

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

v.

Case No. 06-50064

HOLLIS WAYNE FINCHER

DEFENDANT

JURY INSTRUCTION INDEX

1. Introduction (8<sup>th</sup> Cir. 3.01)
2. Duty of the jury (8<sup>th</sup> Cir. 3.02)
3. Evidence; Limitations (8<sup>th</sup> Cir. 3.03)
4. Direct and Circumstantial Evidence (O'Malley, Grenig & Lee 12.04 (modified))
5. Credibility of Witnesses (8<sup>th</sup> Cir. 3.04, AMI 103)
6. Expert Witnesses (8<sup>th</sup> Cir. 4.10)
7. Description of Charges; Indictment not Evidence of Guilt; Presumption of Innocence; Burden of Proof (8<sup>th</sup> Cir. 3.06)
8. Count One - Possession of a Machine Gun - Elements of Offense (18 U.S.C. § 922(o); 8<sup>th</sup> Cir. 3.09; 6.26.5861 (modified))
9. Machine Gun - Definition (26 U.S.C. § 5845(b))
10. Count Two - Possession of an Unregistered Firearm - Elements of Offense (26 U.S.C. § 5861(d); 8<sup>th</sup> Cir. 3.09, 6.26.5861)
11. Sawed-Off Shotgun - Definition (26 U.S.C. § 5845(a), (d))
12. Possession: Actual, Constructive, Sole, Joint (8<sup>th</sup> Cir. 8.02)
13. Knowingly - Definition (8<sup>th</sup> Cir. 7.03 Comment)
14. Proof of Intent or Knowledge (8<sup>th</sup> Cir. 7.05)
15. "Reasonable Doubt" Explained (8<sup>th</sup> Cir. 3.11)
16. "On or About" - Explained (O'Malley, Grenig & Lee 13.05)
17. Election of Foreperson and Jury Deliberation (8<sup>th</sup> Cir. 3.12)

INSTRUCTION NO. 1

INTRODUCTION

Members of the jury, the instructions I gave you at the beginning of trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of or during the trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. All instructions, whenever given and whether in writing or not, must be followed.

AUTHORITY: 8th Circuit Model Instruction 3.01.

INSTRUCTION NO. 2

DUTY OF THE JURY

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

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

AUTHORITY: 8th Circuit Model Instruction 3.02.

INSTRUCTION NO. 3

EVIDENCE; LIMITATIONS

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses, the documents received as exhibits, any facts that have been stipulated -- that is, formally agreed to by the parties -- and any facts that have been judicially noticed.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence. For example, if a lawyer asked a witness a question which contained an assertion of fact, you may not consider the assertion as evidence of the fact, because the lawyer's statements are not evidence.

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by any such objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

4. Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction, and consider that evidence only for the purpose allowed.

AUTHORITY: 8th Circuit Model Instruction 3.03.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. Both types of evidence may properly be considered by you.

A fact is established by direct evidence when, for example, it is proved by witnesses who testify as to what they saw, heard, or experienced.

A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case. You may recall my example concerning snow, which I mentioned to you in my preliminary instructions.

While it is important for you to know the difference between direct and circumstantial evidence, it is equally important for you to know that the law makes no distinction between them, and that you may properly consider both kinds of evidence in deciding the facts which are to be decided by you.

AUTHORITY: (O'Malley, Grenig & Lee, Fed. Jury Prac. & Instr. (5<sup>th</sup> ed.) 12.04 (modified))

INSTRUCTION NO. 5

CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said; or only part of it; or none of it.

You are the sole judges of the weight of the evidence and the credibility of the witnesses.

In determining the credibility of any witness and the weight to be given to the testimony of that witness, you may take into consideration the demeanor of the witness while on the stand; any prejudice the witness may have for or against any party; the means the witness had of acquiring knowledge concerning any matter to which the witness testified; any interest the witness may have in the outcome of the case; and the consistency or inconsistency of the testimony of the witness as well as its reasonableness or unreasonableness.

