

United States v. Duffer

Defendant Duffer came to Clemens Erdahl for representation about three weeks before trial. The trial involved a conspiracy to sell 10,000 pounds of marijuana. Two of the defendants had been arrested in possession of 1100 pounds of marijuana in Arizona. It was claimed that Duffer was part of the operation which sold the marijuana in Iowa. After a two-week trial in which four of the six defendants were convicted on all counts and one defendant was convicted on one of two counts, Duffer was acquitted. The closing argument from that case is included herein.

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF IOWA
3 EASTERN DIVISION

3 UNITED STATES OF AMERICA,)

4 Plaintiff,)

5 vs.)

6 LARRY EDWARD HIVELEY, SCOTT)

7 EDWARD HIVELEY, GARY PAUL)

8 HUBER, ANSIL EZRA HENRY,)

9 ROBERT DUAINÉ DUEFFER, and)

10 MARK EUGENE APPLGATE,)

11 Defendants.)

CR 93-3026

Partial Transcript
of Jury Trial

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15 JURY TRIAL HELD BEFORE THE HONORABLE

16 MICHAEL J. MELLOY

17 at the Federal Building, 101 First Street Southeast,
18 Cedar Rapids, Iowa, on the 29th of July, 1994,
19 commencing at 9:00 a.m. reported by Kellee R.
20 Schaben, a Certified Shorthand Reporter in and for
21 the State of Iowa, pursuant to agreement of the
22 parties in the above-entitled action.

23
24 CARROLL & ASSOCIATES
25 Suite 210, Paramount Building
Cedar Rapids, Iowa 52401
(319) 362-0538

FILED

United States District Court

CEDAR RAPIDS HOCTRS OFFICE
NORTHERN DISTRICT OF IOWA

NORTHERN DISTRICT OF IOWA

AUG 4 1994

9:30
WILLIAM J. KANAK - Clerk

W. J. Kanak
Clerk

UNITED STATES OF AMERICA

JUDGMENT OF ACQUITTAL

V.

ROBERT DUAINÉ DUFFER

CASE NUMBER: CR 93-3026

The Defendant was found not guilty. IT IS ORDERED that the Defendant is acquitted, discharged, and any bond exonerated.

Michael J. Melloy

Signature of Judicial Officer

Michael J. Melloy, Chief Judge
Name and Title of Judicial Officer

Aug 4, 1994

Date

Copies mailed on 8-4-94
to counsel of record or pro se
parties as shown on the docket
sheet.

William J. Kanak
Clerk

US Marshal
US Probation

APPEARANCES:

ASSISTANT UNITED STATES ATTORNEY PATRICK J. REINERT, United States Attorney's Office, 425 Second Street Southeast, Suite 950, Cedar Rapids, Iowa 52404, appeared on behalf of the United States of America.

ASSISTANT UNITED STATES ATTORNEY RICHARD L. MURPHY, United States Attorney's Office, 425 Second Street Southeast, Suite 950, Cedar Rapids, Iowa 52404, appeared on behalf of the United States of America.

ATTORNEY E. DANIEL O'BRIEN, of the firm of Fisher, Ehrhart, McCright & Turner, 425 Second Street Southeast, Suite 1010, Cedar Rapids, Iowa 52401, appeared on behalf of the Defendant Larry Edward Hiveley.

ATTORNEY R. L. SOLE, of the firm of Glasson, Grove, Sole & McManus, 118 Third Avenue Southeast, Suite 206, Cedar Rapids, Iowa 52401, appeared on behalf of the Defendant Scott Edward Hiveley.

ATTORNEY ALERED E. WILLETT, of the firm of Irvine & Robbins, 417 First Avenue Southeast, P.O. Box 2819, Cedar Rapids, Iowa 52406-2819, appeared on behalf of the Defendant Gary Paul Huber.

ATTORNEY THOMAS O'FLAHERTY, of the O'Flaherty Law Firm, 116 Third Avenue Southeast, Cedar Rapids, Iowa 52401, appeared on behalf of the Defendant Ansil Ezra Henry.

ATTORNEY CLEMENS ERDAHL, Iowa State Bank Building, Suite 311, Iowa City, Iowa 52240, appeared on behalf of the Defendant Robert Duaine Duffer.

ATTORNEY MONTY L. FISHER, 200 Snell Building, P.O. Box 1560, Fort Dodge, Iowa 50501, appeared on behalf of the Defendant Mark Eugene Applegate.

1 MR. ERDAHL: Your Honor; well, at least. I'm
2 not going last. Folks, it's been a long trial,
3 and for those of us who drive from out of town,
4 it probably seems a little bit longer, and -- but
5 I can't think of anything in the way that would
6 be tougher than having to listen to seven
7 arguments by attorneys in the course of a day.
8 At least we got one of the arguments done
9 yesterday, and I'm not going to belabor it, but I
10 really do want to thank you for your time and
11 attention, and the lawyers can tell when a jury
12 is paying attention, particularly during a long
13 trial. It's a difficult task. In fact, there
14 were long periods of time where I felt I wasn't
15 paying attention.

16 There hasn't been a lot of time spent on Bob
17 Duffer's case, not a lot of testimony about him
18 during this two-week trial, but I think there's
19 been a little more comment during argument and
20 there may well be more said about Bob Duffer
21 proportionately than some of the other defendants
22 in the government's rebuttal because it's the
23 hardest case they're ever going to try to prove.
24 They've got the least credible evidence against
25 him, and as I'm going to point out, they're

1 grasping at things to convince you.

2 Now, in Instruction No. 10, the Judge tells
3 you, "Remember to give separate consideration to
4 the evidence about each defendant. Each
5 defendant is entitled to be treated separately,
6 and you must return a separate verdict for each,"
7 so, you know, you probably got as tired of
8 listening to it as we got of saying it, but when
9 we all go around the room and join in an
10 objection, it doesn't mean we're joining in with
11 the other defendants. Someone had mentioned
12 being cocounsel, but really, we're not cocounsel.
13 Each of us separately represent a separate
14 defendant, and you must consider each of their
15 cases separately. In arguments, really, there's
16 -- it may seem a little unfair, for the
17 government gets to go first and then gets to go
18 last, but it's balanced out.

19 First of all, they have the burden of proof,
20 but also, as a defense attorney, I'm now making
21 two arguments: I am making a rebuttal argument
22 to things that Mr. Reinert said, and I am making
23 a summation in anticipation of what Mr. Murphy
24 might say. I am not going to be able to predict
25 everything that might be said in response to what

1 I'm going to tell you, but I do want to let you
2 know that sometimes on rebuttal evidence, things
3 will be said that I wish I could respond to, and
4 I want you to think if Mr. Murphy starts to
5 comment on the evidence about Robert Duffer or
6 perhaps compliments part of the argument, mine or
7 someone else's, to think what I might be saying
8 with respect to that.

9 I'm going to tell you what I think the
10 witnesses did and didn't say. That's what I
11 think, that's what I remember, but what's
12 important is what you remember. It's not
13 evidence, and then I want to talk about what a
14 conspiracy is and what a conspiracy is not, and
15 throughout it, I want to discuss some of the
16 instructions that are given.

17 Now, you are the judges of the facts, and
18 you will have to remember what evidence was put
19 in front of you, but there are a couple of things
20 Mr. Reinert said that I take exception to. Tom
21 Burns did not say anything about Robert Duffer,
22 calling him about payments or being paid
23 anything. There was an implication to that in
24 trying to explain why a phone call of Bob's was
25 important on the summary of phone calls sheet.

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All the government could manage to get Tom Burns to say was maybe Bob picked up 50 pounds one time, and I thought Ansil said something about Bob storing a couple loads, not very strong or convincing evidence, even if you believe Tom Burns.

Mr. Reinert in his summation interpreted a couple of phone calls in light of that testimony, and I think it's very important to know that there wasn't any testimony by Tom Burns about Bob Duffer talking about or making payments. There's another thing he said. He said that on the tape when Bob Duffer was talking to Tom Burns, he said, "I ain't been doing nothing with Ansil for two or three years." Now, that wasn't what was on the tape. It wasn't what was on the transcript, but what's important is that it wasn't on the tape. What he said, as I recall it, was, "I don't even have it out there at the house. I haven't been doing nothing, as far as I know, for two and a half to three years, doing nothing." Doing nothing, smoking marijuana, selling an eighth of an ounce of marijuana, or something entirely different. We don't know, but he didn't say "doing nothing with Ansil Henry."

1 Now, Mr. Reinert, Mr. Murphy, they weren't
2 there. They weren't listening on the phone.
3 They don't know what was said in those phone
4 calls, and I want to talk about that exhibit
5 right away. Exhibit 51A shows a summary of Ansil
6 Henry's phone calls, and you will have that
7 summary, and if -- you know, when they take out
8 these six or seven phone calls of Robert Duffer's
9 or calls from Ansil Henry's residence to Dan and
10 Bob's auto repair, calls from Ansil Henry's
11 residence to Robert Duffer's residence, calls
12 from Robert Duffer's residence to Ansil Henry's
13 residence, take those six or seven phone calls
14 and only put those in their summary that are
15 close to some other flurry of phone calls or
16 activity, it looks like there's a pattern there,
17 and -- but if you look at the larger pattern --
18 and you do have all the records.

19 You don't have to go through the boxes of
20 records, although you have those too, but you
21 have some summaries that will show you the phone
22 calls made by Ansil Henry to -- or from his
23 residence to those places; and you'll find that
24 there's a pattern there, a larger pattern, and
25 that is that there are phone calls in the spring

1 and there are phone calls in the fall, and there
2 particularly are phone calls in March and April
3 and November and December, and there was evidence
4 presented by independent witness about what those
5 phone calls were about totally unattached to any
6 of the activities that were in the demonstrative
7 exhibit that was put up before you on the screen.

8 Now, there's one cross examination I asked
9 Mr. O'Keefe about that first phone call that's on
10 their sheet, April 3rd. That wasn't brought up;
11 April 11th wasn't brought up. The only phone
12 call that was brought up was the May 3rd phone
13 call. Why didn't they talk about that phone call
14 a month earlier? Well, it doesn't fit the
15 pattern that they are trying to present. Phone
16 calls in April do fit the pattern of getting the
17 straw, the horse manure, and other things from
18 Ansil Henry.

19 November follows going out to Brushy Creek
20 and going hunting, bow hunting, pheasant hunting,
21 and really, when you look at those phone records,
22 that really explains those phone calls. There
23 are a few phone calls in the summer, but not just
24 in the summer they want to refer to, but in the
25 previous summer and then in the next summer there

1 aren't phone records, so don't let that glimpse
2 or selective use of evidence fool you into
3 thinking that there's some circumstantial
4 evidence that's there. That's not circumstantial
5 evidence. That's coincidental evidence, and it
6 can be summarized: straw, hunting, horse manure.

7 Now, you're going to get an instruction on
8 credibility, and it's your job to apply that
9 instruction. In part, you'll apply that
10 instruction to the different witnesses that have
11 testified in the case. With respect to Butch
12 White, every single thing in the instruction
13 applies to him. You're supposed to consider the
14 witness's intelligence, the witness's memory.
15 His memory is vague. His manner, his demeanor;
16 his manner seemed like he was joking around on
17 the stand, acting like it was a game.

18 His motives are very clear and had been
19 discussed by other counsel. If he said something
20 different at an earlier date than what he's
21 saying now, that happened several times. Any
22 addictive drug or alcohol use. It's an
23 understatement that he admitted he was a problem
24 drinker, and whether his evidence is consistent
25 with other evidence. More importantly, it says

1 if that evidence is about an important fact.

2 Now, this cocaine testimony, which doesn't
3 apply, really, to Robert Duffer's case, but
4 that's an important fact because it was a
5 question of whether there was knowledge before or
6 after the trip, and he has different evidence
7 about that, and then about this trip that he says
8 he made with Bob Duffer, it was 1987, 1988, 1990;
9 it was in the spring of 1990, it was the summer
10 of 1988. It was between March and November of
11 1988. How can someone come up and confront or
12 explain where they were from 1987 to 1990 in
13 three different seasons of the year during
14 eight-month periods? That's how inconsistent his
15 testimony is.

16 Instruction 18 says, in part, "A person who
17 has no knowledge of a conspiracy but who happens
18 to act in a way which advances some purpose does
19 not thereby become a member." They have to prove
20 that Bob Duffer joined and became a member.
21 That's one of the things that happens here.

22 Now, the prosecutor puts a great importance
23 on the testimony of Tom Lowe and Mike Archibald.
24 He says, "This proves that Robert Duffer was out
25 there doing what was consistent with the

1 conspiracy, selling marijuana," and this fits the
2 prosecutor's scenario, but even if you believe
3 it, it really doesn't fit. It's like trying to
4 put a foot that's too large into a slipper
5 because the conspiracy charge is from 1986 to
6 1993. The involvement by Bob Duffer that Tom
7 Burns and Butch White are talking about is in
8 '88, '89, '90, '91; at best, '88 to '91, but
9 you've got Mike Archibald talking about Bob
10 Duffer selling him an ounce before 1986.

11 Now, one time it might have been '87. It's
12 not consistent with what they're trying to say,
13 and you've got Tom Lowe, if you can believe him
14 at all, saying that my client sold an eighth of
15 an ounce of marijuana, an eighth of an ounce in a
16 conspiracy of a thousand or 10,000 pounds in
17 1993.

18 As far as Tom Lowe, Tom Lowe and Butch White
19 both have a reputation for dishonesty among
20 people who testified here from Fort Dodge, and
21 you saw those people, Bob Duffer's witnesses.
22 They weren't criminals; they weren't liars; they
23 weren't drug users, drug dealers. They weren't
24 laughing on the stand. Their personalities
25 didn't change on the stand or over the weekend.

1 They haven't had head injuries or mental
2 problems. They were folks like you know,
3 neighbor, owner of a neighboring business,
4 business partner, owner of a restaurant down the
5 street.

6 Tom Lowe has a reputation as a liar. Butch
7 White as a reputation as a liar even with his own
8 girlfriend. He can't even really, frankly, look
9 you in the eye and comment about whether he has a
10 reputation about it or whether he lies or tells
11 the truth or has problems with honesty. He's
12 told two different stories, and Tom Lowe's told
13 two different stories too. He says the first
14 time he talked about Bob Duffer selling this
15 eighth of an ounce of marijuana to his
16 father-in-law. He said that he -- that Tom Lowe
17 was present. Later on, he just said he heard
18 about it, and he says it took place in a blue van
19 at Bob's shop, which hasn't even been there in
20 over a year.

21 Now, let's look at Butch White's testimony.
22 Even if you believe Bob made this trip, he says
23 he was with a guy from Omaha, but Butch doesn't
24 remember the guy's name, but he says that Bob and
25 his friend were off doing something else. They

1 were not with Ansil and Butch.

2 Butch also says that he got \$2,000. He said
3 the guy from Omaha got a pound of pot, but there
4 was no testimony at all about Bob getting
5 anything. He heard -- and you heard him talk
6 about when he drove with Kyrene (phonetic). He
7 just assumed everybody knew what was going on,
8 but he didn't even testify that he thought that
9 Bob knew what was being transported, so there's
10 no evidence even if this trip took place that my
11 client knew what was in that truck when it was
12 driven across or that he got anything from
13 driving across, but also, Butch White contradicts
14 Tom Burns because Tom Burns says that Bob came
15 and picked something up. Maybe he picked up the
16 marijuana one time in a pickup, not part of a
17 delivery. Tom Burns and Butch White didn't get
18 their stories straight.

19 Now, I want to talk to you about what a
20 conspiracy is and what a conspiracy is not a
21 little bit. The Judge has given you an
22 instruction, and, you know, I'm a trial lawyer.
23 I try civil cases too, but I don't do a lot of
24 business law. What I know about business law and
25 contracts is what I learned in law school.

1 Before I got to law school, I thought a contract
2 was a written document, but we learned there that
3 a contract is the meeting of minds, the agreement
4 between two people. The reason it's put or
5 committed to writing is so that there will be
6 better proof of what was agreed upon, but the
7 contract does not have to be written to be a
8 contract.

9 Now, that's similar to Instruction 18 that
10 the Judge will give you. This doesn't have to be
11 a formal agreement. It doesn't have to be a
12 written agreement, but folks, it has to be an
13 agreement. What the government has to prove,
14 however they seek to prove it, even by inference
15 or circumstantial evidence, has to be an
16 agreement, and Instruction 21 talks about
17 becoming a member of the conspiracy. Instruction
18 18 talks about a person becoming a member of a
19 conspiracy.

20 Now, Mr. Reinert told you this is not a
21 corporation with articles of corporation, but
22 there is a requirement of membership. We are not
23 just here for you to say, "They were all there in
24 court together or some of them knew each other or
25 they called each other or they did things

1 together that may or may not have been criminal."

2 What you have to do in the one and only
3 count that is here against Robert Duffer is you
4 have to find that he has made an agreement, and
5 the government has to prove beyond a reasonable
6 doubt that he has entered into an agreement, that
7 he has become a member of a conspiracy, and that
8 he knows what that conspiracy is about, not
9 necessarily everything, but he has to know what
10 the plan is, what the agreement or understanding
11 is. He has to know, so you have to have
12 knowledge, and Mr. Reinert has described this
13 conspiracy to you, this 10,000 pounds or 1,000
14 pounds, and he would like you to find that Robert
15 Duffer has made an agreement to be part of that,
16 but there isn't evidence of that. There isn't
17 knowledge of the conspiracy or knowledge of the
18 agreement or knowledge of the understanding or
19 knowledge of the plan. Those have not been
20 shown, not against Robert Duffer.

21 Now, if I'm flipping through pages, that's
22 good. That means we're moving along, stuff
23 that's been covered and so forth, so I want to
24 talk to you about the elements. That's
25 Instruction No. 9. There are three elements --

1 and again, there's only one count here against
2 Robert Duffer, and you have to consider that
3 about Robert Duffer as an individual citizen,
4 "that between 1986 and November 1993" -- and it
5 can be thereabouts -- "two or more persons came
6 to an understanding to commit" -- and then
7 there's a list of five different criminal acts.
8 That's element one.

9 "Two, that the defendant" -- now it's got to
10 be Robert Duffer, not guilt by association, but
11 Robert Duffer -- "voluntarily and intentionally
12 joined, joined an agreement or understanding,"
13 and to prove the second element, the government
14 must prove that the defendant, Robert Duffer,
15 joined the agreement. In other words, that he
16 became a member of the conspiracy, and at the
17 time, Element No. 3 is -- now, remember, they
18 have to prove each element, each and every
19 element. If they fail to prove one element, you
20 have to find Robert Duffer not guilty.

21 Element No. 3 is that if the defendant
22 joined in the agreement or understanding, he knew
23 the purpose of the agreement. In order to have a
24 meeting of the minds, an agreement of this sort,
25 you have to know what you're agreeing to, and

1 because the government has no evidence of this,
2 no evidence that there was a plan that he knew
3 about, no evidence that there was an agreement
4 that he made, no evidence that he knew or joined,
5 the government is grasping for evidence.

6 They bring in Mike Archibald, who had a
7 physical fight over a piece of property with my
8 client back in 1987. They bring him in to say
9 that once -- probably before the dates of this
10 conspiracy -- Bob sold him an ounce of pot.

11 Then they bring in Tom Lowe, and now you're
12 really getting down to the bottom of the barrel.
13 That once, last year, in a van that three honest
14 and true citizens have told you was not where Tom
15 Lowe says it was, Bob supposedly smoked a joint
16 with Tom Lowe, and Tom Lowe says two different
17 versions, that Bob Duffer sold him in 1993 an
18 eighth of an ounce of pot.

19 I've heard many analogies and seen many
20 analogies about the scales of justice, but this
21 fairly boggles the mind. One-eighth of an ounce
22 of marijuana is one-millionth, less than one-
23 millionth of 10,000 pounds of marijuana. An
24 eighth of an ounce of marijuana is less than 128-
25 thousandth of a thousand pounds of marijuana. I

1 didn't figure it out for 1100, give or take a few
2 hundred-thousandths.

3 They are grasping for evidence. Their
4 evidence is exceedingly weak, and it comes from
5 the mouths of people who are, frankly, not very
6 credible at all. There is a lack of evidence
7 here against Robert Duffer. There's no evidence
8 of Bob paying for anything, contrary to what was
9 hinted at. There's no membership in the
10 conspiracy shown. There are no credit card
11 receipts for any trips. There are no expense
12 records, no drug records; no drugs were found on
13 Robert Duffer when he was arrested, no guns,
14 although he is a hunter. He's just a businessman
15 who goes to work and doesn't travel much. He
16 went to Las Vegas for his wedding, bought tickets
17 for a few friends, got paid back, and he goes to
18 Minnesota once a year to go fishing.

19 Now, we talked about reasonable doubt some,
20 and you're going to get an instruction on
21 reasonable doubt, and there's really four parts
22 to this whole concept. One, that a presumption
23 of innocence alone is sufficient if it's not
24 overcome. That alone is sufficient for you to
25 find a defendant not guilty, and it can only be

1 overcome if the government proves because the
2 burden -- that's the second thing -- the burden
3 is on them, and they have to prove that in each
4 and every element of that crime beyond a
5 reasonable doubt, and they have to do it against
6 each individual. They have to prove to you so
7 that you don't hesitate about it that Robert
8 Duffer knew about this thousand pound, 10,000
9 pound conspiracy, and that he joined up, that he
10 entered into an agreement to be part of it, and
11 they have to do it all beyond a reasonable doubt.

12 Now, it's very important to apply these
13 principles to the taped conversation that was
14 eluded to by Mr. Reinert. I've already told you
15 one thing: Don't be fooled by it here. It's
16 that "I haven't done anything for two and a half
17 to three years." He didn't say "I haven't done
18 anything with Ansil Henry." That's not on that
19 tape, and when you listen to the tape, there was
20 a transcript prepared by the FBI that was handed
21 out, and I want to point out to you a few places
22 where I heard something different, and I want to
23 remind you of the instruction that says "It's
24 what you heard on the tape that's important."
25 It's not a matter of what was written down there,

1 and if there's a discrepancy in your mind or
2 memory, you should not rely on notes you might
3 have taken from the transcript but rather your
4 actual memory of what you heard on the tape or
5 notes that you took from what you heard on the
6 tape.

7 There is one point that was on page 4 of the
8 transcript where there's a statement by Robert --
9 attributed to Robert Duffer, "Well, what did you
10 say then as far as what you know about me doing?"
11 and in the transcript, it was written down
12 "dealing," and this is the type of reason why I
13 want to make it clear that the Judge's
14 admonishment to pay attention to what was
15 actually said on the tape as far as you can hear
16 it and not on the written transcript was very
17 important.

18 Now, there was a discussion -- and I asked
19 the expert hypothetically about what you do in
20 enhancing a tape with certain types of noise, and
21 I said, "For instance, if there's a child there
22 or some music" -- and I was asking him
23 hypothetically and he knew just what I was
24 talking about. "Well, in that case, we don't
25 mess with that sound. We don't separate it out."

1 I said, "Well, there could be a discussion behind
2 that that wasn't heard," and he said, "Yeah,
3 that's not part of the enhancement procedure the
4 FBI goes through," and right before Robert Duffer
5 says, "I mean, I told you that years ago." There
6 is an indication on the transcript that the child
7 was talking in the background and I'm sure you
8 heard the child talking, and her father, Tom
9 Burns, saying, "All right; well, go," but again,
10 Robert Duffer then says, "I mean, I told you that
11 years ago."

12 Now, Burns admitted that after he was fired
13 from the railroad and after his car was damaged
14 and he told Bob that he'd had drugs in it, Bob
15 made an estimate on it, that Bob told Burns to
16 quit messing with drugs, and he didn't disagree
17 that Bob probably said the same thing during the
18 taped conversation. "I told you to quit messing
19 with drugs years ago." Bob goes on to say --
20 when Burns says they're going to indict
21 everybody, Bob said -- and you heard it on the
22 tape -- "I haven't done nothing," and then on
23 page 10, there is a part where the transcript
24 says, "This Cedar Rapids deal is about Ansil,
25 huh? They ain't got no proof," and the

1 transcript says "on me," and some of you who were
2 listening carefully might have heard him say "on
3 him" or "of it." Those are important differences
4 between the tape and the transcript. I hope
5 you'll check your notes and the memories on that.

