

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

GERBER DAVID SANTOS  
GONZALEZ,

Defendant.

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**4:24-CR-40055**

**FINAL JURY INSTRUCTIONS**

## 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 the trial are not repeated here.

The instructions I am about to give you now 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.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.01 (2023).

## 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.

You should not be influenced by any person's race, color, ethnicity, national origin, religion, gender, gender identity, sexual orientation, disability, or economic circumstances. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may express without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

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.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.02 (2023); Defendant's Proposed Jury Instruction No. 9 (modified).

### 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 any facts that have been stipulated—that is, formally agreed to by the parties, and any facts that have been judicially noticed—that is, facts which I say you may, but are not required to, accept as true, even without evidence.

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 will 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.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.03 (2023).

#### 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.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.04 (2023);  
Defendant's Proposed Jury Instruction No 6.

## INSTRUCTION NO. 5

There is nothing particularly different in the way that you should consider the evidence in a trial from that in which any reasonable and careful person would treat any very important question that must be resolved by examining facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case. Use the evidence only for those purposes for which it has been received and give the evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything other than the evidence received in the case and the instructions of the Court. Remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence because the burden of proving guilt beyond a reasonable doubt is always assumed by the government.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.02 (6th ed. 2008) (modified).

## INSTRUCTION NO. 6

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes no distinction between the weight or value 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 him not guilty.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.04 (6th ed. 2008) (modified); *Eighth Circuit Manual of Model Jury Instructions Criminal*, §§ 1.03, 4.17 (2022).

## INSTRUCTION NO. 7

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the proceedings. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

*United States v. Rhodes*, 631 F.2d 43, 46 n.3 (5th Cir. 1980); O'Malley, Grenig, and Lee, *Federal Jury Practice and Instructions*, § 12.07 (6th ed. 2008).



## INSTRUCTION NO. 8

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. 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.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 14.16 (6th ed. 2008); Defendant's Proposed Instruction No. 7 (modified).

### INSTRUCTION NO. 9

The Indictment in this case charges the defendant with two different crimes.

Count 1 charges that on or about March 12, 2024, in the District of South Dakota and elsewhere, the defendant, Gerber David Santos Gonzalez, did attempt to use a facility and means of interstate commerce, that is, a cell phone and the internet, to knowingly persuade, induce, and entice an individual, who had not yet attained the age of 18, namely an undercover law enforcement officer posing as a 15 year-old female, to engage in sexual activity for which the defendant could be charged with a criminal offense, namely, criminal sexual conduct in violation of South Dakota Codified Law §§ 22-22-1, 22-22-7, and 22-22-24.3, all in violation of 18 U.S.C. § 2422(b).

Count 2 charges that on or about March 12, 2024, in Sioux Falls, South Dakota and elsewhere, in and affecting interstate and foreign commerce, Gerber David Santos Gonzalez, did knowingly and intentionally recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, and solicit, by any means, a person, to wit; an undercover law enforcement officer posing as a 15-year-old female, and knowing that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act, and attempted to do so, all in violation of 18 U.S.C. §§ 1591(a)(1) and 1591(b)(2).

The defendant has pleaded not guilty to these charges. There is no burden upon the defendant to prove that he is innocent of the charges against him.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.06 (2023) (modified); Defendant's Proposed Instruction No. 1 (modified).

## INSTRUCTION NO. 10

You must presume that the defendant is innocent of the crimes charged against him. The Indictment is only a formal method of beginning a criminal case. It does not create any presumption of guilt; it is merely an accusation. The fact that a person has been indicted does not create any inference, nor is it evidence, that he is guilty of a crime. The presumption of innocence alone is sufficient to acquit the defendant unless you as jurors are satisfied beyond a reasonable doubt of the defendant's guilt of the crime charged from all the evidence that has been introduced in the case against him.

The burden is always upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to a 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. Unless the government proves, beyond a reasonable doubt, that the defendant committed each and every element of an offense charged against him in the Indictment, you must find the defendant not guilty of that offense.

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

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.06 (2023) (modified); O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.10 (6th ed. 2008) (modified); Defendant's Proposed Jury Instruction No. 1 (modified).

INSTRUCTION NO. 11

Section 2422(b) of Title 18 of the United States Code provides that it is unlawful for any person to use any facility or means of interstate commerce to knowingly persuade, induce, entice, or coerce any individual who has not attained the age of 18 years, to engage in any sexual activity for which any person can be charged with a criminal offense.

It is also unlawful to attempt to violate section 2422(b).

18 U.S.C. § 2422(b).

## INSTRUCTION NO. 12

The crime of using any facility or means of interstate commerce to attempt to persuade, induce, or entice anyone under eighteen (18) years of age to engage in sexual activity for which any person can be charged with a criminal offense, as charged in Count 1 of the Indictment, has the following essential elements, which are:

- One*, that on or about March 12, 2024, in the District of South Dakota, the defendant knowingly used a facility or means of interstate commerce, that is, a cell phone or the internet, to attempt to persuade, induce, or entice an individual under the age of eighteen (18) years of age to engage in sexual activity;
- Two*, that the defendant believed that such individual was less than eighteen (18) years of age;
- Three*, that if the sexual activity had occurred, the defendant could have been charged with a criminal offense under South Dakota law; and
- Four*, that the defendant intended to persuade, induce, or entice the individual to engage in unlawful sexual activity and knowingly and willfully took some action that was a substantial step toward persuading, inducing, or enticing the individual to engage in unlawful sexual activity.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant Gerber David Santos Gonzalez guilty of the crime charged in Count 1 in the Indictment; otherwise, you must find the defendant not guilty of this crime.

