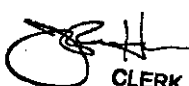


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
JAN 11 2007

CLERK

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOSEPH RUBEN GERKEN,)
)
 Defendant.)

CR.06-50047

JURY INSTRUCTIONS

JT: Tuesday, January 9, 2007 at 9 a.m.

COUNSEL: Plaintiff - Carolyn G. Royce
Assistant U.S. Attorney
United States Courthouse
515 Ninth Street
Rapid City, SD 57701
342-7822

Defendant - Gary G. Colbath, Jr.
Assistant Federal Public Defender
703 Main Street, 2nd Floor
Rapid City, SD 57701
343-5110

CHARGE: Aggravated Sexual Abuse (18 U.S.C. §§ 2241(a)(1) and 1153)

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 trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier 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 think the law is 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--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 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. Anything you saw or heard about this case outside the courtroom is not evidence.

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

The indictment in this case charges that:

On or about the 23rd day of October, 2005, near Manderson, in Indian country, in the District of South Dakota, the defendant, Joseph Ruben Gerken, an Indian, did knowingly engage and attempt to engage in a sexual act, to-wit, contact between the penis and the vulva, by using force against Colette Swallow, in violation of 18 U.S.C. §§ 2241(a)(1) and 1153.

The defendant has pleaded not guilty to this charge.

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 essential element of the crime charged.

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

INSTRUCTION NO. 6

The Indictment charges the defendant with aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(1). That statute provides that “Whoever . . . knowingly causes another person to engage in a sexual act . . . by using force against that other person,” shall be guilty of an offense against the United States.

INSTRUCTION NO. 7

The crime of aggravated sexual abuse as charged in the indictment, has the following essential elements:

1. That on or about the 23rd day of October, 2005, the defendant engaged in a sexual act with Colette Swallow by contact between the penis and the vulva;
2. That the defendant acted knowingly and intentionally;
3. That the defendant engaged in the sexual act by using force against Colette Swallow;
4. That the offense was committed in Manderson, in Indian Country, in the District of South Dakota; and
5. That the defendant is an Indian person.

For you to find the defendant guilty of the crime charged, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 8

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. 1

The term "sexual act" as used within these instructions means contact between the penis and the vulva, and for purposes of these instructions, contact involving the penis occurs upon penetration, however slight.

INSTRUCTION NO. 10

You will note that the indictment charges that the offense was committed on or about the 23rd day of October, 2005. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

INSTRUCTION NO. 11

The indictment in this case alleges that the defendant is an Indian and that the offense occurred in Indian Country. The existence of those two factors is necessary in order for this Court to have jurisdiction over the case.

The government and the defendant have agreed or stipulated that the defendant is an Indian and that the place where it is alleged that the incident occurred is in Indian Country.

The defendant has not, by entering this agreement or stipulation, admitted his guilt of the offense charged. You may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to establish the fact that the defendant is an Indian and that the place where it is alleged that the incident occurred is in Indian Country.

INSTRUCTION NO. 12

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 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

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 Court Security Officer or Marshal signed by one or more jurors. Upon receipt of any written question, I will review the question with government counsel, defense counsel, and the defendant. I will then respond as soon as possible thereafter, either in writing, or orally in open

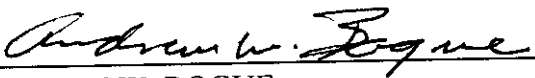
court. Remember that you should not tell anyone -- including me -- how your votes stand numerically.

Fifth, you will note from the oath that will be taken by the Court Security Officer or Marshal after final arguments, that he or she, too, as well as all other persons, is forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Sixth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict whether guilty or not 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 marshal that you are ready to return to the courtroom.

Dated this 11th day of January, 2007.



ANDREW W. BOGUE
SENIOR DISTRICT JUDGE