16-F-9

FILED

2014 NOV -4 PM 8:21

JEFF FISH
CIRCUIT CLERK

CHARGE TO THE JURY

Ladies and gentlemen, you have heard the opening statements of the lawyers and you have heard the testimony of the witnesses in this case. In a few minutes, you will hear the closing arguments. I will now instruct you as to the law applicable to this case.

You are the sole judges of the facts. It is your sworn duty to follow the law as the court instructs you. You cannot change the law or apply what you think the law should be.

Do not pick out any one statement or instruction and ignore others. Do not draw any inference from the order or manner in which these instructions are given. Do not permit yourself to be influenced by sympathy, passion, prejudice or public sentiment.

Nothing said or done by the lawyers can be considered as evidence of the facts. Opening statements were intended to give you a brief outline of what each side expected to prove. The closing arguments are often helpful to refresh your memory, but your verdict cannot be based on opening statements or closing arguments. They are not evidence. Your recollection and interpretation controls.

Nothing that the Court has said or done is evidence. I have no opinion concerning any fact, the credibility of any witness, the weight of any evidence or the guilt or innocence of the defendant. The court does not favor either side. I stand completely neutral and impartial. My only interest is to see to it that the trial is conducted in accordance with the rules and the law.

Only consider the evidence presented. Do not guess or speculate as to what may have happened in the absence of evidence or testimony on a given point. You are sworn to try this case and render a verdict based on the law and the evidence, but you are not limited to the bald statements of the witnesses. You are permitted to draw reasonable inferences based on your own experience.

During this trial, the court has ruled on the admissibility of evidence. Do not be concerned with the reason for those rulings. Whether evidence is admissible or inadmissible is purely a question of law.

Do not guess what the answer might have been to any question to which an objection was sustained and do not speculate as to why the question was asked or the reason for the objection to the question. It is not only the right, but the duty of a lawyer to object evidence which he or she deems inadmissible or improper. The fact that a lawyer made such objections, motions, or offers of evidence, regardless of my rulings, must not prejudice you either for or against that side.

You may consider either direct evidence or circumstantial evidence. As a general rule the law makes no distinction between the two. Direct evidence of a fact is usually the testimony of a witness who saw, heard, or otherwise observed a fact. Circumstantial evidence of a fact is usually the testimony of a witness who saw, heard, or otherwise observed some separate circumstantial fact, which from the usual connection of cause and effect leads to a reasonable conclusion that the fact to be proved exists.

You must consider all of the evidence. However, you do not have to accept all of the evidence as true or accurate. You are the judges of the credibility or believability of each witness and you are the judges of the weight to be given to each witness' testimony. As used in this Charge, credibility of a witness means the truthfulness or lack of truthfulness of a witness. The weight of evidence means the extent to which you are, or you are not, convinced by the evidence.

The number of witnesses testifying on one side or the other is not alone the test of credibility or the weight of the evidence. You may believe one witness against a number of witnesses testifying differently. In determining what credit and weight you will give the

testimony when a witness has testified before you, you may consider a witness':

- good memory or lack of memory;
- interest or lack of interest in the outcome of the trial;
- relationship to any of the parties to the case or other witnesses;
- the demeanor or manner of testifying;
- the opportunity and means of having knowledge of the matters concerning which he or she testified;
- the intelligence or lack of intelligence;
- the reasonableness or unreasonableness of his or her testimony;
- apparent fairness or lack of fairness;
- bias, prejudice, hostility, friendliness or unfriendliness for or against the State or for or against the defendant; and
- the extent to which each witness is either supported or contradicted by other evidence.

A witness may be discredited or impeached by contradictory evidence or by a showing that they testified falsely concerning a material matter or by evidence that, at some other time, the witness has acted inconsistently with the witness' trial testimony in this case.

If you believe that any witness has been discredited or impeached, then it is within your province to give that testimony such credibility or weight, if any, as you think it deserves. You may believe parts of their testimony and reject any parts you believe are false.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact at issue, a witness qualified as an expert may testify and state his or her opinion concerning such matters.

