UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM, a/k/a
JOHN BOY PATTON and
VINE RICHARD MARSHALL a/k/a
RICHARD VINE MARSHALL a/k/a
DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' PROPOSED JURY INSTRUCTIONS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 22, 2010, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana L. Hanna

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
☒ Electronic Case Filing

/s/ Robert A. Mandel

Robert A. Mandel
Assistant United States Attorney

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GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 1

WIRETAP OR OTHER TAPE-RECORDED EVIDENCE

You have heard tape recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.

Source: 8th Circuit Model Pattern Jury Instruction §2.5.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 2

TRANSCRIPT OF TAPE-RECORDED CONVERSATION

There is a typewritten transcript of the tape recordings you have heard. The transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you keep track of the speakers. Differences in meaning between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice. It is what you hear, however, and not what you read, that is the evidence.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the tape recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Source: 8th Circuit Pattern Jury Instruction §2.06; see also, United States v. Arlo Looking Cloud, Jury Instruction No. 9 (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 3

STATEMENTS BY THE DEFENDANT

You have heard testimony the defendant made statements to law enforcement and to other witnesses. It is for you to decide as to each purported statement:

first, whether the defendant made the statement; and

second, if so, how much weight you should give to it.

In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made.

Source: 8th Circuit Model Pattern Jury Instruction §2.07, See also, United States v. Arlo Looking Cloud, Jury Instruction No. 10.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 4

INFLUENCING WITNESS, ETC.

Attempts by a defendant to make up evidence or influence a witness in connection with the crime charged in this case may be considered by you in light of all other evidence in the case. You may consider whether this evidence shows a consciousness of guilt and determine the significance to be attached to any such conduct.

Source: 8th Circuit Model Pattern Jury Instruction §4.09.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 5

OPINION EVIDENCE, EXPERT WITNESS

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their 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' 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.

Source: 8th Circuit Model Pattern Jury Instruction §4.10. United States v. Arlo Looking Cloud, Instruction No. 13.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 6

SILENCE IN THE FACE OF ACCUSATION

Evidence has been introduced that a statement accusing the defendant of the crime charged in the Indictment was made, and that the defendant did not deny the accusation or object to the statement. If you find the defendant was present and actually heard and understood the statement, and that it was made under such circumstances that the defendant would be expected to deny or object to it if it were not true, then you may consider whether the defendant's silence was an admission of truth of the statement.

Source: 8th Circuit Pattern Jury Instruction §4.14. See generally, Jenkins v. Anderson, 447 U.S. 231 (1980); Fletcher v. Weir, 455 U.S. 603 (1982). Post-arrest silence by a defendant after Miranda warnings have been given is inadmissible against the defendant. Doyle v. Ohio, 426 U.S. 610 (1976). If a defendant gives a statement, however, his silence as to other matters may be admitted. Anderson v. Charles, 447 U.S. 404 (1980); see United States v. Mitchell, 558 F.2d 1332, 1334-35 (8th Cir. 1997). A defendant's pre-arrest silence may be admitted, Jenkins v. Anderson, 447 U.S. 231 (1980) as well as silence after arrest but prior to warnings. Fletcher v. Weir, 455 U.S. 603 (1982).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 7

FALSE EXCULPATORY STATEMENTS

When a defendant voluntarily and intentionally offers an explanation, or makes some statement before trial tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

Source: 8th Circuit Model Pattern Jury Instructions §4.15 (committee comment). False exculpatory statements are properly admissible as substantive evidence tending to show consciousness of guilt. United States v. Hudson, 717 F.2d 1211, 1215 (8th Cir. 1983). This Circuit has repeatedly held that an instruction of this nature "is properly given when a defendant . . . offers an exculpatory explanation which is later proven to be false." United States v. Wells, 702 F.2d 141, 144 (8th Cir. 1983); United States v. Hudson, 717 F.2d 1211 (8th Cir. 1983); see also Rizzo v. United States, 304 F.2d 810, 830 (8th Cir. 1962).

Wells also held that such an instruction does not unfairly penalize the criminal defendant who, upon confrontation, denies the crime rather than remain silent. 702 F.2d at 144. Hudson further held such an instruction proper because it permits the jury to attach as much or as little significance to the statement as it chooses. 717 F.2d at 1215.

