United States v. Rocco DeSimone, 09-CR-24
Jury Instructions

Introduction

At this time, it is my duty to instruct you on the law applicable to this case. You must accept the rules of law that I give you and apply them to the facts in this case as you find those facts to be.

In applying the law that I am about to explain to you in these instructions, you must consider the instructions as a whole. You should not choose one part and disregard another. You must accept and apply the law as I give it to you in its entirety.

You must accept and apply the rules of law that I give to you whether you agree with them or not. It would be a violation of the oath you took as jurors to base a decision on any version of the law other than that contained in my instructions, just as it would be a violation of that oath to return a decision upon anything but the evidence in this case. It is not up to you to decide what the law is or should be. Your duty is to apply the law as I explain it to you.

Presumption of Innocence

As I have previously told you, a Defendant is presumed to be innocent of the accusations against him. This presumption of innocence remains with a Defendant unless and until the Government presents evidence satisfying you beyond a reasonable doubt that the Defendant is guilty.

The presumption of innocence is sufficient to require a not guilty verdict unless you find that such evidence has been presented.

If you find that the Government has proven the Defendant guilty beyond a reasonable doubt, the presumption of innocence disappears and is of no further avail to him. However, until that time, the presumption remains with the Defendant.

Testimony of Defendant

In this case, the Defendant decided to testify. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of the case. You should not disregard or disbelieve his testimony simply because he is charged as a defendant in the case.

Proof of All Elements

In a moment, I will explain the offenses with which the Defendant is charged and the elements the Government must prove in order to establish that the Defendant is guilty of these offenses.

In order for the Government to prove the Defendant guilty of any offense, it must convince you, beyond a reasonable doubt, that it has proven each and every element of that offense. Possibilities or even probabilities are not sufficient.

If the Government fails to prove any one or more elements of an offense beyond a reasonable doubt, you must find the Defendant not guilty of that offense.

On the other hand, if you are convinced, beyond a reasonable doubt, that all elements of an offense with which the Defendant has been charged have been proven, then you should find the Defendant guilty of that offense.

Bear in mind that the requirement that the Government prove every element of the offenses with which the Defendant is charged does not mean that the Government is required to prove every statement contained in the indictment. What it means is that the Government must prove facts sufficient to prove all of the elements of the offenses with which the Defendant is charged.

Reasonable Doubt

The government's burden to prove beyond a reasonable doubt that the Defendant is guilty of the charges made against him is a strict and heavy burden, but it does not mean that the Defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning the Defendant's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a Defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions-one that the Defendant is guilty as charged, the other that the defendant is not guilty-you will find the defendant not guilty.

It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with

absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against the Defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the Defendant is guilty of a particular offense, you must give the Defendant the benefit of the doubt and find the Defendant not guilty of that offense.

Indictment - Effect

You will have the indictment with you in the jury room to help you remember the precise nature of the charges against the Defendant.

I remind you, once again, that an indictment is nothing more than an accusation. It should not be considered as evidence of guilt. It may not even be the basis of an inference of guilt. All that it does is to bring this matter before you for determination. Beyond that, it has no significance at all. It merely sets forth the elements of the offenses which the Government must prove beyond a reasonable doubt.

Definition of "On or About"

You will note the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The Charges

Defendant Rocco DeSimone is charged with:

- Nine counts of mail fraud, that is, knowingly devising and intending to devise a scheme and artifice to defraud, and to obtain money and property from individuals interested in investing in new inventions, including the Drink Stik, Song Tube, and Disk Shield inventions, by means of false and fraudulent pretenses, representations, and promises, beginning in May 2006 and continuing until in or about December 2007, in violation of 18 U.S.C. § 1341 (Counts 1-9);
- One count of money laundering, that is, knowingly engaging and attempting to engage in a monetary transaction by and through or to a financial institution, affecting interstate or foreign commerce, in criminally deprived property of a value greater than $10,000, in violation of 18 U.S.C. § 1957(a) and (b)(1) and (b)(2) (Count 10).

Counts 1 through 9 - Title 18, United States Code, Section 1341
Mail Fraud

The Defendant is charged in counts One through Nine with violating the federal statute making mail fraud illegal. The relevant statute is 18 U.S.C. § 1341, which prohibits the use of the mails in furtherance of any scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

For you to find the Defendant guilty of mail fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that there was a scheme, substantially as charged in the indictment, to defraud or to obtain money or property by means of false or fraudulent pretenses;

Second, that the scheme to defraud involved the misrepresentation or concealment of a material fact or matter, or the scheme to obtain money or property by means of false or fraudulent pretenses involved a false statement, assertion, half-truth or knowing concealment concerning a material fact or matter;

Third, that the Defendant knowingly and willfully participated in this scheme with the intent to defraud or to

obtain money or property by means of false or fraudulent pretenses; and

Fourth, that for the purpose of executing the scheme or in furtherance of the scheme, the Defendant caused the United States mail to be used, or it was reasonably foreseeable that the United States mail would be used, on or about the date alleged.

A scheme includes any plan, pattern or course of action. It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the alleged scheme actually succeeded in defrauding anyone. But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment.

The term "defraud" means to deceive another in order to obtain money or property.

The term "false or fraudulent pretenses" means any false statements or assertions that were either known to be untrue when made or were made with reckless indifference to their truth and that were made with the intent to defraud. The term includes actual, direct false statements as well as half-truths and the knowing concealment of facts.

A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decision maker to whom it was addressed.

The Defendant acted "knowingly" if he was conscious and aware of his actions, realized what he was doing or what was happening around him and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if the Defendant acted in good faith, he cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what the Defendant knew or intended at a particular time, you may consider any statements made or acts done or omitted by the Defendant and all other facts and circumstances received in evidence that may aid in your determination of the Defendant's knowledge or intent. You may infer, but you certainly are not required to infer, that a

person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

The mailing does not itself have to be essential to the scheme, but it must have been made to carry it out. There is no requirement that the Defendant himself was responsible for the mailing, that the mailing itself was fraudulent or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud. But the government must prove beyond a reasonable doubt that the Defendant knew, or could reasonably have foreseen, that use of the mail or interstate commercial carrier would follow in the course of the scheme in furtherance of the scheme or for the purpose of executing the scheme.

Count 10 - Title 18, United States Code, Section 1957
Money Laundering

The Defendant is charged in Count 10 of the Indictment with knowingly engaging or attempting to engage in a monetary transaction involving more than $10,000 of criminally derived property. It is against federal law to engage in such activity. For you to find the Defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

First, that the Defendant deposited, withdrew or exchanged funds or attempted to do so, over $10,000 in a financial institution affecting interstate commerce on the date specified;

Second, the Defendant knew that the money came from some kind of criminal offense;

Third, the money was in fact criminally derived from mail or wire fraud; and

Fourth, the mail or wire fraud took place in the United States.

"Affecting interstate commerce" means that the transaction affected commerce in any way or degree; a minimal effect is sufficient deposit or withdrawal from an FDIC-insured bank is sufficient.

The government does not have to prove that the Defendant knew that the money was derived from the mail fraud or wire fraud or that the Defendant committed the mail fraud or wire fraud. It is enough that the Defendant had general knowledge that the money came from some kind of criminal offense.

Method of Assessing Evidence

Now that you know what it is that the Government must prove and the standard of proof to be applied, the next question is how do you determine whether the Government has proven these elements beyond a reasonable doubt?

You must make your determination solely from the evidence properly before you and from all reasonable and legitimate inferences to be drawn from that evidence.

The evidence that is properly before you consists of:

1. The testimony of the witnesses;
2. The exhibits that I have admitted into evidence;
3. Any stipulations by which the parties have agreed to what the facts are.
4. Any facts that I have instructed you to find.

From that evidence, you may draw whatever conclusions are reasonable under the circumstances.

The evidence that is properly before you does not include:

1. Comments, statements, questions, or objections by the attorneys.
2. Anything, including answers from witnesses, which I have excluded from evidence or ordered stricken and instructed you to disregard.

3. Documents, photographs or other items which may have been referred to but have not been admitted into evidence. Since they are not proper evidence, you should not speculate or guess as to what they might say or show and you may not consider them except to the extent and for the purpose that they may have been read or shown to you during the course of the trial.
4. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.
5. The indictment.

Stipulations

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you choose.

Witnesses - Credibility - General Factors

As to the testimony of witnesses, your principal task is to determine the credibility of the witnesses and the weight you will give to the testimony of each.

In making that determination, there are a number of factors that you may consider:

1. The opportunity the witness had or did not have to acquire knowledge of the facts about which the witness testified. In other words, was the witness in a position to have accurately perceived the facts that the witness related to you.
2. The reliability or unreliability of the witness's memory. In other words, did the witness have a clear recollection of what happened or was the witness's memory uncertain or unclear.
3. The witness's appearance on the stand. Did the witness appear to be a person who was telling the complete and unadulterated truth, or did it appear that the witness was slanting things one way or another either consciously or unconsciously.
4. The probability or improbability of the witness's testimony. Did what the witness have to say sound

reasonable or plausible or did it appear to be highly unlikely or impossible.

5. Whether the witness had anything to gain or lose from the outcome of this case. In other words, was the witness totally impartial or did the witness have some stake in the outcome or some reason to favor one side or the other.

Witnesses - Credibility - Government Agents

The fact that a witness may be employed by a law enforcement agency does not, by itself, mean that you should give that witness's testimony any greater or any lesser weight simply because of that fact. You should assess the credibility and testimony of such a witness by applying the same factors as you would with respect to any other witness.

Witnesses - Number - Weight of Testimony

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in light of all the evidence, you believe that the witness is mistaken or has testified falsely or is proposing something impossible or unworthy of belief, you may disregard that witness' testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines the weight of the evidence. Rather, it is the quality of the witnesses' testimony that counts.

