UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIE KELLAM,

Plaintiff,

v.

OFFICER GARY HEMBREE,
in his Official and Individual Capacities,

Defendant.

Case No. 11-14310

Hon. Linda V. Parker

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1. Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction alone as stating the law, but consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

2. Unless I state otherwise, you should consider each instruction given to apply separately and individually to each party in the case.

3. Unless you are otherwise instructed, the evidence in the case consists of the sworn testimony of the witnesses regardless of who called the witness, all exhibits received in evidence regardless of who may have produced them, and all facts and events that may have been admitted or stipulated to [*and all facts and events that may have been judicially noticed*].

Statements and arguments by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statement, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. However, when the lawyers on both sides stipulate or agree on the evidence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

[*I may take judicial notice of certain facts or events. When I declare that I will take judicial notice of some fact or event, you must, unless otherwise instructed, accept my declaration as evidence and regard as proved the fact or event which has been judicially noticed.*]

Any evidence to which I have sustained an objection and evidence that I have ordered stricken must be entirely disregarded.

4. Plaintiff, Willie Kellam, has the burden of proof in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If Plaintiff should fail to establish any essential element of his claims by a preponderance of the evidence in the case, you should find for Defendants as to that claim.

"To establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proven by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

You may have heard of the term "proof beyond a reasonable doubt." This is a stricter standard that applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

5. When I instruct you that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean that you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

6. Generally speaking, there are two types of evidence that are generally presented during a trial – direct evidence and circumstantial evidence. "Direct evidence" is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. "Indirect or circumstantial" evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

7. You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw reasonable inferences from the facts you find to have been proven; as long as those inferences seem justified in light of your experience.

"Inferences" are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

8. You have a right to consider all the evidence in the light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of any particular fact in this case, that knowledge may not be used as evidence.

9. You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict; and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the evidence of each witness such weight, if any, that you may think it deserves. In short, you may accept or reject the testimony of any witness, in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

10. To impeach means to call into question the veracity or truthfulness of a witness. A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness' present testimony.

If you believe that any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, as you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness' other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

11. A witness may be discredited or impeached by evidence that the witness has been convicted of a felony, that is, an offense punishable by death or imprisonment for in excess of one year.

If you believe that any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, as you think it deserves.

12. The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

13. Plaintiff claims that one or more Police officers, acting under color of law, intentionally violated his rights under the Fourth Amendment to the Constitution of the United States by subjecting him to excessive force. Plaintiff claims that he was subjected to excessive force during the course of a lawful arrest. Specifically, Plaintiff claims that he was unconstitutionally struck, kicked, and/or punched while he was taken into custody.

Plaintiff's federal claim is for a violation of his Fourth Amendment rights. He does not have any other claims under federal law.

The Police Officers deny violating Plaintiff's Fourth Amendment rights. Specifically, Defendant Gary Hembree maintains that Plaintiff did not comply with the Officer's directives, resisted arrest and willfully sought to evade apprehension from the outset of this incident. Further, Defendant Hembree maintains that he used only that force which was reasonably necessary under the circumstance to effectuate Plaintiff's arrest. Defendant further asserts that he is innocent of any fault or wrongdoing in regard to the incident sued upon.

14. Plaintiff must prove by a preponderance of the evidence that Officer Hembree was personally involved in the conduct that the Plaintiff complains about. You may not find Defendant liable for what other officers may or may not have done. Each Officer's liability must be assessed individually based on his own actions.

15. In order to prove his claims, the burden is upon plaintiff to establish by a preponderance of the evidence each of the following elements:

> First: Defendant performed acts which operated to deprive Plaintiff of his Fourth Amendment rights, as defined and explained in these instructions, by subjecting him to excessive force;
>
> Second: Defendant then and there acted under color of law; and
>
> Third: That the acts Defendant were the proximate cause of damages sustained by Plaintiff.

With respect to the second element of Plaintiff's claims – that the Defendant acted under color of law – the parties stipulate that Defendants were acting under color of law at the time of the events which are the subject of this suit. Therefore, this second element of Plaintiff's case is not at issue.

16. Plaintiff claims that Defendant violated his Fourth Amendment right to be free from excessive force by striking him. In lawfully detaining a person, a law enforcement officer has the right to use such force as is necessary under the circumstances to detain the person. Whether or not the force used in detaining a person was unreasonable is a question to be determined by you in light of all of the evidence received in the case.

You must determine the degree of force that a reasonable and prudent law enforcement officer would have applied in effecting the arrest under the circumstances shown from the evidence received in this case. In determining whether an Officer use excessive force, you may consider:

1. The extent of the injury suffered;

2. The need for the application of force;

3. The relationship between the need and the amount of force used;

4. The threat reasonably perceived by the responsible officials; and

5. Any efforts made to temper the severity of a forceful response. Injuries which result from, for example, an officer's use of force to overcome resistance to arrest, do not involve constitutionally protected interests.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with hindsight. The nature of reasonableness must allow for the fact that law enforcement officers are

often forced to make split-second judgments – under circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

This reasonableness inquiry is an objective one. The question is whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation.

17. Plaintiff has also has made a claim for assault and battery. An assault is any intentional, unlawful threat or offer to do bodily injury to another by force, under circumstances which create a well-founded fear of imminent peril, coupled with the apparent present ability to carry out the act if not prevented.

18. A battery is the willful or intentional touching of a person against that person's will by another.

19. An arresting officer may use such force as is reasonably necessary to effect a lawful arrest. However, an officer who uses more force than is reasonably necessary to effect a lawful arrest commits a battery upon the person arrested to the extent the force used was excessive.

20. Plaintiff also claims that Defendant is responsible for the intentional infliction of emotional distress. For this claim, Plaintiff has the burden of proving each of the following:

a. that Defendant's conduct was extreme and outrageous,

b. that Defendant's conduct was intentional or reckless,

c. that Defendant's conduct caused Plaintiff severe emotional distress, and

d. that Defendant's conduct caused Plaintiff damages.

21. If you conclude that Defendant violated Plaintiff's Fourth Amendment rights, Assaulted or Battered Plaintiff, or Intentionally Inflected Emotional Distress to Plaintiff you must also determine if Defendant's conduct was a proximate cause of any injury or damage to Plaintiff.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result; or a reasonable probable consequence of the act or omission.

"Proximate cause" means, first, that there must have been a connection between Defendant's actions and Plaintiff's injury, and, second, that the occurrence which is claimed to have produced the injury was a natural and probable result of Defendant's conduct.

Your verdict will be for Plaintiff if he proves all elements of any one of the three claims (Violation of Fourth Amendment, Assault and Battery, or Intentional Infliction of Emotional Distress) , and that his damages were proximately caused by Defendant's conduct. Your verdict will be for Defendant if Plaintiff has failed to prove any one of those elements.

22. If you find for Plaintiff you must determine his damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate Plaintiff for the deprivation of civil rights, the assault and battery, or the intentional infliction of emotional distress proximately caused by Defendant. Damages may not be based on speculation or sympathy. They must be based on the evidence presented at trial and only that evidence. However, it is not necessary for Plaintiff to prove the amount of his damages with certainty.

You should consider the following elements of damages to the extent you find them proven by a preponderance of the evidence, and no others:

1. The reasonable cost of Plaintiff's medical care and hospitalization;

2. An amount for any pain and suffering, emotional distress and humiliation that you find from the evidence Plaintiff endured or will endure as a result of the actions of Defendant. Even though it is obviously difficult to establish a standard of measurement for this element, that difficulty is not grounds for denying recovery. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view but from a fair and impartial point of view of the amount of pain and suffering, emotional distress and humiliation that Plaintiff incurred or will incur as a result of the Defendant's actions, and you must place a

money value on this, attempting to come to a conclusion that will be fair and just to the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages.

3. Punitive damages, if any, as I will explain more in these instructions later.

If you find for Plaintiff, but you find that he has failed to prove damages, you shall return an award of nominal damages not to exceed one dollar or another nominal amount. The mere fact that a constitutional deprivation has been shown to have occurred is an injury to the person entitled to enjoy that right, even when no actual damages flow from the deprivation.

23. If you find that Defendant is liable for Plaintiff's injuries, you must award Plaintiff the compensatory or nominal damages that he has proven. If you find Defendant liable for Plaintiff's injuries due to Violation of the Fourth Amendment, you also may award punitive damages. To obtain punitive damages, Plaintiff must prove by a preponderance of the evidence that Defendant either knew his actions violated federal law or acted in a callous or reckless indifference to that risk

If you decide to award punitive damages, the amount to be awarded is also within your sound discretion. The purpose of punitive damages is to punish a defendant or deter that defendant and others from engaging in similar conduct in the future.

Factors you may consider include, but are not limited to, the nature of Defendant's conduct (how reprehensible or blameworthy was it), the impact of that conduct on Plaintiff, the ratio between the actual compensatory damages and the punitive damages, the relationship between Plaintiff and Defendant, the likelihood that Defendant or others would repeat the conduct if the punitive award is not made, and any other circumstances shown by the evidence, including any mitigating or extenuating circumstances that bear on the question of the size of such an award. You may determine reprehensibility by considering the nature and extent of the harm; whether the conduct showed indifference to or disregard for the health or safety of others; whether the conduct involved repeated actions or was an isolated

instance; and whether the harm was the result of intentional malice.

24. The fact that I have instructed you as to the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance only in the event you should find in favor of Plaintiffs from a preponderance of the evidence in the case in accordance with the other instructions.

25. The verdict must represent the considered judgment of twelve of you. In order to return a verdict, it is necessary that six jurors agree. Your verdict does not have to be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without disregard of individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that 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.

26. Upon retiring to the jury room, you will select one of your members to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court. A Special Verdict form has been prepared for your convenience. You will take this form to the jury room.

The special verdict forms set forth several questions that you are to answer. Some of the questions call for a "Yes" or "No" answer, while others call for a monetary amount. The answer to each question must be the answer of at least six of the jurors. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question. You will see from the instructions set forth in the special verdict forms and the wording of the questions themselves that it may not be necessary to answer certain questions depending on your responses to earlier questions. Simply follow the instructions set forth in the Special Verdict form and you should have no problem understanding how to complete the form. Upon completion of the Special Verdict form, the foreperson will then date and sign it; and you will then return with it to the courtroom.

27. Nothing said in these instructions and nothing in any verdict forms prepared for your convenience is meant to suggest or convey in any way or manner any suggestion or hint as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

28. If it becomes necessary during your deliberations to communicate with me, 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 me by any means other than a signed writing, and I 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 me – how the jury stands, numerically or otherwise, on the questions before you, until after seven of you have reached a verdict.