

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

FILED
DEC 15 2009

SOUTHERN DIVISION

[Signature]
CLERK

UNITED STATES OF AMERICA,	*	CR.09-40054
	*	
Plaintiff,	*	
	*	
- vs -	*	JURY
	*	INSTRUCTIONS
	*	
TERRY BOLL,	*	
	*	
Defendant.	*	

INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the 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 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. Again, *all* instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

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.

INSTRUCTION NO. 3

There is nothing particularly different in the way that you should consider the evidence in a trial from that in which any reasonable and careful person would treat any very important question that must be resolved by examining facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case for only those purposes for which it has been received and to give such evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything other than the evidence received in the case and the instructions of the Court. Remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence because the burden of proving guilt beyond a reasonable doubt is always assumed by the government.

INSTRUCTION NO. 4

I have mentioned the word “evidence.” The “evidence” in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and any facts that have been stipulated—that is, formally agreed to by the parties.

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 will list those things again for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case 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 the 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.

INSTRUCTION NO. 5

There are two types of evidence which 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. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely 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 than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

INSTRUCTION NO. 6

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

INSTRUCTION NO. 7

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

INSTRUCTION NO. 8

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.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 9

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 10

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's 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.

INSTRUCTION NO. 11

You must presume that the Defendant is innocent of the crime charged against him. The indictment is only a formal method of beginning a criminal case. It does not create any presumption of guilt; it is merely an accusation. The fact that a person has been indicted does not create any inference, nor is it evidence, that he is guilty of a crime. The presumption of innocence alone is sufficient to acquit the Defendant unless you as jurors are satisfied beyond a reasonable doubt of the Defendant's guilt of the crime charged from all the evidence that has been introduced in the case against him.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. Unless the government proves, beyond a reasonable doubt, that the Defendant committed each and every element of the crime charged against him in the Indictment, you must find the Defendant not guilty.

There is no burden upon the Defendant to prove that he is innocent.

INSTRUCTION NO. 12

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.

INSTRUCTION NO. 13

A reasonable doubt is a doubt based upon 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 and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 14

The Indictment in this case charges that on or about the 2nd day in June 2008, in Minnehaha County, in the District of South Dakota, the defendant, Terry Boll, did knowingly possess computer files that contained images of child pornography that had been mailed or shipped or transported in interstate or foreign commerce by any means, including by computer, or that were produced using material that had been mailed or shipped or transported in interstate or foreign commerce by any means, including by computer, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8).

The Defendant has pleaded not guilty to the charge against him, and he is presumed to be innocent unless and until the government proves him guilty beyond a reasonable doubt.

INSTRUCTION NO. 15

The 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 Indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

INSTRUCTION NO. 16

Section 2252A(a)(5)(B) of Title 18 of the United States Code provides, in pertinent part, that it is unlawful to:

knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer

18 U.S.C. §§2252A(5)(B).

INSTRUCTION NO. 17

The crime of knowing possession of child pornography as charged in the Indictment, has three essential elements, which are:

One, that on or about the 2nd day of June, 2008, defendant knowingly possessed one or more computer files that contained visual depictions of child pornography;

Two, that the defendant knew that the visual depiction or depictions were of a minor engaging in sexually explicit conduct; and

Three, that the visual depiction or depictions under consideration had either been transported in interstate or foreign commerce or produced using materials that had been transported by computer in interstate or foreign commerce.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously as to which visual depiction or depictions the defendant possessed.

If you find these elements unanimously and beyond a reasonable doubt, then you must find the Defendant guilty of the crime of possessing child pornography; otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 18

The term “minor” means any person under the age of eighteen years.

The phrase “child pornography” means any visual depiction of a minor engaging in sexually explicit conduct, where the minor was engaged in the sexually explicit conduct during production of the depiction. The term “visual depiction” includes any photograph, video or picture, whether made or produced by electronic, mechanical, or other means. It includes data stored on computer disk or by electronic means which is capable of conversion into a visual image.

The term “sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; masturbation or lascivious exhibition of the genitals or pubic area of any person.

INSTRUCTION NO. 19

Whether a visual depiction of the genitals or pubic area constitutes a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as (1) whether the focal point of the picture is on the minor's genitals or pubic area; (2) whether the setting of the picture is sexually suggestive, that is, in a place or pose generally associated with sexual activity; (3) whether the minor is depicted in an unnatural pose or in inappropriate attire, considering the age of the minor; (4) whether the minor is fully or partially clothed, or nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the picture is intended or designed to elicit a sexual response in the viewer; (7) whether the picture portrays the minor as a sexual object; and (8) the caption(s) on the picture(s).

It is for you to decide the weight or lack of weight to be given to any of these factors. A picture need not involve all of these factors to constitute a lascivious exhibition of the genitals or pubic area.

INSTRUCTION NO. 20

Possession is an element of the offense charged in the Indictment. 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.

Possession in a possession of child pornography case requires that the defendant knowingly possessed child pornography.

INSTRUCTION NO. 21

The phrase "interstate commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia.

The phrase "foreign commerce," as used above, means commerce between any state, territory or possession of the United States and a foreign country.

The term "commerce" includes, among other things, travel, trade, transportation and communication.

Images transmitted or received over the Internet have moved in interstate or foreign commerce. It is for you to determine, however, if the material containing the visual depiction had been transmitted or received over the Internet or was produced using materials that had been transmitted or received over the Internet.

INSTRUCTION NO. 22

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I will list those rules for you now.

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 so without violence to individual judgment, because your verdict – whether guilty or not guilty – 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.

Third, if the Defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me, you may send a note to me through the marshal, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone, including me, how your vote stands numerically.

INSTRUCTION NO. 22, continued

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

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 upon the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CR 09-40054

Plaintiff,

-vs-

VERDICT FORM

TERRY BOLL,

Defendant.

Please return your verdict by placing an "X" or "√" in the spaces provided.

VERDICT

We, the jury in the above entitled and numbered case, as to the crime of knowing possession of child pornography, as charged in the Indictment, find the Defendant, Terry Boll:

____ NOT GUILTY

____ GUILTY

If you find the Defendant "not guilty," have the foreman sign and date the verdict form. If you find the Defendant "guilty," you must answer the following question:

If you found the Defendant "guilty," which of the following exhibits did you unanimously find contained visual depictions of child pornography knowingly possessed by Defendant?

Government's Exhibit 1 _____

Government's Exhibit 2 _____

Government's Exhibit 3 _____

Government's Exhibit 4 _____

Government's Exhibit 5 _____

Government's Exhibit 7 _____

Have your foreperson sign and date the Verdict Form below.

Dated this _____ day of December, 2009.

Foreperson

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FILED
DEC 15 2009
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CLERK

UNITED STATES OF AMERICA,

CR.09-40054

Plaintiff,

JURY INSTRUCTIONS

- vs -

(FORFEITURE)

TERRY BOLL,

Defendant.

[Signature]

INSTRUCTION NO. 1

In view of your verdict that Defendant Terry boll is guilty of the offense alleged in the Indictment, you must now render a special verdict concerning whether the defendant must forfeit certain property which the government claims is subject to forfeiture to the United States pursuant to 18 U.S.C. § 2253 because such property was used or intended to be used in the possession of child pornography.

Under federal law, any person who is convicted of possession of child pornography shall forfeit to the United States “any property, real or personal, used or intended to be used to commit or to promote the commission of such offense or any property traceable to such property.”

To be forfeitable, the property need not be used exclusively for illegal activity; property that is used the vast majority of the time for legitimate purposes may nevertheless be forfeited if it facilitates the criminal offense. Facilitation of even a single felony offense is sufficient to justify forfeiture.

You must now consider what verdict to render on the question whether there is a nexus, that is a connection, between property that the asset forfeiture allegation of the Indictment alleges shall be forfeited to the United States and the offense for which you have already found Defendant Terry Boll guilty.

You are instructed, however, that your previous finding that Defendant is guilty of committing the offense alleged in the Indictment is final, conclusive, and binding. Because you are bound by your previous finding that the defendant is guilty, I direct you not to discuss in your forfeiture deliberations whether the defendant is guilty or not guilty of the knowing possession of child pornography offense.

All of my previous instructions regarding direct and circumstantial evidence, credibility of witnesses, and duty to deliberate apply with respect to your verdicts regarding forfeiture.

INSTRUCTION NO. 2

The previous instruction on the United States' standard of proof regarding your verdict on the guilt of Defendant does not apply to your deliberation and verdict regarding forfeiture. In deliberating and deciding your verdict regarding forfeiture, you are instructed that the United States need only prove by a preponderance of the evidence that the property listed in the asset forfeiture allegation of the Indictment is subject to forfeiture as constituting "any property, real or personal, used or intended to be used to commit or to promote the commission of" possession of child pornography.

You are instructed that, in order for the United States to establish by a preponderance of the evidence that the property is subject to forfeiture pursuant to 18 U.S.C. § 2253 it must prove that it is more likely than not that the property was used or intended to be used to commit or to promote the possession of child pornography offense for which Defendant was found guilty.

INSTRUCTION NO. 3

While deliberating, you may consider any evidence, including testimony, offered by the parties at any time during the trial.

INSTRUCTION NO. 4

In determining whether property is subject to forfeiture, you should not consider what might happen to property that is declared forfeited as that is exclusively a matter for the Court to decide. You should disregard any claims that other persons may have to the property. The interests that other persons may have in the property will be taken into account by the Court at a later time. Any claims that the forfeiture of the property would constitute excessive punishment will also be taken into account by the Court at a later time as will the issue regarding whether or not the property is presently available.

Your sole concern now is to determine whether the computers set forth in the forfeiture allegation of the Indictment were used or intended to be used to commit or to promote the commission of knowing possession of child pornography for which Defendant was found guilty.

INSTRUCTION NO. 5

The Special Verdict form lists the property which the United States asserts Defendant should forfeit pursuant to 18 U.S.C. § 2253 as property used or intended to be used to commit or to promote the possession of child pornography offense for which Defendant was found guilty. You must reach a unanimous verdict as to each question on the Special Verdict form.

You may answer by simply putting an "X" or check mark in the space provided next to the words "YES" or "NO." The foreperson must then sign and date the Special Verdict form.