UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	No. 21 CR 536
v.	)	
	)	
KAROL J. CHWIESIUK & AGNIESZKA CHWIESIUK	)	Hon. Ana C. Reyes
	)	

DEFENDANTS' POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL

The defendants, Karol J. Chwiesiuk and Agnieszka Chwiesiuk, through their undersigned counsel, respectfully request that this Court enter judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. In support, the Chwiesiuks state:

I. Background

Karol J. Chwiesiuk and Agnieszka Chwiesiuk were charged in connection to the events occurring at the United States Capitol on January 6, 2021. Both defendants were charged with entering and remaining in a restricted building in violation of 18 U.S.C. § 1752(a)(1) (Count One); disorderly or disruptive conduct in a restricted building in violation of 18 U.S.C. § 1752(a)(2) (Count Two); disorderly conduct in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Four); and parading, demonstrating, or picketing in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G) (Count Five). Dkt. 54. Karol J. Chwiesiuk was further charged with entering or remaining in a room designated for the use of a member of Congress in violation of 40 U.S.C. § 5104(e)(2)(C)(i) (Count Three). *Id.*

The case proceeded to jury trial on August 7, 2023. On August 9, 2023, after the government rested, the defendants moved for dismissal of all counts pursuant to Federal Rule of Criminal Procedure 29. The Court denied the motion as to Counts 1, 2, 4, and 5 of the superseding information but asked for further briefing on Count 3. *See* Dkt. 100-102. On August 10, 2023, the

defendants rested and renewed their motion for judgment of acquittal as to all counts. The Court heard further argument and held the motion in abeyance. The jury began deliberating. On August 11, 2023, the jury reached a verdict of guilty of Counts 1, 2, 4, and 5 as to defendants Agnieszka Chwiesiuk and Karol Chwiesiuk. The jury reached a verdict of not guilty of Count 3 as to defendant Karol Chwiesiuk.

II. Argument

The Court should grant the defendants' motion for judgment of acquittal pursuant to Rule 29 as to all counts of conviction. Rule 29 requires a "court on the defendant's motion to enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). A defendant seeking a judgment of acquittal based on insufficient evidence must show that no "rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *United States v. Williams*, 836 F.3d 1, 6 (D.C. Cir. 2016). The Court "must view the evidence in the light most favorable to the government, drawing no distinction between direct and circumstantial evidence, and giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." *Id.* This standard is "highly deferential" to the jury verdict. *Id.* Pursuant to Rule 29, the Court may reserve decision on the motion, proceed with the trial, 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. Fed. R. Evid. 29(b). If the jury has returned a guilty verdict, the Court may set aside the verdict and enter an acquittal. Fed. R. Evid. 29(c)(2).

A. Count 1 – Entering or Remaining in a Restricted Building or Grounds 18 U.S.C. § 1752(a)(1)

No rational trier of fact could have found the elements of Count 1 beyond a reasonable doubt as to either Karol or Agnes Chwiesiuk. To find a defendant guilty of Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1), the Court must find the

following beyond a reasonable doubt: (1) the defendant entered or remained in a restricted building without lawful authority to do so; and (2) the defendant did so knowingly. 18 U.S.C. § 1752(a)(1). *Also see United States v. Griffith*, No. 21-244-2 (CKK), 2023 U.S. Dist. LEXIS 84966, at *15 (D.D.C. May 16, 2023).

The government presented insufficient evidence to demonstrate that the Defendants acted knowingly. As the jury was instructed, "a person acts 'knowingly' when if he or she realizes what he or she is doing and is aware of the nature of his or conduct, and does not act through ignorance, mistake, or accident." Final Jury Instructions, Dkt. 103 at 8. *Also see* Seventh Circuit Pattern Criminal Jury Instructions; *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005); *United States v. Carpenter*, 21-cr-00305 (JEB), ECF No. 97, at 12. In determining this element, the jury "may consider all of the evidence, including what the defendant did, said, or perceived." *Id.* Here, the act that the Defendants must have taken knowingly is to enter or remain in a restricted building or grounds. *See* 18 U.S.C. § 1752(a)(1); *See* Superseding Information, Dkt. 54 at 1. The term "restricted building or grounds means, "any posted, cordoned off, or otherwise restricted area of a building or grounds where a person protected by the Secret Service is or will be temporarily visiting." Final Jury Instructions, Dkt. 103 at 8.

