

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARC SEAN WISECARVER,

Defendant.

) CR. 08-50087-RHB
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) JURY INSTRUCTIONS
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FILED

JAN 29 2009


CLERK

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INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

INSTRUCTION NO. 3

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, the facts that have been stipulated – that is, formally agreed to by the parties, the facts, if any, that have been judicially noticed – this is, facts which I say you may, but are not required to, accept as true, even without evidence.

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 an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

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

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

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

INSTRUCTION NO. 4

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. 6

The indictment in this case charges the defendant with two different crimes. The indictment charges:

COUNT I

On or about the 29th day of April, 2008, near Manderson, in the District of South Dakota, the defendant, Marc Sean Wisecarver, did unlawfully forcibly assault, resist, oppose, intimidate and interfere with Bureau of Indian Affairs Soil Conservation Officer Duke Bourne, a federal employee, while Officer Bourne was engaged in the performance of his official duties, with a dangerous weapon, all in violation of 18 U.S.C. §§ 111(a)(1) and 111(b).

COUNT II

On or about the 29th day of April, 2008, near Manderson, in the District of South Dakota, the defendant, Marc Sean Wisecarver, did willfully injure and commit a depredation against property of the United States and of any department thereof, namely, a Chevrolet pickup truck bearing license plate G62-2207A and belonging to the Bureau of Indian Affairs (BIA) of the United States Department of the Interior, to wit, Marc Sean Wisecarver did willfully shoot the front grill of said BIA Chevrolet pickup with a 30-30 caliber Glenfield GT rifle, causing damage in excess of \$1000, all in violation of 18 U.S.C. § 1361.

The defendant has pleaded not guilty to each of 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. Thus the defendant, even though charged, begins the trial with no evidence against him. The 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 crime charged.

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. 6

Title 18 of the United States Code, section 111 provides in pertinent part as follows:

Whoever (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . .

shall be guilty of an offense against the laws of the United States.

Section 1114 of Title 18 of the United States Code provides that any officer or employee of the United States or of any agency in any branch of the United States Government is protected under this law.

INSTRUCTION NO. 7

The crime of assault of a federal officer, as charged in Count I of the indictment, has four elements, which are:

1. That defendant forcibly assaulted, or forcibly resisted, or forcibly opposed, or forcibly intimidated, or forcibly interfered with Bureau of Indian Affairs Soil Conservation Officer Duke Bourne;
2. That the defendant's act was done voluntarily and intentionally;
3. That the defendant used a dangerous weapon to forcibly resist, assault, oppose, intimidate, or interfere; and
4. That, at the time of the conduct alleged, Duke Bourne was engaged in his official duties as a federal officer.
5. That the defendant did not act in self defense of his person.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, and if it has further been proved beyond a reasonable doubt that the defendant was not acting in self defense; then you must find the defendant guilty of the crime charged under Count I. Otherwise, you must find the defendant not guilty of this crime under Count I.

INSTRUCTION NO. 8

Intent or knowledge 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 defendant's knowledge or intent.

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. 9

If a person reasonably believes that force is necessary to protect himself 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 of his person.

INSTRUCTION NO. 10

Title 18 of the United States Code, section 1361 provides in pertinent part as follows:

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, . . .

shall be guilty of an offense against the laws of the United States.

INSTRUCTION NO. 11

The crime of destruction of government property, as charged in Count II of the indictment, has four elements, which are:

1. That the defendant willfully injured or committed a depredation against property, namely, Chevrolet pickup bearing license number G62-2207A;
2. That the property involved was property of the United States or of any department or agency thereof;
3. That the defendant acted voluntarily and intentionally; and
4. That the damage to the property exceeded \$1000.
5. That the defendant did not use justifiable force to protect his property.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, and if it has further been proved beyond a reasonable doubt that the defendant was not acting reasonably in the defense of his property; then you must find the defendant guilty of the crime charged under Count II. Otherwise, you must find the defendant not guilty of this crime under Count II.

INSTRUCTION NO. 12

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. 13

You are instructed that a federal officer engaged in the good faith performance of his duties such as making an arrest or the keeping of the peace may not be forcibly resisted. It is the duty of persons to submit peaceably to the lawful orders of such officer.

INSTRUCTION NO. 14

It is defendant's assertion that he reasonably believed that his property was in the process of being damaged or injured and thereafter that he was in the process of being physically assaulted by Duke Bourne when his encounter with Bourne occurred. You are instructed that, if after hearing the evidence, you find that the government has failed to prove beyond a reasonable doubt that defendant was not acting in defense of his property or self defense at such time, then you must find defendant not guilty.

INSTRUCTION NO. 15

An owner or occupant in lawful possession of property may use only so much force as is reasonably necessary to protect the property. Such a person commits assault and battery if more force is used than is necessary. A person who, in defense of property, applies force in excess of that which is privileged is liable for so much of the force as is excessive, and the person against whom the actor defended the property has the privilege of defending oneself against the actor's use or attempted use of excessive force. The determination of this issue depends on the defendant's contemporaneous knowledge of facts.

INSTRUCTION NO. 16

You have heard testimony about the character and reputation of the defendant for truthfulness and peacefulness. You may consider this evidence only in deciding whether to believe the testimony of the defendant and how much weight to give it.

INSTRUCTION NO. 17

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict – whether guilty or not guilty – must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

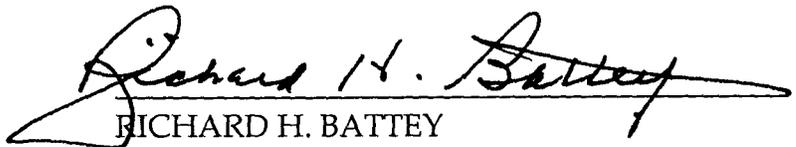
Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone – including me – how your votes stand numerically.

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict whether guilty or not guilty must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be – that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom.

Dated this 28 day of January, 2009.


RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE