

PRELIMINARY INSTRUCTION TO JURY BEFORE TRIAL

Members of the jury, if at any time you cannot hear me, a lawyer, or a witness, please raise your hand to get our attention. At this time, I am going to provide you with some instructions.

Complaint. This is the trial of a criminal case. The defendant, [name], is charged in a complaint with ____.

Here, read the complaint.

In reading the complaint, do not disclose to the jury: (1) the potential penalties for an offense, see *Commonwealth v. Bart B.*, 424 Mass. 911, 913 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-83 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-77 (1984); (2) that the defendant is charged as a subsequent offender, G.L. c. 278, ' 11A; or (3) that there are alternate ways of committing the offense that are charged in the complaint but inapplicable to the case being tried, *Commonwealth v. Johnson*, 45 Mass. App. Ct. 473, 477 n.3 (1998).

Presumption of innocence and burden of proof. In every criminal case, the defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt. The law requires the prosecutor – who represents the Commonwealth – to prove that the defendant is guilty beyond a reasonable doubt. The law does *not* require the defendant to prove his (her) innocence or to produce any evidence.

At the end of trial, you must find the defendant not guilty unless the Commonwealth has proved to you beyond a reasonable doubt that the defendant has committed the offense(s) with which he (she) is charged.

Elements of the crime.

As you have heard, the defendant is charged with the crime(s) of _____.

The Commonwealth must prove each of the elements which make up (that crime) (those crimes). Those elements are as follows:

[Here set out the elements of each offense.]

The trial will proceed in the following order:

Opening statements.

First, the prosecutor will present an opening statement. The defense attorney may choose to make an opening statement immediately, may postpone doing so until later, or may decide not to do one at all, since the burden of proof is always on the Commonwealth.

The opening statements are an opportunity for the lawyers to explain what the trial is about. They are not evidence.

Presentation of evidence.

The prosecutor will present evidence first. Then the defendant may present evidence if he (she) wishes, but he (she) is not obliged to do so. Remember, the burden to prove the defendant's guilt is always on the Commonwealth. There is no burden on the defendant to prove his (her) innocence or to produce any evidence at all.

Closing arguments. After the evidence is presented, each side will make arguments about what conclusions you might draw from the evidence. I instruct you that the closing arguments of the attorneys, like their opening statements, are *not* evidence.

Jury charge. After the closing arguments, I will instruct you in detail on the law that you must apply during your deliberations.

Jury's function. Your function as the jury is to determine what evidence to believe, how important any evidence is that you *do* believe, and what conclusions all the believable evidence leads you to. You are the sole and exclusive judges of the facts, and in determining what those facts are, you should draw on your own common-sense and life experience. Our system of justice requires you to render a fair decision based on the evidence, not on biases. In evaluating the evidence and determining the facts, keep in mind that everyone, myself included, makes assumptions and forms opinions based in part upon likes or dislikes, opinions, stereotypes, perceptions, and prejudices arising from our own personal backgrounds and experiences of which we may not be aware. These assumptions and opinions can impact what we see and hear, how we remember what we see

and hear, and may cause us to draw generalizations or to pre-judge.

Because you are making very important decisions in this case, you must be alert to recognize any potential biases that might affect your view of the evidence in this case. You must not allow bias – conscious or subconscious – to interfere with your ability to fairly evaluate the evidence, apply the law as I instruct you, and render a fair and impartial verdict based on the evidence presented at this trial.

Judge's function.

My job is to see that this is a fair trial, and to decide questions of law.

Optional: Objections.

If during the trial a lawyer makes an objection, I will rule on it. It is a lawyer's responsibility to make appropriate objections and you should not look negatively on any lawyer for doing so.

If I overrule an objection, you may consider the answer.

If I sustain an objection, you may not consider the answer in any way whatsoever.

Optional: Sentencing.

The duty of imposing sentence in the event of conviction rests exclusively with me as the judge, and that issue should not influence your deliberations in any way.

Discussion prohibited.

Finally, you may not discuss this case with your fellow jurors until your deliberations. You may never use a cell phone or

electronic device for any purpose regarding this case, nor may you discuss this case with family members, friends, or on social media until after a verdict is announced in the courtroom.

Commonwealth v. Werner, 81 Mass. App. Ct. 689, 700-01 (2012).

If a caution on extraneous publicity is appropriate.

As I have told you, you must decide this case solely on the evidence presented in the courtroom. You must completely disregard any newspaper, television or radio reports about this case in which you might encounter. It would be unfair to consider such reports, since they are not evidence and the parties will have no opportunity to challenge their accuracy or to explain them. Please try to avoid such news reports. If any come to your attention, it is your sworn responsibility to put them aside immediately and to direct your attention elsewhere.

Conclusion.

I know that you will try this case according to the oath which you have taken as jurors, in which you promised that you would well and truly try the issue(s) between the Commonwealth and the defendant according to the evidence and the law. If you follow that oath, and try the

issues without fear or prejudice or bias or sympathy, you will arrive at a true and just verdict.

This and the following alternate Instruction 1.140 are provided as optional and general pretrial instructions to the jury. Any part of the instructions may be used as needed, depending upon what instructions the jurors have previously received in the jury pool.

Commentators have noted the advantage of “precharging” the jury before evidence is taken, so that jurors will understand their function and the general significance of the evidence as it is offered. See *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.31. In addition, preliminary instructions will be considered on appeal in deciding whether the instructions as a whole were correct, proper and fair. *Commonwealth v. Cintron*, 438 Mass. 779, 786 (2003) (no requirement that jury be sworn prior to preliminary instructions); *Commonwealth v. Green*, 25 Mass. App. Ct. 751, 753 (1988).

The caution against seeking outside information is pursuant to the Trial Court’s Policy on Juror Use of Personal Communication Devices (March 26, 2010), which requires judges to inform jury pools and seated jurors that they may not use a computer, cellular phone, or other electronic device with communication capabilities during trial or jury deliberations, or to obtain or disclose information relevant to the case when they are not in court.