

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD E. CRAYTON,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

10-cr-12-bbc

On January 21, 2011, this court held the final pretrial conference. Defendant Richard Crayton was present with his attorneys Gregory Dutch and Farheen Ansari. The government was represented by Assistant United States Attorney David Reinhard.

Prior to the hearing, the court circulated draft voir dire questions to the parties. The government had no proposed changes other than to correct a typo. Defendant proposed 29 questions, *see* dkt. 35, some of which the court agreed to include, the rest of which it declined for reasons stated. A copy of the final version of the voir dire is attached to this order.

Next we discussed the universe of jury instructions. The key dispute between the parties is that the defendant contends that the “resulted in death” allegation is an element of the offense, *see* dkt. 34, while the government contends that it is a sentencing factor that requires a special verdict question, *see* dkt. 41. We discussed the matter at the hearing and defendant filed a post hearing brief supplementing his argument on this point, *see* dkt. 44. Although the court’s original draft presented the “resulted in death” allegation as an element of the offense, I have been persuaded by the government that this should be treated as a sentencing allegation. This still requires the government to prove the allegation beyond a reasonable doubt and additionally separates this allegation into its own special verdict question, which would seem to provide more protection to defendant than a general verdict. Further, in *United States v. Hatfield*, 591 F.3d 945, 951 (7th Cir. 2010), the court observes without comment that the trial court used a special verdict form to address this issue, and the appellate court’s quote from the trial court’s

jury instruction on this issue (*id.* at 947) includes a burden of proof clause; this implies that this was a stand-alone instruction rather than one of the elements of the charged offense (because the burden of proof clause is provided after reciting all of the elements of the charged offense, not with each element). The issue is before the court for a final decision. Copies of the modified instructions and verdict form (adopting the government's position) are attached to this order.

Third on the agenda were in limine issues. Defendant has disclaimed an alibi defense, so the government's request, dkt. 31 is academic. Defendant filed a six-part motion in limine, dkt. 33; the government may wish to be heard on Part (1) because the government intends to offer one photograph of the crime scene that shows the victim's body. The government also disputes Part (3), which seeks to exclude prior uncharged drug transactions between defendant and government witnesses. The government raises this same issue from the opposite direction in its notice of intent to offer Rule 404(b) evidence, *see* dkt. 39, Part (2). The government does not dispute Parts (2) or (4) through (6) of defendant's motion in limine. Defendant does not dispute the government's Rule 609 proffer in its notice of intent, dkt. 39 Part (1). Defendant wishes to be heard on the government's motion to exclude evidence or argument on penalties, dkt. 40.

The parties agree that this case will take no more than three days and that one alternate juror will suffice. Defendant has access to street clothes. The parties are aware that they must present evidence on the court's ELMO. The parties had no other matters to bring to the court's attention.

Entered this 27th day of January, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge