

**FILED**

JUN 09 2010

*[Signature]*  
CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	CR. 09-50102-JLV
	)	
Plaintiff,	)	FINAL INSTRUCTIONS
	)	TO THE JURY
vs.	)	
	)	
MISTY RANDALL,	)	
a/k/a MISTY EAGLE ELK,	)	
	)	
Defendant.	)	

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**FINAL INSTRUCTION NO. 1 - INTRODUCTION**

Members of the jury, the written instructions I gave you at the beginning of the trial and any oral instructions I gave you during the trial remain in effect. *All* instructions, whenever given, must be followed.

The final instructions I am about to give you are in writing and will be available to you in the jury room.

**FINAL INSTRUCTION NO. 2 - DUTY OF JURORS**

Your duty is to decide from the evidence whether the defendant is not guilty or guilty of the crime charged against her. You must find the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 10. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts that have been established by the evidence. You will then apply the law, which I give you in these instructions, to the facts to reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, based solely on the evidence, your common sense, and the law as I give it to you. Do not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think your verdict should be. Similarly, do not conclude from any ruling or other comment I may have made that I have any opinions on how you should decide the case.

Please remember that only the defendant, Misty Randall, not anyone else, is on trial here. Also, remember that this defendant is on trial **only** for the crime charged against her, not for anything else.

**FINAL INSTRUCTION NO. 3 - INVOLUNTARY MANSLAUGHTER**

The charge against the defendant is set out in an indictment. An indictment is simply an accusation. It is not evidence of anything. The defendant has pleaded not guilty to the charge brought against her; therefore, the defendant is presumed to be innocent unless and until the prosecution proves, beyond a reasonable doubt, her guilt of the offense.

The indictment charges that the offense was committed “on or about” a certain date. The prosecution does not have to prove with certainty the exact date of an offense charged. It is sufficient if the evidence establishes that an offense occurred within a reasonable time of the date alleged in the indictment.

The indictment charges that on or about August 24, 2009, near Wanblee, in Indian country, in the District of South Dakota, the defendant, Misty Randall, a/k/a Misty Eagle Elk, an Indian, unlawfully killed a human being, without malice, in the commission of a lawful act in an unlawful manner which might produce death. Such act was committed in a grossly negligent manner with actual knowledge that her conduct was a threat to the lives of others or with actual knowledge that would reasonably enable her to foresee the peril to which her act might subject another, to-wit, defendant did unlawfully kill Jason Wilcox by operating a motor vehicle while under the influence of alcohol, and by driving a motor vehicle in an unsafe manner, and did thereby commit the crime of involuntary manslaughter.

***Elements***

For you to find Misty Randall guilty of the involuntary manslaughter offense charged in the indictment, the government must prove the following six essential elements beyond a reasonable doubt:

***One, that Jason Wilcox is dead; and, two, that the defendant caused the death of Jason Wilcox;***

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that Jason Wilcox died as a result of injuries sustained when he was struck by a vehicle driven by defendant, Misty Randall, on August 24, 2009, east of Wanblee, South Dakota.

The defendant has not, by entering into this agreement or stipulation, admitted her guilt of the offense charged.

***Three, the death of Jason Wilcox occurred as a result of an act done by the defendant, without malice, during the commission of a lawful act, done either in an unlawful manner or with wanton or reckless disregard for human life, which might produce death, that is, driving while under the influence of alcohol and driving in an unsafe manner;***

To constitute the crime of involuntary manslaughter, the act which might produce death must have been done either in an unlawful manner or in a grossly negligent manner. Gross negligence is defined as a reckless disregard for human life. Either form of conduct must be proven beyond a reasonable doubt.

***Four, that the defendant knew that her conduct was a threat to the lives of others or it was reasonably foreseeable that the defendant's conduct might be a threat to the lives of others;***

The defendant must be shown to have had actual knowledge that her conduct was a threat to the lives of others, or to have had knowledge that would reasonably enable her to foresee the peril to which her act might subject others.

***Five, that the defendant is an Indian; and, six, that the offense took place in Indian country.***

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that the defendant is an Indian and that the place where the alleged incident occurred is in Indian country.

The defendant has not, by entering into this agreement or stipulation, admitted her guilt of the offense charged.

**FINAL INSTRUCTION NO. 4 - DRIVING WHILE UNDER THE  
INFLUENCE OF ALCOHOL**

Under the law, no person shall drive or be in actual physical control of any motor vehicle if there is an amount equal to .10 percent by weight of alcohol in that person's blood, as measured by a blood, breath test, urine test, or other reliable scientific test, or if that person is under the influence of an alcoholic beverage to such a degree that she is incapable of safe driving.

**FINAL INSTRUCTION NO. 5 - LOCATION OF A STOPPED VEHICLE**

Under the law, no person may stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main-traveled portion of any highway when it is practical to stop, park, or leave such vehicle standing off of the paved or improved or main-traveled portion of the highway.

**FINAL INSTRUCTION NO. 6 - PASSING OF A VEHICLE**

Under the law, no driver of a vehicle may drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

**FINAL INSTRUCTION NO. 7 - DEFENSE**

It is the defendant's assertion that she did not commit an unlawful act in operating her motor vehicle, but that in any event, the death in this case was merely accidental or the result of unavoidable circumstances rather than any negligence on her part. If you find there is reasonable doubt as to whether she committed an unlawful act or reasonable doubt as to whether she acted in a grossly negligent manner, you must find defendant not guilty of the crime charged.

**FINAL INSTRUCTION NO. 8 - REASONABLE DOUBT**

A reasonable doubt may arise from the evidence or lack of evidence produced by the prosecution. 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 in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

**FINAL INSTRUCTION NO. 9 - PRESUMPTION OF INNOCENCE  
AND BURDEN OF PROOF**

The defendant is presumed innocent and, therefore, not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact that she is here in court. The presumption of innocence remains with the defendant throughout the trial. That presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the prosecution proves, beyond a reasonable doubt, each element of a crime charged against her.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the 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. Therefore, the fact that the defendant did not testify must not be discussed or considered by you in any way when deliberating and arriving at your verdict. A defendant is not even obligated to produce any evidence by cross-examining the witnesses who are called to testify by the prosecution.

Unless the prosecution proves beyond a reasonable doubt that the defendant has committed each and every element of the offense charged in the indictment against her, you must find her not guilty of that offense.

**FINAL INSTRUCTION NO. 10 - DEFINITION OF EVIDENCE**

Evidence is:

1. Testimony.
2. Exhibits that I admit into evidence.
3. Stipulations, which are agreements between the parties.

Evidence may be “direct” or “circumstantial.” The law makes no distinction between the weight to be given to direct and circumstantial evidence. The weight to be given any evidence is for you to decide.

The fact that an exhibit may be shown to you does not mean that you must rely on it more than you rely on other evidence.

The following are not evidence:

1. Statements, arguments, questions, and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony I tell you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

**FINAL INSTRUCTION NO. 11 - 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 says, 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 see or hear 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 witness's drug or alcohol use or addiction, if any, 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 see or hear things differently and sometimes forget things. You need to consider, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead from an intentional falsehood or pretended lapse of memory.

Finally, just because a witness works in law enforcement or is employed by the government does not mean you should give more weight or credence to such a witness's testimony than you give to any other witness's testimony.

**FINAL INSTRUCTION NO. 12 - EXPERTS**

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become an 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.

**FINAL INSTRUCTION NO. 13 - IMPEACHMENT**

In Final Instruction No. 11, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

**FINAL INSTRUCTION NO. 14 - OBJECTIONS**

The lawyers have made objections and motions during the trial that I have ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers had a duty to object to testimony or other evidence that they believed was not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

**FINAL INSTRUCTION NO. 15 - USE OF NOTES**

Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes. At the end of the trial, you may take your notes out of the notebook and keep them, or leave them, and we will destroy them.

You will notice that we have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching your verdict.

**FINAL INSTRUCTION NO. 16 - DUTY TO DELIBERATE**

A verdict must represent the considered judgment of each juror. Your verdict as to the defendant must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To bring twelve minds to an unanimous result, you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish the defendant's guilt beyond a reasonable doubt on the offense charged against her, then the defendant should have your vote for a not guilty verdict. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for the defendant. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt, then your vote should be for a verdict of guilty against the defendant, and if all of you reach that conclusion, then the verdict

of the jury must be guilty for the defendant. As I instructed you earlier, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged.

Remember also that the question before you can never be whether the government wins or loses the case. The government, as well as society, always wins, regardless of whether your verdict is not guilty or guilty, when justice is done.

Finally, remember that you are not partisans; you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest that you carefully consider all of the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be resolved at some later time.

**FINAL INSTRUCTION NO. 17 - DUTY DURING DELIBERATIONS**

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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

*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, 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 votes stand numerically.**

*Fourth*, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or guilty, 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.

*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 form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

Dated June 9<sup>th</sup>, 2010.

BY THE COURT:



JEFFREY L. VIKEN  
UNITED STATES DISTRICT JUDGE