

PRELIMINARY INSTRUCTION TO JURY BEFORE TRIAL

Members of the jury, I am about to make some general remarks to introduce you to the trial of this case and to acquaint you with some of the general legal principles that will control your deliberations. These remarks are not a substitute for the more detailed instructions on the law which I will give you at the conclusion of the trial before you retire to consider your verdict.

Complaint.

This is the trial of a criminal case. The defendant,

[name] , is charged in a complaint which reads as follows:

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, 679 N.E.2d 531, 533 (1997); *Commonwealth v. Smallwood*, 379 Mass. 878, 882-883, 401 N.E.2d 802, 805 (1980); *Commonwealth v. Buckley*, 17 Mass. App. Ct. 373, 375-377, 458 N.E.2d 781, 783-784 (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, 700 N.E.2d 270, 272 n.3 (1998).

You should clearly understand that this piece of paper, called a “complaint,” is not itself any evidence of guilt. It is merely a formal manner of accusing a person of a crime in order to bring him or her to trial. You must not draw any inference of guilt from this complaint or the fact that the

defendant has been formally charged.

Presumption of innocence and burden of proof.

In any criminal case, the defendant is presumed to be innocent unless he or she is proven guilty beyond a reasonable doubt. The law requires the prosecutor — whom we refer to in court terminology as 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) that he (she) is charged with.

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 attorneys for the Commonwealth and for

the defendant will have an opportunity to present opening statements.

After the assistant district attorney makes his (her) opening statement for the prosecution, the defense attorney may choose to make an opening statement immediately, or may postpone doing so until later, or may decide not to do so at all, since the burden of proof is on the Commonwealth.

The opening statements of counsel are not evidence. They are somewhat like road maps from the attorneys to explain to you what they expect will lie ahead. We have opening statements to assist you to understand what the evidence is expected to be.

***Presentation of evidence.* Next, the prosecution will introduce evidence in support of the charge(s) in the complaint. After that, the defendant may present evidence in his (her) behalf if he (she) wishes to do so, but he (she) is not obliged to do so. Remember, the burden of proof is always on the Commonwealth to prove that the defendant is guilty. The law does not require any defendant to prove his or her innocence or to produce any evidence at all.**

***Closing arguments.* After all the evidence, each side will have an opportunity to offer you arguments about what conclusions you might draw from the evidence. I again remind you that the closing arguments of**

the attorneys, like their opening statements, are *not* evidence. We have closing arguments to assist you to understand the evidence and what each party suggests that the evidence means.

Jury charge.

Finally, after all the evidence and the attorneys'

arguments, I will instruct you in detail on the principles of law which you are to apply in your deliberations when you retire to consider your verdict.

Your verdict must be unanimous.

Judge's function.

Let me now speak with you briefly about your role as

the jury and mine as the judge in this case. My responsibility is to see that this case is tried in a way that is orderly, fair and efficient. It is also my function to decide any questions of law that come up during the trial, and to instruct you about the law that applies to this case. It is your duty to accept the law as I state it to you.

Jury's function.

Your function as the jury is to determine the facts. You

are the sole and exclusive judges of the facts. You alone 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 will have to consider and weigh the testimony of all the witnesses who will appear before you, and you alone will determine whether to believe any witness

and the extent to which you believe any witness. It is part of your responsibility to resolve any conflicts in testimony that may arise during the course of the trial and to determine where the truth lies. Ultimately, you must determine whether or not the Commonwealth has proved the charge(s) beyond a reasonable doubt.

Disregard any perceived judicial opinion as to guilt. During the course of the trial, I will be speaking with both attorneys and ruling on their motions and objections. I may pose questions to witnesses, and I will be instructing you on the law. When I do so, you are not to take any of my words or expressions as any indication of my own opinion as to the defendant's guilt or innocence. If you come to believe during the course of the trial that I have an opinion as to any disputed fact in this case, you are to disregard it. That is *your* area of responsibility.

What constitutes evidence. You must decide this case solely on the evidence presented in the courtroom. This includes the sworn testimony of witnesses, any exhibits that I admit into evidence, any facts which I tell you have been agreed to by both sides, and any facts which I indicate that you may take to be a matter of common knowledge.

If there will be a view: You may also consider anything you observe

about the layout of the scene of the alleged crime when we go to visit it.

Questions to witnesses, no matter how artfully phrased, are not evidence. Only the answers which you receive from the witnesses who are testifying under oath are evidence. If one of the attorneys or I refer to some part of the evidence and that does not coincide with your own recollection, it is your recollection which you are to follow in your deliberations.

Objections. During the trial, the attorneys may object to questions or statements that may not be admissible under our rules of evidence. That is their responsibility, and you should not look negatively in any way on a lawyer who makes such objections.

If I agree with an objection to a question — the term we use is “sustained” — you are to disregard that question and you are not to speculate as to what the answer might have been. In the same way, you are to disregard any evidence that I tell you is stricken from the record. If I reject — or “overrule” — an objection, I will permit the witness to answer and you *may* consider that answer. You are not to give that answer any

more weight than you would have if no objection had been made.

***Disregard sentencing consequences.* You are not to concern yourself with what punishment the defendant might receive if he (she) is convicted. 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. You should weigh the evidence in this case and determine the guilt or innocence of the defendant based solely upon the evidence, without any consideration of the matter of punishment.**

***Communicating with the judge.* If it becomes necessary during this trial to communicate with me, you may send me a signed note through the court officer. This should normally be done by your foreman (forelady). During this case you may not communicate with the lawyers or the witnesses or the defendant at all.**

Bear in mind also that you are not to tell anyone how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the defendant, until after you have reported a unanimous verdict. You should not even volunteer such information to me unless I directly ask for certain information here in the courtroom.

Discussion prohibited.

Until this case is submitted to you after my final instructions, you must not discuss it with anyone – not even with the other jurors. Discussion can lead to conclusions being drawn or positions being taken prematurely. Fairness requires you to keep an open mind about everything until your deliberations.

You may only consider evidence presented to you in the courtroom. You may not conduct any investigation on your own; nor may you engage in any research on the law that might apply in this case.

You have been chosen precisely because you are impartial. As soon as you take on the role of investigator or lawyer, you become an advocate and lose your ability to be impartial.

You may not use outside electronic devices such as cell phones or computers nor the internet, social media, news reports, maps, legal texts or dictionaries to learn things outside of what is presented here.

You may not discuss this case with anyone, not even with your fellow jurors. You must not talk to anyone about this case in person, by telephone, the internet, email, or social media. This includes family and friends.

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 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 between the Commonwealth and the defendant according to the evidence.” 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, 784 N.E.2d 617, 623 (2003) (no requirement that jury be sworn prior to preliminary instructions); *Commonwealth v. Green*, 25 Mass. App. Ct. 751, 753, 522 N.E.2d 424, 425 (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.