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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,)	CR. 12-50097-JLV
)	
Plaintiff,)	
)	FINAL INSTRUCTIONS
vs.)	TO THE JURY
)	
JUSTIN M. BREWER,)	
)	
Defendant.)	

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FINAL INSTRUCTION NO. 1 - ROLE OF INSTRUCTIONS

Members of the jury, the written instructions I gave you at the beginning of the trial and any oral instructions I gave you during the trial remain in effect. All instructions, whenever given and whether in writing or not, are equally binding on you and must be followed.

The final instructions I am about to give you will be available to you in the jury room. These instructions explain the law that applies to this case. You must consider my instructions as a whole and not single out some instructions and ignore others.

FINAL INSTRUCTION NO. 2 - DUTY OF JURORS

This is a criminal case brought by the United States government against the defendant, Justin Brewer. The defendant is charged with the offenses of assault with a dangerous weapon and assault resulting in serious bodily injury.

Your duty is to decide from the evidence whether Mr. Brewer is not guilty or guilty of each offense charged against him. You will find the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 12. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict based solely on the evidence, your common sense, and the law as I give it to you. Do not take anything I said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from

any ruling or comment I made that I have any opinion on how you should decide the case.

Please remember only Mr. Brewer, not anyone else, is on trial here. Also, remember Mr. Brewer is on trial only for the offenses charged against him, not for anything else.

FINAL INSTRUCTION NO. 3 - PRELIMINARY MATTERS

Each offense consists of “elements” which the government must prove beyond a reasonable doubt in order to convict the defendant of that offense. To help you evaluate the evidence, I will give you the elements that make up each offense charged in the indictment. However, I must first explain some preliminary matters.

The charges against Mr. Brewer are set out in an indictment. An indictment is simply an accusation. It is not evidence of anything. Mr. Brewer pled not guilty to the charges brought against him. Therefore, Mr. Brewer is presumed to be innocent unless and until the government proves, beyond a reasonable doubt, each element of an offense charged.

The indictment charges the offenses were committed “on or about” a certain date. The government does not have to prove with certainty the exact date of an offense charged. It is sufficient if the evidence establishes that an offense occurred within a reasonable time of the date alleged in the indictment.

In the next two instructions, I will give you the elements for each offense charged in the indictment. Keep in mind that each count charges a separate offense. You must consider each count separately and return a separate verdict for each count.

FINAL INSTRUCTION NO. 4 - STIPULATION REGARDING JURISDICTION

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that Mr. Brewer is an Indian person and that the place where the alleged incident occurred is in Pine Ridge, South Dakota, and is in Indian country.

This stipulation applies to count I, assault with a dangerous weapon, and the lesser offense of simple assault, and to count II, assault resulting in serious bodily injury, and the lesser offense of assault by striking, beating or wounding.

By entering into this agreement or stipulation, the defendant has not 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 Mr. Brewer is an Indian person and that, if the jury finds the alleged incident occurred, it occurred in Indian country.

FINAL INSTRUCTION NO. 5

COUNT I: ASSAULT WITH A DANGEROUS WEAPON

Count I of the indictment charges that on or about September 19, 2011, at Pine Ridge, in the District of South Dakota, in Indian county, the defendant, Justin Brewer, an Indian, did knowingly assault Anthony Brewer with a dangerous weapon, namely a wooden fence post, with intent to inflict bodily harm.

Elements

For you to find Mr. Brewer guilty of the offense of assault with a dangerous weapon as charged in Count I, the government must prove the following six essential elements beyond a reasonable doubt:

One, that on or about September 19, 2011, Justin Brewer assaulted Anthony Brewer;

An “assault” is any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm.

Two, that Mr. Brewer used a wooden fence post to commit the assault and that a wooden fence post is a dangerous weapon;

A “dangerous weapon” is an object used in a manner likely to endanger life or inflict serious bodily harm.

Three, that Mr. Brewer intended to do bodily harm;

“Intent to do bodily harm” means knowingly and intentionally doing an act for the purpose of causing someone to suffer bodily injury.

Four, that Mr. Brewer was not acting in self defense;

The term "self defense" is defined in the court's Final Instruction No. 7.

Five and six, that Mr. Brewer is an Indian person and that the offense took place at Pine Ridge, South Dakota, in Indian country.

To find the defendant guilty of the offense of assault with a dangerous weapon as charged in Count I of the indictment, the government must prove all six essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

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

The offense of simple assault has four essential elements, which are:

One, that on or about September 19, 2011, Justin Brewer, voluntarily and intentionally engaged in a simple assault of Anthony Brewer;

A "simple assault" is any intentional or knowing harmful or offensive bodily touching or contact, however slight, without justification or excuse, with another's person, regardless of whether physical harm is intended or inflicted. It is not necessary that the person have a reasonable apprehension of bodily harm.

Two, that Mr. Brewer was not acting in self defense;

The term "self defense" is defined in the court's Final Instruction No. 7.

Three and four, that Mr. Brewer is an Indian person and that the offense took place at Pine Ridge, South Dakota, in Indian country.

To find the defendant guilty of the offense of simple assault, the government must prove all four essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

FINAL INSTRUCTION NO. 6

COUNT II: ASSAULT RESULTING IN SERIOUS BODILY INJURY

Count II of the indictment charges that on or about September 19, 2011, at Pine Ridge, in Indian country, in the District of South Dakota, the defendant, Justin Brewer, an Indian, unlawfully assaulted Anthony Brewer, and the assault resulted in serious bodily injury.

Elements

For you to find Mr. Brewer guilty of the offense of assault resulting in serious bodily injury as charged in Count II, the government must prove the following five essential elements beyond a reasonable doubt:

One, that on or about September 19, 2011, Justin Brewer assaulted Anthony Brewer;

An "assault" is any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm.

Two, that the assault resulted in serious bodily injury to Anthony Brewer;

Serious bodily injury 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.

Three, that Justin Brewer was not acting in self defense;

The term "self defense" is defined in the court's Final Instruction No. 7.

Four and five, that Mr. Brewer is an Indian person and that the offense took place at Pine Ridge, South Dakota, in Indian country.

To find the defendant guilty of the offense of assault resulting in serious bodily injury as charged in Count II of the indictment, the government must prove all five essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

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

The offense of assault by striking, beating, or wounding has four essential elements, which are:

One, that on or about September 19, 2011, Justin Brewer voluntarily and intentionally assaulted Anthony Brewer by striking, beating, or wounding him;

An "assault" is any intentional and voluntary attempt or threat to do bodily injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm.

Bodily injury means (1) a cut, abrasion, bruise, burn, or disfigurement; (2) physical pain; (3) illness; (4) impairment of the function of a bodily member, organ, or mental faculty; or (5) any other injury to the body, no matter how temporary.

Two, that Mr. Brewer was not acting in self defense;

The term "self defense" is defined in the court's Final Instruction No. 7.

Three and four, that Mr. Brewer is an Indian person and that the offense took place at Pine Ridge, South Dakota, in Indian country.

To find the defendant guilty of the offense of assault by striking, beating, or wounding, the government must prove all four essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

FINAL INSTRUCTION NO. 7 - "SELF DEFENSE" DEFINED

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

Although a defendant asserting self defense is not required to retreat before resorting to force, the availability of retreat may be a factor for the jury to consider in evaluating whether the force used was reasonable. An aggressor need not have been armed in order for the defendant to raise self defense. Whether an aggressor was armed may be relevant in determining the degree of force the defendant was entitled to use.

In order to convict Mr. Brewer of any offense the government must prove beyond a reasonable doubt that he was not acting in self defense during the incident alleged. This instruction applies to Count I, assault with a dangerous weapon, and the lesser offense of simple assault, and to Count II, assault resulting in serious bodily injury, and the lesser offense of assault by striking, beating or wounding.

FINAL INSTRUCTION NO. 8 - PROOF OF INTENT

Intent may be proven 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 intent.

FINAL INSTRUCTION NO. 9 - INTOXICATION

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

Being under the influence of alcohol provides a legal excuse for the commission of the offense of assault with a dangerous weapon, but only if the effect of alcohol makes it impossible for Mr. Brewer to have the specific intent to cause bodily injury. Evidence that Mr. Brewer may have acted while under the influence of alcohol may be considered by you, together with all other evidence, in determining whether or not Mr. Brewer did, in fact, have the specific intent to cause bodily injury.

