

1 Defendant requests this court set aside the guilty verdict on Count IV of the information charging
2 Defendant with solicitation to commit marriage fraud and enter a judgment of acquittal. The
3 government opposes the motion.

4 Defendant proffers the following arguments: 1) it is legally impossible for Defendant to have
5 solicited Severene Kosam (Kosam) to commit the offense of marriage fraud, because it is legally
6 impossible for Kosam to commit marriage fraud; 2) the evidence was insufficient for a reasonable jury
7 to find beyond a reasonable doubt that Defendant committed the offense of solicitation; 3) the
8 government did not prove every element of the offense because Defendant was never identified by any
9 witness as the individual who committed the offense; and 4) the government presented evidence of
10 entrapment then failed to show that Defendant was predisposed to violate the law.

11 First, Kosam did not have to be legally capable of committing the solicited act in order for
12 Defendant to be guilty of solicitation. Second, there was sufficient evidence of Defendant's identity
13 and guilt. Lastly, the government did not have to prove Defendant was predisposed to violate the law.
14 Therefore, for the reasons stated below, Defendant's motion for judgment of acquittal is hereby
15 DENIED. Each of Defendant's arguments will be addressed in turn.

16 17 **II. LAW GOVERNING JUDGMENT OF ACQUITTAL**

18 "The court on motion of a defendant or of its own motion shall order the entry of judgment of
19 acquittal of one or more offenses charged in the information after the evidence on either side is closed
20 if the evidence is insufficient to sustain a conviction of such offense or offenses." Com. R. Crim. P.
21 29(a). The proper test is whether any rational trier of fact could have found the essential elements of
22 the crime in question beyond a reasonable doubt. *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 237
23 (1995); *United States v. Sharif*, 817 F.2d 1375, 1377 (9th Cir. 1987). The trial court should deny the
24 motion unless the government's evidence is insufficient to sustain the conviction. *Ramangmau*, 4
25 N.M.I. at 237-38.

26 "In making this assessment, the court may not weigh or draw inferences from the evidence, or
27 assess witness credibility; these are functions of the jury". *Id.* at 238 citing *Curley v. United States*, 160
28 F.2d 229, 232-33 (D.C. Cir. 1947). Further, "the existence of conflicting testimony does not, in itself,

1 merit a judgment of acquittal." *Id.* There is nothing subjective in the trial court's review; rather, the
2 court's determination is whether a "reasonable juror" could have found the defendant guilty beyond a
3 "reasonable" doubt and the court must do so without weighing the evidence. *Jackson v. Virginia*, 443
4 U.S. 307, 319 n. 13 (1979).

6 **III. DISCUSSION**

7 **1. Solicitation Does Not Require the Solicitee Be Legally Capable of Committing the Solicited** 8 **Offense**

9 Defendant argues the government did not present sufficient evidence showing Defendant
10 solicited Kosam to commit marriage fraud because it is legally impossible for Defendant to commit the
11 offense of marriage fraud. Defendant reasons because Kosam was only seeking monetary benefits
12 rather than an immigration benefit, it is legally impossible for Kosam to commit marriage fraud and,
13 therefore, it is legally impossible for Defendant to be convicted of soliciting Kosam to commit such
14 offense.¹ The government argues Defendant misunderstands the law.

15 Section 302(a) of the Commonwealth code reads:

16 A person commits the offense of solicitation, if , with intent to
17 promote or facilitate the commission of an offense, that person
18 commands, encourages, or requests another person to engage in the
19 acts or cause the result specified by the definition of the offense, or
engages in conduct which would establish complicity in the specified
conduct or result.

20 6 CMC § 302(a).

21 Marriage fraud is defined as follows:

22 Any individual who knowingly enters into a marriage for the sole
23 purpose of obtaining a labor or immigration benefit or for the purpose
24 of evading any provision of Chapter 3, Chapter 4 or Chapter 6 of this
Title, or any United States immigration law, shall be guilty of
marriage fraud.

25 3 CMC § 4366(a).

26
27 ¹This court will not address whether or not Kosam is actually legally capable of committing marriage fraud
28 because it is inconsequential to whether or not Defendant solicited Kosam in violation of 6 CMC § 302(a).

1 Although not yet addressed by the CNMI Supreme Court, the majority of jurisdictions agree it
2 is no defense that the solicitee is criminally irresponsible or immune to prosecution or that there has
3 been no overt act towards the commission of the crime. *See e.g. Martin v. Kaiser*, 907 F.2d 931 (10th
4 Cir. 1990); *Initiative & Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005);
5 *Kimbrough v. State*, 544 So. 2d 177 (Ala. 1989); *People v. Burt*, 45 Cal.2d 311 (1955); *State v. Waskin*,
6 481 So. 2d 492 (Fla. Dist. Ct. App. 1985); *People v. Terrell*, 339 Ill. App. 3d 786 (Ill. App. Ct. 2003);
7 *People v. Lubow*, 29 N.Y.2d 58 (1971). Further, the solicitor may be found guilty even if the solicitee
8 refuses, or for some other reasons fails to commit the crime solicited. *Id.* It follows then, that the crime
9 of solicitation is committed even though the person solicited (such as an undercover officer) would
10 never have acquiesced to the scheme set forth by the defendant.

11 As discussed throughout the aforementioned cases, criminalizing solicitation is not intended to
12 punish the solicited crime; rather, it is to protect citizens from being exposed to inducement to commit
13 or join in the commission of the crimes. *See e.g. People v. Burt*, 45 Cal.2d 311 (1955). This court finds
14 no reason to interpret the Commonwealth's similar statute any differently.

15 A careful reading of the statute's language and other jurisdiction's concurring interpretations
16 of their respective solicitation statutes makes it clear that Defendant's argument is fatally flawed.
17 Solicitation does not require that the person being solicited (here, Kosam) be actually culpable or guilty
18 of the underlying crime. Further, nothing in the statute or otherwise cited by Defendant lends itself
19 towards the interpretation that Defendant proffers. It is inconsequential that Kosam could not have
20 been charged with marriage fraud. Defendant solicited Kosam to *participate* in the crime and that is
21 the act which 6 CMC §302(a) prohibits. Therefore, it is unquestionable that Kosam, the solicitee, did
22 not have to be legally capable of committing marriage fraud in order for Defendant to be convicted of
23 solicitation.

24
25 **2. The Evidence Was Sufficient for a Reasonable Jury to Find Beyond a Reasonable Doubt**
26 **That Defendant Committed the Offense of Solicitation**

27 In order to support the jury's verdict, there must be sufficient evidence satisfying the following
28 elements of solicitation: (1) that Defendant had the intent to promote or facilitate the commission of

1 marriage fraud and; (2) that Defendant commanded, encouraged, or requested Severene Kosam to either
2 engage in acts or cause the result specified by the definition of marriage fraud (or) engage in conduct
3 which would specify complicity in the specified conduct or result. 6 CMC § 302(a).

4 Taking the evidence in the light most favorable to the government, the following is undisputed.
5 Defendant was going to pay \$1,000 to Kosam if Kosam turned in the marriage application. To further
6 entice Kosam's cooperation, Defendant offered to pay Kosam an additional \$500 if Defendant obtained
7 his green card. Defendant told Kosam he needed to be married because his "paper" was going to expire.
8 Defendant and Kosam met privately and Defendant stated that he wanted the arrangement to be between
9 only the two of them. Defendant never intended on living with Kosam. Kosam was already involved
10 in a romantic relationship and Defendant had knowledge of this relationship. As far as Defendant knew,
11 Kosam was entering the marriage solely for monetary benefits. Further, there was no evidence
12 presented which indicated that the marriage was for any legitimate purpose.

13 From this testimony alone, which is only a small snapshot of all the evidence presented at trial,
14 a reasonable fact finder could infer that Defendant encouraged and requested Kosam to engage in acts
15 that would result in marriage fraud. Most notably, Defendant's offer of money to Kosam in exchange
16 for Kosam's participation has substantial significance and weighs heavily towards a finding of guilt.
17 Therefore, the offer of money coupled with evidence that the marriage had no legitimate purpose is
18 sufficient for a reasonable juror to find Defendant guilty of Solicitation to Commit Marriage Fraud in
19 violation of 6 CMC §302(a).

20 Defendant cites his own self serving statements as proof of conflicting evidence requiring
21 judgment of acquittal. However, it is the jury's duty to weigh the credibility of the witnesses and reach
22 conclusions of fact. *Ramangmau*, 4 N.M.I at 238. Nonetheless, even if the jury found Defendant
23 credible – that Kosam called him ten or fifteen times – this court fails to see how that obviates
24 Defendant's own role in the arrangement of the marriage and Defendant's enticement of Kosam with
25 money. Whether Kosam called Defendant fifteen times or not is inconsequential. The testimony is not
26 mutually exclusive and the jury could have believed both witnesses and still reached their verdict.

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1 **3. The Government Proved Defendant Was the Individual Who Committed the Offense**

2 Defendant argues that the government failed to establish every element of their case because the
3 witnesses never identified Defendant as the individual whom they were testifying about. The
4 government argues that Defendant has failed to meet his burden of proof because he offers no evidence
5 that supports his assertion but nonetheless, many witnesses motioned towards defendant during their
6 testimony leaving no doubt that they were speaking about Defendant.

7 Commonwealth Rule of Civil Procedure 83.2 directs parties to the proper use of authority in
8 pleadings. Failure to comply with these rules permits a court to disregard cited authority. Here,
9 Defendant makes multiple references to internet addresses which purport to be supporting authority.
10 The court will not encourage improper use of authority by searching out unreliable and unauthenticated
11 web sites. The proffered cases cited by Defendant, if proper authority for this court to consider, are
12 reported in official reporters and should be cited as such.² Or, at the very least, the court should be
13 provided with a copy of the case as dictated by Rule 83. For this reason, this court did not review any
14 of Defendant's ill cited cases relating to this issue.

