

FILED

OCT 18 2013



CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)	CR. 13-50037-01 & 02-JLV
)	
Plaintiff,)	
)	
vs.)	FINAL INSTRUCTIONS
)	TO THE JURY
MICHAEL ALFORD, and)	
PHILANA RED FEATHER,)	REDACTED
a/k/a PHILANA GARCIA,)	
)	
Defendants.)	

TABLE OF CONTENTS

NO. 1 - ROLE OF INSTRUCTIONS 2

NO. 2 - DUTY OF JURORS 3

NO. 3 - PRELIMINARY MATTERS 5

NO. 4 - COUNT I: LARCENY 6

NO. 5 - COUNT II: TAMPERING WITH A WITNESS 9

NO. 6 - COUNT III: TAMPERING WITH A WITNESS 11

NO. 7 - PROOF OF INTENT OR KNOWLEDGE 13

NO. 8 - AID AND ABET 14

NO. 9 - PRESUMPTION OF INNOCENCE AND
BURDEN OF PROOF. 15

NO. 10 - REASONABLE DOUBT. 17

NO. 11 - DEFINITION OF EVIDENCE 18

NO. 12 - STATEMENT BY A DEFENDANT 20

NO. 13 - EYEWITNESS TESTIMONY 21

NO. 14 - CREDIBILITY OF WITNESSES 23

NO. 15 - IMPEACHMENT 25

NO. 16 - OBJECTIONS 26

NO. 17 - NOTE TAKING 27

NO. 18 - DUTY TO DELIBERATE 28

NO. 19 - DUTY DURING DELIBERATIONS 30

VERDICT FORMS

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 defendants, Michael Alford and Philana Red Feather, also known as Philana Garcia. In count I, Mr. Alford and Ms. Red Feather are charged with larceny. In counts II and III, Mr. Alford is charged with tampering with witnesses.

Your duty is to decide from the evidence whether the defendants are not guilty or guilty of the offenses charged against each of them. Keep in mind you must give separate consideration to the evidence about each individual defendant.

You will find the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 11. 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 verdicts. 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 just verdicts 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. Alford and Ms. Red Feather, not anyone else, are on trial here. Also, remember each defendant is on trial only for the offenses charged against him or her, not for anything else.

FINAL INSTRUCTION NO. 3 - PRELIMINARY MATTERS

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

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

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 an offense occurred within a reasonable time of the dates alleged in the indictment. In the next three instructions, I will give you the elements for the offenses 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. Again, keep in mind you must give separate consideration to the evidence regarding each individual defendant.

FINAL INSTRUCTION NO. 4 -

COUNT I: LARCENY

Count I of the indictment charges that on or about December 15, 2012, at Pine Ridge, in Indian country, in the District of South Dakota, the defendants, Michael Alford and Philana Red Feather, Indians, aiding and abetting each other, did take and carry away, with the intent to steal or purloin, the personal property of Patricia Mousseau and others, with a value exceeding \$1,000.

Elements

For you to find a defendant guilty of the offense of larceny as charged in count I of the indictment, the government must prove the following essential elements beyond a reasonable doubt:

One, that on or about December 15, 2012, Mr. Alford and Ms. Red Feather, aiding and abetting each other, did unlawfully take personal property belonging to Patricia Mousseau and others;

Two, that Mr. Alford and Ms. Red Feather did so with the intent to steal or purloin the personal property;

Three, that the personal property had a value in excess of \$1,000;
and

Four and Five, that Mr. Alford and Ms. Red Feather are Indian persons and that the offense took place in Indian country, in the District of South Dakota.

To find a defendant guilty of the offense of larceny as charged in count 1 of the indictment, the government must prove all the essential elements beyond a reasonable doubt as to that defendant. If the government proves all the essential elements beyond a reasonable doubt as to a defendant, you must find that defendant guilty of the offense. If the government fails to prove any essential element beyond a reasonable doubt as to a defendant, you must find that defendant not guilty of the offense.

If you should unanimously find a defendant “Not Guilty,” of the offense of larceny 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 as against that defendant, then you must proceed to determine the guilt or innocence of that defendant as to the lesser offense of larceny involving personal property with a value of \$1,000 or less.

The offense of larceny involving personal property with a value of \$1,000 or less has the following essential elements which the government must prove beyond a reasonable doubt:

One, that on or about December 15, 2012, Mr. Alford and Ms. Red Feather, aiding and abetting each other, did unlawfully take personal property belonging to Patricia Mousseau and others;

Two, that Mr. Alford and Ms. Red Feather did so with the intent to steal or purloin the personal property;

**Three, that the personal property had a value of \$1,000 or less; and
Four and Five, that Mr. Alford and Ms. Red Feather are Indian
persons and that the offense took place in Indian country, in the District
of South Dakota.**

To find a defendant guilty of the offense of larceny involving personal property with a value of \$1,000 or less the government must prove all the essential elements beyond a reasonable doubt as to that defendant. If the government proves all the essential elements beyond a reasonable doubt as to a defendant, you must find that defendant guilty of the offense. If the government fails to prove any essential element beyond a reasonable doubt as to a defendant, you must find that defendant not guilty of the offense.

FINAL INSTRUCTION NO. 5 -

COUNT II: TAMPERING WITH A WITNESS

Count II of the indictment charges that on or about December 15, 2012, at Pine Ridge, in the District of South Dakota, the defendant, Michael Alford, used the threat of physical force, or attempted to do so, against I.T.T., with the intent to prevent the communication to a law enforcement officer of information relating to the commission of a federal larceny offense.

Elements

For you to find Mr. Alford guilty of the offense tampering with a witness as charged in count II of the indictment, the government must prove the following essential elements beyond a reasonable doubt:

One, that on or about December 15, 2012, Mr. Alford used a threat of physical force, or attempted to do so, against I.T.T.;

The offense charged in count II includes an attempt to commit that offense. The defendant may be found guilty of an attempt to engage in the offense alleged in count II if he both intended to engage in the offense and voluntarily and intentionally carried out some act which was a substantial step toward engaging in the offense alleged in count II.

and

Two, that Mr. Alford acted with intent to prevent I.T.T. from communicating to law enforcement authorities information relating to the commission or possible commission of a federal larceny offense.

To find Mr. Alford guilty of the offense of tampering with a witness as charged in count II of the indictment, the government must prove all the essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find Mr. Alford guilty of the offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find Mr. Alford not guilty of the offense.

FINAL INSTRUCTION NO. 6 -

COUNT III: TAMPERING WITH A WITNESS

Count III of the indictment charges that on or about December 15, 2012, at Pine Ridge, in the District of South Dakota, the defendant, Michael Alford, did knowingly attempt to intimidate, threaten, corruptly persuade or engage in misleading conduct toward David Two Two, also known as James Two Two, with the intent to prevent the communication to a law enforcement officer of information relating to the commission of a federal larceny offense.

Elements

For you to find Mr. Alford guilty of the offense tampering with a witness as charged in count III of the indictment, the government must prove the following essential elements beyond a reasonable doubt:

One, that on or about December 15, 2012, Mr. Alford knowingly attempted to intimidate, threaten, corruptly persuade or engage in misleading conduct toward David Two Two, also known as James Two Two;

The offense charged in count III includes an attempt to commit that offense. The defendant may be found guilty of an attempt to engage in the offense alleged in count III if he both intended to engage in the offense and voluntarily and intentionally carried out some act which was a substantial step toward engaging in the offense alleged in count III.

and

Two, that Mr. Alford acted with intent to prevent David Two Two, also known as James Two Two, from communicating to law enforcement authorities information relating to the commission or possible commission of a federal larceny offense.

To find Mr. Alford guilty of the offense of tampering with a witness as charged in count III of the indictment, the government must prove all the essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find Mr. Alford guilty of the offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find Mr. Alford not guilty of the offense.

**FINAL INSTRUCTION NO. 7 -
PROOF OF INTENT AND KNOWLEDGE**

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

FINAL INSTRUCTION NO. 8 - AID AND ABET

A person may be found guilty of larceny even if he or she personally did not do every act constituting the offense charged, if he or she aided and abetted the commission of larceny.

