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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA . CRIMINAL ACTION NO.
. 4:03-CR-188-A
VS. .
. .
RICHARD MICHAEL SIMKANIN . January 5, 2004
. 12:15 p.m.
.

VOLUME IA
TRIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN H. McBRYDE
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 and I'm the judge of the law.

2 Now, you must follow the law whether you agree with it or
3 not. Now, nothing I may say or do during the course of the
4 trial is intended to indicate, nor should it be taken as
5 indicating to you, what your verdict should be. I'm not the
6 one to render the verdict. That's you. So don't take anything
7 I say as indicating what I think your verdict ought to be.

8 Now, the evidence from which you find the facts will
9 consist of the testimony of witnesses, documents, and other
10 things received into the record as exhibits and any facts that
11 may be stipulated upon, and if that were to occur I would call
12 that to your attention.

13 Now, certain things are not evidence and must not be
14 considered by the jury as evidence. Statements, arguments, and
15 questions by lawyers are not evidence. Questions to objections
16 are not evidence. Lawyers have an obligation to their client
17 to make an objection when they believe evidence being offered
18 is improper under the rules of evidence. You should not be
19 influenced by an objection made by a lawyer or by the Court's
20 ruling on that objection. If an objection is sustained, ignore
21 the question as if it had not been asked. If the objection is
22 overruled, treat the answer like you would any other answer.

23 Now, from time to time there may be evidence that I'll say
24 you can consider for only a limited purpose, and I'll explain
25 that to you at the time. Of course, you'll follow those kinds

1 of instructions. From time to time evidence is received before
2 a jury that we later conclude should not have been received
3 under the rules of evidence, and I may ask you to disregard
4 certain evidence if that were to occur. Of course, you would
5 follow that instruction.

6 Now, anything you may have seen or heard outside the
7 courtroom is not evidence and must be disregarded. I think
8 I've emphasized more than once the importance of deciding the
9 case based on the evidence received during the course of the
10 trial, and you're here to decide the case solely on the basis
11 of that evidence.

12 Now, there are two kinds of evidence: direct and
13 circumstantial evidence. Direct evidence is direct proof of a
14 fact, such as the testimony of an eyewitness. Circumstantial
15 evidence is proof of facts from which you may infer that some
16 other fact or other facts exist. And I give a simple example
17 of that, but I think it makes the point: If you were to go to
18 sleep at night and there wasn't any snow on the ground, that
19 would be one fact. And if you woke up in the morning and the
20 ground was covered with snow, that would be another fact. Even
21 though nobody saw it snowing, you could infer from those two
22 facts that it snowed during the night. In other words, you
23 could infer a third fact from the two that have been
24 established. I'll give you some further instructions on that
25 at the end of the trial, but bear in mind as the case goes

1 along you can consider both kinds of evidence, circumstantial
2 evidence and direct evidence.

3 It will be up to you to decide which witnesses to believe
4 and which witnesses not to believe, and how much of any
5 witness's testimony to accept or reject. And I'll give you
6 some guidelines for determining the credibility of witnesses at
7 the end of the case.

8 Now, as I've explained to you before, this is a criminal
9 case and there are basic rules that apply in criminal cases
10 that you must keep in mind. I think I've already gone over
11 these rules with you but they're important enough I'm going to
12 review them with you again. First, the defendant is presumed
13 innocent until proven guilty. The indictment against the
14 defendant brought by the government is only an accusation,
15 nothing more. It is not proof of guilt or anything else. The
16 defendant, therefore, starts out with a clean slate.

17 Second, the burden of proof is on the government until the
18 very end of the case. The defendant has no burden to prove his
19 innocence or to present any evidence or to testify. Since the
20 defendant has the right to remain silent, if he were to do so
21 that could not be taken into account by the jury in reaching a
22 verdict.

23 Third, the government must prove the defendant's guilt
24 beyond a reasonable doubt, and I'll give you some further
25 instructions on that point later but bear in mind that in that

1 respect a criminal case differs from a civil case.

2 Now, let me give you some instructions now about your
3 contact with other people during the trial and even discussing
4 it amongst yourselves during the trial. Those are important
5 things that I want to deal with now.

6 Until the jury starts to deliberate, you're not to discuss
7 this case with anyone, and that means even each other. The
8 importance of not discussing it with people other than outside
9 of the jury is that you don't want somebody else to try to
10 influence you on what the outcome should be. If you were to
11 tell your spouse or your friend or what have you about what the
12 case is all about, the next thing you know they'll want to put
13 their two bits' worth in, and they're not on the jury and what
14 they think about the case is not relevant and we would prefer
15 that you not be exposed to somebody else's thoughts about it
16 until the verdict has been reached. That's why we have that
17 requirement.

