UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | * | CR. 08-30052 |
| Plaintiff, | * | |
| | * | JURY |
| - vs - | * | INSTRUCTIONS |
| EVER DAVID GRANADOS, | * | |
| Defendant. | * | |

INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I 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 the 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.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.01 (2007).

INSTRUCTION NO. 2

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 a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.02 (2007).

INSTRUCTION NO. 3

There is nothing particularly different in the way that you should consider the evidence in a trial from that in which any reasonable and careful person would treat any very important question that must be resolved by examining facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case for only those purposes for which it has been received and to give such evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything other than the evidence received in the case and the instructions of the Court. Remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence because the burden of proving guilt beyond a reasonable doubt is always assumed by the government.

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 12.02, (5th ed. 2000)(modified).

INSTRUCTION NO. 4

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and any facts that have been stipulated–that is, formally agreed to by the parties.

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 will list those things again for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence.

2. 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 that I struck from the record, or told you to disregard, is not evidence and must not be considered.

4. Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.03 (2007).

INSTRUCTION NO. 5

There are two types of evidence which are generally presented during a trial–direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find him not guilty.

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 12.04, (5th ed. 2000).

INSTRUCTION NO. 6

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 12.07, (5th ed. 2000).

INSTRUCTION NO. 7

You have heard evidence that witnesses Gonzalo Morales and Dustin Feather were convicted of crimes. You may use that evidence only to help you decide whether to believe the witnesses and how much weight to give to their testimony.

Eighth Circuit Manual Model Jury Instructions Criminal, § 2.18 (2007)(modified); Defendant's Proposed Jury Instruction No. 12.

INSTRUCTION NO. 8

You have heard evidence that witnesses Travis Napton and Gonzalo Morales have pleaded guilty to a crime which arose out of the same events for which the defendant is on trial here. You must not consider those guilty pleas as any evidence of this Defendant's guilt. You may consider that witness's guilty plea only for the purpose of determining how much, if at all, to rely upon that witness's testimony.

Eighth Circuit Manual Model Jury Instructions Criminal, § 2.19 (2007)(modified); Defendant's Proposed Jury Instruction No. 8.

INSTRUCTION NO. 9

You have heard evidence that witnesses Travis Napton and Gonzalo Morales entered into plea agreements whereby they hope to receive more lenient sentences and reduction of their sentences in return for their cooperation with the Government in this case. The testimony of these witnesses was received in evidence and may be considered by you. You may give the testimony of each of these witnesses such weight as you think it deserves. Whether or not the testimony of each of these witnesses may have been influenced by their hope of receiving a reduced sentence is for you to determine.

The guilty pleas of any of these witnesses cannot be considered by you as evidence of the Defendant's guilt of the charge in this case. The witnesses' guilty pleas can be considered by you only for the purpose of determining how much, if at all, to rely upon the witnesses' testimony.

Eighth Circuit Manual of Model Jury Instructions Criminal, §404,§ 4.05A (2007) (modified); Defendant's Proposed Jury Instruction No. 10 (modified).

INSTRUCTION NO. 10

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

Eighth Circuit Manual of Model Jury Instructions Criminal, § 2.05 (2007).

INSTRUCTION NO. 11

You have heard testimony that the Defendant Ever David Granados made statements to DCI Agent Jason Baldwin and FBI Agent James Van Iten. It is for you to decide how much weight you should give to the statement. In making this decision you should consider all of the evidence, including the circumstances under which the statements may have been made.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 2.07 (2007)(modified).

INSTRUCTION NO. 12

You have heard testimony from persons described as experts. 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.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 4.10 (2007).

INSTRUCTION NO. 13

A witness has testified that he viewed photographs of the Defendant which were shown to him by the police. The police collect pictures of many people from many different sources and for many different purposes. The fact that the police had the Defendant's picture does not mean that he committed the charged crime and it must have no effect on your consideration of the case.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 2.21 (2007) (modified.).

INSTRUCTION NO. 14

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

United States v. Rhodes, 631 F.2d 43, 46 n.3 (5th Cir. 1980).

INSTRUCTION NO. 15

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.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.04 (2007).

INSTRUCTION NO. 16

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 14.16, (5th ed. 2000).

