

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

KELLY C. WARD,

Defendant.

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CR 08-10037

JURY INSTRUCTIONS

INSTRUCTION NO. 1

Ladies and gentlemen of the jury, it is my duty now to explain the rules of law you must apply to this case

You as jurors are the sole judges of the facts. But it is your duty to follow the law stated in these instructions, and to apply that law to the facts as you find them from the evidence before you. It would be a violation of your sworn duty to base your verdicts upon any rules of law other than the ones given you in these instructions, regardless of your personal feelings as to what the law ought to be.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

INSTRUCTION NO. 2

You have been chosen and sworn as jurors to try the issues of fact presented by the allegations of the indictment and the denials made by the defendant in his pleas of "not guilty." You are to perform this duty without bias or prejudice, because the law does not permit jurors to be governed by sympathy or public opinion. The accused and the public expect that you will carefully and impartially consider all of the evidence and will follow the law as stated by the Court, in order to reach just verdicts, regardless of the consequences to any party.

INSTRUCTION NO. 3

The indictment in this case charges that the defendant committed the crimes of assault with a dangerous weapon, assault resulting in serious bodily injury, assaulting a federal officer, and discharging a firearm during and in relation to a crime of violence. The defendant has pleaded not guilty to these charges.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Therefore, the defendant, even though charged, begins the trial with no evidence against him. This presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crimes charged.

There is no burden upon the defendant to prove that he is innocent.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

INSTRUCTION NO. 44

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 5

I have mentioned the word "evidence." The evidence in this case consists of the testimony of witnesses, the documents and other things received as exhibits and the facts that have been stipulated -- that is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained any objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3. Testimony and questions that I struck from the record, or told you to disregard, are not evidence and must not be considered.

4. Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, you were instructed that some evidence was received for a limited purpose only, and you must follow that instruction.

INSTRUCTION NO. *6*

There are two types of evidence from which you may find the truth as to the facts of a case--direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

INSTRUCTION NO. 7

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.

INSTRUCTION NO. 8

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of a greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 9

You have heard testimony from a person described as an expert. A person who, by knowledge, skill, training, education or experience, has become an expert in some field may state opinions on matters in that field and may also state the reasons for those opinions. Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering each witness's education and experience, the soundness of the reasons given for the opinions, acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 10

The crime of assault with a dangerous weapon, as charged in Count I of the indictment, has six essential elements, which are:

1. On or about September 10, 2008, the defendant, without just cause or excuse, voluntarily and intentionally assaulted Louis Poitra with a dangerous weapon
2. A firearm was used and is a dangerous weapon.
3. The defendant assaulted Louis Poitra with intent to do bodily harm to Louis Poitra
4. The defendant was not acting in self defense as defined in Instruction No. 10.
5. The defendant is an Indian; and
6. The alleged offense took place in Indian country.

For you to find the defendant guilty of this crime as charged in Count I of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 1

One of the issues in this case is whether the defendant was intoxicated at the time the act charged in Count I of the indictment was committed.

Being under the influence of alcohol provides a legal excuse for the commission of the crime charged in Count I of the indictment only if the effect of the alcohol made it impossible for the defendant to have the specific intent to commit the offense of assault with a dangerous weapon. Evidence that the defendant acted while under the influence of alcohol may be considered by you, together with all the other evidence, in determining whether or not the defendant did in fact have the specific intent to commit the crime in question.

Voluntary intoxication is not a defense to the crimes charged in Counts II, III and IV.

INSTRUCTION NO. 12

If you should unanimously find the defendant "Not Guilty" of the crime of assault with a dangerous weapon as charged in Count I of the indictment, or, if after all reasonable efforts, you are unable to reach a verdict as to the crime charged in Count I of the indictment, then you must proceed to determine the guilt or innocence of the defendant as to the crime of simple assault under this Instruction.

The crime of simple assault, a lesser included offense of the crime of assault with a dangerous weapon as charged in Count I of the indictment, has four essential elements, which are:

1. On or about September 10, 2008, the defendant voluntarily and intentionally assaulted Louis Poitra.
2. The defendant was not acting in self defense as defined in Instruction No. 11.
3. The defendant is an Indian; and
4. The offense took place in Indian country.

For you to find the defendant guilty of this crime, a lesser included offense of the crime of assault with a dangerous weapon as charged in Count I of the indictment, the government must prove all of the essential elements of this lesser included offense beyond a reasonable doubt. Otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 13

The phrase "dangerous weapon" as used in Instruction No. 10 means any object capable of being readily used by one person to inflict bodily injury upon another person.

INSTRUCTION NO. 14

The crime of assault resulting in serious bodily injury as charged in Count II of the indictment has five essential elements, which are:

1. On or about September 10, 2008, the defendant, without just cause or excuse, voluntarily and intentionally assaulted Louis Poitra.
2. The assault resulted in serious bodily injury to Louis Poitra.
3. The defendant was not acting in self defense as defined in Instruction No. 13.
4. The defendant is an Indian; and
5. The alleged offense took place in Indian Country.

For you to find the defendant guilty of this crime charged in Count II of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 15

“Serious bodily injury” as used in the indictment and Instruction No. 14 means bodily injury which involves:

1. a substantial risk of death;
2. extreme physical pain;
3. protracted and obvious disfigurement; or
4. protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

INSTRUCTION NO. 16

If you should unanimously find the defendant "Not Guilty" of the crime of assault resulting in serious bodily injury as charged in Count II of the indictment, or if, after all reasonable efforts, you are unable to reach a verdict as to the crime charged in Count II of the indictment, then you must proceed to determine the guilt or innocence of the defendant as to the crime of assault by striking, beating, or wounding under this instruction.

The crime of assault by striking, beating, or wounding, a lesser included offense of the crime of assault resulting in serious bodily injury as charged in Count II of the indictment, has four essential elements, which are:

1. On or about September 10, 2008, the defendant voluntarily and intentionally assaulted Louis Poitra by striking, beating, or wounding him;
2. The defendant was not acting in self defense as defined in Instruction No. 15;
3. The defendant is an Indian; and
4. The alleged offense occurred in Indian country.

For you to find the defendant guilty of this crime, a lesser included offense of the crime of assault resulting in serious bodily injury as charged in Count II of the indictment, the government must prove all of the essential elements of this lesser included offense beyond a reasonable doubt. Otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 11

The crime of assaulting a federal officer, as charged in Count III of the indictment, has five essential elements, which are:

1. On or about September 10, 2008, in Corson County, in the District of South Dakota, the defendant forcibly assaulted, resisted, impeded, intimidated, or interfered with Louis Poitra under circumstances constituting more than simple assault.
2. At the time of the assault, Louis Poitra was engaged in his official duties as a law enforcement officer employed by the Bureau of Indian Affairs, Department of Interior. The Court has determined, as a matter of law, that Louis Poitra was a federal law enforcement officer engaged in his official duties on September 10, 2008.
3. The act or acts were done voluntarily and intentionally.
4. The defendant used a dangerous weapon or inflicted bodily injury upon Louis Poitra. You may not find the defendant guilty of this Count III unless the jury unanimously determines which of the two elements described in this paragraph 4 occurred.
5. The defendant was not acting in self defense, as defined in Instruction No. 13.

For you to find the defendant guilty of this crime charged in Count III of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

“Simple assault” as used above means an assault which does not involve actual physical contact or serious bodily injury.

“Bodily injury” as used above means (A) a cut, abrasion, or bruise, (B) physical pain, or (C) any other injury to the body, no matter how temporary.

INSTRUCTION NO. 15

If a person reasonably believes that force is necessary to protect himself or another person from what he reasonably believes to be unlawful physical harm about to be inflicted by another and uses such force, then he acted in self defense or defense of others.

However, self defense which involves using force likely to cause death or great bodily harm is justified only if the person reasonably believes that such force is necessary to protect himself or the third person from what he reasonably believes to be a substantial risk of death or great bodily harm.

INSTRUCTION NO. 19

You must first consider the evidence pertaining to Counts I, II, and III of the indictment, and determine whether the government has proved any of those offenses beyond a reasonable doubt. When you reach a verdict on Counts I, II, and III, only then may you consider Count IV.

If your verdicts were not guilty on all of Counts I, II, and III, you must return a verdict of not guilty on Count IV.

If your verdict was guilty on any of Counts I, II, or III, you then must decide if the government proved all the essential elements of Count IV beyond a reasonable doubt.

INSTRUCTION NO. 26

The crime of discharging a firearm during and in relation to a crime of violence, as charged in Count IV of the indictment, has two essential elements, which are:

1. On or about September 10, 2008, in Corson County, in the District of South Dakota, the defendant committed the crime of assault with a dangerous weapon, assault resulting in serious bodily injury, or assaulting a federal officer; and
2. The defendant voluntarily and intentionally discharged a firearm during and in relation to one or more of those crimes.

For you to find the defendant guilty of this crime charged in Count IV of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 21

Intent may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the intent of the defendant.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 22

The indictment in this case alleges that the defendant is an Indian and that the alleged offenses occurred in Indian country. The existence of those two factors is necessary in order for this Court to have jurisdiction over Counts I and II.

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that the defendant is an Indian and that the place where the alleged incidents are claimed to have occurred is in Indian country.

The defendant has not, by entering this agreement or stipulation, admitted his guilt of the offenses charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to establish the facts that the defendant is an Indian and that the place where the alleged offenses are claimed to have occurred is in Indian country.

INSTRUCTION NO. 15

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A verdict form has been prepared for your convenience.

You will take this form to the jury room and, when you have reached unanimous agreement as to your verdicts, you will have your foreperson fill in, date and sign the form to state the verdicts upon which you unanimously agree, and then notify the marshal that you have a verdict or verdicts.

INSTRUCTION NO. 24

The verdicts must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. Your verdicts must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with the other 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 evidence, solely because of the opinion of the other 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.

INSTRUCTION NO. 25

If you have questions, you may send a note by a marshal, signed by your foreperson, or by one or more members of the jury.

You will note from the oath about to be taken by the marshal that he, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached unanimous verdicts.

INSTRUCTION NO.

36

It is proper to add a final caution.

Nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your verdicts should be.

What the verdicts shall be is your exclusive duty and responsibility.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-10037
	*	
Plaintiff,	*	
	*	
-vs-	*	VERDICT
	*	
KELLY C. WARD,	*	
	*	
Defendant.	*	
	*	

Please return a verdict by placing an "X" in the space provided.

COUNT 1

We, the jury in the above entitled action, as to the crime of assault with a dangerous weapon, as explained in instruction No. 10, find Kelly C. Ward:

_____ NOT GUILTY _____ GUILTY

If, and only if, you found Kelly C. Ward NOT GUILTY of assault with a dangerous weapon, or if, after all reasonable efforts, you are unable to reach a verdict as to that crime, then you must deliberate on the lesser included offense of simple assault as explained in Instruction No. 12, and complete the following:

We, the jury in the above entitled action, as to the crime of simple assault as explained in Instruction No. 12, a lesser included offense of assault with a dangerous weapon, find Kelly C. Ward:

_____ NOT GUILTY _____ GUILTY

COUNT II

We, the jury in the above entitled action, as to the crime of assault resulting in serious bodily injury, as explained in Instruction No. 14, find Kelly C. Ward:

_____ NOT GUILTY _____ GUILTY

If, and only if, you found Kelly C. Ward NOT GUILTY of assault resulting in serious bodily injury, or if, after all reasonable efforts, you are unable to reach a verdict as to that crime, then you must deliberate on the lesser included offense of assault by striking, beating, or wounding as explained in Instruction No. 16, and complete the following:

We, the jury in the above entitled action, as to the crime of assault by striking, beating, or wounding as explained in Instruction No. 16, a lesser included offense of assault resulting in serious bodily injury, find Kelly C. Ward:

_____ NOT GUILTY _____ GUILTY

COUNT III

We, the jury in the above entitled action, as to the crime of assaulting a federal officer, as explained in Instruction No. 17, find Kelly C. Ward:

_____ NOT GUILTY _____ GUILTY

COUNT IV

We, the jury in the above entitled action, as to the crime of discharging a firearm during and in relation to a crime of violence, as explained in Instruction No. 20, find Kelly C. Ward:

_____ NOT GUILTY _____ GUILTY

Dated this _____ day of July, 2009.