IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

Plaintiff,

vs. Cr. No.

,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges, you are the other. I am the judge of the law. You, as jurors, are the judges of the facts. I presided over the trial and decided what evidence was proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

In explaining the rules of law that you must follow, first, I will give you some general instructions which apply in every criminal case—for example, instructions about burden of proof and insights that may help you to judge the believability of witnesses. Then I will give you some specific rules of law that apply to this particular case and, finally, I will explain the procedures you should follow in your deliberations, and the possible verdicts you may return. These instructions will be given to you for use in the jury room, so you need not take notes.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.03

Jury Instruction No. ___

DUTY TO FOLLOW INSTRUCTIONS
(Single Defendant)

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence. That was the promise you made and the oath you took. You must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases. [You should not discuss or consider the possible punishment in any way while deciding your verdict.]

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.04 (modified).

Jury Instruction No. ___

DUTY TO FOLLOW INSTRUCTIONS
(Multiple Defendants)

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you. [Unless otherwise stated you should consider each instruction to apply separately and individually to each Defendant on trial.]

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence. That was the promise you made and the oath you took. You must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases. [You should not discuss or consider the possible punishment in any way while deciding your verdict.]

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.04 (modified).

Jury Instruction No. ___

BURDEN OF PROOF

The United States has the burden of proving the Defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. The United States has the burden of proving the Defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the Defendant not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are 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. It is only required that the United States' proof exclude any "reasonable doubt" concerning the Defendant's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.05

Jury Instruction No. ___

BURDEN OF PROOF
(Any Defendant does not testify)

The United States has the burden of proving the Defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. [A defendant has an absolute right not to testify and may not be compelled to testify. No inference of any kind should be drawn from the election of a defendant not to testify, and that fact should not be considered by you in any way or even discussed in your deliberation.] The United States has the burden of proving the Defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the Defendant not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are 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. It is only required that the United States' proof exclude any "reasonable doubt" concerning the Defendant's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.05

Jury Instruction No. ___

CONSPIRACY
18 U.S.C. § 371

The Defendant is charged in count _____ with a violation of 18 U.S.C. § 371.

This law makes it a crime to conspire to commit an offense against the United States.

To find the Defendant guilty of this crime you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: the Defendant agreed with at least one other person to violate the law.

Second: one of the conspirators engaged in at least one overt act furthering the conspiracy's objective.

Third: the Defendant knew the essential objective of the conspiracy.

Fourth: the Defendant knowingly and voluntarily participated.

Fifth: there was interdependence among the members of the conspiracy; that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

Source: Tenth Circuit Criminal Pattern Jury Instruction 2.19

Comment

United States v. Rahseparian, 231 F.3d 1267, 1272 (10th Cir. 2000); *United States v. Hanzlicek*, 187 F.3d 1228, 1232 (10th Cir. 1999); *United States v. McVeigh*, 153 F.3d 1166, 1196 (10th Cir. 1998); *United States v. Edwards*, 69 F.3d 419, 431 (10th Cir. 1995); *United States v. Johnson*, 12 F.3d 1540, 1545 (10th Cir. 1993); *United States v. Arutunoff*, 1 F.3d 1112, 1116 (10th Cir. 1993).

In drafting Instruction 2.19 (and the correlative drug conspiracy instruction, 2.87), the Committee considered the state of Tenth Circuit conspiracy law.

The United States Code contains a number of conspiracy statutes in addition to the general conspiracy statute, 18 U.S.C. section 371, and the narcotics conspiracy statute, 21 U.S.C. section 846. *See, e.g.*, 18 U.S.C. section 241(conspiracy against rights of citizens); 18 U.S.C. section 286 (conspiracy to defraud the government with respect to claims); 18 U.S.C. section 1951 (interference with commerce by threats or violence); and 21 U.S.C. section 963 (conspiracy to import or export controlled substances). These statutes are necessarily affected by the instructions given in the more common conspiracy cases brought under the general and drug conspiracy statutes.

Proof of an overt act is a required element in conspiracies charged under 18 U.S.C. section 371, but proof of an overt act is not required in 21 U.S.C. section 846 conspiracies. *United States v. Shabani*, 513 U.S. 10, 13 (1994). This important distinction between these two statutes has become blurred in recent Tenth Circuit conspiracy cases. *See, e.g., Rahseparian*, 213 F.3d at 1272. In stating the elements of a section 371 conspiracy, *Rahseparian* omits the overt act requirement. *Id.* (citing *United States v. Edwards*, 69 F.3d 419, 430 (10th Cir. 1995), a section 846 case).

The Tenth Circuit is unique, at least among federal jurisdictions, in requiring the inclusion of "interdependence" between or among conspirators as an essential element of conspiracies charged under 18 U.S.C. section 371 and 21 U.S.C. section 846. Interdependence, as an essential element of § 371 conspiracy, is an innovation of Tenth Circuit jurisprudence that evolved during the 1990s. It now appears to be settled law. *See, e.g., United States v. Quarrell*, 310 F.3d 664, 678 (10th Cir. 2002) (including interdependence as an element of 18 U.S.C. § 371) (citing *Hanzlicek*, 187 F.3d at 1232)); *United States v. (Jalal) Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) (same); *Rahseparian*, 231 F.3d at 1272 (same); *United States v. Lampley*, 127 F.3d 1231, 1243 (10th Cir. 1997) (same); *United States v. Dimeck*, 24 F.3d 1239, 1242 (10th Cir. 1994) (same); *Arutunoff*, 1 F.3d at 1116 (same).

Use Note

Conspiracy to commit a particular substantive offense requires at least the degree of criminal intent necessary to commit the underlying offense. *United States v. Feola*, 420 U.S. 671, 686 (1975). If the underlying offense requires a special criminal intent (for example, premeditation or malice), further instruction on that intent would be necessary.

The verdict form should include a finding as to the overt act.

Regarding the notion of interdependence, please refer to Instruction 2.87.

Regarding aiding and abetting, if there is an aiding and abetting count, a separate instruction should be given. A suggested instruction follows:

> Sometimes jurors have difficulty understanding the legal difference between the criminal offenses of "conspiracy" and "aiding and abetting."

> "Conspiracy" depends and is based on any agreement, unspoken or expressed, whether carried over into a conspiratorial act or not; whereas "aiding and abetting" depends on a showing of conscious participation in a criminal act, i.e., knowingly assisting in the performance of the criminal act charged.

It is the element of "agreement" that distinguishes conspiracy from aiding and abetting.

Jury Instruction No. ___

CONTROLLED SUBSTANCES - CONSPIRACY
21 U.S.C. § 846

The Defendant is charged in count _____ with a violation of 21 U.S.C. § 846.

This law makes it a crime for anyone to conspire with someone else to violate federal laws pertaining to controlled substances. In this case, the Defendant is charged with conspiracy to [describe the conspiracy alleged in the Indictment].

To find the Defendant guilty of this crime you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: two or more persons agreed to violate the federal drug laws;

Second: the Defendant knew the essential objective of the conspiracy;

Third: the Defendant knowingly and voluntarily involved himself in the conspiracy; and

Fourth: there was interdependence among the members of the conspiracy; that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

[*Fifth*: the overall scope of the conspiracy involved [name amount] of a substance containing a detectable amount of [name substance].]

Conspiracy - Agreement

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member. Once a person becomes a member of a conspiracy, he is held legally responsible for the acts of the other members done in furtherance of the conspiracy, even though he was not present or aware that the acts were being committed.

Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

The evidence in the case need not show that the members entered into any express or formal agreement. Nor is it necessary that the evidence show that the members stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. In order to establish proof that a conspiracy existed, the evidence must show beyond a reasonable doubt that the members in some way or manner, or through some contrivance, expressly or impliedly came to a mutual understanding to try to accomplish a common and unlawful plan.

Evidence

The evidence in the case need not establish that all the means or methods set forth in the Indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were members. Rather, the evidence in the case must establish beyond a reasonable doubt that the alleged conspiracy was knowingly formed; and that one or more of the means or methods described in the Indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the Indictment; and that two or more persons, including the Defendant, were knowingly members of the conspiracy.

Membership in Conspiracy

If you conclude from the evidence beyond a reasonable doubt that a conspiracy as charged did exist, then you must next determine whether the Defendant was a member of that conspiracy; that is, whether the Defendant participated in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives. In determining whether the Defendant was a member of the conspiracy, the jury must consider only his acts and statements. The Defendant cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that [he] was one of its members.

Interdependence

To be a member of the conspiracy, the Defendant need not know all of the other members or all of the details of the conspiracy, nor the means by which the objects were to be accomplished. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that for the Defendant to be a member of the conspiracy, the United States must prove beyond a reasonable doubt that [he] [she] was aware of the common purpose and was a willing participant with the intent to advance the purposes of the conspiracy. In other words, while a defendant need not participate in all the acts or statements of the other members of the conspiracy to be bound by them, the acts or statements must be interdependent so that each member of the conspiracy depends upon the acts and statements of the other conspirators to make the conspiracy succeed.

Extent of Participation

The extent of a defendant's participation in the conspiracy is not relevant to whether he is guilty or not guilty. A defendant may be convicted as a conspirator even though he plays a

minor part in the conspiracy. His financial stake, if any, in the venture is a factor that may be considered in determining whether a conspiracy existed and whether the Defendant was a member of it.

Source: Tenth Circuit Criminal Pattern Jury Instruction 2.87 (modified)

Comment

Please refer to the Comment following Instruction 2.19 (the general conspiracy instruction, 18 U.S.C. section 371).

The elements are taken from *United States v. Scull*, 321 F.3d 1270, 1282 (10th Cir. 2003); *United States v. Ruiz-Castro*, 92 F.3d 1519, 1530 (10th Cir. 1996).

The definition of "interdependence" is taken from *United States v. Heckard*, 238 F.3d 1222, 1231-32 (10th Cir. 2001) (noting interdependence exists where each coconspirator's activities "constituted essential and integral steps toward the realization of a common, illicit goal") (citations omitted). *See also United States v. Evans*, 970 F.2d 663, 670-71 (10th Cir. 1992) (coconspirator's actions must facilitate the endeavors of other members of the charged conspiracy or facilitate the venture as a whole).

Interdependence is related to the concern of whether the evidence shows a single conspiracy or multiple conspiracies. *See United States v. Small*, 423 F.3d at 1182 ("a single conspiracy does not exist solely because many individuals deal with a common central player . . . [w]hat is required is a shared, single criminal objective, not just similar or parallel objectives between similarly situated people") (quoting *United States v. Evans*, 970 F.2d at 670). *See also* Instruction 2.20 and *United States v. Carnagie*, 533 F.3d 1231, 1237-44 (10th Cir. 2008). *Carnagie* concerned a section 371 conspiracy, but contains a detailed discussion of interdependence. *Carnagie* also notes that the proof necessary to establish interdependence may be different in a section 371 conspiracy than in a section 846 (drug) conspiracy. 533 F.3d at 1239 n.5.

The government need not allege nor prove the commission of an overt act in furtherance of a section 846 conspiracy. *United States v. Shabani*, 513 U.S. 12, 15 (1994). Drug quantity is not an element, *United States v. Thompson*, 237 F.3d 1258, 1261-62 (10th Cir. 2001), unless the quantity somehow would have the effect of increasing the penalty beyond the statutory maximum. However, drug quantity should be added as an element if it is charged in the indictment and a special verdict form which requires the jury to specify drug quantity should be used.

Use Note

Please refer to the Use Note following Instruction 2.19 (the general conspiracy instruction, 18 U.S.C. section 371).

Ordinarily, venue is not an issue. When it is an issue, it will be necessary to instruct that venue lies either in the jurisdiction in which the conspiratorial agreement was formed or in any jurisdiction in which an act in furtherance of the conspiracy was committed. Venue must be proved by a preponderance of the evidence, not beyond a reasonable doubt. *United States v. Record*, 873 F.2d 1363, 1366 (10th Cir. 1989).

Depending on how the case is tried, it may be appropriate to instruct that the agreement necessary for a conspiracy need not be explicit but may be inferred from the circumstances, *United States v. Rangel-Arreola*, 991 F.2d 1519, 1522 (10th Cir. 1993), and that the government may prove a drug conspiracy entirely with circumstantial evidence, *United States v. Mendoza-Salgado*, 964 F.2d 993, 1006 (10th Cir. 1992).

Jury Instruction No. ___

ATTEMPT AND CONSPIRACY
21 U.S.C. § 963

Title 21, United States Code, Section 963, makes it a crime for anyone to attempt or conspire with someone else to commit an offense against the laws of the United States. In this case, the Defendant is charged with conspiring to _____.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the Defendant guilty of this crime, you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: That two or more persons made an agreement to commit the crime of _____ as charged in the Indictment; and

Second: That the Defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.

Third: That there was interdependence among the Defendant and the other person or persons joining in the agreement to commit the crime. Interdependence means that the participants intended to act together for their mutual benefit to accomplish a shared, unlawful purpose.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or

scheme on one occasion, that is sufficient to convict that defendant for conspiracy even though the Defendant had not participated before and even though the Defendant played only a minor part.

The United States need not prove that the alleged conspirators entered into any formal agreement, or that they directly stated between themselves all the details of the scheme. Similarly, the United States need not prove that all of the details of the scheme alleged in the Indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

Jury Instruction No. ___

CONTROLLED SUBSTANCES -
POSSESSION WITH INTENT TO DISTRIBUTE
21 U.S.C. § 841(a)(1)

The Defendant is charged in count _____ with a violation of 21 U.S.C. section 841(a)(1).

This law makes it a crime to possess a controlled substance with the intent to distribute it.

To find the Defendant guilty of this crime you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: the Defendant knowingly or intentionally possessed [name controlled substance] as charged;

Second: the Defendant possessed the substance with the intent to distribute it; and

Third: the weight of the [name controlled substance] Defendant possessed was at least [name amount] as charged.

[*Fourth*: [serious bodily injury] [death] resulted from use of [name controlled substance].]

[Name controlled substance] is a controlled substance within the meaning of the law.

To "possess with intent to distribute" means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

Source: Tenth Circuit Criminal Pattern Jury Instruction 2.85 (modified)

Use Note

The third element is submitted to the jury under the principle of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the statute imposes increased maximum penalties based on the quantity of the substance. See 21 U.S.C. § 841(b). *Apprendi* also requires that the fourth

element be submitted to the jury where the indictment alleges serious bodily injury or death that would result in an increased penalty under 21 U.S.C. § 841(b). If the parties dispute the quantity of the substance or whether serious bodily injury or death resulted from the use of the substance, the court should consider giving a lesser included offense instruction. *See United States v. Lacey*, 86 F.3d 956, 970 (10th Cir. 1996) (lesser included offense instruction not appropriate where quantities were sufficient for distribution and too great for simple possession); *United States v. Burns*, 624 F.2d 95, 104 (10th Cir. 1980) (lesser included offense instruction should have been given where evidence could have supported conviction for either distribution or possession). Alternatively, where the parties dispute the amount of the substance, the court may substitute for the third element a special interrogatory on the verdict form asking the jury to determine the exact amount of the controlled substance. Where the offense involves two or more controlled substances, and the indictment alleges quantities of each substance sufficient to raise the maximum sentence, the court should submit an additional element to the jury for a finding on each controlled substance, and a specific finding as to quantity should appear on the verdict form.

21 U.S.C. § 841(b) also imposes increased penalties where the defendant has a prior conviction for a felony drug offense. Under current law, the court need not submit the question of a prior conviction to the jury. *See Apprendi*, 530 U.S. at 489-90; *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998).

The court need not submit to the jury for resolution facts increasing the statutory minimum sentence. *Harris v. United States*, 536 U.S. 545, 567-68 (2002).

"[T]he quantity of the drug possessed is a circumstance which may permit the inference that the possessor had an intent to sell, deliver or otherwise distribute." *United States v. King*, 485 F.2d 353, 357 (10th Cir. 1973); *accord United States v. Pulido-Jacobo*, 377 F.3d 1124, 1131 (10th Cir. 2004); *United States v. Gama-Bastides*, 222 F.3d 779, 787 (10th Cir. 2000); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 n.4 (10th Cir. 2000); *United States v. Wood*, 57 F.3d 913, 918 (10th Cir. 1995).

Jury Instruction No. ___

AID AND ABET
18 U.S.C. § 2(a)

Each count of the Indictment also charges a violation of 18 U.S.C. section 2, which provides that: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

This law makes it a crime to intentionally help someone else commit a crime. To find the Defendant guilty of this crime, you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: someone else committed the charged crime, and

Second: the Defendant intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the United States must prove that the Defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him.

The Defendant need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its commission to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting.

Source: Tenth Circuit Criminal Pattern Jury Instruction 2.06

Comment

The Committee believes that this instruction is consistent with *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949); *United States v. Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999); *United States v. Scroger*, 98 F.3d 1256, 1262 (10th Cir. 1996).

Jury Instruction No. ___

USING/CARRYING A FIREARM DURING COMMISSION OF A DRUG TRAFFICKING CRIME OR CRIME OF VIOLENCE
18 U.S.C. § 924(c)(1)

The Defendant is charged in count _____ with a violation of 18 U.S.C. section 924(c)(1).

This law makes it a crime to [use] [carry] a firearm during and in relation to any [drug trafficking crime] [crime of violence] for which a person may be prosecuted in a court of the United States.

To find the Defendant guilty of this crime you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: the Defendant committed the crime of [name of crime], [as charged in count ____ of the Indictment.] You are instructed that [name of crime] is a [drug trafficking crime] [crime of violence];

Second: the Defendant used or carried a firearm;

Third: during and in relation to [name of crime].

The phrase "during and in relation to" means that the firearm played an integral part in the underlying crime, that it had a role in, facilitated (i.e., made easier), or had the potential of facilitating the underlying crime.

A defendant knowingly "uses" a firearm when it (1) is readily accessible and (2) is actively employed during and in relation to the underlying crime.

A defendant knowingly "carries" a firearm when he (1) possesses the firearm through the exercise of ownership or control and (2) transports or moves the firearm from one place to another.

In determining whether the Defendant knowingly [used] [carried] a firearm during and in relation to the underlying crime, you may consider all of the facts received in evidence including the nature of the crime, the usefulness of a firearm to the crime, the extent to which a firearm actually was observed before, during and after the time of the crime, and any other facts that bear on the issue.

A firearm plays an integral part in the underlying crime when it furthers the purpose or effect of the crime and its presence or involvement is not the result of coincidence. The United States must prove a direct connection between the Defendant's [use] [carrying] of the firearm and the underlying crime but the crime need not be the sole reason the Defendant [used] [carried] the firearm.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Source: Tenth Circuit Criminal Pattern Jury Instruction 2.06

Use Note

This instruction applies when the indictment charges using or carrying a firearm "during and in relation to" a drug trafficking crime or a crime of violence. It must *not* be used when the indictment charges "possession" of a firearm "in furtherance of" a drug trafficking crime or crime of violence. *United States v. Avery*, 295 F.3d 1158, 1172-77 (10th Cir. 2002). Instead, use Instruction 2.45.1.

Alternative Instruction:

Title 18, United States Code, Section 924(c)(1), under which Defendant is charged in Count _____, makes it a crime for anyone to carry a firearm during and in relation to a drug trafficking crime.

For you to find the Defendant guilty of the crime charged in Count _____, you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: That the Defendant committed the crime alleged in Count _____; and

Second: That the Defendant knowingly carried a firearm during and in relation to the Defendant's commission of the crime alleged in Count _____.

The United States is not required to prove that the Defendant actually fired the weapon or brandished it at someone in order to prove "use," as that term is used in this instruction. However, you must be convinced beyond a reasonable doubt that the firearm played a role in or facilitated the commission of a drug offense. In other words, you must find that the firearm was an integral part of the drug offense charged.

The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver silencer, or destructive device.

(check the indictment; if it charges “use” then read *Bailey* 118 S.Ct. 253 and probably use “actively employed in” instead of “an integral part of”)

Jury Instruction No. ___

You will note that the Indictment charges that the crime was committed on or about [date]. The United States must prove beyond a reasonable doubt that the Defendant committed the crime reasonably near [date].

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.18

Comment

A similar instruction was approved in *United States v. Agnew*, 931 F.2d 1397, 1401, 1410-11 (10th Cir. 1991). In *United States v. Poole*, 929 F.2d 1476, 1482 (10th Cir. 1991), the court wrote: "the 'on or about' instruction . . . has been approved by this Circuit on numerous occasions."

Care should be taken in giving this instruction if the defendant has raised an alibi defense. *See* Brian H. Redmond, Annotation, *Propriety And Prejudicial Effect Of "On or About" Instruction Where Alibi Evidence In Federal Criminal Case Purports To Cover Specific Date Shown By Prosecution Evidence*, 92 A.L.R. Fed. 313 (1989).

The district court, however, retains the discretion to give an "on or about" instruction even when an alibi defense is raised. *United States v. Phillips*, 869 F.2d 1361, 1368-69 (10th Cir. 1988); *United States v. Lucero*, 601 F.2d 1147, 1150 (10th Cir. 1979). The district court will consider the coincidence, or lack thereof, of a specific date upon which the crime was committed, as alleged and proved, with the specific date of the alibi.

Jury Instruction No. ___

FALSE STATEMENT IN ACQUISITION OF FIREARMS

The Defendant is charged with a violation of 18 U.S.C. § 924(a)(1)(A).

This law makes it a crime for anyone to make a false statement in a record that federal law requires a federally licensed firearms dealer to keep. Federal law requires a licensed firearms dealer to maintain firearm transactions records on ATF Form 4473.

To find the Defendant guilty of this crime you must be convinced that the United States has proved each of the following beyond a reasonable doubt:

First: the Defendant knowingly made a false statement or representation in an ATF Form 4473; and

Second: the statement pertained to information that the law requires a federally licensed firearms dealer to keep.

An entry in a record is "false" if it was untrue at the time it was made, and the person making it, knew it was untrue.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Comment

See Alvarez-Ronquillo, 19cr3240 KG. This instruction is based on *United States v. Johnson*, 60 Fed. Appx. 260, 262 (10th Cir. 2003) and *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994). The definition of "firearm" is from Tenth Circuit Criminal Pattern Jury Instruction 2.41.

Jury Instruction No. ___

KNOWINGLY - DELIBERATE IGNORANCE

When the word "knowingly" is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the Defendant cannot be established merely by demonstrating that the Defendant was negligent, careless, or foolish, knowledge can be inferred if the Defendant deliberately blinded himself to the existence of a fact. Knowledge can be inferred if the Defendant was aware of a high probability of the existence of [the fact in question], unless the Defendant did not actually believe [the fact in question].

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.37

Comment

Although the deliberate ignorance instruction in general was discouraged, it may be given "when the Government presents evidence that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of prosecution." *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 (10th Cir. 2000) (internal quotation marks omitted). If given, a similar deliberate ignorance instruction was approved as the preferred language in *Delreal-Ordones*. *Id.* at 1267; *see also United States v. Glick*, 710 F.2d 639, 643 (10th Cir. 1983). "The purpose of the instruction is to alert the jury that the act of avoidance could be motivated by sufficient guilty knowledge to satisfy the knowing element of the crime." *Delreal-Ordones*, 213 F.3d at 1268-69 (quotation marks and brackets omitted). "The district court need not insist upon direct evidence of conscious avoidance of a fact before tendering a deliberate ignorance instruction. To establish a defendant's 'deliberate ignorance,' the Government is entitled to rely on circumstantial evidence and the benefit of the favorable inferences to be drawn therefrom." *Id.* at 1268 (citation omitted).

Jury Instruction No. ___

WILLFULLY - TO ACT

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.38

Comment

The Committee does not recommend any general instruction defining the term "willfully" because no single instruction can accurately encompass the different meanings this term has in federal criminal law. This term is "a word 'of many meanings, its construction often being influenced by its context.'" *Screws v. United States*, 325 U.S. 91, 101 (1945), quoting *Spies v. United States*, 317 U.S. 492, 497 (1943).

In light of the confusion in the law regarding the meaning of the word "willful," the Committee suggests that, when a statute uses this word, care should be taken to distinguish between its meanings. A "willfulness" requirement may impose on the government the burden of proving that the defendant had knowledge of his conduct, or that his conduct was unlawful, or of the precise legal duty, the violation of which forms the substance of the charges against the defendant.

The following commentary is intended to highlight the difficulty surrounding the willfulness requirement.

"The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998). "Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind." *Id.* "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" *Id.*

Although the term "willful" can denote a specific intent requirement, this is not always the case. *See United States v. Blair*, 54 F.3d 639, 643 (10th Cir. 1995) (discussing specific intent); *United States v. Jackson*, 248 F.3d 1028, 1031 n.2 (10th Cir. 2001) ("the word 'willfully' does not always require specific intent"); *United States v. Youts*, 229 F.3d 1312, 1315-16 (10th Cir. 2000) (term "willfully" used in train wreck statute does not require for conviction proof of specific intent to wreck a train).

An example of willfulness understood as *intentional conduct* is found in *United States v. Hilliard*, 31 F.3d 1509, 1517 n.5 (10th Cir. 1994) ("willfully" is proved where the defendant "knowingly performed an act, deliberately and intentionally 'on purpose' as contrasted with accidently, carelessly or unintentionally").

Willfulness understood as intentional conduct *that the actor knows to be a violation of law* is developed in a series of Supreme Court cases. In *Cheek v. United States*, 498 U.S. 192

(1991), the Court held that, because of the complexity of the tax laws, "willfulness" requires proof of a "voluntary, intentional violation of a known legal duty." *Id.* at 201.

The Supreme Court applied the teachings of *Cheek* to the Bank Secrecy Act in *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (willful violation of antistructuring provision required proof that defendant "knew the structuring in which he engaged was unlawful").

More recently, in *Bryan*, 524 U.S. at 196-98, the Supreme Court examined the federal firearm licensing requirement of 18 U.S.C. § 924(a)(1)(D), and interpreted the willfulness element to require proof that the defendant knew his conduct was unlawful, but not that the defendant knew the precise legal duty which he was charged with violating.

Jury Instruction No. ___

ACTUAL OR CONSTRUCTIVE POSSESSION

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over an object or thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it.

[More than one person can be in possession of an object if each knows of its presence and has the power and intention to control it.]

[A defendant has joint possession of an object when two or more persons share actual or constructive possession of it. However, merely being present with others who have possession of the object does not constitute possession.]

[In the situation where the object is found in a place (such as a room or car) occupied by more than one person, you may not infer control over the object based solely on joint occupancy. Mere control over the place in which the object is found is not sufficient to establish constructive possession. Instead, in this situation, the United States must prove some connection between the particular defendant and the object.]

[In addition, momentary or transitory control of an object, without criminal intent, is not possession. You should not find that the Defendant possessed the object if he possessed it only momentarily, and either did not know that he possessed it or lacked criminal intent to possess it.]

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.31

Comment

United States v. Colonna, 360 F.3d 1169, 1178-79 (10th Cir. 2004); *United States v. Holland*, 116 F.3d 1353, 1358 (10th Cir. 1997) (possession instruction set out and not challenged), *overruled on other grounds by Bousely v. United States*, 523 U.S. 614, 622-24 (1998); *United States v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998) (in joint occupancy case, government must show connection linking defendant to contraband); *United States v. McKissick*, 204 F.3d 1282, 1291 (10th Cir. 2000) (control of premises alone is insufficient); *United States v. Adkins*, 196 F.3d 1112, 1114-15 (10th Cir. 1999) (discussing "fleeting possession" instruction). *See United States v. Avery*, 295 F.3d 1158, 1177-81 (10th Cir. 2002) (discussing possession in various situations).

Jury Instruction No. ___

With respect to the question of whether or not a defendant intended to distribute any controlled substance, you are instructed that the quantity of the controlled substance allegedly possessed by a defendant, if proved, may be considered by the jury in light of all of the other evidence in the case in determining whether or not a defendant intended to distribute any such substance. Whether or not evidence of a particular quantity of substance shows an intent to distribute the same, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

Jury Instruction No. ___

LESSER INCLUDED OFFENSE

If you unanimously find the Defendant not guilty of the offense charged, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the Defendant is guilty or not guilty of [_____].

The difference between these two offenses is that, to convict the Defendant of [_____], the United States does not have to prove [insert element]. This is an element of the greater offense, but not of the lesser included offense.

For you to find the Defendant guilty of [_____], the United States must prove each of the following elements beyond a reasonable doubt: [insert elements of lesser offense].

If you are convinced that the United States has proved all of these elements beyond a reasonable doubt, you may find the Defendant guilty of the lesser included offense. If you have a reasonable doubt about any of these elements, then you must find the Defendant not guilty of the lesser included offense.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.33

Comment

Schmuck v. United States, 489 U.S. 705, 716 (1989) (offense is not necessarily included within another unless the elements of the lesser are a subset of the greater offense); *United States v. Moore*, 108 F.3d 270, 273 (10th Cir. 1997) (noting that "[o]nly when an appellate court is convinced that the evidence issues are such that a rational jury could acquit on the charged crime but convict on the lesser crime may the denial of a lesser included offense be reversed," and, based on the evidence, holding no error in refusing to charge on simple possession as a lesser included offense of possession with intent to distribute); *United States v. Wright*, 131 F.3d 1111, 1112 (4th Cir. 1997) (proof of differentiating element must be sufficiently in dispute).

This instruction has been drafted to allow a lesser included instruction to be given, not only when the jury finds the defendant not guilty of the greater offense, but also when the jury

cannot unanimously reach a verdict, and the defendant requests such instruction. Although the Tenth Circuit has not decided whether such an instruction is appropriate, the weight of authority supports giving such instruction, at least when the defendant requests it. *See Darks v. Mullin*, 327 F.3d 1001, 1008 n.2 (10th Cir. 2003).

Use Note

Where the evidence would prevent any rational jury from acquitting a defendant of the greater offense charged and convicting him of the lesser included offense, the district court does not abuse its discretion in denying a request for a jury instruction on the lesser included offense. *United States v. Harris*, 313 F.3d 1228, 1240-41 (10th Cir. 2002) (discussing four-part test).

Jury Instruction No. ___

We have just talked about what the United States has to prove for you to convict a Defendant of sexual abuse of a minor under 18 U.S.C. § 2243(a). Your first task is to decide whether the United States has proved, beyond a reasonable doubt, that the Defendant committed that alleged crime. If your verdict on that alleged crime is guilty, you are finished. But if your verdict as to that alleged crime is not guilty, or if you are unable to reach a verdict, you should go on to consider whether the Defendant is guilty of abusive sexual contact under 18 U.S.C. § 2244(a).

To find the Defendant guilty of the lesser included crime of abusive sexual contact, in violation of Section 2244(a), the United States must prove each of the following elements beyond a reasonable doubt:

First: that the Defendant knowingly engaged in sexual contact with _____;

Second: that at the time of the sexual contact _____ had attained the age of 12 years of age but had not yet attained the age of 16 years;

Third: that the Defendant was at least four (4) years older than _____;

Fourth: that the incident occurred in Indian Country; and

Fifth: that this happened within the State and District of New Mexico, on or about _____.

If your verdict is that the Defendant is guilty of sexual abuse of a minor under 18 U.S.C. § 2243(a), you need go no further. But if your verdict on that crime is not guilty, or if you are unable to reach a verdict on it, you should consider whether the Defendant has been proved guilty of abusive sexual contact under 18 U.S.C. § 2244(a).

Of course, if the United States has not proved beyond a reasonable doubt that the Defendant committed either crime, your verdict as to the Defendant must be not guilty of all charges.

Jury Instruction No. ___

ENTRAPMENT

As a defense to the crimes charged in the Indictment, the Defendant has asserted that he was entrapped.

The Defendant was entrapped if

- the idea for committing the crime(s) originated with government agents, and
- the government agents then persuaded or talked the Defendant into committing the crime(s), and
- the Defendant was not already willing to commit the crime(s).

When a person has no previous intent or purpose to violate the law, but is induced or persuaded by officers or agents to commit a crime, he is entrapped and the law, as a matter of policy, forbids his conviction in such a case. On the other hand, when a person already has the readiness and willingness to violate the law, and the officers or agents merely provide him with an opportunity to commit the crime and do so even by disguise or ruse, there is no entrapment.

In order to return a verdict of guilty as to [the Defendant] for the crime(s) of [name crime or crimes charged], you must find beyond a reasonable doubt that the Defendant was not entrapped.

[Add as appropriate:

For purposes of this case, [_____], the informant, was an agent of the law enforcement officers.]

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.27

Comment

The Committee has chosen not to use the word "predisposition" as it sounds overly technical and thus may be confusing to the average juror.

This instruction is based on *United States v. Scull*, 321 F.3d 1270, 1274-76 (10th Cir. 2003), and *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1262-63 (10th Cir. 1999) (and Tenth Circuit cases cited therein).

To establish a defense of entrapment, *Scull* seems to require proof of more than persuasion by the government agent. "'Inducement' is 'government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.'" 321 F.3d at 1275 (quoting *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986)). Inducement is neither established by evidence of solicitation, standing alone, nor "'by evidence that the government agent initiated the contact with the defendant or proposed the crime.'" *Id.* (quoting *Ortiz*, 804 F.2d at 1165).

Jury Instruction No. ___

ENTRAPMENT
(Multiple Defendants)

As a defense to the crimes charged in the Indictment, the Defendant, _____, has asserted that he was entrapped.

The Defendant was entrapped if

- the idea for committing the crime(s) originated with government agents, and

- the government agents then persuaded or talked the Defendant into committing the crime(s), and

- the Defendant was not already willing to commit the crime(s).

When a person has no previous intent or purpose to violate the law, but is induced or persuaded by officers or agents to commit a crime, he is entrapped and the law, as a matter of policy, forbids his conviction in such a case. On the other hand, when a person already has the readiness and willingness to violate the law, and the officers or agents merely provide him with an opportunity to commit the crime and do so even by disguise or ruse, there is no entrapment.

In order to return a verdict of guilty as to [the Defendant] for the crime(s) of [name crime or crimes charged], you must find beyond a reasonable doubt that the Defendant was not entrapped.

[Add as appropriate:

For purposes of this case, [_____], the informant, was an agent of the law enforcement officers.]

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.27

Comment

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Jury Instruction No. ___

INSANITY

If you conclude that the United States has proved beyond a reasonable doubt that the Defendant committed the crime charged, you must then consider whether the Defendant should be found "not guilty by reason of insanity." Under the law, a person is not criminally liable for his conduct while insane. Insanity is therefore a defense to the crime charged. The Defendant has presented evidence of insanity at the time he committed the crime charged.

For you to return a verdict of not guilty by reason of insanity, the Defendant must prove 1) that he suffered from a severe mental disease or defect when he committed the crime; *and (*2) that, as a result of this mental disease or defect, he was not able to understand what he was doing or to understand that it was wrong.

Insanity may be temporary or permanent. You may consider evidence of the Defendant's mental condition before, during, and after the crime, in deciding whether he was legally insane at the time of the crime.

Unlike other aspects of a criminal trial, the Defendant has the burden of proving an insanity defense. The Defendant does not have to prove insanity beyond a reasonable doubt, however, but only by clear and convincing evidence. Clear and convincing evidence is evidence that makes it highly probable that the Defendant was insane. You should render a verdict of "not guilty by reason of insanity" if you find, by clear and convincing evidence, that the Defendant was insane when he committed the crime charged.

Although the Defendant has raised the issue of insanity, the United States still has the burden of proving all of the essential elements of the offense charged beyond a reasonable doubt.

Remember that there are three possible verdicts in this case: guilty, not guilty, and not guilty only by reason of insanity.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.34

Comment

18 U.S.C. § 17(a) provides that insanity is an affirmative defense:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

A defendant is not entitled to an insanity instruction unless the evidence shows a mental disease or defect that rendered him unable to appreciate the nature and quality or wrongfulness of his acts. *United States v. Holsey*, 995 F.2d 960, 963 (10th Cir. 1993).