Evidence that Mr. Brewer acted while under the influence of alcohol does not provide a legal excuse for the commission of the offense of assault resulting in serious bodily injury as charged in Count II of the indictment, or the lesser offenses of simple assault and assault by striking, beating or wounding.

FINAL INSTRUCTION NO. 10

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

Mr. Brewer 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 he is here in court. The presumption of innocence remains with Mr. Brewer throughout the trial. This presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the government proves, beyond a reasonable doubt, each essential element of an offense charged.

The burden is always on the government to prove guilt beyond a reasonable doubt. This burden never shifts to Mr. Brewer to prove his innocence, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to cross-examine the witnesses called to testify by the government.

Remember, each count charges a separate offense, and you must consider each count separately. If the government proves beyond a reasonable doubt all the essential elements of an offense charged in the indictment, you must find the defendant guilty of that offense. If the government fails to prove beyond a reasonable doubt any essential element

of an offense charged in the indictment, you must find the defendant not guilty of that offense.

FINAL INSTRUCTION NO. 11 - REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced during trial. 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 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 affairs of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

FINAL INSTRUCTION NO. 12 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses and documents, and other things received as exhibits, and stipulated facts. Stipulated facts are facts that are formally agreed to by the parties. Certain things are *not* evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Objections and rulings on 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 I struck from the record or told you to disregard is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.

The fact an exhibit was shown to you does not mean you must rely on it more than you rely on other evidence.

Furthermore, a particular piece of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose and not for any other purpose. I told you when that occurred and instructed you on the purposes for which the piece of evidence can and cannot be used.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

FINAL INSTRUCTION NO. 13 - STATEMENTS BY DEFENDANT

You have heard testimony that Mr. Brewer made statements to others.

It is for you to decide:

First, whether Mr. Brewer made the statements; and

Second, if so, how much weight you should give the statements.

In making these two decisions, you should consider all of the evidence, including the circumstances under which the statements may have been made.

FINAL INSTRUCTION NO. 14 - CREDIBILITY OF WITNESSES

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 says, 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 see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the witness said something different at an earlier time; the witness's drug or alcohol use or addiction, if any; 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 people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

Also, you should judge the testimony of the defendant in the same manner in which you judge the testimony of any other witness.

Finally, just because a witness works in law enforcement or is employed by the government does not mean you should give more weight or

credibility to the witness's testimony than you give to any other witness's testimony.

FINAL INSTRUCTION NO. 15 - IMPEACHMENT

In the last instruction, I instructed you generally on the credibility of witnesses. I now instruct you further on how the credibility of a witness may 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 a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

INSTRUCTION NO. 16 - EXPERT WITNESSES

You may have heard testimony from a person described as an expert. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

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 the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 17 - OBJECTIONS

The lawyers made objections during the trial that I ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 18 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict.

Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes.

FINAL INSTRUCTION NO. 19 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to Mr. Brewer must be unanimous. It is your duty to consult with one another and to deliberate with a view of 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 change your opinion if you are convinced it is wrong. To bring the jury 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 Mr. Brewer's guilt beyond a reasonable doubt on an offense charged against him, then Mr. Brewer 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 on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence

establishes Mr. Brewer's guilt beyond a reasonable doubt on an offense charged against him, then your vote should be for a verdict of guilty on that offense. If all of you reach that conclusion, then the verdict of the jury must be guilty on that offense. As I instructed you earlier, the burden is on the government to prove beyond a reasonable doubt every essential element of an offense 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 when justice is done, regardless of whether your verdict is not guilty or guilty.

Finally, remember that you are not partisans. You are 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 you carefully consider all of the evidence bearing upon the questions before you. You may take all the time 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 resolved at some later time.

FINAL INSTRUCTION NO. 20 - 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, who will preside over your discussions and speak for you here in court.

Second, if Mr. Brewer is found guilty of an offense, the sentence to be imposed is my responsibility. You may not consider punishment of the defendant in any way in deciding whether the government proved its case beyond a reasonable doubt as to each offense charged in the indictment.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the lawyers, I will respond as soon as possible, either in writing or orally in open court. Remember 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 you reach in this case. You will take this form to the jury room. You must

consider each count separately and return a separate verdict for each count. When you have unanimously agreed on a verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated November 16, 2012.

BY THE COURT:



JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE