couch in the living room and was visible as one passed from the kitchen to the area at the bottom of the stairs to the second floor. Upstairs, there was a flat screen television in the sitting area, along with other electronics.

On August 2, 2006, when paramedic Jeff Baker and his partner Tracy Weaver arrived in their Medic unit at 1509 Swann Street in response to the 9-11 call, Mr. Zaborsky stood on the front steps of the row house in a white terrycloth robe. Mr. Zaborsky was crying and still talking on the phone to the 9-11 dispatcher. Mr. Baker approached the house and asked Mr. Zaborsky, “what’s going on?” Mr. Zaborsky replied that the stabbing victim was on the second floor, and remained where he was. Mr. Baker entered the house carrying a flexible stretcher and began ascending the stairs to the second floor. When he was about $\frac{3}{4}$ of the way up the stair case, he encountered Mr. Ward, who was wearing a white terrycloth robe and walking toward him from the area of the second floor bathroom. Mr. Baker asked Mr. Ward, “what’s going on?” Mr. Ward wordlessly pointed down the hall in the direction of the front guest room, and then walked into his own bedroom.

Mr. Baker went down the hall to the doorway of the guest bedroom, where he stood at the side of the fold-out bed with the head of the bed to his right and the foot to his left. Mr. Wone lay on his back on the bed, with his head on the pillow at the top of the bed and his body positioned slightly at an angle. Mr. Price sat on the bed by the door, wearing underwear and no shirt, near Mr. Wone's body. Mr. Price had one leg tucked beneath him and his back to Mr. Baker. Again Mr. Baker inquired, "what's going on?" and Mr. Price responded, "I heard a scream," and moved over to clear the way for Mr. Baker to pass by. Mr. Baker entered the room and moved to the far side of the bed at Mr. Wone's right shoulder, facing the door and Mr. Price. He then began attending to Mr. Wone, observing the three stab wounds on his torso. Mr. Baker observed that Mr. Wone had no signs of life, and decided that he should be transported to the hospital. He also observed that there was little blood on Mr. Wone or on the scene, but that on Mr. Wone's abdomen there was a thin film of blood that looked as if it bore the impression of a kitchen towel or some item that had either wiped or been pressed on the torso. Mr. Baker rolled Mr. Wone onto his side on the bed, then placed the stretcher under him and rolled him onto the stretcher, removing him to the ambulance.

The scene in the guest room as police and paramedics found it upon the removal of Mr. Wone's body was as follows. The bed was made up with blue striped sheets and the top sheets and covers were folded down at a 45 degree angle under Mr. Wone's body. This was typical of the way in which the defendants usually made up their guest bed. There were two soft-ball sized spots of blood on the bed, possibly caused when paramedics rolled Mr. Wone's body onto the stretcher. The blood, a relatively small amount, about 100 ccs in quantity, had seeped through to the bedding below and had not been smeared or disturbed. On a desk in the room, Mr. Wone had laid out a number of personal items that were apparently undisturbed, including two wallets,

both containing money and credit cards, one of which was a “dummy” wallet that he carried so that he could turn it over, instead of his real wallet, in the event of a mugging. Also on the desk were a Blackberry and Mr. Wone’s purple night guard case. Mr. Wone’s cell phone was on a night stand. Some folded, white terrycloth towels were draped over the back of the desk chair.

A black-handled, steel-bladed kitchen knife that came from the knife block on the kitchen counter was on the nightstand nearest the door to the guest room. On the knife blade was a visible amount of Mr. Wone’s blood and also some of his cut chest hairs and a globule of human tissue or fat. The handle appeared entirely clean and there were some dots or spots of blood on the metal protrusion of the knife separating the blade from the handle, which is sometimes called the hilt. On the floor, piled near Mr. Wone’s overnight bag, was a white cotton terrycloth towel with blood stains on it. Otherwise the room was undisturbed and devoid of any other blood stains.

In the ambulance, Mr. Wone was immediately placed on a cardiac monitor and the paramedics noted that he was in Pulseless Electrical Activity (“PEA”), a state in which a patient has no discernible pulse but electrical activity of the heart is nevertheless reflected on a cardiac monitor. Mr. Baker sat at Mr. Wone’s head and intubated him to clear his airway. Ms. Weaver, his partner, attempted to get IV access in veins on the inside of Mr. Wone’s left elbow. She also may have attempted to gain IV access at the hand. When she was unable to do so, Mr. Baker attempted to gain IV access at the side of Mr. Wone’s neck, also unsuccessfully. A member of the fire department performed CPR, doing compressions on Mr. Wone’s chest to simulate a heartbeat. Mr. Wone’s t-shirt and shorts were cut off his body either en route to the hospital or once at the hospital, retained as evidence and turned over to police.

At the hospital, additional lines of access were established in Mr. Wone, including at the side of his chest, in his femur, at his left clavicle and chest tubes were inserted at his sides. After he was pronounced dead at the hospital, Mr. Wone's body was transported to the Office of the Chief Medical Examiner for the District of Columbia, where Dr. Lois R. Goslinosky performed an autopsy on his remains. Dr. Goslinosky ruled that the cause of Mr. Wone's death was stab wounds of his torso; she further ruled that the manner of his death was homicide. She found specifically that Mr. Wone sustained three stab wounds, one to the chest that involved the right lung, one to the chest that involved the pericardium, aorta and heart, and one to the abdomen that involved the diaphragm, small intestine, pancreas and superior mesenteric vein. The wounds were not far apart from one another on Mr. Wone's upper right torso. Each wound was 4-5" in depth and approximately 7/8" in length on the skin surface. The wounds were oriented identically, with the sharp edge of the knife pointed toward the right shoulder and the blunt edge of the knife pointed diagonally, toward Mr. Wone's left side. The direction of each stab wound was front to back and slightly downward. There was no physical evidence whatever of movement by Mr. Wone or the attacker at the time the stab wounds were inflicted. Dr. Goslinosky observed certain needle puncture marks at Mr. Wone's right ankle, left neck, chest, hand, and forearm inside the left elbow which she described as evidence of medical intervention. Despite Dr. Goslinoski's observations in this regard, it was not apparent from the medical charts or other evidence regarding Mr. Wone's treatment that all of these needle puncture marks actually were the result of medical intervention.

By shortly after midnight on August 3, 2006, police and detectives had converged on 1509 Swann Street. The entirety of the house quickly was designated a crime scene, and the defendants were asked to remain mainly in their living room. As they did so, they were observed

whispering among themselves, and Mr. Price placed his call to Kathy Wone. Sergeant Charles Patrick, the supervising officer on the scene until the arrival of homicide detectives, and Officer Gregory Alemian made similar observations of the defendants as officers generally inquired of them what had happened. At one point, Mr. Ward began to speak. Mr. Price gave him a stare the officers interpreted as forbidding. Mr. Ward stopped talking and Mr. Price began to make a statement about the events of that night. Mr. Price continued to do most of the talking to police, and led them on a tour as he explained the events of the evening.

Mr. Price stated that the defendants had been awakened by the door chime, that they believed Mr. Wone had been attacked by an unknown intruder who had scaled the patio fence, and entered the kitchen from outside through the rear door of the house. Defendants stated that they believed they had left the door unlocked and Mr. Price demonstrated that the rear door was in fact unlocked and slightly ajar at the time police first observed it. Mr. Price suggested that a person who frequented the alley might have committed the murder.

Sometime after 12:30 a.m., all three defendants agreed to be transported from 1509 Swann Street to the Metropolitan Police Department's Violent Crimes Branch ("VCB") offices. They were transported separately, and once at the VCB, each was placed in a separate interview room. Each then proceeded to give statements to a number of detectives throughout the early morning hours of August 3, 2006, and on into the morning. Some of those statements were not videotaped, but once detectives began to feel that things were not "adding up," they began taping the defendants' statements in accordance with procedures requiring that any suspect's statements be videotaped. Each defendant's statements have been admitted as a statement of a party opponent, against the declarant defendant, in his own case only. Each statement of the defendants also was admitted at trial as a "verbal act" to be considered against all defendants.

On the night of Mr. Wone's death and in the days and weeks following, members of law enforcement conducted extensive investigation of the crime scene, throughout the inside and outside of the house, including photographing, fingerprinting, and examination for the presence of blood throughout the house. They recovered many items from the house, including the knife from the nightstand, the bloody towel from the guest room floor and the bedding from the fold-out bed, to be retained as evidence and processed by various evidence examiners and technicians. In addition, numerous detectives and crime scene officers and technicians visually examined the interior and exterior of the home for evidence of an intruder. Law enforcement scoured the area outside the house, searching dumpsters and the alleyways in a several-block radius around 1509 Swann Street. Numerous experts examined the evidence in the case, including fingerprint examiners, hair and fiber experts, and blood pattern and crime scene reconstruction experts. Although some fingerprints of value were recovered from the guest room and compared with the known fingerprints of certain burglary suspects in the area, no useful fingerprint evidence emerged. Drain parts from inside and outside the house, as well as, other possible sources of DNA evidence, were tested for the presence of DNA, without results. Examinations were performed on the victim's clothing, the towel recovered from the scene and the bloody knife itself. Toxicologists performed testing on Mr. Wone's body fluids and tissue samples. This testing yielded no evidence of intoxication or of the presence of any substance that could give insight into why Mr. Wone did not move as he was stabbed. The murder of Robert Wone remains unsolved.

Analysis

I. The Reasonable Doubt Standard

The American criminal justice system presumes a person innocent until the prosecution proves him guilty. The degree of certainty necessary to convict a defendant of a criminal offense is “proof beyond a reasonable doubt.” The reasonable doubt standard of proof requires the factfinder “to reach a subjective state of near certitude of the guilt of the accused.” Rivas v. United States, 783 A.2d 125, 133-134 (D.C. 20001)(en banc)(quoting Jackson v. Virginia, 443 U.S. 307, 315 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). Proof of a fact beyond a reasonable doubt is thus “more powerful” than proof that the fact is “more likely true than not,” which is the standard of proof by which damages are awarded in civil cases. It is more powerful, even, than proof “that its truth is highly probable,” which is the standard called “clear and convincing evidence.” (Darius) Smith v. United States, 709 A.2d 78, 82 (D.C. 1998) (en banc) (approving formulation of reasonable doubt as “the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more important matters in life”). This requirement, a component of due process, “plays a vital role in the American scheme of criminal procedure, because it operates to give ‘concrete substance’ to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding.” Jackson, 443 U.S. at 315 (quoting In re Winship, 397 U.S. 358, 363, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

Many definitions of the term “reasonable doubt” have been debated and offered to jurors over time. Earlier in our country’s jurisprudence, a finding of proof beyond a reasonable doubt was equated with reaching “moral certainty.” See, Amy K. Collignon, *Note: Searching for an Acceptable Reasonable Doubt Jury Instruction in Light of Victor v. Nebraska*, 40 St. Louis L.J. 145 (Winter 1996). In the 1850 case of Commonwealth of Massachusetts v. Webster, Chief Justice Shaw defined the threshold of guilt under the reasonable doubt standard as an “abiding

conviction, to a moral certainty, of the truth of the charge.” Commonwealth v. Webster, 59 Mass. 295, 320 (Mass. 1850).

In recent decades, however, the Supreme Court has recognized that “the common meaning of the phrase [“moral certainty”] has changed.” Victor v. Nebraska, 511 U.S. 1, 16-17 (1994). Concerned that jurors, in applying a standard of “moral certainty” to the definition of reasonable doubt, might interpret the instruction “to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause,” the Supreme Court held in Cage v. Louisiana, 498 U.S. 39, 40-41 (U.S. 1990), that the reasonable doubt standard must not be “considered with reference to ‘moral certainty,’ rather than evidentiary certainty...”

