

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DIAHNA ROSE KIRK,
a/k/a Di-Ahna Rose Kirk,

Defendant.

1:24-CR-10011-CBK

JURY INSTRUCTIONS

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. I also gave you instructions during the trial and you must follow those instructions. It would be a violation of your sworn duty to base your verdict 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 denial made by the defendant in her plea 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 a just verdict, regardless of the consequences to any party.

INSTRUCTION NO. 3

The indictment in this case charges the defendant with the crime of theft from an Indian tribal organization. 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. Therefore, the defendant, even though charged, begins the trial with no evidence against her. 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 crime charged.

There is no burden upon the defendant to prove that she is innocent.

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. Likewise, questions by the Judge 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.

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.

You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.

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 evidence that a witness has pleaded guilty to a crime which arose out of the same events for which defendant is on trial here pursuant to a plea agreement with the government. You must not consider that as any evidence of defendant's guilt. You may consider such witness's guilty plea only for the purpose of determining how much, if at all, to rely upon that witness's testimony.

You have further heard evidence that a witness has agreed to cooperate and provide truthful testimony in this case and hopes to receive a reduced sentence for doing so. If the prosecutor handling the witness's case believes the witness provided substantial assistance, that prosecutor can file in the court a motion to reduce that witness's sentence. The Court has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, makes a motion to reduce a sentence. It is up to the Court to decide whether to reduce the sentence at all, and if so, how much to reduce the sentence. Whether the witness's testimony may have been influenced by a hope of receiving a more lenient sentence is for you to decide. You may give the witness's testimony whatever weight you think it deserves.

INSTRUCTION NO. 10

The crime of theft from an Indian tribal organization, as charged in the indictment, has three essential elements, which are:

1. Between on or about January 1, 2021, and continuing through September 30, 2023, in the District of South Dakota, the defendant embezzled, stole, or misapplied more than \$1,000 of money belonging to Sisseton-Wahpeton Oyate Fuel Inc.
2. The defendant did so with intent to injure or defraud Sisseton-Wahpeton Oyate Fuel Inc.
3. Sisseton-Wahpeton Oyate Fuel Inc. was an Indian tribal organization.

For you to find the defendant guilty of this crime 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 crime.

INSTRUCTION NO. 17

To “embezzle” means to knowingly, voluntarily and intentionally take, or convert to one’s own use, the property of another which came into the defendant’s possession lawfully, by virtue of some office, employment, or position of trust which the defendant held.

To “misapply” means to voluntarily and intentionally use the funds or property of Sisseton-Wahpeton Oyate Fuel Inc. knowing that such use is unauthorized, unjustifiable or wrongful. Misapplication includes the wrongful taking or use of the money or property of Sisseton-Wahpeton Oyate Fuel Inc. by its agent for her own benefit or the use or benefit of some other person.

To act with “intent to defraud” means to act with intent to deceive or cheat, for the purpose of causing a financial loss to someone else or bringing about a financial gain to the defendant or another. A person acts with intent to defraud if she acts knowingly and if the natural result of her conduct would be to defraud the organization, even though this may not have been her motive.

An “Indian tribal organization” is any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

INSTRUCTION NO. 12

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 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. 13

The indictment charges that the offense was committed between on or about certain dates. The proof need not establish with certainty the exact date of the alleged offense. 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 dates alleged.

INSTRUCTION NO. 14

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 verdict, you will have your foreperson fill in, date, and sign the form to state the verdict upon which you unanimously agree, and then notify the marshal that you have a verdict.

INSTRUCTION NO. 15

The verdict must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. Any verdict 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.

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. 16

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 a unanimous verdict.

INSTRUCTION NO. 17

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 verdict should be.

What the verdict shall be is your exclusive duty and responsibility.

UNITED STATES DISTRICT COURT
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Please return a verdict by placing an "X" in the space provided.

We, the jury in the above-entitled action, as to the crime of theft from an Indian tribal organization, as charged in the indictment, find Diahna Rose Kirk:

_____ NOT GUILTY _____ GUILTY

Dated this _____ day of November, 2024.

Foreperson
