

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

DEMETRIUS COOPER,

Plaintiff,

v.

JEFFREY MEYER, PATRICK GORMAN, and
CORY SABISH,

Defendants.

PRELIMINARY
INSTRUCTIONS
[DRAFT 4.13.2018]

16-cv-766-jdp

Members of the jury, we are about to begin the trial of this case. I will begin by describing to you your duties as jurors and giving you instructions concerning this case. This will take about 15 minutes; I will give you written copies of all of my instructions so you will have them when you deliberate.

The party who begins the lawsuit is called the plaintiff. In this case, the plaintiff is Demetrius Cooper, who is a prison at the Waupun Correctional Institution (WCI). The party against whom the suit is brought is called the defendant. In this case, the defendants are Jeffrey Meyer, Patrick Gorman, and Cory Sabish, who are correctional officers at WCI.

On February 4, 2016, Meyer and Gorman handcuffed Cooper to a cell door when Cooper said he might harm himself if left alone in his cell. Cooper says that Meyer and Gorman responded inappropriately to Cooper's mental health needs, that Meyer used excessive force when handcuffing him, and that Gorman and Sabish saw

Meyer use excessive force but failed to intervene. Cooper also says that after he filed this lawsuit, Gorman retaliated against him by placing a razor blade in his food.

The Eighth Amendment to the United States Constitution protects prisoners from cruel and unusual punishment. Not every use of force against a prisoner violates the Eighth Amendment. But a correctional officer may not use extreme or excessive force for the purpose of causing a prisoner harm. Nor may a correctional officer fail to prevent the excessive use of force if he has a reasonable opportunity to do so. Nor may a correctional officer intentionally disregard a prisoner's serious medical need.

The First Amendment to the United States Constitution protects certain forms of speech, and it bars state actors from retaliating against those who engage in speech.

Your job, as jurors in this case, is to decide whether Meyer, Gorman, and Sabish violated Cooper's Eighth Amendment rights and whether Gorman violated Cooper's First Amendment rights. I will give you more detailed instructions about how to decide these questions after you hear the evidence.

A. Functions of the court and the jury

One of my duties as the judge in this case is to decide all questions of law and procedure. In these preliminary instructions, during trial, and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision. The instructions that I give you at the end of the trial will be more detailed than the instructions that I am giving you now.

You have two duties as jurors. Your first duty is to decide the facts from the evidence that you see and hear in court. Your second duty is to take the law as I give it to you, apply it to the facts, and decide whether Meyer, Gorman, and Sabish violated Cooper's Eighth Amendment rights and whether Gorman violated Cooper's First Amendment rights.

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you. You should not take anything that I say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

B. How the trial will proceed

The trial will proceed in six basic phases.

First, plaintiff will make an opening statement outlining his case. Immediately after plaintiff's statement, defendants' counsel will also make an opening statement outlining defendants' case. An opening statement is not evidence. Rather, it is a preview and an explanation from each party as to what that party expects the evidence will show.

Second, after opening statements, plaintiff will introduce evidence in support of his claims. At the conclusion of the plaintiff's case, defendants may introduce evidence. And, finally, plaintiff may choose to introduce rebuttal evidence.

Third, after the evidence has been presented, I will instruct you on the law that you are to apply in reaching your verdict. I will give you copies of all of my instructions, so you will have them in writing when you deliberate.

Fourth, the parties will make closing arguments. Closing arguments are not evidence. Rather, they are an opportunity for each side to explain to you what they think the evidence has shown and to persuade you how to apply the law to this evidence. Plaintiff will make the first closing argument and can make a short rebuttal argument after the defendants' closing argument.

Fifth, I will give you a couple more instructions about how you should conduct your deliberations.

Sixth, you will go to the jury room to deliberate on your verdict.

The trial day usually will run from 9 a.m. until 5:30 p.m. Usually, you will have at least an hour for lunch and two additional short breaks, one in the morning and one in the afternoon. Sometimes I will have to adjust this schedule to take care of something in another case, so we will be somewhat flexible. The courtroom is often kept at a cold temperature; I encourage you to bring clothing that will keep you comfortable in a range of conditions.

C. No juror communication during the trial

During recesses you should keep in mind the following instructions:

First, do not discuss the case either among yourselves or with anyone else during the course of the trial.

I realize that this case is the one thing you all have in common, but you must not talk about it, even amongst yourselves, until it is time to deliberate. Once you express an opinion, there is a natural tendency to defend it and this might make you resist changing your mind. The parties have a right to expect that you will keep an open mind throughout the trial. You should not reach any conclusions about this case until you have heard all of the evidence, you have heard the parties' closing arguments, you have received my instructions on the law, and you have retired to deliberate with the other members of the jury about your verdict.

I must warn you in particular against commenting about the trial in an email, blog, Snapchat, Twitter, Facebook, or any other communication medium. There have been news accounts recently about cases that have had to be re-tried because a member of the jury communicated electronically about the case during the trial. You can imagine what this would mean in the cost of a re-trial, the inconvenience to your fellow jurors whose work would have gone for nothing, and the stress experienced by the parties.

