

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCUS D. CANADY,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

07-CR-61-C

On October 29, 2007 this court held the final pretrial conference. Defendant Marcus Canady was present with his attorney, William Jones. The government was represented by Assistant United States Attorney Elizabeth Altman.

Prior to the hearing the government filed no proposed changes or objections to the court's voir dire. Canady had a small set of proposals, several of which I adopted, several of which I did not. A copy of the final version of the voir dire is attached to this order.

Next we addressed Canady's objections to the universe of jury instructions. The bottom line is that nothing got changed at the hearing. the parties will have the opportunity to tailor the instructions at the close of all the evidence. For that reason, I denied without prejudice Canady's request for a jury instruction on why the firearm no longer looks like the photos of the firearm taken before testing. The court will have to sort out a macédoine of *in limine* disputes regarding the firearm and its testing that will have to be sorted out before the parties or the court are in a position accurately to draft any jury instructions on this point. A copy of the universe of jury instructions is attached to this order.

Next we sorted the parties' *in limine* motions into the "disputed"/"not disputed" categories. In response to the government's request for notice of alibi (dkt. 36), Canady reported that he will not be presenting an alibi defense at trial. Next, the parties jointly reported that they have resolved their dispute regarding fingerprints on the firearm (*See* dkts. 42 and 44), but wish to keep this issue on the final hearing's agenda until Attorney Jones can discuss the matter further with Canady.

Canady does not dispute the government's motions *in limine* No. 1 (to exclude evidence of possible penalties), or No. 5 (to exclude Canady's BAC that night). *See* dkts. 43 & 47. Canady does wish to be heard on the government's motion *in limine* No. 3 (to exclude hearsay reports of defendant's exculpatory comments), No. 4 (to exclude evidence that Canady faces a parallel state investigation and prosecution), and No. 6 (to exclude evidence from any defense expert witness). *See* dkts. 45, 46 & 48.

The various expert witness disputes will be major agenda items at the final hearing. First, Canady contends that the ATF expert should not be allowed to testify that the bullets allegedly possessed by Canady previously had traveled into Wisconsin from another state; as grounds, Canady notes that the agent did not include this fact in her written report.

Next, the parties dispute whether the government must disclose, or Canady may use a lab report recently received by the government. This report states that the gun charged in this prosecution has DNA on it belonging to Duante Vance, the shooting victim in this case. The government refuses to provide a copy of this report to Attorney Jones, stating that it does not intend to call this expert and this report is not exculpatory. The government observes that the

report states that Vance's "DNA" is on the gun, without specifying from which of Vance's bodily fluids it originated. Canady surmises that it's blood, which Canady asserts would be material to his defense. The government counters that after Vance was shot he bled profusely so that there is no shortage of items smeared with his blood. Canady disagrees and wants this court to order disclosure of the report and perhaps other relief depending on what he learns. The issue is framed for further discussion at the November 1 final hearing.

Canady currently does not dispute the government's notice of intent to offer evidence regarding his prior criminal record in the event he takes the stand, and the parties have stipulated to the fact of Canady's prior conviction for the purpose of establishing the first element of the § 922(g) charge. But things change in a hurry in this case; if the stipulation dissolves, then the parties must report this at the final hearing.

The parties expect that this case will go to trial and will spill into a second day. The parties requested two alternate jurors. Canady has access to street clothes through his attorney. The attorneys are aware that they must use the court's ELMO. The parties had no other matters to bring to the court's attention.

Entered this 30th day of October, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

Voir Dire: United States v. Canady, 07-CR-61-C

Statement of the case: This is a criminal case, in which the defendant, Marcus Canady, is charged with unlawfully possessing a handgun and ammunition. 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 by 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 charges. 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 defendant 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 listen regularly 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. The defendant is African American. Would any of you find it difficult to serve as an impartial juror in a case in which an African American man is charged with a crime involving a handgun?

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

9. How many of you own firearms or live with someone who possesses firearms? Would this affect your ability to be impartial in this case?

10. Other than what you already have told us, how many of you ever have fired any type of firearm before? Would this affect your ability to be impartial in this case?

11. Other than what you already have told us, do any of you belong to any groups or organizations that concern themselves with firearms or the possession of firearms, either for or against? Would this affect your ability to be impartial in this case?

12. Do any of you have any strong opinions or feelings about firearms or the possession of firearms? Would this affect your ability to be impartial in this case?

13. Have any of you, your family or close friends ever been injured by a firearm? Would this affect your ability to be impartial in this case?

14. 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?

15. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government, including the United States Attorney's Office, or any district attorney's office? Would this affect your ability to be impartial in this case?

16. 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?

17. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, or religion?

18. 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?

19. Would any of you judge the credibility of a witness who had been convicted of a crime in the past differently from other witnesses solely because of this prior conviction?

20. Would any of you judge the testimony of a witness who was African American differently from other witnesses solely because of the witness's race?

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

22. 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?

23. 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?

24. 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?

25. 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.

26. If at the conclusion of the trial you are convinced that the defendant is guilty beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

27. If at the conclusion of the trial you are not convinced that the defendant is guilty beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

28. 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?

29. 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?

JUROR BACKGROUND INFORMATION

When asked to do so by the court, please stand and provide the following information about yourself:

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

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JURY INSTRUCTIONS

07-CR-61-C

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 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 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 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:

COUNT 1

On or about April 2, 2007, in the Western District of Wisconsin, the defendant, Marcus D. Canady, after having previously been convicted of a crime punishable by a term of imprisonment exceeding one year, knowingly and unlawfully possessed in or affecting commerce a Browning 9 mm pistol, Model High Power, serial number 3CH3576, and three rounds of Winchester 9 mm Luger ammunition, this firearm and ammunition having previously traveled in interstate commerce.

The defendant has entered a plea of not guilty to this charge.

The indictment in this case is the formal method of accusing the defendant of a crime 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 charge. 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 OFFENSE

To sustain the charge against the defendant in Count 1, the government must prove these elements:

(1) Prior to April 2, 2007, the defendant had been convicted of a crime that was punishable by a term of imprisonment exceeding one year;

(2) On or about April 2, 2007, the defendant knowingly possessed the firearm or the ammunition charged in Count 1; and

(3) This firearm or this ammunition had traveled in interstate commerce prior to defendant's possession of it.

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

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

As to the first element of Count 1, the parties have stipulated that prior to April 2, 2007, the defendant had been convicted of a crime that was punishable by a term of imprisonment of more than one year. Therefore, you may conclude the government has met its burden of proof on the first element of Count 1.

As to the second element of Count 1, the government does not need to prove that the defendant possessed both the firearm and the ammunition, but it must prove that he possessed at least one of these items. Before you may find that the government has met its burden of proof on this element, you must unanimously agree on either the firearm or on the ammunition. It is not sufficient for some of you to find that the defendant possessed the firearm and the rest of you to find that he possessed the ammunition. All twelve of you must agree on at least one item listed in Count 1 before you may find that the government has established this element.

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 the word “knowingly” 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.

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

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 the 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.

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.

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

UNITED STATES OF AMERICA,

Plaintiff,

VERDICT

v.

07-CR-61-C

MARCUS D. CANADY,

Defendant.

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Marcus D. Canady,

("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

Presiding Juror

Madison, Wisconsin

Date: _____