The Chwiesiuks do not contest that they entered a restricted building or grounds. However, there was insufficient evidence for the jury to conclude that they did so knowingly. The government presented evidence that established what areas were restricted on the morning of January 6 and the ways such areas were marked as restricted. This included physical temporary barriers such as bike racks and snow fencing and signs that informed the reader, "area closed." 8-8-23 Trial Transcript (Tr.) 52-53, 58-59. The government further presented evidence that established that individuals other than Agnes and Karol Chwiesiuk removed physical barriers and ultimately breached the Capitol building. *Id.* at 75, 87-88. However, the initial breach of the restricted grounds took place at

12:57 p.m. *Id.* at 115. It was 12:57 p.m. when the barricades, including fencing or bike racks, were removed and no longer blocked the path nor visually provided notice that the area was restricted. *Id.* at 115-118. As Officer Borradaile testified, there was "a sea of people running over them," causing the barriers to "disappear from [his] vision." 8-9-23 Tr. 133.

The Chwiesiuks did not reach the Capitol until approximately 2:57 p.m. and did not near the restricted grounds until approximately 2:35 p.m., at which point there were no longer any barricades indicating the grounds were restricted. *Id.* at 74, 104-105. They crossed no barricades on the sidewalk while approaching nor did they cross barricades upon reaching the Capitol building. 8-10-23 Tr. 31. There were no longer any perimeter markings nor signs to provide notice of which areas were restricted. *Id.* Further, there were no law enforcement officers that informed the Defendants or others nearby that the area was restricted. *Id.* Thus, there was no evidence presented to demonstrate that they knew such areas were restricted.

The facts established in this case are very similar to that of *United States v. Martin* where Judge McFadden found that the government had failed to establish the "knowingly" element for 18 U.S.C. § 1752(a)(1). *See United States v. Martin*, No. 21-CR-394, 4-6-22 Trial Transcript, Dkt. 41 at 259-260. While not binding upon this Court, his logic is persuasive. There, the government had presented evidence that signage and barricades had been present on the defendant's path towards the capitol, but similarly to the instant case, were no longer present when the defendant himself reached the restricted grounds. The Court explained that the government had "adduced evidence that people are typically not allowed in these spaces. But when the defendant was there, there were hundreds of people in the area, most of them peacefully milling about and some waving flags. The government has not shown anything that would alert a reasonable person that they were all trespassing and this was a violation of a restricted area." *Id.* at 260-261. Similarly, here, the Defendants approached a then-unmarked area that was filled with hundreds of people who were largely peaceful. Thus, this

Court should find that there was insufficient evidence to demonstrate that they knowingly entered restricted grounds.

The evidence that they knowingly entered the Capitol building itself is similarly lacking. When the Chwiesiuks entered the building, they did so with a large crowd. There was law enforcement present, but they were not stopping anyone from entering the building nor were they telling people to leave. 8-9-23 Tr. 106-109. The building alarms and the violence that had accompanied the initial breaches into the Capitol building took place long before the Chwiesiuks entered. The definition of "restricted building or grounds," clearly contemplates an area that has been marked as restricted. Here, where there were no signs nor barricades present to provide notice to the Defendants, and where hundreds of people were entering and walking through the Capitol building in the presence of law enforcement, no reasonable juror could find that the Defendants knowingly entered or remained in a restricted building or grounds.

Further, no reasonable juror could have found sufficient evidence as to Count 1 for either Defendant because there was evidence that they acted under a good faith belief. The jury was instructed that "A person who enters or remains in a restricted area with a good faith belief that he or she is entering or remaining with lawful authority is not guilty of this crime." Final Jury Instructions, Dkt. 103 at 8-9. Here, Mr. Chwiesiuk testified that there were no restricted signs on the path traveled by him and Agnes. 8-10-23 Tr. 28-30. He further testified that he did not know the area was restricted. *Id.* As described above, the government's evidence supports the same conclusion in that testimony and videos confirmed that there were no signs or barricades by the time the Chwiesiuks' reached the restricted areas. Further, the evidence demonstrated that the first time an officer told Mr. Chwiesiuk that no one was allowed in the Capitol, he and Agnes left. *Id.* at 39-46. When the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, the evidence necessarily fails to establish guilt beyond a reasonable doubt. *United*

States v. Harris, 942 F.2d 1125, 1130 (7th Cir. 1991). Here, the evidence as to the Chwiesiuks knowledge that they were entering or remaining in a restricted building or ground is at least equally consistent with a theory of innocence as a theory of guilt. For these reasons, the Court should enter judgment of acquittal as to the Chwiesiuks on Count 1 of the Superseding Information.

