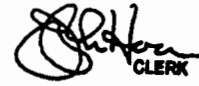


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED

JUL - 1 2015


CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

(1) DAVID RED THUNDER,
(2) RONALD DUMARCE,
(3) DARRELL WHITE,
(4) EDWARD RED OWL,

Defendants.

1:13-CR-10015-CBK

JURY INSTRUCTIONS

INSTRUCTION NO. 1

Ladies and gentlemen of the jury, it is my duty now to explain the rules of law you must apply to this case.

You as jurors are the sole judges of the facts. But it is your duty to follow the law stated in these instructions, and to apply that law to the facts as you find them from the evidence before you. It would be a violation of your sworn duty to base your verdicts upon any rules of law other than the ones given you in these instructions as well as the instructions given to you during trial, regardless of your personal feelings as to what the law ought to be.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

INSTRUCTION NO. 2

You have been chosen and sworn as jurors to try the issues of fact presented by the allegations of the indictment and the denials made by the defendants in their pleas of "not guilty." You are to perform this duty without bias or prejudice, because the law does not permit jurors to be governed by sympathy or public opinion. The accused and the public expect that you will carefully and impartially consider all of the evidence and will follow the law as stated by the Court, in order to reach just verdicts, regardless of the consequences to any party.

INSTRUCTION NO. 3

The indictment in this case charges the defendants with the crimes of conspiracy (Count I) and theft or embezzlement from an Indian tribal organization (Count II). The defendants have pleaded not guilty to these charges.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendants are presumed to be innocent. Therefore, the defendants, even though charged, begin the trial with no evidence against them. This presumption of innocence alone is sufficient to find the defendants not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crimes charged.

Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant.

There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that any defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

INSTRUCTION NO. 4

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. 5

I have mentioned the word "evidence." The evidence in this case consists of the testimony of witnesses, and the documents and other things received as exhibits.

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 shall 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 and questions that I struck from the record, or told you to disregard, are not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.

INSTRUCTION NO. 6

There are two types of evidence from which you may find the truth as to the facts of a case--direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of any defendant. The law makes no distinction between the weight 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 any defendant beyond a reasonable doubt, you must find that defendant not guilty.

INSTRUCTION NO. 7

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. 8

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of a greater credence. 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. 9

You have heard testimony from a person described as an expert. A person who, by knowledge, skill, training, education or experience, has become an expert in some field may state opinions on matters in that field and may also state the reasons for those opinions.

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. 10

The crime of conspiracy as charged in Count 1 of the indictment has four elements, which are:

1. Beginning on or about April 19, 2011, and continuing through August 4, 2011, two or more persons reached an agreement to knowingly and willfully embezzle, steal, knowingly convert to their own use, willfully misapply or willfully permit to be misapplied over \$1,000 of an Indian tribal organization.
2. The defendant in question voluntarily and intentionally joined in the agreement, either at the time it was first reached or at some later time while it was still in effect.
3. At the time two or more defendants joined in the agreement, each knew the purpose of the agreement.
4. While the agreement was in effect, a person or persons who had joined in the agreement knowingly did one or more acts for the purpose of carrying out or carrying forward the agreement.

Instructions Nos. 11, 12, 13, and 14 further explain these elements.

For you to find the defendant in question guilty of the crime charged in Count 1 of the indictment, the government must prove all of the essential elements beyond a reasonable doubt. Otherwise you must find the defendant in question not guilty of this crime.

INSTRUCTION NO. 11

Element one requires that two or more people reached an agreement to commit the crime of embezzlement or theft from an Indian tribal organization.

The indictment charges a conspiracy to commit embezzlement or theft from an Indian tribal organization. For you to find that the government has proved a conspiracy, you must unanimously find that there was an agreement to act for this purpose.

The agreement between two or more people to commit the crime described in paragraph 1 of Instruction No. 10 does not need to be a formal agreement or be in writing. A verbal or oral understanding can be sufficient to establish an agreement.

It does not matter whether the crime described in paragraph 1 of Instruction No. 10 was actually committed or whether the alleged participants in the agreement actually succeeded in accomplishing their unlawful plan.

The agreement may last a long time or a short time. The members of an agreement do not all have to join it at the same time. You may find that someone joined the agreement even if you find that person did not know all of the details of the agreement.

A person may be a member of the agreement even if the person does not know all of the other members of the agreement or the person agreed to play only a minor part in the agreement.

INSTRUCTION NO. 12

Element two requires that the defendant in question voluntarily and intentionally joined the agreement.

If you have determined that two or more people reached an agreement to commit the crime described in paragraph 1 of Instruction No. 10, you must next decide whether the defendant in question voluntarily and intentionally joined that agreement, either at the time it was first formed or at some later time while it was still in effect.

Earlier, in deciding whether two or more people reached an agreement to commit the crime described in paragraph 1 of Instruction No. 10, you could consider the acts and statement of each person alleged to be part of the agreement. Now, in deciding whether the defendant in question joined the agreement, you may consider only the acts and statement of the defendant in question.

A person joins an agreement to commit the crime described in paragraph 1 of Instruction No. 10 by voluntarily and intentionally participating in the unlawful plan with the intent to further the crime described in paragraph 1 of Instruction No. 10. It is not necessary for you to find that the defendant in question knew all of the details of the unlawful plan.

It is not necessary for you to find that the defendant in question reached an agreement with every person you determine was a participant in the agreement.

Evidence that a person was present at the scene of an event, or acted in the same way as others or associated with others does not, alone, prove that the person joined the conspiracy. A person who has no knowledge of a conspiracy, but who happens to act in a way that advances the purpose of the conspiracy, does not thereby become a member. A person's mere knowledge of the existence of a conspiracy, or mere knowledge that an objective of a conspiracy was being considered or attempted, or mere approval of the purpose of a conspiracy, is not enough to prove that the person joined in a conspiracy.

INSTRUCTION NO. 13

Element three requires that the defendant in question knew the purpose of the agreement at the time the defendant in question joined the agreement.

A person knows the purpose of the agreement if he is aware of the agreement and does not participate in it through ignorance, mistake, carelessness, negligence, or accident. It is seldom, if ever, possible to determine directly what was in a defendant's mind. Thus, a defendant's knowledge of the agreement and its purpose can be proved like anything else, from reasonable conclusions drawn from the evidence.

It is not enough that the defendant in question and other alleged participants in the agreement to commit the crime described in paragraph 1 of Instruction No. 10 simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. The defendant in question must have known of the existence and purpose of the agreement. Without such knowledge, the defendant in question cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

INSTRUCTION NO. 14

Element four requires that at least one of the persons who joined the agreement took some act for the purpose of carrying out or carrying forward the agreement.

The defendant in question does not have to personally commit an act in furtherance of the agreement, know about it, or witness it. It makes no difference which of the participants in the agreement did the act. This is because a conspiracy is a kind of “partnership” so that under the law each member is an agent or partner of every other member and each member is bound by or responsible for the acts of every other member done to further their scheme.

The act done in furtherance of the agreement does not have to be an unlawful act. The act may be perfectly innocent in itself.

The government contends that, while the agreement was in effect, a person or persons who had joined in the agreement knowingly did one or more of the following acts for the purpose of carrying forward the agreement:

1. On or about April 19, 2011, David Red Thunder prepared and submitted a voucher to the Sisseton-Wahpeton Housing Authority requesting reimbursement of \$15,700 for costs incurred by the Lake Traverse Aid Incorporation (“LTAI”) to set up three trailer homes. Attached to and in support of the voucher were three contracts for deed, one for each trailer home. Ronald DuMarce signed each contract on behalf of the LTAI as the claimed seller of the trailer homes.
2. On or about May 16, 2011, Edward Red Owl signed a corporate resolution, attested to by Darrell White and David Red Thunder, to reestablish and reopen the LTAI checking account.
3. On or about May 19, 2011, a check for \$15,700 from the Sisseton-Wahpeton Housing Authority was deposited into the LTAI checking account.
4. Between on or about May 19, 2011, and August 4, 2011, the LTAI wrote checks payable to each defendant. The defendants cashed the checks and

used the funds for their own purposes and not for the purposes of the Indian tribe.

