

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. DUSTIN WITT, Defendant.</p>	<p>3:17-CR-30036-RAL FINAL JURY INSTRUCTIONS</p>
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INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions. The instructions I am about to give you now are in writing and will be available to you in the jury room.

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.

All instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

INSTRUCTION NO. 3

I have mentioned the word “evidence.” The “evidence” in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and the facts that have been stipulated—that is, formally agreed to by the parties.

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 that 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.

When you were instructed that evidence was received for a limited purpose, you must follow that instruction.

INSTRUCTION NO. 4

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 of any witness 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. 5

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

INSTRUCTION NO. 6

The indictment in this case charges the defendant with three different crimes. Count I charges the defendant with assault with a dangerous weapon. Count II charges the defendant with assault resulting in serious bodily injury. Count III charges the defendant with child abuse. The defendant has pleaded not guilty to each of those charges.

The indictment is simply the document that formally charges the defendant with the crimes for which he is on trial. The indictment is not evidence of anything. At the beginning of the trial, I instructed you that you must presume the defendant to be innocent. Thus, the defendant began the trial with a clean slate, with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty. This presumption can be overcome only if the government proved during the trial, beyond a reasonable doubt, each element of a crime charged.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

There is no burden upon a defendant to prove that he is innocent. Instead, the burden of proof remains on the government throughout the trial. Accordingly, the fact that a defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.

INSTRUCTION NO. 7

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

One, that on or about the 6th day of June, 2016, the defendant, Dustin Witt, voluntarily and intentionally assaulted Gloria Tobacco;

Two, that the defendant used a dangerous weapon, that is shod feet, in the assault;

“Dangerous weapon” means any object capable of being readily used by one person to inflict bodily injury upon another person. A “dangerous weapon” may include shod feet.

Three, that the defendant had the specific intent to do bodily harm to Gloria Tobacco;

Four, that the defendant is an Indian; and

Five, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find him guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 8

If you should unanimously find the defendant “Not Guilty” of the crime 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 crime charged in Count I of the indictment, then you must proceed to determine whether the defendant is guilty or not guilty as to the crime of simple assault under this instruction.

The crime of simple assault, a lesser included offense of the crime of assault with a dangerous weapon as charged in Count I of the indictment, has three essential elements, which are:

One, that on or about the 6th day of June, 2016, the defendant, Dustin Witt, voluntarily and intentionally engaged in a simple assault of Gloria Tobacco;

Two, that the defendant is an Indian; and

Three, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find him guilty of the crime of simple assault; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 9

The crime of assault resulting in serious bodily injury as charged in Count II of the indictment has four elements, which are:

One, that on or about the 6th day of June, 2016, the defendant, Dustin Witt, voluntarily and intentionally assaulted Gloria Tobacco;

Two, that the assault resulted in serious bodily injury;

Three, that the defendant is an Indian; and

Four, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find him guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 10

“Serious bodily injury” as used in these instructions means bodily injury that involves:

1. A substantial risk of death; or
2. Extreme physical pain; or
3. Protracted and obvious disfigurement; or
4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

INSTRUCTION NO. 11

If you should unanimously find the defendant “Not Guilty” of the crime 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 crime charged in Count II of the indictment, then you must proceed to determine whether the defendant is guilty or not guilty as to the crime of assault by striking, beating, or wounding under this Instruction.

The crime of assault by striking, beating, or wounding, a lesser included offense of the crime of assault resulting in serious bodily injury as charged in Count II of the indictment, has three essential elements, which are:

One, that on or about the 6th day of June, 2016, the defendant, Dustin Witt, voluntarily and intentionally assaulted Gloria Tobacco by striking, beating, or wounding her;

Two, that the defendant is an Indian; and

Three, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime of assault by striking, beating, or wounding; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 12

An “assault” is any intentional and voluntary attempt or threat to do injury to another person, 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.

INSTRUCTION NO. 13

The crime of child abuse, as charged in Count III of the indictment, has five elements, which are:

One, that on or about the 6th day of June, 2016, the defendant, Dustin Witt, did abuse, expose, torture, torment, or cruelly punish L. T.;

Two, that the defendant committed such act without just cause;

Three, that at the time of the offense, L. T. was under the age of eighteen years;

Four, that the defendant is an Indian; and

Five, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find him guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 14

In the crime of child abuse, the defendant must have criminal intent. To constitute criminal intent, it is not necessary that there should exist an intent to violate the law. When a person intentionally does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful.

As used in Count III of the indictment:

The term “abuse” means physical maltreatment;

The term “expose” means to subject a child to needless risk. “Risk” means the possibility of suffering harm or loss; danger;

The term “torture” means to cause intense suffering to or to punish or coerce by inflicting excruciating pain;

The term “torment” means to cause severe and unusually persistent or recurrent distress of body or mind;

The term “cruelly punish” means to punish in such a way as to intentionally inflict physical suffering with reckless indifference to pain.

In the crime of assault with a dangerous weapon, as charged in Count I of the indictment, there must exist in the mind of the perpetrator the specific intent to do bodily harm to the alleged victim. If the defendant acted without such specific intent, the crime of assault with a dangerous weapon has not been committed. There is no specific intent requirement for the crimes of assault resulting in serious bodily as charged in Count II and child abuse as charged in Count III.

Being under the influence of alcohol provides a legal excuse for the commission of a crime only if the effect of the alcohol makes it impossible for the defendant to have the specific intent to commit the offense of assault with a dangerous weapon. Evidence that the defendant acted while under the influence of alcohol may be considered by you, together with all the other evidence, in determining whether or not the defendant had the specific intent to commit assault with a dangerous weapon.

You have heard testimony that certain witnesses may have made statements at an earlier time that are inconsistent with their testimony at trial. If you find that such prior inconsistent statements were indeed made, you may consider the witness's prior inconsistent statements to evaluate the credibility of the witness, but may not consider the prior inconsistent statement as proof of the matter asserted.

Intent or knowledge 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 the determination of the defendant's knowledge or 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.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his actions were unlawful. 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.

If proven, attempts by the defendant to influence a witness in connection with the crimes charged in this case may be considered by you in light of all the other evidence in this case. You may consider whether this evidence shows a consciousness of guilt and determine the significance to be attached to any such conduct.

The indictment in this case alleges that the defendant is an Indian and that the alleged offenses occurred in Indian country. The existence of those two factors is necessary in order for this Court to have jurisdiction over the crimes charged in the indictment.

Counsel for the Government, counsel for the defendant, and the defendant have agreed or stipulated that the defendant is an Indian and that the place where the alleged incidents are claimed to have occurred is in Indian country.

The defendant has not, by entering this agreement or stipulation, 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 the defendant is an Indian and that the place where the alleged offenses are claimed to have occurred is in Indian country.

Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

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—whether guilty or not guilty—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.

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

Fourth, 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.

Fifth, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, Snapchat, LinkedIn, Instagram, YouTube, or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

Sixth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. 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.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. DUSTIN WITT, Defendant.</p>	<p>3:17-CR-30036-RAL VERDICT FORM</p>
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We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. We find the defendant Dustin Witt, _____ (fill in either “not guilty” or “guilty”) of assault with a dangerous weapon as charged in Count I of the indictment.

1.A. Answer if, and only if, you found the defendant “not guilty” as to assault with a dangerous weapon in Part 1 of this form, or if, after reasonable efforts, you are unable to reach a verdict as to assault with a dangerous weapon.
We find the defendant Dustin Witt, _____ (fill in either “not guilty” or “guilty”) of the lesser included offense of simple assault.

2. We find the defendant Dustin Witt, _____ (fill in either “not guilty” or “guilty”) of assault resulting in serious bodily injury as charged in Count II of the indictment.

2.A. Answer if, and only if, you found the defendant “not guilty” as to assault resulting in serious bodily injury in Part 2 of this form, or if, after reasonable efforts, you are unable to reach a verdict as to assault resulting in serious bodily injury.
We find the defendant Dustin Witt, _____ (fill in either “not guilty” or “guilty”) of the lesser included offense of assault by striking, beating, or wounding.

3. We find the defendant Dustin Witt, _____ (fill in either “not guilty” or “guilty”) of child abuse as charged in Count III of the indictment.

Dated August ____, 2017

Foreperson