

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

UNITED STATES OF AMERICA)
)
 v.)
)
 JOHN SMITH)

Cause No. 2:11 CR 53

JURY INSTRUCTIONS

Dated: June 6, 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. I will also give you two copies of these instructions to use in the jury room. 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 defendant 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 defendant are in a document called an Indictment. You will have a copy of the Indictment during your deliberations.

Count One of the Indictment charges the defendant with conspiring to possess with intent to distribute and distribute in excess of 5 kilograms of cocaine between December 2, 2010 and March 8, 2011.

Count Two of the Indictment charges the defendant with attempting to possess with intent to distribute in excess of 5 kilograms of cocaine on January 21, 2011.

Count Three of the Indictment charges the defendant with carrying firearms during and in relation to the drug trafficking crime charged in Count Two of the Indictment.

Count Four of the Indictment charges the defendant with attempting to possess with the intent to distribute in excess of 5 kilograms of cocaine on February 16, 2011.

Count Five of the Indictment charges the defendant with carrying firearms during and in relation to the drug trafficking crime charged in Count Four of the Indictment.

Count Six of the Indictment charges the defendant with transferring firearms on March 8, 2011 knowing the firearms would be used in the drug trafficking crime charged in Count One.

The Indictment is simply the formal way of telling the defendant what crimes he is accused of committing. It is not evidence that the defendant is guilty. It does not even raise a suspicion of guilt.

INSTRUCTION NO. 3

The 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 defendant is guilty as charged.

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

The 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, and the exhibits that I allowed into evidence.

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.

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.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

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

INSTRUCTION NO. 8

Part of your job as jurors is to decide how believable each witness was, and how much weight to give each witness' testimony , including that of the defendant. 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' ability and opportunity to see, hear, or know the things the witness testified about;
- the witness' memory;
- the witness' demeanor;
- whether the witness had any bias, prejudice, or other reason to lie or slant the testimony;
- the truthfulness and accuracy of the witness' testimony in light of the other evidence presented; and
- inconsistent statements or conduct by the witness.

INSTRUCTION NO. 9

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

INSTRUCTION NO. 10

You have heard testimony from Jon Roberson, a witness who received money from the government in exchange for his cooperation with the government.

You have also heard testimony from Terry Carlyle, a witness who pled guilty to some of the crimes the defendant is charged with committing. You may not consider his guilty plea as evidence against the defendant.

You may give testimony of Mr. Roberson and Mr. Carlyle whatever weight you believe is appropriate, keeping in mind that you must consider that testimony with caution and great care.

INSTRUCTION NO. 11

You may consider evidence that a witness was convicted of a crime only in deciding the believability of his testimony. You may not consider it for any other purpose.

INSTRUCTION NO. 12

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

The recordings contain statements by Agent Godsave and a cooperating witness. You are not to consider the statements made on the recordings by Agent Godsave or the cooperating witness for their truth. However, you may consider the statements made on the recordings by Agent Godsave and the cooperating witness to place in context and help you understand the statements or admissions made by the defendant on the recordings.

INSTRUCTION NO. 13

You have heard evidence obtained from the government's use of undercover agents, informants, and deceptive investigative techniques. The government is permitted to use these techniques. You should consider evidence obtained this way together with and in the same way you consider the other evidence.

INSTRUCTION NO. 14

Count One of the Indictment charges the defendant with a narcotics conspiracy.

A conspiracy is an express or implied agreement between two or more persons to commit a crime. In order for you to find the defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The conspiracy as charged in Count One existed; and
2. The defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy.

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.

A conspiracy is an expressed or implied agreement between two or more persons to commit a crime. A conspiracy may be proven even if its goals were not accomplished.

In deciding whether the charged conspiracy existed, you may consider all of the circumstances, including the words and acts of each of the alleged participants. To prove that a conspiracy existed, the government must prove beyond a reasonable doubt that the defendant had an agreement or mutual understanding with at least one other person to possess with the intent to distribute cocaine or distribute cocaine.

INSTRUCTION NO. 15

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

INSTRUCTION NO. 16

Count 1 charges the defendant with a conspiracy having two objects: 1) knowingly and intentionally possessing with intent to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine; and 2) distributing five kilograms or more of a mixture and substance containing a detectable amount of cocaine. The government is not required to prove that the defendant conspired to commit each object of the conspiracy alleged in Count 1. However, the government is required to prove that the defendant conspired to commit at least one of the objects of the conspiracy that is alleged in Count 1. To find that the government has proven this, you must agree unanimously on which particular object of the conspiracy the defendant conspired to commit, as well as all of the other elements of the crime charged.

For example, on Count 1, if some of you were to find that the government has proved beyond a reasonable doubt that the defendant conspired to knowingly and intentionally possess with intent to distribute five kilograms or more of cocaine, and the rest of you were to find that the government has proved beyond a reasonable doubt that the defendant conspired to distribute five kilograms or more of cocaine, then there would be no unanimous agreement on which object of the conspiracy the government has proved. On the other hand, if all of you were to find that the government has proved beyond a reasonable doubt that the defendant conspired to knowingly and intentionally possess with intent to distribute five kilograms or more of cocaine, then there would be a unanimous agreement on which object of the conspiracy the government has proved.

INSTRUCTION NO. 17

To be a member of a conspiracy, the defendant does not need to join it at the beginning, and he does not need to know all of the other members or all of the means by which the illegal goals of the conspiracy were to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the illegal goals of the conspiracy and knowingly joined the conspiracy.

A defendant is not a member of a conspiracy just because he knew and/or associated with people who were involved in a conspiracy, knew there was a conspiracy, and/or was present during conspiratorial discussions.

In deciding whether the defendant joined the charged conspiracy, you must base your decision only on what the defendant did or said. To determine what the defendant did or said, you may consider the defendant's own words or acts. You may also use the words or acts of other persons to help you decide what the defendant did or said.

INSTRUCTION NO. 18

An agreement must exist among co-conspirators, that is, those who actually intend to carry out the agreed upon criminal plan. An undercover government agent or a government informant is not a co-conspirator. A defendant is not liable for conspiring solely with an undercover government agent or a government informant.

INSTRUCTION NO. 19

Counts Two and Four of the Indictment charge the defendant with attempted possession of cocaine with intent to distribute it. 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 intended to possess a controlled substance and intended to distribute it to another person; and
2. The defendant believed that the substance was some kind of a controlled substance. The government is not required to prove that the substance was actually a controlled substance; and
3. The defendant knowingly took a substantial step toward possessing a substance he believed to be a controlled substance, intending to possess it. The substantial step must be an act that strongly corroborates that the defendant intended to distribute a controlled substance.

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

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 as to the charge you are considering, then you should find the defendant not guilty of that charge.

INSTRUCTION NO. 20

A person possesses an object if he has the ability and intention to exercise direction or control over the object, either directly or through others. A person may possess an object even if he is not in physical contact with it and even if he does not own it.

More than one person may possess an object. If two or more persons share possession, that is called “joint” possession. If only one person possesses the object, that is called “sole” possession. The term “possess” in these instructions includes both joint and sole possession.

INSTRUCTION NO. 21

A person “distributes” a controlled substance if he delivers or transfers possession of the controlled substance to someone else or causes a person to deliver or transfer possession of the controlled substance to another person.

INSTRUCTION NO. 22

You are instructed that cocaine is a controlled substance.

INSTRUCTION NO. 23

If you find the defendant guilty of the attempted offenses charged in Counts 2 and 4 of the indictment, you must then determine the amount of cocaine the government has proven was involved in the attempted offense.

You will see on the verdict form a question concerning the amount of narcotics involved in the attempted offenses charged in Counts 2 and 4 of the indictment. You should consider this question only if you have found that the government has proven the defendant guilty of the attempted offenses charged in Counts 2 and 4 of the indictment.

If you find that the government has proven beyond a reasonable doubt that the attempted offense involved 5 kilograms or more of cocaine, then you should check the box next to “5 kilograms or more.”

If you find that the government has not proven beyond a reasonable doubt that the attempted offense involved 5 kilograms or more of cocaine, then you should not check the box next to “5 kilograms or more.” In that case, you should determine whether the government has proven beyond a reasonable doubt that the attempted offense involved 500 grams or more of cocaine, but less than 5 kilograms. If you find that the government has proven beyond a reasonable doubt that the attempted offense involved 500 grams or more of cocaine, but less than 5 kilograms, then you should check the box next to “500 grams, but less than 5 kilograms.”

If you find that the government has not proven beyond a reasonable doubt that the attempted offense involved 500 grams or more of cocaine, but less than 5 kilograms, then you should not check the box next to “500 grams, but less than 5 kilograms.”

