

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>KEVIN ALLEN LAMM, a/ka/ Mike Malone,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: right;">4:17-CR-40040-01-KES</p> <p style="text-align: center;">FINAL INSTRUCTIONS TO THE JURY</p>
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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 – DISTRIBUTION AND RECEIPT OF CHILD PORNOGRAPHY

For you to find Kevin Allen Lamm guilty of the offense of distribution and receipt of child pornography as charged in Count One of the Superseding Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that on or about between January 12, 2017, and April 27, 2017, Lamm knowingly received or distributed or attempted to receive or distribute materials that contained visual depictions of child pornography;

The term “child pornography” means any visual depiction of a minor engaging in sexually explicit conduct, where the minor was engaged in the sexually explicit conduct during production of the depiction.

The term “visual depiction” includes any photograph, film, video, picture, computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means. It includes data stored on computer disk or by electronic means which is capable of conversion into visual image.

The term “minor” means any person under the age of eighteen years.

The term “sexually explicit conduct” means actual or stimulated sexual intercourse, including genital-genital, oral-genital, anal-genital, oral-anal, masturbation, or lascivious exhibition of the genitals or pubic area of any person.

Whether a visual depiction of the genitals or pubic area constitutes a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as:

- 1) whether the focal point of the picture is on the minor’s genitals or pubic area;
- 2) whether the setting of the picture is sexually suggestive, that is, in a place or pose generally associated with sexual activity;
- 3) whether the minor is depicted in an unnatural pose or in inappropriate attire, considering the age of the minor;
- 4) whether the minor is fully or partially clothed, or nude;
- 5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity;
- 6) whether the picture is intended or designed to elicit a sexual response in the viewer;

- 7) whether the picture portrays the minor as a sexual object;
and
- 8) the caption(s) on the picture(s).

It is for you to decide the weight or lack of weight to be given to any of these factors. A picture need not involve all of these factors to constitute a lascivious exhibition of the genitals or pubic area.

A person may be found guilty of an attempt if he intended to receive or distribute child pornography and voluntarily and intentionally carried out some act which was a substantial step toward that 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 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 that statute.

Two, that Lamm knew that the visual depictions were of a minor engaging in sexually explicit conduct;

And three, that the materials containing the visual depictions had been mailed, shipped, or transported, including by computer, in interstate or foreign commerce.

The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

The term "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 and a foreign country.

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

Images transmitted or received over the Internet have moved in interstate or foreign commerce. It is for you to determine, however, if the material containing the visual depiction had been transmitted or received over the Internet.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously as to which visual depiction or depictions the defendant received or distributed. You are instructed that the government is only required to prove that Lamm received or distributed a single image.

You have also heard evidence of receipt or distribution of child pornography. You must agree unanimously as to whether Lamm received computer files that contained visual depictions of child pornography, distributed computer files that contained visual depictions of child pornography, or both.

For you to find Lamm guilty of the offense charged in Count One of the Superseding Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. Otherwise, you must find Lamm not guilty of the offense charged in Count One of the Superseding Indictment.

FINAL INSTRUCTION NO. 3 – PRODUCTION OF CHILD PORNOGRAPHY

For you to find Kevin Allen Lamm guilty of the offense of production of child pornography as charged in Count Two of the Superseding Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

One, that on or about January 12, 2017, Minor Female A was under the age of eighteen years;

The government is not required to prove that the defendant knew that Minor Female A was under the age of eighteen.

Two, that Lamm knowingly employed, used, persuaded, induced, enticed, or coerced Minor Female A to engage in sexually explicit conduct;

A person is “used” if they are photographed or videotaped.

The term “sexually explicit conduct” was defined for you in Final Instruction No. 2.

Three, that Lamm acted with the purpose of producing a visual depiction of such conduct;

An item is “produced” if it is produced, directed, manufactured, issued, published, advertised, created, made, or is in any other way brought into being by the involvement of an individual participating in the recording of child pornography.

The term “visual depiction” was defined for you in Final Instruction No. 2.

And four, that Lamm knew or had reason to know that such visual depiction would be transported across state lines or in foreign commerce or the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce by any means, including a computer.

