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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CR.09-40098

Plaintiff,

JURY INSTRUCTIONS

- vs -

TODD ALLEN TUTTLE,

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.

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.

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.

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.

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 a defendant beyond a reasonable doubt, you must find him not guilty.

INSTRUCTION NO. 6

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

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

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

INSTRUCTION NO. 7

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.

INSTRUCTION NO. 4

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

INSTRUCTION NO. 4

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.

INSTRUCTION NO. 10

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.

INSTRUCTION NO. 11

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 a defendant unless you as jurors are satisfied beyond a reasonable doubt of a 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 a 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 a defendant committed each and every element of the offense charged against him in the Indictment, you must find that defendant not guilty of that offense.

There is no burden upon a defendant to prove that he is innocent.

INSTRUCTION NO. 13

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. 13

Count 1 of the Indictment charges that on or about April 18, 2009, in the District of South Dakota, Todd Allen Tuttle, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess firearms, to-wit: a Mossberg 12 gauge shotgun, Model 500A, bearing serial number L634800; a Makarov 9mm semi-automatic pistol, bearing serial number H608725; and a Hi-Standard .22 caliber pistol bearing serial number 2282218, which had been shipped and transported in interstate commerce, all in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

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.

INSTRUCTION NO. 14

Section 922(g)(1) of Title 18 of the United States Code provides, in relevant part, that:

It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to . . . possess in or affecting commerce, any firearm

INSTRUCTION NO. 15

The crime of being a felon in possession of a firearm, as charged in Count 1 of the Indictment, has three elements, which are:

One, the defendant has been convicted of a crime punishable by imprisonment for a term exceeding one year;

Two, the defendant thereafter knowingly possessed firearms, that is a Mossberg 12 gauge shotgun, Model 500A, bearing serial number L634800; a Makarov 9mm semi-automatic pistol, bearing serial number H608725; and a Hi-Standard .22 caliber pistol bearing serial number 2282218; and

Three, the firearms were transported across a state line at some time during or before the defendant's possession of them.

You are instructed that possession of a controlled drug or substance is a crime punishable by imprisonment for more than one year under the laws of the State of South Dakota.

If all three elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged in Count 1 of the Indictment; otherwise, you must find the defendant not guilty of the crime charged in Count 1 of the Indictment.

Eighth Circuit Manual of Model Jury Instructions Criminal, §§ 6.18.922, 3.09 (2007) (modified);
Government's Proposed Jury Instruction No. 2.

INSTRUCTION NO. 16

Count 2 of the Indictment charges that on or about April 18, 2009, in the District of South Dakota, Todd Allen Tuttle, then being an unlawful user of and addicted to a controlled substance as defined in 21 U.S.C. § 802, did knowingly possess firearms, to-wit: a Mossberg 12 gauge shotgun, Model 500A, bearing serial number L634800; a Makarov 9mm semi-automatic pistol, bearing serial number H608725; and a Hi-Standard .22 caliber pistol bearing serial number 2282218, which had been shipped and transported in interstate commerce, all in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2).

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.

INSTRUCTION NO. 17

Section 922(g)(3) of Title 18 of the United States Code provides, in relevant part, that:

It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) to . . . possess in or affecting commerce, any firearm

INSTRUCTION NO. 18

The crime of being a drug user in possession of a firearm, as charged in Count 2 of the Indictment, has three elements, which are:

One, the defendant was an unlawful user of controlled substances, that is, methamphetamine and marijuana;

Two, the defendant knowingly possessed firearms, that is a Mossberg 12 gauge shotgun, Model 500A, bearing serial number L634800; a Makarov 9mm semi-automatic pistol, bearing serial number H608725; and a Hi-Standard .22 caliber pistol bearing serial number 2282218 ; and

Three, the firearms were transported across a state line at some time during or before the defendant's possession of them.

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

INSTRUCTION NO. 14

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

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 13.05 (5th ed. 2000);
Government's Proposed Instruction No. 11.

INSTRUCTION NO. 20

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.

INSTRUCTION NO. 31

The government and the defendant have stipulated—that is, they have agreed—that: (1) the defendant has been convicted of a crime punishable by imprisonment greater than one year; (2) that the defendant was an unlawful user of controlled substances methamphetamine and marijuana on or about April 18, 2009; and (3) the weapons in this case are firearms as defined by federal law and were manufactured in a state other than South Dakota and were transported across state lines before they were seized on April 18, 2009. The parties have further stipulated that these stipulations constitute proof beyond a reasonable doubt of the first and third elements of the offenses with which the defendant Todd Allen Tuttle is charged in Counts 1 and 2 of the Indictment. The remaining issue for you to decide as a result of the stipulations entered into between the two parties is whether the defendant knowingly possessed a firearm, that is a Mossberg 12 gauge shotgun, Model 500A, bearing serial number L634800; or a Makarov 9mm semi-automatic pistol, bearing serial number H608725; or a Hi-Standard .22 caliber pistol bearing serial number 2282218; or any combination thereof.

You have been instructed that possession includes actual as well as constructive possession and also sole as well as joint possession.

Possession of whatever type means knowing possession. Unless you are convinced beyond a reasonable doubt that Todd Allen Tuttle was aware of the presence of the firearms he is charged with possessing on or about April 18, 2009, you must find Todd Allen Tuttle not guilty of such possession.

Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions, § 54.08 (4th ed. 1992); Eighth Circuit Manual of Model Jury Instructions Criminal, § 2.03 (2007) (modified); Defendant's Proposed Jury Instruction No. 2.

