

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. DRACE DREAMING BEAR, Defendant.</p>	<p>5:23-CR-50043-RAL FINAL JURY INSTRUCTIONS</p>
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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—that 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.

When you were instructed that evidence was received for a limited purpose, you must follow that instruction.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

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 of any witness 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

The Indictment in this case charges the defendant, Drace Dreaming Bear, with three counts of Aggravated Sexual Abuse and one count of Kidnapping. The defendant has pleaded not guilty to these charges.

The Indictment is simply the document that formally charges the defendant with the crimes for which he is on trial. The Indictment is not evidence of anything. At the beginning of the trial, I instructed you that you must presume the defendant to be innocent. Thus, the defendant began the trial with a clean slate, with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty. This presumption can be overcome only if the United States proved during the trial, beyond a reasonable doubt, each element of the crimes charged.

Please remember that only the defendant, not anyone else, is on trial here, and that the defendant is on trial only for the crimes charged, not for anything else.

There is no burden upon the defendant to prove that he is innocent. Instead, the burden of proof remains on the United States throughout the trial. 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. 6

The crime of Aggravated Sexual Abuse, as charged in Count I of the Indictment, has four essential elements, which are:

***One*, that on or about between the 3rd day of December 2022, and the 4th day of December 2022, at Oglala, in the District of South Dakota, the defendant, Drace Dreaming Bear, knowingly caused, and attempted to cause, Lathon Cross Dog, to engage in the sexual act of contact between his penis and her vulva;**

***Two*, that the defendant committed such act by using force against Lathon Cross Dog and without the consent of Lathon Cross Dog;**

***Three*, that the defendant is an Indian; and**

***Four*, that the offense took place in Indian country.**

If you find unanimously that the United States has proved these four elements 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. 7

The crime of Aggravated Sexual Abuse, as charged in Count II of the Indictment, has four essential elements, which are:

***One*, that on or about between the 3rd day of December 2022, and the 4th day of December 2022, at Oglala, in the District of South Dakota, the defendant, Drace Dreaming Bear, knowingly caused, and attempted to cause, Lathon Cross Dog, to engage in the sexual act of contact between his penis and her anus;**

***Two*, that the defendant committed such act by using force against Lathon Cross Dog and without the consent of Lathon Cross Dog;**

***Three*, that the defendant is an Indian; and**

***Four*, that the offense took place in Indian country.**

If you find unanimously that the United States has proved these four elements 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. 8

The crime of Aggravated Sexual Abuse, as charged in Count III of the Indictment, has five essential elements, which are:

***One*, that on or about between the 3rd day of December 2022, and the 4th day of December 2022, at Oglala, in the District of South Dakota, the defendant, Drace Dreaming Bear, knowingly caused, and attempted to cause, Lathon Cross Dog, to engage in the sexual act of penetrating her vagina with his finger;**

***Two*, that the defendant committed such act by using force against Lathon Cross Dog and without the consent of Lathon Cross Dog;**

***Three*, that the defendant committed such act to abuse, humiliate, harass, or degrade Lathon Cross Dog or to arouse or gratify the defendant's sexual desire;**

***Four*, that the defendant is an Indian; and**

***Five*, that the offense took place in Indian country.**

If you find unanimously that the United States has proved these five elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged in Count III of the Indictment. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 9

As used in these instructions, the term “sexual act” means:

(A) Contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) 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.

INSTRUCTION NO. 10

The term “force” as used in these instructions means the use of physical force sufficient to overcome, restrain, or injure the alleged victim or if the defendant uses a threat of harm sufficient to coerce or compel submission; or the use of force sufficient to prevent the alleged victim from escaping the sexual act. A discrepancy in the size of the individuals is not, by itself, sufficient to conclude that the defendant used force.

INSTRUCTION NO. 11

You have heard evidence that the defendant may have previously committed another sexual assault involving S.G., a 16-year-old female at the time. An individual who has attained the age of 16 can consent to engage in a sexual act, regardless of the age of the other participant.

The defendant is not charged with any criminal offense related to this other conduct. You may consider this evidence only if you unanimously find it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt.

If you find that this other offense has not been proved, you must disregard it. If you find that this other offense has been proved, you may consider it to help you decide any matter to which it is relevant. You should give it the weight and value you believe it is entitled to receive. You may consider the evidence of such other act of sexual assault for its tendency, if any, to show the defendant's propensity to engage in sexual assault, as well as its tendency, if any, to determine whether the defendant committed any of the acts charged in the Indictment; to determine the defendant's intent; to determine the defendant's motive, plan, design, or opportunity to commit the acts charged in the Indictment; and to determine the defendant's knowledge.

Remember, the defendant is on trial only for the crimes charged. You may not convict a person simply because you believe he may have committed similar acts in the past.

INSTRUCTION NO. 12

A person may be found guilty of an attempt to commit an offense if he intended to engage in an offense and voluntarily and intentionally carried out some act which was a substantial step towards engaging in the offense. 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 offense. 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 offense 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 commit the substantive offense.

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 offense. In order for behavior to be punishable as an attempt it need not be incompatible with innocence, but the conduct must be necessary to the consummation of the offense and be of such a nature that a reasonable observer viewing the conduct in context could conclude beyond a reasonable doubt that it was undertaken with a design to commit the offense charged.

INSTRUCTION NO. 13

The crime of Kidnapping, as charged in Count IV of the Indictment, has four essential elements, which are:

***One*, that on or about between the 3rd day of December 2022, and the 4th day of December 2022, at Oglala, in Indian Country, in the District of South Dakota, the defendant, Drace Dreaming Bear, unlawfully and willfully seized, confined, inveigled, decoyed, kidnapped, or carried away Lathon Cross Dog without her consent;**

***Two*, the defendant held Lathon Cross Dog for ransom, reward, or otherwise, specifically for the purpose of committing the sexual assault charged in Count III of the Indictment;**

The “or otherwise” is satisfied if the person kidnapped was taken for some reason that the defendant considered sufficient benefit to him, or for some purpose of the defendant’s own.

***Three*, that the defendant is an Indian; and**

***Four*, that the alleged offense took place in Indian country.**

If you find unanimously that the United States has proved these four elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged in Count IV of the Indictment. Otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 14

The term “kidnap” as used in Instruction No. 13 means to take and carry away a person by force and against his or her will. “Seize,” “confine,” and “carry away” all mean the taking and carrying away of a person, or holding of someone by force or without that person’s consent.

The term “inveigle” as used in Instruction No. 13 means to lure or entice or lead astray by false representations or promises, or other deceitful means.

The term “decoy” as used in Instruction No. 13 means enticement by means of some fraud, trick, or temptation.

INSTRUCTION NO. 15

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 United States, 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. 16

Intent or knowledge 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 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.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The United States is not required to prove that the defendant knew that his actions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NO. 17

You have heard testimony that the defendant made a statement to others. It is for you to decide:

First, whether the statement was made; and

Second, if so, how much weight you should give the statement.

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

INSTRUCTION NO. 18

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education, or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

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. 19

Reasonable doubt is doubt based upon reason and common sense, and not doubt based on 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 does not mean proof beyond all possible doubt.

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 United States 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 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.

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 cell phone, smart phone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, mobile application, or website such as Facebook, Snapchat, LinkedIn, Instagram, YouTube, TikTok, X (formerly known as Twitter), or Truth Social, 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. 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.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. DRACE DREAMING BEAR, Defendant.</p>	<p>5:23-CR-50043-RAL VERDICT FORM</p>
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We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. We find the defendant, Drace Dreaming Bear, _____ (fill in either “not guilty” or “guilty”) of Aggravated Sexual Abuse as charged in Count I of the Indictment.
2. We find the defendant, Drace Dreaming Bear, _____ (fill in either “not guilty” or “guilty”) of Aggravated Sexual Abuse as charged in Count II of the Indictment.
3. We find the defendant, Drace Dreaming Bear, _____ (fill in either “not guilty” or “guilty”) of Aggravated Sexual Abuse as charged in Count III of the Indictment.
4. We find the defendant, Drace Dreaming Bear, _____ (fill in either “not guilty” or “guilty”) of the crime of Kidnapping as charged in Count IV of the Indictment.

Dated February _____, 2024.

Foreperson