

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

WALTER R. BURNLEY,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

06-CR-141-S-1

On November 9, 2006, this court held the final pretrial conference. Defendant Walter Burnley was present with his attorney, Alan Habermehl. The government was represented by Assistant United States Attorney John Vaudreuil.

First we discussed the voir dire questions. The parties suggested some minor changes which I adopted. A copy of the voir dire question is attached to this order.

Next we discussed the packet of jury instructions. The government asked the court to amplify the definition of “intimidation” by adding two sentences from the advisory committee comments on this rule. Burnley objected to any amplification of the pattern instruction. I found that the first of the requested sentences would be helpful to the jury while the second was not as important, so I granted half of the government’s request. Both sides might wish to argue this decision from opposite directions at the final hearing.

Out third topic was *in limine* issues. The parties dispute what level of detail F.R. Crim. Pro. 12.1(b)(1) requires the government to provide in response to Burnley’s notice of alibi.

The government has agreed to provide a bit more detail than its initial response. If the parties cannot resolve this dispute then they will promptly advise the court.

The government has proffered Burnley's criminal record pursuant to Rule 609 and has announced its intent to offer evidence describing Burnley's relationship with former co-defendant Lisa Harding, (*see* dkt. 42). Burnley has until November 14, 2006 to file any written objections with the court.

In response to Burnley's request for production of Harding's pre-sentence investigation report, I will review the PSR *in camera* and order disclosed any impeaching information about Harding.

I denied as moot Burnley's pending motion to identify the confidential informant (dkt. 31) because the government does not know the tipster's identity.

The parties are predicting that they will finish this trial in two days. One alternate juror will suffice. Burnley has access to street clothes for trial.

Entered this 13th day of November, 2006.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

STATEMENT OF THE CASE

v.

AND VOIR DIRE

WALTER R. BURNLEY,

06-CR-141-S

Defendant.

Statement of the case: This is a criminal case, in which the defendant, Walter R. Burnley, is charged with robbing three different branches of the Associated Bank in Beloit, a branch of the First National Bank in Beloit, and a branch of Anchor Bank in Janesville. The defendant has entered a plea of not guilty to these charges.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: this case will begin this morning and finish by this Wednesday. Are any of you actually unable to sit as jurors because of this schedule?

2. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

3. The court reads Pattern Jury Instructions of the Seventh Circuit:

Presumption of Innocence. The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

Burden of Proof. The government has the burden of proving the defendant's guilt beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendant, and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to rise, and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you regularly listen to talk radio, and if so, to which programs.

6. Do any of you in the jury box know each other from before today?

7. Have any of you or any members of your family ever held any sort of account, or obtained any sort of loan, or had any other financial dealings with any branch of Associated Bank, Anchor Bank, or the First National Bank? Would this affect your ability to be impartial in this case?

8. Have any of you or any members of your family ever been employed by Associated Bank, Anchor Bank or the First National Bank? Would this affect your ability to be impartial in this case?

9. Have any of you or any members of your family ever had a business relationship with Associated Bank, Anchor Bank or the First National Bank? Would this affect your ability to be impartial in this case?

10. Have any of you or any members of your family ever been employed by, or had any business relationship with any other bank, credit union, check-cashing business,

collection business or other financial business? Would this affect your ability to be impartial in this case?

11. Have any of you, your family or close friends ever been the victim of a robbery, attempted robbery or other violent crime? Would this affect your ability to be impartial in this case?

12. The defendant is African American. Would anything about the prosecution of an African American man for bank robbery affect your ability to be impartial in this case?

13. Do any of you, by virtue of past dealings with the United States government, or for any reason, have any bias for or against the government in a criminal case?

14. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

15. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement, investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?

16. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, or religion?

17. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

18. Would any of you judge the testimony of a witness who was African American differently from other witnesses solely because of the witness's ethnic heritage?

19. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was a defendant who was testifying?

20. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

21. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?

22. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

23. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

24. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

25. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

26. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

27. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

28. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in his case?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

JURY INSTRUCTIONS

v.

06-CR-141-S-1

WALTER R. BURNLEY,

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow my instructions on the law, even if you disagree with them. Each of the instructions is important. You must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. Do not allow any person's race, color, religion, national ancestry or sex to influence you.\

Nothing I say now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider among other things: the witness's age; the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

You should use common sense in weighing the evidence. Consider the evidence in light of your own observations in life. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

Some of you have heard the phrases “circumstantial evidence” and “direct evidence.” Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts that tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. You should consider all the evidence in the case, including the circumstantial evidence, in reaching your verdict.

Certain things are not evidence. I will list them for you:

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

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and must not influence your verdict.

Third, questions and objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your collective memory is what counts.

It is proper for a lawyer to interview any witness in preparation for trial.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

You have received evidence of a statement said to be made by the defendant to _____ on _____. You must decide whether the defendant did make the statement attributed to him. If you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself, and the circumstances under which the statement was made.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

You have heard evidence of acts of the defendant other than those charged in the indictment. Specifically, _____
You may consider this evidence only on the question _____.
You should consider this evidence only for these limited purposes.

You have heard evidence that _____
have been convicted of crimes. You may consider this evidence only in deciding whether the testimony of any of these witnesses is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard evidence about the character trait of _____
for untruthfulness. You should consider this evidence in deciding the weight that you will
give to their testimony.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

You have heard evidence about a number of the witnesses that may affect your evaluation of their testimony:

You have heard testimony from _____, who admitted lying under oath.

You have heard testimony that _____ has received benefits from the government in connection with this case. Specifically, _____.

You have heard testimony from _____, who stated that she was involved in the commission of the alleged crimes charged against the defendant.

The witness _____ has pleaded guilty to crimes arising out of the same allegations for which the defendant is now on trial.

The witness _____ has received immunity; that is, a promise from the government that any testimony or other information she provided would not be used against her in a criminal case.

You may give the testimony of all these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

Moreover, the guilty pleas of witnesses _____ cannot be considered as evidence against the defendants on trial now.

THE INDICTMENT

The defendant is charged in the indictment as follows:

[Court reads the indictment]

The indictment in this case is the formal method of accusing the defendant of a crime and placing the defendant on trial. It is not evidence against the defendant and does not create any implication of guilt.

The defendant is not on trial for any act or any conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome as to the defendant unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

THE ELEMENTS OF BANK ROBBERY

To sustain any of the charges in Counts 1, 2, 3, 4 or 5, the government must prove these elements:

1) The defendant took from the person or presence of another money belonging to, or was in the care, custody, control, management or possession of the bank named in the count that you are considering;

2) At the time charged in the count that you are considering, this bank had its deposits insured by the Federal Deposit Insurance Corporation; and

3) The defendant acted to take such money by intimidation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the count that you are considering, then you should find the defendant guilty of that count.

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the count that you are considering, then you must find the defendant not guilty of that count.

As used in the third element, “intimidation” means to say or do something in such a way as would place a reasonable person in fear. Actual fear is not required since intimidation may be inferred from conduct, words or circumstances, reasonably calculated to produce fear.

In order to meet its burden of proof as to the first element of any count, the government must prove that the money allegedly taken belonged to, or was in the care, or the custody, or under the control, or under the management of the bank named in the count that you are considering. The government does not need to prove all of these ways that the bank could have possessed and controlled the money, but it must prove at least one of them. Before you may find that the government has met this burden in any given count, all twelve of you must agree on whether the money specified in that count belonged to or was in the care, or the custody, or the control, or the possession, or under the management of the bank named in the count that you are considering.

The term “knowingly” means that the defendant realized what he was doing and was aware of the nature of his or her conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.

By themselves, the defendant's presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish the defendant's guilt.

If the defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

An offense may be committed by more than one person. The defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

If the defendant knowingly caused the acts of another, the defendant is responsible for those acts as though he personally committed them.

The defendant need not personally perform every act constituting the crime charged.
Every person who willfully participates in the commission of a crime may be found guilty.

Whatever a person is legally capable of doing he can do through another person by causing that person to perform the act. If the defendant willfully ordered, directed or authorized the acts of another, he is responsible for such acts as though he personally committed them.

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself or herself with the criminal venture, participate in it and try to make it succeed.

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court. A verdict form has been prepared for you. [Court reads verdict form.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign it.

Each count of the indictment charges the defendant with having committed a separate offense. You must give separate consideration to each count. You must consider each count and the evidence relating to it separate and apart from the other count. You should return a separate verdict as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to the defendant under any other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court. You will note from the oath about to be taken by the bailiffs that they too, 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. You must not reveal to any person, including the court, your numerical split on any verdict question until you have reached a unanimous verdict on every count.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

VERDICT

06-CR-141-S

WALTER R. BURNLEY,

Defendant.

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Walter R. Burnley,

("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Walter R. Burnley,

("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

COUNT 3

We, the Jury in the above-entitled cause, find the defendant, Walter R. Burnley,

("Guilty" or "Not Guilty")

of the offense charged in Count 3 of the indictment.

COUNT 4

We, the Jury in the above-entitled cause, find the defendant, Walter R. Burnley,

("Guilty" or "Not Guilty")

of the offense charged in Count 4 of the indictment.

COUNT 5

We, the Jury in the above-entitled cause, find the defendant, Walter R. Burnley,

("Guilty" or "Not Guilty")

of the offense charged in Count 5 of the indictment.

Presiding Juror

Madison, Wisconsin

Date: _____