INSTRUCTION NO. 24

Count Three of the Indictment charges the defendant with carrying a firearm during and in relation to a drug trafficking crime. In order for you to find the defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant committed the crime of attempted possession with intent to distribute cocaine as charged in Count Two of the Indictment; and
2. He knowingly carried a firearm during and in relation to such crime.

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

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 as to the charge you are considering, then you should find the defendant not guilty of that charge.

INSTRUCTION NO. 25

Count Five of the Indictment charges the defendant with carrying a firearm during and in relation to a drug trafficking crime. In order for you to find the defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant committed the crime of attempted possession with intent to distribute cocaine as charged in Count Four of the Indictment; and
2. He knowingly carried a firearm during and in relation to such crime.

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

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 as to the charge you are considering, then you should find the defendant not guilty of that charge.

INSTRUCTION NO. 26

A person “carries” a firearm when he knowingly transports it on his person or in a vehicle.

“During” means at any point within the offense conduct charged in Counts Two and Four of the indictment.

A person carries a firearm “in relation to” a crime if there is a connection between carrying of the firearm and the drug trafficking crime. The firearm must have some purpose or effect with respect to the crime; its presence or involvement cannot be the result of accident or coincidence. The firearm must at least facilitate, or have the potential of facilitating, the crime.

INSTRUCTION NO. 27

Count Six of the Indictment charges the defendant with transfer of a firearm for use in a drug trafficking crime. 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 knowingly transferred a firearm; and
2. The defendant knew that the firearm would be used in the drug trafficking crime charged in Count 1.

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

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 as to the charge you are considering, then you should find the defendant not guilty of that charge .

INSTRUCTION NO. 28

The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped by any government agent, informant, or law enforcement officer. The government must prove either:

1. Law enforcement officers and their agents did not persuade or otherwise induce the defendant to commit the offense; or
2. The defendant was predisposed to commit the offense before he had contact with law enforcement officers or their agents. If the defendant was predisposed, then he was not entrapped, even though law enforcement officers or their agents provided a favorable opportunity to commit the offense, made committing the offense easier, or participated in acts essential to the offense.

INSTRUCTION NO. 29

You have heard testimony that the defendant committed acts other than the ones charged in the indictment. Before using this evidence, you must decide whether it is more likely than not that the defendant did the acts that are not charged in the indictment. If you decide that he did, then you may consider this evidence to help you decide whether the defendant was entrapped. You may not consider it for any other purpose. Keep in mind that the defendant is on trial here for conspiracy to commit drug trafficking, attempted drug trafficking, and firearms trafficking, not for the other acts.

INSTRUCTION NO. 30

In deciding whether the government has proved that it did not entrap the defendant, you may consider all of the circumstances, including:

1. The defendant's background;
2. Whether government agents, government informants, or law enforcement officers first suggested the criminal activity;
3. Whether the defendant engaged in the criminal activity for profit;
4. Whether the defendant was reluctant to engage in criminal activity;
5. Whether law enforcement officers or their agents merely invited or solicited the defendant to commit the offense;
6. The nature and extent of any pressure or persuasion used by law enforcement officers or their agents;
7. Whether law enforcement officers or their agents offered the defendant an ordinary opportunity to commit a crime or instead offered the defendant exceptional profits or persuasion; and
8. The defendant's ability to commit the crime without the assistance of law enforcement officers or their agents.

It is up to you to determine the weight to be given to any of these factors and any others that you consider.

INSTRUCTION NO. 31

The Indictment charges that the offenses were committed “on or about” certain dates. The government must prove that the offense happened reasonably close to that date but is not required to prove that the alleged offense happened on that exact date.

INSTRUCTION NO. 32

The defendant 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 and the evidence concerning 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

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

INSTRUCTION NO. 34

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. 35

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

INSTRUCTION NO. 36

A defendant's presence at the scene of a crime and knowledge that a crime is being committed is not sufficient by itself to establish the defendant's guilt.

INSTRUCTION NO. 37

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 by telephone, cell phone, smart phone, computer, text messaging, instant messaging, the internet, chat rooms, blogs, websites, or services like Facebook, or Twitter, or any other method of communication.

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. 38

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 verdict forms, and then each of you will sign it.

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

INSTRUCTION NO. 39

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.