6 Remember, in this context, there are rumors
7 all over town and discussions going on. Don't
8 let them take words and make them have guilt they
9 don't have. There is a presumption of innocence
10 that attaches to Robert Duffer here, and what
11 does he say at the end? "I don't know what to
12 do, Tom. I don't know much. I ain't done
13 nothing. I haven't done nothing. I ain't doing
14 nothing, I haven't done nothing."

15 Now, I want to talk to you what you cannot
16 convict Robert Duffer for. He's charged with one
17 count, one count of joining the membership of the
18 conspiracy. You cannot convict Robert Duffer of
19 selling an ounce of pot in 1985. You cannot
20 convict him, as the Judge has said, of tax
21 evasion. This is not a tax evasion case. You
22 cannot convict him of smoking pot in 1993, and
23 you cannot convict him of selling an ounce of pot
24 in 1993. The charge is conspiracy.

25 Now, they can try to argue that this eighth

1 of an ounce of pot or that joint smoked in the
2 van was some kind of proof of that conspiracy,
3 but you cannot convict him of those things, and
4 you can't convict him merely because he was
5 present or merely because he had some knowledge,
6 and as you read through the instructions, you
7 will find in Instruction 18 -- and read it very
8 carefully -- that you have to really join up.
9 That's what it's about.

10 Now, the government can try to prove that
11 somebody joined or somebody made an agreement
12 based on circumstantial evidence, but you don't
13 have to accept that. It says, "You may find
14 based on circumstantial evidence. You may find
15 based on other things." You may, but you don't
16 have to. They on the government's side have to
17 prove those elements beyond a reasonable doubt.

18 I talk about tax evasion and tax because
19 there's been a lot of discussion about tax
20 records. You heard what Mr. Sole said about that
21 notebook over there. When they talked about Bob
22 Duffer's tax records for 1992, the way I heard
23 it, there was a subtraction of the credit card
24 purchases from the income before he came up with
25 the figure saying he only had \$3,000 to live on.

1 As far as the interest income, there was a
2 calculation made in a response to a question by
3 Mr. Murphy that there would have been savings of
4 a thousand or \$1200, but again, that's if you had
5 those savings all the way through the year. Mr.
6 Duffer was married in February of 1992, and he
7 spent some money taking some friends out to Las
8 Vegas. I think it was \$180 for a ticket. I
9 think the evidence would show to you that his
10 friends paid back some of those tickets, and Bob
11 has built his own house from scratch. His
12 activities are fishing, gardening. He takes a
13 fishing trip to Minnesota every year, a lifestyle
14 that I suppose less than any of the others even
15 shows that he was a high rolling drug dealer.

16 You know, we had John Peterson come in here,
17 and there was some discussion about him and how
18 afraid he was. He was caught as a result of this
19 violation for violations of the IRS act, and he
20 entered into a plea agreement. Now, he's a
21 businessman, seemed like a decent guy, pretty
22 embarrassed about what he'd done. He admitted
23 his tax violation because he was caught
24 red-handed about it, but you know, when the
25 government starts going out and looking for

1 people, very often, there might be concern with
2 tax violations. I don't want you assuming
3 anything about tax violations against Robert
4 Duffer. You really -- this is not a tax evasion
5 case.

6 Now, we all have different roles in this
7 type of proceeding, and I want to talk a minute
8 about those roles. Obviously, the Judge's role
9 is to set forth the law, to make the rulings
10 during -- in the courtroom, and it's your role,
11 as we talked about in voir dire -- not the
12 prosecutors, not the FBI -- it's your role to
13 decide ultimately who is guilty, and most
14 particularly, as you'll get in Instruction No. 3,
15 to come up with a just verdict.

