


UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED

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 CLERK

UNITED STATES OF AMERICA,)	CR. 10-50086-JLV
)	
Plaintiff,)	FINAL INSTRUCTIONS
)	TO THE JURY
vs.)	
)	
MARK MARTIN,)	
)	
Defendant.)	

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FINAL INSTRUCTION NO. 1 - INTRODUCTION

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

The final instructions I am about to give you will be available 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, Mark Martin. The defendant is charged with the offense of possession of a firearm by a prohibited person. Your duty is to decide from the evidence whether the defendant is not guilty or guilty of the offense charged against him. You will find the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 11. 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, which I will give you in these instructions, 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. Martin, not anyone else, is on trial here. Also, remember he is on trial only for the offense charged against him, not for anything else.

FINAL INSTRUCTION NO. 3 - DESCRIPTION OF THE OFFENSE

I will give you a summary of the offense charged and the elements that make up each alternative theory of the offense. However, I must first explain some preliminary matters.

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

The indictment charges the offense was committed “on or between” May 26, 2010, and June 29, 2010. The government does not have to prove with certainty the exact date of the offense charged. It is sufficient if the evidence establishes that the offense occurred within a reasonable time of the date alleged in the indictment.

The indictment charges that, on or between May 26, 2010, and June 29, 2010, in the District of South Dakota, the defendant, Mark Martin, knowingly possessed, in and affecting commerce, one or more firearms after having been previously convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year, or while being an unlawful user of a controlled substance.

The indictment charges the defendant with one criminal offense—possession of a firearm by a prohibited person. You may find the defendant guilty under one or both of the following alternative theories:

- (1) possession of a firearm after having been convicted of a felony; or
- (2) possession of a firearm while being an unlawful user of a controlled substance.

The government need only prove one of these theories beyond a reasonable doubt for you to find the defendant guilty of the offense charged in the indictment, but you must unanimously agree which theory the government has proven beyond a reasonable doubt, if either or both.

**Alternative I: Possession of a Firearm After Having Been
Convicted of a Felony**

The crime of being a felon in possession of a firearm has the following three essential elements:

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

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that, on December 27, 1991, the defendant was convicted in the state courts of South Dakota of a crime punishable by imprisonment for a term exceeding one year, with the judgment being filed January 3, 1992. That is, the defendant was convicted of a felony.

By entering into this agreement or stipulation, the defendant has not admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is that you must consider the first essential element as proven.

Two, the defendant thereafter knowingly possessed one or more firearms,
that is,

- (1) an Excel, single shot, 12-gauge shotgun, bearing serial number F44481XE;
- (2) a Ruger, New Model, Single-Six, .22 caliber revolver, bearing serial number 260-93314;
- (3) a Harrington & Richardson, model 949, .22 caliber revolver, bearing serial number AX069736;
- (4) a Fratelli Tanfoglio, F.I.E., model E15, .22 caliber revolver, bearing serial number TC66669;
- (5) a Smith & Wesson, Eastfield, model 916, 12-gauge shotgun, bearing serial number B84062;
- (6) an Italian made, 7.35 caliber rifle, bearing serial number G1737;
- (7) a JC Higgins, model 20, 12-gauge shotgun, bearing no serial number;
- (8) a Savage, Stevens model 311, 20-gauge shotgun, bearing no serial number;
- (9) a Marlin, model 1894S, .44 caliber rifle, bearing serial number 04064581;
- (10) a Winchester, model 70, .30-.06 rifle, bearing serial number G1127076;
- (11) a Marlin, model 60, .22 caliber rifle, bearing serial number 17480093;
- (12) a Savage, Stevens model 67, Series E, 12-gauge shotgun, bearing serial number E848442;
- (13) a Savage, Stevens model 311E, 12-gauge shotgun, bearing serial number A518964; and

- (14) an Anschutz, model Woodchucker, .22 caliber rifle, bearing serial number WC03090; and

Three, the firearm or firearms had been previously shipped or transported in interstate or foreign commerce.

If you have found beyond a reasonable doubt that the firearm or firearms were manufactured in a state other than South Dakota and that the defendant possessed the firearm or firearms in the State of South Dakota then you may, but are not required to, find that the firearm or firearms had been previously shipped or transported in interstate or foreign commerce.

To find the defendant guilty of being a felon in possession of a firearm, the government must prove all of these elements beyond a reasonable doubt. If the government fails to prove any essential element beyond a reasonable doubt, then you must find the defendant not guilty of being a felon in possession of a firearm.

**Alternative II: Possession of a Firearm While Being an
Unlawful User of a Controlled Substance**

The crime of being an unlawful user of a controlled substance in possession of a firearm has the following three essential elements:

One, the defendant was an unlawful user of a controlled substance, that is, marijuana;

Two, the defendant, while he was an unlawful user of a controlled substance, knowingly possessed one or more firearms, that is,

- (1) an Excel, single shot, 12-gauge shotgun, bearing serial number F44481XE;
- (2) a Ruger, New Model, Single-Six, .22 caliber revolver, bearing serial number 260-93314;
- (3) a Harrington & Richardson, model 949, .22 caliber revolver, bearing serial number AX069736;
- (4) a Fratelli Tanfoglio, F.I.E., model E15, .22 caliber revolver, bearing serial number TC66669;
- (5) a Smith & Wesson, Eastfield, model 916, 12-gauge shotgun, bearing serial number B84062;
- (6) an Italian made, 7.35 caliber rifle, bearing serial number G1737;
- (7) a JC Higgins, model 20, 12-gauge shotgun, bearing no serial number;
- (8) a Savage, Stevens model 311, 20-gauge shotgun, bearing no serial number;
- (9) a Marlin, model 1894S, .44 caliber rifle, bearing serial number 04064581;
- (10) a Winchester, model 70, .30-.06 rifle, bearing serial number G1127076;
- (11) a Marlin, model 60, .22 caliber rifle, bearing serial number 17480093;
- (12) a Savage, Stevens model 67, Series E, 12-gauge shotgun, bearing serial number E848442;
- (13) a Savage, Stevens model 311E, 12-gauge shotgun, bearing serial number A518964; and
- (14) an Anschutz, model Woodchucker, .22 caliber rifle, bearing serial number WC03090; and

Three, the firearm or firearms had been previously shipped or transported in interstate or foreign commerce.

If you have found beyond a reasonable doubt that the firearm or firearms were manufactured in a state other than South Dakota and that the defendant possessed the firearm or firearms in the State of South Dakota then you may, but are not required to, find that the firearm or firearms had been previously shipped or transported in interstate or foreign commerce.

The phrase “unlawful user of a controlled substance” means a person who uses a controlled substance in a manner other than as prescribed by a licensed physician. The defendant must have been actively engaged in the use of a controlled substance during the period of time he possessed the firearm or firearms, but the law does not require that he use the controlled substance at the precise time he possessed the firearm or firearms. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. An inference that a person was a user of a controlled substance may be drawn from evidence of a pattern of use or possession of a controlled substance that reasonably covers the time the firearm or firearms were possessed.

You are instructed that marijuana is a controlled substance. You must ascertain whether or not the substance in question in the indictment was

marijuana. In doing so, you may consider all the evidence in this case which may aid in the determination of that issue.

To find the defendant guilty of being an unlawful user of a controlled substance in possession of a firearm, the government must prove all of these elements beyond a reasonable doubt. If the government fails to prove any essential element beyond a reasonable doubt, then you must find the defendant not guilty of being an unlawful user of a controlled substance in possession of a firearm.

FINAL INSTRUCTION NO. 4 - DEFINITION OF FIREARM

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

FINAL INSTRUCTION NO. 5 - DEFINITION OF KNOWINGLY

An act is done “knowingly” if the defendant realized what he was doing and did not act through ignorance, mistake, or accident. The government is not required to prove the defendant knew his acts or omissions were unlawful.

FINAL INSTRUCTION NO. 6 - PROOF OF INTENT OR KNOWLEDGE

Intent or knowledge may be proven 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 defendant's knowledge or intent.

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

FINAL INSTRUCTION NO. 7 - POSSESSION

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word "possession" has been used in these instructions it includes actual as well as constructive possession and also sole as well as joint possession.

FINAL INSTRUCTION NO. 8 - DEFENSE

It is the defendant's position that he was never in actual possession of any firearm and that he did not have any intention to exercise control over any firearm so as to put him in constructive possession of a firearm. If you find the defendant did not actually or constructively possess any of the firearms in this trial, you must find him not guilty.

FINAL INSTRUCTION NO. 9 -

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The defendant 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 the defendant throughout the trial. This presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the government proves, beyond a reasonable doubt, one or both of the alternative theories of the offense.

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

FINAL INSTRUCTION NO. 10 - 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. 11 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, 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.

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. 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.

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 - EXPERT WITNESSES

You may 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.

FINAL INSTRUCTION NO. 14 - OBJECTIONS

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

FINAL INSTRUCTION NO. 15 - USE OF NOTES

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

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

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

FINAL INSTRUCTION NO. 16 - DUTY TO DELIBERATE

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

In the course of your deliberations you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring 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 the defendant's guilt beyond a reasonable doubt on the offense charged against him, then the defendant should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for the defendant on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt on the offense

charged against him, then your vote should be for a verdict of guilty against the defendant on that offense. If all of you reach that conclusion, then the verdict of the jury must be guilty for the defendant on that offense. As I instructed you earlier, the burden is upon the government to prove beyond a reasonable doubt one or both of the alternative theories of the offense.

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

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

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

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be resolved at some later time.

FINAL INSTRUCTION NO. 17 - DUTY DURING DELIBERATIONS

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

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

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

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the lawyers, I will respond as soon as possible, either in writing or orally in open court. Remember you should not tell anyone—including me—how your votes stand numerically.

If you need to examine any of the firearms admitted into evidence, you may send a note to me through the court security officer, signed by one or more jurors. I will make arrangements for you to examine the requested firearms in the courtroom. A court security officer and deputy clerk will be with you while you examine the firearms.

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.** 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 and interrogatory are simply the written notice of the decisions you reach in this case. You will take this form to the jury room. You must consider each alternative theory of the offense separately, and you must unanimously agree which theory the government has proven beyond a reasonable doubt, if either or both. The answers to the verdict form and interrogatory must be unanimous. When you have unanimously agreed on answers to the verdict form and interrogatory, the foreperson will fill in the forms, sign and date them, 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 July 21st, 2011.

BY THE COURT:



JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE