

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCIS LEE DUBRAY,

Defendant.

1:23-CR-10032-CBK

JURY INSTRUCTIONS

INSTRUCTION NO. 1

Ladies and gentlemen of the jury, it is my duty now to explain the rules of law you must apply to this case.

You as jurors are the sole judges of the facts. But it is your duty to follow the law stated in these instructions, and to apply that law to the facts as you find them from the evidence before you. I also gave you instructions during the trial and you must follow those instructions. It would be a violation of your sworn duty to base your verdicts upon any rules of law other than the ones given you in these instructions, regardless of your personal feelings as to what the law ought to be.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

INSTRUCTION NO. 2

You have been chosen and sworn as jurors to try the issues of fact presented by the allegations of the indictment and the denials made by the defendant in his pleas of “not guilty.” You are to perform this duty without bias or prejudice, because the law does not permit jurors to be governed by sympathy or public opinion. The accused and the public expect that you will carefully and impartially consider all of the evidence and will follow the law as stated by the Court, in order to reach just verdicts, regardless of the consequences to any party.

INSTRUCTION NO. 3

The indictment in this case charges the defendant with the crimes of first degree burglary, assault with a dangerous weapon, and witness tampering. The defendant has pleaded not guilty to 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. Therefore, the defendant, even though charged, begins the trial with no evidence against him. This 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 crimes charged.

There is no burden upon the defendant to prove that he is innocent. Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.

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. 4

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. 5

I have mentioned the word “evidence.” The evidence in this case consists of the testimony of witnesses, and the documents and other things received as exhibits.

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 and questions that I struck from the record, or told you to disregard, are not evidence and must not be considered.

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

INSTRUCTION NO. 6

There are two types of evidence from which you may find the truth as to the facts of a case -- direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

INSTRUCTION NO. 7

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.

INSTRUCTION NO. 8

You have heard evidence that a witness has pleaded guilty to a crime which arose out of the same events for which defendant is on trial here pursuant to a plea agreement with the government. You must not consider that as any evidence of defendant's guilt. You may consider such witnesses' guilty plea only for the purpose of determining how much, if at all, to rely upon that witness's testimony.

You have further heard evidence that a witness has agreed to cooperate and provide truthful testimony in this case and hopes to receive a reduced sentence for doing so. If the prosecutor handling the witness's case believes the witness provided substantial assistance, that prosecutor can file in the court a motion to reduce that witness's sentence. The Court has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, makes a motion to reduce a sentence. It is up to the Court to decide whether to reduce the sentence at all, and if so, how much to reduce the sentence. Whether the witness's testimony may have been influenced by a hope of receiving a more lenient sentence is for you to decide. You may give the witness's testimony whatever weight you think it deserves.

INSTRUCTION NO. 9

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of a greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 10

The crime of first degree burglary, as charged in Count I of the indictment, has seven elements, which are:

1. On or about July 5, 2023, defendant unlawfully entered a structure described as the home of Peggy Thompson.
2. The structure was not, at the time, open to the public nor was the defendant licensed or privileged to enter or remain in the structure.
3. The structure was an occupied structure.
4. The defendant unlawfully entered or unlawfully remained within the structure with the intent to commit the crime of assault.
5. The defendant inflicted or attempted to inflict physical harm on another.
6. The defendant is an Indian.
7. The offense occurred in Indian country.

For you to find the defendant guilty of this crime charged in Count I of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 11

The term “structure” includes a house, building, trailer, or shelter, or any portion thereof.

The phrase “occupied structure” means any structure which is the permanent or temporary habitation of any person, whether or not any person is actually present, or any structure in which at the time any person is present. The structure need not be lawfully occupied.

The term “assault” is defined in Instruction No. 14.

INSTRUCTION NO. 12

The crime of assault with a dangerous weapon, as charged in Count II of the indictment, has five essential elements, which are:

1. On or about July 5, 2023, the defendant, without just cause or excuse, voluntarily and intentionally assaulted Burdon Lester.
2. A bat or shod feet were used and are dangerous weapons.
3. The defendant assaulted Burdon Lester with intent to do bodily harm to Burdon Lester.
4. The defendant is an Indian; and
5. The alleged offense occurred in Indian Country.

For you to find the defendant guilty of this crime charged in Count II of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 13

The crime of assault with a dangerous weapon, as charged in Count III of the indictment, has five essential elements, which are:

1. On or about July 5, 2023, the defendant, without just cause or excuse, voluntarily and intentionally assaulted Peggy Thompson.
2. Shod feet were used and are dangerous weapons.
3. The defendant assaulted Peggy Thompson with intent to do bodily harm to Peggy Thompson.
4. The defendant is an Indian; and
5. The alleged offense occurred in Indian Country.

