

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH KENNETH HENRY,

Defendant.

4:21-CR-40106

4:22-CR-40018

FINAL 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.

You should not be influenced by any person's race, color, ethnicity, national origin, religion, gender, gender identity, sexual orientation, disability, or economic circumstances. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may express without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

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

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, and any facts that have been judicially noticed—that is, facts which I say you may, but are not required to, accept as true, even without evidence.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I will list those things again for you now:

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

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

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

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

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

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.03 (2023).

INSTRUCTION NO. 4

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. 4A

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 4.10 (2023).

INSTRUCTION NO. 5

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. Use the evidence only for those purposes for which it has been received and give the evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

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

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.02 (6th ed. 2008) (modified).

INSTRUCTION NO. 6

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 no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.04 (6th ed. 2008) (modified); *Eighth Circuit Manual of Model Jury Instructions Criminal*, § 1.03 (2023).

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 proceedings. 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.

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.

United States v. Rhodes, 631 F.2d 43, 46 n.3 (5th Cir. 1980); O'Malley, Grenig, and Lee, *Federal Jury Practice and Instructions*, § 12.07 (6th ed. 2008).

INSTRUCTION NO. 8

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

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 14.16 (6th ed. 2008).

INSTRUCTION NO. 9

The Indictments in this case charge the defendant with two different crimes.

The first Indictment charges that on or about January 26, 2021, in the District of South Dakota, the Defendant, Joseph Kenneth Henry, having been convicted of a crime punishable by imprisonment for a term exceeding one year, and then knowing he had been convicted of a crime punishable by imprisonment for a term exceeding one year, and then being an unlawful user of a controlled substance, and knowing he was an unlawful user of a controlled substance, did knowingly possess a firearm, to wit: a Calwestco, Jennings Trademark, model J-22, .22 Long Rifle caliber, semi-automatic pistol, bearing serial number 629059, said firearm having been shipped and transported in interstate commerce.

The second Indictment charges that on or about January 3, 2022, in the District of South Dakota, the Defendant, Joseph Kenneth Henry, did knowingly escape from custody by failing to report to the Glory House residential facility on the day and time designated by the United States Magistrate Court.

The defendant has pleaded not guilty to these charges. There is no burden upon the defendant to prove that he is innocent of the charges against him.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.06 (2023) (modified); Defendant's Proposed Jury Instruction No. 1 (modified).

INSTRUCTION NO. 10

You must presume that the defendant is innocent of the crimes charged against him. An 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 the defendant unless you as jurors are satisfied beyond a reasonable doubt of the defendant's guilt of the crime charged from all the evidence that has been introduced in the case against him.

The burden is always upon the government 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 committed each and every element of the offenses charged against him in the Indictments, you must find the defendant not guilty of that offense.

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

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.06 (2023) (modified); O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.10 (6th ed. 2008) (modified).

INSTRUCTION NO. 11

Section 922(g)(1) and (g)(3) of Title 18 of the United States Code provides that it is unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, or who is an unlawful user of any controlled substance, to knowingly possess a firearm which has been shipped or transported in interstate commerce.

18 U.S.C. §§ 922(g)(1), 922(g)(3).

INSTRUCTION NO. 12

It is a crime for a felon or an unlawful user of a controlled substance to knowingly possess a firearm, as charged in the first Indictment. This crime has four essential elements which are:

***One*, that on or about January 26, 2021, the defendant knowingly possessed a firearm, that is: a Calwestco, Jennings Trademark, model J-22, .22 Long Rifle caliber, semi-automatic pistol, bearing serial number 629059;**

The term “firearm” means any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

***Two*, that on or about January 26, 2021, the defendant had previously been convicted of a crime punishable by imprisonment for more than one year, or he was an unlawful user of a controlled substance;**

***Three*, at the time the defendant knowingly possessed the firearm, he knew that he had previously been convicted of a crime punishable by imprisonment for more than one year, or he knew that he was an unlawful user of a controlled substance; and**

***Four*, the firearm was transported across a state line at some time during or before the defendant’s possession of it.**

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than the State of South Dakota, and that the defendant possessed the firearm in the State of South Dakota, then you may, but are not required to, find that it was transported across a state line.

There are two theories identified in the first Indictment for why the defendant is prohibited from possessing a firearm: (1) that he was previously convicted of a crime punishable by imprisonment for a term exceeding one year, or (2) that he was an unlawful user of a controlled substance. The government need not prove beyond a reasonable doubt that the defendant is prohibited under both theories. Instead, the government must prove beyond a reasonable doubt that the defendant was prohibited under at least one of these theories. You must unanimously agree as to whether one of these theories, both of these theories, or neither of these theories of prohibited status applies to the defendant.

If all of the elements have been proved beyond a reasonable doubt as to the defendant Joeseeph Kenneth Henry, then you must find the defendant Joeseeph Kenneth Henry guilty of the crime charged in the first Indictment; otherwise, you must find the defendant not guilty of this crime.

Eighth Circuit Manual of Model Jury Instructions Criminal, §§ 3.09, 6.18.922A (2023) (modified); 18 U.S.C. §§ 922(g)(1), 922(g)(3); Government's Proposed Jury Instruction No. 1 (modified).

INSTRUCTION NO. 13

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

Eighth Circuit Manual of Model Jury Instructions Criminal, § 6.18.922B (2023);
Government's Proposed Jury Instruction No. 3.

INSTRUCTION NO. 14

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, 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.

INSTRUCTION NO. 15

Section 751(a) of Title 18 of the United States Code provides that it is unlawful to escape from any custody under and by any virtue of any process issued under the laws of the United States by any Court, Judge, or Magistrate Judge.

18 U.S.C. § 751(a)

INSTRUCTION NO. 16

The crime of escape from custody, as charged in the second Indictment, has four essential elements, which are:

One, the defendant was in the custody of the Glory House by order of the United States District Court for the District of South Dakota;

A person may be in custody for purposes of the statute prohibiting escape from custody, even though the physical restraints upon him are minimal and even though the custody is constructive, rather than actual.

Two, the defendant was lawfully confined in custody by virtue of an arrest for a federal felony offense;

Three, the defendant left custody without authorization;

Leaving custody may include willfully failing to arrive at or return to a facility within the time prescribed by the District Court's Order.

Four, in doing so, the defendant knew he was leaving custody without authorization.

If all of the elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime of escape charged in the second Indictment; otherwise, you must find the defendant not guilty of this crime.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 6.18.751 (2023); *United States v. Goad*, 788 F.3d 873, 875 (8th Cir. 2015); *United States v. Bailey*, 444 U.S. 394, 413 (1980); Government's Proposed Jury Instruction No. 1 (in CR 22-40018).

INSTRUCTION NO. 17

Intent or knowledge 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 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.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 7.05; Government's Proposed Jury Instruction No. 5.

INSTRUCTION NO. 18

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in life's most important decisions. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.11 (2023) (modified); O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.10 (6th ed. 2008) (modified).

INSTRUCTION NO. 19

The first Indictment charges that the firearm offense was committed “on or about” January 26, 2021. The second Indictment charges that the escape offense was committed “on or about” January 3, 2022. Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on a date reasonably near, it is not necessary for the government to prove that the offenses were committed precisely on the date charged.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 13.05 (6th ed. 2008) (modified); *Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.14 (2023) (modified).

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 a verdict—whether guilty or not guilty—must be unanimous.

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

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

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

Fourth, if you need to communicate with me during your deliberations, 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.

Fifth, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts, whether guilty or not guilty, must be unanimous. 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.

Eighth Circuit Manual of Model Jury Instructions Criminal, § 3.12 (2023).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,
vs.

JOSEPH KENNETH HENRY,

Defendant.

4:21-CR-40106

4:22-CR-40018

VERDICT

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

VERDICT ONE

Step 1:

We, the jury, as to the crime of possession of a firearm by a prohibited person as charged in the first Indictment, unanimously find the defendant, Joseph Kenneth Henry:

_____ NOT GUILTY

_____ GUILTY

Step 2:

If you found the defendant guilty of this offense, please indicate which category of "prohibited person" you determined the defendant to fall into:

_____ The defendant was knowingly a person who had been convicted of a crime punishable for a term of imprisonment exceeding one year

_____ The defendant was knowingly an unlawful user of a controlled substance

_____ The Government must prove one category or the other beyond a reasonable doubt and you may find one category, both categories, or neither category was proved. If neither, check this blank instead of the other two blanks in step two.

VERDICT TWO

We, the jury, as to the crime of escape as charged in the second Indictment, find the Defendant, Joseph Kenneth Henry:

_____ NOT GUILTY

_____ GUILTY

Dated this _____ day of November, 2024.

FOREPERSON