

FILED

OCT 23 2013



UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,

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13-30042-02-RAL

Plaintiff,

FINAL INSTRUCTIONS
TO JURY

-vs-

MART KIRKLAND,

Defendant.

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 indictment in this case charges the Defendant with two different crimes. Under Count I, the indictment charges that the Defendant committed the crime of Aggravated Sexual Abuse. Under Count II, the indictment charges that the Defendant committed the crime of Sexual Abuse. 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, as charged in Count I of the indictment, has five elements, which are:

One, that on or about the 29th day of October, 2012, the Defendant engaged in or attempted to engage in a sexual act with Matilda Brave, a/k/a Matilda Crow Dog;

The term “sexual act” as it is used in this instruction means: 1) contact between the penis and the vulva or the penis and the anus. Contact involving the penis occurs upon penetration, however slight; or 2) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Two, that the Defendant committed such act by using force against Matilda Brave, a/k/a Matilda Crow Dog, and without the consent of Matilda Brave, a/k/a Matilda Crow Dog;

Three, that the Defendant committed such act knowingly;

Four, that the Defendant is an Indian; and

Five, 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 indictment, otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 8

The Defendant is charged in Count I of the indictment not only with committing the crime of Aggravated Sexual Abuse but also with aiding and abetting the crime of Aggravated Sexual Abuse. A person may be found guilty of Aggravated Sexual Abuse even though he personally did not do every act constituting the offense charged if he aided and abetted the commission of the Aggravated Sexual Abuse.

In order for the Defendant to have aided and abetted the commission of the crime of Aggravated Sexual Abuse as charged in Count I of the indictment, the Government must prove beyond a reasonable doubt that before or at the time the crime was committed:

One, that the Defendant knew that aggravated sexual abuse was being committed or going to be committed;

Two, that the Defendant caused, encouraged, or aided the commission of aggravated sexual abuse;

Three, that the Defendant committed such act knowingly;

Four, that the Defendant is an Indian; and

Five, that the offense occurred in Indian country.

For you to find the Defendant guilty of Aggravated Sexual Abuse by reason of aiding and abetting, the Government must prove beyond a reasonable doubt all of these elements and must also prove beyond a reasonable doubt that all of the elements of Aggravated Sexual Abuse were committed by some person or persons whom the Defendant aided and abetted in the commission of the 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.

INSTRUCTION NO. 9

Aggravated Sexual Abuse, as charged in Count I of the indictment, requires proof beyond a reasonable doubt that the Defendant used “force.” The element of “force,” as it applies to Count I of the indictment means the use of such force as is sufficient to overcome or restrain a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.

INSTRUCTION NO. 10

The crime of Sexual Abuse, as charged in Count II of the indictment, has five elements, which are:

One, that on or about the 29th day of October, 2012, the Defendant knowingly engaged in or attempted to engage in a sexual act with Matilda Brave, a/k/a Matilda Crow Dog;

The term “sexual act” as it is used in this instruction means: 1) contact between the penis and the vulva or the penis and the anus. Contact involving the penis occurs upon penetration, however slight; or 2) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Two, that at the time of such act, Matilda Brave, a/k/a Matilda Crow Dog was incapable of appraising the nature of the conduct or was physically incapable of declining participation in, or communicating her unwillingness to engage in, that sexual act;

Three, that the Defendant knew that Matilda Brave, a/k/a Matilda Crow Dog was incapable of appraising the nature of the conduct or was physically incapable of declining participation in, or communicating her unwillingness to engage in, that sexual act;

Four, that the Defendant is an Indian; and

Five, 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 indictment, otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 11

The Defendant is charged in Count II of the indictment not only with committing the crime of Sexual Abuse but also with aiding and abetting the crime of Sexual Abuse. A person may be found guilty of Sexual Abuse even though he personally did not do every act constituting the offense charged if he aided and abetted the commission of the Sexual Abuse.

In order for the Defendant to have aided and abetted the commission of the crime of Sexual Abuse as charged in Count II of the indictment, the Government must prove beyond a reasonable doubt that before or at the time the crime was committed:

One, that the Defendant knew that sexual abuse was being committed or going to be committed;

Two, that the Defendant caused, encouraged, or aided the commission of the sexual abuse;

Three, that the Defendant committed such act knowingly;

Four, that the Defendant is an Indian; and

Five, that the offense occurred in Indian Country.

For you to find the Defendant guilty of Sexual Abuse by reason of aiding and abetting, the Government must prove beyond a reasonable doubt all of these elements and must also prove beyond a reasonable doubt that all of the elements of Sexual Abuse were committed by some person or persons whom the Defendant aided and abetted in the commission of the 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.

INSTRUCTION NO. 12

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. 13

The crimes charged in Counts I and II of the indictment include an attempt to cause a sexual act. A person may be found guilty of an attempt if he intended to cause a sexual act 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, would conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.

INSTRUCTION NO. 14

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. 15

Being under the influence of alcohol provides a legal excuse for the commission of a crime only if the effect of the alcohol makes it impossible for the Defendant to have the specific intent to commit the offense. Evidence that the Defendant acted while under the influence of alcohol may be considered by you, together with all the other evidence, in determining whether or not he did in fact have specific intent to commit any crime.

INSTRUCTION NO. 16

You have heard evidence that Zachary Poorman participated in the crimes charged against the Defendant and that he hopes to receive a reduced sentence on criminal charges pending against him in return for his cooperation with the Government in this case.

Zachary Poorman entered into an agreement with the United States Attorney which provides that in return for his assistance, the Government will consider his cooperation and may recommend a less severe sentence.

You may give the testimony of this witness such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by his desire to please the Government or strike a good bargain with the Government about his own situation or his hope of receiving a reduced sentence is for you to decide.

Zachary Poorman's guilty plea cannot be considered by you as any evidence of this defendant's guilt. Zachary Poorman's guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon his testimony.

INSTRUCTION NO. 17

Reasonable doubt is doubt based upon reason and common sense, and not the mere possibility of innocence or mere speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Proof beyond a reasonable doubt, however, does not mean proof beyond all possible doubt.

INSTRUCTION NO. 18

You will note that the 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. 19

The 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 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 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 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, Instagram, 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. 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 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. 13-30042-02-RAL

*

Plaintiff, *

-vs- * VERDICT FORM

MART KIRKLAND, *

*

Defendant. *

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

1. We find Defendant Mart Kirkland _____ (fill in either "not guilty" or "guilty") of Aggravated Sexual Abuse as charged in Count I.

2. We find Defendant Mart Kirkland _____ (fill in either "not guilty" or "guilty") of Sexual Abuse as charged in Count II.

Dated October __, 2013

Foreperson