

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

UNITED STATES OF AMERICA)
)
)
 V.)
)
)
 ERICA MAXWELL)

NO. 2:06-CR-079 PS

FINAL JURY INSTRUCTIONS

Date: March 22, 2007

s/ Philip P. Simon
Philip P. Simon, Judge
United States District Court

COURT'S INSTRUCTION NO. 1

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

COURT'S INSTRUCTION NO. 2

The evidence consists of the testimony of the witnesses and the exhibits admitted in evidence.

COURT'S INSTRUCTION NO. 3

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider, among other things:

- the witness's intelligence;
- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the manner of the witness while testifying; and
- the reasonableness of the witness's testimony in light of all the evidence in the case.

COURT'S INSTRUCTION NO. 4

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life. In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inferences you make must be reasonable and must be based on the evidence in the case.

COURT'S INSTRUCTION NO. 5

Some of you have heard the phrases “circumstantial evidence” and “direct evidence.” Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. All the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

COURT'S INSTRUCTION NO. 6

Certain things are not evidence. I will list them for you:

First, testimony that I struck from the record, or that I told you to disregard, is not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

COURT'S INSTRUCTION NO. 7

It is proper for an attorney to interview any witness in preparation for trial.

COURT'S INSTRUCTION NO. 8

The indictment in this case is the formal method of accusing the defendant of an offense and placing the defendant on trial. It is not evidence against the defendant and does not create any inference of guilt.

The defendant is charged with the offense of participating in a conspiracy to sell drug paraphernalia. She is also charged with the offense of selling and offering to sell drug paraphernalia. The defendant has pleaded not guilty to the charges.

COURT'S INSTRUCTION NO. 9

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged. The government has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove her innocence or to produce any evidence at all.

COURT'S INSTRUCTION NO. 10

The defendant has an absolute right not to testify. The fact that the defendant did not testify should not be considered by you in any way in arriving at your verdict.

COURT'S INSTRUCTION NO. 11

You have received evidence of statements said to be made by the defendant . You must decide whether the defendant did in fact make the statements. If you find that the defendant did make the statements, then you must decide what weight, if any, you feel the statements deserve. In making this decision, you should consider all matters in evidence having to do with the statements, including those concerning the defendant herself and the circumstances under which the statements were made.

COURT'S INSTRUCTION NO. 12

You have heard evidence that before trial a witness made a statement that may be inconsistent with the witness' testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness' testimony in trial. You may not use it as evidence of the truth of the matters contained in that prior statement.

COURT'S INSTRUCTION NO. 13

You have heard testimony from Boris Zivkovich and John Thorsky who:

(a) received immunity; that is, a promise from the government that any testimony or other information they provide would not be used against them in a criminal case;

(b) received benefits from the government in connection with this case, namely the dismissal of other charges and a promise that the government will notify the sentencing judge of the nature, extent and value of their cooperation with the government; and

(c) have pleaded guilty to an offense arising out of the same occurrence for which the defendant is now on trial. Their guilty pleas are not to be considered as evidence against the defendant.

You may give the testimony of John Thorsky and Boris Zivkovich such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

COURT'S INSTRUCTION NO. 14

You have heard recorded conversations. These recorded conversations are proper evidence and you may consider them, just as any other evidence.

I am providing you with the recordings and a player. You are not required to play the tapes, in part or in whole. You may rely, instead, on your recollections of these recordings as you heard them at trial.

COURT'S INSTRUCTION NO. 15

Count 1 of the indictment charges the defendant with the crime of conspiracy in violation of Title 18, United States Code, Section 371, which reads in pertinent part as follows:

“If two or more persons conspire to commit an offense against the United States . . . and one or more such persons does any act to effect the object of the conspiracy [they are in violation of this statute].”

COURT'S INSTRUCTION NO. 16

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain the charge of conspiracy, the government must prove:

First, that the conspiracy as charged in Count 1 existed;

Second, that the defendant knowingly became a member of the conspiracy with an intention to further the conspiracy; and

Third, that an overt act was committed by at least one conspirator in furtherance of the conspiracy.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

COURT'S INSTRUCTION NO. 17

The object of the conspiracy alleged in Count 1 of the indictment in this case is selling or offering for sale drug paraphernalia in violation of Title 21, United States Code, Section 863.

COURT'S INSTRUCTION NO. 18

When the word “knowingly” is used in these instructions, it means that the defendant realized what she was doing and was aware of the nature of her conduct, and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case. You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word. You may not conclude that the defendant had knowledge if she was merely negligent in not discovering the truth.

COURT'S INSTRUCTION NO. 19

A defendant's association with conspirators or persons involved in a criminal enterprise is not by itself sufficient to prove her participation or membership in a conspiracy.

If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

COURT'S INSTRUCTION NO. 20

Count 9 of the indictment charges the defendant with knowingly selling and offering to sell drug paraphernalia in violation of Title 21, United States Code, Section 863.

COURT'S INSTRUCTION NO. 21

To sustain the charge contained in Count 9 of the indictment the government must prove the following propositions:

First: That on or about the dates set forth in the indictment, the defendant did knowingly offer for sale, or sold, paraphernalia; and

Second: That the paraphernalia offered for sale, or sold, was primarily intended or designed for drug use.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of that charge.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of that charge.

An item is “designed for use” as drug paraphernalia if it is principally used with illegal drugs by virtue of its objective features, *i.e.* features designed by the manufacturer. The objective characteristics of some items establish that they are designed specifically for use with controlled substances. Items that meet the “designed for use” standard constitute drug paraphernalia irrespective of the knowledge or intent of one who sells them or offers them for sale.

You are instructed as a matter of law that

- (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
- (2) water pipes;
- (3) carburetion tubes and devices;
- (4) smoking and carburetion masks;
- (5) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
- (6) miniature spoons with level capacities of one-tenth cubic centimeter or less;
- (7) chamber pipes;
- (8) carburetor pipes;
- (9) electric pipes;
- (10) air-driven pipes;
- (11) chillums;
- (12) bongs;
- (13) ice pipes or chillers;

are items of drug paraphernalia.

COURT'S INSTRUCTION NO. 23

In order to prove that paraphernalia is “primarily intended” for drug use, the government must prove that the defendant was aware that customers in general were likely to use the merchandise with illegal drugs.

COURT'S INSTRUCTION NO. 24

In determining whether an item is “primarily intended” for drug use, for those items that are not specifically listed in Instruction No. 22, you may consider the following:

- (1) Instructions, oral or written, provided with the item concerning its use;
- (2) Descriptive materials accompanying the items which explain or depict its use;
- (3) National and local advertising concerning its use;
- (4) The manner in which the item is displayed for sale;
- (5) Whether the owner or anyone in control of the item is a dealer of tobacco products; and
- (6) The existence and scope of legitimate uses of the item.

In addition, for those items not specifically listed in Instruction No. 22, if you find that the items are traditionally intended for use with tobacco products, including any pipe, paper or accessory, then you must find that the defendant is not guilty.

COURT'S INSTRUCTION NO. 25

The indictment charges that the offense was committed "on or about" certain specified dates. The government must prove that the alleged offense happened reasonably close to that date but is not required to prove that the alleged offense happened on that exact date.

COURT'S INSTRUCTION NO. 26

Any person who knowingly aids, counsels, commands, induces or procures the commission of an offense may be found guilty of that offense. That person must knowingly associate with the criminal activity, participate in the activity, and try to make it succeed.

COURT'S INSTRUCTION NO. 27

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

A verdict form has been prepared for you.

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the form, and each of you will sign and date it.

COURT'S INSTRUCTION NO. 28

Each count of the indictment charges the defendant with having committed a separate offense.

Each count and the evidence relating to it should be considered separately, and a separate verdict should be returned as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count.

COURT'S INSTRUCTION NO. 29

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the marshal.

COURT'S INSTRUCTION NO. 30

The verdict must represent the considered judgment of each juror. Your verdict, whether it be guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.