B. Count 2 – Disorderly or Disruptive Conduct in a Restricted Building 18 U.S.C. § 1752(a)(2)

No rational trier of fact could have found the elements of Count 2 beyond a reasonable doubt as to either Karol or Agnes Chwiesiuk. To find a defendant guilty of Disorderly and Disruptive Conduct in a Restricted Building, in violation of 18 U.S.C. § 1752(a)(2), the government must prove the following beyond a reasonable doubt: (1) the defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building; (2) the defendant did so knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions; and (3) the defendant's conduct occurred when, or so that, his [or her] conduct in fact impeded or disrupted the orderly conduct of Government business or official functions. 18 U.S.C. § 1752(a)(2). *Also see United States v. Grider*, No. 21-022 (CKK), 2022 U.S. Dist. LEXIS 230569, at *36-37 (D.D.C. Dec. 21, 2022). First, as to the requirement that they acted "knowingly," the evidence was insufficient because it demonstrated a lack of physical barricades nor other notice to the Defendants of what areas were restricted, as explained in detail above.

Further, while the Defendants do not deny that they were present on restricted grounds, there was insufficient evidence for a rational juror to conclude that they engaged in disorderly or disruptive conduct in such locations nor that the Defendants intended to do so. The jury was instructed that "disorderly conduct' is conduct that tends to disturb the public peace or undermine public safety," and that "disruptive conduct' is a disturbance that interrupts an event, activity, or the normal course of process." Final Jury Instructions, Dkt. 103 at 9. *Also see Grider*, 21-cr-22 (CKK)

(ECF No. 150 at 24) (quoting 'Disorderly,' Black's Law Dictionary (9th ed. 2009) ("'[D]isorderly' conduct is that which 'tends to disturb the public peace, offend public morals, or undermine public safety.'); *and see* Redbook 6.643.

Judges in this jurisdiction have disagreed on how to interpret the definitions of these terms in the context of collective action taking place on January 6. Judge Kollar-Kotelly has previously held in January 6 cases that "even mere presence in an unlawful mob or riot is both (1) "disorderly" in the sense that it furthers the mob's "disturb[ing] the public peace" and (2) "disruptive" insofar as it disturbs the normal and peaceful condition of the Capitol grounds and buildings, its official proceedings, and the safety of its lawful occupants." *Grider*, No. 21-022 (CKK), 2022 U.S. Dist. LEXIS 230569, at *37-38 (D.D.C. Dec. 21, 2022) (citing *United States v. Rivera*, 607 F. Supp. 3d 1, 9 (D.D.C. 2022)).

On the other hand, Judge McFadden has found that the statute prohibiting disorderly and disruptive conduct requires more than mere presence in the crowd. *See Martin*, No. 21-CR-394 Tr. 268-70. In *Martin*, the government argued that the defendant was disorderly because he was a part of the crowd approaching the Capitol. *Id.* at 268-69. The Court found this unpersuasive because the defendant himself was quiet and orderly. *Id.* at 269. Further, at the time that the defendant was moving in the crowd, the crowd was peaceful. *Id.* The Court explained, "there are often crowds in public places, such as concerts, rallies, et cetera." *Id.* Thus, the Court found that as to the defendant's mere presence in the crowd, "no reasonable juror could find this activity to be disorderly." *Id.* The government further argued that it met its burden to demonstrate disruptive or disorderly conduct in that the defendant was present in the rotunda when a crowd of other protesters were yelling at, confronting, and assaulting officers. *Id.* The Court rejected this argument because "the defendant engaged in none of that" and "did not shout or chant." *Id.* The government further argued that the defendant was disorderly or disruptive because the evidence showed that he

filmed an officer telling him to "get back," while he was pulling a man off a window of the Capitol building and the defendant did not appear to follow this command. *Id.* at 269-70. The Court again rejected this as proof beyond a reasonable doubt because the mere act of filming an officer was not actively resisting or hindering the officers. *Id.* at 270. Overall, the Court found that the government must present evidence that the defendant himself engaged in disruptive or disorderly conduct while present in the Capitol building, not that other individuals near him did so.

