

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARRY MILOSEVICH,

Defendant.

JURY INSTRUCTIONS

07-cr-66-bbc

II. POST TRIAL INSTRUCTIONS

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

All of the introductory instructions that I gave you at the beginning of this trial still are in effect. I will give you copies of those instructions to take back to the jury room with you.

You have received evidence of a statement said to be made by the defendant to _____. You must decide whether the defendant did make the statement. If you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself, and the circumstances under which the statement was made.

In deciding the believability of witnesses, you should judge defendant's testimony in the same way as you judge the testimony of any other witness.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

You have heard evidence of acts of the defendant other than those charged in the indictment. Specifically, _____. You may consider this evidence only on the questions of _____. You should consider this evidence only for this limited purpose.

You have heard evidence that _____ have been convicted of crimes. You may consider this evidence only in deciding whether the testimony of any of these witnesses is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard evidence that the defendant has been convicted of a crime. You may consider this evidence only for two purposes. First, you may use it to determine whether the government has proved all the elements of the offense charged in Count 1 as set forth below. Second, you may use the fact of the defendant's conviction in deciding whether the defendant's testimony is truthful as a whole, in part, or not at all. You may not consider it for any other purpose.

You have heard evidence that the defendant has been convicted of a crime. You may consider this evidence only to determine whether the government has proved all the elements of the offense charged in Count 1 as set forth below. You may not consider it for any other purpose.

You have heard [reputation/opinion] evidence about the character trait of _____ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to _____'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc]. You should consider character evidence together with all the other evidence in the case and in the same way.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of the defendant's testimony in this trial.

_____ has admitted lying under oath. You may give his testimony such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony that _____ have received benefits from the government in connection with this case. Specifically, _____ You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony from _____ who each stated that he or she was involved in the commission of the alleged crime charged against the defendant. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

The witnesses _____ have pleaded guilty to a crime arising out of the same allegations for which the defendant is now on trial. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care. Moreover, the guilty pleas of these defendants cannot to be considered as evidence against the defendant[s] on trial now.

The witnesses _____ have received immunity; that is, a promise from the government that any testimony or other information he or she provided would not be used against him in a criminal case. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You must consider with caution and great care the testimony of any witness who is currently addicted to drugs. It is up to you to determine whether the testimony of a drug addict has been affect by drug use or the need for drugs.

The witnesses _____ gave opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the

testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications and all of the other evidence in the case.

Certain summaries are in evidence. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same way as all other evidence in the case.

Certain summaries are in evidence. Their accuracy has been challenged by the defendant. Thus, the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the summaries are accurate.

You have heard recorded conversations. These recorded conversations are proper evidence and you may consider them, just as any other evidence. When the recordings were played during the trial, you were furnished transcripts of the recorded conversations prepared by government agents. The recordings are the evidence, and the transcripts were provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it. It is up to you to decide whether the transcripts correctly reflect what was said and who said it. If you noticed any difference between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if after careful listening, you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

THE INDICTMENT

The indictment in this case is the formal method of accusing the defendant of offenses and placing the defendant on trial. It is not evidence against the defendant and it does not create any inference of guilt.

The defendant is charged in the indictment as follows:

[Court reads the indictment]

The defendant has entered a plea of not guilty to each of these charges.

The defendant is not on trial for any act or any conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges against him. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

The indictment charges that the offense was committed "on or about" a certain date. The government must prove that the offenses happened reasonably close to those dates but it is not required to prove that the alleged offenses happened on those exact dates.

THE ELEMENTS OF MAIL FRAUD: COUNTS 1, 3, 4 AND 5

The defendant is charged in Counts 1, 3, 4 and with mail fraud. To sustain any of these charges, the government must prove these elements beyond a reasonable doubt:

First, the defendant knowingly devised or participated in the scheme to defraud or obtain money by means of false pretenses, representations or promises, as described in Paragraphs 1 through 11 of Count 1;

Second, the false pretenses, representations or promises made by the defendant as part of the scheme were material;

Third, the defendant acted knowingly and with the intent to defraud; and,

Fourth, that for the purpose of carrying out the scheme or attempting to do so, the defendant used or caused the use of the United States Mails in the manner charged in the particular count that you are considering.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt as to a particular count, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to a particular count, then you must find the defendant not guilty of that count.

THE ELEMENTS OF WIRE FRAUD: COUNTS 6 AND 7

The defendant is charged in Counts 6 and 7 with wire fraud. To sustain either of these charges against the defendant, the government must prove these elements beyond a reasonable doubt:

First, the defendant knowingly devised or participated in the scheme to defraud or to obtain money by means of false and fraudulent pretenses, representations or promises, as described in Paragraphs 1 through 11 of Count 1;

Second, the false pretenses, representations or promises made by the defendant as part of the scheme were material;

Third, the defendant acted knowingly and with the intent to defraud; and

Fourth, that for the purpose of carrying out the scheme or attempting to do so, the defendant caused interstate wire communications to take place in the manner charged in the particular count that you are considering.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt as to a particular count, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to a particular count, then you must find the defendant not guilty of that count.

Throughout these instructions, the term “**knowingly**” means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by a defendant's conduct and by all the facts and circumstances surrounding the case.

A **scheme** is a plan or course of action formed with the intent to accomplish some purpose. A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain property.

In proving the first element of Counts 1 and 3 through 7, the government must prove beyond a reasonable doubt either that there was a scheme to defraud, or that there was a scheme to obtain money. The government does not have to prove both that there was a scheme to defraud and a scheme to obtain money. However, before you may find that the government has met its burden of proof as to the first element, you must

unanimously agree on one of the two purposes of the charged scheme. It is not enough for some of you to find that there was a scheme to defraud and the rest of you to find that there was a scheme to obtain money. In order to find that the government has met its burden of proof as to the first element, you must all agree that there was a scheme to defraud, or you must all agree that there was a scheme to obtain money.

Similarly, before you may find that the charged scheme existed, you must find that one or more of the specified material false pretenses, representations, promises and acts charged has been proved beyond a reasonable doubt. Although it is not necessary that the government prove all of the material false pretenses, representations, and promises charged in paragraphs 1 - 11 of Count 1, it must prove at least one of them beyond a reasonable doubt to establish the existence of the scheme to defraud. Before you may find that the government has met this burden, you must unanimously agree on at least one of the specified material false pretenses, representations or promises. It is not enough for some of you to agree that the defendant made one particular material false representation and the rest of you agree that the defendant made another.

A representation or promise can be **false** in several ways. First, a representation or promise is false if the defendant knew that it was untrue at the time he made it. Second, a representation or promise is false if the defendant made it with reckless indifference as to whether it was true or false, provided that the defendant made it with intent to defraud. Third, a representation or promise is false when it constitutes a half-truth or effectively omits or conceals a material fact, provided that the defendant made or used the half-truth, omission, or concealment with intent to defraud.

A false representation or promise is **material** if it has the natural tendency to influence, or is capable of influencing, the decision of the person to whom it is addressed.

The phrase **intent to defraud** means that the acts charged were done knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant.

Good faith, or the absence of an intent to defraud, constitutes a complete defense to charges of mail fraud and wire fraud. The good faith defense requires a genuine belief by the defendant that the representations or promises alleged to be fraudulent were true at the time he made them. A defendant's honest and genuine belief that he will be able to perform in the future what he promised in the past is not a defense to mail or wire fraud if the defendant also knowingly made false and fraudulent representations. The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with the specific intent to defraud as alleged in Counts 1 through 4 of the indictment.

The government is not required to produce direct evidence to establish the defendant's intent. The government may prove the defendant's intent by means of circumstantial evidence alone. In determining the defendant's intent, you may consider all of his statements, acts and omissions, as well as all other facts and circumstances in evidence that indicate the defendant's state of mind.

