

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 17-cr-20344-JPM-1

DIMITAR PETLECHKOV,

Defendant.

JURY INSTRUCTIONS

General Instruction

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions—what we call your deliberations.

It will be your duty to decide whether the government has proved beyond a reasonable doubt the specific facts necessary to find the defendant guilty of the crimes charged in the indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial, and you must not be influenced in any way by either sympathy or prejudice for or against the defendant or the government.

You must also follow the law as I explain it to you whether you agree with that law or not, and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against the defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require the defendant to prove his innocence or produce any evidence at all. The government has the burden of proving the defendant guilty beyond a reasonable doubt as to each charge in the indictment, and if it fails to do so you must find the defendant not guilty as to that charge.

Reasonable Doubt

While the government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning a defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Evidence

As stated earlier, you must consider only the evidence that I have admitted in the case. The term “evidence” includes the testimony of the witnesses, the exhibits admitted in the record and any facts of which the court has taken judicial notice or as to which the parties have stipulated. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make, and you should not be concerned about whether the evidence is direct or circumstantial. “Direct evidence” is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. “Circumstantial evidence” is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty. The law makes no distinction between direct or circumstantial evidence.

Also you should not assume from anything I may have said or done that I have any opinion concerning any of the issues before you in this case. Except for my instructions to you, you should disregard anything I may have said in arriving at your own decision concerning the facts.

If you have taken notes, please remember that your notes are not evidence. You should keep your notes to yourself. They can only be used to help refresh your personal recollection of the evidence in the case.

If you cannot recall a particular piece of evidence, you should not be overly influenced by the fact that someone else on the jury appears to have a note regarding that evidence. Remember, it is your recollection and the collective recollection of all of you upon which you should rely in deciding the facts in this case.

Separate Consideration: Single Defendant
Charged with Multiple Crimes

The defendant has been charged with twenty (20) crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each charge, and to return a separate verdict for each one. For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge.

Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any of the other charges.

Judicial Notice

You are instructed that the Court has taken judicial notice of the fact that Memphis, Tennessee is located in the Western District of Tennessee.

Since you are the fact-finders in this case, you may, but are not required to, accept even this fact as conclusively established.

Witnesses and Credibility

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did he or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did he or she appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

Defendant's Election Not to Testify or Present Evidence

A defendant has an absolute right not to testify or present evidence. The fact that he did not testify or present any evidence cannot be considered by you in any way. Do not even discuss it in your deliberations.

Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

Venue

In addition to determining whether the government has proven the elements of the offense beyond a reasonable doubt, you must also determine whether venue is proper. Venue is the location where a case is heard. Venue is proper in this District if you find that the defendant shipped or caused to be shipped something such as a letter, package, or item (that is, “shipped matter”) that originated in, moved into, or moved through the Western District of Tennessee.

The government must establish venue by preponderance of the evidence. It must present the more convincing evidence. To prove that the “shipped matter” originated in, moved into, or moved through the Western District of Tennessee by a preponderance simply means to prove that something is more likely than not. In other words, in light of the evidence do you believe that it is more likely than not that the “shipped matter” originated in, moved into, or moved through the Western District of Tennessee. If not, or if the evidence is equally balanced, then the government has not carried its burden to establish venue. Stated another way, a preponderance of the evidence means the greater weight of the evidence. It refers to quality and persuasiveness of the evidence, not the number of witnesses or documents. If you think of the “scales of justice,” the government’s evidence on whether the “shipped matter” originated in, moved into, or moved through the Western District of Tennessee must tip the scale at least slightly in its favor in order to prevail. It is not sufficient for the government to prove the “shipped matter” might have originated in, moved into, or moved through the Western District of Tennessee or even prove that it is as likely to be true as not.

Let me further explain preponderance of the evidence to you:

The preponderance of the evidence means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that the “shipped matter” *probably* originated in, moved into, or moved through the Western District of Tennessee. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on the issue of venue appears to be equally balanced, the government must fail.

In making this determination, you may consider any direct or circumstantial evidence that was admitted at trial.

The preponderance standard only applies to your determination regarding venue. The government must prove the actual elements of the offense beyond a reasonable doubt.

Indictment Not Evidence of Guilt

Turning now to the indictment in this case, you will only reach a criminal count in this case if you have first found that venue is proper as to that count. If the government has failed to establish that venue is proper as to a particular count, you will not consider that count.

I told you at the outset that this case was initiated through an indictment. An indictment is but a formal method of accusing the defendant of a crime. It includes the government's theory of the case, and we will be going over in a few minutes the substance of the indictment. The indictment is not evidence of any kind against an accused.

The defendant has pleaded not guilty to the charges contained in the indictment. This plea puts in issue each of the essential elements of each offense as described in these instructions and imposes upon the government the burden of establishing each of these elements by proof beyond a reasonable doubt.

Reading of the Indictment

I will read the indictment to you once again so that you are well aware of the charges made in the indictment.

The indictment reads:

Defendant's Theory and Contention

It is the theory and contention of the defendant, Dimitar Petlechkov, that he did not make a material false statement. The claim that he was a NASSCO vendor, although untrue, did not have a natural tendency to influence and was not capable of influencing the decision of a person of ordinary prudence and comprehension based upon the language of the pricing agreements.

Interstate Carrier Fraud: 18 U.S.C. § 1341

Counts 1 through 20 of the indictment charge the defendant with interstate carrier fraud. The relevant statute on this subject is Title 18 of the United States Code, Section 1341. It provides, in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, . . . deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, . . . or knowingly causes to be delivered by . . . such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [guilty of a crime].

Purpose of the Statute

The purpose of the federal interstate carrier fraud statute is to prevent the use of the facilities and services of private and commercial interstate carriers for fraudulent purposes. A scheme to defraud may be punished under the federal interstate carrier fraud statute whether or not it also violates state law.

Elements of the Offense

For you to find the defendant guilty of interstate carrier fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

1. First, that the defendant knowingly devised a scheme to defraud in order to obtain money or property;
2. Second, that the scheme included a material misrepresentation or concealment of a material fact;
3. Third, that the defendant had the intent to defraud; and
4. Fourth, that the defendant used a private or commercial interstate carrier, or caused another to use a private or commercial interstate carrier, in furtherance of the scheme.

It is not necessary that the government prove: (1) all of the details alleged concerning the precise nature and purpose of the scheme, (2) that the material transmitted by interstate carrier was itself false or fraudulent, (3) that the alleged scheme actually succeeded in defrauding anyone, (4) that the use of a private or commercial interstate carrier was intended as the specific or exclusive means of accomplishing the alleged fraud, (5) that someone relied on the

misrepresentation or false statement, or (6) that the defendant obtained money or property for his own benefit.

First Element – Scheme to Defraud

The first element the government must prove beyond a reasonable doubt in each of Counts 1 through 20 is that the defendant knowingly devised a scheme to defraud in order to obtain money or property.

A “scheme” is merely a plan for the accomplishment of an object.

“Fraud” is a general term which embraces all the various means which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions or suppression of the truth, or deliberate disregard of the truth.

A “scheme to defraud” includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

The term “false or fraudulent pretenses, representations or promises” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

An act is “knowingly” done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

If you find that the government has sustained its burden of proof that the defendant knowingly devised a scheme to defraud in order to obtain money or property, as charged, you next should consider the second element.

Second Element – Material Misrepresentation

The second element the government must prove beyond a reasonable doubt in each of Counts 1 through 20 is that the scheme to defraud included a material misrepresentation or concealment of a material fact.

A misrepresentation or concealment is “material” if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

The false or fraudulent representation or statement must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision.

This means if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision. The same principle applies to fraudulent half-truths or omissions of material facts.

Third Element – Intent to Defraud

The third element that the government must establish beyond a reasonable doubt in each of Counts 1 through 20 is that the defendant had the intent to defraud.

To act with “intent to defraud” means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself.

The question of whether a person acted with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one’s state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged must be established beyond a reasonable doubt.

Fourth Element – Use of Interstate Carrier

The fourth and final element that the government must establish beyond a reasonable doubt in each of Counts 1 through 20 is that the defendant used a private or commercial interstate carrier, or caused another to use a private or commercial interstate carrier, in furtherance of the scheme to defraud.

To use a private or commercial interstate carrier is to submit something such as a letter, package, or item (that is, “something to be shipped” or “shipped matter”) to the interstate carrier for delivery.

To “cause” a private or commercial interstate carrier to be used is to do an act with knowledge that the use of a private or commercial interstate carrier will follow in the ordinary course of business or where such use can reasonably be foreseen.

The “shipped matter” need not contain a fraudulent representation or purpose or request for money. It must, however, further or assist in the carrying out of the scheme to defraud.

It is not necessary for the defendant to be directly or personally involved in any shipping by interstate carrier, as long as the shipping is reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

In this regard, it would be sufficient to establish this element of the crime if the testimony justifies a finding that the defendant caused the shipping by others; this does not mean that the

defendant must specifically have authorized others to do the shipping. When one does an act with knowledge that the use of a private or commercial interstate carrier will follow in the ordinary course of business or where such use of a private or commercial interstate carrier can reasonably be foreseen, even though not actually intended, then the defendant causes a private or commercial interstate carrier to be used. The government contends that it was reasonably foreseeable that a private or commercial interstate carrier would be used in the ordinary course of business under the alleged scheme and therefore that the defendant caused the shipping.

With respect to the use of a private or commercial interstate carrier, the government must establish beyond a reasonable doubt the particular use charged in the indictment. However, the government does not have to prove that the shipping was made on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the private or commercial interstate carrier was used on a date reasonably near the dates alleged in the indictment.

Inferring Required Mental State

Next, I want to explain something about proving a defendant's state of mind.

Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

But, a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

You may also consider the natural and probable results of any acts that the defendant knowingly did or did not do, and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

On or About

Next, I want to say a word about the date mentioned in the indictment.

The indictment alleges that a crime happened “on or about” the date in the count you are considering. The government does not have to prove that the crime happened on that exact date. But the government must prove that the crime happened reasonably close to that date.

Summary

If you find that the government has proved beyond a reasonable doubt each of the elements of the offense as to the count you are considering as set out under these instructions, then you must return a verdict of guilty as to that count. If you find that the government has not proved beyond a reasonable doubt each of the elements of the offense as to the count you are considering as set out in these instructions, then you must return a verdict of not guilty as to that count.

Consider Only Specific Offense Charged

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty of the crimes set out in the indictment. The defendant is on trial only for the specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the court to determine.

Disregard Belief as to Guilt or Innocence of Other Persons

You are here to determine the guilt or innocence of the accused defendant from the evidence in this case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. You must determine whether or not the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused without regard to any belief you may have about guilt or innocence of any other person or persons.

Verdict Must be Unanimous

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges — judges of the facts.

Deliberation Instructions

When you go to the jury room, you should first select one of your members to act as your presiding juror. The presiding juror will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience. The verdict form will be placed in a folder and handed to you by the Court Security Officer. At any time that you are not deliberating (*i.e.*, when at lunch or during a break in deliberations), the folder and verdict form should be delivered to the Court Security Officer who will deliver it to the courtroom Deputy Clerk for safekeeping.

[EXPLAIN VERDICT FORM]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your presiding juror fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the Court Security Officer who will bring it to my attention. I will then respond as promptly as possible after conferring with counsel, either in writing or by having you returned to the courtroom so that I can address you orally. Please understand that I may only answer questions about the law and I cannot answer questions about

the evidence. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

I remind you that you are to decide this case based only on the evidence you have heard in court and on the law I have given you. You are prohibited from considering any other information and you are not to consult any outside sources for information. You must not communicate with or provide any information, photographs or video to anyone by any means about this case or your deliberations. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, or computer; the Internet; any text or instant messaging service; or any chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate with anyone or to conduct any research about this case.

If you feel a need to see the exhibits which are not being sent to you for further examination, advise the Court Security Officer and I will take up your request at that time.

[ANY JURY ALTERNATES NOT ALREADY EXCUSED,
SHOULD BE EXCUSED AT THIS TIME].

You may now retire to begin your deliberations.

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