~~You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness. [TO BE GIVEN ONLY IF DEFENDANT TESTIFIES]~~

AUTHORITY: 8th Circuit Model Instruction 3.04; AMI3d 103.

INSTRUCTION NO. 6

EXPERT WITNESSES

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 opinions.

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 education and experience of the witness, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

AUTHORITY: 8th Circuit Model Instruction 4.10.

INSTRUCTION NO. 7

DESCRIPTION OF CHARGES, ETC.

The indictment in this case charges the defendant with two different crimes.

Under Count 1, the indictment charges that the defendant committed the crime of knowingly possessing a machine gun, namely any one or more of the following: (1) A homemade Browning model 1919 .308 caliber machine gun, further described as bearing the following inscription: "Browning 1919 Borne by Hollis Wayne Fincher Black Oak Arkansas Amendment 2 is invoked SN61505 Non-commercial"; (2) a homemade Sten type design machine gun 9 mm, further described as having camouflage painting; and (3) a homemade Browning model 1919 .308 caliber machine gun, further described as bearing the following inscription: "W Fincher Non-commercial Amendment 2 is invoked Black Oak ARX 7Q01;"

Under Count 2, the indictment charges that the defendant committed the crime of knowingly possessing a firearm, namely a sawed off shotgun, further described as a Remington model 870 express magnum 12 gauge short barreled shotgun, serial number A861076M, not registered to him in the National Firearms Registration and Transfer Record.

The defendant has pleaded not guilty to each of these charges.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the

contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the Government proves, beyond a reasonable doubt, each essential element of the crime charged.

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

**There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict. [GIVE ONLY IF DEFENDANT REQUESTS]**

AUTHORITY: Eighth Circuit Model Instruction 3.06.

*We requested*

INSTRUCTION NO. 8

COUNT ONE - POSSESSION OF A MACHINE GUN -

ELEMENTS OF OFFENSE

Count One of the Indictment charges the defendant with possession of a machine gun. The essential elements of this offense are:

*One*, the defendant knew he had the firearm in his possession;

*Two*, the defendant knew the firearm was a machine gun, namely any one or more of the following: (1) A homemade Browning model 1919 .308 caliber machine gun, further described as bearing the following inscription: "Browning 1919 Borne by Hollis Wayne Fincher Black Oak Arkansas Amendment 2 is invoked SN61505 Non-commercial," (2) a homemade Sten type design machine gun 9 mm, further described as having camouflage painting, and (3) a homemade Browning model 1919 .308 caliber machine gun, further described as bearing the following inscription: "W Fincher Non-commercial Amendment 2 is invoked Black Oak ARX 7QQ1;" and

*Three*, the firearm was capable of operating as designed.

If all of these essential elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of possessing a machine gun, as charged in Count One of the Indictment; otherwise, you must find the defendant not guilty of this offense.

may not

AUTHORITY: 18 U.S.C. § 922(o); Eighth Circuit Model  
Instructions 3.09, 6.26.5861(modified).

INSTRUCTION NO. 9

"MACHINE GUN" - DEFINITION

The term "machine gun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term also includes the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

AUTHORITY: 26 U.S.C. § 5845(b).

COUNT TWO - POSSESSION OF AN UNREGISTERED FIREARM -

ELEMENTS OF OFFENSE

Count Two of the Indictment charges the defendant with possession of an unregistered firearm, a sawed off shotgun further described as a Remington model 870 express magnum 12 gauge short barreled shotgun, serial number A861076M, not registered to him in the National Firearms Registration and Transfer Record. This offense has four essential elements, which are:

One, the defendant knew he had the firearm in his possession;

Two, the defendant knew the firearm was a sawed off shotgun further described as a Remington model 870 express magnum 12 gauge short barreled shotgun, serial number A861076M;

Three, the firearm was capable of operating as designed; and

Four, the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.

If all of these essential elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of possessing an unregistered firearm, as charged in Count Two of the Indictment; otherwise, you must find the defendant not guilty of this offense.

AUTHORITY: 26 U.S.C. § 5861(d); Eighth Circuit Model Instructions 3.09, 6.26.5861.