The statutes against mail fraud and wire fraud can be violated whether or not there is any loss or damage to the victim of the crime or gain to the defendant.

Interstate commerce means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state. “Foreign commerce” means trade, transactions, transportation or communication between any point in a country and any place outside that country. The government must prove that the foreseeable consequences of the defendant’s acts would be to affect interstate or foreign commerce. It is not necessary for you to find that the defendant knew or intended that his actions would affect interstate or foreign commerce.

Although an item communicated interstate need not itself contain a fraudulent representation or promise or a request for money, it must further or attempt to further the scheme.

Each separate use of an interstate communication facility in furtherance of the scheme to defraud constitutes a separate offense.

THE ELEMENTS OF CONSPIRACY: COUNT 2

The defendant is charged in Count 2 with conspiring with other people to commit mail fraud and wire fraud. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain the charge in Count 2, the government must prove these elements:

First, the conspiracy charged in Count 2 existed;

Second, the defendant knowingly became a member of this conspiracy with an intention to further the conspiracy; and

Third, an overt act was committed by at least one conspirator in furtherance of the conspiracy.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to Count 2, then you should find the defendant guilty of Count 2.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt as to Count 2, then you must find the defendant not guilty of Count 2.

A conspiracy may be established even if its purpose was not accomplished.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.

As to the first element of Count 2, in deciding whether the charged conspiracy existed, you may consider the actions and statements of every one of the alleged participants. An agreement may be proved from all the circumstances and the words and conduct of all of the alleged participants which are shown by the evidence.

As to the second element of Count 2, in deciding whether the defendant joined the charged conspiracy, you must base your decision solely on what the defendant personally did or said. In determining what the defendant personally did or said, you may consider his own words and acts. You also may consider the words and acts of

other people to help you determine what the defendant personally did or said, and you may use the words and acts of other people to help you understand and interpret the defendant's own words and acts. Keep in mind, however, that the defendant's membership in the charged conspiracy can only be proved by his own words or acts.

By themselves, the defendant's presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish the defendant's guilt.

The defendant's association with conspirators is not by itself sufficient to prove his participation or membership in a conspiracy.

If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

To meet its burden of proof as to Count 2, the government must prove that the defendant knowingly and intentionally joined the charged conspiracy, knowing the conspiracy's aim and intending to achieve it.

In meeting its burden of proof for the third element of Count 2, the government does not need to prove all of the **overt acts** charged in the conspiracy. It only needs to prove one. However, you must unanimously agree on at least one overt act. It is not sufficient for some of you to find that the government has proved one overt act and the rest of you to find that the government has proved a different overt act. All twelve of you must agree on a particular act or acts.

The overt act proved may itself be a lawful act.

INSTRUCTIONS ON RESPONSIBILITY

By themselves, the defendant's presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish the defendant's guilt.

If the defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

An offense may be committed by more than one person. The defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

If the defendant knowingly caused the acts of another, the defendant is responsible for those acts as though he personally committed them.

The defendant need not personally perform every act constituting the crime charged. Every person who willfully participates in the commission of a crime may be found guilty.

Whatever a person is legally capable of doing he can do through another person by causing that person to perform the act. If the defendant willfully ordered, directed or authorized the acts of another, then he is responsible for such acts as though he personally committed them.

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself with the criminal venture, participate in it and try to make it succeed.

DELIBERATIONS

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court.

A verdict form has been prepared for you. [Court reads verdict form.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign the form.

Although you have seen that the trial is being recorded by a court reporter, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.

Each count of the indictment charges the defendant with having committed a separate offense. You must consider each count and the evidence relating to it separate and apart from the other counts. You should return a separate verdict as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to the defendant under any other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court. You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. You must not reveal to any person, including the court, your numerical split on any verdict question until you have reached a unanimous verdict on every count.