

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
NOV 21 2013
[Signature]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFREY HARLEY STROM; and
AUSTIN JON DALSTED,

Defendants.

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CR 13-40040-03, 04

JURY INSTRUCTIONS

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

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.

INSTRUCTION NO. 7

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. 8

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. 8a

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.

You should judge the testimony of a defendant in the same manner as you judge the testimony of any other witness.

INSTRUCTION NO. 9

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. 10

The government and the defendant have stipulated -- that is, they have agreed -- that certain facts are as the government and the defendants agreed. You must therefore treat those facts as having been proved.

INSTRUCTION NO. 11

You have heard evidence that witnesses have received a promise from the Government that their testimony will not be used against them in a criminal case. The testimony of these witnesses was received in evidence and may be considered by you. You may give testimony such weight as you think it deserves. Whether or not the testimony of these witnesses may have been influenced by the Government's promise is for you to determine.

INSTRUCTION NO. 12

You have heard evidence that witnesses 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.

INSTRUCTION NO. 13

You have heard evidence that certain witnesses hope to receive reduced sentences on criminal charges against them in return for their cooperation with the Government in this case. These witnesses entered into agreements with the Government which provide that in return for their assistance, the Government will recommend less severe sentences which could be less than the mandatory minimum sentence for the crimes with which they have been charged. These witnesses are subject to mandatory minimum sentences, that is, sentences that the law provides must be of a certain minimum length. If the prosecutor handling these witnesses' cases believes they provided substantial assistance, that prosecutor can file with the sentencing court a motion to reduce their sentences below the statutory minimum. The judge has no power to reduce a sentence for substantial assistance unless the Government, acting through the United States Attorney, files a such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the Government, then it is up to the judge to decide whether to reduce the sentence at all, and if so, how much to reduce it.

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.

INSTRUCTION NO. 14

You have heard evidence that witnesses have pleaded guilty to a crime which arose out of the same events for which the defendants are on trial here. The guilty pleas of any of these witnesses cannot be considered by you as evidence of either 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.

INSTRUCTION NO. 15

The Superseding Indictment in this case charges that beginning at an unknown time, and continuing until on or about March 27, 2013, in the District of South Dakota and elsewhere, Defendant Jeffrey Harley Strom and Defendant Austin Jon Dalsted did knowingly and intentionally combine, conspire, confederate, and agree together, with others known and unknown to the Grand Jury, to knowingly and intentionally distribute 500 grams or more of a mixture and substance containing methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. You must presume that each Defendant is innocent of the crime charged against him. The Superseding 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 a crime. The presumption of innocence alone is sufficient to acquit a Defendant unless you as jurors are satisfied beyond a reasonable doubt of that Defendant's guilt of the crime charged from all the evidence that has been introduced in the case against him.

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 the Defendant in issue committed each and every element of the crime charged against him in the Superseding Indictment, you must find the Defendant in issue not guilty of that crime. There is no burden upon a Defendant to prove that he is innocent. Instead, the burden of proof remains on the government throughout the trial. The fact that a defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.07 (2013)(modified); O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, § 12.10, (5th ed. 2000), (modified).

INSTRUCTION NO. 16

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 . . . a controlled substance[.]

INSTRUCTION NO. 17

You are instructed, as a matter of law, that methamphetamine is a controlled substance.

You are further instructed that an ounce is equal to 28.35 grams.

It is solely for you, however, to determine whether or not the Government has proven beyond a reasonable doubt that the substance was methamphetamine and the quantity involved in the offense.

Government's Proposed Instruction No. 5.

INSTRUCTION NO. 18

The crime of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, as charged in the Superseding Indictment, has four essential elements, which are:

- One, From an unknown time, and continuing through on or about March 27, 2013, two or more persons reached an agreement or came to an understanding to distribute 500 grams or more of a mixture or substance containing methamphetamine;
- Two, The defendant in issue 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 in issue joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and
- Four, The agreement or understanding involved 500 grams or more of a mixture or substance containing methamphetamine.

If you find these four elements unanimously and beyond a reasonable doubt as to the defendant in issue, then you must find the defendant in issue guilty of the crime charged in the Superseding Indictment. Record your determination on the Verdict Form that is submitted to you with these instructions.

If you do not find the Defendant in issue guilty of this crime, go on to consider whether the defendant in issue conspired to distribute 50 grams or more of a mixture or substance containing methamphetamine.

If you find unanimously and beyond a reasonable doubt:

The first three elements set forth above; and

INSTRUCTION NO. 18, continued.

Fourth, you find that the agreement or understanding involved 50 grams or more of a mixture or substance containing methamphetamine, then you must find the Defendant in issue guilty of the crime of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine. Record your determination on the Verdict Form.

If you do not find the Defendant in issue guilty of this crime, go on to consider whether the defendant in issue conspired to distribute some amount of a mixture or substance containing methamphetamine. If you find the first three elements set forth above unanimously and beyond a reasonable doubt, you must find the defendant in issue guilty of the crime of conspiracy to distribute some amount of a mixture or substance containing methamphetamine. Otherwise you must find that defendant not guilty. Record Your determination on the Verdict Form.

The quantity of controlled substances involved in the agreement or understanding includes the controlled substances the defendant in issue possessed for personal use or 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 in issue.

INSTRUCTION NO. 19

It is not necessary for the Government to prove that the defendant in issue knew the precise nature of the controlled substance distributed.

The Government must prove beyond a reasonable doubt, however, that the defendant in issue did know that some type of controlled substance was distributed.

INSTRUCTION NO. 20

The Government must prove that the defendant in issue reached an agreement or understanding with at least one other person. It makes no difference whether that person is named in the Superseding Indictment.

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.

However, 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.

In determining whether an alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement maybe inferred from all the circumstances and the conduct of the alleged participants. In determining whether a defendant became a member of a conspiracy, you may consider only his acts and statements.

INSTRUCTION NO. 21

Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a defendant's guilt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 22

You may find that a defendant acted knowingly if you find beyond a reasonable doubt that the defendant in question was presented with facts that put him on notice that criminal activity was particularly likely, yet the defendant intentionally failed to investigate those facts. The element of knowledge may be inferred if the defendant in question deliberately closed his eyes to what would otherwise have been obvious to him. You may not find the defendant acted knowingly if you find he was merely negligent, careless or mistaken regarding the facts as to which knowledge is in question.

INSTRUCTION NO. 23

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

INSTRUCTION NO. 24

If you have found beyond a reasonable doubt that a conspiracy existed and that a defendant was one of its members, then you may consider acts knowingly done and statements knowingly made by that defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to that defendant even though they were done or made in the absence of and without the knowledge of that defendant. This includes acts done or statements made before that 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.

INSTRUCTION NO. 25

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

INSTRUCTION NO. 26

The Government is not required to prove that the defendants were involved in a conspiracy that filled the entire period charged so long as the time frame proved was within the period alleged in the Superseding Indictment.

INSTRUCTION NO. 27

If a person enters into an agreement but withdraws from that agreement before anyone has committed an act in furtherance of it, then the crime of conspiracy was not complete at that time and the person who withdrew must be found not guilty of the conspiracy. In order for you to find that a person withdrew from a conspiracy, you must find that person took a definite, positive step to disavow or defeat the purpose of the conspiracy. Merely stopping activities or a period of inactivity is not enough. That person must have taken such action before any member of the scheme had committed any act in furtherance of the conspiracy.

A defendant has the burden of proving that he withdrew by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. If the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against a defendant. The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

INSTRUCTION NO. 28

In conducting your deliberations and returning your verdicts, 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 the Defendant in issue is found guilty of the charge against him, 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 with regard to each defendant.

Fourth, if you need to communicate with me, you may send a note to me through the court service officer, 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.

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.

INSTRUCTION NO. 28, continued.

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 court service officer that you are ready to return to the courtroom.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

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VERDICT FORM

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

VERDICT ONE

We, the jury in the above entitled numbered case, as to the crime of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, find the Defendant **Jeffrey Harley Strom**:

_____ NOT GUILTY

_____ GUILTY

If you unanimously find Defendant Jeffrey Harley Strom guilty of the above crime, do not consider Verdicts Two and Three and go on to Verdict Four. If you unanimously find Defendant Jeffrey Harley Strom not guilty of the above crime, you must then consider in Verdict Two whether Defendant Jeffrey Harley Strom is guilty of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine. If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide under Verdict two whether Defendant Jeffrey Harley Strom is guilty of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine,

VERDICT TWO

We, the jury in the above entitled numbered case, as to the crime of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine, find the Defendant **Jeffrey Harley Strom**

_____ NOT GUILTY

_____ GUILTY

If you unanimously find Defendant Jeffrey Harley Strom guilty of the above crime, do not consider Verdict Three and go on to Verdict Four. If you unanimously find Defendant Jeffrey Harley Strom not guilty of the above crime, you must then consider in Verdict Three whether Defendant Jeffrey Harley Strom is guilty of conspiracy to distribute some amount of methamphetamine. If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide under Verdict Three whether Defendant Jeffrey Harley Strom is guilty of conspiracy to distribute some amount of a mixture or substance containing methamphetamine,

VERDICT THREE

We, the jury in the above entitled numbered case, as to the crime of conspiracy to distribute some amount of a mixture or substance containing methamphetamine, find the Defendant **Jeffrey Harley Strom**

_____ NOT GUILTY

_____ GUILTY

Go on to consider Verdict Four.

VERDICT FOUR

We, the jury in the above entitled numbered case, as to the crime of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, find the Defendant **Austin Jon Dalsted:**

_____ NOT GUILTY

_____ GUILTY

If you unanimously find Defendant Austin Jon Dalsted guilty of the above crime, do not consider Verdicts Five and Six. If you unanimously find Defendant Austin Jon Dalsted not guilty of the above crime, you must then consider in Verdict Five whether Defendant

Austin Jon Dalsted is guilty of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine. If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide under Verdict Five whether Defendant Austin Jon Dalsted is guilty of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine.

VERDICT FIVE

We, the jury in the above entitled numbered case, as to the crime of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine, find the Defendant **Austin Jon Dalsted**:

_____ NOT GUILTY

_____ GUILTY

If you unanimously find Defendant Austin Jon Dalsted guilty of the above crime, do not consider Verdict Six. If you unanimously find Defendant Austin Jon Dalsted not guilty of the above crime, you must then consider in Verdict Six whether Defendant Austin Jon Dalsted is guilty of conspiracy to distribute some amount of methamphetamine. If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide under Verdict Six whether Defendant Austin Jon Dalsted is guilty conspiracy to distribute some amount of a mixture or substance containing methamphetamine.

VERDICT SIX

We, the jury in the above entitled numbered case, as to the crime of conspiracy to distribute some amount of a mixture or substance containing methamphetamine, find the Defendant **Austin Jon Dalsted**:

_____ NOT GUILTY

_____ GUILTY

Have your foreperson sign and date the Verdict Form below.

Dated this _____ day of November, 2013.

Foreperson