INSTRUCTION NO. 11

"SAWED-OFF SHOTGUN" - DEFINITION

The term "sawed-off shotgun" means a weapon having a barrel of less than 18 inches in length or a weapon having an overall length of less than 26 inches that is designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

AUTHORITY: 26 U.S.C. § 5845(a), (d).

INSTRUCTION NO. 12

POSSESSION: ACTUAL, CONSTRUCTIVE, SOLE, JOINT

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word "possession" has been used in these instructions it includes actual as well as constructive possession and also sole as well as joint possession.

AUTHORITY: Eighth Circuit Model Instructions 8.02.

INSTRUCTION NO. 13

"KNOWINGLY" - DEFINITION

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.

AUTHORITY: Eighth Circuit Model Instructions 7.03 (Comment).

INSTRUCTION NO. 14

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 WHICH MAY AID IN A DETERMINATION OF 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.

AUTHORITY: Eighth Circuit Model Instructions 7.05.

INSTRUCTION NO. 15

REASONABLE DOUBT

A reasonable doubt is a doubt based on reason and common sense, and not the mere possibility of innocence. A reasonable doubt is 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 on it and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

AUTHORITY: Eighth Circuit Model Instruction 3.11

INSTRUCTION NO. 16

"ON OR ABOUT"

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

AUTHORITY: (O'Malley, Grenig & Lee, Fed. Jury Prac. & Instr. (5<sup>th</sup> ed.) 13.05

INSTRUCTION NO. 17

ELECTION OF FOREPERSON AND JURY DELIBERATION

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do without violence to individual judgment because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if it should be necessary, during your deliberations, to communicate with the court, you may do so by sending a note by

the bailiff. It is not appropriate for me to communicate with less than all of the jury since you are a corporate body. Accordingly, any communication must be from the entire jury and I must require that the foreperson sign any such communication so as to so indicate. I will respond as soon as possible either in writing or on the record in open court.

Remember that you are not to reveal to any person -- not even the court -- how the jury stands on the questions before it, numerically or otherwise, while you are deliberating and before you have returned your unanimous verdict and it has been accepted by the court.

During your deliberations, no member of the jury should ever attempt to communicate with the court individually concerning any matter touching on the merits of the case and the court, likewise, will not communicate with any individual member of the jury on any subject touching on the merits of the case.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Your verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

Fifth, you are not to consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Finally, the verdict form is simply the written notice of the decision that you reach in this case.

You will take this form to the jury room and when each of you has agreed on the verdict, your foreperson will fill in the appropriate form, sign and date it, and advise the bailiff that you are ready to return to the courtroom.

AUTHORITY: 8th Circuit Model 3.12.

INSTRUCTION NO. 5

CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said; or only part of it; or none of it.

You are the sole judges of the weight of the evidence and the credibility of the witnesses.

In determining the credibility of any witness and the weight to be given to the testimony of that witness, you may take into consideration the demeanor of the witness while on the stand; any prejudice the witness may have for or against any party; the means the witness had of acquiring knowledge concerning any matter to which the witness testified; any interest the witness may have in the outcome of the case; and the consistency or inconsistency of the testimony of the witness as well as its reasonableness or unreasonableness.

AUTHORITY: 8th Circuit Model Instruction 3.04; AMI3d 103.

contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the Government proves, beyond a reasonable doubt, each essential element of the crime charged.

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

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

AUTHORITY: Eighth Circuit Model Instruction 3.06.

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

v.

Case No. 06-50064

HOLLIS WAYNE FINCHER

DEFENDANT

VERDICT FORM

VERDICT AS TO COUNT ONE: Do you find, beyond a reasonable doubt, that Hollis Wayne Fincher possessed a machine gun, as charged in Count One of the Indictment?

\_\_\_\_\_  
(yes or no)

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date

VERDICT AS TO COUNT TWO: Do you find, beyond a reasonable doubt, that Hollis Wayne Fincher possessed an unregistered firearm, as charged in Count Two of the Indictment?

\_\_\_\_\_  
(yes or no)

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date

*250/1/0  
Vigorous  
1/5/07/06/1*