16 What is the role of the FBI? The role of
17 the FBI is to find a crime, to try to figure out
18 who's guilty, to put up -- get their evidence
19 together, and to try to get a conviction, and the
20 prosecution's role is to try to get that
21 conviction too. Now, I don't fault them their
22 job and doing it vigorously and with zeal, but
23 there is a lot of power and authority when the
24 Federal Bureau of Investigation is involved, and
25 that can change the situation, and that can

1 change the reality that the witnesses face.

2 Mr. O'Keefe told you that the most important
3 skill an FBI agent can have is strong
4 communication skills and being able to convince
5 people to talk. Well, we see here the fear that
6 was discussed by Mr. Sole, this palpable fear
7 that was in the courtroom. It was very
8 interesting if you observed what I did. The
9 witnesses that were on the stand, they talk about
10 various threats. They identify defendants they
11 knew. They didn't show fear, but when it got to
12 talking about their plea agreements, when they
13 got to talking about how much prison time they
14 might do and their need to get a recommendation
15 for substantial assistance, you could hear and
16 see the fear.

17 We also have a pattern here -- not out of
18 malevolence or ill will -- officers go forward to
19 try to get the information they think is there,
20 and the information that is clear that the FBI
21 was trying to get against Robert Duffer, was that
22 he sold marijuana, and they were trying to get
23 information against Robert Duffer, and they got
24 Tom Lowe to say it; not very credible evidence,
25 but he said it. They tried to get Pam Williams

1 to say this same thing, but we have -- you can
2 see the type of pressure and fear that someone
3 who's innocent like Pam Williams would have,
4 feeling scared and dirty. What kind of fear does
5 someone like Butch White or Tom Burns have when
6 confronted in the same way?

7 Laura Neumann talked about it. She said, "I
8 didn't really know anything. I felt I was being
9 pressured." We've had some scared witnesses, and
10 if you think about how scared someone like Pam
11 Williams can be in this situation and how
12 pressured she felt to say something against
13 Robert Duffer, then you know where Tom Burns
14 said, "Well, he might have picked up, I thought
15 Ansil said." Then you know why Butch Henry said
16 what he said.

17 Now, again, there may be a good deal of time
18 spent talking about Mr. Duffer's case. There
19 hasn't been a lot of evidence. I've probably
20 taken enough of your time now. I want to refer
21 you to Instruction No. 3. "It's your duty to
22 find the evidence -- it's your duty to find from
23 the evidence what the facts are. The law demands
24 of you a just verdict, unaffected by anything
25 except the evidence, your common sense, and the

1 law as I give it to you." When you go to think
2 about the verdict here, to come up with a just
3 verdict, don't leave your common sense behind.
4 That is your role, to bring to this system your
5 common sense, your ability as citizens to say,
6 "Wait a second. It's just not there, not what we
7 need to see to find beyond a reasonable doubt
8 that someone is a member of a conspiracy, not
9 with what's at stake here." Apply your common
10 sense to that.

11 When we talked in voir dire, I asked you as
12 many as I could talk to you about the cherished
13 doctrines that we have that apply because of the
14 Bill of Rights, the presumption of innocence, the
15 burden being on the government to prove each and
16 every element beyond a reasonable doubt, and you
17 all -- all that I got to talk to agreed with me,
18 and I believe you and Robert Duffer believe you.

19 We talked about the importance of the
20 jurors' role through history, that it's the final
21 protection for citizens. The final protection is
22 not any other amendment but the Sixth Amendment
23 which guarantees Robert Duffer a trial by
24 citizens like himself who can look at people like
25 Dan Grady can, Dan Tominson, Pam Williams, and

1 say, "Yeah, those are good, honest people. Those
2 are people I'll believe," and when you said that
3 you would take on this difficult task, I believed
4 you and Robert Duffer believed you.

5 Now, you may think about this case from time
6 to time. I dare say I will, and when you do, it
7 may be ten, it may be twenty, it may be -- I
8 don't know how many years from now. There are
9 two things you're going to think, and I'm sure of
10 it. Where is Robert Duffer now? And did I do
11 justice in his case? We were confident when we
12 selected you as a jury that you were equal to
13 this task, and so we know that the case is in
14 good hands. I ask you to return a verdict of not
15 guilty. not guilty on the one and only count the
16 government has brought against your fellow
17 citizen, Robert Duffer.

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