However, expert testimony is not more conclusive than the testimony of any other witness. Just as in the case of non-expert witnesses, you may from all of the foregoing considerations and from all other evidence and circumstances appearing in the trial, give to the

testimony of an expert witness such credit and weight as you believe it is entitled. Furthermore, after weighing and considering the testimony and opinion of an expert, you may believe or disbelieve the testimony and the opinion of such witness in whole or part.

The burden is always on the State of West Virginia to prove the guilt of this defendant beyond a reasonable doubt. This defendant is not required to testify in this case or to prove his innocence in any way. The defendant has a constitutional right not to testify. The fact that he did not testify in his own behalf is not evidence and cannot be used by you as the basis for any inference of guilt. You are to entirely disregard and not even discuss the fact that this defendant did not testify in this trial.

This is a criminal case. The State of West Virginia has the burden of proof in all criminal cases. Criminal cases are brought to Court by way of what the law calls an indictment. The indictment is not to be considered by you in the slightest degree as any indication of guilt. An indictment is a mere formality, required by law, to inform a defendant of the charge against him. The indictment has no weight whatsoever as evidence against the defendant and you should not be influenced against him because of the indictment.

You will note that the indictment charges or alleges that the crimes were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged crime. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the crime was committed on a date reasonably near the date alleged.

In your deliberations, you must not discuss or consider punishment or permit any speculation concerning punishment to influence your verdict. The punishment provided by law for the crime charged in the indictment in this case is a matter exclusively within the province of the Judge.

The law presumes this defendant to be innocent of the crimes charged. Thus, the defendant, although accused, begins this trial with a "clean slate" – with no evidence against him. The law permits nothing but legal evidence presented to the jury for consideration in support of the charge against the defendant. The presumption of innocence alone is sufficient to acquit the defendant unless you are satisfied, beyond a reasonable doubt, of his guilt after careful and impartial consideration of all the evidence.

The presumption of innocence is not a matter of form, but it is a substantial part of the law which goes with the defendant throughout every part of this trial. If after hearing all the evidence in this case, there remains in the mind of the jury a reasonable doubt as to the guilt of the defendant, he is entitled to the benefit of that doubt and the jury must acquit him.

It is not required that the State prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is based upon reason and common sense – 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 to act upon it.

Remember that the defendant in a criminal case is never to be convicted on mere suspicion or guesswork. The burden is always on the State to prove guilt beyond a reasonable doubt and the defendant is not required to prove himself innocent. The burden of proof never shifts to the defendant. The law never imposes upon the defendant in a criminal case the burden or the duty of calling any witness or producing any evidence at all.

If the jury, after careful and impartial consideration of all the evidence in this case, has a reasonable doubt that the defendant is guilty, it must acquit him. If the jury views the evidence as reasonably permitting either of two conclusions or interpretations – one of innocence, the

other of guilt – the jury should, of course, adopt the conclusion of innocence.

You are here to determine the guilt or innocence of the defendant from the evidence in this case. The defendant is not on trial for any act or conduct or crimes not charged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial in this case as the defendant.

You have listened to recordings that have been received in evidence. There were transcripts of the recordings to help you identify speakers and as a guide to help you listen to the recordings. However, bear in mind that the recordings are the evidence, not the transcripts. If you heard something different from what appeared in the transcripts, what you heard is controlling.

The offense charged in the sole count of the Indictment in this case is Murder in the First Degree. One of four verdicts may be returned by you under the Indictment. They are: (1) not guilty; (2) guilty of Murder in the First Degree; (3) guilty of Murder in the Second Degree; and (4) guilty of Voluntary Manslaughter.

Murder in the First Degree is the unlawful, felonious, willful, malicious, deliberate, and premeditated killing of another person.

Murder in the Second Degree is the intentional killing of another person with malice but without deliberation or premeditation.

Voluntary Manslaughter is the felonious and intentional taking of another person's life, but without premeditation, deliberation or malice, upon sudden provocation and in the heat of passion.

Before the defendant can be convicted of Murder in the First Degree, the State of West Virginia must and prove to the satisfaction of the jury beyond a reasonable doubt that:

(1) The defendant, Micah Lemaster,

(2) in Cabell County, West Virginia,

(3) on or about the 18th day of March, 2015,

(4) did unlawfully,

(5) feloniously,

(6) willfully,

(7) maliciously,

(8) deliberately,

(9) premeditatedly,

(10) kill Joshua Martin.

If after impartially considering, weighing and comparing all the evidence, both that of the State and that of the defendant, the jury and each member of the jury is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Murder in the First Degree, you should find Micah Lemaster guilty of Murder in the First Degree as charged in the Indictment. If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of Murder in the First Degree, you shall find the Defendant, Micah Lemaster, not guilty of Murder in the First Degree and shall deliberate on the lesser included offense of Murder in the Second Degree as hereinafter instructed.

Before the defendant can be convicted of Murder in the Second Degree, the State of West Virginia must prove to the satisfaction of the jury beyond a reasonable doubt that:

(1) The defendant, Micah Lemaster,

(2) in Cabell County, West Virginia,

(3) on or about the 18th day of March, 2015,

(4) did intentionally,

(5) maliciously,

(6) but without deliberation or premeditation,

(7) kill Joshua Martin.

If after impartially considering, weighing and comparing all the evidence, both that of the State and that of the defendant, the jury and each member of the jury is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Murder in the Second Degree, you should find Micah Lemaster guilty of Murder in the Second Degree as charged. If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of Murder in the Second Degree, you shall find the Defendant, Micah Lemaster, not guilty of Murder in the Second Degree and shall deliberate on the lesser included offense of Voluntary Manslaughter as hereinafter instructed.

Before the defendant can be convicted of Voluntary Manslaughter, the State of West Virginia must prove to the satisfaction of the jury beyond a reasonable doubt that:

(1) The defendant, Micah Lemaster,

(2) in Cabell County, West Virginia,

(3) on or about the 18th day of March, 2015,

(4) did feloniously,

(5) unlawfully, and

(6) intentionally

(7) without premeditation, deliberation, or malice,

(8) upon sudden provocation and in the heat of passion

(9) kill Joshua Martin.

If after impartially considering, weighing and comparing all the evidence, both that of the State and that of the defendant, the jury and each member of the jury is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of voluntary manslaughter, you should find the defendant, Micah Lemaster, guilty of Voluntary Manslaughter as charged. If the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of voluntary manslaughter, you shall find Micah Lemaster not guilty.

There is a permissible inference of fact that a person intends that which he does or which is the immediate and necessary consequence of his act.

The word malice, as used in these instructions, is used in a technical sense. It may be either express or implied and it includes not only anger, hatred, and revenge, but other unjustifiable motives. It may be inferred or implied by you from all of the evidence in this case if you find such inference is reasonable from facts and circumstances in this case, which have been proven to your satisfaction beyond all reasonable doubt. It may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden. Malice is not confined to ill-will toward any one or more particular persons, but malice is every evil design in general; and it means that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved, and malignant spirit, and carry with them the plain indications of a heart, regardless of social duty, fatally bent upon mischief. It is not necessary that malice must have existed for any particular length of time and it may first come into existence at the time of the act or at any previous time.

Malice and intent to kill can be inferred by the jury from the defendant's use of a deadly weapon, under circumstances which you do not believe afforded the defendant excuse, justification, or provocation for his or her conduct.

To deliberate is to reflect, with a view to making a choice. If a person reflects even for a moment before he acts, it is sufficient deliberation.

To premeditate is to think of a matter before it is executed. Premeditation may occur in an instant. Premeditation implies something more than deliberation, and may mean the party not only deliberated, but formed in his mind the plan of destruction.

The terms "deliberate" and "premeditated" often carry a certain degree of overlap. To guilty of first degree murder one must not only intend to kill but in addition he must premeditate the killing and deliberate about it. "Deliberation" requires a cool mind that is capable of reflection. "Premeditation" requires that one with a cool mind did in fact reflect, at least for a short period of time before the act of killing. The intention to kill must be finally formed only as a conclusion of prior mediation and deliberation.

Murder in the First Degree consists of an intentional, deliberate and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period of time cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as to the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for First Degree Murder.

Reasonable provocation means those certain acts committed against the defendant which would cause a reasonable man to kill. Inherent in this concept is the further requirement that the provocation be such that it would cause a reasonable person to lose control of himself and act out of the heat of passion, and that he did in fact do so.

One of the questions to be determined by you in this case is whether or not the defendant acted in self-defense so as to justify his acts. Under the laws of this State, if the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he, or others, were in imminent danger of death or serious bodily harm from which he could save himself, or others, only by using deadly force against his assailant, then he had the right to employ deadly force in order to defend himself or others. Deadly force is force that is likely to cause death or serious bodily harm.

For the defendant to have been justified in the use of deadly force in self-defense, he must not have provoked the assault on him or have been the aggressor. Mere words, without more, do not constitute provocation or aggression. Prior threats and violence can negate criminal intent.

The circumstances under which he acted must have been such as to produce in the mind of a reasonable prudent person, similarly situated, the reasonable belief that the other person was then about to kill him or to do him serious bodily harm. In addition, the defendant must have actually believed that he was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it. Furthermore, with regard to the amount of force that can be used in self-defense, where one is threatened only with non-deadly force he may use only non-deadly force in return.

The reasonableness of the defendant's belief and actions in using deadly force must be judged in the light of the circumstances in which he acted at the time and is not measured by subsequently developed facts.

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.

The fact that a witness may be a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of any ordinary witness. It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witnesses and to give to that testimony whatever weight, if any, and find it deserves.

You as a jury must consider the circumstances in which the killing occurred to determine whether it fits into the first degree murder category. Relevant factors include: (1) the relationship of the accused and the victim and its condition at the time of the homicide; (2) whether plan or preparation existed either in terms of the type of weapon utilized or the place where the killing occurred; and (3) the presence of a reason or motive to deliberately take life.

No one factor is controlling. Any one or all taken together may indicate actual reflection on the decision to kill. This is what our statute means by "willful, deliberate and premeditated.

An intruder is a person who enters, remains on, uses, or touches land or chattels in another's possession without the possessor's consent.

Our society recognizes that the home shelters and is a physical refuge for the basic unit of society, the family. A man attacked in this own home by an intruder may invoke the law of self-defense without retreating. The occupant of a dwelling is not limited in using deadly force

against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.

The violent and unlawful entry into a dwelling with intent to injure the occupants or commit a felony carries a common sense conclusion that he may be met with deadly force.

In addressing the standard by which the reasonableness of an individual's beliefs and actions in self-defense must be judged, we have recognized that the reasonableness of such beliefs and actions must be viewed in light of the circumstances in which he acted at the time and not measured by subsequently developed facts.

A defendant who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he, or others, are in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself.

A defendant who is the aggressor may not rely on self-defense. Self-defense constitutes a complete justification for a homicide.

If after impartially considering, weighing and comparing all the evidence the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of First Degree Murder as set forth in the indictment, you shall find Micha E. Lemaster, not guilty of First Degree Murder.

As a juror, each of you must consider all of the evidence, and discuss your views with other jurors and listen to the views and discussion of other jurors during the course of deliberations. In the event your consideration and discussion of the evidence and the applicable law leads you to change your own opinion, do not be afraid or hesitate to do so. However, do

not feel that because other jurors have a different opinion as to the evidence that you are compelled to adopt their views and change your honest conviction unless their views have persuaded you that you should do so.

While it is very important that you make every reasonable effort to reach a just verdict inasmuch as this case has taken much effort in its preparation and in its presentation before you, it is even more important that your verdict be unanimous and is reached only after each one of you has made your own determination of the facts from the evidence according to the law.

In a criminal trial, the law requires the concurrence of all twelve jurors in the conclusion of guilt before a conviction can be had. Each juror should be satisfied beyond a reasonable doubt of the guilt of the accused before he or she should consent to a verdict of guilty. The Court, however, instructs you that the jury room is no place for pride or stubbornness and it is your duty to discuss and consider the evidence in a spirit of fairness and candor and, if possible, to conscientiously agree upon a verdict. However, if any juror after considering the evidence and after consulting with fellow jurors in a spirit of fairness should still entertain a reasonable doubt as to the guilt of the accused, you are not compelled to surrender your own conviction simply because all or some of the other jurors hold a different opinion.