

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FILED
FEB 07 2007
[Signature]

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 07-30004-01-KES

vs.

KEITH E. HAWKMAN,

Defendant.

**FINAL
INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

FINAL INSTRUCTIONS

| | |
|---|----|
| NO. 1 - INTRODUCTION | 1 |
| NO. 2 - SEXUAL ABUSE | 2 |
| NO. 3 - THEORY OF DEFENSE | 5 |
| NO. 4 - PREVIOUS CONVICTIONS | 6 |
| NO. 5 - IMPEACHMENT | 7 |
| NO. 6 - PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF .. | 8 |
| NO. 7 - REASONABLE DOUBT | 9 |
| NO. 8 - DUTY TO DELIBERATE | 10 |
| NO. 9 - DUTY DURING DELIBERATIONS | 12 |

VERDICT FORM

FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 - SEXUAL ABUSE

The indictment charges that, on or about May 14, 2006, in Todd County, in Indian country, in the District of South Dakota, Keith E. Hawkman, an Indian, did knowingly engage in or attempt to engage in a sexual act, namely, contact between his penis and the vulva of Melissa Ann White Horse, when she was incapable of appraising the nature of the conduct or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act.

Elements

For you to find Mr. Hawkman guilty of the “sexual abuse” offense charged in the indictment, the government must prove the following four essential elements beyond a reasonable doubt as to the defendant:

One, that on or about May 14, 2006, Mr. Hawkman knowingly engaged in or attempted to engage in a sexual act with Melissa Ann White Horse;

An act is done “knowingly” if the defendant is aware of the act and did not act through ignorance, mistake, or accident. You may consider evidence of the defendant’s acts and words, along with all the other evidence, in deciding whether the defendant acted knowingly.

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.

A person may be found guilty of an “attempt” if he intended to engage in a sexual act and voluntarily and intentionally carried

out some act which was a substantial step toward engaging in a sexual act.

A "substantial step" 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.

Two, that at the time of the offense, Melissa Ann White Horse 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. Hawkman is an Indian; and

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that the defendant is an Indian.

The defendant has not, by entering into this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to present to the jury the fact that the defendant is an Indian.

Four, that the offense took place in Indian country, namely in Todd County, South Dakota.

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

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

For you to find the defendant guilty of Sexual Abuse as charged in the indictment, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this offense.

FINAL INSTRUCTION NO. 3 - THEORY OF DEFENSE

It is the theory of the defense that Melissa Ann White Horse consented to the sexual act that occurred between her and the defendant on May 14, 2006.

You are further instructed that if after hearing the evidence, you have reasonable doubt about whether Melissa Ann White Horse consented to whatever sexual act occurred between her and the defendant, you must acquit the defendant.

FINAL INSTRUCTION NO. 4 - PREVIOUS CONVICTIONS

This defendant was convicted in 1996 of incest. This does not mean that he is guilty of the charge of sexual abuse as to which he has pled not guilty in this case which you will be deciding. You may give such evidence and the testimony of this witness such weight and value, if any, as you believe it is entitled to receive.

You have heard evidence that Mr. Hawkman was previously convicted of assault with a dangerous weapon in 2007 and forgery in 1998. You may use that evidence only to help you decide whether to believe his testimony and how much weight to give it. That evidence does not mean that he committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.

FINAL INSTRUCTION NO. 5 - IMPEACHMENT

In Preliminary Instruction No. 7, 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 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 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. 6 - PRESUMPTION OF INNOCENCE
AND BURDEN OF PROOF

Keith Hawkman 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 he is here in court. The presumption of innocence remains with Mr. Hawkman throughout the trial. That presumption alone is sufficient to find him not guilty. The presumption of innocence may be overcome as to Mr. Hawkman only if the prosecution proves, beyond a reasonable doubt, each element of the crime charged against him.

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. 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 Mr. Hawkman has committed each and every element of the offense charged in the indictment against him, you must find him not guilty of that offense.

FINAL INSTRUCTION NO. 7 - 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. 8 - 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 him, then the defendant should have your vote for a not guilty verdict on the offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for the defendant on the offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt on the offense charged, then your vote should be for a verdict of guilty against the defendant on the charge,

and if all of you reach that conclusion, then the verdict of the jury must be guilty for the defendant on the charge. As I instructed you earlier, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of a 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.

FINAL INSTRUCTION NO. 9 - 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 guilty, the sentence to be imposed is my responsibility. You may not consider punishment of Keith Hawkman in any way in deciding whether the prosecution has proved its case beyond a reasonable doubt.

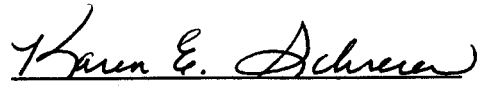
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible, either in writing or orally in open court. **Remember that you should not tell anyone—including 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 marshal or court security officer that you are ready to return to the courtroom.

Dated February 7, 2008.


Karen E. Schreier
Karen E. Schreier
Chief Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

| | | |
|---------------------------|---|--------------------|
| UNITED STATES OF AMERICA, |) | CR 07-30004-01-KES |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | VERDICT |
| |) | |
| KEITH E. HAWKMAN, |) | |
| |) | |
| Defendant. |) | |

Please return a verdict by placing an "X" or "√" in the spaces provided.

| SEXUAL ABUSE | VERDICT |
|---|--|
| On the charge of "sexual abuse" as explained in Final Jury Instruction Number 2, we find the defendant Keith E. Hawkman | <input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty |

_____ Date

_____ Foreperson