While this Court is not bound by the rulings of these prior cases, the statute itself suggests that more than mere presence is required as a matter of law. The statute clearly requires both presence in a restricted area and a further act that qualifies as disorderly or disruptive conduct. *See* 18 U.S.C. § 1752(a)(2). Mere presence in a restricted area is prohibited by 18 U.S.C. § 1752(a)(1) and it is the further act of engaging in disruptive or disorderly conduct, that does, in fact, disrupt the orderly business of government, that sets the two sections of the statute apart. *Compare* 18 U.S.C. § 1752(a)(1) *to* § 1752(a)(2). Thus, in the present case, the government was required to prove more than the Defendants' mere presence on January 6 to demonstrate that they engaged in disorderly conduct or that they intended to do so.

The government failed to do so, and no reasonable juror could have found otherwise. The government's evidence demonstrated that the Chwiesiuks calmly entered restricted grounds and the Capitol building. They remained inside for approximately 8 minutes and took photographs. There was no evidence that either defendant brought a weapon, engaged in any violence, nor took part in actions such as breaching Capitol doors or windows. There was no evidence that either defendant yelled, chanted, or interfered with police activities. The government presented extensive evidence of others engaging in disruptive or disorderly conduct on restricted grounds on January 6. However, the government failed to present evidence that either of these specific Defendants engaged in such conduct, nor that they intended to do so.

Finally, there was insufficient evidence to demonstrate that the Defendants' engaged in disruptive or disorderly conduct that "occurred when, or so that, their conduct in fact impeded or disrupted the orderly conduct of government business or official functions." 18 U.S.C. § 1752(a)(2). The evidence established that there was no government business or official functions occurring at the time of the Defendants' conduct, even if the Court finds that their conduct qualified as disruptive or disorderly. The government presented evidence that government business was impeded. Specifically, the government introduced testimony that the joint session had to be stopped to ensure the safety of the members of Congress. 8-8-23 Tr. 82. However, that took place around 2:20 p.m. when the Defendants had not reached restricted grounds. The government failed to present evidence that the Chwiesiuks engaged in disruptive or disorderly conduct that did "in fact impede or disrupt the orderly conduct of Government business or official functions." 18 U.S.C. § 1752(a)(2).

The government argued at trial that it did present sufficient evidence for this element in that the jury learned that shortly after 8:00 p.m., hours after the joint session was stopped and hours after the Chwiesiuks' conduct took place, Congress reconvened. 8-10-23 Tr. 222-23. In prior cases where the Court has found sufficient evidence for this element of the offense, there was testimony explaining that "proceedings could not recommence until the entire building was secured and cleared of rioters." *River*a, 607 F. Supp. 3d at 9. Thus, because the evidence indicated that Congress was waiting to reconvene and could not do so while any rioters were present in the Capitol, the Court found that a rioter merely being present in the building was in fact impeding the orderly conduct of government business. *Id.*

There was no such evidence presented to the jury in this case. Agent Galvey testified that the Vice President was kept in a secure location for safety reasons and ultimately went back to continue the certification proceedings hours after the Chwiesiuks conduct took place. 8-9-23 Tr. 20-21.

However, the government failed to present any evidence suggesting that Congress was attempting to reconvene the joint session, at all or while the Chwiesiuks were in the Capitol, nor did the government explain to the jury why the Chwiesiuks presence in the Capitol would have stopped Congress from doing so. Thus, this case is again more similar to *Martin* where the Court found evidence lacking on this element. There, the Court explained, "I find that the proceedings had been halted well before he entered the capitol building and that they did not resume until long after he had left. There's no evidence that he intended to disrupt the proceedings or that his presence alone in fact did so." *See Martin*, No. 21-CR-394 Tr. 270. While *Martin* differs in that it was a bench trial, there was no evidence presented to the jury in this case upon which it could rely to find that the Chwiesiuks conduct did in fact impede on the orderly conduct of government business that was not occurring at the time of their conduct. Thus, the Court should find that there was insufficient evidence for a reasonable juror to conclude that the Defendants engaged in conduct that did in fact impede the orderly conduct of official government business and enter a judgment of acquittal as to Count 2.

C. Count 4 – Violent Entry and Disorderly Conduct in a Capitol Building 40 U.S.C. § 5104(e)(2)(D)

No rational trier of fact could have found the elements of Count 4 proven beyond a reasonable doubt as to either Karol or Agnes Chwiesiuk. In order for the Court to find Defendant guilty of Violent Entry and Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D), the Court must find the following beyond a reasonable doubt: (1) the defendant engaged in disorderly or disruptive conduct in any of the United States Capitol Buildings; (2) the defendant did so with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress; and (3) the defendant acted willfully and knowingly. 40 U.S.C. § 5401(e)(2)(D). *Also see Griffith*, No. 21-244-2 (CKK), 2023 U.S. Dist. LEXIS 84966, at *20.

