

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED
OCT 30 2009
[Signature]
CLERK

UNITED STATES OF AMERICA,

CR 09-10035

Plaintiff,

JURY INSTRUCTIONS

-VS-

WAYNE D. BREITAG,

Defendant.

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INSTRUCTION NO. 1

Ladies and gentlemen of the jury, it is my duty now to explain the rules of law you must apply to this case.

You as jurors are the sole judges of the facts. But it is your duty to follow the law stated in these instructions, and to apply that law to the facts as you find them from the evidence before you. It would be a violation of your sworn duty to base your verdicts upon any rules of law other than the ones given you in these instructions, regardless of your personal feelings as to what the law ought to be.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

INSTRUCTION NO. 2

You have been chosen and sworn as jurors to try the issues of fact presented by the allegations of the indictment and the denials made by the defendant in his pleas of "not guilty." You are to perform this duty without bias or prejudice, because the law does not permit jurors to be governed by sympathy or public opinion. The accused and the public expect that you will carefully and impartially consider all of the evidence and will follow the law as stated by the Court, in order to reach just verdicts, regardless of the consequences to any party.

INSTRUCTION NO. 3

The indictment in this case charges that the defendant committed the crimes of smuggling and two counts of Lacey Act false labeling violations. The defendant has pleaded not guilty to these charges.

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. Therefore, the defendant, even though charged, begins the trial with no evidence against him. This 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 essential element of the crimes charged.

There is no burden upon the 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 verdict.

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

INSTRUCTION NO. 4

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. 5

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 the 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 shall 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 any objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony and questions that I struck from the record, or told you to disregard, are not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.

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

INSTRUCTION NO. 6

There are two types of evidence from which you may find the truth as to the facts of a case--direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of the defendant. The law makes no distinction between the weight 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 the defendant not guilty.

INSTRUCTION NO. 7

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. 8

You have heard testimony that Wayne D. Breitag made a statement to Special Agent Robert Prieksat of the U.S. Fish and Wildlife Service. It is for you to decide:

First, whether the defendant made the statement and

Second, if so, how much weight you should give to it.

In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made. This includes, among other things, the fact that there is no tape or audio recorded statement of any kind.

INSTRUCTION NO. 9

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of a greater credence. 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.

INSTRUCTION NO. 10

You have heard evidence that witnesses Jan Swart and Mark Booth 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 those witnesses' guilty pleas only for the purpose of determining how much, if at all, to rely upon those witnesses' testimony.

INSTRUCTION NO. 11

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or crime not charged in the Indictment. This includes any activities in Africa.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crimes charged. The fact that another person also may be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter into your thinking as you decide whether this defendant has been proved guilty of the crimes charged.

INSTRUCTION NO. 12

You have received evidence that Jan Swart and Mark Booth hoped to receive reduced sentences on criminal charges in return for cooperation with the government in this case. Jan Swart and Mark Booth entered into "plea agreements" with the government promising such cooperation.

You may give the testimony of these witnesses such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by hope of receiving a reduced sentence is for you to decide.

The witnesses' guilty pleas cannot be considered by you as any evidence of this defendant's guilt. 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.

INSTRUCTION NO. 13

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in court, and you should consider this testimony together with all other evidence received.

INSTRUCTION NO. 14

The crime of Smuggling, as charged in Count I of the indictment, has three essential elements, which are:

1. On or about November 5, 2004, in the District of Colorado or elsewhere, the defendant voluntarily and intentionally imported or brought a leopard hide into the United States or aided and abetted such importation.
2. The importation of the leopard hide was "contrary to law" because the defendant did not first obtain a valid CITES import permit for the leopard hide issued by the United States Fish and Wildlife Service, and
3. The defendant knew that the importation was "contrary to law."