United States v. Toby Bolzer, CR 02-50025 (D. SD).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 8

INDICTMENT TIME FRAME

The Superseding Indictment charges that the offense alleged was committed "on or about" a certain date. Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the Superseding Indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

Source: United States v. Arlo Looking Cloud, Instruction No. 17.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 9

MURDER STATUTE

18 U.S.C. § 1111 provides:

Murder is the lawful killing of a human being with malice aforethought. . . . . [A]ny . . . . kind of willful, deliberate, malicious, and premeditated killing ... is murder in the first degree.

Source: United States v. Arlo Looking Cloud, Instruction No. 18. 18 U.S.C. § 1111.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 10

MURDER, FIRST DEGREE, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES

The crime of murder in the first degree as charged in Count I of the Superseding Indictment has five (5) essential elements, which are:

One: That the defendant, at the time and place alleged in the Superseding Indictment, killed, or aided and abetted the killing of, Annie Mae Aquash aka Annie Mae Pictou.

Two: That the defendant did so with malice aforethought as defined in Instruction No. ____.

Three: That the killing was premeditated as defined in Instruction No. _____.

Four: That the defendant is an Indian or aided and abetted an Indian in the commission of the offense.

Five: That the offense took place in Indian Country.

To sustain its burden of proof for the crime of first degree murder as charged in the Superseding Indictment, the government must prove all of these essential elements beyond a reasonable doubt, otherwise you must find the defendant not guilty of this crime.

Source: 8th Circuit Pattern Jury Instructions 6.18.1111A, and 5.01 (aiding and abetting).

18 U.S.C. § 2 provides as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir.) cert. denied 490 U.S. 1028 (1989) ("to be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense. Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares a reckless intent of the offense.") H.R. Rep. No. 1038, 94th Cong., 2d Sess, 1 reprinted in 1976 US Code Cong. & Admin. News 1125 (Congress' desire that Indians and non-Indians committing the same crime be subject to the same punishment was clearly expressed in the legislative history of the 1976 amendments to the Major Crimes Act). United States v. Walking Eagle, 974 F.2d 551, 553 (4th Cir. 1992) (under the Major Crimes Act, a federal court has jurisdiction over a non-enumerated offense if, as a matter of federal trial procedure, the court is permitted to instruct the jury on the lesser included, non-enumerated offense). United States v. Yankton, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (federal jurisdiction for accessory after the fact pursuant to 18 U.S.C. § 3). Felicia v. United States, 495 F.2d 353, 355 (8th Cir. 1974) (federal jurisdiction in the context of lesser included offenses). United States v. White Horse, 316 F.3d 769, 772-73 (8th Cir. 2003) (even if non-Indian status was element of charge violation of 1152, government's failure to prove non-Indian status was not error since the defendant's conviction was sustainable under 1153 if he was an Indian, and under 1152 if he was not); see also United States v. Driver, 945 F.2d 1410 (8th Cir. 1991).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 11

MURDER, FIRST DEGREE, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES

The crime of murder in the first degree as charged in Count II of the Superseding Indictment has five (5) essential elements, which are:

One. That the defendant, at the time and place alleged in the Superseding Indictment, killed, or aided and abetted the killing of, Annie Mae Aquash aka Annie Mae Pictou.

Two: That the defendant did so with malice aforethought as defined in Instruction No. ____.

Three: That the killing was premeditated as defined in Instruction No. _____.

Four. That Annie Mae Aquash aka Annie Mae Pictou was an Indian.

Five. That the offense took place in Indian Country.

To sustain its burden of proof for the crime of first degree murder as charged in the Superseding Indictment, the government must prove all of these essential elements beyond a reasonable doubt, otherwise you must find the defendant not guilty of this crime.

Source: 8th Circuit Pattern Jury Instructions 6.18.1111A, and 5.01 (aiding and abetting).

