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**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

No. CR 09-50038-01-KES

vs.

**FINAL
INSTRUCTIONS
TO THE JURY**

RALPH BEAR KILLER,
Defendant.

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

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

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 – FELON IN POSSESSION OF A FIREARM

The indictment charges that on or about December 15, 2007, at Pine Ridge, in the District of South Dakota, the defendant, Ralph Bear Killer, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm that is a Winchester, model 70, .270 caliber rifle, bearing serial number G30369, which had been transported in interstate and foreign commerce.

Elements

For you to find Ralph Bear Killer guilty of the sole count in the indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that Ralph Bear Killer had been convicted of a crime punishable by imprisonment for a term exceeding one year;

Two, that Ralph Bear Killer thereafter knowingly possessed a firearm that is a Winchester, model 70, .270 caliber rifle, bearing serial number G30369; and

The law recognizes several kinds of possession. A person may have "actual possession" or "constructive possession." A person who knowingly has direct physical control over a thing, at a given time, is then in "actual possession" of it. A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in "constructive possession" of it. A person may have "sole possession" or "joint possession." If one person alone has actual or constructive possession of a thing, possession is "sole." If two or more persons share actual or constructive possession of a thing, possession is "joint." Whenever the word "possession" or "possessed" is used in these instructions, it includes "actual" as well as "constructive" possession and also "sole" as well as "joint" possession.

In addition, mere presence where the firearm was found or mere physical proximity to the firearm is insufficient to establish that

the defendant had "possession" of the firearm. The defendant's knowledge of the presence of the firearm, at the same time the defendant has control over the firearm or the place in which it was found, is required. Thus, in order to establish "possession" of a firearm, in addition to knowledge of the presence of the firearm, the prosecution must establish that, at the same time, (a) the defendant intended to exercise control over the firearm or place in which it was found; (b) the defendant had the power to exercise control over the firearm or place in which it was found; and (c) the defendant knew that he had the power to exercise control over the firearm or place in which it was found. Constructive possession requires knowledge of an object, the ability to control it, and the intent to do so.

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

Three, the firearm was transported across a state line at some time during or before Ralph Bear Killer's possession of it.

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that the defendant has been convicted of a crime punishable by imprisonment for more than one year, and that the firearm was manufactured outside the state of South Dakota and moved in interstate and foreign commerce prior to its presence in the state of South Dakota on December 15, 2007. You must consider the first and third elements as proven.

The defendant has not, by entering into this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to present to the jury the fact that the defendant has been convicted of a crime punishable by imprisonment for a term exceeding one year and that the firearm was transported across a state line prior to December 15, 2007.

For you to find the defendant guilty of being a felon in possession of a firearm, as charged in the indictment, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find him not guilty.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 7, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 –
PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

Ralph Bear Killer is presumed innocent, and therefore, not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact that he is here in court. The presumption of innocence remains with the defendant throughout the trial. That presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the prosecution proves, beyond a reasonable doubt, each element of a crime charged against him.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. Therefore, the fact that the defendant did not testify must not be discussed or considered by you in any way when deliberating and arriving at your verdict. A defendant is not even obligated to produce any evidence by cross-examining the witnesses who are called to testify by the prosecution.

Unless the prosecution proves beyond a reasonable doubt that Ralph Bear Killer has committed each and every element of an offense charged in the indictment against him, you must find him not guilty of that offense.

FINAL INSTRUCTION NO. 5 – REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced by the prosecution. 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 in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

FINAL INSTRUCTION NO. 6 – DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to the defendant must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To bring twelve minds to a unanimous result, you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish the defendant's guilt beyond a reasonable doubt on an offense charged against him, then the defendant should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for the defendant on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt on an offense charged, then your vote should be for a verdict of guilty against the defendant on that charge, and if all of you reach that conclusion, then the verdict of the jury must be guilty for the defendant on that charge. As I instructed you earlier, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of a crime charged.

Remember also that the question before you can never be whether the government wins or loses the case. The government, as well as society, always

wins, regardless of whether your verdict is not guilty or guilty, when justice is done.

Finally, remember that you are not partisans; you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest that you carefully consider all of the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.

FINAL INSTRUCTION NO. 7 – DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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.

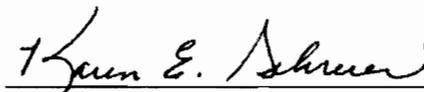
Second, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment of the defendant in any way in deciding whether the prosecution has proved its case beyond a reasonable doubt.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, 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.**

Fourth, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or 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 or court security officer that you are ready to return to the courtroom.

Dated September 29, 2009.



Karen E. Schreier
Chief Judge