

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JESS BRIAN DUCHENEAUX

Defendant.

3:18-CR-30153-RAL

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. The instructions I am about to give you now are in writing and will be available to you in the jury room.

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.

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

I have mentioned the word “evidence.” The “evidence” in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and the facts that have been stipulated—that is, formally agreed to by the parties.

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

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

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained 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.

When you were instructed that evidence was received for a limited purpose, you must follow that instruction.

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 of any witness 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. 5

The amended second superseding indictment in this case charges the defendant with conspiracy to distribute a controlled substance, maintaining a drug-involved premises, distribution to persons under age twenty-one, possession of a controlled substance with intent to distribute, and prohibited person in possession of a firearm. The defendant has pleaded not guilty to these charges.

The amended second superseding indictment is simply the document that formally charges the defendant with the crimes for which he is on trial. The amended second superseding indictment is not evidence of anything. At the beginning of the trial, I instructed you that you must presume the defendant to be innocent. Thus, the defendant began the trial with a clean slate, with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty. This presumption can be overcome only if the United States proved during the trial, beyond a reasonable doubt, each element of the crimes charged.

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

Please remember that only the defendant, not anyone else, is on trial here, and that the defendant is on trial only for the crimes charged, not for anything else.

There is no burden upon a defendant to prove that he is innocent. Instead, the burden of proof remains on the United States throughout the trial. 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. 6

Count I of the amended second superseding indictment charged the crime of conspiracy to distribute or to possess with the intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine. This Court has decided that it is proper to instruct you only on a lesser included offense to that charge, which involves the lesser amount of 50 grams. The crime of conspiracy to distribute or to possess with the intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine has four essential elements, which are:

***One*, that beginning at a time unknown but no later than on or about January 1, 2014, and continuing to on or about December 17, 2018, in the District of South Dakota and elsewhere, two or more persons reached an agreement or came to an understanding to distribute or to possess with the intent to distribute a mixture or substance containing methamphetamine, a Schedule II controlled substance;**

Methamphetamine is a Schedule II controlled substance.

***Two*, the defendant, Jess Brian Ducheneaux, 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 joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and**

***Four*, the agreement or understanding involved 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine.**

If you find unanimously that the government has proved these four elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime of conspiracy to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine. Otherwise, you must find the defendant not guilty of this crime.

If you do not unanimously find all four elements beyond a reasonable doubt, but you do find the first three elements unanimously and beyond a reasonable doubt, you must go on to consider whether the defendant conspired to distribute some lesser amount of methamphetamine. If you unanimously find that the defendant conspired to distribute an amount of methamphetamine less than 50 grams beyond a reasonable doubt, you must find the defendant guilty of the crime of conspiracy to distribute methamphetamine, which is a second lesser included offense. Otherwise, you must find the defendant not guilty.

INSTRUCTION NO. 7

The quantity of the controlled substances involved in the agreement or understanding includes the controlled substances the defendant 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.

Do not double count any quantities of methamphetamine if more than one co-conspirator was involved in conspiring to distribute that particular quantity of methamphetamine. Instead, you must determine the amount of methamphetamine involved in the conspiracy for which the defendant can be held responsible.

INSTRUCTION NO. 8

To find the existence of a “conspiracy,” the government must prove two or more persons reached an agreement or understanding to distribute or to possess with the intent to distribute methamphetamine. It makes no difference whether those persons are named in the amended second superseding indictment.

To assist you in determining whether there was an agreement or understanding to conspire to distribute or to possess with the intent to distribute methamphetamine, you should consider the elements of a “distribution” offense. The elements of distributing methamphetamine are: (1) a person intentionally distributed methamphetamine to another; and (2) at the time of the distribution, the person knew that what he or she was distributing was methamphetamine.

To find the defendant guilty of the “conspiracy” charged against him, you do not have to find the offense of distribution of methamphetamine was actually committed by the defendant or anyone else. It is the agreement to distribute methamphetamine which is illegal. The agreement is the conduct which has been charged in the amended second superseding indictment and which must be proven beyond a reasonable doubt to establish the defendant’s guilt on the offense charged in Count I of the amended second 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 the conspiracy was to be carried out. It is not necessary that the members have directly stated between themselves the details or purpose of the conspiracy.

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 the defendant has joined in an agreement or understanding. Similarly, the defendant’s mere knowledge of the existence of a conspiracy or his mere association with an individual engaged in the illegal conduct of a conspiracy is not enough to prove he joined the conspiracy. The defendant’s mere knowledge that an objective of a conspiracy was considered or attempted or his mere approval of the purpose of a conspiracy, is not enough to prove that he joined the conspiracy.

A person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of the conspiracy, does not thereby become a member of that conspiracy. The defendant must know of the existence and purpose of the conspiracy. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

On the other hand, a person may join in an agreement or understanding without knowing all the details of the agreement or understanding, and without knowing all the other members of the conspiracy. 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 deciding whether the defendant voluntarily and intentionally joined in the agreement, you must consider only evidence of the defendant’s own actions and statements. You may not

consider actions and statements of others, except to the extent any statement of another describes something which was said or done by the defendant.

INSTRUCTION NO. 9

If you determine that an agreement existed and that the defendant joined the agreement, you may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of the conspiracy as evidence pertaining to the defendant even though the acts or statements were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant joined the agreement, because a person who knowingly, voluntarily and intentionally joins an existing conspiracy becomes responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

INSTRUCTION NO. 10

To the extent it may be helpful in your deliberations, one ounce is the equivalent of 28.35 grams and one pound is the equivalent of 453.59 grams.

INSTRUCTION NO. 11

The crime of maintaining a drug-involved premises, as charged in Count II of the amended second superseding indictment, has two essential elements, which are:

***One*, that beginning at a time unknown but no later than on or about January 1, 2014, and continuing to on or about December 17, 2018, in the District of South Dakota, the defendant Jess Brian Ducheneaux knowingly used and maintained a place located at 25878 BIA Route 8, Ridgeview, South Dakota; and**

***Two*, the defendant did so for the purpose of distributing or using methamphetamine, a controlled substance.**

A defendant maintains a place for the purpose of distributing or using methamphetamine if the defendant maintains the place for the specific purpose of distributing or using methamphetamine. The specific purpose need not be the sole purpose for which the place is used, but must be one of the primary or principal uses to which the place is used. The defendant must have a substantial connection to the place and be more than a casual visitor.

If you find unanimously that the government has proved these two elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of this crime. Otherwise, you must find the defendant not guilty of this offense.

INSTRUCTION NO. 12

The crime of distribution to persons under age twenty-one, as charged in Count III of the amended second superseding indictment, has four essential elements, which are:

One, that beginning at a time unknown but no later than on or about April 7, 2014, and continuing to on or about December 17, 2018, in the District of South Dakota and elsewhere, the defendant Jess Brian Ducheneaux knowingly or intentionally distributed a mixture or substance containing a detectable amount of methamphetamine to Gabriella LeBeau;

Methamphetamine is a Schedule II controlled substance.

Two, the defendant knew that the mixture or substance contained methamphetamine or some other federally controlled substance;

Three, the defendant was at least eighteen years of age; and

Four, Gabriella LeBeau was under twenty-one years of age.

If you find unanimously that the government has proved these four elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of this crime. Otherwise, you must find the defendant not guilty of this offense.

INSTRUCTION NO. 13

The crime of possession of a controlled substance with the intent to distribute, as charged in Count IV of the amended second superseding indictment, has three elements, which are:

***One*, on or about December 17, 2018, in the District of South Dakota, the defendant Jess Brian Ducheneaux possessed a mixture or substance containing methamphetamine, a Schedule II controlled substance;**

***Two*, the defendant knew that he possessed a mixture or substance containing methamphetamine; and**

***Three*, the defendant intended to distribute some or all of the mixture or substance containing methamphetamine to another person.**

If you find unanimously that the government has proved these three elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of this crime. Otherwise, you must find the defendant not guilty of this offense.

INSTRUCTION NO. 14

The crime of possession of a firearm by a prohibited person, as charged in Count V of the amended second superseding indictment, has four essential elements, which are:

***One*, that prior to December 17, 2018, in the District of South Dakota, the defendant Jess Brian Ducheneaux had been convicted of a crime punishable by imprisonment for more than one year or was an unlawful user of or addicted to a controlled substance, that is, methamphetamine;**

***Two*, that on or about December 17, 2018, the defendant knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year or knew that he was an unlawful user of or addicted to a controlled substance, that is, methamphetamine;**

***Three*, that on or about December 17, 2018, the defendant knowingly possessed firearms, to wit:**

- A. A Remington Arms Company Incorporated, model 870 Express, 12 gauge, pump-action shotgun, bearing serial number X301486M, and**
- B. A Savage Arms Incorporated, model Axis, .243 Winchester caliber, bolt-action rifle, bearing serial number H250784; and**

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

If you have found beyond a reasonable doubt that the firearms in question were manufactured in a state other than South Dakota and the defendant possessed that firearm in the State of South Dakota, then you may, but are not required to, find that they were transported across a state line. The United States is not required to prove that the defendant knew the firearm had crossed a state line.

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.

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 time he possessed the firearm or firearms, but the law does not require that he used 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.

The term "addicted" means habitual use of a controlled substance so as to endanger the public morals, health, safety or welfare or use of a controlled substance such that the person has lost the power of self-control with reference to his addiction.

If you find unanimously that the government has proved these four elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of this crime. Otherwise, you must find the defendant not guilty of this offense.

INSTRUCTION NO. 15

Count V of the amended second superseding indictment alleges that the defendant was convicted of a crime punishable by imprisonment for more than one year. Counsel for the government, counsel for the defendant, and the defendant have agreed or stipulated that the defendant was convicted of a crime punishable by imprisonment for more than one year. The defendant has not, by entering this agreement or stipulation, admitted his guilt of the offenses charged, and you may not draw any inference of guilt from this stipulation. The only effect of this stipulation is to establish the fact that the defendant was convicted of a crime punishable by imprisonment for more than one year.

This evidence can be used by you only for the purpose of determining whether defendant committed the crime of prohibited person in possession of a firearm. A person may be a prohibited person in possession of a firearm either by possessing a firearm while having a prior felony conviction of an offense punishable by imprisonment for more than one year, or by possessing a firearm while an unlawful user of or addicted to a controlled substance. The evidence of the defendant's prior conviction can be considered only to decide whether the defendant had a prior felony conviction and if the defendant knew he had a prior felony conviction. Evidence of the defendant's prior conviction cannot be used for any other purpose. Simply because a person has a prior conviction does not mean that he is guilty of a new charge.

INSTRUCTION NO. 16

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. 17

“Intent” and “knowledge” are elements of the offenses charged in this case and must be proven beyond a reasonable doubt. The government is not required to prove a defendant knew that his acts or omissions were unlawful. An act is done “knowingly” if a person realizes what he is doing and does not act through ignorance, mistake, or accident. You may consider the evidence of a defendant’s words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly.

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant in connection with the offense charged. You may also consider 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.

INSTRUCTION NO. 18

You have heard testimony from witnesses who made plea agreements with the government, received promises they would not be prosecuted further, or received promises their testimony will not be used against them. Such testimony was received in evidence and may be considered by you. You may give this testimony such weight as you think it deserves. Whether or not this testimony may have been influenced by any plea agreements or the government's promises is for you to decide.

Any witness's guilty plea or conviction of a crime cannot be considered by you as any evidence of this defendant's guilt. The witness's guilty plea or conviction can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness's testimony.

INSTRUCTION NO. 19

You have heard evidence from witnesses who hope to receive a reduced sentence on certain criminal charges in return for their cooperation with the government in this case. If the United States Attorney's Office decides that a witness convicted of a federal offense who entered into a cooperation agreement provided substantial assistance through what the United States Attorney believes was truthful testimony, then the United States Attorney may bring what is called a Rule 35 Motion for the sentencing Court to reduce the sentence. If such a motion is filed, the sentencing Court then decides whether to reduce the sentence or not and how much to reduce the sentence, and it may, or may choose not to, reduce it below a mandatory minimum.

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

INSTRUCTION NO. 20

You have heard testimony from individuals described as an expert. 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.

INSTRUCTION NO. 21

The second amended second superseding indictment charges that the offenses alleged in Count I and Count II were committed “beginning at a time unknown” but no later than on or about January 1, 2014, and continuing to on or about December 17, 2018; and that the offense alleged in Count III was committed “beginning at a time unknown” but no later than on or about April 7, 2014, and continuing to on or about December 17, 2018; and that the offenses alleged in Counts IV and V were committed on or about December 17, 2018.

It is enough for the government to prove beyond a reasonable doubt that the offenses were committed on a date reasonably near or within the dates alleged in the amended second superseding indictment. It is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

INSTRUCTION NO. 22

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 the defendant's guilt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 23

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall 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 United States 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 or court security 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 votes stand numerically.

Fifth, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, Snapchat, Instagram, YouTube, or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

Sixth, your verdict 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 verdict should be—that is entirely for you to decide.

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

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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| UNITED STATES OF AMERICA, Plaintiff, vs. JESS BRIAN DUCHENEAX Defendant. | 3:18-CR-30153-RAL VERDICT FORM |
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We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. We find Defendant Jess Brian Ducheneaux _____ (fill in either “guilty” or “not guilty”) of the crime of conspiracy to distribute a controlled substance as charged in Count I of the amended second superseding indictment.

If you find the defendant “guilty” of conspiracy to distribute methamphetamine, you must check one, and only one, of the following:

The quantity of methamphetamine the defendant conspired to distribute was:

- a. _____ 50 grams or more but less than 500 grams of a mixture or substance containing a detectable amount of methamphetamine; or
- b. _____ Less than 50 grams of a mixture or substance containing a detectable amount of methamphetamine.

Please check the drug quantity of methamphetamine involved in the conspiracy for which you find beyond a reasonable doubt that this defendant can be held responsible.

2. We find Defendant Jess Brian Ducheneaux _____ (fill in either “guilty” or “not guilty”) of the crime of maintaining a drug-involved premises as charged in Count II of the amended second superseding indictment.
3. We find Defendant Jess Brian Ducheneaux _____ (fill in either “guilty” or “not guilty”) of the crime of distribution to persons under age twenty-one as charged in Count III of the amended second superseding indictment.
4. We find Defendant Jess Brian Ducheneaux _____ (fill in either “guilty” or “not guilty”) of the crime of possession of a controlled substance with intent to distribute as charged in Count IV of the amended second superseding indictment.

5. We find Defendant Jess Brian Ducheneaux _____ (fill in either “guilty” or “not guilty”) of the crime of possession of a firearm by a prohibited person as charged in Count V of the amended second superseding indictment.

If you find the defendant “guilty” of possession of a firearm by a prohibited person, you must check the firearms the defendant possessed:

- a. _____ A Remington Arms Company Incorporated, model 870 Express, 12 gauge, pump-action shotgun, bearing serial number X301486M; and/or
- b. _____ A Savage Arms Incorporated, model Axis, .243 Winchester caliber, bolt-action rifle, bearing serial number H250784.

Dated November ____, 2020

Foreperson