

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

UNITED STATES OF AMERICA,

Plaintiff,

PRETRIAL MOTION
HEARING ORDER

v.

06-CR-183-S

WILLIAM B. BOMA,

Defendant.

On November 30, 2006 this court held the pretrial motion hearing and an evidentiary hearing. Defendant William Boma was present with his attorney, Mark Eisenberg. The government was represented by Assistant United States Attorney Paul Connell.

Boma filed a series of discovery motions and a motion to suppress evidence. After taking a discovery proffer from the government and discussing the course of discovery with both sides, I granted the motion docketed as 19 and denied 17-18 and 20-28 for reasons stated on the record. The government must disclose expert witnesses not later than January 2, 2007 with reciprocal defense expert disclosure by January 15, 2007.

Next we took evidence on Boma's motion to suppress his post-arrest statement. (Dkt. 29). Boma's first brief in support of this motion must be filed and served by December 15, 2006, with the government's response due December 22, 2006 and Boma's reply due December 29, 2006. Same day service is required. The parties had no other substantive

matters to bring to the court's attention.

Entered this 1st day of December, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge

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

UNITED STATES OF AMERICA,

Plaintiff

v.

WILLIAM B. BOMA,

Defendant.

STATEMENT OF THE CASE
AND VOIR DIRE

06-CR-183-S

Statement of the case: This is a criminal case, in which the defendant, William B. Boma, is charged with conspiring to manufacture and to distribute methamphetamine and with actually manufacturing it. The defendant has entered a plea of not guilty to the charges against him.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: this case will begin today and will conclude tomorrow. Are any of you actually unable to sit as jurors because of this schedule?

2. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

3. The court reads Pattern Jury Instructions of the Seventh Circuit:

Presumption of Innocence. The defendant is presumed to be innocent of the charge. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

Burden of Proof. The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendants and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to rise, and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you regularly listen to talk radio and if so, to which programs.

6. Do any of you in the jury box know each other from before today?

7. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense, or any offense involving cocaine or marijuana? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

8. Have any of you, your relatives or close friends ever needed, sought, or obtained any sort of counseling or treatment for a problem related to alcohol or any other drug? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

9. Do any of you, your family or close friends work in a health related field which treats or counsels people who have problems related to alcohol or other drugs? Would this affect your ability to be impartial in this case?

10. Have any of you, your relatives or any close friends ever belonged to any group that is concerned in any way with marijuana, alcohol, or other drugs, either for or against them? What is the name of that group, and what is your involvement in it? Would this affect your ability to be impartial in this case?

11. Do any of you think that the drug laws in this country or the enforcement of the drug laws are either too harsh or too lenient?

12. Do any of you believe that a person charged with drug crimes is probably a dangerous person simply because he is charged with a drug crime?

13. Do any of you, by virtue of past dealings with the United States government, or for any reason, have any bias for or against the government in a criminal case?

14. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

15. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement, investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?

16. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

17. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was the defendant who was testifying?

18. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?

19. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

20. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

21. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

22. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

23. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

24. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

25. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

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

UNITED STATES OF AMERICA,

Plaintiff,

JURY INSTRUCTIONS

v.

06-CR-183-S

WILLIAM B. BOMA,

Defendant.

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.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow my instructions on the law, even if you disagree with them. Each of the instructions is important. You must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. Do not allow any person's race, color, religion, national ancestry or sex to influence you.

Nothing I say now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider among other things: the witness's age; the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

You should judge the defendant's testimony in the same way as you judge the testimony of any other witness.

You should use common sense in weighing the evidence. Consider the evidence in light of your own observations in life. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

Some of you have heard the phrases “circumstantial evidence” and “direct evidence.” Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts that tend to show whether a defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. You

should consider all the evidence in the case, including the circumstantial evidence, in reaching your verdict.

Certain things are not evidence. I will list them for you:

First, testimony and exhibits that I struck from the record or that I told you to disregard are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and must not influence your verdict.

Third, questions and objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your collective memory is what counts.

It is proper for a lawyer to interview any witness in preparation for trial.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

You have heard evidence that the defendant has been convicted of a crime. You may consider this evidence only 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 received evidence of statements said to have been made by the defendant to _____. You must decide whether the defendant did make the statements. If you find that the defendant did make the statements, then you must decide what weight, if any, you believe the statements deserve. In making this decision, you should consider all matters in evidence having to do with the statements, including those concerning the defendant himself and the circumstances under which the statements were made.

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.

