

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

JUN 19 2013


CLERK

UNITED STATES OF AMERICA,)	CR. 12-50066-JLV
)	
Plaintiff,)	
)	FINAL INSTRUCTIONS
vs.)	TO THE JURY
)	
ALEX LEE SALWAY,)	
)	
Defendant.)	

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VERDICT FORM

FINAL INSTRUCTION NO. 1 - ROLE OF INSTRUCTIONS

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 to you 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 defendant, Alex Lee Salway. The defendant is charged with two offenses of distribution of a controlled substance within 1,000 feet of the Martin Grade School, a public elementary school. Your duty is to decide from the evidence whether Mr. Salway is not guilty or guilty of the offenses charged against him.

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. 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 Mr. Salway, not anyone else, is on trial here.
Also, remember Mr. Salway is on trial only for the offenses charged against
him, not for anything else.

INSTRUCTION NO. 3 - PRELIMINARY MATTERS

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

The charges against the defendant are set out in an indictment. An indictment is simply an accusation. It is not evidence of anything. Mr. Salway pled not guilty to the charges brought against him. Therefore, Mr. Salway is presumed to be innocent unless and until the government proves, beyond a reasonable doubt, each element of the offenses charged.

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

I will give you the elements for each offense charged in the indictment. Keep in mind that each count charges a separate offense. You must consider each count separately and return a separate verdict for each count.

INSTRUCTION NO. 4 -

COUNTS I AND II: DISTRIBUTION OF A CONTROLLED SUBSTANCE

Counts I and II of the indictment charge that on or about January 27, 2012, at Martin, in the District of South Dakota, the defendant, Alex Lee Salway, did knowingly and intentionally distributed morphine, a Schedule II controlled substance, within 1,000 feet of the real property comprising the Martin Grade School, a public elementary school.

Elements

For you to find Mr. Salway guilty of the offenses of distribution of a controlled substance, the government must prove the following four essential elements beyond a reasonable doubt **as to each count**:

One, that on or about January 27, 2012, Alex Lee Salway knowingly and intentionally distributed morphine to another person;

Two, that Mr. Salway distributed morphine at Martin, in the District of South Dakota;

Three, that Mr. Salway distributed morphine within 1,000 feet of the Martin Grade School, a public elementary school; and

Four, that morphine is a Schedule II controlled substance.

To find Mr. Salway guilty of the offenses of distribution of a controlled substance as charged in counts I and II of the indictment, the government must prove all four essential elements beyond a reasonable doubt as to each count. If the government proves all the essential elements beyond a reasonable doubt, you must find Mr. Salway guilty of the offense. If the

government fails to prove any essential element beyond a reasonable doubt, you must find Mr. Salway not guilty of the offense. **You must consider each count separately.**

FINAL INSTRUCTION NO. 5 - STIPULATION OF THE PARTIES

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated the Martin Grade School is a public elementary school.

By entering this agreement or stipulation, the defendant has not admitted his guilt of the offenses charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to establish the fact the Martin Grade School is a public elementary school.

FINAL INSTRUCTION NO. 6 - INTENT AND KNOWLEDGE

“Intent” and “knowledge” are elements of the offenses charged in this case and must be proven beyond a reasonable doubt. The government is not required to prove the defendant knew that his acts or omissions were unlawful. An act is done “knowingly” if the defendant realizes what he 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 the defendant acted knowingly.

FINAL INSTRUCTION NO. 7 -

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

Mr. Salway is 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 defendant or the fact he is here in court. The presumption of innocence remains with Mr. Salway throughout the trial. This presumption alone is sufficient to find Mr. Salway not guilty. The presumption of innocence may be overcome only if the government proves, beyond a reasonable doubt, each essential element of an offense charged.

The burden is always on the government to prove guilt beyond a reasonable doubt. This burden never shifts to Mr. Salway to prove his innocence, for the law never imposes upon the defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to cross-examine the witnesses called to testify by the government.

Remember, each count charges a separate offense, and you must consider each count separately. If the government proves beyond a reasonable doubt all the essential elements of an offense charged in the indictment, you must find Mr. Salway guilty of that offense. If the government fails to prove beyond a reasonable doubt any essential element

of an offense charged in the indictment, you must find Mr. Salway not guilty of that offense.

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, and stipulated facts. Stipulated facts are facts that are formally agreed to by the parties. 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. Testimony I struck from the record or told you to disregard is not evidence and must not be considered.
4. 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.

Furthermore, a particular piece of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one

particular purpose and not for any other purpose. I told you when that occurred and instructed you on the purposes for which the piece of evidence can and cannot be used.

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 - STATEMENTS BY THE DEFENDANT

You have heard testimony that Mr. Salway made statements to others.

It is for you to decide:

First, whether Mr. Salway made the statements; and

Second, if so, how much weight you should give the statements.

In making these two decisions, you should consider all of the evidence, including the circumstances under which the statements may have been made.

FINAL INSTRUCTION NO. 11 - DEFENDANT'S PRIOR ACTS

You heard evidence that the defendant previously engaged in conduct which may be a wrong. This evidence was received for a limited purpose only.

You are not permitted to consider this evidence to show the defendant took action in conformity with the previous conduct. You may, however, consider this evidence to help you decide proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. If you find that the evidence of other acts is not proven by the greater weight of the evidence, then you must disregard such evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. This is a lower standard than proof beyond a reasonable doubt.

You may give such evidence no weight or such weight as you think it is entitled to receive.

The defendant is on trial for the crimes charged and for those crimes alone. You may not convict a person simply because you believe he may have committed some acts, even bad acts, in the past.

FINAL INSTRUCTION NO. 12 - 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.

The fact the defendant did not testify must not be considered by you in any way or even discussed in arriving at your verdict.

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. 13 - 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 trial 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. 14 - OTHER CONSIDERATIONS

You heard testimony from Dana Frederick that she had an arrangement with the government under which she received a benefit for providing information to the government. Whether or not her information or testimony may have been influenced by a benefit she received is for you to determine. You may give her testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 15 - 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. 16 - 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. 17 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. It is your duty to consult with one another and to deliberate with a view of 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 the jury to a 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 Mr. Salway's guilt beyond a reasonable doubt on an offense charged against him, he should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, the verdict of the jury must be not guilty on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes Mr. Salway's guilt beyond a reasonable doubt on an offense charged, your vote should be for a verdict of guilty on that offense. If all of you reach that conclusion, the

verdict of the jury must be guilty on that offense. As I instructed you earlier, the burden is on the government to prove beyond a reasonable doubt every essential element of an offense charged.

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, then Mr. Salway's case is left open and must be resolved at some later time.

FINAL INSTRUCTION NO. 18 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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

Second, if Mr. Salway is found guilty of an offense, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government proved its case beyond a reasonable doubt as to each 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 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 offense.** Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decisions you reach in this case. You will take this form to the jury room. When you

have unanimously agreed on the verdict, the foreperson will fill in the form, date and sign it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated June 19, 2013.

BY THE COURT:



JEFFREY L. VIKEN
CHIEF JUDGE