

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH IRVING ASKEW,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

08-cr-170-bbc

On March 12, 2009, this court held the final pretrial conference. Defendant Kenneth Askew was present with his attorneys, Michael Lieberman and Erika Bierma. The government was represented by Assistant United States Attorney Timothy O'Shea.

Prior to the hearing, the court provided the parties with draft voir dire questions. The government suggested a few minor changes that Askew did not oppose. Askew had no additional changes to suggest. A copy of the final version of the voir dire is attached to this order. Both sides confirmed that they consented to me picking the jury in this case.

Prior to the hearing, the court provided the parties with a packet of draft jury instructions for their consideration. The government caught one typo and offered an instruction on use of transcripts of recordings. I revised the government's transcript instruction and both sides accepted my revision. Askew had no proposed changes to the instructions packet at this time, although at the hearing he orally flagged a substantive instruction that he intends to challenge at the close of the evidence. Specifically, Askew predicts that he will ask the court to excise the instruction on constructive possession. Askew's concern is that even if the jury disbelieves the testimony of every witness at trial about what happened on the night that he allegedly actually possessed the shotgun, the jury still might convict him of constructive possession simply because the police found this shotgun in the house in which he had been staying with his girlfriend. The government responds that it is impossible to argue or decide this issue until all of the witnesses

have testified. If Askew wishes to amplify his argument before trial, he may do so in his March 16, 2009 response to the government's trial memorandum (discussed below). In any event, a copy of the universe of jury instructions is attached to this order. The trial judge will tailor the instructions to fit the evidence actually admitted at trial.

The government filed four motions in limine to exclude certain types of evidence. *See* docket Nos. 21 - 24. Askew does not contest any of these motions and does not need rulings from the trial judge on them.

The government filed a trial memorandum, docket No. 25, in which it proffers the version of events it intends to prove at trial and raises some evidentiary issues that likely will need rulings from the court at the appropriate time. I gave Askew until Monday, March 16, 2009, to file any written response. Both sides agree that some of these evidentiary issues depend on how certain witnesses testify at trial. The burden is on the parties to seek the court's input and decision when a particular evidentiary dispute ripens.

The parties understand that after the jury pick their trial will begin Monday, March 23 at 1:00 p.m. and continue all day Tuesday, which is all the time they predict they will need. One alternate juror will suffice. Askew has access to street clothes. The parties had no other matters to bring to the court's attention.

Entered this 12th day of March, 2009.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

Voir Dire: United States v. Askew, 08-cr-170-jtm

Statement of the case: This is a criminal case, in which the defendant, Kenneth Irving Askew, is charged with unlawfully possessing a shotgun after having been convicted of a crime punishable by more than a year in prison, and with unlawfully possessing a sawed-off shotgun. The defendant has entered a plea of not guilty to the 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: Trial will begin this afternoon at 1:00 and continue through the rest of today and all of tomorrow (Tuesday). 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.

Whether you regularly use the Internet for purposes other than personal business such as e-mail and banking, and if so, what types of sites you like to visit.

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

7. How many of you own firearms or live with someone who possesses firearms? Would this affect your ability to be impartial in this case?

8. Other than what you have already told us, do any of you belong to any groups or organizations that concern themselves with firearms or the possession of firearms, either for or against? Would this affect your ability to be impartial in this case?

9. Do any of you have any strong opinions or feelings about firearms or the possession of firearms, either for or against? Would this affect your ability to be impartial in this case?

10. Are any of you familiar, from movies, television or other sources, with the type of firearm referred to as a sawed-off shotgun? Would this affect your ability to be impartial in this case?

11. You may hear evidence in this case that law enforcement officers recovered the firearm charged against the defendant when they responded to a report of a domestic dispute. Would this affect your ability to be impartial in this case?

12. Have any of you, your family or close friends ever been injured by a firearm? Would this affect your ability to be impartial in this case?

13. The defendant is African American. Would anything about the prosecution of an African American man for unlawfully possessing a handgun affect your ability to be impartial in this case?

14. 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?

15. 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?

16. 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?

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

18. Would any of you judge the credibility of a witness who had been convicted of a crime in the past differently from other witnesses solely because of this prior conviction?

19. 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?

20. 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?

21. 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?

22. 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?

23. 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?

24. 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?

25. 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?

26. 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.

27. 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?

28. 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?

29. 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?

30. 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
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UNITED STATES OF AMERICA,

Plaintiff,

v.

JURY INSTRUCTIONS

08-cr-170-jtm

KENNETH IRVING ASKEW,

Defendant.

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 judge the defendant's testimony in the same way as you judge the testimony of any other witness.

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 a 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 heard evidence that the defendant has been convicted of a crime. You may consider this evidence only for two purposes. First, you may use it to determine whether the government has proved all the elements of the offense charged in Count I as set forth below.

Second, you may use the fact of the defendant's conviction in deciding whether the defendant's testimony is truthful as a whole, in part, or not at all. You may not consider it for any other purpose.

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

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of the defendant's testimony in this trial.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that a 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 questions of _____. You should consider this evidence only for this limited purpose.

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 [reputation/opinion] evidence about the character trait of _____
_____ for truthfulness [or untruthfulness]. You should consider this evidence
in deciding the weight that you will give to _____'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant
_____ 's character trait for [truthfulness, peacefulness,
etc]. You should consider character evidence together with all the other evidence in the case
and in the same way.

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.

_____ has admitted lying under oath. You may
give his testimony such weight as you believe it deserves, keeping in mind that it must be
considered with caution and great care.

You have heard testimony that _____ have received benefits from
the government in connection with this case. Specifically, _____.
You may give the testimony of these witnesses such weight as you believe it deserves,
keeping in mind that it must be considered with caution and great care.

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications and all of the other evidence in the case.

During trial you heard recordings of conversations as part of the evidence in this case. While the recordings were playing, the court allowed you to use written transcripts of the conversations solely to help you identify who was speaking and to follow the conversations.

These transcripts, however, are not evidence. Only the recordings themselves are evidence. The transcripts are merely aids to understanding the recordings. Therefore, if you noticed any difference between what you heard on a recording and what you read in the transcript, then you must accept as evidence what you heard on the recording, not what you read in the transcript. Similarly, if there were parts of the recordings where you could not tell who was speaking or what a speaker was saying, then you cannot use the transcript to identify who was speaking or what was said. You must limit yourself to what you hear on the recordings.

THE INDICTMENT

The defendant is charged in the indictment as follows:

COUNT 1

On or about July 8, 2008, in the Western District of Wisconsin, the defendant, Kenneth Irving Askew, after having previously been convicted of a crime punishable by a term of imprisonment exceeding one year,

knowingly and unlawfully possessed a Mossberg Model 88 12 gauge shotgun bearing serial number MV05947G, said firearm having previously traveled in and affected interstate commerce.

COUNT 2

On or about July 8, 2008, in the Western District of Wisconsin, the defendant, Kenneth Irving Askew, knowingly and unlawfully possessed a firearm, namely weapon made from a Mossberg Model 88 12 gauge shotgun bearing serial number MV05947G, said weapon as modified having a barrel of less than 18 inches in length, which was not registered to him in the National Firearms Registration and Transfer Record.

The defendant has entered a plea of not guilty to these charges.

The indictment in this case is the formal method of accusing the defendant of crimes 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 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.

ELEMENTS OF THE CHARGE: COUNT 1

To sustain the charge against the defendant in Count 1, the government must prove these elements:

- 1) Prior to July 8, 2008, the defendant had been convicted of a crime that was punishable by a term of imprisonment of more than one year;
- 2) On or about July 8, 2008, the defendant knowingly possessed the firearm specified in Count 1; and
- 3) This firearm had traveled in interstate commerce prior to defendant's possession of it.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 1.

As to the first element of Count 1, the parties have stipulated that prior to July 8, 2008, the defendant had been convicted of a crime that was punishable by a term of imprisonment of more than one year. Therefore, you may conclude the government has met its burden of proof on the first element of Count 1.

ELEMENTS OF THE CHARGE: COUNT 2

To sustain the charge against the defendant in Count 2, the government must prove these elements:

- 1) The defendant knowingly possessed the weapon made from a shotgun specified in Count 2;

2) The defendant knew that this weapon was a shotgun and knew that its barrel length was less than 18 inches;

3) This firearm was not registered in the National Firearms Registration and Transfer Record.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 2.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 2.

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

“Interstate commerce” is commerce between two or more states.

When the word “knowingly” is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his 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.

With regard to the second element of Count 2, if the government proves that the defendant knew the specified weapon was a shotgun, then the government also must prove that the defendant knew that this shotgun's barrel length was less than 18 inches. In determining what the defendant knew regarding the weapon's barrel length, you may infer knowledge from any externally obvious characteristics of the weapon.

With regard to the third element of Count 2, the government does not have to prove that the defendant knew that this weapon was not registered in the National Firearms Registration and Transfer Record.

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.

[Form of verdict read.]

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 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.

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 before you until after you have reached a unanimous verdict.

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH IRVING ASKEW,

Defendant.

VERDICT

08-cr-170-jtm

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Kenneth Irving Askew,

("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, Kenneth Irving Askew,

("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

Presiding Juror

Madison, Wisconsin

Date: _____