18 U.S.C. § 17(b) places the burden of proof by clear and convincing evidence upon the Defendant. While the "clear and convincing" standard is a fairly high one, it does not call for the highest levels of proof. "If evidence would permit the jury to find to a high probability that the Defendant was insane, an insanity instruction is required." *United States v. Denny-Shaffer*, 2 F.3d 999, 1016 (10th Cir. 1993) (discussing multiple personality disorder for purposes of insanity defense) (italics and quotations omitted).

The Supreme Court has held that the Insanity Defense Reform Act of 1984, 18 U.S.C. § 4241-4247, does not require an instruction concerning the consequences of a not guilty by reason of insanity (NGI) verdict, and that "such an instruction is not to be given as a matter of general practice." *Shannon v. United States*, 512 U.S. 573, 587 (1994); *see Neely v. Newton*, 149 F.3d 1074, 1085-86 (10th Cir. 1998) (rejecting claims that the New Mexico guilty but mentally ill (GBMI) statute violated due process, and that the jury should have been told of consequences of NGRI and GBMI).

The three possible verdicts are set forth in 18 U.S.C. § 4242(b), Special verdict. The Defendant claims that he was insane at the time of the events alleged in the indictment. If you conclude that the United States has proved beyond a reasonable doubt that the Defendant committed the crime as charged, you must then consider whether the Defendant should be found "not guilty only by reason of insanity."

The Defendant was insane as the law defines that term only if, as a result of a severe mental disease or defect, the Defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

On the issue of insanity, it is the Defendant who must prove his insanity by clear and convincing evidence. You should render a verdict of "not guilty only by reason of insanity" if you are persuaded by clear and convincing evidence that the Defendant was insane when the crime was committed.

Remember, then, that there are three possible verdicts in this case: guilty, not guilty, and not guilty only by reason of insanity.

Jury Instruction No. ___

DEFENDANT'S NON-INVOLVEMENT (ALIBI)

Evidence has been introduced tending to establish an alibi - that the Defendant was not present at the time when, or at the place where, the Defendant is alleged to have committed the offense charged in the Indictment.

The United States has the burden of proving that the Defendant was present at that time and place. Unless the United States proves this beyond a reasonable doubt, you must find the Defendant not guilty.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.35

Comment

United States v. Haala, 532 F.2d 1324, 1329-30 (10th Cir. 1976) (discussing when alibi defense instruction not necessary). Alibi is not an affirmative defense, but an evidentiary matter. Popularization of the term "alibi" has led to a negative connotation. This draft instruction tries to avoid that negative connotation and to avoid confusion as to the burden of proof.

Jury Instruction No. ___

Although intoxication or drunkenness alone will never provide a legal excuse for the commission of a crime, the fact that a person may have been intoxicated at the time of the commission of a crime may negate the existence of a specific intent.

So evidence that a defendant acted or failed to act while in a state of intoxication is to be considered in determining whether or not the defendant acted, or failed to act, with specific intent, as charged.

If the evidence in the case leaves you with a reasonable doubt whether, because of the degree of a defendant's intoxication, the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, you should acquit the accused of that crime.

Always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Jury Instruction No. ___

SELF-DEFENSE OR DEFENSE OF ANOTHER

The Defendant [name the Defendant] has offered evidence that he was acting in [self-defense] [defense of another].

A person is entitled to defend [himself] [another person] against the immediate use of unlawful force. But the right to use force in such a defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.

[A person may use force which is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to [himself] [another]].

To find the Defendant guilty of the crime charged in the Indictment, you must be convinced that the United States has proved beyond a reasonable doubt:

Either, the Defendant did not act in [self-defense] [defense of another],

Or, it was not reasonable for the Defendant to think that the force he used was necessary to defend [himself] [another person] against an immediate threat.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.28

Comment

As with most affirmative defenses, once the defendant raises the defense, the government must establish beyond a reasonable doubt that the defendant's action was not in self-defense. *United States v. Corrigan*, 548 F.2d 879, 881-84 (10th Cir. 1977).

Jury Instruction No. ___

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.06

Use Note

This instruction is consistent with federal practice generally. *United States v. Caballero*, 277 F.3d 1235, 1244 (10th Cir. 2002); *United States v. Sanders*, 929 F.2d 1466, 1470 (10th Cir. 1991).

Paragraph (2) should be tailored to delete any references to kinds of evidence not relevant to the particular trial. If the court has taken judicial notice of a fact, the term "judicial notice" should be explained to the jury.

Paragraph (4) should also be tailored depending on what has happened during trial.

It is settled practice to give a general instruction defining what is and is not evidence.

In some cases, there may not be any stipulations, or any judicially noticed facts. In such cases, paragraph (2) should be tailored to eliminate the unnecessary and irrelevant language. The strongly worded admonition in paragraph (4) regarding proffered evidence that was rejected or stricken may be necessary to counteract the jurors' natural curiosity and inclination to speculate about these matters. This paragraph should be tailored to fit the particular facts of the case. If, for example, there was no occasion during the course of the trial to order that things the jurors saw or heard be stricken from the record, the language in this paragraph dealing with such matters should be omitted.

Jury Instruction No. ____

Any notes that you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should rely on your memory and not on the notes. Your notes are only to refresh your recollection. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and should not be influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

Cr.14a

Jury Instruction No. ___

[There are, generally speaking, two types of evidence from which a jury may properly determine the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of facts which point to the existence or non-existence of certain other facts.]

[As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.]

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in the light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts which have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.07

Comment

See United States v. Rahseparian, 231 F.3d 1267, 1271-72 (10th Cir. 2000); *United States v. Ortiz-Ortiz*, 57 F.3d 892, 895 (10th Cir. 1995); *United States v. McIntyre*, 997 F.2d 687, 702-03 & nn.16-18 (10th Cir. 1993).

Use Note

The bracketed first two paragraphs are optional. Some judges instruct before closing argument, some after. If instructions are given after closing argument, the Committee suggests that this instruction be modified depending on whether the attorneys have referred to the distinction between direct and circumstantial evidence during their closing arguments.

Jury Instruction No. ___

I remind you that it is your job to decide whether the United States has proved the guilt of the Defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses [including the Defendant] who testified in this case. You should think about the testimony of each witness you have heard and decide whether you believe all or any part of what each witness had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome in this case? Did the witness have any relationship with either the United States or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he/she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection - like failure of recollection - is not uncommon.

[The testimony of the Defendant should be weighed and his credibility evaluated in the same way as that of any other witness.]

[The Defendant did not testify and I remind you that you cannot consider his decision not to testify as evidence of guilt. I want you to clearly understand, please, that the Constitution of the United States grants to a Defendant the right to remain silent. That means the right not to testify or call any witnesses. That is a constitutional right in this country, it is very carefully guarded, and you should understand that no presumption of guilt may be raised and no inference of any kind may be drawn from the fact that a Defendant does not take the witness stand and testify or call any witnesses.]

In reaching a conclusion on a particular point, or ultimately in reaching a verdict in this case, do not make any decisions simply because there were more witnesses on one side than on the other.

Jury Instruction No. ___

IMPEACHMENT BY PRIOR INCONSISTENCIES

(Defendant does not testify)

You have heard the testimony of [name of witness]. You have also heard that, before this trial, he made a statement that may be different from his testimony here in court.

This earlier statement was brought to your attention only to help you decide how believable his testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.10

Use Note

This instruction must be given when a prior inconsistent statement which does not fall within Fed. R. Evid. 801(d)(2)(A) has been admitted. If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes. It should also be given during trial as a limiting instruction, if requested under Fed. R. Evid. 105. This seems consistent with *United States v. Carter*, 973 F.2d 1509, 1512 (10th Cir. 1992); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987).

Jury Instruction No. ___

IMPEACHMENT BY PRIOR CONVICTION

You have heard evidence that the Defendant has been convicted of a felony, that is, a crime punishable by imprisonment for a term of years. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of his testimony you will believe in this trial. The fact that the Defendant has been convicted of another crime does not mean that he committed the crime charged in this case, and you must not use his prior conviction as proof of the crime charged in this case. You may find him guilty of the crime charged here only if the United States has proved beyond a reasonable doubt that he committed it.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.11

Use Note

The court should consider giving this instruction at the conclusion of the defendant's testimony as well as at the conclusion of the trial.

Jury Instruction No. ___

IMPEACHMENT BY PRIOR INCONSISTENCIES
(Defendant testifies)

You have heard the testimony of [name of witness]. You have also heard that, before this trial, he made a statement that may be different from his testimony here in court.

This earlier statement was brought to your attention only to help you decide how believable his testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

[If the Defendant testifies, the Defendant's testimony should be weighed and considered, and the Defendant's credibility determined, in the same way as that of any other witness.]

