

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

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<p>UNITED STATES OF AMERICA,  Plaintiff,  vs.  JAMES WADE HENRY, SR.,  Defendant.</p>	<p>3:15-CR-30119-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.

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.

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

INSTRUCTION NO. 5

You have heard testimony from persons described as experts. A person who, by knowledge, skill, training, education, or experience, has become expert in some field may state his or her opinion on matters in that field and may also state the reasons for his or her 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' 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. Count I charges that the defendant committed the crime of Aggravated Sexual Abuse of a Child. Count II charges that the defendant committed the crime of Abusive Sexual Contact with a Child. The defendant has pleaded not guilty to each of those charges.

Count I and Count II are alternative counts. The defendant can be found guilty on only one of the two Counts or on neither Count.

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 government proved during the trial, beyond a reasonable doubt, each element of the crimes charged.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

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

INSTRUCTION NO. 7

You are to consider Count I of the indictment first. The crime of Aggravated Sexual Abuse of a Child, as charged in Count I of the indictment, has four elements, which are:

***One, that on or about between the 27th day of September, 2014, and the 28th day of September, 2014, the defendant, James Wade Henry, Sr., did knowingly engage in a sexual act with [NAME REDACTED] or knowingly attempt to engage in a sexual act with [NAME REDACTED];***

***Two, that [NAME REDACTED] had not attained the age of twelve years at the time of the sexual act;***

***Three, that James Wade Henry, Sr. is an Indian; and***

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

If all of these elements have been proved beyond a reasonable doubt as to James Wade Henry, Sr., then you must find him guilty of the crime charged; otherwise you must find him not guilty of this crime.



INSTRUCTION NO. 8

The term “sexual act” as used in these instructions, means the intentional touching, not through the clothing (meaning skin-to-skin), of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

INSTRUCTION NO. 9

If you find the defendant not guilty on Count I, then you are to consider Count II of the indictment. The crime of Abusive Sexual Contact with a Child, as charged in Count II of the indictment, has four elements, which are:

***One, that on or about between the 27th day of September, 2014, and the 28th day of September, 2014, the defendant, James Wade Henry, Sr., did knowingly engage in sexual contact with [NAME REDACTED] or knowingly attempt to engage in sexual contact with [NAME REDACTED];***

***Two, that [NAME REDACTED] had not attained the age of twelve years at the time of the sexual contact;***

***Three, that James Wade Henry, Sr. is an Indian; and***

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

If all of these elements have been proved beyond a reasonable doubt as to James Wade Henry, Sr., then you must find him guilty of the crime charged; otherwise you must find him not guilty of this crime.

INSTRUCTION NO. 10

The term “sexual contact” as used in these instructions, means the intentional touching, through the clothing (not skin-to-skin), of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

INSTRUCTION NO. 11

The crimes charged in Counts I and II of the indictment include an attempt to engage in sexual acts or sexual contact. A person may be found guilty of an attempt if he intended to engage in the sexual act or sexual contact and voluntarily and intentionally carried out some act which was a substantial step toward the sexual act or sexual contact.

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.

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 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. 13

In the crimes of Aggravated Sexual Abuse of a Child and Abusive Sexual Contact of a Child, as charged in Counts I and II of the indictment, there must exist in the mind of the defendant the specific intent to abuse, humiliate, harass, or degrade the alleged victim, or to arouse and gratify the defendant's sexual desire.

If the defendant acted without such specific intent, crimes of Aggravated Sexual Abuse of a Child and Abusive Sexual Contact of a Child, as charged in Counts I and II of the indictment have not been committed.

INSTRUCTION NO. 14

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government 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 other evidence, in deciding whether the defendant acted knowingly.

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, 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. 16

You will note that the indictment charges that the offense was committed “on or about” a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the case establishes beyond a reasonable doubt that the offense was committed on a date or dates reasonably near the dates alleged.

INSTRUCTION NO. 17

The indictment in this case alleges that the defendant James Wade Henry, Sr. 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 incident is 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 place where the alleged incident is claimed to have occurred is in Indian country.

INSTRUCTION NO. 18

You have heard that Manda Brave and Shana Schmidt were once convicted of crimes. You may use that evidence only to help you decide whether to believe the witness and how much weight to give their testimony.

INSTRUCTION NO. 19

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, Snapchat, LinkedIn, Instagram, YouTube, My Space 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. 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.

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<p>UNITED STATES OF AMERICA,  Plaintiff,  vs.  JAMES WADE HENRY, SR.,  Defendant.</p>	<p>3:15-CR-30119-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, James Wade Henry, Sr., \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of Aggravated Sexual Abuse of a Child as charged in Count I of the indictment.

*(If and only if you find the defendant “not guilty” on Count I, you are then to consider Count II of the indictment)*

2. We find the defendant, James Wade Henry, Sr., \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of Abusive Sexual Contact with a Child as charged in Count II of the indictment.

DATED this \_\_\_\_ day of June, 2016.

\_\_\_\_\_  
FOREPERSON