

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

JAN 25 2013

 CLERK

UNITED STATES OF AMERICA,)	CR. 12-50075-JLV
)	
Plaintiff,)	FINAL INSTRUCTIONS
)	TO THE JURY
vs.)	
)	(REDACTED)
DANIEL TOBACCO,)	
)	
Defendant.)	

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VERDICT FORM

FINAL INSTRUCTION NO. 1 - ROLE OF INSTRUCTIONS

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 and whether in writing or not, are equally binding on you and must be followed.

The final instructions I am about to give you will be available to you in the jury room. These instructions explain the law that applies to this case. You must consider my instructions as a whole and not single out some instructions and ignore others.

FINAL INSTRUCTION NO. 2 - DUTY OF JURORS

This is a criminal case brought by the United States government against the defendant, Daniel Tobacco. The defendant is charged with the offense of sexual abuse.

Your duty is to decide from the evidence whether Mr. Tobacco is not guilty or guilty of the offense charged against him. You will find the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 12. 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 established by the evidence. You will then apply the law 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 the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. 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 said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I made that I have any opinion on how you should decide the case.

Please remember only Mr. Tobacco, not anyone else, is on trial here.
Also, remember Mr. Tobacco is on trial only for the offense charged against him, not for anything else.

FINAL INSTRUCTION NO. 3 - PRELIMINARY MATTERS

An offense consists of “elements” which the government must prove beyond a reasonable doubt in order to convict the defendant of that offense. To help you evaluate the evidence, I will give you the elements that make up the offense charged in the indictment. However, I must first explain some preliminary matters.

The charge against Mr. Tobacco is set out in an indictment. An indictment is simply an accusation. It is not evidence of anything. Mr. Tobacco pled not guilty to the charge brought against him. Therefore, Mr. Tobacco is presumed to be innocent unless and until the government proves, beyond a reasonable doubt, each element of the offense charged.

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

In the next two instructions, I will give you the elements for the offense charged in the indictment.

FINAL INSTRUCTION NO. 4 - SEXUAL ABUSE

The indictment charges that on or about February 23, 2012, at Pine Ridge, in Indian country, in the District of South Dakota, the defendant, Daniel Tobacco, an Indian, did knowingly engage in a sexual act with K.L.W., that is, contact between his penis and the vulva of K.L.W., at a time when K.L.W. was incapable of appraising the nature of the conduct and physically incapable of declining participation in and communicating an unwillingness to engage in the sexual act.

Elements

For you to find Daniel Tobacco guilty of the offense of sexual abuse, as charged in the indictment, the government must prove the following five essential elements beyond a reasonable doubt:

One, that on or about February 23, 2012, Daniel Tobacco knowingly engaged in a sexual act with K.L.W.;

As used in this instruction, an act is done “knowingly” if the defendant realized what he was doing and did not act through ignorance, mistake, or accident. You may consider the evidence of the defendant’s acts and words, along with all the evidence, in deciding whether the defendant acted knowingly.

The term “sexual act,” as used in this instruction, means contact between the penis and the vulva. Contact involving the penis occurs upon penetration, however slight.

Two, that K.L.W. was incapable of appraising the nature of the conduct or was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act;

Three, that Mr. Tobacco knew K.L.W. was incapable of appraising the nature of the conduct or was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act;

Four and five, that Mr. Tobacco is an Indian person and that the offense took place at Pine Ridge, South Dakota, in Indian country.

To find the defendant guilty of the offense of sexual abuse as charged in the indictment, the government must prove all five essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of the offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of the offense.

FINAL INSTRUCTION NO. 5 -

STIPULATION REGARDING JURISDICTION

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that Mr. Tobacco is an Indian person and that the place where the alleged incident occurred is in Pine Ridge, South Dakota, and is in Indian country.

By entering into this agreement or stipulation, the defendant has not admitted his guilt to the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to establish the facts that Mr. Tobacco is an Indian person and that, if the jury finds the alleged incident occurred, it occurred in Indian country.

INSTRUCTION NO. 6 - THEORY OF DEFENSE

It is Mr. Tobacco's assertion that K.L.W. consented to and willingly participated in any sexual encounter she had with him. If you find the government failed to prove beyond a reasonable doubt that K.L.W. was incapable of appraising the nature of the conduct and was physically incapable of declining participation in and communicating an unwillingness to engage in the sexual act, then you must find Mr. Tobacco not guilty.

FINAL INSTRUCTION NO. 7 - MISTAKE OF FACT

One of the elements in this case is whether Mr. Tobacco knew K.L.W. was incapable of appraising the nature of the sexual act or physically incapable of declining participation in and communicating her unwillingness to engage in the sexual act. A defendant's genuinely held mistake of fact may negate the mental intent required to commit the offense charged, even if the mistake of fact is an unreasonable one when viewed under the objective standard of a hypothetical reasonable person.

If you find Mr. Tobacco held a genuine, but mistaken, belief K.L.W. was, in fact, capable of appraising the nature of the sexual act or physically capable of declining participation in and communicating unwillingness to engage in the sexual act, you must find Mr. Tobacco not guilty.