It is not necessary for the government to prove that the individual was, in fact, less than eighteen (18) years of age; but it is necessary for the government to prove the defendant believed such individual to be under that age.

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.

Under South Dakota law, a person commits a criminal offense when they subject another person who is at least thirteen years of age, but less than sixteen years of age, to sexual penetration and the actor is at least three years older than the other person. “Sexual penetration” means an act, however slight, of sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the body or of any object into the genital or anal openings of another person's body.

Under South Dakota law, a person commits a criminal offense when they knowingly engage in sexual contact with another person, other than that person’s spouse, if the other person is under the age of sixteen years and the actor is sixteen years of age or older. “Sexual contact” means any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, §§ 3.09, 8.01 and 6.18.2422B (2023) (modified); SDCL §§ 22-22-1, 22-22-2, 22-22-7, 22-22-7.1; *United States v. Joiner*, 39 F.4th 1003, 1009 (8th Cir. 2022) (citing *United States v. Berg*, 640 F.3d 239, 252 (7th Cir. 2011) and *United States v. Patten*, 397 F.3d 1100, 1103 (8th Cir. 2005)); Government’s Proposed Jury Instruction No. 1 (modified); Defendant’s Proposed Jury Instruction No. 2 (modified).

INSTRUCTION NO. 13

Section 1591(a) of Title 18 of the United States Code provides that it is unlawful for any person, in or affecting interstate or foreign commerce, to knowingly recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, or solicit by any means a person knowing, or, except where the act constituting the violation is advertising, in reckless disregard of the fact, that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.

It is also unlawful to attempt to violate section 1591(a).

INSTRUCTION NO. 14

The crime of attempted sex trafficking of a child, as charged in Count 2 of the Indictment, has the following essential elements, which are:

*One*, on or about March 12, 2024, the defendant knowingly attempted to recruit, entice, obtain, patronize, or solicit by any means a person, namely, an undercover law enforcement officer posing as a 15-year-old female, whom he knew would be caused to engage in a commercial sex act;

*Two*, the defendant knew or recklessly disregarded that the person who would be caused to engage in a commercial sex act was under eighteen (18) years of age;

*Three*, the offense was in or affected interstate or foreign commerce; and

*Four*, the defendant intended to recruit, entice, obtain, patronize, or solicit an individual under eighteen (18) years of age to engage in a commercial sex act and voluntarily and intentionally carried out some action that was a substantial step toward recruiting, enticing, obtaining, patronizing or soliciting such individual to engage in a commercial sex act.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant Gerber David Santos Gonzalez guilty of the crime charged under Count 2 in the Indictment; otherwise, you must find the defendant not guilty of this crime.

The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.



The phrase “interstate commerce” means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia.

The phrase “foreign commerce” means commerce between any state, territory or possession of the United States, including the District of Columbia, and a foreign country.

The term “commerce” includes, among other things, travel, trade, transportation and communication.

In determining whether the defendant’s conduct was “in or affecting interstate or foreign commerce,” you may consider whether the defendant used means or facilities of interstate commerce, such as telephones, the internet, or hotels that serviced interstate travelers, or whether the defendant’s conduct substantially affected interstate commerce by virtue of the fact that the defendant purchased items that had moved in interstate commerce.

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.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, §§ 3.09, 8.01, and 6.18.1591 (2023) (modified); *United States v. Mung*, 5:18-CR-50091-KES, Docket 42 at pages 6-8 (D.S.D. Feb. 26, 2019); *United States v. Slim*, 5:17-CR-50126-JLV, 2020 WL 6036837, at \*3 (D.S.D. May 27, 2020), *report and recommendation*

*adopted in relevant part by*, 2020 WL 3790681 at \*2 (D.S.D. Jul. 7, 2020) (“Attempted commercial sex trafficking of a minor requires proof the minor would be caused to engage in a commercial sex act. . . .”); *United States v. Lopez*, 74 F.4th 915, 918 (8th Cir. 2023) (“A person intends to commit the offense of commercial sex trafficking of a minor ‘when he subjectively intends ‘to engage in a commercial sex act with someone he believed to be a minor . . .’ even if that belief is mistaken.”); *United States v. Wolff*, 798 F.3d 972, 975 (8th Cir. 2015); *United States v. Zam Lian Mung*, 989 F.3d 639, 643 (8th Cir. 2021) (stating that the reckless disregard mens rea applies to the age criteria); Defendant’s Proposed Jury Instruction No. 3 (modified); Government’s Proposed Jury Instruction No. 2 (modified).

INSTRUCTION NO. 15

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 must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in life's most important decisions. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.11 (2023) (modified); O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 12.10 (6th ed. 2008) (modified); Defendant's Proposed Instruction No. 5 (modified).

INSTRUCTION NO. 16

“Intent” and “knowledge” are elements of the offenses charged in this case and must be proven beyond a reasonable doubt. The government is not required to prove the defendant knew his acts or omissions were unlawful. An act is done “knowingly” if the defendant realizes what he is doing and does not act through ignorance, mistake, or accident. You may consider the evidence of the defendant’s words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly.

Intent or knowledge may be proved like anything else. You may consider 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 knowledge or 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. 17

The Indictment charges that the offenses were committed “on or about” March 12, 2024. Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 13.05 (6th ed. 2008) (modified); *Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.14 (2023) (modified).

## INSTRUCTION NO. 18

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I will 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, 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 vote stands numerically.

*Fifth*, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts, whether guilty or not guilty,

must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be—that is entirely for you to decide.

*Finally*, the verdict form is simply the written notice of the decisions that you reach in this case. You will take this form to the jury room, and when each of you has agreed upon the verdicts, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom.

*Eighth Circuit Manual of Model Jury Instructions Criminal*, § 3.12 (2022).