INSTRUCTION NO. 20

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 verdicts – whether guilty or not guilty – must be unanimous.

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

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

Third, if a 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. 32, continued

Fifth, your verdicts 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 verdicts should be -- that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decisions that you reach in this case. You will take this form to the jury room, and when each of you has agreed upon the verdicts, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

 UNITED STATES OF AMERICA, * CR.09-40098
 Plaintiff, *
 - vs - * VERDICT FORM
 TODD ALLEN TUTTLE, *
 Defendant. *

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

VERDICT ONE

We, the jury in the above entitled and numbered case, as to the crime being a felon in possession of a firearm, as charged in Count 1 of the Indictment, find the Defendant, Todd Allen Tuttle:

____ NOT GUILTY

____ GUILTY

Go on to consider Verdict Two.

VERDICT TWO

We, the jury in the above entitled and numbered case, as to the crime of being a drug user in possession of a firearm, as charged in the Count 2 of the Indictment, find the Defendant, Todd

Allen Tuttle:

_____ NOT GUILTY

_____ GUILTY

Dated this _____ day of November, 2008.

Foreperson

INSTRUCTION NO. 23

In view of your verdict that Defendant Todd Allen Tuttle is guilty of one or more of the offenses alleged in Counts 1 and 2 of the Indictment, you must now render a special verdict concerning whether the defendant must forfeit certain property which the government claims is subject to forfeiture to the United States pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c) because they are firearms involved in the commission of a firearms offense.

Under federal law, any person who is convicted of a firearm offense for which Defendant Todd Allen Tuttle has been found guilty shall forfeit to the United States all firearms involved in the commission of such violation.

To be forfeitable, the property need not be used exclusively for illegal activity; property that is used the vast majority of the time for legitimate purposes may nevertheless be forfeited if it facilitates the criminal offense. Facilitation of even a single felony offense is sufficient to justify forfeiture.

You must now consider what verdict to render on the question whether there is a nexus, that is a connection, between property that the asset forfeiture allegation of the Indictment allege shall be forfeited to the United States and the offense(s) for which you have already found Defendant Todd Allen Tuttle guilty.

You are instructed, however, that your previous finding that Defendant Tuttle is guilty of committing one or more of the firearms offenses alleged in the Indictment is final, conclusive, and binding. Because you are bound by your previous finding that the defendant is guilty, I direct you not to discuss in your forfeiture deliberations whether the defendant is guilty or not guilty of any firearms offense.

All of my previous instructions regarding direct and circumstantial evidence, credibility of witnesses, and duty to deliberate apply with respect to your verdicts regarding forfeiture.

Government's Proposed Forfeiture Jury Instruction No. 1.

INSTRUCTION NO. 24

The previous instruction on the United States' burden of proof regarding your verdict on the guilt of Defendant Todd Allen Tuttle does not apply to your deliberation and verdict regarding forfeiture. In deliberating and deciding your verdict regarding forfeiture, you are instructed that the United States need only prove by a preponderance of the evidence that the property listed in the asset forfeiture allegation of the Indictment is subject to forfeiture as it is firearms involved in the commission of the firearms offense(s) of which Defendant Todd Allen Tuttle has been convicted.

You are instructed that, in order for the United States to establish by a preponderance of the evidence that the property is subject to forfeiture pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), it must prove that it is more likely than not that the property constitutes firearms involved in the commission of the firearms offense(s).

INSTRUCTION NO. 25

While deliberating, you may consider any evidence, including testimony, offered by the parties at any time during the trial.

INSTRUCTION NO. 26

In determining whether property is subject to forfeiture, you should not consider what might happen to property that is declared forfeited as that is exclusively a matter for the Court to decide. You should disregard any claims that other persons may have to the property. The interests that other persons may have in the property will be taken into account by the Court at a later time. Any claims that the forfeiture of the property would constitute excessive punishment will also be taken into account by the Court at a later time as will the issue regarding whether or not the property is presently available.

Your sole concern now is to determine whether the firearms were involved in the commission of the firearms offense(s).

INSTRUCTION NO. 37

The Special Verdict form lists the property which the United States asserts Defendant Todd Allen Tuttle should forfeit pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c) as property involved in the commission of the firearms offense(s).

You must reach a unanimous verdict as to each question on the Special Verdict form.

You may answer by simply putting an "X" or check mark in the space provided next to the words "YES" or "NO." The foreperson must then sign and date the Special Verdict form.

UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH DAKOTA
 SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CR.09-40098

Plaintiff,

SPECIAL VERDICT FORM
 (FORFEITURE)

- vs -

TODD ALLEN TUTTLE,

Defendant.

We, the jury in the above-entitled and numbered case, find by a preponderance of evidence that Defendant Todd Allen Tuttle's interest in following property is subject to forfeiture to the United States:

Mossberg 12 gauge shotgun, Model 500A, bearing serial number L634800.	<input type="checkbox"/> YES
We, the jury, find this property is subject to forfeiture:	<input type="checkbox"/> NO
Makarov 9 mm semi-automatic pistol, bearing serial number H608725.	<input type="checkbox"/> YES
We, the jury, find this property is subject to forfeiture:	<input type="checkbox"/> NO
Hi-Standard .22 caliber pistol bearing serial number 2282218.	<input type="checkbox"/> YES
We, the jury, find this property is subject to forfeiture:	<input type="checkbox"/> NO

Dated this _____ day of November, 2008.

 Foreperson