

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

**FILED**

JUL 18 2012

*[Signature]*  
CLERK

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UNITED STATES OF AMERICA,

CR 12-10004

Plaintiff,

JURY INSTRUCTIONS

-vs-

MARCOS DAVILA,

Defendant.

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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, 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 defendant in his 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 defendant with the crimes of abusive sexual contact. The defendant has 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 defendant is presumed to be innocent. Therefore, the defendant, even though charged, begins the trial with no evidence against him. This 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 crimes charged.

There is no burden upon the 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.

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.

Finally, you were instructed that some evidence was received for a limited purpose only, and you must follow such instructions.

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 the 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 the defendant beyond a reasonable doubt, you must find the 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. Persons who, by knowledge, skill, training, education or experience, have 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 each witness's education and experience, the soundness of the reasons given for the opinions, acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 10

You have heard testimony that persons interviewed made statements to Special Agent Miller. It is for you to decide:

First, whether a witness made the statements,

Second, if so, how much weight you should give to them, and

Third, you may also take into consideration the fact that there is no recording of any interview.

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

INSTRUCTION NO. 11

The crime of abusive sexual contact, as charged in Count I of the indictment, has four essential elements, which are:

1. On or about between July 1, 2011 and July 11, 2011, the defendant did knowingly and intentionally engage in sexual contact with [REDACTED] namely, the intentional touching, either directly or through the clothing, of the genitalia, groin, or inner thigh of [REDACTED] with an intent to abuse, humiliate, harass, or degrade [REDACTED] or to arouse or gratify Marcos Davila's sexual desire.
2. At the time of the alleged offense, [REDACTED] had not attained the age of 12 years.
3. [REDACTED] is an Indian, and
4. The alleged offense occurred in Indian Country.

For you to find the defendant guilty of this crime as charged in Count I of 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 crime.

INSTRUCTION NO. 12

The law permits the jury to find the defendant guilty of any lesser offense which is necessarily included in the crime charged in Count I of the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.

So, if you should unanimously find the defendant "Not Guilty" of the crime explained in Instruction No. 11, or if, after all reasonable efforts, you are unable to reach a verdict as to such crime, then you must proceed to determine the guilt or innocence of the defendant as to any lesser offense which is necessarily included in the crime explained in Instruction No. 11.

The crime of abusive sexual contact as explained in Instruction No. 11 includes the lesser offense of simple assault, as later defined in these instructions.

Consider this instruction and Instruction No. 13 only if you have first found the defendant "Not Guilty" of the crime explained in Instruction No. 11, or if, after all reasonable efforts, you have been unable to reach a verdict as to such alleged crime.

INSTRUCTION NO. 13

If your verdict under Instruction No. 11, as to the crime charged in Count I of the indictment is "Not Guilty," or if, after all reasonable efforts, you are unable to reach a verdict as to such alleged crime, you should record that decision on the verdict form and go on to consider whether the defendant is guilty of the crime of simple assault under this Instruction.

The crime of simple assault, a lesser included offense of the crime explained in Instruction No. 11, has three essential elements, which are:

1. That on or about the dates alleged, the defendant did voluntarily and intentionally assault [REDACTED],
2. That [REDACTED] is an Indian;
3. That the offense took place in Indian country.

The term "assault," as used in this Instruction, means any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm.

For you to find the defendant guilty of the crime of simple assault, a lesser included offense of the crime explained in Instruction No. 11, the government must prove all of the essential elements of such lesser included offense beyond a reasonable doubt. Otherwise you must find the defendant not guilty of the crime of simple assault.

INSTRUCTION NO. 14

The crime of abusive sexual contact, as charged in Count II of the indictment, has four essential elements, which are:

1. On or about between August 2002 and June 2003, the defendant did knowingly and intentionally engage in sexual contact with Sharlow Morrison, namely, the intentional touching, either directly or through the clothing, of the genitalia, groin, or inner thigh of Sharlow Morrison with an intent to abuse, humiliate, harass, or degrade Sharlow Morrison or to arouse or gratify Marcos Davila's sexual desire.
2. At the time of the alleged offense, Sharlow Morrison had attained the age of 12 years but had not attained the age of 16 years, and was at least four years younger than the defendant.
3. Sharlow Morrison is an Indian, and
4. The alleged offense occurred in Indian Country.

For you to find the defendant guilty of this crime as charged in Count II of 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 crime.

INSTRUCTION NO. 15

Intent may be proved like anything else. You may consider any statements 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.

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. 16

The indictment in this case alleges that the alleged victims are Indians 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 indictment.

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that the alleged victims are Indians and that the place where the alleged incidents 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 fact that the alleged victims are Indians and that the place where the alleged offenses are claimed to have occurred is in Indian country.

INSTRUCTION NO. 17

The indictment charges that offenses were committed “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 as to that offense.

INSTRUCTION NO. 18

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. 19

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 verdict as to each count 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 or verdicts.

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. 20

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. 21

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

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UNITED STATES OF AMERICA,

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CR 12-10004

Plaintiff,

-vs-

VERDICT

MARCOS DAVILA,

Defendant.

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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 abusive sexual contact, as charged in Count I of the indictment, find Marcos Davila:

\_\_\_\_\_ NOT GUILTY      \_\_\_\_\_ GUILTY

If, and only if, you found Marcos Davila NOT GUILTY of abusive sexual contact, or if, after all reasonable efforts, you are unable to reach a verdict as to that crime, then you must deliberate on the lesser included offense of simple assault as explained in Instruction No. 12, and complete the following:

We, the jury in the above entitled action, as to the crime of simple assault as explained in Instruction No. 13, a lesser included offense of abusive sexual contact, find Marcos Davilla:

\_\_\_\_\_ NOT GUILTY      \_\_\_\_\_ GUILTY

**COUNT II**

We, the jury in the above entitled action, as to the crime of abusive sexual contact, as charged in Count II of the indictment, find Marcos Davila:

\_\_\_\_\_ NOT GUILTY      \_\_\_\_\_ GUILTY

Dated this \_\_\_\_\_ day of July, 2012.

\_\_\_\_\_  
Foreperson