It is not necessary that the government prove that more than one act was done in furtherance of the agreement. It is sufficient if the government proves one such act; but in that event, in order to return a verdict of guilty, you must all agree which act was done.

INSTRUCTION NO. 15

The crime of embezzlement or theft from an Indian tribal organization, as charged in Count 2 of the indictment, has four elements, which are:

1. On or about between April 19, 2011, and August 4, 2011, in the District of South Dakota, the defendant in question voluntarily and intentionally embezzled, stole, misapplied or permitted to be misapplied , or converted to his own use or the use of another, money, funds, or assets.
2. The money, funds, or assets belonged to the Sisseton-Wahpeton Oyate Sioux Tribe and had a value in excess of \$1,000.00.
3. The Sisseton-Wahpeton Oyate Sioux Tribe was an Indian tribal organization.
4. The defendant in question did so with the intent to deprive the owner of the use or benefit of the money, funds, or assets.

The term “embezzle” means to voluntarily and intentionally take, or to convert to one’s own use or that of another, the property of another which came into the hands of the embezzler lawfully.

The term “misapply” means to voluntarily and intentionally use the funds or property of the Indian tribal organization knowing that such use is unauthorized, unjustifiable or wrongful. Misapplication includes the wrongful taking or use of the money or property of the Indian tribal organization by a person for his own benefit or the use or benefit of some other person.

For you to find the defendant in question guilty of the crime charged in Count 2 of the indictment, the government must prove all of the essential elements beyond a reasonable doubt. Otherwise you must find the defendant in question not guilty of this crime.

INSTRUCTION NO. 16

The defendants in this case are accused of embezzling, stealing, misapplying or converting to their own uses monies and funds belonging to an Indian tribal organization. All parties have agreed or stipulated that the Sisseton-Wahpeton Oyate Sioux Tribe and the Sisseton-Wahpeton Housing Authority are Indian tribal organizations.

The jury should not speculate or deliberate about whether the Lake Traverse District, the Lake Traverse Development Corporation, or the Lake Traverse Aid Incorporation ("LTAI") are Indian tribal organizations. The allegations in the indictment are only that the tribe itself and the Sisseton-Wahpeton Housing Authority are Indian tribal organizations

INSTRUCTION NO. 17

Funds from an Indian tribal organization do not cease to be funds from an Indian tribal organization simply because the funds are received and administered by a non-Indian tribal organization.

If you find that the \$15,700 check was erroneously issued, this does not necessarily mean that the funds did not belong to an Indian tribal organization. Whether the funds remained property of an Indian tribal organization is for you to determine.

In deciding whether the \$15,700 belonged to an Indian tribal organization, you may consider, among other things: (1) whether the money was obtained for a specific purpose under rules and regulations of the Housing Authority dealing with the Homebuyer's Assistance Program; and (2) the control and supervision, if any, exercised by the Housing Authority or the tribe in connection with the dispensing and spending of tribal funds.

INSTRUCTION NO. 18

A person may also be found guilty of the crime charged in Count 2 of the indictment even if he personally did not do every act constituting the crime charged, if he aided and abetted the commission of the crime. In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

1. Have known the crime was being committed or going to be committed;
2. Have knowingly acted in some way for the purpose of causing or aiding the commission of the offense; and
3. Have intended to commit the crime in question as explained in Instruction No. 15

For you to find the defendant in question guilty of the crime charged in Count 2 of the indictment by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the elements of the crime charged in Count 2 of the indictment were committed by some person or persons and that the defendant in question aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

You are also instructed that a person cannot aid and abet himself in the commission of the crime. In other words, you may only find the defendant in question guilty of aiding and abetting a crime if you first find that some other person has performed acts necessary for the commission of the crime charged in Count 2 of the indictment.

INSTRUCTION NO. 19

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

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 20

One of the issues in this case is whether one or more of the defendants acted in good faith. Good faith is a complete defense to the crimes of theft or embezzlement if the defendant in question did not act with the intent to obtain money by means of false or fraudulent pretenses, representations, or promises, which is an element of the charge. The essence of the good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring fraudulent intent.