The term “computer” was defined for you in Final Instruction No. 2.

The term “foreign commerce” was defined for you in Final Instruction No. 2.

The term “commerce” was defined for you in Final Instruction No. 2.

Images transmitted or received over the Internet have moved in interstate or foreign commerce. It is for you to determine, however, if the material containing the visual depiction had been transmitted or received over the Internet.

For you to find Lamm guilty of the offense charged in Count Two of the Superseding Indictment, the prosecution must prove all four of the essential elements beyond a reasonable doubt. Otherwise, you must find Lamm not guilty of the offense charged in Count Two of the Superseding Indictment.

FINAL INSTRUCTION NO. 4 – POSSESSION OF CHILD PORNOGRAPHY

For you to find Kevin Allen Lamm guilty of the offense of possession of child pornography as charged in Count Three of the Superseding Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that on or about between January 24, 2017, and April 27, 2017, Lamm knowingly possessed or attempted to possess materials that contained visual depictions of child pornography;

The term “child pornography” was defined for you in Final Instruction No. 2.

The term “visual depiction” was defined for you in Final Instruction No. 2.

The term “attempt” was defined for you in Final Instruction No. 2.

Two, that Lamm knew that the visual depictions were of a minor engaging in sexually explicit conduct;

The term “minor” was defined for you in Final Instruction No. 2.

The term “sexually explicit conduct” was defined for you in Final Instruction No. 2.

And three, that the materials containing the visual depictions had been shipped or transported in interstate or foreign commerce or were produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce.

The term “interstate commerce” was defined for you in Final Instruction No. 2.

The term “foreign commerce” was defined for you in Final Instruction No. 2.

The term “commerce” was defined for you in Final Instruction No. 2.

Images transmitted or received over the Internet have moved in interstate or foreign commerce. It is for you to determine, however, if the material containing the visual depiction had been transmitted or received over the Internet or was produced using materials that had been transmitted or received over the Internet.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously as to which visual depiction or depictions the defendant possessed. You are instructed that the government is only required to prove that Lamm possessed a single image.

You have also heard evidence of possession of child pornography. You must agree unanimously as to whether Lamm possessed computer files that contained visual depictions of child pornography.

For you to find Lamm guilty of the offense charged in Count Three of the Superseding Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. Otherwise, you must find Lamm not guilty of the offense charged in Count Three of the Superseding Indictment.

FINAL INSTRUCTION NO. 5 – DIFFERENT VISUAL DEPICTIONS

For Counts One and Three, you must consider different visual depictions. For instance, if the government contends that the defendant possessed visual depiction “A” under Count Three, the government may not also try the defendant for distributing visual depiction “A” under Count One.

FINAL INSTRUCTION NO. 6 – IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight, if any, you think it deserves.

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.

FINAL INSTRUCTION NO. 7 – PRIOR SIMILAR ACTS

You have heard evidence that the defendant may have previously committed the offense of possession of child pornography in 2006. The defendant is not charged here with this other offense. 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 offense has not been proved, you must disregard it. If you find that this offense has been proved, you may consider it to help you decide any matter to which it is relevant with respect to Counts One through Three. 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 possession of child pornography for its tendency, if any, to show the defendant's propensity to engaged in possession of child pornography, as well as its tendency, if any, to determine whether the defendant committed the acts charged in the Superseding Indictment, and for its tendency, if any, to determine the defendant's intent, motive, plan, design, or opportunity to commit the acts charged in the Second Superseding Indictment.

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.

FINAL INSTRUCTION NO. 8 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charge, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of an offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.

This burden means that you must find the defendant not guilty of an offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of that offense.

FINAL INSTRUCTION NO. 9 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 10 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.

Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 11 – DUTY DURING DELIBERATIONS

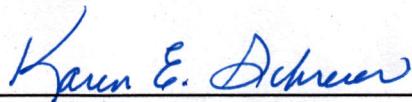
You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is guilty or not guilty. If the defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

Dated October 30, 2019.

BY THE COURT:

Handwritten signature of Karen E. Schreier in blue ink.

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE