

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

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CLERK

UNITED STATES OF AMERICA,)	CR. 11-50096-JLV
)	
Plaintiff,)	FINAL INSTRUCTIONS
)	TO THE JURY
vs.)	(REDACTED)
)	
SANDRA K. BERRY and)	
KIM BRADLEY CATANIA,)	
)	
Defendants.)	

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FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and any oral instructions I gave you during the trial remain in effect. All instructions, whenever given and whether in writing or not, are equally binding on you and must be followed.

The final instructions I am about to give you will be available in the jury room. These instructions explain the law that applies to this case. You must consider my instructions as a whole and not single out some instructions and ignore others.

FINAL INSTRUCTION NO. 2 - DUTY OF JURORS

This is a criminal case brought by the United States government against the defendants, Sandra K. Berry and Kim Bradley Catania. The defendants are charged with the offense of conspiracy to distribute marijuana. Your duty is to decide from the evidence whether each defendant is not guilty or guilty of the offense charged against him or her. Keep in mind you must give separate consideration to the evidence about each individual defendant.

You will find the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 9. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law to the facts to reach your verdict as to each defendant. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict based solely on the evidence, your common sense, and the law as I give it to you. Do not take anything I said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I made that I have any opinion on how you should decide the case.

Please remember only Ms. Berry and Mr. Catania, not anyone else, are on trial here. Also, remember Ms. Berry and Mr. Catania are on trial only for the offense charged against them, not for anything else.

FINAL INSTRUCTION NO. 3 - PRELIMINARY MATTERS

An offense consists of “elements” which the government must prove beyond a reasonable doubt in order to convict a defendant of that offense. To help you evaluate the evidence, I will give you the elements that make up the offense charged in the indictment. However, I must first explain some preliminary matters.

The charge against the defendants is set out in an indictment. An indictment is simply an accusation. It is not evidence of anything. The defendants pled not guilty to the charge brought against them. Therefore, each defendant is presumed to be innocent unless and until the government proves, beyond a reasonable doubt, every element of the offense charged.

The indictment charges the offense was committed “on or about” a certain date. The government does not have to prove with certainty the exact date of the offense charged. It is sufficient if the evidence establishes that the offense occurred within a reasonable time of the date alleged in the indictment.

FINAL INSTRUCTION NO. 4 - CONSPIRACY TO DISTRIBUTE MARIJUANA

The indictment charges that beginning on or about no later than September of 2009 and continuing to on or about September 20, 2011, in the District of South Dakota and elsewhere, the defendants, Sandra K. Berry and Kim Bradley Catania, knowingly and intentionally, combined, conspired, confederated and agreed with other persons to distribute marijuana, a Schedule I controlled substance.

Elements

For you to find a defendant guilty of the offense of conspiracy to distribute marijuana as charged in the indictment, the government must prove the following three essential elements beyond a reasonable doubt:

One, that beginning on or about September of 2009 and continuing to on or about September 20, 2011, two or more persons reached an agreement or came to an understanding to distribute marijuana;

The government must prove that two or more persons reached an agreement or understanding to distribute marijuana. It makes no difference whether they are defendants or named in the indictment.

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.

To assist you in determining whether there was an agreement or understanding to distribute marijuana, which was one the alleged objectives of the conspiracy,

you should consider the elements of a “distribution” offense. The elements of distributing marijuana are the following: (1) a person intentionally distributed marijuana to another; and (2) at the time of the distribution, the person knew that what he or she was distributing was a controlled substance.

Marijuana is a Schedule I controlled substance.

To find an individual defendant guilty of the “conspiracy” charged in the indictment, you do not have to find that the offense of distribution of marijuana was actually committed by a defendant or anyone else. It is the agreement to distribute marijuana that is illegal, so that is the conduct that has been charged in the indictment and what must be proven to establish a defendant’s guilt on that charge.

Two, that 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;

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 purpose of one, does not thereby become a member. Similarly, the mere knowledge of an illegal act or association by a defendant with an individual engaged in the illegal conduct of a conspiracy is not enough to prove a person has joined the conspiracy.

On the other hand, 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.

In deciding whether the defendant voluntarily and intentionally joined in the agreement, you must consider only evidence of his 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.

and

Three, that at the time the defendant joined in the agreement or understanding, he or she knew the purpose of the agreement or understanding.

The defendant must know of the existence and purpose of the conspiracy. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his or her acts furthered the conspiracy.

To find a defendant guilty of the offense of conspiracy to distribute marijuana as charged in the indictment, the government must prove all three essential elements beyond a reasonable doubt as to that defendant. If the government fails to prove any essential element beyond a reasonable doubt as to a defendant, you must find that defendant not guilty of the offense.

FINAL INSTRUCTION NO. 5 - INTENT AND KNOWLEDGE

“Intent” and “knowledge” are elements of the offense charged in this case and must be proven beyond a reasonable doubt. The government is not required to prove a defendant knew that his or her acts or omissions were unlawful. An act is done “knowingly” if the defendant realizes what he or she is doing and does not act through ignorance, mistake, or accident. You may consider the evidence of a defendant’s words, acts, or omissions, along with all other evidence, in deciding whether that defendant acted knowingly.

FINAL INSTRUCTION NO. 6 -

ACTS AND STATEMENTS OF CO-CONSPIRATORS

You may consider acts knowingly done and statements knowingly made by a 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 joined in 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.

FINAL INSTRUCTION NO. 7 -

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The defendants are presumed innocent and, therefore, not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendants or the fact they are here in court. The presumption of innocence remains with the defendants throughout the trial. This presumption alone is sufficient to find a defendant not guilty. The presumption of innocence may be overcome only if the government proves, beyond a reasonable doubt, each essential element of the offense charged.

The burden is always on the government to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant to prove his or her innocence, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to cross-examine the witnesses called to testify by the government. The fact the defendants did not testify must not be considered by you in any way or even discussed in arriving at your verdict.

If the government proves beyond a reasonable doubt all the essential elements of the offense charged in the indictment against a defendant, you must find that defendant guilty of the offense. If the government fails to prove beyond a reasonable doubt any essential element of the offense charged in the indictment against a defendant, you must find that defendant not guilty of the

offense. Each defendant is entitled to be treated separately, and you must determine whether the government met its burden of proof as to each defendant separately.

FINAL INSTRUCTION NO. 8 - REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced during trial. 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 must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the more serious and important affairs of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

FINAL INSTRUCTION NO. 9 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses and documents and other things received as exhibits. Certain things are *not* evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Objections and rulings on objections are not evidence. Lawyers 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.
3. Anything you see or hear about this case outside the courtroom is not evidence.

The fact an exhibit was shown to you does not mean you must rely on it more than you rely on other evidence.

You heard tape recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms. 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.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

FINAL INSTRUCTION NO. 10 - CREDIBILITY OF WITNESSES

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 says, 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 see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the witness said something different at an earlier time; the witness's drug or alcohol use or addiction, if any; 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 people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

Finally, just because a witness works in law enforcement or is employed by the government does not mean you should give more weight or credibility to the witness's testimony than you give to any other witness's testimony.

FINAL INSTRUCTION NO. 11 - IMPEACHMENT

In the last instruction, I instructed you generally on the credibility of witnesses. I now instruct you further on how the credibility of a witness may be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 12 - OTHER CONSIDERATIONS

In weighing the evidence, you may also consider the following:

1. You heard evidence that witness [REDACTED] has been convicted of crimes. You may use this evidence only to help you decide whether to believe the witness and how much weight to give his testimony.
2. You heard evidence that [REDACTED] made a plea agreement with the government, received a promise from the government that he will not be prosecuted further, and received a promise from the government that his testimony will not be used against him in a criminal case. Whether or not his testimony may have been influenced by the plea agreement or by the government's promises is for you to determine. [REDACTED] guilty plea cannot be considered by you as any evidence of either defendant's guilt. [REDACTED] guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon his testimony. You may give his testimony whatever weight you think it deserves.
3. You also heard evidence that [REDACTED] hopes to receive a reduced sentence on the criminal charge pending against him in return for his cooperation with the government in this case. The prosecutor handling [REDACTED] case believes he provided substantial assistance and will move for a more lenient sentence. The court has no power to reduce a sentence for substantial assistance unless the government, acting through the United

States Attorney, makes such a motion. It is up to the court to decide whether to reduce the sentence at all, and if so, how much to reduce it.

Whether or not the testimony of [REDACTED] may have been influenced by his hope of receiving a more lenient sentence is for you to decide. You may give his testimony whatever weight you think it deserves.

4. You heard testimony from [REDACTED] and witness [REDACTED] who stated they participated in the offense charged against the defendants. Whether or not their testimony may have been influenced by their desire to please the government or to strike a good bargain with the government about their own situations is for you to determine. You may give their testimony whatever weight you think it deserves.

5. You heard evidence that [REDACTED] had an arrangement with the government under which she received money and was not prosecuted for a state law violation in exchange for providing information to the government. [REDACTED] also testified she believed she was under a grant of immunity and may be testifying in the hope the government will not file charges against her. Whether or not her information or testimony may have been influenced by these benefits is for you to determine. You may give her testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 13 - EXPERT WITNESSES

You may have heard testimony from a person described as an expert. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept 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.

FINAL INSTRUCTION NO. 14 - OBJECTIONS

The lawyers made objections during the trial that I ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 15 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict.

Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes.

FINAL INSTRUCTION NO. 16 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to each defendant must be unanimous. You must return a separate verdict for each defendant. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring twelve minds to an unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish an individual defendant's guilt beyond a reasonable doubt on the offense charged against him or her, then that defendant should have your vote for a not guilty verdict on the offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for that defendant on the offense. Of course, the opposite also applies. If, in your individual judgment, the

evidence establishes an individual defendant's guilt beyond a reasonable doubt on the offense charged against him or her, then your vote should be for a verdict of guilty against that defendant on the offense. If all of you reach that conclusion, then the verdict of the jury must be guilty for that defendant on the offense. As I instructed you earlier, the burden is upon the government to prove beyond a reasonable doubt every essential element of the offense charged. Remember, each defendant is entitled to be treated separately, and you must determine whether the government met its burden of proof as to each defendant separately.

Remember also that the question before you can never be whether the government wins or loses the case. The government, as well as society, always wins when justice is done, regardless of whether your verdict is not guilty or guilty.

Finally, remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest you carefully consider all of the evidence bearing upon the questions before you. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be

selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict as to a defendant, then that defendant's case is left open and must be resolved at some later time.

FINAL INSTRUCTION NO. 17 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your separate verdict for each defendant:

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

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

Third, 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. After conferring with the lawyers, I will respond as soon as possible, either in writing or orally in open court. Remember you should not tell anyone—including me—how your votes stand numerically.

Fourth, your verdict as to each defendant must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or guilty, must be unanimous as to each defendant.** Nothing I have said or done is intended to suggest what your verdicts should be—that is entirely for you to decide.

Finally, the verdict forms are simply the written notice of the decisions you reach in this case. You will take these forms to the jury room. When you have unanimously agreed on the verdict as to each defendant, the foreperson will fill in each form, sign and date it, and advise the court security officer that you have reached a verdict as to each defendant. You will then return to the courtroom where your verdicts will be received and announced.

Dated February 16th, 2012.

BY THE COURT:



JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE