

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID BIENFANG and
CHRISTOPHER D. SCHMELTZER,

Defendants.

JURY INSTRUCTIONS

10-cr-130-wmc

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 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.

Each 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 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 defendant _____ has been convicted of crimes. You may consider this evidence only in deciding whether the defendant's testimony is truthful in whole, in part, or not at all. You may not consider it for any other purpose. A conviction of another crime is not evidence of the defendant's guilt of the crime for which the defendant now is charged.

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 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 a 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 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 affected 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 defendants of offenses and placing the defendants on trial. It is not evidence against either defendant and it does not create any inference of guilt.

The defendants are charged in the indictment as follows:

COUNT 1

From in or about March 2009, to in or about January 2010, in the Western District of Wisconsin, the defendants, DAVID A. BIENFANG and CHRISTOPHER D. SCHMELTZER, knowingly conspired and agreed with each other, and with Hal

D. “Casey” Mulford, and with other persons known and unknown to the grand jury, to possess pseudoephedrine, a listed chemical as defined in 21 U.S.C. § 802, with the intent to manufacture methamphetamine, a Schedule II controlled substance.

COUNT 2

From in or about March 2009, to in or about January 2010, in the Western District of Wisconsin, the defendants, DAVID A. BIENFANG and CHRISTOPHER D. SCHMELTZER, knowingly conspired and agreed with each other, and with Hal D. “Casey” Mulford, and with other persons known and unknown to the grand jury, to manufacture methamphetamine, a Schedule II controlled substance.

COUNT 3

On or about January 4, 2010, in the Western District of Wisconsin, the defendant, DAVID A. BIENFANG knowingly and intentionally possessed equipment, chemicals and materials which may be used to manufacture a controlled substance, [*namely . . .*,] knowing, intending and having reasonable cause to believe that they would be used to manufacture a controlled substance, namely methamphetamine, a Schedule II controlled substance.

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

The defendants are not on trial for any act or any conduct not charged in the indictment.

Each 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 a defendant is guilty as charged.

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

The indictment charges that the offenses were committed "on or about" certain dates. 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.

ELEMENTS OF THE CONSPIRACY CHARGES: COUNTS 1 AND 2

Count 1 and Count 2 each charges the defendants with conspiracy. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain either charge against a defendant, the government must prove these elements:

- 1) That the conspiracy charged in the count that you are considering existed, and
- 2) That 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 defendant you are considering in the count that you are considering, then you should find that 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

defendant you are considering in the count that you are considering, then you must find that defendant not guilty of that count.

CONSPIRACY INSTRUCTIONS

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 Count 1 and 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 1 and Count 2, in deciding whether a defendant joined the charged conspiracy, you must base your decision solely on what that defendant personally did or said. In determining what a 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 a defendant's membership in the 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 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 that 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.

SINGLE OR MULTIPLE CONSPIRACIES

Count 1 and Count 2 each charges a single, separate conspiracy. However, it might be possible to find additional, separate conspiracies regarding distinct parts of this case.

Whether there was one conspiracy, two conspiracies, multiple conspiracies or no conspiracy at all is a fact for you to determine in accordance with these instructions.

If you do not find beyond a reasonable doubt that the defendant you are considering was a member of any conspiracy, you must find that defendant not guilty of both Count 1 and Count 2.

If you find beyond a reasonable doubt that there was a conspiracy as alleged in Count 1 or in Count 2 and that a defendant was a member of that conspiracy, then you should find the defendant guilty of that count.

If you find that there were any other conspiracies and also find that a defendant was a member of one or more of these additional conspiracies, then you may find that defendant guilty of Count 1 or Count 2 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 in Count 2, then you must find the defendant not guilty of these counts.

ELEMENTS OF THE OFFENSE: COUNT 3

To sustain the charge in Count 3, the government must prove these elements:

1. The defendant knowingly attempt to possessed equipment, or chemicals or materials as charged in Count 3 [*bill of particulars?*];
2. These items can [*may?*] be used to manufacture methamphetamine; and
3. The defendant attempted to possess these items knowing, or intending [*or having reasonable cause to believe?*] that they would be used to manufacture methamphetamine.

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 3, then you should find the defendant guilty of Count 3.

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to Count 3, then you must find that defendant not guilty of Count 3.

As to the first element of Count 3, it is not necessary for the government to prove that the defendant possessed all of the equipment and chemicals and materials specified in Count 3. [*bill of particulars?*] However, the government must prove that the defendant knowingly possessed at least one of the items specified in Count 3. 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 3. 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 3.

DEFINITIONS

The term “knowingly” means that a 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.

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.

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 and control over it, either directly or through others.

RESPONSIBILITY

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.

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

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

A 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 a defendant willfully ordered, directed or authorized the acts of another, he is responsible for such acts as though he or she 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 each defendant. [Court reads the verdict forms.]

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

Even though the defendants are being tried together, you must give each of them separate consideration. In doing this, you must analyze what the evidence shows about each defendant, leaving out of consideration any evidence that was admitted solely against the other defendant. Each defendant is entitled to have his case decided on the evidence and the law that applies to that defendant.

Also, you must give separate consideration to each count. In doing this, you must analyze what the evidence shows as to each count, leaving out of consideration any evidence that was admitted solely as to another 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.

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.

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.