So, for example, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, just because there may be more witnesses testifying on one side of an issue than on the other does not mean that the weight of the evidence lies in favor of the greater number of witnesses. Once again, it is the credibility

or quality of the testimony that determines where the weight of the evidence lies.

Exhibits

In addition to assessing the credibility of the witnesses and the weight to be given to their testimony, you should also evaluate the exhibits which you will have with you in the jury room. Examine them and consider them carefully.

However, bear in mind that merely because an exhibit has been admitted into evidence does not mean that you are required to accept it at face value. Like the testimony of a witness, the significance of an exhibit or the weight you attach to it will depend on your evaluation of that exhibit in light of all the facts and circumstances of the case.

Impeachment of Defendant's Testimony by Prior Conviction

You have heard evidence that the Defendant was previously convicted of a crime. You may consider that evidence in deciding, as you do with any witness, how much weight to give the Defendant's testimony. The fact that the Defendant was previously convicted of another crime does not mean that he committed the crimes for which he is now on trial. You must not use that prior conviction as proof of the crime charged in this case.

Flight after Accusation/Consciousness of Guilt

You have heard testimony that Defendant escaped from prison. Intentional flight by a defendant after he is accused of the crime for which he is now on trial may be considered by you in the light of all the other evidence in the case. The burden is upon the government to prove intentional flight.

Intentional flight after a defendant is accused of a crime is not alone sufficient to conclude that he or she is guilty. Flight does not create a presumption of guilt. At most, it may provide the basis for an inference of consciousness of guilt. But flight may not always reflect feelings of guilt. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. In your consideration of the evidence of flight, you should consider that there may be reasons for the Defendant's actions that are fully consistent with innocence.

It is up to you as members of the jury to determine whether or not evidence of intentional flight shows a consciousness of guilt and the weight or significance to be attached to any such evidence.

Circumstantial Evidence

As I mentioned previously, you may consider only the evidence that is properly before you. However, that does not mean that, in determining the facts, you are limited to the statements of the witnesses or the contents of the exhibits.

In reaching your conclusions, you are permitted to draw, from facts which you find have been proven, reasonable inferences that seem justified in light of your experience.

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in the case. Such evidence is sometimes called circumstantial evidence.

To put it another way, a fact may be proven either by direct evidence or by circumstantial evidence. Direct evidence includes such things as the testimony of an eyewitness who personally observed the fact in question, or a photograph or document showing the actual thing described.

Circumstantial evidence consists of proof of a series of facts or circumstances from which the existence or nonexistence of another fact may be reasonably inferred.

The law makes no distinction between the weight to be given to direct and circumstantial evidence. However, it does require

that any fact required to convict a Defendant be proven beyond a reasonable doubt.

Example of circumstantial evidence: rain on the driveway/grass.

Conduct of Court - General

As I have said before, it is up to you to determine the facts in this case. You should not interpret anything I have said or done during this trial as expressing an opinion on my part as to what the facts in this case are. I have not intended to express any such opinion and you should not be concerned about what my opinions might be regarding the facts. The facts are for you to decide.

Objections

During this trial there have been occasions when the attorneys for or the Government or the Defendant have objected to a question that was asked of a witness. You are not to penalize either the Government or the Defendant for making objections to testimony which they believed to be not in conformance with the rules of evidence. It is their right to make such objections.

If I sustained the objection, it is important that you not speculate about what the answer to the objected-to question might have been. By sustaining the objection, the court has determined that the evidence should not be considered by you.

The Government as a Party

The mere fact that this case is brought in the name of the United States of America does not entitle the prosecution to any greater consideration than that accorded to the Defendant. By the same token, it does not mean that the prosecution is entitled to any less consideration. All parties, whether Government or individuals, stand as equals at the bar of justice.

Bias and Prejudice

Neither bias in favor of any person or cause, prejudice against any person or cause, nor sympathy of any kind should be permitted to influence you in the course of your deliberations.

All that any party here is entitled to, or for that matter expects, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence before you and your application of the law as I have explained it to you.

Verdict - Unanimity Required

In order to return a verdict in this case, all twelve of you must agree as to what that verdict will be. You cannot return a verdict of either guilty or not guilty with respect to the charges against the Defendant unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully to what your fellow jurors have to say, and should be open-minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is correct based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree, as long as you have listened to their views with an open mind.

Selection of Foreperson and Duty to Deliberate

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach unanimous agreement if you can do so.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

Jury Recollection Controls - Rehearing Testimony

If any reference by the court or by counsel to matters of evidence is inconsistent with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. Understand that in a short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. But keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the Marshall, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing. And I will communicate with the jury concerning the case only in writing, or here in open court.

Return of Verdict

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form, sign and date it, and advise the court that you are ready to return to the courtroom.

Copy of Instructions

I have instructed you on the law that governs your deliberations. I will send a written copy of my instructions to the jury room. But keep in mind that the law is as I have given it to you from the bench; the written copy is merely a guide to assist you.