FINAL INSTRUCTION NO. 8 - PROOF OF INTENT

Intent may be proven like anything else. You may consider any statements made and acts done by the defendant and all the facts and circumstances in evidence which may aid in a determination of the defendant's intent.

FINAL INSTRUCTION NO. 9 -

EVIDENCE ALLOWED FOR A LIMITED PURPOSE

You have heard evidence that Mr. Tobacco allegedly attempted to engage in sexual misconduct with Mary Beth American Horse. Mr. Tobacco disputes this allegation.

“Other act” evidence must be proven by a preponderance of the evidence; that is, you must find that the evidence is more likely true than not true. This is a lower standard than proof beyond a reasonable doubt. If you find that the other act is proven by a preponderance of the evidence, you should give it the weight and value you believe it is entitled to receive. If you find that it is not proven by a preponderance of the evidence, then you shall disregard such evidence.

You may consider the “other act” evidence as to the defendant’s motive, opportunity, intent, propensity, knowledge, absence of mistake or accident concerning the offense charged in the indictment. Remember, even if you find that the defendant may have committed a similar act, this is not evidence that he committed the offense charged in this case. You may not convict a person simply because you believe he may have committed a similar act. Mr. Tobacco is on trial only for the offense charged.

FINAL INSTRUCTION NO. 10 -

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

Mr. Tobacco 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 he is here in court. The presumption of innocence remains with Mr. Tobacco throughout the trial. This presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the government proves, beyond a reasonable doubt, each essential element of the offense charged.

The burden is always on the government to prove guilt beyond a reasonable doubt. This burden never shifts to Mr. Tobacco to prove his innocence, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to cross-examine the witnesses called to testify by the government.

If the government proves beyond a reasonable doubt all the essential elements of the offense charged in the indictment, you must find the defendant guilty. If the government fails to prove beyond a reasonable doubt any essential element of the offense charged in the indictment, you must find the defendant not guilty.

FINAL INSTRUCTION NO. 11 - REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced during trial. 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 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 affairs of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

FINAL INSTRUCTION NO. 12 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses and documents, and other things received as exhibits, and stipulated facts. Stipulated facts are facts that are formally agreed to by the parties. Certain things are *not* evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Objections and rulings on 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 I struck from the record or told you to disregard is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.

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

Furthermore, a particular piece of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose and not for any other purpose. I told you when that occurred and instructed you on the purposes for which the piece of evidence can and cannot be used.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

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. 13 - STATEMENTS BY DEFENDANT

You have heard testimony that Mr. Tobacco made statements to others. It is for you to decide:

First, whether Mr. Tobacco made the statements; and

Second, if so, how much weight you should give the statements.

In making these two decisions, you should consider all of the evidence, including the circumstances under which the statements may have been made.

FINAL INSTRUCTION NO. 14 - 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 the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the 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 people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

Also, you should judge the testimony of the defendant in the same manner in which you judge the testimony of any other witness.

Finally, just because a witness works in law enforcement or is employed by the government does not mean you should give more weight or

credibility to the witness's testimony than you give to any other witness's testimony.

FINAL INSTRUCTION NO. 15 - IMPEACHMENT

In the last instruction, I instructed you generally on the credibility of witnesses. I now instruct you further on how the credibility of a witness may 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 earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe 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. 16 - EXPERT WITNESSES

You may have heard testimony from a person described as an expert. 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. 17 - OBJECTIONS

The lawyers made objections during the trial that I 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 have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 18 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict.

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. No one will read the notes.

FINAL INSTRUCTION NO. 19 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to Mr. Tobacco must be unanimous. It is your duty to consult with one another and to deliberate with a view of 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 change your opinion if you are convinced it is wrong. To bring the jury to a 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 Mr. Tobacco's guilt beyond a reasonable doubt on the offense charged against him, then Mr. Tobacco 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. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes Mr. Tobacco's guilt beyond a

reasonable doubt on the offense charged against him, then your vote should be for a verdict of guilty. If all of you reach that conclusion, then the verdict of the jury must be guilty. As I instructed you earlier, the burden is on the government to prove beyond a reasonable doubt every essential element of the offense 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 when justice is done, regardless of whether your verdict is not guilty or guilty.

Finally, remember that you are not partisans. You are 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 you carefully consider all of the evidence bearing upon the questions before you. You may take all the time 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. 20 - 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, who will preside over your discussions and speak for you here in court.

Second, if Mr. Tobacco is found guilty of the offense, the sentence to be imposed is my responsibility. You may not consider punishment of the defendant in any way in deciding whether the government proved its case beyond a reasonable doubt as to the offense charged in the indictment.

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. After conferring with the lawyers, I will respond as soon as possible, either in writing or orally in open court. Remember 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 you reach in this case. You will take this form to the jury room. When you

have unanimously agreed on a verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated January 25th, 2013.

BY THE COURT:



JEFFREY D. VIKEN
CHIEF JUDGE