18 U.S.C. § 2 provides as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir.) cert. denied 490 U.S. 1028 (1989) ("to be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense. Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares a reckless intent of the offense.") H.R. Rep. No. 1038, 94th Cong., 2d Sess, 1 reprinted in 1976 US Code Cong. & Admin. News 1125 (Congress' desire that Indians and non-Indians committing the same crime be subject to the same punishment was clearly expressed in the legislative history of the 1976 amendments to the Major Crimes Act). United States v. Walking Eagle, 974 F.2d 551, 553 (4th Cir. 1992) (under the Major Crimes Act, a federal court has jurisdiction over a non-enumerated offense if, as a matter of federal trial procedure, the court is permitted to instruct the jury on the lesser included, non-enumerated offense). United States v. Yankton, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (federal jurisdiction for accessory after the fact pursuant to 18 U.S.C. § 3). Felicia v. United States, 495 F.2d 353, 355 (8th Cir. 1974) (federal jurisdiction in the context of lesser included offenses). United States v. White Horse, 316 F.3d 769, 772-73 (8th Cir. 2003) (even if non-Indian status was element of charge violation of 1152, government's failure to prove non-Indian status was not error since the defendant's conviction was sustainable under 1153 if he was an Indian, and under 1152 if he was not); see also United States v. Driver, 945 F.2d 1410 (8th Cir. 1991).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 12

AIDING AND ABETTING

A person may be found guilty of first degree murder even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of first degree murder.

In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

1. Have known first degree murder was being committed or going to be committed; and
2. Have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of first degree murder.

For you to find the defendant guilty of first degree murder by reason of aiding and abetting, the government must prove, beyond a reasonable doubt, that all of the essential elements of first degree murder were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

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

Source: 8th Circuit Model Jury Instruction §5.01; United States v. Arlo Looking Cloud, Instruction No. 20.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 13

MALICE AFORETHOUGHT DEFINED

As used in these instructions, "malice aforethought" means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.

In determining whether Annie Mae Aquash aka Annie Mae Pictou was unlawfully killed with malice aforethought, you should consider all the evidence concerning the facts and circumstances preceding, surrounding and following the killing which tend to shed light upon the question of intent.

Source: 8th Circuit Pattern Jury Instruction §6.18.1111A-1; United States v. Arlo Looking Cloud Jury Instruction No. 21.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 14

PREMEDITATION DEFINED

A killing is premeditated when it is intentional and the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the defendant, after forming the intent to kill, to be fully conscious of his intent, and to have thought about the killing.

For there to be premeditation the defendant must think about the taking of a human life before acting. The amount of time required for premeditation cannot be arbitrarily fixed. The time required varies as the minds and temperaments of people differ and according to the surrounding circumstances in which they may be placed. Any interval of time between forming the intent to kill, and acting on that intent, which is long enough for the defendant to be fully conscious and mindful of what he intended and willfully set about to do, is sufficient to justify the finding of premeditation.

Source: 8th Circuit Pattern Jury Instruction §6.18.1111A-2; United States v. Arlo Looking Cloud Jury Instruction No. 22.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 15

PROOF OF INTENT OR KNOWLEDGE

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 that may aid in a 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.

Source: 8th Circuit Pattern Jury Instruction §7.05; United States v. Arlo Looking Cloud Jury Instruction No. 23.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 16

KNOWINGLY

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 acts or omissions 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.

Source: 8th Circuit Pattern Jury Instruction §7.03 (committee comments modified); United States v. Arlo Looking Cloud Jury Instruction No. 24 (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 17

"INDIAN" DEFINED

An "Indian" is a person who:

(1) has some Indian blood; and

(2) the person is "recognized" as an Indian.

In determining whether a person is recognized as an Indian you may consider, among other matters:

(a) whether the person is enrolled in a tribe.

(b) whether the government has recognized either formally or informally that the person is an Indian through providing the person with assistance reserved only to Indians.

(c) whether the person enjoys the benefits of tribal affiliation.

(d) whether the person is socially recognized as an Indian through living on the reservation and participating in Indian social life.

The term "Indian Country" includes, but is not limited to, all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

Source: United States v. Arlo Looking Cloud Jury Instruction No. 25 (modified); United States v. Lawrence, 51 F.3d 150, 153 (8th Cir. 1995) (citing St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988)); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); United States v. Bruce, 394 F.3d 1215, 1223-24 (9th Cir. 2005); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976) (emphasis on importance of individual having held themselves out to be Indian).