Second, do not permit any third person to discuss the case in your presence.

If anyone tries to talk to you despite your telling them not to, report that fact to the court as soon as you are able. Do not discuss the event with your fellow jurors or

discuss with them any other fact that you believe you should bring to the attention of the court.

Third, do not do any reading or research about this case.

You must not read about the case on the internet, in newspapers, or in magazines, and you must not listen to radio or television broadcasts about the trial. If a headline catches your eye, do not examine the article further. Media accounts may be inaccurate and may contain matters that are not proper for your consideration. No matter how interested you may become in the facts of the case, you must not do any independent research, investigation, or experimentation of any sort. As I have explained, you must base your verdict solely on the evidence presented here in court.

You will not have to explain your verdict to anyone. When this case is completely over, I will tell you that you can discuss the case with others if you want to. But until then, you should not discuss the case at all.

D. The evidence

You must decide the case based on the evidence, and I want to make sure you understand what counts as evidence and how you should consider it.

I. Evidence defined

You may consider only the evidence that you see and hear in court. You may not consider anything that you may or see or hear outside of court, including anything from a newspaper, television, radio, the internet, or from any other source.

The evidence includes only what the witnesses say when they are testifying under oath, the exhibits that I allow into evidence, and any facts to which the parties stipulate. A stipulation is an agreement that certain facts are true.

Nothing else is evidence. Any statements and any arguments that the parties make are not evidence. If what a party says is different from the evidence as you hear or see it, then the evidence is what counts.

The questions and objections of the parties or their lawyers likewise are not evidence. When an objection is made, then I will be required to rule on the objection. If I sustain an objection to a question that a party asks, then you must not speculate as to what the answer might have been. If I strike testimony or an exhibit from the record, or if I tell you to disregard something, then you must not consider it.

Pay close attention to the evidence as it is being presented. During your deliberations, you will have any exhibits that I allow into evidence, but you will not

have a transcript of the testimony. You will have to make your decision based on what you recall of the evidence.

You can take notes during the trial if you wish. Take notes only if you want to and if you think that they will help you remember the evidence when you are deliberating. Do not let notetaking interfere with your careful listening to all of the evidence and your evaluation of the credibility of the witnesses. If you take notes, you should use them during deliberations only as an aid to your memory of what happened during the trial. The notes are not evidence, and you should not be unduly influenced by the notes of other jurors. Each of you should rely on your own independent recollection of the evidence.

2. Considering the evidence

Give the evidence whatever weight you believe it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience. 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.

You may have heard the terms “direct evidence” and “circumstantial evidence.” Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that proves a fact indirectly, by proving some facts that allow you to infer that some other fact exists. For example, direct evidence that it was raining outside is testimony by a witness that she was outside and she saw it raining. Indirect evidence

that it was raining outside is testimony by a witness that she was inside and saw people enter the building carrying wet umbrellas. You should consider both direct and circumstantial evidence. One type of evidence is not automatically better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

Part of your job as jurors is to decide how believable each witness is, and how much weight to give each witness's testimony. You may accept all of what a witness says, or part of it, or none of it.

Some factors you may consider are: the witness's age, intelligence, and memory; the witness's ability and opportunity to see, hear, or know the things that the witness testified about; the witness's demeanor while testifying; whether the witness had any bias, prejudice, or other reason to lie or to slant his or her testimony; inconsistent statements or conduct by the witness; and the believability of the witness's testimony in light of the other evidence presented. You may also consider any other factors that shed light on the believability of each witness's testimony.

A witness may be discredited 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's present testimony.

If you believe that any witness has been discredited, it is up to you to decide how much of the testimony of that witness you believe. If a witness is shown to have given false testimony knowingly, that is, voluntarily and intentionally, about any

important matter, you have a right to distrust the witness's testimony about other matters. You may reject all the testimony of that witness or you may choose to believe some or all of it. The general rule is that if you find that a witness said something before the trial that is different from what the witness said at trial, you are to consider the earlier statements only as an aid in evaluating the truthfulness of the witness's testimony at trial. You cannot consider as evidence in this trial what was said before the trial began. There is an exception to this general rule for witnesses who are the actual parties in the case. If you find that any of the parties made statements before the trial began that are different from the statements they made at trial, you may consider as evidence in the case whichever statement you find more believable.

Do not make decisions by simply counting the number of witnesses who testified about a certain point. What is important is how believable you think each witness was and how much weight you think each witness's testimony deserves.

E. Burden of proof

You will hear the term "burden of proof" used during this trial. In simple terms, the phrase "burden of proof" means that the party who makes a claim has the obligation of proving that claim. At the end of the case, I will instruct you on the proper burden of proof to be applied to the issues in this case.

But here is the basic burden of proof concept that you should bear in mind as you hear the evidence. Plaintiffs have the burden of proving that defendant violated each plaintiff's First Amendment rights by a preponderance of the evidence. A

“preponderance of the evidence” means that when you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true that defendant violated each plaintiff’s rights.