15 However, one improper cite referenced by Defendant implicates *State v. Freeman*, 380 So. 3d
16 1288 (Fla. 1980), and a proper cite is given for *Freeman*. (Defendant's Motion 12:5-7). In *Freeman*,
17 the court held that even where identity was the *only issue* in the trial, the trial court was not required
18 to give a separate jury instruction regarding identity. The court agreed with a dissenting judge at the
19 lower court in reversing the lower court's ruling. Quoting the dissenting judge, the court stated:

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21 In charging the jury on the elements of the crime, the burden of proof,
22 and the presumption of innocence, the court made reference to "the"
23 defendant no less than 36 times. There was only one defendant in the
24 courtroom and it is inconceivable to me that a jury did not realize
25 about whom the court was talking or that the jury must find this
26 particular defendant guilty of each and every element of the crime
27 beyond a reasonable doubt.

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30 ²Defendant includes proper citations in footnote 7 following an improper internet cite. (Defendant's Motion at
31 12:23-25). Each of the cases involve a defendant who was not present at trial. This is a stark contrast from the case at
32 bar, therefore, those cases have no bearing on defendant's claims.

1 *Id.* at 1288.

2 Similarly, this court clearly instructed the jury that the government had the burden of proving
3 each and every element of the charged offense. Further, the jury was told they must find the defendant
4 guilty of each and every element. The court, when instructing the jury, also referenced “the defendant”
5 multiple times. This court agrees that it is preposterous to believe the jury did not know they must find
6 this *particular defendant* guilty of the elements of the crime.

7 Moreover, unlike *Freeman*, identity was never an issue at trial. In fact, as shown by the
8 transcript in Defendant’s motion, questions posed to the witness were often framed using language
9 which directly implicated “the defendant” such as “how many times did you meet with the defendant.
10 . . .” (Defendant’s Motion at 9:3; 9:24). Further, Defendant was introduced by his counsel at the
11 commencement of trial. Additionally, Defendant’s own statements indicate he was the individual who
12 was meeting and discussing the marriage with Kosam. (Defendant’s Motion at 10:22-25; 11:1-8).

13 There was sufficient evidence for a reasonable jury to identify Defendant as the individual who
14 committed the charged offense.

15
16 **4. The Commonwealth Did Not Have the Burden of Proving Defendant was Predisposed to**
17 **Violate the Law**

18 Defendant argues that the evidence at trial “patently showed that the proffered crime was
19 induced by government agents” and the Commonwealth then failed to show Defendant was predisposed
20 to commit the offense. (Defense Motion at 12:12-14). Further, Defendant argues that where the facts
21 are undisputed, it is for the court to rule on the issue of entrapment as a matter of law. The government
22 contends that Defendant fails to make any substantiating argument to support his position.

23
24 This jurisdiction has adopted the subjective test of entrapment which “focuses on the criminal
25 predisposition of the accused prior to government contact and reserves the issue of predisposition to the
26 trier of fact.” *Commonwealth v. Cabrera*, 4 N.M.I. 240, 249 (1995). Where the facts are undisputed,
27 the court rules on the issue of entrapment as a matter of law. *Id.* The defense of entrapment has two
28 elements: “(1) government inducement of the crime, and (2) the absence of predisposition on the part

1 of the defendant." *Id.* "Once *the defendant has shown evidence of inducement*, the burden shifts to the
2 government to prove that the defendant was predisposed to violate the law before the government
3 intervened." *Id.* quoting *United States v. Mkhsian*, 5 F.3d 1306, 1309 (9th Cir. 1993) (internal quotes
4 removed) (emphasis added).

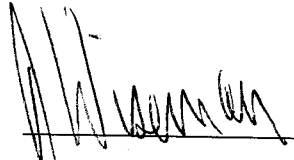
5 During trial, Defendant never raised the defense of entrapment nor presented any evidence of
6 inducement. Defendant never requested a jury instruction regarding entrapment, elicited testimony
7 regarding entrapment, or argued entrapment during his opening or closing statements. Further, none
8 of this supposed "patent" evidence of entrapment is cited in Defendant's motion. Defendant merely
9 states that there was evidence presented during the prosecutions case in chief which showed government
10 inducement of the crime. This falls spectacularly short of proving government inducement.

11 Nonetheless, assuming, *arguendo*, that the government's evidence showed government
12 inducement, Defendant's claim still fails. It is true that where the facts are undisputed, the court must
13 rule on entrapment as a matter of law. However, this certainly does not give rise to a *sua sponte* duty
14 on behalf of the court to raise the issue and find entrapment as a matter of law. Further, Defendant cites
15 no authority that imposes such a duty on the court.

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17 **IV. CONCLUSION**

18 Consistent with the foregoing opinion Defendant Miah's motion for judgment of acquittal is
19 DENIED.

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21 So **ORDERED** this 18 day of November 2008.

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25 David A. Wiseman, Associate Judge
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