

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. CASEY FOGG, Defendant.</p>	<p>5:17-CR-50041-01-KES FINAL INSTRUCTIONS TO THE JURY</p>
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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 the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 – POSSESSION OF A FIREARM BY A PROHIBITED PERSON

For you to find Casey Fogg guilty of possession of a firearm by a prohibited person, as charged in Count 1 of the Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that Fogg had been convicted of a crime punishable by imprisonment for more than one year;

The parties have agreed that Fogg has been convicted of a crime punishable by imprisonment for more than one year under the laws of the State of South Dakota and you must consider the first element as proven.

Two, that on or about January 19, 2017, in the District of South Dakota, Fogg knowingly possessed a firearm, to wit: a Mossberg, model 500A, 12 gauge shotgun, bearing serial number L572494;

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

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.

And three, that the firearm was transported across a state line at some time during or before Fogg's possession of it.

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

The United States is not required to prove that the defendant knew the firearm had crossed a state line.

If all of these elements have been proved beyond a reasonable doubt as to Fogg, then you must find Fogg guilty of the crime charged in the Superseding Indictment; otherwise, you must find Fogg not guilty of that crime.

FINAL INSTRUCTION NO. 3 - POSSESSION OF AN UNREGISTERED FIREARM

For you to find Casey Fogg guilty of possession of an unregistered firearm, as charged in Count 2 of the Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that on or about January 19, 2017, Fogg knew he had a weapon made from a shotgun, bearing serial number L572494, in his possession;

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Two, that Fogg knew the firearm was a short-barreled shotgun;

Three, the firearm was capable of operating as designed or could readily be put in operating condition;

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.

Four, that the firearm was not registered to Fogg in the National Firearms Registration and Transfer Record; and

Five, that the firearm had a barrel length of less than eighteen inches.

If all of these elements have been proved beyond a reasonable doubt as to Fogg, then you must find Fogg guilty of the crime charged in the Superseding Indictment; otherwise, you must find Fogg not guilty of that crime.

FINAL INSTRUCTION NO. 4 – 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, 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.

In addition, mere presence where the firearm was found or mere physical proximity to the firearm is insufficient to establish that the defendant had “possession” of the firearm. The defendant’s knowledge of the presence of the firearm, at the same time the defendant has control over the firearm or the place in which it was found, is required. Thus, in order to establish “possession” of a firearm, in addition to knowledge of the presence of the firearm, the prosecution must establish that, at the same time, (a) the defendant intended to exercise control over the firearm or place in which it was found; (b) the defendant had the power to exercise control over the firearm or place in which it was found; and (c) the defendant knew that he had the power to exercise control over the firearm or place in which it was found.

Constructive possession requires knowledge of an object, the ability to control it, and the intent to do so.

FINAL INSTRUCTION NO. 5 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charges, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of an offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.
- This burden means that you must find the defendant not guilty of the offenses charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of the offenses.

FINAL INSTRUCTION NO. 6 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 7 – IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

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.

FINAL INSTRUCTION NO. 8 - USE OF DRUG EVIDENCE

You have heard evidence that the vehicle in which Mr. Fogg and others were riding contained various drugs and drug paraphernalia and that Mr. Fogg's blood contained methamphetamine and marijuana. You may consider this evidence, if proved, to decide whether Mr. Fogg had a motive, opportunity, intent, or plan to possess the firearm. You should give this evidence the weight and value you believe it is entitled to receive. If you find that this evidence has not been proved, you must disregard it.

You are cautioned that Mr. Fogg is not on trial for any drug offenses. You may not find Mr. Fogg guilty of the offenses charged in the superseding indictment simply because drugs or drug paraphernalia were found in the vehicle.

FINAL INSTRUCTION NO. 9 - FLIGHT

The intentional flight of a defendant immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

FINAL INSTRUCTION NO. 10 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 11 – DUTY DURING DELIBERATIONS

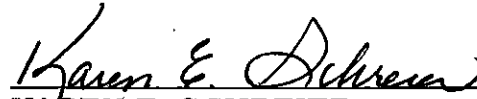
You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is guilty or not guilty. If the defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 26th day of July, 2017.

BY THE COURT:

A handwritten signature in cursive script, reading "Karen E. Schreier", is written over a horizontal line.

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE