

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID EVAN STARR,

Defendant.

No. CR 06-13-LRR

FINAL JURY INSTRUCTIONS

Ladies and Gentlemen of the Jury:

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I will 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 and during 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.

INSTRUCTION NUMBER 1

In considering these instructions, attach no importance or significance whatsoever to the order in which they are given.

INSTRUCTION NUMBER 2

Neither in these instructions nor in any ruling, action or remark that I have made during this trial have I intended to give any opinion or suggestion as to what the facts are or what your verdicts should be.

INSTRUCTION NUMBER 3

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 just verdicts, unaffected by anything except the evidence, your common sense and the law as I give it to you.

INSTRUCTION NUMBER 4

I have mentioned the word “evidence.” The “evidence” in this case consists of the following: the testimony of the witnesses, stipulations of the parties, and the documents and other things received as exhibits.

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 the lawyers are not evidence.
2. Anything that might have been said by jurors or the attorneys during the jury selection process is not evidence.
3. Objections are not evidence. The parties 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.
4. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
5. Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, if you were given an instruction that some evidence was received for a limited purpose only, you must follow that instruction.

INSTRUCTION NUMBER 5

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. 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 NUMBER 6

The jurors are the sole judges of the weight and credibility of the testimony and the value to be given to each witness, who has testified in this case. 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, a 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 NUMBER 7

In a previous instruction, 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 are to consider the testimony of certain witnesses.

A witness may be discredited or impeached by contradictory evidence; by showing that the witness testified falsely concerning a material matter; by showing the witness has a motive to be untruthful; 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.

INSTRUCTION NUMBER 8

You have heard testimony that the defendant made statements to the Marion Police Department and the Federal Bureau of Investigation. It is for you to decide:

First, whether the defendant made the statements and

Second, if so, how much weight you should give to them.

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

INSTRUCTION NUMBER 9

The Indictment in this case charges the defendant with nine different crimes. Under Counts 1, 3 and 7, the Indictment charges that the defendant sexually exploited and/or attempted to sexually exploit a child. Under Counts 2 and 8, the Indictment charges that the defendant knowingly received and attempted to receive child pornography. Under Counts 4, 5, 6 and 9, the Indictment charges that the defendant knowingly possessed child pornography. The defendant has pleaded not guilty to each of these charges.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crimes charged. Keep in mind that each count charges a separate crime. You must consider each count separately, and return separate verdicts for each count.

There is no burden upon the defendant to prove that he is innocent. 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 verdicts.

INSTRUCTION NUMBER 10

The crime of sexual exploitation of a minor as charged in Counts 1 and 7 has four essential elements, which are:

- One,* in or about the time period alleged in the Indictment [Count 1 - in or about the last quarter of 2004 or early 2005; Count 7 - in or about the last quarter of 2005 or early 2006], the female referenced in the Count [Count 1 - V.M.; Count 7 - K.S.] was under the age of eighteen years;
- Two,* the defendant used, persuaded, induced, enticed, or coerced the female [Count 1 - V.M.; Count 7 - K.S.] to engage in sexually explicit conduct;
- Three,* the defendant voluntarily and intentionally did this for the purpose of causing the production of a visual depiction of such conduct; and
- Four,* the defendant knew or had reason to know that the visual depiction would be transported in interstate commerce or mailed, or that the visual depiction was actually transported in interstate commerce.

If all of the essential elements have been proved beyond a reasonable doubt as to Counts 1 and 7, then you must find the defendant guilty of the crime charged in Counts 1 and 7; otherwise you must find the defendant not guilty of the crime charged in Counts 1 and 7.

