

FILED

OCT 13 2011

[Signature]
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

DAVID TWEDT,

Plaintiff,

-vs-

ADAM DUPIC,
in his individual capacity,

Defendant.

*
*
*
*
*
*
*
*
*
*
*

CIV. 10-4028-RAL

FINAL
JURY INSTRUCTIONS

FINAL INSTRUCTION NO. 1

Members of the jury, the instructions I gave 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.

FINAL INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 3

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, you may consider a witness's intelligence, the opportunity a witness had to see or hear the things testified about, a witness's memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a 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.

FINAL INSTRUCTION NO. 4

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses, documents and other things received as exhibits and any facts that have been judicially noticed.

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. Exhibits that are identified by a party but not offered or received in evidence are not evidence.
3. Objections are not evidence. Lawyers have a right and sometimes an obligation to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question or the exhibit and must not try to guess what the answer or information might have been.
4. Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence and must not be considered.
5. Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item 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.

FINAL INSTRUCTION NO. 5

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel. You are the sole judges of the evidence received in this case.

FINAL INSTRUCTION NO. 6

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impressions of each juror as to what the testimony may have been.

FINAL INSTRUCTION NO. 7

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

FINAL INSTRUCTION NO. 8

Plaintiff is suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal constitutional rights under color of state law.

To prevail on a claim under Section 1983, Plaintiff must prove each of the following elements by a preponderance of the evidence:

- 1. Defendant tased Plaintiff and sprayed him with Oleoresin Capsicum spray in the act of arresting Plaintiff, and**
- 2. Defendant used “excessive force” as defined in Instruction 9 on Plaintiff, and**
- 3. As a direct result, Plaintiff was damaged, and**
- 4. Defendant was acting under color of state law.**

Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.

If any of the above elements has not been proved, then your verdict must be for Defendant.

FINAL INSTRUCTION NO. 9

The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person. Officers are liable for the use of excessive force when they use force that is not objectively reasonable in light of the facts and circumstances confronting them.

In evaluating Plaintiff's claim that Defendant's use of force was "excessive," you are advised that the Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general, and only requires that the seizures fall within a range of objective reasonableness.

In determining whether such force was "excessive," you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of 20/20 hindsight, would have used such force under similar circumstances. You should keep in mind that the decision about how much force to use often must be made in circumstances that are tense, uncertain and rapidly changing. You must consider whether Defendant's actions are reasonable in the light of the facts and circumstances confronting the Defendant.

Whether Defendant used the minimum amount of force available to him when he arrested Plaintiff is irrelevant. Defendant's use of force must only be objectively reasonable in light of the facts and circumstances confronting him at the time of the arrest.

FINAL INSTRUCTION NO. 10

Your verdict depends on whether you find certain facts have been proved by a preponderance of the evidence, which means by the greater weight of the evidence. In order to find that a fact or element has been proved by the greater weight of the evidence, you must find that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

You have probably heard of the phrase "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. That standard does not apply in civil cases such as this. You should, therefore, put that standard out of your minds.

INSTRUCTION NO. 11

You have heard evidence that Plaintiff had previous contact with Defendant and other law enforcement officers. You may use that evidence only to determine whether Defendant, given his pre-arrest knowledge about Plaintiff, acted in an objectively reasonable manner on May 31, 2009.

FINAL INSTRUCTION NO. 12

If you find in favor of Plaintiff, then you must award Plaintiff such sum as you find will fairly and justly compensate Plaintiff for any damages you find Plaintiff sustained as a direct result of the violation of Plaintiff's constitutional rights.

You should consider the physical pain and mental and emotional suffering Plaintiff has experienced and is reasonably certain to experience in the future.

FINAL INSTRUCTION NO. 13

If you find in favor of Plaintiff, but you find that Plaintiff's damages have no monetary value, than you must return a verdict for Plaintiff in the nominal amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 14

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of Plaintiff and if it has been proved that the conduct of Defendant was malicious or recklessly indifferent to Plaintiff's rights, then you may, but are not required to, award Plaintiff an additional amount as punitive damages for the purposes of punishing Defendant for engaging in such misconduct and deterring Defendant and others from engaging in such misconduct in the future. You should presume that Plaintiff has been made whole for his injuries by the damages awarded.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible Defendant's conduct was. In this regard, you may consider whether there was violence, deceit, intentional malice, or reckless disregard for human health or safety.
2. How much harm Defendant's wrongful conduct caused Plaintiff.
3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering Defendant's financial condition, to punish Defendant for his wrongful conduct toward Plaintiff and to deter Defendant and others from similar wrongful conduct in the future.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to Plaintiff.

FINAL INSTRUCTION NO. 15

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of Plaintiff from the greater weight of the evidence in accordance with the other instructions.

FFINAL INSTRUCTION NO. 16

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

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 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. Remember at all times that 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.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, 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 which I have given to you in my instructions. The verdict 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.

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 bailiff that you are ready to return to the courtroom.