

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID NEVE,

Defendant.

No. 10-CR-2044-LRR

FINAL JURY INSTRUCTIONS

Ladies and Gentlemen of the Jury:

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 1

In considering these instructions, attach no importance or significance whatsoever to the order in which they are given.

INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action or remark that I have made during this trial have I intended to give any opinion or suggestion as to what the facts are or what your verdicts should be.

INSTRUCTION NO. 3

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you just verdicts, unaffected by anything except the evidence, your common sense and the law as I give it to you.

INSTRUCTION NO. 4

I have mentioned the word “evidence.” The “evidence” in this case consists of the following: the testimony of the witnesses and documents and other things received as exhibits.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by the lawyers are not evidence.
2. Anything that might have been said by jurors, the attorneys or the judge during the jury selection process is not evidence.
3. Objections are not evidence. The parties have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
4. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
5. Anything you saw or heard about this case outside the courtroom is not evidence.

If you were instructed that some evidence was received for a limited purpose only, you must follow that instruction. During the trial, documents were referred to but they were not admitted into evidence and, therefore, they will not be available to you in the jury room during deliberations.

INSTRUCTION NO. 5

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witness to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 6

The jurors are the sole judges of the weight and credibility of the testimony and the value to be given to the testimony of each witness who has testified in this case. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 7

In a previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you are to consider the testimony of certain witnesses.

A witness may be discredited or impeached by contradictory evidence; by showing that the witness testified falsely concerning a material matter; by showing the witness has a motive to be untruthful; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony.

You have heard evidence that certain witnesses were once convicted of a crime. You may use that evidence only to help you decide whether you believe these witnesses and how much weight to give their testimony.

You have heard evidence that certain witnesses hope to receive a reduced sentence on criminal charges pending against these witnesses in return for the witnesses’ cooperation with the government in this case. If the prosecutor handling a witness’s case believes the witness provided substantial assistance, that prosecutor can file in the court in which the charges are pending against the witness a motion to reduce the witness’s sentence. The judge has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, files such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the government, then it is up to the judge to decide whether to reduce the sentence at all, and if so, how much to reduce it. You may give the testimony of these witnesses such weight as you think it deserves. Whether or not the testimony of the witnesses may have been influenced by the witnesses’ hopes of receiving a reduced sentence is for you to decide. These witnesses’ guilty pleas cannot be considered by you as any evidence of this defendant’s guilt. These witnesses’ guilty pleas can be considered by you only for the purpose of determining how much, if at all, to rely upon these witnesses’ testimony.

INSTRUCTION NO. 8

You have heard testimony from persons described as experts. A person who, by knowledge, skill, training, education or experience, has become an expert in some field may state his opinions on matters in that field and may also state the reasons for his opinions.

Expert testimony should be considered just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used and all the other evidence in the case.

INSTRUCTION NO. 9

You have heard evidence that the defendant displayed a firearm to James Whitehill. You may consider this evidence only if you unanimously find it is more likely true than not true. This is a lower standard of proof than beyond a reasonable doubt. If you find that this evidence is more likely true than not true, you may consider it to help you decide issues related to the defendant's intent and/or motive. You should give it the weight and value you believe it is entitled to receive. If you find that it is not more likely true than not true, then you shall disregard it.

Remember, even if you find that the defendant may have committed a similar act in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. The defendant is on trial only for the crimes charged, and you may consider evidence of prior acts only on the issue of intent and/or motive.

INSTRUCTION NO. 10

Exhibits have been admitted into evidence and are to be considered along with all of the other evidence to assist you in reaching your verdicts. You are not to tamper with the exhibits or their contents, and each exhibit should be returned into open court, along with your verdicts, in the same condition as it was received by you.

INSTRUCTION NO. 11

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 12

The Indictment in this case charges the defendant with five separate crimes.

In Count 1, the Indictment charges that from an unknown date but at least from January 2002 and continuing through September 15, 2010, in the Northern District of Iowa, the defendant conspired to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine and to distribute 50 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance.

In Count 2, the Indictment charges that on or about September 13, 2010, the defendant knowingly and intentionally distributed 50 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance.

In Count 3, the Indictment charges that on or about September 15, 2010, the defendant knowingly and intentionally possessed with intent to distribute 50 grams or more of actual (pure) methamphetamine, a Schedule II controlled substance.

In Count 4, the Indictment charges that, on or about September 15, 2010, the defendant knowingly possessed a firearm in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States (as charged in Counts 1 and 3 of the Indictment).

In Count 5, the Indictment charges that, on or about September 13, 2010, the defendant knowingly possessed a firearm in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States (as charged in Counts 1 and 2 of the Indictment).

The defendant has pleaded not guilty to each charge.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him.

(CONTINUED)

INSTRUCTION NO. 12 (Cont'd)

The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each element of the crimes charged.

Keep in mind that each count charges a separate crime. You must consider each count separately and return a separate verdict for each count.

There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.

INSTRUCTION NO. 13

The crime of conspiracy to distribute methamphetamine, as charged in Count 1 of the Indictment, has three essential elements, which are:

One, between about January 2002 and continuing through September 15, 2010, two or more persons reached an agreement or came to an understanding to distribute methamphetamine;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding was to commit the crime of distributing methamphetamine.

The government alleges two objects of the conspiracy: (1) distribution of a mixture or substance containing a detectable amount of methamphetamine and (2) distribution of actual (pure) methamphetamine. To find the defendant guilty of Count 1, the government must prove, beyond a reasonable doubt, at least one object of the conspiracy. You must unanimously agree as to which object or objects the government has proved beyond a reasonable doubt. If all of the essential elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under Count 1; otherwise, you must find the defendant not guilty of the crime charged under Count 1.

To assist you in deciding whether there was an agreement or understanding to commit the crime of distributing methamphetamine, you are advised that the elements of distributing methamphetamine are set out in Instruction Number 16. However, keep in mind that Count 1 of the Indictment charges a conspiracy to commit distribution of methamphetamine and does not require the government to prove that the crime of distribution of methamphetamine was actually committed.

INSTRUCTION NO. 14

In considering whether the government has met its burden of proving a conspiracy as alleged in Count 1 of the Indictment, you are further instructed as follows:

The government must prove, beyond a reasonable doubt, that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is a defendant or named in the Indictment as long as you find beyond a reasonable doubt that there was at least one other co-conspirator.

The "agreement or understanding" need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purposes of one, does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

(CONTINUED)

INSTRUCTION NO. 14 (Cont'd)

You must decide, after considering all of the evidence, whether the conspiracy alleged in Count 1 of the Indictment existed. If you find that the alleged conspiracy did exist, you must also decide whether the defendant voluntarily and intentionally joined the conspiracy, either at the time it was first formed or at some later time while it was still in effect. In making that decision, you must consider only evidence of the defendant's own actions and statements. You may not consider actions and pretrial statements of others, except to the extent that pretrial statements of others describe something that had been said or done by the defendant.

It is not necessary for the government to prove that the conspiracy actually succeeded.

INSTRUCTION NO. 15

If you have found beyond a reasonable doubt that a conspiracy existed and that the defendant was one of its members, then you may consider acts knowingly done and statements knowingly made by the defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant had joined the conspiracy, for a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

INSTRUCTION NO. 16

The crime of distributing actual (pure) methamphetamine, as charged in Count 2 of the Indictment, has two essential elements, which are:

One, on or about September 13, 2010, the defendant intentionally transferred methamphetamine to another person; and

Two, at the time of the transfer, the defendant knew that it was methamphetamine.

If all of the essential elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under Count 2; otherwise, you must find the defendant not guilty of the crime charged under Count 2.

INSTRUCTION NO. 17

The crime of possession with intent to distribute 50 grams or more of actual (pure) methamphetamine, as charged in Count 3 of the Indictment, has three essential elements, which are:

One, on or about September 15, 2010, the defendant was in possession of actual (pure) methamphetamine;

Two, the defendant knew he was in possession of the methamphetamine; and

Three, the defendant intended to distribute some or all of the methamphetamine to another person.

If all of the essential elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under Count 3; otherwise you must find the defendant not guilty of the crime charged under Count 3.

INSTRUCTION NO. 18

The crime of possession of firearms in furtherance of a drug trafficking crime, as charged in Count 4 of the Indictment, has two essential elements, which are:

One, on or about September 15, 2010, the defendant committed one or more of the following drug trafficking crimes:

- (A) conspiracy to distribute methamphetamine;
- (B) distribution of methamphetamine; or
- (C) possession with intent to distribute methamphetamine ; and

Two, the defendant knowingly possessed a firearm in furtherance of one or more of those drug trafficking crimes.

If all of the essential elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under Count 4; otherwise, you must find the defendant not guilty of the crime charged under Count 4.

INSTRUCTION NO. 19

The crime of possession of firearms in furtherance of a drug trafficking crime, as charged in Count 5 of the Indictment, has two essential elements, which are:

One, on or about September 13, 2010, the defendant committed one or more of the following drug trafficking crimes:

- (A) conspiracy to distribute methamphetamine;
- (B) distribution of methamphetamine; or
- (C) possession with intent to distribute methamphetamine; and

Two, the defendant knowingly possessed a firearm in furtherance of one or more of those drug trafficking crimes.

If all of the essential elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under Count 5; otherwise, you must find the defendant not guilty of the crime charged under Count 5.

INSTRUCTION NO. 20

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by action of the explosive or the frame or receiver of any such weapon.

INSTRUCTION NO. 21

The phrase “in furtherance of” should be given its plain meaning, that is, the act of furthering, advancing or helping forward. The phrase “in furtherance of” is a requirement that the defendant actually possess the firearm with the intent that it advance, assist or help commit the crime, not that it actually did so.

INSTRUCTION NO. 22

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word "possession" has been used in these instructions, it includes actual as well as constructive possession and also sole as well as joint possession.

INSTRUCTION NO. 23

You are instructed as a matter of law that methamphetamine is a Schedule II controlled substance. You must ascertain whether or not the substances in question as to Counts 1, 2 and 3 were methamphetamine. In so doing, you may consider all the evidence in the case which may aid in the determination of that issue.

In determining whether the defendant is guilty of the offenses charged in Counts 1, 2 and 3 of the Indictment, the government is not required to prove that the amount or quantity of the controlled substance was as charged in the Indictment. The United States need only prove beyond a reasonable doubt that there was a measurable amount of the controlled substance.

If you find the defendant guilty of the offense charged in Count 1, you will need to determine whether the mixture or substance containing the detectable amount of methamphetamine involved in the conspiracy was (1) 500 grams or more; (2) 50 grams or more, but less than 500 grams; or (3) less than 50 grams.

If you find the defendant guilty of the offenses charged in Counts 2 and 3, you will need to determine whether the quantity of the actual (pure) methamphetamine was (1) 50 grams or more, but less than 500 grams; or (2) less than 50 grams.

The burden of proof is on the government to establish the quantity beyond a reasonable doubt. For your information, one gram equals 1,000 milligrams, one ounce equals 28.35 grams, one pound equals 452.6 grams and one kilogram equals 1,000 grams.

INSTRUCTION NO. 24

As to Count 1, the quantity of controlled substance involved in the agreement or understanding includes the controlled substances that the defendant possessed for personal use or distributed or agreed to distribute. The quantity also includes the controlled substances fellow conspirators distributed or agreed to distribute, if you find that those distributions or agreements to distribute were a necessary consequence of the agreement or understanding and were reasonably foreseeable by the defendant.

INSTRUCTION NO. 25

The term “distribute” means to deliver a controlled substance to the possession of another person. The term “deliver” means the actual or attempted transfer of a controlled substance to the possession of another person. No consideration for the delivery need exist, and it is not necessary that money or anything of value change hands. The law is directed at the act of “distribution” of a controlled substance and does not concern itself with any need for a “sale” to occur.

INSTRUCTION NO. 26

Intent may be proven by circumstantial evidence. It rarely can be established by other means. While witnesses may see or hear and thus be able to give direct evidence of what a person does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit an offense.

You may consider it reasonable to draw the inference and believe that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so. As I have previously mentioned, it is entirely up to you to decide what facts to find from the evidence.

I instruct you that possession of a large quantity of methamphetamine supports an inference of an intent to distribute. Thus, in determining whether the defendant possessed methamphetamine with the intent to distribute, you should consider whether the defendant knowingly and intentionally possessed a large quantity of methamphetamine. If you believe that he did, then you may, but are not required to infer that he had the intent to distribute.

INSTRUCTION NO. 27

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done “knowingly” if the defendant is aware of the act and does not act through ignorance, mistake or accident. You may consider evidence of the defendant’s words, acts or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NO. 28

You will note that the Indictment charges that the offenses were committed “on or about” or “between about” certain dates. The government need not prove with certainty the exact date or the exact time period of the offenses charged. It is sufficient if the evidence establishes that the offenses occurred within a reasonable time of the date or period of time alleged in the Indictment.

INSTRUCTION NO. 29

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 30

In conducting your deliberations and returning your verdicts, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because your verdicts—whether guilty or not guilty—must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or simply to reach your verdicts.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

(CONTINUED)

INSTRUCTION NO. 30 (Cont'd)

Fifth, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdicts might be—that is entirely for you to decide.

INSTRUCTION NO. 31

Attached to these instructions you will find the Verdict Forms and Interrogatory Forms. The Verdict Forms and Interrogatory Forms are simply the written notices of the decisions that you reach in this case. The answers to the Verdict Forms and Interrogatory Forms must be the unanimous decisions of the jury.

You will take the Verdict Forms and Interrogatory Forms to the jury room, and when you have completed your deliberations and each of you has agreed to the answers to the Verdict Forms and Interrogatory Forms, your foreperson will fill out the Verdict Form and Interrogatory Form, sign and date them and advise the Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return the Verdict Forms and Interrogatory Forms in accord with the evidence and these instructions.

1/20/11

Date



Linda R. Reade, Chief Judge
United States District Court
Northern District of Iowa