

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
JUDGE WILLIAM B. SHUBB

FILED
2006 FEB 27 PM 5:30
RICHARD W. WIENING
CLERK
U.S. DISTRICT COURT
N. DIST. OF CA

UNITED STATES OF AMERICA,

Case Number: CR03-00095-01-WBS

Plaintiff,

v.

AMR MOHSEN,

Defendant.

_____ /

JURY INSTRUCTIONS GIVEN

Dated: 2/27/06



Courtroom Deputy

INSTRUCTION NO. 1

Members of the jury, now that you have heard all the evidence and the arguments of counsel on phase one of this trial, it is my duty to instruct you on the law which applies to this phase. A copy of these instructions will be available in the jury room for you to consult if you should find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return - that is a matter entirely up to you.

INSTRUCTION NO. 2

The indictment is not evidence. The defendant has pleaded not guilty to the charges. The defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charges beyond a reasonable doubt.

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INSTRUCTION NO. 3

A defendant in a criminal case has a constitutional right not to testify. No presumption of guilt may be raised, and no inference of any kind may be drawn, from the fact that the defendant did not testify.

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INSTRUCTION NO. 4

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2 Proof beyond a reasonable doubt is proof that leaves you
3 firmly convinced that the defendant is guilty. It is not
4 required that the government prove guilt beyond all possible
5 doubt.

6 A reasonable doubt is a doubt based upon reason and common
7 sense and is not based purely on speculation. It may arise from
8 a careful and impartial consideration of all the evidence, or
9 from lack of evidence.

10 If after a careful and impartial consideration of all the
11 evidence, you are not convinced beyond a reasonable doubt that
12 the defendant is guilty, it is your duty to find the defendant
13 not guilty. On the other hand, if after a careful and impartial
14 consideration of all the evidence, you are convinced beyond a
15 reasonable doubt that the defendant is guilty, it is your duty to
16 find the defendant guilty.

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INSTRUCTION NO. 5

The evidence from which you are to decide what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which have been received into evidence; and
- (3) any facts to which all the lawyers have stipulated.

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INSTRUCTION NO. 6

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2 In reaching your verdict you may consider only the testimony
3 and exhibits received into evidence and the facts to which both
4 sides have stipulated. Certain things are not evidence and you
5 may not consider them in deciding what the facts are. I will
6 list them for you:

- 7 1. Arguments and statements by lawyers are not evidence.
8 The lawyers are not witnesses. What they have said in
9 their opening statements, closing arguments and at
10 other times is intended to help you interpret the
11 evidence, but it is not evidence. If the facts as you
12 remember them differ from the way the lawyers state
13 them, your memory of them controls.
- 14 2. Questions and objections by lawyers are not evidence.
15 Attorneys have a duty to their clients to object when
16 they believe a question is improper under the rules of
17 evidence. You should not be influenced by the
18 question, the objection, or the court's ruling on it.
- 19 3. Testimony that has been excluded or stricken, or that
20 you have been instructed to disregard, is not evidence
21 and must not be considered. In addition some testimony
22 and exhibits have been received only for a limited
23 purpose; where I have given a limiting instruction, you
24 must follow it.
- 25 4. Anything you may have seen or heard when the court was
26 not in session is not evidence. You are to decide the
27 case solely on the evidence received at the trial.

INSTRUCTION NO. 7

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

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INSTRUCTION NO. 8

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2 In deciding the facts in this case, you may have to decide
3 which testimony to believe and which testimony not to believe.
4 You may believe everything a witness says, or part of it, or none
5 of it.

6 In considering the testimony of any witness, you may take
7 into account:

- 8 1. the opportunity and ability of the witness to see or
9 hear or know the things testified to;
- 10 2. the witness' memory;
- 11 3. the witness' manner while testifying;
- 12 4. the witness' interest in the outcome of the case and
13 any bias or prejudice;
- 14 5. whether other evidence contradicted the witness'
15 testimony;
- 16 6. the reasonableness of the witness' testimony in light
17 of all the evidence; and
- 18 7. any other factors that bear on believability.

19 The weight of the evidence as to a fact does not necessarily
20 depend on the number of witnesses who testify.
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INSTRUCTION NO. 9

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions. These persons are sometimes referred to as "expert witnesses."

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

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INSTRUCTION NO. 10

A separate crime is charged against the defendant in each count of the Indictment. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

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INSTRUCTION NO. 11

The defendant is charged in Count One of the Indictment with conspiring to commit perjury and to obstruct justice, in violation of Sections 1621(1) and 1503 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about March 29, 1998, and ending on or about May 10, 2000, there was an agreement between two or more persons to commit at least one crime as charged in the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it;

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in

1 similar ways, or perhaps helped one another. You must find that
2 there was a plan to commit at least one of the crimes alleged in
3 the indictment as an object of the conspiracy with all of you
4 agreeing as to the particular crime which the conspirators agreed
5 to commit.