For you to find the defendant guilty of this crime as charged in Count I of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 15

The crime of False Labeling as charged in Count II of the indictment has two essential elements, which are:

1. On or about between August 23, 2003, and September 10, 2004, in the United States, the defendant voluntarily and intentionally submitted a false CITES import permit application form stating he had hunted and killed a leopard in Zimbabwe when, in fact, as he then knew, he had hunted and killed the leopard in South Africa, and
2. The leopard hide was intended to be imported to the United States from a foreign country and was imported at Denver, Colorado.

For you to find the defendant guilty of this crime charged in Count II of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 14

The crime of False Labeling as charged in Count III of the indictment has two essential elements, which are:

1. On or about between May 10, 2004, and November 5, 2004, in the United States, the defendant voluntarily and intentionally submitted or caused to be submitted or aided and abetted the submission of a false CITES import permit application form stating that Mark Booth had hunted and killed a leopard in Zimbabwe when, in fact, as the defendant then knew, the defendant had hunted and killed the leopard in South Africa, and
2. The leopard hide had been or was intended to be imported to the United States from a foreign country and was imported to the United States from a foreign country.

For you to find the defendant guilty of this crime charged in Count III of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 17

Intent may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the intent of the defendant.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 18

A person may also be found guilty of the crimes charged in the indictment even if that person personally did not do every act constituting the crimes charged, if he aided and abetted the commission of the crimes. In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

1. have known the crime was being committed or going to be committed;
2. have knowingly acted in some way for the purpose of causing or aiding the commission of the offense; and
3. have intended to commit the crime in question.

For you to find the defendant guilty of the crimes charged in Counts I or III of the indictment by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the elements of the crime in question were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

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 become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

You are also instructed that a person cannot aid and abet herself or himself in the commission of the crime. In other words, you may only find the defendant guilty of aiding and abetting a crime if you first find that some other person has performed acts necessary for the commission of one of the offenses charged.

INSTRUCTION NO. 19

Count I of the indictment charges the defendant with smuggling. Count III of the indictment charges the defendant with false labeling. The government alleges that the defendant either committed these crimes himself or aided and abetted another in committing the crimes.

The jury must unanimously agree that either the defendant committed the crime or crimes or that he aided and abetted some other person in committing the crime or crimes. If the jury unanimously finds that the defendant aided and abetted another, the jury must unanimously agree which specific other individual committed the crime or crimes charged.

INSTRUCTION NO. 20

You will note that the indictment charges that the offenses were committed "on or about" or "on or about and between" a certain date or dates. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date or dates reasonably near the dates alleged.

INSTRUCTION NO. 21

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A verdict form has been prepared for your convenience.

You will take this form to the jury room and, when you have reached unanimous agreement as to your verdicts, you will have your foreperson fill in, date and sign the form to state the verdicts upon which you unanimously agree, and then notify the marshal that you have a verdict or verdicts.

INSTRUCTION NO. 22

The verdicts must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. Your verdicts must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges--judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTION NO. 23

If you have questions, you may send a note by a marshal, signed by your foreperson, or by one or more members of the jury.

You will note from the oath about to be taken by the marshal that he, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached unanimous verdicts.

INSTRUCTION NO. 24

It is proper to add a final caution.

Nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your verdicts should be.

What the verdicts shall be is your exclusive duty and responsibility.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,

CR 09-10035

Plaintiff,

-VS-

WAYNE D. BREITAG,

VERDICT

Defendant.

Please return a verdict by placing an "X" in the space provided.

COUNT I

We, the jury in the above entitled action, as to the crime of Smuggling, as explained in instruction No. 14, find Wayne D. Breitag:

NOT GUILTY GUILTY

COUNT II

We, the jury in the above entitled action, as to the crime of False Labeling, as explained in instruction No. 15, find Wayne D. Breitag:

NOT GUILTY GUILTY

COUNT III

We, the jury in the above entitled action, as to the crime of False Labeling, as explained in instruction No. 16, find Wayne D. Breitag:

NOT GUILTY GUILTY

Dated this _____ day of _____, 2009.

Foreperson