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.10

Use Note

This instruction must be given when a prior inconsistent statement which does not fall within Fed. R. Evid. 801(d)(2)(A) has been admitted. If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes. It should also be given during trial as a limiting instruction, if requested under Fed. R. Evid. 105. This seems consistent with *United States v. Carter*, 973 F.2d 1509, 1512 (10th Cir. 1992); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987).

The bracketed material (paragraph 3) was not included in the 10th Circuit Pattern Jury Instructions.

Jury Instruction No. ___

IMPEACHMENT BY PRIOR CONVICTION AND INCONSISTENCIES

You have heard the testimony of [name of witness]. You have also heard that, before this trial, he made a statement that may be different from his testimony here in court.

This earlier statement was brought to your attention only to help you decide how believable his testimony in this trial was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

[The Defendant has a right not to testify. If the Defendant does testify, however, the Defendant's testimony should be weighed and considered, and the Defendant's credibility determined, in the same way as that of any other witness. Evidence of a defendant's previous conviction of a crime is to be considered by you only insofar as it may affect the credibility of the Defendant as a witness, and must never be considered as evidence of guilt of the crime for which the Defendant is on trial.]

Source: Tenth Circuit Criminal Pattern Jury Instructions 1.10, 1.11

Use Note

This instruction must be given when a prior inconsistent statement which does not fall within Fed. R. Evid. 801(d)(2)(A) has been admitted. If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes. It should also be given during trial as a limiting instruction, if requested under Fed. R. Evid. 105. This seems consistent with *United States v. Carter*, 973 F.2d 1509, 1512 (10th Cir. 1992); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987).

The bracketed material was not included in the 10th Circuit Pattern Jury Instructions.

Jury Instruction No. ___

IMPEACHMENT BY PRIOR CONVICTION
(Witness Other Than Defendant)

The testimony of a witness may be discredited or impeached by showing that the witness previously has been convicted of a [felony, that is, of a crime punishable by imprisonment for a term of years] or of a [crime of dishonesty or false statement]. A prior conviction does not mean that a witness is not qualified to testify, but is merely one circumstance that you may consider in determining the credibility of the witness. You may decide how much weight to give any [prior felony conviction] [crime of dishonesty] that was used to impeach a witness.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.12

Use Note

Fed. R. Evid. 609 expressly requires that evidence of a felony conviction shall be admitted, subject to Rule 403. It is important that the court conduct, on the record, a Rule 403 balancing before determining whether to admit or exclude evidence of a felony conviction. *United States v. Howell*, 285 F.3d 1263, 1269-70 (10th Cir. 2002). Rule 403 balancing is not required if the prior crime involves dishonesty or false statements. *United States v. Begay*, 144 F.3d 1336, 1338 (10th Cir. 1998). A crime of dishonesty or false statement does not need to be a felony. Care must be exercised, however, because some offenses that may sound like crimes of dishonesty may not be. *See, e.g., United States v. Dunson*, 142 F.3d 1213, 1215-16 (10th Cir. 1998) (holding that shoplifting is not "automatically" a crime of dishonesty or false statement).

The court should consider giving this instruction at the conclusion of the witness's testimony, as well as at conclusion of the trial.

Jury Instruction No. ___

The testimony of a witness may be discredited or impeached by showing that the witness previously has been convicted of a [felony, that is, of a crime punishable by imprisonment for a term of years] or of a [crime of dishonesty or false statement]. A prior conviction does not mean that a witness is not qualified to testify, but is merely one circumstance that you may consider in determining the credibility of the witness. You may decide how much weight to give any [prior felony conviction] [crime of dishonesty] that was used to impeach a witness.

You have heard evidence that the Defendant has been convicted of a felony, that is, a crime punishable by imprisonment for a term of years. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of his testimony you will believe in this trial. The fact that the Defendant has been convicted of another crime does not mean that he committed the crime charged in this case, and you must not use his prior conviction as proof of the crime charged in this case. You may find him guilty of the crime charged here only if the United States has proved beyond a reasonable doubt that he committed it.

Source: Tenth Circuit Criminal Pattern Jury Instructions 1.11, 1.12

Use Note

The court should consider giving this instruction at the conclusion of the defendant's testimony as well as at the conclusion of the trial.

Jury Instruction No. ___

IMPEACHMENT BY EVIDENCE OF UNTRUTHFUL CHARACTER

You have heard the testimony of [name of witness], who was a witness in the [United States] [defense] case. You also heard testimony from others concerning [their opinion about his character for truth-telling] [his reputation, in the community where he lives, for telling the truth]. It is up to you to decide from what you heard here whether [name of witness] was telling the truth in this trial. In deciding this, you should bear in mind the testimony concerning his [reputation for] truthfulness.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.13

Comment

Under Fed. R. Evid. 608(a), a witness is not limited to reputation testimony, but may also state his opinion as to the character of another witness for truthfulness.

This instruction should be rarely, if ever, needed.

Cf. Instructions 1.09 (Evidence of Good Character) and 1.09.1 (Evidence of Reputation for Honesty).

Jury Instruction No. ___

The testimony of a witness may be discredited or impeached by showing that the witness previously has been convicted of a [felony, that is, of a crime punishable by imprisonment for a term of years] or of a [crime of dishonesty or false statement]. A prior conviction does not mean that a witness is not qualified to testify, but is merely one circumstance that you may consider in determining the credibility of the witness. You may decide how much weight to give any [prior felony conviction] [crime of dishonesty] that was used to impeach a witness.

You have heard the testimony of [name of witness], who was a witness in the [United States's] [defense] case. You also heard testimony from others concerning [their opinion about his character for truth-telling] [his reputation, in the community where he lives, for telling the truth]. It is up to you to decide from what you heard here whether [name of witness] was telling the truth in this trial. In deciding this, you should bear in mind the testimony concerning his [reputation for] truthfulness.

Jury Instruction No. ___

[During the trial you heard the testimony of _____ who expressed opinions concerning _____.] In some cases, such as this one, scientific, technical, or other specialized knowledge may assist the jury in understanding the evidence or in determining a fact in issue. A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.

You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.17

Use Note

In the typical one-expert case (e.g., drugs), the bracketed sentence may be omitted. Where expert opinions are in issue, the names of the experts and a description of their opinions might be inserted.

Jury Instruction No. ___

ACCOMPLICE—INFORMANT—IMMUNITY

An accomplice is someone who joined with another person in committing a crime, voluntarily and with common intent. The testimony of an accomplice may be received in evidence and considered by you, even though it is not supported by other evidence. You may decide how much weight it should have.

You are to keep in mind, however, that accomplice testimony should be received with caution and considered with great care. You should not convict a defendant based on the unsupported testimony of an alleged accomplice, unless you believe the unsupported testimony beyond a reasonable doubt.

Informant

An informant is someone who provides evidence against someone else for a personal reason or advantage. The testimony of an informant alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilt, even though not corroborated or supported by other evidence. You must examine and weigh an informant's testimony with greater care than the testimony of an ordinary witness. You must determine whether the informant's testimony has been affected by self-interest, by an agreement he has with the United States, by his own interest in the outcome of the case, or by prejudice against the Defendant.

You should not convict a defendant based on the unsupported testimony of an informant, unless you believe the unsupported testimony beyond a reasonable doubt.

Immunity

A person may testify under a grant of immunity (an agreement with the United States). His testimony alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilt even though it is not corroborated or supported by other evidence. You should consider testimony given under a grant of immunity with greater care and caution than the testimony of an ordinary witness. You should consider whether testimony under a grant of immunity has been affected by the witness's own interest, the United States' agreement, the witness's interest in the outcome of the case, or by prejudice against the Defendant.

On the other hand, you should also consider that an immunized witness can be prosecuted for perjury for making a false statement. After considering these things, you may give testimony given under a grant of immunity such weight as you feel it deserves.

You should not convict a defendant based on the unsupported testimony of an immunized witness, unless you believe the unsupported testimony beyond a reasonable doubt.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.14

Comment

United States v. Bridwell, 583 F.2d 1135, 1142 (10th Cir. 1978).

Use Note

When the immunity instruction is given, the nature of the agreement with the government should be spelled out in the instruction. *United States v. Valdez*, 225 F.3d 1137, 1139-41 (10th Cir. 2000).

Jury Instruction No. ____

ACCOMPLICE—CO-DEFENDANT—PLEA AGREEMENT

The United States called as one of its witnesses an alleged accomplice, who was named as a co-defendant in the Indictment. The United States has entered into a plea agreement with the co-defendant, providing [*e.g.*, for the dismissal of some charges and a recommendation of a lesser sentence than the co-defendant would otherwise likely receive]. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

An alleged accomplice, including one who has entered into a plea agreement with the United States, is not prohibited from testifying. On the contrary, the testimony of an alleged accomplice may, by itself, support a guilty verdict. You should receive this type of testimony with caution and weigh it with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that testimony beyond a reasonable doubt. The fact that an accomplice has entered a guilty plea to the offense charged is not evidence of the guilt of any other person.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.15

Use Note

The bracketed material in the first paragraph should be adapted to the particular case.

Jury Instruction No. ___

WITNESS'S USE OF ADDICTIVE DRUGS

The testimony of a drug abuser must be examined and weighed by the jury with greater caution than the testimony of a witness who does not abuse drugs.

[Name of witness] may be considered to be an abuser of drugs.

You must determine whether the testimony of that witness has been affected by the use of drugs or the need for drugs.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.16

Comment

The use of an addict instruction was discussed with approval by the Tenth Circuit in United States v. Smith, 692 F.2d 658, 660-61 (10th Cir. 1982); there, however, the Court declined to find error in the trial court's refusal to give such instruction in light of the instructions read as a whole. See also United States v. Nicholson, 983 F.2d 983, 991 (10th Cir. 1993).

Jury Instruction No. ___

EVIDENCE OF GOOD CHARACTER

[The Defendant has offered evidence of his reputation for good character.] [The Defendant has offered evidence of someone's opinion as to his good character.] You should consider such evidence along with all the other evidence in the case.

Evidence of good character may be sufficient to raise a reasonable doubt whether the Defendant is guilty, because you may think it improbable that a person of good character would commit such a crime. Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt.

You should also consider any evidence offered to rebut the evidence offered by the Defendant.

You should always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.09

Comment

The Committee suggests that *United States v. McMurray*, 656 F.2d 540, 550-51 (10th Cir. 1980), neither mandates nor precludes the use of the word "alone". *See United States v. Daily*, 921 F.2d 994, 1010 (10th Cir. 1990), *overruling on other grounds recognized by United States v. Schleibaum*, 130 F.3d 947, 949 (10th Cir. 1997). The matter is, however, subject to some debate.

There is no per se rule that the "evidence of good character *alone*" instruction must be given either sua sponte or upon request. The trial courts should consider this issue on a case-by-case basis, and give the "evidence of good character *alone*" instruction when the circumstances of a particular case so require. *See, e.g., Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361, 366 (1896); *Oertle v. United States*, 370 F.2d 719, 727

(10th Cir. 1967) (en banc); *Bird City Equity Mercantile Exch. v. United States*, 338 F.2d 790, 791-92 (10th Cir. 1964).

Cf. Instruction 1.13 (Impeachment By Evidence of Untruthful Character).

Use Note

The word "alone" can be inserted in the second paragraph, when appropriate: "Evidence of good character alone may be sufficient... ."

Jury Instruction No. ___

VOLUNTARINESS OF STATEMENT BY DEFENDANT
(Single Defendant)

Evidence has been presented about a statement attributed to the Defendant alleged to have been made after the commission of the crime [or crimes] charged in this case but not made in court. Such evidence should always be considered by you with caution and weighed with care. Any such statements should be disregarded entirely unless the other evidence in the case convinces you beyond a reasonable doubt that the statement was made knowingly and voluntarily.

In determining whether any such statement was knowingly and voluntarily made, consider, for example, the age, gender, training, education, occupation, and physical and mental condition of the Defendant, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all the other circumstances in evidence surrounding the making of the statement.

If, after considering all this evidence, you conclude by a preponderance of the evidence that the Defendant's statement was made knowingly and voluntarily, you may give such weight to the statement as you feel it deserves under all the circumstances.

[*Alternatively:* In determining whether any such statement is reliable and credible, consider factors bearing on the voluntariness of the statement. For example, consider the age, gender, training, education, occupation, and physical and mental condition of the Defendant, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all the other circumstances in evidence surrounding the making of the statement.

You are permitted to consider the Defendant's statements as relevant evidence as long as you find by a preponderance of the evidence that the statements were made voluntarily. Preponderance of evidence is evidence sufficient to persuade you that a fact is more likely present than not present.]

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.25

Comment

The Committee has not used the terms "confession" and "admission." These labels that the law gives to statements may be confusing in jury instructions. "'[S]tatements' is a more neutral description than 'confession,' and should be used in its place . . . unless the statements can be considered a 'complete and conscious admission of guilt–a strict confession,'" *United States v. Gardner*, 516 F.2d 334, 346 (7th Cir. 1975) (quoting *Opper v. United States*, 348 U.S. 84, 91 (1954)), in which case the instruction may be adapted by the trial judge.

In *Lego v. Twomey*, 404 U.S. 477 (1972), the Supreme Court set the minimum burden of proof required to establish that a confession is voluntary when such confession has been challenged as involuntary. The Court stated that the burden must be "at least by a preponderance of the evidence." The court stated that the states are free to adopt a higher standard as a matter of state law. In *United States v. McCullah*, 76 F.3d 1087, 1100 (10th Cir. 1996), the Tenth Circuit incorporated the language of Lego, "at least by a preponderance of the evidence," thereby establishing the burden for this circuit.

United States v. Toles, 297 F.3d 959, 965-66 (10th Cir. 2002), discusses voluntariness analysis but does not include gender specifically among factors to be considered. Nothing in Toles seems to suggest that those factors specifically referred to are exhaustive. According to Toles, the determination of voluntariness is based on the totality of circumstances, including the characteristics of the accused and the details of the interrogation. *See also United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999). Such factors include age, intelligence, education of the defendant, length of detention, length and nature of questioning, whether defendant was advised of constitutional rights and whether defendant was subjected to physical punishment. *United States v. Glover*, 104 F.3d 1570, 1579 (10th Cir. 1997).

The instruction is consistent with *United States v. March*, 999 F.2d 456, 462-63 (10th Cir. 1993), and *United States v. Janoe*, 720 F.2d 1156, 1163-64 (10th Cir. 1983).

Use Note

See Instruction 1.05.1 for "preponderance of evidence." Language in brackets is alternative language incorporating the separate preponderance instruction.

Jury Instruction No. ___

CONFESSION-STATEMENT - VOLUNTARINESS
(Multiple Defendants)

Evidence relating to any statement attributed to the Defendant alleged to have been made after the commission of the crime (or crimes) charged in this case but not made in court, should always be considered by you with caution and weighed with care. Any such statements should be disregarded entirely unless the other evidence in the case convinces you beyond a reasonable doubt that the statement was made knowingly and voluntarily.

In determining whether any such statement was knowingly and voluntarily made, you should consider, for example, the age, gender, training, education, occupation, and physical and mental condition of the Defendant, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all the other circumstances in evidence surrounding the making of the statement.

If, after considering all this evidence, you conclude by a preponderance of the evidence that the Defendant's statement was made knowingly and voluntarily, you may give such weight to the statement as you feel it deserves under all the circumstances.

Of course, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant on trial.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.26

See Comment to Instruction 1.25

Jury Instruction No. ___

IDENTIFICATION TESTIMONY

The United States must prove, beyond a reasonable doubt, that the offense[s] charged in this case was actually committed and that it was the Defendant who committed it. Thus, the identification of the Defendant as the person who committed the offense[s] charged is a necessary and important part of the United States' case.

You should evaluate the credibility of any witness making an identification in the same manner as you would any other witness. You should also consider at least the following questions:

Did the witness have the ability and an adequate opportunity to observe the person who committed the offense[s] charged? You should consider, in this regard, such matters as the length of time the witness had to observe the person in question, the lighting conditions at that time, the prevailing visibility, the distance between the witness and the person observed, and whether the witness had known or observed the person before.

Is the testimony about an identification made after the commission of the crime[s] the product of the witness's own recollection? In this regard, you should consider very carefully the circumstances under which the later identification was made, including the manner in which the Defendant was presented to the witness for identification and the length of time that elapsed between the crime[s] and the witness's subsequent identification.

If, after examining all of the testimony and evidence in this case, you have a reasonable doubt as to the identity of the Defendant as the person who committed the offense[s] charged, you must find the Defendant not guilty.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.29

Comment

This instruction should be given whenever identification testimony has become an issue because of lack of corroboration or limited opportunity for observation, because the witness's memory has faded by the time of trial, or because of law-enforcement induced problems that might affect the reliability of identification testimony.

This instruction takes account of *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972). An instruction consisting only of the first and last paragraphs may be consistent with *United States v. Pena*, 930 F.2d 1486, 1492-93 (10th Cir. 1991), and *United States v. Thoma*, 713 F.2d 604, 607-08 (10th Cir. 1983) (discussing when cautionary instruction is needed).

The Committee believes that elaboration on the specific circumstances surrounding an identification is best left to argument at trial.

Jury Instruction No. ___

You have heard evidence of other [crimes] [acts] [wrongs] engaged in by the Defendant. You may consider that evidence only as it bears on the Defendant's [e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident] and for no other purpose. Of course, the fact that the Defendant may have previously committed an act similar to the act[s] charged in this case does not mean that the Defendant necessarily committed the act[s] charged in this case.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.30

Comment

This instruction is based on the Ninth Circuit's Model Jury Instruction (criminal) 4.3. It follows Tenth Circuit precedent. *See, e.g., United States v. Cuch*, 842 F.2d 1173, 1177 (10th Cir. 1988). It respects the four factors of proper limited purpose, relevance, prejudice analysis, and the right to a limiting instruction mentioned in *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988).

Use Note

Merely reading the text of Federal Rule of Evidence 404(b) is not the best way to instruct the jury. *United States v. Doran*, 882 F.2d 1511, 1524 (10th Cir. 1989). This instruction should be given during trial when requested under Fed. R. Evid. 105, *see Huddleston v. United States*, 485 U.S. 681, 691-92 (1988), and in closing instructions.

The government bears the burden of demonstrating how the proffered evidence is relevant to an issue in the case. In demonstrating the relevance of proffered other acts evidence, "'[t]he Government must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts.'" *Cuch*, 842 F.2d at 1176 (quoting *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985)). Before such evidence is admitted "it must tend to establish intent, knowledge, motive or one of the enumerated exceptions; must have real probative value, not just possible worth; and must be reasonably close in time to the crime charged." *Id.*

Jury Instruction No. ____

The interpreter has been here only to help us communicate during the proceedings. The interpreter is not a party in the case, has no interest in the case, and has been and will continue to be completely neutral. Accordingly, the interpreter has not been working for either party. The interpreter's sole responsibility has been to enable us to communicate with each other.

Treat the interpretation of the witness's testimony as if the witness had spoken English and no interpreter was present. Do not allow the fact that testimony is given in a language other than English to influence you in any way.

If any of you understand the language of the witness, disregard completely what the witness has said in the witness's language. Consider as evidence only what has been provided by the interpreter in English. You should make your deliberations on the basis of the official interpretation.

Jury Instruction No. ____

During the trial, you listened to audio recordings in the Spanish language. Each of you was given a transcript of the recording which was admitted into evidence. The transcript is a translation of the Spanish language audio recording. Although some of you may know the Spanish language, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript as the official document to be used in the deliberation and disregard any different meaning. The same applies to documents admitted in the Spanish language wherein the English translation is to be used in the deliberations.

Source: O'Malley, Grenig, & Lee, *Fed. Jury. Prac. & Instr. Crim* Comp HB § 19:1

Jury Instruction No. ____

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the United States 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.

Cr.24c

Jury Instruction No. ___

CAUTION—CONSIDER ONLY CRIME CHARGED
(Single Defendant and Single Count)

You are here to decide whether the United States has proved beyond a reasonable doubt that the Defendant is guilty of the crime charged. The Defendant is not on trial for any act, conduct, or crime not charged in the Indictment.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crime charged. The fact that another person *also* may be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter your thinking as you decide whether this Defendant has been proved guilty of the crime charged.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.19

Comment

See United States v. Oberle, 136 F.3d 1414, 1422-23 (10th Cir. 1998), approving instruction directing jury not to concern themselves with the guilt of anyone except the defendant over objection that it directed jurors to ignore defendant's defense of mistaken identity.

Use Note

The Committee suggests that this instruction be given if the defendant has an instruction as to a person other than the defendant being guilty of the crime. Modification of this instruction will be necessary in those cases where the evidence necessarily raises the question of the guilt of others such as conspiracy or aiding and abetting. Modification should also be considered in cases in which an alibi or mistaken identification is raised.

Jury Instruction No. ___

CAUTION - CONSIDER ONLY CRIME CHARGED
(Single Defendant and Multiple Counts)

A separate crime or offense is charged in each count of the Indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

You are here to decide whether the United States has proved beyond a reasonable doubt that the Defendant is guilty of the crime charged. The Defendant is not on trial for any act, conduct, or crime not charged in the Indictment.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crime charged. The fact that another person *also* may be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter your thinking as you decide whether this Defendant has been proved guilty of the crime charged.

Source: Tenth Circuit Criminal Pattern Jury Instructions 1.19, 1.22 (modified for single defendant)

Comment

See United States v. Oberle, 136 F.3d 1414, 1422-23 (10th Cir. 1998), approving instruction directing jury not to concern themselves with the guilt of anyone except the defendant over objection that it directed jurors to ignore defendant's defense of mistaken identity.

Use Note

The Committee suggests that this instruction be given if the defendant has an instruction as to a person other than the defendant being guilty of the crime.

Modification of this instruction will be necessary in those cases where the evidence necessarily raises the question of the guilt of others such as conspiracy or aiding and abetting.

Modification should also be considered in cases in which an alibi or mistaken identification is raised.

Jury Instruction No. ___

MULTIPLE DEFENDANTS—SINGLE COUNT

The rights of each of the Defendants in this case are separate and distinct. You must separately consider the evidence against each Defendant and return a separate verdict for each.

Your verdict as to one Defendant, whether it is guilty or not guilty, should not affect your verdict as to any other Defendant.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.21

Comment

This instruction is based on *Kotteakos v. United States*, 328 U.S. 750, 772 (1946); *United States v. Edwards*, 69 F.3d 419, 434 n.8 (10th Cir. 1995).

Jury Instruction No. ___

MULTIPLE DEFENDANTS - MULTIPLE COUNTS

A separate crime is charged against one or more of the Defendants in each count of the Indictment. You must separately consider the evidence against each Defendant on each count and return a separate verdict for each Defendant.

Your verdict as to any one Defendant or count, whether it is guilty or not guilty, should not influence your verdict as to any other Defendants or counts.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.22

Comment

This instruction combines the concepts contained in "Single Defendants–Multiple Counts" and "Multiple Defendants–Single Count" instructions.

Use Note

The second paragraph should be modified when guilt of one charge is a prerequisite for conviction of another charge. *See, e.g.*, 18 U.S.C. § 1961 (R.I.C.O. conviction requires proof of two predicate offenses).

Jury Instruction No. ___

If you find the Defendant [or Defendants] guilty, it will be my duty to decide what the punishment will be. You should not discuss or consider the possible punishment in any way while deciding your verdict.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.20

Jury Instruction No. ____

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another, and to deliberate in an effort to reach agreement if you can do so without giving up your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case and you must decide whether the United States has proved the Defendant guilty beyond a reasonable doubt.

Jury Instruction No. ____

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, computer, the Internet, any text or instant messaging service, blog, or any website such as Facebook, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you to inform me if you become aware of another juror's violation of these instructions.

You may not use electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social media may be wrong, incomplete, or inaccurate. You are permitted to discuss the case with only your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors and the parties in this case. This would unfairly and adversely impact the judicial process.

Jury Instruction No. ___

EXPLANATION OF VERDICT FORMS
(Single Verdict)

In a moment, the Courtroom Deputy will escort you to the jury room. Please take your copies of the instructions that I have just read. Any exhibits admitted into evidence will be placed in the jury room for your review.

When you go to the jury room, you should first select a foreperson, who will help to guide your deliberations and will speak for you here in the courtroom. [The second thing you should do is review the instructions. Not only will your deliberations be more productive if you understand the legal principles upon which your verdict must be based, but for your verdict to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, but you are bound by your oath to follow the law stated in the instructions.]

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on the count listed in the Indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

A form of verdict has been prepared for your convenience.

The foreperson will [write/circle] the unanimous answer of the jury [in the space provided] for the count listed in the Indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security officer. I will either reply in writing or bring you back into the court to respond to your message. Under no circumstances should you reveal to me the numerical division of the jury.

Source: Tenth Circuit Criminal Pattern Jury Instruction 1.23

Comment

Concerning the admonition against disclosure of the numerical division of the jury, *see Brasfield v. United States*, 272 U.S. 448, 449-50 (1926).

Use Note

The bracketed material in the second paragraph might be appropriate when the trial judge provides the jurors with written copies of the instructions.

The Committee recognizes that many judges do not routinely instruct on the verdict form. For those who do, the bracketed notation "Explain the Verdict Form" indicates an appropriate place for that instruction to be given.

Jury Instruction No. ___

EXPLANATION OF VERDICT FORMS
(Multiple Verdicts)

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When you go to the jury room, you should first select a foreperson, who will help to guide your deliberations and will speak for you here in the courtroom. [The second thing you should do is review the instructions. Not only will your deliberations be more productive if you understand the legal principles upon which your verdict must be based, but for your verdict to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, but you are bound by your oath to follow the law stated in the instructions.]

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the Indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

A form of verdict has been prepared for your convenience.

The foreperson will [write/circle] the unanimous answer of the jury [in the space provided] for each count of the Indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security officer. I will either reply in writing or bring you back into the court to respond to your message. Under no circumstances should you reveal to me the numerical division of the jury.

Jury Instruction No. ___

You have heard testimony that a firearm was seized at the Defendant's residence and offered by the United States for you to consider as a tool of the drug trafficking trade. Mere presence of a firearm at the scene is not enough by itself to find that the Defendant committed a drug trafficking offense, because the firearm's presence may be coincidental or entirely unrelated to the underlying offense that is charged in the Indictment.

Source: Tenth Circuit Criminal Pattern Jury Instruction 2.45.1 (modified)

Jury Instruction No. ____

JANE/JOHN DOE

Both the Indictment and these instructions refer to the alleged victim of the crime charged in the Indictment as "Jane Doe." Jane Doe is not the alleged victim's real name, but rather a pseudonym used to protect her privacy in documents that may be viewed by the general public. The victim's real name was provided to you during the trial, and you should not draw any inferences about the guilt of the Defendant based on the use of the pseudonym "Jane Doe" in these documents.

Source: *USA v. Smith*, Cr. No. 07-791 MCA, (Doc. 109) at 7, filed July 24, 2008.