The phrase "good faith" includes, among other things, an opinion or belief honestly held, even if the opinion is in error or the belief is mistaken. However, even though a defendant honestly held a certain opinion or belief, a defendant does not act in good faith if he also knowingly made false or fraudulent representations or promises, or otherwise acted with the intent to defraud or deceive another. Proof of fraudulent intent requires more than proof that a defendant only made a mistake in judgment or management, or was careless.

The government has the burden of proving beyond a reasonable doubt that the defendant in question acted with the intent to obtain money by means of false or fraudulent pretenses, representations, or promises. Evidence that the defendants in question acted in "good faith" may be considered by you, together with all the other evidence, in determining whether or not the defendant in question acted with the intent to obtain money by means of false or fraudulent pretenses, representations, or promises.

INSTRUCTION NO. 21

You may find that a defendant acted knowingly if you find beyond a reasonable doubt that the defendant believed there was a high probability that the crimes alleged in the indictment were going to be committed and that he took deliberate actions to avoid learning of that fact. Knowledge may be inferred if the defendant in question deliberately closed his eyes to what would otherwise have been obvious to him. A willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. You may not find the defendant in question acted "knowingly" if you find he was merely negligent, careless or mistaken as to whether the crimes alleged in the indictment were going to be committed.

INSTRUCTION NO. 22

The indictment charges that offenses were committed "on or about" or "on or about between" certain dates. The proof need not establish with certainty the exact date or dates of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense in question was committed on a date or dates reasonably near the date or dates alleged.

INSTRUCTION NO. 23

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A verdict form has been prepared for your convenience.

You will take this form to the jury room and, when you have reached unanimous agreement as to your verdicts, you will have your foreperson fill in, date and sign the form to state the verdicts upon which you unanimously agree, and then notify the marshal that you have a verdict.

INSTRUCTION NO. 24

The verdicts must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. Your verdicts must 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 violence to individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to re-examine 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 the evidence, solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times, 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.

INSTRUCTION NO. 25

If you have questions, you may send a note by a marshal, signed by your foreperson, or by one or more members of the jury.

You will note from the oath about to be taken by the marshal that he, 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 the Court--how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached unanimous verdicts.

INSTRUCTION NO. 26

It is proper to add a final caution.

Nothing that I have said in these instructions—and nothing that I have said or done during the trial—has been said or done to suggest to you what I think your verdicts should be.

What the verdicts shall be is your exclusive duty and responsibility.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. (1) DAVID RED THUNDER , (2) RONALD DUMARCE , (3) DARRELL WHITE , (4) EDWARD RED OWL , Defendants.</p>	<p>1:13-CR-10015-CBK VERDICT</p>
---	---

Please return a verdict by placing an "X" in the space provided.

COUNT I

We, the jury in the above entitled action, as to the crime of conspiracy, find David Red Thunder:

_____ NOT GUILTY _____ GUILTY

We, the jury in the above entitled action, as to the crime of conspiracy, find Ronald DuMarce:

_____ NOT GUILTY _____ GUILTY

We, the jury in the above entitled action, as to the crime of conspiracy, find Darrell White:

_____ NOT GUILTY _____ GUILTY

We, the jury in the above entitled action, as to the crime of conspiracy, find Edward Red Owl:

_____ NOT GUILTY _____ GUILTY

COUNT 2

We, the jury in the above entitled action, as to the crime of theft or embezzlement from an Indian tribal organization, find David Red Thunder:

_____ NOT GUILTY _____ GUILTY

We, the jury in the above entitled action, as to the crime of theft or embezzlement from an Indian tribal organization, find Ronald DuMarce:

_____ NOT GUILTY _____ GUILTY

We, the jury in the above entitled action, as to the crime of theft or embezzlement from an Indian tribal organization, find Darrell White:

_____ NOT GUILTY _____ GUILTY

We, the jury in the above entitled action, as to the crime of theft or embezzlement from an Indian tribal organization, find Edward Red Owl:

_____ NOT GUILTY _____ GUILTY

Dated this _____ day of July, 2015.

FOREPERSON