

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

RANDY NEVER MISSES A SHOT,

Defendant.

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CR 13-30013-RAL

FINAL INSTRUCTIONS
TO JURY

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

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.

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

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 the facts that have been stipulated—this 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 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 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. 4

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. 5

You have heard testimony from persons described as experts. 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. 6

The superseding indictment in this case charges the Defendant with four different crimes. Under Count I, the superseding indictment charges that the Defendant committed the crime of aggravated sexual abuse of a child. Under Count II, the superseding indictment charges that the Defendant committed the crime of abusive sexual contact of a child. Under Count III, the superseding indictment charges that the Defendant committed the crime of aggravated sexual abuse of a child. Under Count IV, the superseding indictment charges that the Defendant committed the crime of abusive sexual contact of a child. The Defendant has pleaded not guilty to each of 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 Defendant is presumed to be innocent. Thus the Defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the Defendant not guilty and can be overcome only if the Government proves, beyond a reasonable doubt, each element of the crimes charged.

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. 7

The crime of Aggravated Sexual Abuse of a Child, as charged in Count I of the superseding indictment, has four elements, which are:

***One*, that on or about between the 1st day of January, 1993, and the 16th day of October, 1997, the Defendant knowingly caused or knowingly attempted to cause [NAME REDACTED] to engage in a sexual act, that is, contact between the Defendant's penis and [NAME REDACTED] vulva;**

Contact involving the penis occurs upon penetration, however slight;

***Two*, that [NAME REDACTED] had not attained the age of 12 at the time of the sexual act;**

***Three*, that the Defendant is an Indian; and**

***Four*, that the offense took place in Indian country.**

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged in Count I of the superseding indictment, otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 8

The crime of Abusive Sexual Contact, as charged in Count II of the superseding indictment, has four elements, which are:

One, that on or about between the 1st day of January, 1993, and the 31st day of May, 1997, the Defendant did knowingly engage in, or attempt to engage in, sexual contact with [NAME REDACTED];

The term "sexual contact," as used in Count II of the superseding indictment, means the intentional touching by the Defendant, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of [NAME REDACTED] with an intent to abuse, humiliate, harass, or degrade her or with the intent to arouse or gratify the sexual desire of the Defendant.

Two, that [NAME REDACTED] had not attained the age of 12 at the time of the offense;

Three, that the Defendant is an Indian; and

Four, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged in Count II of the superseding indictment, otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 9

The crime of Aggravated Sexual Abuse of a Child, as charged in Count III of the superseding indictment, has four elements, which are:

One, that on or about between the 1st day of April, 2000, and the 30th day of September, 2000, the Defendant knowingly caused or knowingly attempted to cause [NAME REDACTED] to engage in a sexual act, that is, the intentional touching, not through the clothing, of the genitalia of [NAME REDACTED];

The term “sexual act” as it is used in Count III of the superseding indictment, means the intentional touching, skin to skin and not through the clothing, of the genitalia of [NAME REDACTED], with the intent to abuse, humiliate, harass, or degrade [NAME REDACTED], or to arouse or gratify the Defendant’s sexual desire.

Two, that [NAME REDACTED] had not attained the age of 12 at the time of the sexual act;

Three, that the Defendant is an Indian; and

Four, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged in Count III of the superseding indictment, otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 10

If you should unanimously find the Defendant “not guilty,” of the crime of Aggravated Sexual Abuse as charged in Count III of the superseding indictment, or if, after reasonable efforts, you are unable to reach a verdict as to the crime charged in Count III of the superseding indictment, then you must proceed to determine whether the Defendant is guilty or not guilty of the crime of Abusive Sexual Contact under this Instruction.

The crime of Abusive Sexual Contact, a lesser included offense of the crime of Aggravated Sexual Abuse as charged in Count III of the superseding indictment, has four elements, which are:

One, that on or about between the 1st day of April, 2000, and the 30th day of September, 2000, the Defendant did knowingly engage in, or attempt to engage in, sexual contact with [NAME REDACTED];

The term “sexual contact,” as used in this instruction, means the intentional touching by the Defendant, through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of [NAME REDACTED] with an intent to abuse, humiliate, harass, or degrade her or with the intent to arouse or gratify the sexual desire of the Defendant.

Two, that [NAME REDACTED] had not attained the age of 12 at the time of the offense;

Three, that the Defendant is an Indian; and

Four, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the lesser included offense of abusive sexual contact of Pauline Straight, otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 11

The crime of Abusive Sexual Contact, as charged in Count IV of the superseding indictment, has four elements, which are:

One, that on or about between the 12th day of May, 2007, and the 15th day of May, 2007, the Defendant did knowingly engage in, or attempt to engage in, sexual contact with [NAME REDACTED];

The term “sexual contact,” as used in Count IV of the superseding indictment, means the intentional touching by the Defendant, through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of [NAME REDACTED] with an intent to abuse, humiliate, harass, or degrade her or with the intent to arouse or gratify the sexual desire of the Defendant.

Two, that [NAME REDACTED] had not attained the age of 12 at the time of the offense;

Three, that the Defendant is an Indian; and

Four, that the offense took place in Indian country.

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged in Count IV of the superseding indictment, otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 12

In the crime of Abusive Sexual Contact in Count II and Count IV, the crime of Aggravated Sexual Abuse of a Child in Count III, and the lesser included offense to Count III, there must exist in the mind of the Defendant the specific intent to abuse, humiliate, harass, or degrade the alleged victim, or to arouse and gratify the Defendant's sexual desire. If the Defendant acted without such specific intent, this crime has not been committed.

In the crime of Aggravated Sexual Abuse of a Child as charged in Counts I and III of the superseding indictment, there must exist in the mind of the Defendant the specific intent to attempt the sexual act described in those counts. If the Defendant acted without such specific intent, the attempt to commit such crimes has not been committed.

INSTRUCTION NO. 13

Intent may be proved 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 the determination of the Defendant's intent.

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. 14

The crimes charged in Counts I, II, III, the lesser included offense of Count III, and Count IV include an attempt to engage in criminal sexual activity. A person may be found guilty of an attempt if he intended to engage in the criminal sexual activity and voluntarily and intentionally carried out some act which was a substantial step toward that act.

A substantial step, as used in this instruction, must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context, could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.

INSTRUCTION NO. 15

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.

INSTRUCTION NO. 16

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. 17

You will note that the superseding indictment charges that the offenses were committed “on or about” a certain date. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the case establishes beyond a reasonable doubt that the offenses were committed on a date or dates reasonably near the dates alleged.

INSTRUCTION NO. 18

You have heard evidence that the Defendant allegedly engaged in sexual misconduct with [NAMES REDACTED]. If you conclude that the Defendant committed sexual abuse on another occasion, you may use this evidence in deciding whether the Defendant is guilty beyond a reasonable doubt of the offenses charged in the superseding indictment. If you conclude that the Defendant did not commit sexual abuse on another occasion, then you must disregard the evidence.

The Defendant is on trial only for the crimes charged in the superseding indictment. The testimony of prior misconduct does not mean that the Defendant is guilty of the offenses charged in the superseding indictment.

INSTRUCTION NO. 19

The superseding indictment in this case alleges that the Defendant is an Indian and that the alleged offenses occurred in Indian country. The existence of those two factors is necessary in order for this Court to have jurisdiction over the crimes charged in the superseding indictment.

Counsel for the Government, counsel for the Defendant, and the Defendant have agreed or stipulated that the Defendant is an Indian and that the places where the incidents alleged in the superseding indictment are claimed to have occurred is in Indian country.

The Defendant has not, by entering this agreement or stipulation, admitted his guilt of the offenses 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 the Defendant is an Indian and that the places where the alleged offenses are claimed to have occurred is in Indian country.

INSTRUCTION NO. 20

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall 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 a 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 during your deliberations, you may send a note to me through the marshal or bailiff, 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.

Fifth, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

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

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA, * CR 13-30013-RAL

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Plaintiff, *

-vs- * VERDICT FORM

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RANDY NEVER MISSES A SHOT, *

*

Defendant. *

We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. We find Defendant Randy Never Misses A Shot _____ (fill in either “not guilty” or “guilty”) of Aggravated Sexual Abuse of a Child as charged in Count I.
2. We find Defendant Randy Never Misses A Shot _____ (fill in either “not guilty” or “guilty”) of Abusive Sexual Contact of a Child as charged in Count II.
3. We find Defendant Randy Never Misses A Shot _____ (fill in either “not guilty” or “guilty”) of Aggravated Sexual Abuse of a Child as charged in Count III.
4. *Answer if, and only if, you found the Defendant “Not Guilty” as to Aggravated Sexual Abuse of a Child in part 3 of this form. If you found the Defendant “Guilty” in part 3 of this form, then skip this line and go to line 5.* We find Defendant Randy Never Misses A Shot _____ (fill in either “not guilty” or “guilty”) of the offense of abusive sexual contact.
5. We find Defendant Randy Never Misses A Shot _____ (fill in either “not guilty” or “guilty”) of Abusive Sexual Contact of a Child as charged in Count IV.

Depending upon how you decide a certain issue, the Court may have one additional issue for you to decide.

Dated September ___, 2013

Foreperson

INSTRUCTION NO. 21

Ladies and gentlemen: Now that you have found the Defendant guilty of abusive sexual contact of Kaulauna Iron Shell, there is an additional matter to submit to you.

The Defendant also has been charged with one count of Abusive Sexual Contact While Registered as a Sex Offender.

Count V of the Superseding Indictment charges that on or about between the 12th day of May, 2007, and the 15th day of May, 2007, at Pine Ridge, in the District of South Dakota, Randy Never Misses A Shot, an individual required by Federal, State, Tribal and other law to register as a sex offender, committed a felony offense involving a minor, that is, Abusive Sexual Contact under 18 U.S.C. § 2244(a)(5) and 2246(3), as alleged in Count IV, in violation of 18 U.S.C. § 2260A.

The Defendant has pleaded not guilty to this charge and is presumed to be not guilty unless and until proved guilty beyond a reasonable doubt.

INSTRUCTION NO. 22

The crime of Abusive Sexual Contact While Registered As a Sex Offender, as charged in Count V of the indictment, has two elements, which are:

One, that the Defendant committed Abusive Sexual Contact of [NAME REDACTED], as set forth in Count IV of the superseding indictment;

Two, at the time that the Defendant committed the offense set forth in Count V of the indictment, the Defendant was required by Federal or other law to register as a sex offender;

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged in Count V of the superseding indictment, otherwise you must find the Defendant not guilty of this crime.

You should follow instructions 1 through 4, 16, and 20 in reaching your verdict on this additional charge.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

RANDY NEVER MISSES A SHOT,

Defendant.

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CR 13-30013-RAL

VERDICT FORM
ON COUNT V

We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

- 6. We find Defendant Randy Never Misses A Shot _____ (fill in either “not guilty” or “guilty”) of Abusive Sexual Contact While Registered as a Sex Offender as charged in Count V.

Dated September ____, 2013

Foreperson