In order to have aided and abetted the commission of larceny, a person must have:

1. Known an offense of larceny was being committed or going to be committed; and
2. Knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of larceny; and
3. Intended or knew there was a specific intent to commit the offense of larceny.

For you to find a defendant guilty of larceny by reason of aiding and abetting, the government must prove beyond a reasonable doubt all the elements of larceny were committed by another person and that the defendant aided and abetted that crime. Otherwise, you must find that defendant not guilty of larceny by aiding and abetting.

FINAL INSTRUCTION NO. 9 -

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The defendants are 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 defendants or the fact they are here in court. The presumption of innocence remains with the defendants throughout the trial. This presumption alone is sufficient to find the defendants 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 a defendant to prove his or her 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. A 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 as to a defendant, you must find that defendant guilty of the offense. If the government fails to prove beyond a reasonable doubt any essential element of the offense charged as to a defendant, you must find that defendant not guilty of the offense. Each

defendant is entitled to be treated separately, and you must determine whether the government met its burden of proof as to each defendant separately.

FINAL INSTRUCTION NO. 10 - 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. 11 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, and stipulated facts. Stipulated facts are facts 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 saw or heard 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 could and could not 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. 12 -
STATEMENT BY A DEFENDANT**

You have heard testimony a defendant made a statement to others. It is for you to decide:

First, whether the statement was made; and

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

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

You may consider a defendant's statement only in the case against him or her, and not in the case against the other defendant. You may not consider or discuss a defendant's statement in any way when you are deciding if the government proved, beyond a reasonable doubt, its case against the other defendant.

FINAL INSTRUCTION NO. 13 - EYEWITNESS TESTIMONY

The value of eyewitness identification testimony depends on the opportunity a witness had to observe an alleged offender at the time of the alleged offense and to make a reliable identification later.

In evaluating eyewitness testimony you should consider all of the factors mentioned in these instructions concerning your assessment of the credibility of any witness, and you should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time of the alleged offense. You may consider such matters as the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and whether the witness had known or observed the person at earlier times.

You should also consider whether the identification made by the witness after the alleged offense was the product of his or her own recollection. You may consider the strength of the identification, the circumstances under which the identification was made, and the length of time which elapsed between the occurrence of the alleged offense and the next opportunity the witness had to see the defendant.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to the witness for identification, you should scrutinize the identification with great care.

The government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness be free from doubt as to the correctness of the identification. However, the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification before you may find a defendant guilty. If you are not convinced beyond a reasonable doubt that a defendant was the person who committed the alleged offense, you must find that defendant not guilty.

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 Mr. Alford and Ms. Red Feather 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 trial 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.

FINAL INSTRUCTION NO. 16 - OBJECTIONS

The lawyers made objections during the trial which I ruled on. 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 had a duty to object to testimony or other evidence they believed was not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 17 - 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. 18 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to each defendant must be unanimous. You must return a separate verdict for each defendant. 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 an individual defendant's guilt beyond a reasonable doubt on an offense charged against him or her, then that defendant should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, the verdict of the jury must be not guilty for that defendant on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes an individual defendant's guilt beyond a reasonable doubt on an

offense charged, your vote should be for a verdict of guilty against that defendant on that offense. If all of you reach that conclusion, the verdict of the jury must be guilty for that defendant 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, each defendant is entitled to be treated separately, and you must determine whether the government met its burden of proof as to each defendant separately.

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. 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 as to a defendant, then that defendant's case is left open and must be resolved at some later time.

**FINAL INSTRUCTION NO. 19 -
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 a defendant is found guilty of an offense, the sentence to be imposed is my responsibility. You may not consider punishment of a 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 as to each defendant must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or guilty, must be unanimous as to each defendant.** 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 forms are simply the written notice of the decisions you reach in this case. You will take these forms to the jury room. When you have unanimously agreed on the verdict as to each defendant, the foreperson will fill in each form, date and sign it, and advise the court security officer you have reached a verdict as to each defendant. You will then return to the courtroom where your verdicts will be received and announced.

Dated October 18, 2013.

BY THE COURT:



JEREMY L. VIKEN
CHIEF JUDGE