For you to find the defendant guilty of this crime charged in Count III of the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 14

The term “assault” as used in these instructions means any intentional and voluntary attempt or threat to injure another person, combined with the apparent present ability to do so, which is sufficient to put the other person in fear of immediate bodily harm or any intentional and voluntary harmful and offensive touching of another person without justification or excuse.

INSTRUCTION NO. 15

The phrase “dangerous weapon,” as used in these instructions means any object capable of being readily used by one person to inflict bodily injury upon another person.

If you find that the defendant used a dangerous weapon, you must unanimously agree which weapon was used.

INSTRUCTION NO. 16

The crime of witness tampering, as charged in Count IV of the indictment, has two elements, which are:

1. On or about July 7, 2023, the defendant knowingly intimidated, threatened, or corruptly persuaded Peggy Thompson, or attempted to persuade her from communicating with a federal law enforcement officer.
2. The defendant did so with the intent to hinder, delay, or prevent Peggy Thompson from reporting information related to the commission or possible commission of a federal offense.

For you to find the defendant guilty of the crime charged in Count IV of the indictment, the government must prove all of these elements beyond a reasonable doubt. Otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 17

To “intimidate” someone means intentionally to say or do something that would cause a person of ordinary sensibilities to be fearful of harm to herself or another. It is not necessary for the government to prove that Peggy Thompson was actually frightened.

To corruptly persuade someone means to persuade or attempt to persuade with consciousness of wrongdoing.

To act with “intent to influence” the communication of a person means to act for the purpose of getting the person to change or color or shade her communication in some way. It is not necessary for the government to prove that the person’s communication was, in fact, changed in any way.

INSTRUCTION NO. 18

The crimes charged in the indictment include attempts to commit the crime in question. The defendant may be found guilty of an attempt if he intended to engage in the activities alleged in the indictment and he knowingly and intentionally carried out some act which was a substantial step toward the commission of the alleged activity.

INSTRUCTION NO. 19

A person may also be found guilty of the crimes of burglary and assault with a dangerous weapon even if he personally did not do every act constituting the crime charged, if he aided and abetted the commission of the crime. In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

1. Have known the crime was being committed or going to be committed;
2. Have had enough advance knowledge of the extent and character of the crime that he was able to make the relevant choice to walk away from the crime before all elements of the offense were complete;
3. Have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of the crime; and
4. Have acted with the intent to commit the crime.

For you to find the defendant guilty of any of the crimes of burglary or assault with a dangerous weapon by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the elements of the crime in question were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

INSTRUCTION NO. 20

Intent 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 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. 21

The indictment charges that the offenses were committed “on or about” a certain date. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

INSTRUCTION NO. 22

The term "Indian," as used in these instructions, means that the defendant:

1. Has some Indian blood, and
2. Is recognized as an Indian by a federally recognized tribe or the federal government or both.

INSTRUCTION NO. 23

I have determined, as a matter of law, that Corson County, South Dakota, is in Indian Country. It is for the jury to determine whether the offenses occurred in Corson County.

INSTRUCTION NO. 24

The verdicts must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. Any verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times, 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.

INSTRUCTION NO. 25

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A verdict form has been prepared for your convenience.

You will take this form to the jury room and, when you have reached unanimous agreement as to your verdicts, you will have your foreperson fill in, date, and sign the form to state the verdicts upon which you unanimously agree, and then notify the marshal that you have a verdict.

INSTRUCTION NO. 26

If you have questions, you may send a note by a marshal, signed by your foreperson, or by one or more members of the jury.

You will note from the oath about to be taken by the marshal that he, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached unanimous verdicts.

INSTRUCTION NO. 27

It is proper to add a final caution.

Nothing that I have said in these instructions, and nothing that I have said or done during the trial, has been said or done to suggest to you what I think your verdicts should be.

What the verdicts shall be is your exclusive duty and responsibility.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

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|---|--------------------------------------|
| UNITED STATES OF AMERICA, Plaintiff, vs. FRANCIS LEE DUBRAY, Defendant. | 1:23-CR-10032-CBK VERDICT |
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Please return a verdict by placing an "X" in the space provided.

COUNT I

We, the jury in the above-entitled action, as to the crime of first degree burglary, as charged in Count I of the indictment, find Francis Lee DuBray:

_____ NOT GUILTY _____ GUILTY

COUNT II

We, the jury in the above-entitled action, as to the crime of assault with a dangerous weapon, as charged in Count II of the indictment, find Francis Lee DuBray:

_____ NOT GUILTY _____ GUILTY

COUNT III

We, the jury in the above-entitled action, as to the crime of assault with a dangerous weapon, as charged in Count III of the indictment, find Francis Lee DuBray:

_____ NOT GUILTY _____ GUILTY

COUNT IV

We, the jury in the above-entitled action, as to the crime of witness tampering, as charged in Count IV of the indictment, find Francis Lee DuBray:

_____ NOT GUILTY _____ GUILTY

Dated this _____ day October, 2024.

Foreperson