Our Court of Appeals has approved the so-called “Redbook Jury Instruction” that we now give on reasonable doubt in Superior Court, in which we instruct juries that they must be “firmly convinced” of a defendant’s guilt. See e.g., Smith v. United States, 709 A.2d 78, 80 (D.C. 1998)(en banc)(approving substitution of the words “firmly convinced” for “abiding conviction”).¹

¹ Superior Court criminal juries now are instructed in part as follows regarding the definition of reasonable doubt:

Reasonable doubt, as the name implies, is a doubt based on reason--a doubt for which you have a reason based upon the evidence or lack of evidence in the case. If, after careful, honest, and impartial consideration of all the evidence, you cannot say that you are firmly convinced of the defendant's guilt, then you have a reasonable doubt.

Reasonable doubt is the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more important matters in life. However, it is not an imaginary doubt, or a doubt based on speculation or guesswork; it is a doubt based on reason. The government is not required to prove guilt beyond all doubt, or to a mathematical or scientific certainty. Its burden is to prove guilt beyond a reasonable doubt.

Redbook Jury Instruction 2.108

From the beginning, this case has been a test of the meaning of the reasonable doubt standard of proof. In the ordinary decisions we make in our daily lives, a person who believes something strongly, but without evidentiary support beyond a reasonable doubt, may still be correct in her belief and responsible in her decision making; but to convict an accused, a trier of fact must be firmly convinced based on evidentiary certainty.

In making my decisions, I am mindful that the law says that direct evidence and circumstantial evidence may be given equal weight. I also recognize that each defendant is entitled to have the issue of his guilt as to each of the crimes for which he is on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone. I may not rely on speculation or conjecture; I must only draw reasonable inferences from the facts that I find have been proven.

II. **Elements of the Charged Offenses**

The elements of each of the charged offenses are as follows.

Obstruction of Justice

For a defendant to be convicted of the offense of obstructing justice in the circumstances of this case, the government must prove beyond a reasonable doubt:

1. That the defendant obstructed or impeded, or endeavored to obstruct or impede, the due administration of justice in a pending . . . investigation or other proceeding . . . conducted by . . . an agency or department of the District of Columbia government; and
2. That the defendant did so . . . with the intent to undermine the integrity of the pending proceeding . . . or investigation.

D.C. Code § 22-722(a)(6); Criminal Jury Instructions for the District of Columbia 6.101(F)(5th ed. Rev. 2009)(hereinafter the “Redbook Jury Instructions”).² For purposes of this instruction the parties agree that the Metropolitan Police Department’s investigation of the murder of Robert Wone, begun by the 9-11 call placed by Mr. Zaborsky at 11:49 on August 2, 2006, was a “pending investigation or other proceeding” under District of Columbia law. D.C. Code § 22-721(4); Crutchfield v. United States, 779 A.2d 307, 328 (D.C. 2001).

Although the second element of the offense as stated in the Redbook Jury Instructions no longer states that the government must prove that the defendant acted with the “specific intent” to undermine the integrity of the pending investigation, this is in fact the level of intent the government must prove. See, e.g., Griffin v. United States, 861 A.2d 610, 614-615 (D.C. 2004).

A defendant need only have “endeavored” to obstruct justice to be guilty of the offense; he need not succeed in doing so. See Irving v. United States, 673 A.2d 1284 (D.C. 1996). Under a prior iteration of a different section of the obstruction statute, the term “endeavor” was interpreted to mean conduct having a “reasonable tendency” to achieve the result in the context of threats made to a witness. McBride v. United States, 393 A.2d 123, 131 (D.C. 1978).

Conspiracy

The charge of conspiracy to obstruct justice is a separate charge from obstructing justice itself. It is against the law to agree with someone to commit the crime of obstruction justice. Redbook Jury Instruction 7.102.

² Under District of Columbia law, one of the ways in which a person commits Obstruction of Justice is if he “corruptly, or by threats of force, [in] any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.” D.C. Code § 22-722(a)(6). The term “official proceeding” means any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, or grand jury proceeding. D.C. Code § 22-721(4).

For a defendant to be convicted of the crime of conspiracy to obstruct justice, the government must prove the following three elements beyond a reasonable doubt:

1. That there was an agreement between two or more people, between August 2, 2006, and November 21, 2008, to commit the offense of obstruction of justice;
2. That the defendant intentionally joined in that agreement -- or in other words that he knowingly and voluntarily participated in the agreement with the intent to commit the criminal objective; and
3. That one of the conspirators did one of the overt acts charged in the indictment during the conspiracy and in furtherance of the conspiracy.

McCoy v. United States, 890 A.2d 204, 210 (D.C. 2006); McCullough v. United States, 827 A.2d 48, 58 (D.C. 2003). Redbook Jury Instruction 7.102.

With respect to the first element of the offense, the agreement does not have to be a formal agreement or plan, in which everyone involved sat down together and worked out the details. On the other hand, merely because people get together and talk about common interests or do similar things, this does not necessarily show that an agreement exists to obstruct justice. The government must prove beyond a reasonable doubt that there was a common understanding among those who were involved to commit the crime of obstruction of justice. Redbook Jury Instruction 7.102 (and Comments and citations thereto).

With respect to the second element of the offense, it is not necessary to find that a defendant agreed to all the details of the crime. A person may become a member of a conspiracy even if that person agrees to play only a minor part, as long as that person understands the unlawful nature of the plan and voluntarily and intentionally joins in it with the intent to advance or further the unlawful object of the conspiracy. Id.

Mere presence at the scene of an agreement or of the crime, or merely being with or talking to the other participants, does not show that the defendant knowingly joined in the

agreement. Unknowingly acting in a way that helps the participants, or merely knowing about the agreement itself, without more, does not make the defendant part of the conspiracy.

As for the third element of the offense, the indictment in this case alleges the commission by defendants of certain specific overt acts, one of which must be proven beyond a reasonable doubt.

Tampering with Evidence

For a defendant to be convicted of the offense of Tampering with Physical Evidence in the circumstances of this case, the government must prove each of the following elements beyond a reasonable doubt:

1. That the defendant knew or had reason to believe that an official proceeding, namely the investigation by the Metropolitan Police Department of the District of Columbia of the death of Robert Wone, had begun or knew that the investigation was likely to be instituted;
2. That the defendant altered, destroyed, concealed or removed an object; and
3. That the defendant intended to alter that object to reduce its value as evidence, or its availability for use as evidence in the investigation of the death of Robert Wone.

D.C. Code § 22-723 (2008); Redbook Jury Instruction 6.114. The government need not prove that the defendant was the focus or target of the official proceeding in question.

III. Discussion

This was a long and complicated trial and it presented some very complex legal and factual issues. The parties spent a great deal of care presenting their evidence and building their cases. Superior Court Criminal Rule 23(c) states that “[i]n a case tried without a jury, the court shall make a general finding and shall in addition, on request, made before the general finding,

find the facts specially.” I think the right thing to do here, although I have not been asked to, is to find the facts specially. I think the parties and the public have a right to know what the fact finder has found from the evidence. My findings of fact and analysis are as follows.

Underpinning the government’s central theory of the defendants’ guilt is the premise that Robert Wone’s murderer “was either one of the defendants, or someone known to them who was able to enter without breaking.” Government’s Opposition to Anticipated Defense Motion for Judgment of Acquittal, at 11. The government conceded in closing argument, however, that the government’s proof at trial does not establish beyond a reasonable doubt that all three defendants, or even that any one in particular, participated in the murder. The government also conceded, therefore, that the evidence presented at trial has not proved beyond a reasonable doubt as to Mr. Price, Mr. Zaborsky or Mr. Ward, that he individually participated in the acts that brought about Mr. Wone’s death. The government further conceded that the evidence at trial is not sufficient to prove beyond a reasonable doubt that any particular defendant even knew about the murder when it was happening.³ The government’s theory of the defendants’ guilt is that, even if a defendant was not a participant in the murder, and even if he did not know about it until after it was done, at the time he discovered it, he became sufficiently aware of the circumstances of the murder to form an intent to conceal the truth from the police, and to act on that intent by altering the crime scene and lying to the police. Further, the government contends, each conspired with the other defendants to conceal the truth from the police and to cause the police to believe that an intruder had committed the murder.

Specifically, the government claims that the evidence establishes that the defendants altered the crime scene by planting a knife at the scene that was not the actual murder weapon, by applying blood to it to make it look like it was the actual murder weapon, and by cleaning

³ The government maintains that this deficiency in its proof is the result of the alleged cover-up.

blood from Mr. Wone's body. The government also contends that the evidence proves that each defendant accomplished the objective of the conspiracy by lying to members of law enforcement about the circumstances of the murder in his statements on August 2, and 3, 2006, in an effort to persuade them falsely that an intruder committed the murder.

The defendants contend that the government has failed to prove that the defendants, or any one of them, was involved in Mr. Wone's murder in any way, that any of them knew the true circumstances of the murder, that any of them altered the crime scene in any way or that any of them lied to police in any respect. They contend that each reasonably believed that an intruder had entered the home and stabbed Mr. Wone and that each truthfully communicated this belief, as well as his belief that none of the other defendants was involved in the crime, to police on August 2 and 3, 2006, and to others thereafter.

The Intruder Theory

As an initial matter, I am persuaded by the trial evidence in its totality, and I find, that the murder of Robert Wone was not committed by an intruder unknown to the defendants. My reasons for this conclusion are the evidence that: there was no sign of forced entry; no items or property were disturbed within the home; no mark or disturbance was made in the dust or debris on the fence railing, defendants' car or the plant beds inside the fence; not a single item of value of the type commonly taken by burglars was taken, including a flat screen television and a laptop computer in view of the kitchen and two wallets in plain view on the desk in the guest room; and the intruder had to have passed by Mr. Ward's room to get to the guest room, yet nobody entered Mr. Ward's room. Other reasons for my finding include the fact that Mr. Wone was entirely immobile at the time of the stabbing, and the deliberate and methodical way in which the wounds were inflicted. Mr. Wone, who certainly could have been asleep, with his night guard in his

mouth and lying on his covers on a very warm evening, nevertheless physiologically could have moved during the infliction of the three terrible wounds and just did not do so. The circumstances of the commission of the murder itself are inconsistent with the defense position that an intruder killed Mr. Wone.⁴

This is not to say that there is no possibility whatsoever that an intruder entered as defendants say one did. The defendants presented evidence that a sandbox cover next door in a yard enclosed by a fence as high as defendants' fence was crushed inward, suggesting this was done by the intruder who could have stepped on the sandbox as he climbed the fence. Had anyone done so, however, he would have fallen into the steep brick stairwell that led from defendants' patio down to their basement directly on the other side of the fence from the sandbox. Although defendants also demonstrated that a person could have – and that people actually have -- vaulted the fence from the alleyway, there is simply no evidence in this record that this happened on August 2, 2006.

The government has thus presented powerful evidence to support its claim that Robert Wone's murderer was either one of the defendants, or someone known to them who was able to enter without breaking. However, although I am satisfied that an intruder did not commit the murder, this is not the only issue before me. The essential question remains whether the evidence proves beyond a reasonable doubt as to any defendant that he knew sufficient information about the murder at any point on August 2-3, 2006, to develop the specific intent to undermine the integrity of the investigation and to take action on that intent.

⁴ I also include the fact of the remaining unexplained needle puncture marks in my rationale for this finding.

I will now turn to the more specific factual allegations underpinning the tampering, obstruction and conspiracy charges.

Defendants' Conduct at the Crime Scene

I find that the government has failed to prove that the true murder weapon was a knife from the cutlery set found in Mr. Ward's bedroom closet, or that the knife found on the night stand next to Mr. Wone's body was planted by any of the three defendants either individually or in concert, or that any of them applied blood to it with a towel to make it appear falsely to be the murder weapon. Although it is possible that the knife once housed in the cutlery set found in Mr. Ward's closet was the murder weapon, in that its dimensions are consistent with those of Mr. Wone's stab wounds, the court would have to speculate to conclude on the current record that that particular knife was ever inside 1509 Swann Street, or used to murder Mr. Wone. Moreover, as defendants argued, it makes little sense that a killer would successfully dispose of a murder weapon only to have his friends create evidence that could actually inculpate both the killer and the people covering up the killing.

I further conclude that the knife used to commit the stabbing was in fact the kitchen knife found on the nightstand. Dr. Henry Lee, the defense blood pattern expert, testified persuasively that the blood pattern on the knife was consistent with its having been inserted three times into the victim's torso, each time pushing a ridge of blood and other materials away from the tip and toward the handle of the knife. The pattern described by Dr. Lee is distinctly observable on the knife, which is depicted in the large photograph of the murder weapon as it sat on the nightstand (defense exhibit 167A).⁵ In addition, government and defense witnesses alike agreed, and the

⁵ I should note that I also have examined the weapon itself carefully, and the pattern still remains on the knife, though its condition appears altered by time and handling since its recovery.

photograph shows, that also on the blade of the knife recovered from the crime scene was at least one shiny globule of human fat or tissue, and several cut fragments of dark hair from Mr.

Wone's chest. For these reasons, I am convinced that the knife found at the crime scene was the murder weapon.

With respect to the questions whether Mr. Ward or Mr. Zaborsky in any respect handled the knife at the crime scene after the commission of the stabbing, or cleaned blood from the victim's body or elsewhere on the crime scene, I concluded at the close of the government's case that no reasonable juror could find that either of them did so, either as a principal or as an aider and abettor. I therefore granted their motions for judgment of acquittal as to the charges of tampering with evidence. For the same reasons, I conclude that the government's proof is insufficient to establish that either Mr. Ward or Mr. Zaborsky altered the crime scene or any evidence at the crime scene, including the knife, on August 2, 2006.

I turn now to Mr. Price's actions at the crime scene and his later statements about his actions at the scene. The varied and inconsistent statements Mr. Price made to police and others about his contact with the murder weapon and the body, taken together with my close examination of the physical evidence and the expert testimony of Dr. Lee have persuaded me that it is very likely that Mr. Price pulled the murder weapon from the victim's chest, actually wiped a portion of the blade and even possibly the handle of the knife with a towel at the crime scene, or wiped the body of blood. Further, if he did any of these things, he later omitted these material facts from his statements to police about his handling of the knife and the body. The question for the court has been how convinced I am that he did any or all of these things, and if he did them, why he did not tell police about them.

In Mr. Price's interview with Detectives Norris and Wagner, he told them he found the knife "laying" on Mr. Wone's chest and that he moved it. He speculated that his fingerprints might therefore be found on the knife. He made other references to fingerprints that could be on the scene and was clearly focused on explaining the presence of his own should they be found on the knife. After this interview, Mr. Price left the VCB and sat with his close friend Scott Hixson and Mr. Zaborsky – whom he had not seen since he left 1509 Swann Street earlier that night -- in Mr. Hixson's automobile. During his conversation with Mr. Hixson, in Mr. Zaborsky's presence, Mr. Price stated that he "pulled the knife out of his friend." A few minutes later, Mr. Price returned to the VCB and stated to Detective Waid during a narrative unprompted by questions, "I think I said the knife was laying on him. One of the officers actually – I think one of the guys last night or whatever said, was it – you know was it in him? I don't know. I mean it was very surreal."

Days later, Mr. Price repeated to Tara Ragone, a mutual friend of his and Mr. Wone's, that he had pulled the knife from Mr. Wone's chest. He later stated also to Ms. Ragone, in response to her question whether he had tampered with evidence at the scene, "there is a big difference between tampering with a crime scene and somebody wiping away some blood because they are freaking out waiting for the ambulance." But Mr. Price never admitted to police having pulled the knife from Mr. Wone's body, and never admitted wiping blood away from either the knife or the body.

The photograph of the knife as it sat on the night stand depicts a thin portion of the blade at the sharp edge of the knife that appears to have been wiped clean with some cloth or towel. This portion of the blade has none of the layering of blood resulting from three insertions into the torso that Dr. Lee pointed out on the rest of the blade. Dr. Lee acknowledged that the sharp edge

of the blade appeared unusually free of the layered blood pattern he had described on the rest of the blade, and attempted, unconvincingly, to explain that it could have occurred as the result of the knife's contact with the victim's t-shirt as the knife was pulled from the chest. This answer was unconvincing based on Dr. Lee's own testimony that the cut fibers of the t-shirt likely would have made a distinctive dotted pattern on the knife had they come in contact with it. On the hilt, of the knife appears the dotted pattern that Douglas Deedrick, the government's fiber expert testified, and I credit, was consistent with having been made by a looped fabric like a cotton towel, as opposed to another type of woven fabric. The black handle of the knife is pristine.

During the trial defense counsel demonstrated— in order to disprove the government's theory that blood had been applied to a clean knife for purposes of a plant -- the motion of drawing a knife that was an exact replica of the murder weapon, used for demonstrative purposes, through the actual blood stained towel found at the crime scene with thumb and forefinger pinched along the blade. On that towel, depicted in close-up view with back lighting in defendant's Exhibit 6040, are two mirror image, approximately nickel-sized spots of blood about three inches apart, and another approximately the size of a quarter also about three inches from one of the other two spots. These appear to have been made by the very motion demonstrated by counsel – the drawing of the knife, blade side into the towel but not touching the fabric so as to cut it, between pinched thumb and forefinger. Any person who has ever used a sharp kitchen knife while cooking has replicated that same motion in wiping the blade's edge clean with a towel.

Finally, although the knife was processed for fingerprints, none were found on it, including on the clean portion of the steel hilt and on the rougher surface of the black handle.

I am persuaded by all of this evidence that Mr. Price very likely tampered with and altered the murder weapon, and that he lied about his conduct in this regard to police with obstructive purpose, although I conclude that I cannot fairly find this beyond a reasonable doubt. I say this after lengthy consideration of this issue, because I conclude that I do not know enough specifically about what Mr. Price did at the crime scene with respect to the knife – what he wiped – or about why he did it. I have no direct evidence that Mr. Price did anything to the handle and can only suppose because he was so focused on fingerprints in his statements that he intended to remove fingerprints from it. Despite my conclusions that the knife blade was wiped along the sharp edge, it is the case that wiping the blade only would have been of little value to someone trying to destroy evidence. In addition, there was no expert testimony regarding this factual scenario, and the government has never adopted this theory in its prosecution.

With respect to the government's claim that Mr. Price wiped blood from the victim's body, there is evidence in his own admission to Ms. Ragone that he did. The physical evidence at the crime scene coupled with Mr. Price's statements to others suggested variously that Mr. Price may have – albeit briefly -- applied pressure to the wounds as he had been directed, or that he may have wiped the body for reasons that are unclear. Dr. Lee opined and the evidence showed that the towel recovered from the floor had a discernible blood stain on it that could have resulted from some application of pressure with the heel or four fingers of the hand to the wounds. The government's observation that there is not very much blood in that particular stain is correct. However, this evidence appears to be more or less consistent with the testimony of all of the medical and forensic pathology experts that Mr. Wone's injuries resulted in extensive internal bleeding, but very limited external bleeding. More cannot be said on this record about how much blood should have been on Mr. Wone, on the towel, or elsewhere on the scene.

On the current record, I cannot firmly conclude that Mr. Price wiped blood from the body, as opposed to applying pressure to the wounds, although it is probable in light of his statements that he did wipe the body. While there is some evidence supplied by Mr. Zaborsky's statements that a second towel may have been used at some point, this statement was not admitted for its truth against Mr. Price, and there is no physical evidence that any other, much more bloody, towel was in fact used or disposed of. Moreover, I cannot find that, if Mr. Price did wipe the body, he did so in an effort to alter the scene or destroy evidence. It is unclear that wiping blood from Mr. Wone's body could accomplish any particular obstructive purpose, something the government conceded in closing argument.

Additionally, I find that it is likely Mr. Price actually pulled the weapon from the victim's chest, based upon his own statements to others and intentionally omitted this fact from his statements to police as well. But I cannot say why he pulled the knife from the chest if he did so, or that his reasons for failing to tell police about it if he did were to obstruct justice rather than cover for a reflexive act he knew later would make him look foolish. The government conceded in closing argument that the latter motive would not support a conviction for tampering with evidence or obstruction of justice.

I conclude therefore that my findings regarding this discrete set of acts, that is, Mr. Price's handling of the knife, towel and blood at the crime scene and his statements about this to police, do not, by themselves, establish proof beyond a reasonable doubt of obstruction of justice.

For the same reasons, with respect to the charge of tampering with evidence remaining against Mr. Price only, although I find that it is very likely Mr. Price altered or destroyed evidence at the scene with the specific intent to reduce its value as evidence in the imminent

investigation of the death of Robert Wone, I further conclude that the government has not established these elements beyond a reasonable doubt.

Defendants' Statements

I turn now to the voluminous statements of the defendants and the question whether their content and the circumstances of their making establish the charged offenses in this case. The government's theory as to all three defendants is that the inconsistencies among and within the statements, and between the statements and the physical evidence in the case, establishes their falsity and that defendants deliberately misrepresented the facts in their statements with intent to undermine the integrity of the investigation.

The defendants' statements to police were lengthy and, because they were interviewed repeatedly by several detectives, they each repeated their assertions many times. Their statements to non-police in the next days and weeks largely repeated the story told to the police. Although the statements were not identical in every respect, they were extremely consistent in the important details.⁶ Each defendant posited that an "intruder" had entered the patio door after jumping the fence. Each defendant discussed Mr. Price's having heard a chime and referred to the chime as the way in which the entry of an intruder had been established. Mr. Zaborsky added that he heard a second chime that possibly represented the departure of the intruder. Each provided explanations for how the back door could have been left unlocked. Each stated he was certain neither of his housemates could have murdered Mr. Wone, despite the fact that none could fully explain the whereabouts of every member of the household at the time of the murder, and that there was so little evidence of an intruder. Each put the time that all four people in the

⁶ The exception to this is the statements Mr. Price made about his handling of evidence at the crime scene.

house went to bed that night as very close to 11 p.m. Each gave the same timeline regarding the discovery of the crime, stating that Mr. Price and Mr. Zaborsky ran downstairs together when they heard Mr. Wone's grunts or screams, and then that Mr. Ward heard the commotion created by Mr. Zaborsky's reaction and after a very few minutes emerged from his room.

There is certainly strong evidence in the record supporting the government's position. On the one hand the consistency of the defendants' statements is disturbing, given how little time they would have had to discuss the events if police truly arrived within minutes of their discovery of the crime. On the other hand, there are inconsistencies among the statements as well, such as in how the defendants described the way in which Mr. Price attended to the victim's wounds. These inconsistencies do not really establish much other than that sometimes even people who have seen or even quickly discussed the same thing describe it differently. But they do illustrate, somewhat in support, and somewhat in contradiction, of the government's theory, that in their statements the defendants were not speaking in perfect unison.

Other evidence supporting the government's theory includes the change in the way in which Mr. Zaborsky described the noises the victim made at the time of the stabbing, before and after he had contact with Mr. Price in a car outside the VCB on August 2, 2006. Mr. Zaborsky also equivocated after meeting with Mr. Price regarding how Mr. Price handled the knife, having just heard Mr. Price say he had pulled the knife from Mr. Wone's chest. The government argues this alteration of his statement is evidence of the conspiracy and Mr. Zaborsky's participation in it. It is clear from the evidence presented at trial that Mr. Zaborsky was very inclined to be directed by and influenced by Mr. Price. The evidence regarding their interpersonal relationship and their demeanors as observed by police and as observed by the court first hand in watching the videotapes is consistent in this regard. However, in and of itself, what the change in Mr.

Zaborsky's statements may reflect is this suggestibility, and not necessarily entry into or participation in a conspiracy. It is hard to tell whether he was just parroting or whether he was "back on message," as the government argues.

The government persuasively relies upon other evidence to prove its conspiracy claim as well as the falsity of defendants' statements. Mr. Price purported to speak for the other two defendants from the minute police arrived, and they let him do so. Mr. Price non-verbally enforced an apparent agreement that only he would talk to police by glaring at Mr. Ward when Mr. Ward spoke and causing him to stop speaking. The defendants' polyamorous, family relationship promoted a high degree of loyalty between and among the defendants such that they would not betray the "family" and expose the wrongdoing of one member, even if they had not been involved in that wrongdoing. The defendants' delayed report to police that Michael Price burglarized the Swann Street residence only two months later is further support for the government's assertion that defendants would cover up for someone close to them if they learned that person had murdered Mr. Wone.

On the other hand, Mr. Ward in particular was, according to the evidence, somewhat independent of the group and of Mr. Price's influence. He had indicated flagging interest in Mr. Price only weeks before the murder and Mr. Price was making efforts to draw him back into his sphere. Mr. Ward's statements at the time of Michael Price's October burglary of the Swann Street residence reflect that he was eager to report it, though also deferential to Mr. Price's relationship with his brother.

Some of the most persuasive evidence in the record supporting the government's position is the demeanor and conduct of the defendants. From the beginning, each one of them, Mr. Zaborsky included, displayed a demeanor wholly at odds with what anyone would expect from

an innocent person whose friend had just been murdered tragically and violently in his home. At every opportunity each had to respond to these terrible circumstances in a way that rang true, each instead responded discordantly. This was true during the 9-11 call, and when the defendants were on videotape, talking to police, and even talking to Ms. Wone, later. Mr. Price was consistently arrogant, unconcerned, flippant, aggressive, self-centered and dismissive. Mr. Zaborsky was histrionic and tearful but entirely passive and apparently unmotivated to help detectives solve the murder that had occurred in his home. His words and demeanor on the 9-11 call are at best odd and eyebrow-raising, and at worst calculated. Mr. Ward was, from the start, distant and detached, unmoved, patient and calm. He also was apparently unmotivated to help police solve this terrible crime, of which – had it truly been done by an intruder – he could easily have been the victim. However, despite the evidence going to each defendant's state of mind and demeanor, the fact of the matter is that I can only judge a person's knowledge and intent so far by this. Without more specific information about what any particular defendant knew and when he knew it, I can only conclude that some of the defendants probably were hiding things, but not that all had to be.

The government has introduced evidence concerning Michael Price, Joseph Price's brother. I am unconvinced that he committed the murder, essentially because none of the defendants acted like they thought he had. Mr. Price engaged in phone calls with him while on videotape at the VCB, and never acted like he was talking to a sibling who had been the cause of the "worst night of his life," or even like he was pretending to act "normally." None of the defendants went out of their way to suggest to police that Michael Price should be a suspect on August 2-3, 2006, or any time thereafter. None seemed at all concerned about continuing to allow him to have the key to their home. They changed the locks after he took their property in

October 2006, but continued to keep him intimately in their lives after the murder. Although they maintained the murder had been done by an intruder with no signs of forced entry, they never considered Michael Price a possible suspect, although he had their key, had a substance abuse problem, had stolen from them in the past and been violent in the past.

Because the defendants seemed so certain he was not the murderer, I conclude that Michael Price probably was not the murderer, although his failure to attend class that evening and his phlebotomy studies are certainly worth pausing over in the circumstances of this case. But that the defendants did not suspect Michael Price when it would have been so logical to do so, is additional evidence that the defendants, or at least some of them, knew who had murdered Mr. Wone.

I wish to give some attention to the government's argument that the defendants' statements constituted obstruction in the totality of the falsehoods that were told and the inconsistencies they expose. I will address some of the government's specific factual claims.

I have already decided that there is not enough evidence for me to find that Mr. Price's statements to police about his handling of the knife were materially false. I also conclude that the evidence is insufficient to establish Mr. Ward or Mr. Zaborsky materially misrepresented Mr. Price's contact with the knife to police, because I cannot find that either actually saw or knew what Mr. Price did with it.

The government claims that Mr. Ward's and Mr. Price's statements to police that the victim showered were false. Although there were no wet towels observed at the scene, and no other physical evidence that Mr. Wone did shower, I cannot exclude the real possibility that he nevertheless did so. It was a hot night and Mr. Wone was self-conscious about his sweating.

Additionally, there is no evidence in the trial record, and I would have to speculate to conclude that the defendants believed there was a purpose to lying about whether Mr. Wone showered.