6 One becomes a member of a conspiracy by willfully
7 participating in the unlawful plan with the intent to advance or
8 further some object or purpose of the conspiracy, even though the
9 person does not have full knowledge of all the details of the
10 conspiracy. Furthermore, one who willfully joins an existing
11 conspiracy is as responsible for it as the originators. On the
12 other hand, one who has no knowledge of a conspiracy, but happens
13 to act in a way which furthers some object or purpose of the
14 conspiracy, does not thereby become a conspirator. Similarly, a
15 person does not become a conspirator merely by associating with
16 one or more persons who are conspirators, nor merely by knowing
17 that a conspiracy exists.

18 An overt act does not itself have to be unlawful. A lawful
19 act may be an element of a conspiracy if it was done for the
20 purpose of carrying out the conspiracy. The government is not
21 required to prove that the defendant personally did one of the
22 overt acts.

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INSTRUCTION NO. 12

The defendant is charged in Counts Two, Three and Four of the Indictment with perjury in violation of Section 1621 of Title 18 of the United States Code. With respect to each of those counts, in order for the defendant to be found guilty, the government must prove each of the following elements beyond a reasonable doubt:

First, that in a matter pending before a court of the United States the defendant took an oath that he would testify, declare, depose or certify truly;

Second, that contrary to that oath the defendant testified falsely;

Third, that the false testimony was material to the matters before the court;

Fourth, that the defendant acted willfully, that is deliberately and with knowledge that the testimony was false.

All of you must agree as to which statement was false.

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INSTRUCTION NO. 13

The defendant is charged in Count Ten of the Indictment with subornation of perjury, in violation of Section 1622 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant persuaded Aly Mohsen to testify falsely in proceedings before the United States District Court for the Northern District of California;

Second, Aly Mohsen falsely testified under oath that he had witnessed certain entries in the 1988 Notebook on the dates falsely reflected in that notebook;

Third, the false testimony was material to the matters before the district court; and

Fourth, both the defendant and Aly Mohsen knew the testimony was false.

All of you must agree as to which statement was false.

INSTRUCTION NO. 14

The testimony of one witness is not enough to support a finding that testimony was false. There must be additional independent evidence - either the testimony of another person or other evidence - which tends to support the testimony of falsity. The other evidence, standing alone, need not convince you beyond a reasonable doubt that the testimony was false. But after considering all of the evidence on the subject, you must be convinced beyond a reasonable doubt that the testimony was false.

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INSTRUCTION NO. 15

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2 A statement is "material" in the context of a perjury or
3 subornation of perjury charge if it has a natural tendency to
4 influence the decision of the decision-making body to which it is
5 to be submitted. In a civil case, the decision-making body is
6 the fact-finder to whom the statement is to be submitted. A
7 fact-finder can be the judge to whom a matter is to be submitted
8 for a factual determination. A fact-finder can also be the jury
9 in a civil case if the statement relates to an issue to be
10 determined by the jury.

11 A misrepresentation has a natural tendency to influence the
12 fact-finder in a civil patent case if the fact or facts
13 misrepresented are relevant to an issue to be determined by the
14 fact-finder. In other words, to be material, a misrepresentation
15 must relate to a fact that the fact-finder would naturally
16 consider in determining the issues before it.

17 The test is an objective, not a subjective, one. In other
18 words, the appropriate inquiry is not whether the
19 misrepresentation actually influenced the fact-finder in the
20 case, or what those persons actually involved in the case
21 thought, but whether the misrepresentation had a natural tendency
22 to influence the fact-finder's decision on an issue which was
23 relevant to the matters to be determined by the fact-finder.

24 The "materiality" of a false statement must be tested as of
25 the time the alleged false statement was made, and not on the
26 basis of events that occurred later. The government need not
27 prove that the perjured testimony actually influenced the
28 decision-making body.

INSTRUCTION NO. 16

Wilfulness requires that an act be done knowingly and intentionally, not through ignorance, mistake or accident.

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INSTRUCTION NO. 17

The defendant is charged in Counts Eleven through Eighteen of the Indictment with mail fraud, in violation of Section 1341 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant made up a scheme or plan for obtaining money or property by making false statements, with all of you agreeing on at least one particular false statement that was made;

Second, the defendant knew that the statements were false;

Third, the statements were material, that is they would reasonably influence a person to part with money or property;

Fourth, the defendant acted with the intent to defraud; and

Fifth, the defendant used, or caused to be used, the mails or private commercial interstate carriers to carry out or attempt to carry out an essential part of the scheme.

A mailing or use of private interstate carriers is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

INSTRUCTION NO. 18

An intent to defraud is an intent to deceive or cheat.

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INSTRUCTION NO. 19

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

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INSTRUCTION NO. 20

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2 In the context of the mail fraud charges, the law defines
3 "materiality" differently than in the context of the perjury and
4 subornation of perjury charges. In order to prove that
5 statements were "material" ⁱⁿ the context of the mail fraud charges,
6 the government must prove beyond a reasonable doubt that the
7 statements would reasonably influence a person (including
8 corporate entities) to part with money or property. Materiality
9 must be determined as of the time the alleged false statement is
10 made. The government is not required to establish that anyone
11 was actually defrauded or sustained a monetary loss. Further, in
12 determining whether a statement is "material" in the context of
13 the mail fraud charges, it does not matter whether the scheme to
14 defraud was successful or not.

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INSTRUCTION NO. 21

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2 The defendant is charged in Count Nineteen of the Indictment
3 with obstruction of justice in violation of Section 1503 of Title
4 18 of the United States Code. In order for the defendant to be
5 found guilty of that charge, the government must prove each of
6 the following elements beyond a reasonable doubt:

7 *First*, there was a case pending before a court of the United
8 States;

9 *Second*, the defendant knew of the pending case and
10 endeavored to influence, obstruct or impede the due
11 administration of justice in that case by creating a fraudulent
12 1988 Notebook and falsely backdating certain entries in the 1988
13 Notebook and thereafter falsely testifying under oath that he
14 actually created the entries on the dates reflected in the
15 fabricated 1988 Notebook;

16 *Third*, the defendant's act was done corruptly, that is, the
17 defendant acted knowingly and dishonestly, with the intent to
18 influence, obstruct or impede the due administration of justice
19 in that case.

20 The government need not prove that the defendant actually
21 obstructed justice. It is sufficient that the government prove
22 that the defendant endeavored to obstruct justice. "Endeavor"
23 means any effort undertaken which would have the natural and
24 probable effect of interfering with the due administration of
25 justice.

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INSTRUCTION NO. 22

"Corruptly" means that the act must be done with the purpose of obstructing justice.

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INSTRUCTION NO. 23

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2 The defendant may be found guilty of the crime of
3 obstruction of justice, even if the defendant personally did not
4 commit the act or acts constituting the crime but aided and
5 abetted in its commission. To prove a defendant guilty of aiding
6 and abetting, the government must prove beyond a reasonable
7 doubt:

8 *First*, the crime of obstruction of justice was committed by
9 someone;

10 *Second*, the defendant knowingly and intentionally aided,
11 counseled, commanded, induced or procured that person to commit
12 each element of the crime of obstruction of justice;

13 *Third*, the defendant acted before the crime was completed.

14 It is not enough that the defendant merely associated with
15 the person committing the crime, or unknowingly or
16 unintentionally did things that were helpful to that person, or
17 was present at the scene of the crime.

18 The evidence must show beyond a reasonable doubt that the
19 defendant acted with the knowledge and intention of helping that
20 person commit obstruction of justice as alleged in Count 19.

21 The government is not required to prove precisely which
22 person actually committed the crime of obstruction of justice and
23 which person aided and abetted.

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INSTRUCTION NO. 24

Also, each member of a conspiracy is responsible for the actions of the other conspirators performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of the conspiracy, the other members have also, under the law, committed that crime.

Therefore, you may find the defendant guilty of obstruction of justice as charged in Count Nineteen of the Indictment if the government has proved each of the following elements beyond a reasonable doubt:

1. Aly Mohsen committed the crime of obstruction of justice as alleged in that count;
2. Aly Mohsen was a member of the conspiracy charged in Count One of the Indictment;
3. Aly Mohsen committed the crime of obstruction of justice in furtherance of the conspiracy;
4. the defendant Amr Mohsen was a member of the same conspiracy at the time the offense charged in Count Nineteen was committed; and
5. the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement.

INSTRUCTION NO. 25

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2 The defendant is charged in Count Twenty of the Indictment
3 with contempt of court in violation of 18 U.S.C. § 401(3). In
4 order for the defendant to be found guilty of that charge, the
5 government must prove each of the following elements beyond a
6 reasonable doubt:

7 *First*, that there was an order, decree, rule or command
8 issued by a court of the United States;

9 *Second*, that the defendant knew of such order, decree, rule
10 or command;

11 *Third*, that the defendant wilfully disobeyed or resisted
12 that order, decree, rule or command.

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INSTRUCTION NO. 26

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

5 You will then discuss the case with your fellow jurors to
6 reach agreement if you can do so. Your verdict, whether guilty
7 or not guilty, must be unanimous.

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

12 Do not be afraid to change your opinion if the discussion
13 persuades you that you should. But do not come to a decision
14 simply because other jurors think it is right.

15 It is important that you attempt to reach a unanimous
16 verdict but, of course, only if each of you can do so after
17 having made your own conscientious decision. Do not change an
18 honest belief about the weight and effect of the evidence simply
19 to reach a verdict.

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INSTRUCTION NO. 27

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

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INSTRUCTION NO. 28

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

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INSTRUCTION NO. 29

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

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INSTRUCTION NO. 30

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

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INSTRUCTION NO. 31

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2 If it becomes necessary during your deliberations to
3 communicate with me, you may send a note through the Court
4 Security Officer, signed by your foreperson or by one or more
5 members of the jury. No member of the jury should ever attempt
6 to communicate with me except by a signed writing, and I will
7 respond to the jury concerning the case only in writing, or here
8 in open court. If you send out a question, I will consult with
9 the lawyers before answering it, which may take some time. You
10 may continue your deliberations while waiting for the answer to
11 any question. Remember that you are not to tell anyone—including
12 me—how the jury stands, numerically or otherwise, on the question
13 of the guilt of the defendant, until after you have reached a
14 unanimous verdict or have been discharged.

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