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

_____ 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 stated that he was
involved in the commission of the offense(s) charged against the defendant in Count(s)

_____. You may give the testimony of this witness 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 has pleaded guilty to an offense arising out of the same occurrence for which the defendant is now on trial. You cannot consider this witness's guilty plea as evidence against the defendant. You may give the testimony of this witness such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

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 recording and what you read in the transcripts, then 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, then you must ignore the transcripts as far as those parts are concerned.

You have heard a witness give 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.

THE INDICTMENT

The defendant is charged in the indictment as follows: [*court reads the indictment*]. The defendant has entered a plea of not guilty to these charges.

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

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

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome as to the defendant 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.

ELEMENTS OF THE CHARGE: COUNTS 1, 3 AND 5

Count 1, Count 3 and Count 5 separately charge the defendant with having participated in three different conspiracies with different purposes. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain any of these conspiracy charges against the defendant, the government must prove these elements:

- 1) The conspiracy charged in the count that you are considering existed; and
- 2) The defendant knowingly became a member of this conspiracy with an intention to further the conspiracy.

If you find from your consideration of all the evidence that both of these propositions have been proved beyond a reasonable doubt as to the count that you are considering, then you should find the defendant guilty of that count.

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

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

To be a member of the conspiracy, a 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 each conspiracy count, 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 each conspiracy count, in deciding whether the defendant joined that particular conspiracy, you must base your decision solely on what that defendant personally did or said. In determining what the defendant personally did or said, you may consider the defendant's 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 a charged conspiracy can only be proved by his own words or acts.

By themselves, a 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.

A defendant's association with conspirators is not by itself sufficient to prove his or her or her 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.

The government must prove that a defendant knowingly and intentionally joined the charged conspiracy, knowing the conspiracy's aim and intending to achieve it.

Count 1, Count 3 and Count 5 charge the existence of separate conspiracies with similar but distinct purposes. When considering the evidence as to each conspiracy count, you might find that some evidence is relevant to more than one of the Counts; however you must take care to ensure that the evidence you are considering as to particular count actually applies to that count.

Whether there was one conspiracy, two conspiracies, three conspiracies, or no conspiracy at all are facts for you to determine in accordance with these instructions.

If you do not find beyond a reasonable doubt that the defendant was a member of any conspiracy, you then must find that defendant not guilty of Count 1, Count 3 and Count 5.

If you find that there was more than one conspiracy and also find that the defendant was a member of one or more of these conspiracies, then you may find the defendant guilty of Count 1, or Count 3, or Count 5, or some combination of these counts, only if you further find beyond a reasonable doubt that the proven conspiracy of which the defendant was a member is included within the conspiracy charged in the count that you are considering.

On the other hand, if you find that the proven conspiracy of which the defendant was a member is not included within the conspiracy alleged in Count 1 or Count 3 or Count 5, then you must find the defendant not guilty of these counts.

ELEMENT OF THE OFFENSE: COUNT 2

Count 2 charges the defendant with manufacturing methamphetamine. To sustain this charge, the government must prove that the defendant knowingly or intentionally manufactured methamphetamine.

If you find from your consideration of all the evidence that this proposition has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 2.

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

ELEMENTS OF THE OFFENSE: COUNT 4

Count 4 charges the defendant with knowingly and intentionally possessing materials to manufacture methamphetamine. To sustain this charge,, the government must prove these elements:

1. The defendant knowingly possessed _____ (*items to be listed in the government's bill of particulars*) as charged in Count 4;
2. The materials, chemicals or equipment that defendant possessed can be used to manufacture methamphetamine; and
3. The defendant possessed these materials, chemicals or equipment knowing and intending that they would be used to manufacture methamphetamine.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt as to Count 4, then you should find the defendant guilty of Count 4.

On the other hand, if you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt as to Count 4, then you must find that defendant not guilty of Count 4.

As to the first element of Count 4, it is not necessary for the government to prove that the defendant possessed all of the equipment and chemicals and materials specified in Count 4. However, the government must prove that the defendant knowingly possessed at least one of the items specified in Count 4. Before you may find that the that government has met its burden of persuasion on this element, you must unanimously agree on at least one piece of equipment, or one chemical, or one material specified in Count 4. It is not sufficient for some of you to agree on one item and the rest of you to agree on some other item or items. All twelve of you must agree on at least one item specified in Count 4.

As used in Counts 2 and 4, the term “manufacture” means the production, preparation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of these methods.

You are instructed that methamphetamine is a Schedule II controlled substance.

You are instructed that pseudoephedrine is a listed chemical.

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

When any form of the verb “to know” is used in these instructions, it 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 the defendant's conduct and by all the facts and circumstances surrounding the case.

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 it.

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 every other count. 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 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.

Bear in mind also that you are never to reveal to any person –not even to the court– how the jury stands, numerically or otherwise, on the question before you until after you have reached a unanimous verdict.