First, as explained above, the government failed to demonstrate that either Defendant engaged in disorderly or disruptive conduct while inside a United States Capitol Building, nor did the government present evidence to demonstrate their intent to do so. Unique to this Count, the intent proven must be specifically to impede a session of Congress or either House of Congress. 40 U.S.C. § 5104(3)(2)(D). As described in detail above, there was no session of Congress upon which the Defendants could have intended to impede when they were inside the Capitol building nor was there evidence presented to the jury in support of a theory that they intended to impede Congress reconvening by their mere presence in the building.

Further, there was insufficient evidence to demonstrate that the Defendants acted willfully and knowingly. The "knowingly" element has been addressed in the previous sections and the evidence was insufficient for the same reasons as to Count 4. Additionally, there was insufficient evidence that the Defendants acted willfully. The jury was instructed that "a person acts 'willfully' if he acts with the intent to do something that the law forbids, that is, to disobey or disregard the law." Final Jury Instruction, Dkt. 103 at 10. *Also see Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (a person acts "willfully" when they "act with knowledge that their conduct was unlawful).

Here, the government failed to present evidence demonstrating that either of the Defendants acted with intent to do something that the law forbids. The Defendants peacefully entered the Capitol building with hundreds of other people in the presence of law enforcement. When law enforcement informed the Defendants that they could not be in the building, the Defendants left, demonstrating an intent to comply with the law once they were made aware of it. Thus, the government failed to present sufficient evidence to demonstrate that the Defendants willfully and knowingly engaged in disorderly or disruptive conduct with the intent to impede a session of Congress.

D. Count 5 – Parading, Demonstrating, or Picketing in a Capitol Building 40 U.S.C. § 5104(e)(2)(G)

No rational trier of fact could have found the elements of Count 5 beyond a reasonable doubt as to either Karol or Agnes Chwiesiuk. To find a defendant guilty of Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G), the Court must find the following beyond a reasonable doubt: (1) the defendant paraded, demonstrated, or picketed in any of the United States Capitol Buildings; and (2) the defendant acted willfully and knowingly. 40 U.S.C. § 5104(e)(2)(G); *Also see Griffith*, No. 21-244-2 (CKK), 2023 U.S. Dist. LEXIS 84966, at *21.

There was again insufficient evidence for a reasonable juror to find that the defendants acted knowingly and willfully, for the same reasons explained in previous sections. Further, there was insufficient evidence to demonstrate that the defendants 'paraded, demonstrated, or picketed,' while inside the Capitol building. The factual scenario of this case is again very similar to *Martin* in that the Defendant entered the building with a flag in hand but did not himself engage in activities qualifying as parading, demonstrating, or picketing. Upon finding that the evidence was lacking as to this element, the Court explained,

> While there is little guidance on the exact meaning of [paraded, demonstrated, or picketed], I do not think the defendant's actions while in the capitol building are consistent with any of them. He spent almost his entire time in the capitol building videoing the surroundings and what others were doing. He did not shout, he did not wave his flag, he did not confront officers, he did not engage in violence. Indeed, his conduct was about as minimal and nonserious as I can imagine for a protester in the Capitol on January 6th.
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> *Martin*, No. 21-CR-394 Tr. 271.

Similarly, here, the Defendants entered the building, photographed their surroundings, did not shout, confront others, or engage in violence, and left after only approximately 8 minutes. Karol Chwiesiuk, like the defendant in *Martin*, did have a flag in hand but he did not take action that would qualify as parading. Further, Agnes Chwiesiuk did not carry a flag. There was no evidence upon

which a reasonable juror could have relied to find that their actions qualified as parading, demonstrating, or picketing. Thus, the Court should enter judgment of acquittal as to Count 5.

III. Conclusion

For these reasons, the Defendants, Karol J. Chwiesiuk and Agnieszka Chwiesiuk, respectfully request that this Court grant their post-trial motion pursuant to Federal Rule of Criminal Procedure 29, set aside the jury's guilty verdict, and enter judgment of acquittal on Counts 1, 2, 4, and 5.

Respectfully submitted,

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