

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. XAVIER ZEPHIER, Defendant.	No. CR. 18-40023-01-KES FINAL INSTRUCTIONS TO THE JURY
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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 – AGGRAVATED SEXUAL ABUSE

For you to find Xavier Zephier guilty of the offense of Aggravated Sexual Abuse as charged in the Indictment, the prosecution must prove the following five essential elements beyond a reasonable doubt:

One, that on or about October 29, 2017, Xavier Zephier caused Amelia Zephier to engage in a sexual act or attempted to do so;

The term “sexual act” means contact between the penis and the vulva, and contact involving the penis occurs upon penetration, however slight.

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

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 Zephier did so by using force against Amelia Zephier and without the consent of Amelia Zephier;

The term “force” means the use or threatened use of a weapon; the use of physical force sufficient to overcome, restrain, or injure the alleged victim; a threat of harm sufficient to coerce or compel submission by the alleged victim; 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.

Three, that Zephier did such acts knowingly;

An act is done “knowingly” if the defendant is aware of the act and does not act through ignorance, mistake, or accident. 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. The prosecution is not required to prove that the defendant knew his acts or omissions were unlawful.

Four, that Zephier is an Indian;

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that Zephier is an Indian.

The defendant has not, by entering into this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to present to the jury the fact that Zephier is an Indian.

And five, that the offense took place in Indian Country in the District of South Dakota.

The term "Indian country," includes: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

For you to find Zephier guilty of the offense charged in the Indictment, the prosecution must prove all five of the essential elements beyond a reasonable doubt. Otherwise, you must find Zephier not guilty of the offense charged in the Indictment.

FINAL INSTRUCTION NO. 3 – PROOF OF INTENT

Intent may be proven like anything else. You may consider any statements made or 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.

FINAL INSTRUCTION NO. 4 – INTOXICATION; DRUG USE

To find the defendant guilty based on an attempt to engage in a sexual act, there must exist in the mind of the defendant the specific intent to commit the sexual act described in that count. One of the issues in this case is whether the defendant was intoxicated at the time the act charged in the Indictment was committed.

Being under the influence of alcohol provides a legal excuse for the commission of a crime only if the effect of the alcohol makes it impossible for the defendant to have the specific intent to commit the act charged. Evidence that the defendant acted while under the influence of alcohol may be considered by you, together with all the other evidence, in determining whether or not he did in fact have the specific intent to commit the sexual act described in the Indictment. If the defendant acted without such specific intent, the attempt to commit such crime has not be committed.

FINAL INSTRUCTION NO. 5 – THEORY OF DEFENSE

Xavier Zephier's theory of defense is that Amelia Zephier consented to and willingly participated in any sexual encounter she had with him. The government has the burden of proving each of the essential elements of aggravated sexual abuse beyond a reasonable doubt. If you find that Amelia Zephier consented to any sexual encounter she had with Xavier Zephier, then you must find Xavier Zephier not guilty of this offense.

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 – DEFENDANT’S PRIOR SIMILAR ACTS

You have heard evidence that the defendant may have previously committed other offenses of sexual assault and attempted sexual assault. The defendant is not charged with these other offenses. You may consider this evidence only if you unanimously find it 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 these offenses have not been proved, you must disregard them. If you find that these offenses have been proved, you may consider them to help you decide any matter to which they are relevant. You should give them the weight and value you believe they are entitled to receive. You may consider the evidence of such other acts 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 the act charged in the Indictment, and for its tendency, if any, to determine the defendant’s intent, motive, plan, design, or opportunity to commit the act charged in the Indictment.

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

FINAL INSTRUCTION NO. 8 – SILENCE IN THE FACE OF ACCUSATION

Evidence has been introduced that a statement accusing the defendant of the crime charged in the Indictment was made, and that the defendant did not deny the accusation. If you find that the defendant was present and actually heard and understood the statement, and that it was made under such circumstances that the defendant would be expected to deny it if it was not true, then you may consider whether the defendant's silence was an admission of the truth of the statement.

FINAL INSTRUCTION NO. 9 – 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 the offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of the offense.

FINAL INSTRUCTION NO. 10 – 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. 11 – 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. 12 – DUTY DURING DELIBERATIONS

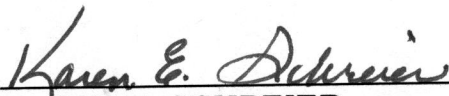
You must follow certain rules while conducting your deliberations and returning your verdict:

- 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 March 5, 2019.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE