

STRAFFORD COUNTY THE STATE OF NEW HAMPSHIRE SUPERIOR COURT

The State of New Hampshire

v.

Chad Evans

Docket No.: 00-S-888 - 896-F & 934/935-I

JURY INSTRUCTIONS

Members of the jury, the evidence and arguments in this case have been completed. I will now instruct you as to the law that applies in this case. You will then retire to decide a verdict.

In order to reach a fair and just verdict, you must understand and follow the law as I explain it to you. For example, you have to understand the definition of the crimes with which the defendant is charged. You have to understand how convinced one way or the other you should be before you reach a verdict. You have to understand what to consider in deciding whether to believe a particular witness. These instructions will explain the law as to these and other matters so that you can reach a fair and just verdict.

It is your duty as jurors to follow all of the instructions I am about to give you. Regardless of any opinion you may have as to what the law ought to be, the law as I explain it to you is the law you must follow in reaching your verdict.

It is up to you to decide the facts in this case. You must decide the facts solely from the evidence in this trial. You must apply the law I will give to you in these instructions to the facts and in this way reach a fair and just verdict. You should decide

the facts in this case without prejudice, without fear, and without sympathy.

The fact that the defendant **Chad Evans** has been arrested, charged or indicted, and brought to stand trial is not evidence of guilt. The indictment or charge is simply a way of giving the defendant notice of the accusations against him, a formal way of accusing the defendant of a crime in order to bring the defendant to trial. In your deliberations, you must not consider the fact of defendant's arrest, the indictment, or the defendant's being brought to stand trial as evidence of guilt of the defendant.

The defendant has an absolute right not to take the witness stand to testify. The fact that the defendant did not testify in this case may not be considered by you in any way in deciding this case. The State has the burden of proving guilt beyond a reasonable doubt. The defendant has no obligation to present evidence or to prove that he is innocent.

The possible punishment the defendant may receive if you return a guilty verdict should not influence your decision. The duty of imposing sentence is for the judge. You should base your verdict only on the evidence presented without considering the issue of punishment.

You have heard the lawyers discuss the facts and the law in their arguments to you and through questioning witnesses. Arguments are not evidence. Their purpose is to help you understand the evidence and the law. If the lawyers have stated the law differently from the law as I explain it to you in these

instructions, then you must follow these instructions and ignore the statements of the lawyers. If the lawyers have stated the evidence differently from how you recall it, then you should follow your own memory of what the evidence was.

Now let me tell you what is evidence. The evidence in this case consists of the testimony under oath of the witnesses and the exhibits which have been admitted into evidence. You must base your decision solely on the evidence presented.

During the trial the lawyers made objections. The lawyers are supposed to object when they believe that certain evidence is not admissible. If I sustained an objection or excluded any evidence, you must not guess as to what the answer or evidence would have been. If I ordered that a question and answer be stricken from the record, you must not consider either the question or the answer as evidence. As you will recall, I ordered the testimony of Corey Merrill stricken. That means you may not consider any of his testimony in your deliberations. Let me state again the reason why. Corey Merrill declined to continue to answer questions. Therefore, counsel for the defendant did not have a full chance to cross-examine him. Cross examination is an important way to test the reliability of any witnesses testimony. Therefore, because Mr. Merrill declined to answer cross examination questions, his testimony cannot be considered as reliable and admissible. Under these circumstances, I am directing you not to consider Mr. Merrill's testimony in any way during your jury deliberations.

If I overruled an objection and permitted a witness to answer the question, you must not give that testimony any greater weight than any other testimony simply because I allowed its introduction over an objection. I am not expressing views as to the importance of evidence when I make my rulings. I am merely applying the law as is my duty.

If you believe that I have expressed or suggested an opinion as to the facts in my rulings, you should ignore such an opinion. The Court in this case, as in all cases, is completely neutral and impartial. It is up to you alone to decide the facts in this case.

You may not guess or speculate about evidence. You may only consider what has been introduced into evidence and the reasonable inferences that you can draw from the evidence. By reasonable inferences, I mean conclusions which reason and common sense lead you to draw from the facts that are proven to your satisfaction.

There are two types of evidence: direct and circumstantial.

Direct evidence is the testimony of a person who claims to have personal knowledge of facts about the crime charged, such as an eyewitness.

Circumstantial evidence is proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. There is no distinction between the weight to be given either direct or circumstantial evidence. Both types of evidence are equally acceptable and may be sufficient to establish the elements of a crime beyond a reasonable doubt. However, to be sufficient to establish guilt beyond a reasonable doubt, a case

based solely on circumstantial evidence must exclude all other rational conclusions consistent with innocence. This means that if, from the circumstantial evidence, it is rational to arrive at two conclusions, one consistent with guilt and one consistent with innocence, then you must choose the rational conclusion consistent with innocence. However, you do not consider each item of circumstantial evidence in isolation. In determining whether all other rational conclusions have been excluded, you should consider each item of circumstantial evidence in the context of all the other evidence, which includes all other circumstantial evidence and direct evidence.

Keep in mind the State is not required to prove each fact or each piece of evidence beyond a reasonable doubt, nor is it required to rule out every hypothesis except that of guilt. Rather, the State must prove the elements of the crime beyond a reasonable doubt and, if the case rests on circumstantial evidence, the State must exclude all rational conclusions consistent with innocence.

The rule requiring you to exclude all other rational conclusions applies only to circumstantial evidence not direct evidence. Let me give you an example that will demonstrate the distinction. (EXAMPLE)

In reviewing the evidence, you should consider the quality of the evidence not the quantity. It is not the number of witnesses or quantity of evidence that is important, but rather what the witnesses have to say and how persuaded you are.

In deciding whether the State has proven the charge against the defendant, you must decide the credibility of witnesses; that is, it is up to you to decide whom to believe. If there is any conflict between the witnesses, then you must resolve the conflict and decide what the truth is. Simply because a witness has taken an oath to tell the truth does not mean that you have to accept the testimony as true.

In deciding which witnesses to believe, you should use your common sense and judgment. I suggest you consider a number of factors: whether the witness appeared to be candid, whether the witness appeared worthy of belief, the appearance and demeanor of the witness, whether the witness had an interest in the outcome of the case, whether the witness had any reason for not telling the truth, whether what the witness said seemed reasonable or probable, whether what the witness said seemed unreasonable or inconsistent with the other evidence in the case, or with prior statements by the witness, and whether the witness had any friendship or animosity towards other people in this case.

You should consider these factors in deciding the credibility of all the witnesses whether or not they happen to be ordinary citizens, police officers, or expert witnesses. The credibility of a witness who is also a law enforcement agent or officer is entitled to no greater weight than a civilian witness and is to be viewed by you by the same standards as you weigh civilian testimony.

In deciding which witnesses to believe and how much of their testimony to believe, you should consider both the direct and cross-examinations of the witnesses regardless of who called the witness. It may be that a witness called by one side may have something helpful to offer for the other side.

You can accept all of what a witness has said; you can reject all of what a witness has said; or you can accept some of it and reject some of it.

In deciding whether you believe a witness, you may also consider whether the witness made statements before trial which were not consistent with what the witness said at trial. If the witness made an inconsistent statement before trial, you may use that statement in deciding whether to believe that witness. You may not use the statement made before trial as proof that the facts in the statement are true. The statement made before trial is only to be used by you in deciding whether to believe a witness.

Evidence has been introduced regarding statements the defendant offered to explain certain bruising on Kassidy. If you find the defendant intentionally made statements tending to demonstrate his innocence or to influence a witness, and that the statements are later discovered to be false, then you may consider whether the statements show a consciousness of guilt and determine what significance ^{if any} to give such evidence.

You've also heard the testimony of certain individuals who were qualified as experts. You are not required to accept an expert witness's opinion. An expert's opinion is subject to the

same rules concerning reliability as the testimony of any other witness in the case. It is given to you in order to assist you in reaching a decision in the case. It is not controlling on your judgment of the facts. You may reject an expert's opinion if you decide that the facts are different from the facts that form the basis of the expert's opinion, and you may also reject an expert's opinion if, after careful consideration of all the evidence in the case, expert or other, you disagree with that opinion.

In examining an expert witness, an attorney may ask hypothetical question(s). A hypothetical question is one in which an expert witness is asked to assume that certain facts are true and to give an opinion based upon that assumption.

It is for you to decide from all of the evidence whether or not the facts, assumed in the hypothetical, have been actually proved. If you do not think the facts assumed have been proved, you should disregard the opinion based on those facts.

If, however, you think the facts assumed have been established by the evidence, you may consider the opinion and give it the weight you think it deserves. Such an answer is essentially expert or opinion evidence, and like all other evidence of this nature, you may accept or reject it, in whole or in part, according to your best judgment.

Evidence has been introduced that the defendant made a statement concerning the crime charged. You should carefully examine the circumstances surrounding the statement to decide whether it was made freely and voluntarily. If you decide that the

defendant gave a statement freely and voluntarily, then you may use the statement together with all the other evidence in deciding a verdict. For the defendant's statement to be free and voluntary, he must give the statement with an understanding of what he is saying. The statement must be given without fear, threats, coercion or force, and without promise or reward. If you find that the statement was not made freely and voluntarily by the defendant, you must not use it as evidence in reaching a verdict.

In deciding whether the statement was free and voluntary, you may consider the nature of the full exchange between the police and the defendant, including whether the defendant was warned of his rights, the time and place the statement occurred, the length of time that the defendant was questioned, the other persons present, the physical and mental condition of the defendant and all other circumstances surrounding the making of the statement. You may also consider the age, education, experience, character and intelligence of the defendant.

A statement is not involuntary simply because it was the product of interrogation, or was made while the defendant was under arrest, or was made without the defendant's lawyer present, or was made without the defendant being warned that he had a right to remain silent and that the statement could be used against him. However, you should consider such circumstances in deciding whether the statement was given freely and voluntarily.

The burden is on the State to prove beyond a reasonable doubt that the alleged statement was voluntary. Unless you are convinced

that the State has proven beyond a reasonable doubt that the statement was voluntary, you must not consider the statement in deciding a verdict.

Under our Constitutions, all defendants in criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt. The burden of proving guilt is entirely on the State. The defendant does not have to prove his innocence. The defendant enters this courtroom as an innocent person, and you must consider him to be an innocent person unless and until the State convinces you beyond a reasonable doubt that he is guilty of every element of the alleged offense. It is not enough for the State to prove the defendant is ^{Possibly} probably guilty, rather the State must prove the defendant's guilt beyond a reasonable doubt. If, after all the evidence and arguments, you have a reasonable doubt as to whether the defendant has committed any one or more of the elements of an offense charged, then you must find him not guilty as to that offense.

A "reasonable doubt" is just what the words would ordinarily imply. The use of the word "reasonable" means simply that the doubt must be reasonable rather than unreasonable; it must be a doubt based on reason. It is not a frivolous or fanciful doubt, nor is it one that can be easily explained away. Rather, it is such a doubt based upon reason that remains after consideration of all of the evidence that the State has offered against it. The test you must use is this: If you have a reasonable doubt as to whether the State has proved any one or more of the elements of a

crime charged, you must find the defendant not guilty. However, if you find that the State has proved all of the elements of an offense charged beyond a reasonable doubt, you should find the defendant guilty as to such offense.

The laws of New Hampshire set forth certain crimes. If it's not defined in the criminal code it isn't a crime. And each crime has a precise definition. The definition of each crime requires that the State prove both that a defendant committed certain acts and that he acted with a certain mental state. So crimes have at least two parts: an action and a mental state.

In deciding whether a person is guilty of a crime, it is necessary for you to know both what a person's actions were and what his mental state was. The words "mental state" refer to what a person mentally believes his physical acts will accomplish; and the word "act" refers to a physical deed. For a person to be guilty of a crime, he must have the requisite mental state, and he must have physically acted to do something that is criminal.

The matter of determining a person's mental state is something that you will have to decide. And there is often no direct evidence of the mental state because there's no way of examining the operation of a person's mind. So you should consider all of the facts and all of the circumstances in the evidence in the case in deciding whether or not the State has proven the requisite mental state.

Each of the charges against the defendant constitute a

separate offense. You must consider each charge separately and determine whether the State has proven the defendant's guilt beyond a reasonable doubt as to each charge. The fact that you may find the defendant guilty or not guilty on one of the charges should not influence your verdict with respect to the other charges. And your verdict with respect to each charge must be unanimous.

In this case, the defendant is charged with 1 Count of Second Degree Murder, 1 Count of First Degree Assault, 6 Counts of Second Degree Assault, 1 Count of Simple Assault and 1 Count of Endangering the Welfare of a Child. Remember, the State does not have to prove beyond a reasonable doubt each and every fact upon which it relies at trial, but the State must prove each part of the definition of each crime beyond a reasonable doubt.

As you may recall, the defendant was originally charged with 2 counts of First Degree Assault. There is now only one count of First Degree Assault before you for your consideration, the charge alleging that the defendant fractured Kassidy's leg. You must not guess or speculate about why only one charge involving First Degree Assault remains.

Let me first define the crime of Second Degree Murder. The definition of Second Degree Murder has 3 parts. The State must prove each part of the definition beyond a reasonable doubt. Thus, the State must prove:

1. That the defendant caused the death of Kassidy Bortner.

That is, you must find that the defendant caused injury which was a direct and substantial factor in bringing about Kassidy's

death.

2. That the defendant's actions in bringing about death occurred in New Hampshire. You need not find that death occurred in New Hampshire, but you must find the defendant's actions in bringing about death occurred in New Hampshire, and;

3. That the defendant acted recklessly under circumstances showing an extreme indifference to the value of human life.

To prove that the defendant acted recklessly, the State must prove:

First, that the defendant was aware of a substantial and unjustifiable risk. This means there must be proof that the defendant knew that there was a substantial risk that his conduct would cause Cassidy's death.

Second, if the defendant was aware of the risk, there must be proof that the defendant consciously disregarded the risk. In other words, the defendant decided to disregard the risk and took a chance in doing certain acts that Cassidy's death would occur.

Third, you must examine the circumstances known to the defendant. From what he knew of the circumstances, you must decide whether his disregard of the risk was a gross deviation from what a law abiding person would have done. The key words here are "gross deviation." If you find that the defendant's actions were unreasonable or thoughtless, that is not enough. To find that the defendant acted recklessly, you must find that his disregard of the risk was a substantial departure from the actions of a law abiding person under the same circumstances.

It is not enough for the State to prove that the defendant acted negligently; that is, it is not enough to prove that the defendant failed to become aware of the risk involved. The State must prove that the defendant was aware of the risk and consciously disregarded it.

For a killing to be Second Degree Murder, the defendant must not simply act recklessly, but rather must act recklessly under circumstances showing an extreme indifference to the value of human life. This means something more than merely being aware of and consciously disregarding a substantial and unjustifiable risk. The circumstances must show a blatant disregard for the value of human life. It is not enough if the evidence shows a gross deviation from law abiding conduct. The State must prove what may be called a "depraved heart murder."

If you find the defendant not guilty of Second Degree Murder, you may go on to consider whether the defendant is guilty of the lesser included offense of Manslaughter. A lesser included offense is a similar but less serious crime. However, you may not consider whether the defendant is guilty or not guilty of Manslaughter unless you first find him not guilty of Second Degree Murder.

The definition of Manslaughter has 3 parts. The State must prove each part of the definition beyond a reasonable doubt. Thus, the State must prove:

1. That the defendant caused the death of Cassidy Bortner.

That is, you must find that the defendant caused injury which were a direct and substantial factor in bringing about Cassidy's

death.

2. That the defendant's actions in bringing about death occurred in New Hampshire. You need not find that death occurred in New Hampshire, but you must find the defendant's actions in bringing about death occurred in New Hampshire, and;

3. That the defendant acted recklessly, as I have already defined that term on page 13.

The difference between Second Degree Murder and Manslaughter is that to prove Second Degree Murder, the State must prove the defendant caused Cassidy's death recklessly, under circumstances manifesting an extreme indifference to the value of human life. However, to prove Manslaughter, the State must prove the defendant caused Cassidy's death recklessly. Proof of Manslaughter does not require proof of extreme difference to the value of human life.

Let me now define the crime of First Degree Assault. As I just explained, only the charge alleging the defendant fractured Cassidy's leg remains for your consideration. The definition of the crime has four parts, or elements. Thus, the State must prove the following beyond a reasonable doubt.

1. That the defendant acted recklessly, as I have already defined that term on page 13.

2. That the defendant caused serious bodily injury to Cassidy Bortner by fracturing Cassidy's leg.

Serious bodily injury means any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or function of any part of the body.

3. That the defendant's conduct causing serious bodily injury occurred in New Hampshire, and;

4. That Cassidy was under the age of 13 years old.

Let me now define the crime of Second Degree Assault. As you may recall, the defendant is charged with six counts of Second Degree Assault, each alleging the same conduct, squeezing Cassidy's face. One charge alleges an assault occurred in September, 4 charges allege an assault occurred once a week in October and one charge alleges an assault occurred in November. Each charge alleges a separate crime and you must consider each charge separately and return a unanimous verdict as to each indictment. The definition has four parts or elements. Thus, the State must prove the following beyond a reasonable doubt:

1. That the defendant acted knowingly.

To prove the defendant acted knowingly, the State must prove that the defendant was aware that his conduct would cause bodily injury. The State does not have to prove that the defendant specifically intended to commit the crime or that he had a desire to do so. What the State must prove is that the defendant was aware his conduct would cause bodily injury;

2. That the defendant caused bodily injury to Cassidy Bortner; bodily injury means harm to the body of another person.

3. That the defendant's conduct causing bodily injury occurred in New Hampshire, and;

4. That Cassidy was under the age of 13 years at the time of the offense.

Again, you must consider all eight charges separately and reach a unanimous verdict as to each offense.

Let me now define the crime of Endangering the Welfare of a Child. The definition of the crime has 4 parts, or elements. Thus the State must prove the following beyond a reasonable doubt:

1. That the defendant acted knowingly, as I have already defined that term above.

2. That the defendant endangered the welfare of Kassidy.

3. That Kassidy was under the age of 18 years at the time, and;

4. That the defendant endangered Kassidy's welfare by purposely violating a duty of care he owed to Kassidy, to provide her care and supervision.

Let me now define the crime of Simple Assault. The definition of the crime of simple assault has 2 parts. The State must prove each part of the definition beyond a reasonable doubt. Thus, the State must prove:

1. The defendant acted knowingly, as I have already defined that term on page 16, and;

2. That the defendant caused unprivileged physical contact to Amanda Bortner.

Ladies and gentlemen, this case is important to both of the parties, the State and the defendant. In your deliberations, you should follow these instructions which the Court has given you. You should not decide this case out of bias or sympathy, but with honesty and understanding. You should make a conscientious effort to determine what a fair and just result is in this case because that is your highest duty as officers of this Court.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each and every juror agree with the verdict. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view towards reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your views and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or merely for the purpose of returning a verdict.

Attorneys

→ 1) # 6
2) # 9
3) # 10