INSTRUCTION NUMBER 11

The crime of attempted sexual exploitation of a minor as charged in Counts 1, 3 and 7 has four essential elements, which are:

- One,* in or about the time period alleged in the Indictment [Count 1 - in or about the last quarter of 2004 or early 2005; Count 3 - in or about the last quarter of 2004; Count 7 - in or about the last quarter of 2005 or early 2006], the female referenced in the Count [Count 1 - V.M.; Count 3 - K.E.; Count 7 - K.S.] was under the age of eighteen years;
- Two,* the defendant attempted to use, persuade, induce, entice, or coerce the female [Count 1 - V.M.; Count 3 - K.E.; Count 7 - K.S.] to engage in sexually explicit conduct;
- Three,* the defendant voluntarily and intentionally did this for the purpose of causing the production of a visual depiction of such conduct; and
- Four,* the defendant knew or had reason to know that the visual depiction would be transported in interstate commerce or mailed.

If all of the essential elements have been proved beyond a reasonable doubt as to Counts 1, 3 and 7, then you must find the defendant guilty of the attempt crime charged in Counts 1, 3 and 7; otherwise you must find the defendant not guilty of the attempt crime charged in Counts 1, 3 and 7.

INSTRUCTION NUMBER 12

The crime of receiving child pornography, as charged in Counts 2 and 8 of the Indictment, has three essential elements, which are:

- One,* during the time period alleged in the Indictment [Count 2 - in or about the last quarter of 2004 or early 2005; Count 8 - in or about the last quarter of 2005 or early 2006], the defendant knowingly received one or more visual depictions of a minor [Count 2 - V.M.; Count 8 - K.S.] engaged in sexually explicit conduct;
- Two,* the defendant knew the visual depiction under consideration was of a minor engaging in sexually explicit conduct; and
- Three,* the visual depiction under consideration had been mailed, shipped or transported in interstate commerce.

If all of the essential elements have been proved beyond a reasonable doubt as to Counts 2 and 8, then you must find the defendant guilty of the crime charged in Counts 2 and 8; otherwise you must find the defendant not guilty of the crime charged in Counts 2 and 8.

INSTRUCTION NUMBER 13

The defendant is also charged in Counts 2 and 8 of the Indictment with attempted receipt of child pornography. A person may be found guilty of an attempt if he intended to receive child pornography and voluntarily and intentionally carried out some act which was a substantial step toward that receipt.

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 commit the criminal conduct alleged in the Indictment.

INSTRUCTION NUMBER 14

“Receiving” and “receipt” are not defined terms. In reaching your verdicts, you should give these terms their plain and ordinary meaning.

INSTRUCTION NUMBER 15

The crime of possessing child pornography, as charged in Counts 4, 5, 6 and 9 of the Indictment, has three essential elements which are:

- One,* during the time period alleged in the Indictment [Counts 4 and 5 - beginning on a date unknown and continuing until in or about March 2005; Count 6 - in or about March 2005; Count 9 - in or about February 2006], the defendant knowingly possessed one or more visual depictions of a minor [Counts 4 and 5 - E.M.; Count 6 - V.M.; Count 9 - K.S.] engaged in sexually explicit conduct;
- Two,* the defendant knew the visual depiction under consideration was of a minor engaging in sexually explicit conduct; and
- Three,* the visual depiction under consideration had been mailed, shipped or transported in interstate commerce.

If all of the essential elements have been proved beyond a reasonable doubt as to Counts 4, 5, 6 and 9, then you must find the defendant guilty of the crime charged in Counts 4, 5, 6 and 9; otherwise you must find the defendant not guilty of the crime charged in Counts 4, 5, 6 and 9.

INSTRUCTION NUMBER 16

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in “actual possession” of it.

A person who, although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in “constructive possession” of it.

If one person alone has actual or constructive possession of a thing, possession is “sole.” If two or more persons share actual or constructive possession of a thing, possession is “joint.”

Whenever the word “possession” has been used in these instructions it includes “actual” as well as “constructive” possession and also “sole” as well as “joint” possession.

INSTRUCTION NUMBER 17

“Child pornography” as used in these instructions means any visual depiction, including any photograph, film, video, picture, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where (1) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct, or (2) such visual depiction is of a minor engaging in sexually explicit conduct.

INSTRUCTION NUMBER 18

“Visual depiction” as used in these instructions includes data stored by electronic means which is capable of conversion into a visual image.

INSTRUCTION NUMBER 19

As used in these instructions, the term “minor” means any person under the age of eighteen years.

INSTRUCTION NUMBER 20

As used in these instructions, the term “sexually explicit conduct” means actual or simulated (1) masturbation or (2) the lascivious exhibition of the genitals or pubic area of any person.

INSTRUCTION NUMBER 21

Not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a picture or image of the genitals or pubic area constitutes such a lascivious exhibition requires a consideration of the overall content of the material.

In deciding whether an exposure of the genitals or pubic area constitutes a lascivious exhibition, you may consider such factors as: (1) whether the focal point of the picture or image is on the minor's genitals or pubic area; (2) whether the setting of the picture or image 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 or image suggests sexual coyness or a willingness to engage in sexual activity; and/or (6) whether the picture or image is intended or designed to elicit a sexual response in the viewer.

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

INSTRUCTION NUMBER 22

To return a verdict of guilty under each count, you need not unanimously agree on every image admitted into evidence. You must, however, unanimously agree on at least one visual depiction. If you cannot agree that the same visual depiction constitutes child pornography as defined in these instructions, you may not return a guilty verdict.

INSTRUCTION NUMBER 23

The term “interstate commerce” includes commerce between one or more States, Territories, Possessions, or the District of Columbia and another State, Territory, Possession or the District of Columbia.

INSTRUCTION NUMBER 24

The phrase “transported in interstate commerce” means that the image, at any time, traveled or moved between one state and another. Evidence that an image was received over the Internet or produced in a state other than Iowa is sufficient to prove that the image has been transported in interstate commerce. It is not necessary for the government to prove that the defendant transported the material in interstate commerce. It is sufficient that the government prove that at some point before or during the defendant’s alleged receipt, at least one of the charged images traveled in interstate commerce.

INSTRUCTION NUMBER 25

You will note the Indictment charges that the offenses were committed “in or about” certain time periods. The government need not prove with certainty the exact date or the exact time period of an offense charged. It is sufficient if the evidence established that an offense occurred within a reasonable time of the date or period of time alleged by the Indictment.

INSTRUCTION NUMBER 26

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 NUMBER 27

An act is done “knowingly” if the defendant realized what he was doing and did not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider the evidence of the defendant’s acts and words, along with all other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NUMBER 28

Intent may be proven by circumstantial evidence. It rarely can be established by other means. While witnesses may see or hear and thus be able to give direct evidence of what a person does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit an offense.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so. As I have previously mentioned, it is entirely up to you to decide what facts to find from the evidence.

INSTRUCTION NUMBER 29

The government and the defendant have stipulated—that is, they have agreed—that certain facts are as counsel have stated. You must therefore treat those facts as having been proved.

INSTRUCTION NUMBER 30

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NUMBER 31

In conducting your deliberations and returning your verdicts, 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 an 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.

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INSTRUCTION NUMBER 31 (Cont'd)

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.

Finally, 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.

INSTRUCTION NUMBER 32

Attached to these instructions you will find Verdict Forms and Interrogatories. These are simply the written notices of the decisions that you reach in this case. The answers to the Verdict Forms and the Interrogatories must be the unanimous decisions of the jury.

You will take the Verdict Forms and the Interrogatories to the jury room, and when you have completed your deliberations and each of you has agreed on answers to the Verdict Forms and the Interrogatories, your foreperson will fill out the Verdict Forms and the Interrogatories, sign and date them and advise the Marshal or Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return such verdicts as accord with the evidence and these instructions.

July 13, 2006
DATE

Linda R. Reade
LINDA R. READE
JUDGE, U. S. DISTRICT COURT