The government has attempted to establish that there was a significant time delay in the reporting of the stabbing by means of Mr. Zaborsky's 9-11 call at 11:49 p.m. The government argues that the evidence of this delay is significantly at odds with the timelines related by all three defendants to law enforcement. I conclude that the government's evidence does not sufficiently establish the time of the stabbing or of the defendants' discovery of the stabbing to prove the defendants' timelines are false. The defendants' next door neighbor, Mr. Thomas, testified that he heard a scream from his bedroom at a time when he also believed he heard reporter Maureen Bunyan on television from downstairs, suggesting that this had to be before the conclusion of the news at 11:30 p.m. The government's medical evidence suggested that Mr. Wone may have survived for some minutes after the stabbing and the paramedics stated that Mr. Wone appeared to have been deceased for some time upon their arrival. However, none of this evidence is conclusive on the question of the truthfulness of the defendants' timeline.

While it is very possible that the call was not made so quickly as was asserted, it is also clear from the evidence that Mr. Wone could not have survived, untreated, in PEA for very long. If defendants did lie about the timeline it surely was material and in and of itself would have supported a conviction for obstruction and conspiracy as to all three. I am not convinced by the trial record, however, that the government has established its claims about the time of the stabbing, beyond a reasonable doubt.

Further, I am persuaded that, with or without a delay, defendants discussed the murder before the police arrived based on their initial statements to police that they had resolved that an intruder had entered the home through the back door, and other admissions later made by the

defendants that they had discussed the crime. This does not necessarily prove they conspired to obstruct justice in their discussions, although it is some evidence that they had the opportunity to do so. In addition, the defendants' own extensive evidence regarding the possible time of the stabbing in relation to when the 9-11 call was made establishes that there likely was enough time after the stabbing for the defendants to have discussed what they would say to police and even to tamper with the knife or other items at the scene if that was what happened.

Based on the preceding analysis of the statements and the circumstances of their making by all defendants, I am not firmly convinced that any of the particular details the government has identified within any of the defendant's statements was a knowing, falsehood uttered with the intent to obstruct justice. Overall, the defendants' story that an intruder committed the offense is incredible beyond a reasonable doubt. But as I have said, that does not answer the question whether each defendant knew this at the time he spoke to investigators on August 2-3, 2006, or later in talking to others. Any one of the defendants could have been the odd man out of the scheme. Any one of them could have believed the others when he was told that they were not responsible for Mr. Wone's death and that they had no idea how it had occurred. Any one of them could have found the intruder theory plausible in the face of these denials, if he did not know the real truth, and if he trusted his co-defendants at the time. If any defendant was this one, his statements were not knowingly false and his statements were not made with the intent to keep the police from solving the murder. I do not find beyond a reasonable doubt that the statements of any defendant were so knowingly or demonstrably false that they alone establish the charges.

IV. Conclusions

My analysis of the evidence has been lengthy. Although I have attempted to discuss all of the parties' major factual contentions as they relate to the charges, I may not have discussed every piece of evidence that is in the record. I have however, considered all of the evidence in the trial record extremely carefully, and my verdicts are the product of my application of the law, and the burden of proof beyond a reasonable doubt, to the evidence presented at this trial. As I have said, the scope of a reasonable mind is broad, and both innocence and guilt beyond a reasonable doubt may be fair conclusions based upon given facts.

The question remains whether, viewing the entire trial record of the defendants' actions in their totality, the evidence establishes beyond a reasonable doubt the charges against the defendants. Based on the foregoing analysis and upon the entire record, I cannot, in the end, conclude with the high level of certainty required by the reasonable doubt standard that any particular one of the defendants was not the odd man out. That is, I cannot find beyond a reasonable doubt as to each individual defendant, as if he were being tried alone, that he knew enough about the murder of Robert Wone to have endeavored to impede the due administration of justice, with the specific intent to undermine the integrity of the investigation into Mr. Wone's death, or that he agreed with others to do so.

Despite the many suspicious and even damning circumstances, despite the implausibility of the intruder story, and despite the discordant and inappropriate demeanor and conduct of the defendants, I am constrained to conclude that the government has not eliminated, beyond a reasonable doubt, the real possibility created by what I have termed the "math problem" in this case. It is very probable that the government's theory is correct, that even if the defendants did not participate in the murder some or all of them knew enough about the circumstances of it to provide helpful information to law enforcement and have chosen to withhold that information for

reasons of their own. Nevertheless, after lengthy analysis of the evidence I conclude that the government has failed to prove beyond a reasonable doubt the essential elements of obstruction of justice as to Mr. Price, Mr. Zaborsky or Mr. Ward. I further find that, for the same reasons, that the government has failed to prove beyond a reasonable doubt as to each defendant that he joined a conspiracy to obstruct justice. I find also, for all of the reasons I have stated, that the government has failed to prove beyond a reasonable doubt that Mr. Price committed the offense of tampering with evidence.

My verdicts represent my effort to fairly and impartially follow the rule of law. My focus on the difference between “moral certainty” and “evidentiary certainty” in this case is probably cold comfort to those who loved Robert Wone and wish for some measure of peace or justice, and I am extremely sorry for this. I believe, however, that the reasonable doubt standard is essential to maintaining our criminal justice system as the fair and just system we wish it to be. I cite the wisdom of English jurist William Blackstone that it is “better that ten guilty persons escape than that one innocent suffer.” 4 William Blackstone, Commentaries.

I want to say how very much I have appreciated the level of candor and civility displayed by all the lawyers at all stages of my involvement in this case and during this lengthy trial. The conduct and presentations by all of the lawyers for both the prosecution and the defense in this case were at all times highly professional, and reflected the highest standards of ethics and advocacy.

Verdicts

Based on the foregoing, I find Joseph Price, Dylan Ward and Victor Zaborsky each not guilty of the offenses of obstruction of justice and conspiracy to obstruct justice. I find Joseph Price not guilty of the offense of tampering with evidence.



Lynn Leibovitz
Associate Judge

Date: June 29, 2010

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