

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

UNITED STATES OF AMERICA)
)
 v.)
)
 MICHAEL McMCCLELLAN,)
 TINA McMCCLELLAN,)
)
 Defendants.)

Cause Number: 2:12 CR 153

FINAL JURY INSTRUCTIONS

Dated: November 18, 2013

s/ Philip P. Simon
PHILIP P. SIMON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

INSTRUCTION NO. 1

Members of the jury, I will now instruct you on the law that you must follow in deciding this case. You must follow all of my instructions about the law, even if you disagree with them. This includes the instructions I gave you before the trial, any instructions I gave you during the trial, and the instructions I am giving you now.

As jurors, you have two duties. Your first duty is to decide the facts from the evidence that you saw and heard here in court. This is your job, not my job or anyone else's job.

Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proved the defendants guilty beyond a reasonable doubt.

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you. In addition, do not let any person's race, color, religion, national ancestry, or gender influence you.

You must not take anything I said or did during the trial as indicating that I have an opinion about the evidence or about what I think your verdict should be.

INSTRUCTION NO. 2

The charges against the defendants are in a document called an indictment. You will have a copy of the indictment during your deliberations.

The indictment in this case charges defendant Michael McClellan with one count of harboring an alien and three counts of mail fraud. The defendants Michael McClellan and Tina McClellan are each charged with one count of money laundering. The defendants have pled not guilty to the charges.

The indictment is simply the formal way of telling the defendants what crimes they are accused of committing. It is not evidence that the defendants are guilty. It does not even raise a suspicion of guilt.

INSTRUCTION NO. 3

Each defendant is presumed innocent of each and every one of the charges. This presumption continues throughout the case, including during your deliberations. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the particular defendant you are considering is guilty as charged.

The government has the burden of proving each defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case.

A defendant is never required to prove his innocence. He is not required to produce any evidence at all.

INSTRUCTION NO. 4

You must make your decision based only on the evidence that you saw and heard here in court. Do not consider anything you may have seen or heard outside of court, including anything from the newspaper, television, radio, the Internet, or any other source.

The evidence includes only what the witnesses said when they were testifying under oath, the exhibits that I allowed into evidence, and any stipulations that the lawyers agree to. A stipulation is an agreement that certain facts are true.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers' questions and objections likewise are not evidence.

A lawyer has a duty to object if he thinks a question is improper. If I sustained objections to questions the lawyers asked, you must not speculate on what the answers might have been.

If, during the trial, I struck testimony or exhibits from the record, or told you to disregard something, you must not consider it.

INSTRUCTION NO. 5

Give the evidence whatever weight you decide it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience.

People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences, so long as they are based on the evidence.

INSTRUCTION NO. 6

You may have heard the terms “direct evidence” and “circumstantial evidence.” Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

INSTRUCTION NO. 7

Do not make any decisions simply by counting the number of witnesses who testified about a certain point.

What is important is how truthful and accurate the witnesses were and how much weight you think their testimony deserves.

INSTRUCTION NO. 8

A defendant has an absolute right not to testify or present evidence. You may not consider in any way the fact that a defendant did not testify or present evidence. You should not even discuss it in your deliberations.

INSTRUCTION NO. 9

Part of your job as jurors is to decide how believable each witness was, and how much weight to give each witness' testimony. You may accept all of what a witness says, or part of it, or none of it.

Some factors you may consider include:

- the intelligence of the witness;
- the witness's ability and opportunity to see, hear, or know the things the witness testified about;
- the witness's memory;
- the witness's demeanor;
- whether the witness had any bias, prejudice, or other reason to lie or slant the testimony;
- the truthfulness and accuracy of the witness's testimony in light of the other evidence presented; and
- inconsistent or consistent statements or conduct by the witness.

INSTRUCTION NO. 10

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

INSTRUCTION NO. 11

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. You may consider an inconsistent statement made before the trial only to help you decide how believable a witness's testimony was here in court. If an earlier statement was made under oath, then you can also consider the earlier statement as evidence of the truth of whatever the witness said in the earlier statement.

INSTRUCTION NO. 12

You have heard testimony from Francis Lopez and Horacio Bastida who:

- were promised and received benefits in return for their testimony and cooperation with the government;
- and, in the case of Francis Lopez, has admitted lying under oath;

You may give these witnesses' testimony whatever weight you believe is appropriate, keeping in mind that you must consider that testimony with caution and great care.

INSTRUCTION NO. 13

You have heard testimony that defendant Michael McClellan made a statement to Phil Coduti of the Department of Homeland Security. You must decide whether the defendant actually made the statement, and, if so, how much weight to give to the statement. In making these decisions, you should consider all of the evidence, including the defendant's personal characteristics and circumstances under which the statement may have been made.

INSTRUCTION NO. 14

You have heard recorded conversations and seen video recordings. This is proper evidence that you should consider together with and in the same way you consider the other evidence.

You were also given transcripts of the conversations to help you follow the recordings as you listened to them. The recordings are the evidence of what was said and who said it. The transcripts are not evidence. If you noticed any differences between what you heard in a conversation and what you read in the transcripts, your understanding of the recording is what matters. In other words, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of a recording, you must ignore the transcripts as far as those parts are concerned. You may consider a person's actions, facial expressions, and lip movements that you are able to observe on a video recording to help you determine what was said and who said it.

I am providing you with the recordings and a device with instructions on its use. It is up to you to decide whether to listen to the recording during your deliberations. You may, if you wish, rely on your recollections of what you heard during the trial.

INSTRUCTION NO. 15

Certain summaries were admitted in evidence. You may use those summaries as evidence.

It is up to you to decide how much weight to give to the summaries.

INSTRUCTION NO. 16

If you have taken notes during the trial, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

INSTRUCTION NO. 17

Count 1 of the indictment charges the defendant Michael McClellan with harboring an alien. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant harbored the persons named in the indictment; and
2. The persons named in the indictment were aliens; and
3. The persons named in the indictment remained in the United States in violation of the law; and
4. The defendant knew that the persons named in the indictment were not lawfully in the United States.

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

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

INSTRUCTION NO. 18

An “alien” is any person who is not a citizen or national of the United States.

A “citizen of the United States” is a person who was born within the United States or naturalized through judicial proceedings.

A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States.

To “harbor” an alien means to provide a known alien with a secure haven, a refuge, or a place to stay where it is unlikely that the authorities will be seeking him.

INSTRUCTION NO. 19

A person acts knowingly if he or she realizes what they are doing and are aware of the nature of their conduct, and does not act through ignorance, mistake, or accident. In deciding whether a defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.

INSTRUCTION NO. 20

Count 1 charges the defendant with harboring more than one illegal alien. The government is not required to prove that the defendant harbored every one of the illegal aliens alleged in Count 1. However, the government is required to prove that the defendant harbored at least one of the illegal aliens alleged in Count 1. To find that the government has proven this, you must agree unanimously on which particular illegal alien the defendant harbored, as well as all of the other elements of the crime charged.

INSTRUCTION NO. 21

Counts 2, 3, and 4 of the indictment charge the defendant Michael McClellan with mail fraud. In order for you to find the defendant guilty of mail fraud, the government must prove each of the following elements beyond a reasonable doubt:

1. That the defendant knowingly devised or participated in a scheme to defraud, as described in Count 2, 3 and 4; and
2. That the defendant did so with the intent to defraud; and
3. The scheme to defraud involved a materially false or fraudulent pretense, representation, or promise, and
4. That for the purpose of carrying out the scheme or attempting to do so, the defendant caused the use of a private or commercial interstate carrier in the manner charged in the particular count.

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

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

INSTRUCTION NO. 22

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money, or property or cause the potential loss of money or property to another, by means of materially false or fraudulent pretenses, representations or promises.

A materially false or fraudulent pretense, representation, or promise may be accomplished by the omission or the concealment of material information.

INSTRUCTION NO. 23

In considering whether the government has proven a scheme to defraud, the government must prove that one or more of the false or fraudulent pretenses, representations or promises charged in the portion of the indictment describing the scheme be proved beyond a reasonable doubt. The government, however, is not required to prove all of them.

INSTRUCTION NO. 24

A false or fraudulent pretense, representation, promise, omission, or concealment is “material” if it is capable of influencing the decision of the persons to whom it was addressed.

It is not necessary that the false or fraudulent pretense, representation, promise, omission, or concealment actually have that influence or be relied on by the alleged victim, as long as it is capable of doing so.

INSTRUCTION NO. 25

A person acts with intent to defraud if he acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant or another or the potential loss of money or property to another.

INSTRUCTION NO. 26

If the defendant acted in good faith, then he lacked the intent to defraud required to prove the offenses charged in Counts 2 through 4. The defendant acted in good faith if, at the time, he honestly believed the truthfulness and validity of the Indiana Department of Workforce Development quarterly reports that the government has charged as being false.

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with intent to defraud as charged in Counts 2 through 4.

INSTRUCTION NO. 27

The government must prove that a private or commercial interstate carrier was used to carry out the scheme, or was incidental to an essential part of the scheme.

In order to cause the use of a private or commercial interstate carrier, the defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts from which that use could reasonably have been foreseen. However, the government does not have to prove that the defendant knew that the carrier was an interstate carrier.

The defendant need not actually or personally use an interstate carrier.

Although an item sent by interstate carrier need not itself contain a fraudulent representation or promise or a request for money, it must carry out or attempt to carry out the scheme.

In connection with whether a mailing was made, you may consider evidence of the habit or the routine practice of a person or an organization.

Each separate use of an interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

INSTRUCTION NO. 28

Count 5 of the indictment charges defendants with money laundering. In order for you to find a defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant engaged in a monetary transaction; and
2. That defendant knew the transaction involved criminally derived property; and
3. The property had a value greater than \$10,000; and
4. The property was derived from mail fraud; and
5. The transaction occurred in the United States.

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

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

INSTRUCTION NO. 29

The term “monetary transaction” means the deposit, withdrawal, transfer or exchange, in or affecting interstate commerce, of funds or a monetary instrument, by, through, or to a financial institution. The alleged monetary transaction need not involve “all” criminally derived property, only over \$10,000 in criminally derived property.

“Interstate commerce” means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state.

The term “financial institution” includes commercial banks, trust companies, and businesses and persons engaged in real estate closings or settlements.

The term “criminally derived property” means any property constituting, or derived from, proceeds obtained from a criminal offense.

The term “mail fraud” was previously defined in these instructions. Additionally, mail fraud can be committing by using or causing the use the United States mails.

INSTRUCTION NO. 30

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

INSTRUCTION NO. 31

Any person who knowingly aids, counsels, commands, induces, or procures the commission of an offense may be found guilty of that offense if he or she knowingly participated in the criminal activity and tried to make it succeed.

If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he or she personally committed them.

INSTRUCTION NO. 32

Defendant Michael McClellan has been accused of more than one crime. The number of charges is not evidence of guilt and should not influence your decision.

You must consider each charge separately. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any other charge.

INSTRUCTION NO. 33

Even though the defendants are being tried together, you must consider each defendant, and the evidence concerning that defendant, separately. Your decision concerning one defendant, whether it is guilty or not guilty, should not influence your decision concerning any other defendant.

INSTRUCTION NO. 34

In deciding your verdict, you should not consider the possible punishment of the defendants who are on trial. If you decide the government has proved a defendant guilty beyond a reasonable doubt, then it will be my job to decide on the appropriate punishment.

INSTRUCTION NO. 35

Once you are all in the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. You may discuss the case only when all jurors are present.

Once you start deliberating, do not communicate about the case or your deliberations with anyone. You may not communicate with others about the case or your deliberations by any means. This includes oral or written communication, as well as any electronic method of communication, such as telephone, cell phone, smart phone, computer, or on the Internet through services such as Facebook.

If you need to communicate with me while you are deliberating, send a note through the court security officer. The note should be signed by the foreperson, or by one or more members of the jury. To have a complete record of this trial, it is important that you do not communicate with me except by a written note. I may have to talk to the lawyers about your message, so it may take me some time to get back to you. You may continue your deliberations while you wait for my answer. Please be advised that transcripts of trial testimony are not available to you. You must rely on your collective memory of the testimony.

If you send me a message, do not include the breakdown of any votes you may have conducted. In other words, do not tell me that you are split 6–6, or 8–4, or whatever your vote happens to be.

INSTRUCTION NO. 36

A verdict form has been prepared for you. You will take this form with you to the jury room.

When you have reached unanimous agreement, your foreperson will fill in, date, and sign the appropriate verdict forms.

Advise the court security officer once you have reached a verdict. When you come back to the courtroom, I will read the verdict aloud.

INSTRUCTION NO. 37

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

You should make every reasonable effort to reach a verdict. In doing so, you should consult with each other, express your own views, and listen to your fellow jurors' opinions. Discuss your differences with an open mind. Do not hesitate to re-examine your own view 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 just because of the opinions of your fellow jurors or just so that there can be a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence. You should deliberate with the goal of reaching an agreement that 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.