INSTRUCTION NO. 17

You must presume that the Defendant is innocent of the crime charged. The Indictment is only a formal method of beginning a criminal case. It does not create any presumption of guilt; it is merely an accusation. The fact that a person has been indicted does not create any inference, nor is it evidence, that he is guilty of any crime. The presumption of innocence alone is sufficient to acquit the Defendant unless you as jurors are satisfied beyond a reasonable doubt of the Defendant's guilt of the crime charged from all the evidence that has been introduced in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the Defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. Unless the government proves, beyond a reasonable doubt, that the Defendant committed each and every element of the offense charged against him in the Indictment, you must find the Defendant not guilty of that offense.

There is no burden upon the Defendant to prove that he is innocent.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.05 (2007), (modified); O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 12.10, (5th ed. 2000), (modified).

INSTRUCTION NO. 18

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.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.11 (2007).

INSTRUCTION NO. 19

The Indictment charges that from on or about June 14, 2006, and June 14, 2008, in the District of South Dakota and elsewhere, the Defendant, Ever David Granados, did knowingly and intentionally combine, conspire, confederate, and agree together, with others known and unknown to the Grand Jury, to distribute or possess with intent to distribute marihuana, a Schedule I controlled substance, in violation of 21 U.S.C. § § 841(a)(1) and 846.

The Defendant has pleaded not guilty to this charge. There is no burden upon a defendant to prove that he is innocent of the charge against him.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.06 (2007) (modified.); Government's Proposed instruction No. 1 (modified).

INSTRUCTION NO. 20

Section 841(a)(1) of Title 21 of the United States Code provides, in part, that:

(a) . . . it shall be unlawful for any person knowingly or intentionally -

(1) to . . . distribute, or . . . possess with intent to . . . distribute . . . a controlled substance [.]

This provision is to assist you in determining whether the conspiracy charged in the Indictment existed. Keep in mind that the Indictment charges a conspiracy to distribute or possess with intent to distribute a controlled substance and does not charge distribution of a controlled substance or possession with intent to distribute a controlled substance.

21 U.S.C. § 841(a)(1); Defendant's Proposed Jury Instruction No. 3 (modified).

INSTRUCTION NO. 21

The Indictment charges that the offense alleged was committed "on or about" certain dates. Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on dates reasonably near the dates alleged in the Indictment, it is not necessary for the government to prove that the offense was committed precisely on the dates charged.

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 13.05, (5th ed. 2000).

INSTRUCTION NO. 22

It is not necessary for the government to prove that the Defendant knew the precise nature of the controlled substance that he conspired to distribute or conspired to possess with the intent to distribute.

The government must prove beyond a reasonable doubt, however, that the Defendant did know that some type of controlled substance was distributed or possessed with intent to distribute.

Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions, § 54.15 (4th ed. 1992).

INSTRUCTION NO. 23

The term "to . . . possess" means to exercise control or authority over something at a given time. There are several types of possession -- actual, constructive, sole, and joint.

The "possession" is considered to be actual possession when a person knowingly has direct physical control or authority over something. The "possession" is called constructive possession when a person does not have direct physical control over something, but can knowingly control it and intends to control it, sometimes through another person.

The "possession" may be knowingly exercised by one person exclusively which is called sole possession; or the "possession" may be knowingly exercised jointly when it is shared by two or more persons.

Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions, § 54.08 (4th ed. 1992).

INSTRUCTION NO. 24

The phrase "with intent to distribute" means to have in mind or to plan in some way to deliver or to transfer possession or control over a thing to someone else.

In attempting to determine the intent of any person you may take into your consideration all the facts and circumstances shown by the evidence received in the case concerning that person.

In determining a person's "intent to distribute" a controlled substance, the jury may consider, among other things, the purity of the controlled substance, the quantity of the controlled substance, the presence of equipment used in the processing or sale of controlled substances, and large amounts of cash or weapons.

Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions, § 54.09 (4th ed. 1992) (modified).

INSTRUCTION NO. 25

You are instructed, as a matter of law, that marihuana is a controlled substance. It is solely for you to determine, however, whether the government has proven beyond a reasonable doubt that the defendant conspired to distribute or possess with intent to distribute a controlled substance.

Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions, § 54.13 (4th ed. 1992), (modified).

INSTRUCTION NO. 26

The crime of conspiracy, as charged in the Indictment, has four essential elements, which are:

One, that from on or about June 14, 2006, and June 14, 2008, in the District of South Dakota and elsewhere, two or more persons reached an agreement or came to an understanding to possess with intent to distribute or distribute marihuana;

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;

Three, at the time the Defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and

Four, the agreement or understanding involved some amount of marihuana.

Record your determination on the Verdict Form.

The quantity of controlled substances involved in the agreement or understanding includes the controlled substances the Defendant 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 or natural consequence of the agreement or understanding and were reasonably foreseeable by the Defendant. Proof of association or acquaintanceship alone is not enough to establish a conspiracy.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 6.21.846A.1 (2007) (modified).

INSTRUCTION NO. 27

The government must prove that the Defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is named in the Indictment. You do not have to find that all of the persons charged were members of the conspiracy.

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 purpose 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.

You must decide, after considering all of the evidence, whether the conspiracy alleged in 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.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 5.06B (2007).

INSTRUCTION NO. 28

The existence of a simple buyer-seller relationship between a defendant and another person, without more, is not sufficient to establish a conspiracy, even where the buyer intends to resell the marihuana. The fact that the defendant may have bought marihuana from another person or sold marihuana to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy.

In considering whether a conspiracy or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:

(1) Whether the transaction involved large quantities of marihuana;

(2) Whether the parties had a standardized way of doing business over time;

(3) Whether the sales were on credit or on consignment;

(4) Whether the parties had a continuing relationship;

(5) Whether the seller had a financial stake in a resale by the buyer; and

(6) Whether the parties had an understanding that the marihuana would be resold.

No single factor necessarily indicates by itself that the defendant was or was not engaged in a simple buyer-seller relationship.

Fed. Crim. Jury Instructions 7th Cir. 6.12 (1999)

INSTRUCTION NO. 29

It is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 5.06E (2007).;

INSTRUCTION NO. 30

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.

Acts and statements which are made before the conspiracy began or after it ended are admissible only against the person making them and should not be considered by you against the Defendant.

Eighth Circuit Manual Model Jury Instructions Criminal, § 5.06I (2007) (modified).

INSTRUCTION NO. 31

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I will 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 agreement if you can do so without violence to individual judgment, because your verdict – 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 a verdict.

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, you may send a note to me through the marshal, 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 vote stands numerically.

INSTRUCTION NO. 31, continued

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. 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 decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed upon the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.12 (2007).

INSTRUCTION NO. 32

As stated in my instructions, 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 to change your opinion if you are convinced it is wrong. To bring twelve minds 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 guilt beyond a reasonable doubt, then the defendant should have your vote for a not guilty verdict. If all of you reach the same conclusion, then the verdict of the jury must be not guilty. Of course the opposite also applies. If in your individual judgment the evidence establishes guilt beyond a reasonable doubt, then your vote should be for a verdict of guilty and if all of you reach that conclusion then the verdict of the jury must be guilty. As I instructed you earlier, the burden is upon the Government to prove beyond a reasonable doubt every element of the crime charged.

Finally, remember that you are not partisans; you are judges -- 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. But I suggest that you carefully consider all the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

INSTRUCTION NO. 32, continued

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, the case is left open and must be disposed of at some later time.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 10.02 (2007).

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | * | CR. 08-30052 |
| Plaintiff, | * | VERDICT FORM |
| - vs - | * | |
| EVER DAVID GRANADOS, | * | |
| Defendant. | * | |

Please return your verdict by placing an "X" or "√" in the spaces provided.

**VERDICT**

We, the jury in the above entitled and numbered case, as to the crime of conspiracy to possess with intent to distribute or to distribute marihuana as charged in the Indictment, unanimously find the Defendant, Ever David Granados:

_____ NOT GUILTY

_____ GUILTY

**Have your foreperson sign and date the Verdict Form below.**

Dated this _____ day of November, 2008.

_____

Foreperson

Eighth Circuit Manual of Model Jury Instructions Criminal, §§ 11.01 (2007)(modified); Defendant's Proposed Verdict Form (modified).