18 Now, as far as discussing the case with each other, we
19 prohibit that until you start your deliberations because you
20 tend to form opinions when you have discussions about
21 something. We want you to keep an open mind until all of the
22 evidence is concluded and you start your deliberations. And
23 the best way to ensure that is simply not to have any
24 discussion about the case.

25 Do not read or listen to anything touching on this case in

1 any way. As you know, there was some newspaper publicity about
2 the case this morning. There may be additional newspaper
3 publicity. There may be something over the radio; there may be
4 something over the TV. I don't know. But if anything like
5 that happens, don't read it if it's in the newspaper, turn a
6 deaf ear to it if it's on the TV, and a blind eye -- I mean, a
7 blind eye and deaf ear if it's on the TV, and a deaf ear if
8 it's on the radio. In other words, don't be hearing somebody
9 else's thoughts about the case because you're the one to decide
10 the case and not somebody else.

11 If anybody tries to talk to you about the case during the
12 course of the trial and before you reach a verdict, you should
13 bring that to my attention immediately so action can be taken.

14 Do not try to make any investigation about the case on
15 your own. Don't do any research overnight or during the
16 recesses. For example, don't even look up a dictionary
17 definition of a word. If there's something that needs to be
18 defined for you, we'll do that for you in the instructions at
19 the end of the case.

20 The bottom line is that you're to be guided by your
21 deliberations and your decisions on what you learn in the
22 courtroom during the course of the trial and nothing else, of
23 course taking into account the legal instructions you receive.

24 Do not form any opinion about the case until all of the
25 evidence has been concluded. Keep an open mind until you start

1 your deliberations at the end of the case. I don't think
2 you'll have occasion to be in contact with any of the attorneys
3 or parties involved in the case, any of the witnesses during
4 the course of the trial. But if you were to have any such
5 contact, don't have any communication whatsoever with any of
6 those persons, not even passing the time of day.

7 And when you go to the jury room the first time, you'll
8 receive a badge that identifies you as a juror. Always wear
9 that when you're in and around the courthouse on your outer
10 garment, just in case somebody who has some connection with the
11 case were to be around you they would know that they should not
12 have any contact with you.

13 Now, I don't permit the taking of notes during the course
14 of the trial. I have several reasons for that but the main
15 reason is that I notice that note taking can be distracting,
16 not only to the person taking the notes, but to persons around
17 the note taker. I think it's a whole lot more important that
18 everybody on the jury watch very closely everything going on in
19 the courtroom. Specifically, it's very important that the jury
20 watch closely a witness's demeanor and reaction when questions
21 are being asked. Day in and day out you, in your conversations
22 with people, form judgments as to whether that person is being
23 honest and candid with you by the facial expression, by how
24 they answer questions, how they react when they answer
25 questions, how they react when they hear the question. The

1 same things that you take into account unconsciously in
2 determining whether somebody is being honest and candid with
3 you, you can take into account in determining whether a witness
4 is being honest and candid with you. And I think it's very
5 important that you pay close attention to that. And you'll be
6 surprised, if you don't take notes, how well your collective
7 memory will serve you as to what the evidence was when you go
8 back to deliberate.

9 Now, I may be called upon to rule on motions or objections
10 made by the lawyers during the trial. I'm sure I will be. You
11 should not infer from any ruling I may make that I have any
12 opinions on the merits of the case favoring one side or the
13 other. If I sustain an objection to a question that goes
14 unanswered by a witness, you should not speculate on what the
15 answer would have been if the witness had answered the
16 question. Nor should you speculate on what -- Nor should you
17 draw any inferences from the question itself.

18 I may have to confer with the lawyers during the course of
19 the trial. Normally, I have them come up here to the
20 microphone, as you've seen already occur. I turn my microphone
21 off and talk with them. If it's something that may take a
22 while, I may ask you to go back to the jury room during the
23 course of the conversation. You can be assured when that
24 happens we won't be talking about things of interest to you.
25 We'll be talking about legal questions or procedural comments

1 that are not of a matter of concern to the jury.

2 Now, the trial is beginning to start, and I'm going to
3 give you an outline of what happens during the course of the
4 trial. First, the government will read the indictment while
5 the defendant stands. After the indictment has been read, the
6 defendant will either plead guilty or not guilty to the
7 indictment. Presumably it will be guilty (sic).

8 Then the government -- each side will have an opportunity
9 to make an opening statement. The opening statement is a
10 dispassionate statement of what the lawyer expects the evidence
11 to prove during the course of the trial. It's limited to five
12 minutes per side, and it's not to be argumentative in any
13 respect. It's simply a dispassionate statement of what the
14 lawyer thinks the evidence will be.

15 Now, neither side is obligated to make an opening
16 statement. If one side or the other declines to do so, that
17 simply means the lawyer didn't think it was necessary. It's
18 not to be taken as an indication of anything other than the
19 fact that the decision was made not to make an opening
20 statement.

21 If the defendant wishes to make an opening statement but
22 doesn't want to do it at the outset, the defendant can wait
23 until after the government's evidence has been concluded. That
24 assumes the defendant plans to offer evidence, and can make an
25 opening statement prior to offering evidence.

1 The government goes first in the opening statement, and
2 throughout the trial the government always makes the first
3 move. And the reason for that is the government has the burden
4 of proof so logically it has to make the first move.

5 After the opening statements have been made, then the
6 government will start putting its evidence on. It will call
7 witnesses and offer exhibits. As each witness is called, and
8 after the government has had a chance to question that witness,
9 then the attorney for the defendant has an opportunity to
10 cross-examine the witness. You see that on -- you see how that
11 works on TV, except this doesn't work exactly the way it works
12 on TV because here the cross-examination is not argumentative,
13 the lawyers don't make statements. Rather, the
14 cross-examination is simply asking questions, and another
15 feature that is different from what you may have otherwise
16 observed is that the cross-examination is limited to -- in
17 addition to the credibility of the witness, it's limited to the
18 subjects that were covered when the witness was questioned by
19 the government's attorney. The cross-examiner can't go on to
20 new subjects and cross-examine the witness, and the lawyers
21 know that and I don't think I'll have to call the lawyer's
22 attention to the fact that he's exceeding the scope of the
23 cross-examination because they're skilled lawyers and they know
24 whether it does or does not and presumably they'll comply with
25 the rule.

1 We also prohibit repetitious questioning and prohibit any
2 kind of a statement to the jury during cross-examination.
3 That's simply a time for asking questions.

4 Then after the government has concluded the government's
5 evidence, the government's attorney will announce that the
6 government rests, and that will give the defendant an
7 opportunity to offer evidence if the defendant wishes to do so.
8 If the defendant offers evidence and calls witnesses, then the
9 same rules relative to cross-examination will apply, and the
10 government's attorney is limited the same way the defendant's
11 attorney was limited as I've already described to you.

12 After the defendant has concluded the defendant's
13 evidence, if the defendant does offer evidence, then the
14 defendant's attorney will announce that the defendant rests and
15 that will give the government's attorney an opportunity to
16 offer rebuttal testimony. And generally that's not lengthy,
17 but it would be limited to answering the things that were
18 raised during the presentation by the defendant's evidence.

19 After the government has concluded the rebuttal, the
20 government will announce that the government closes and then
21 the defendant's attorney will announce that the defendant
22 closes.

23 Following that, each side will be given an opportunity to
24 make a final statement, and that final statement is in the form
25 of an argument in the sense that the lawyers will be reasoning

1 with you why the evidence, in view of the lawyer, establishes
2 the position that lawyer's client is taking in the case. And
3 then after that has occurred, then I'll give you the legal
4 instructions that guide you in your deliberations and you'll
5 start your deliberations.

6 Now, for your information on the timing of when we're
7 going to take lunch, I'm going to have the attorney for the
8 government read the indictment and take the defendant's plea,
9 and then I'm going to have the opening statements done and then
10 we'll take lunch. So I'm going to guess it will be around 1:00
11 o'clock before we take lunch.

12 Okay. At this time -- Let me do one other thing. Come up
13 here, David.

14 (Court confers with U.S. Marshal.)

15 (COURT REPORTER'S NOTE: Transcript continues in Volume
16 II. There have been no deletions or additions.)

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18 CERTIFICATE

19 I certify that the foregoing is a correct transcript from
20 the record of proceedings in the above-entitled matter. I
21 further certify that the transcript fees format comply with the
22 those prescribed by the Court and the Judicial Conference of
23 the United States.

22

23 _____
Eileen M. Brewer
Official Court Reporter
24 Texas CSR No. 3016

Date

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