

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA :
 :
 :
 v. : Case No. 2:14-cr-95
 :
 DONALD RAY BOLES, :
 :
 Defendant. :
 :

Jury Charge

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept the instructions of law and apply them to the facts as you determine them.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principal different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be--or ought to be--it would violate your sworn duty to base a verdict upon any other view of the law than that which I give to you.

This case is a criminal prosecution brought by the United

States against the Defendant, Donald Ray Boles. In the Second Superseding Indictment, the Grand Jury charges Mr. Boles in three counts. You will receive a copy of the indictment to take with you into the jury room.

Count One alleges that:

In or about September 2011, in the District of Vermont, the defendant, Donald Ray Boles, knowingly possessed at least one matter which contained a visual depiction that was produced using materials which had been mailed and shipped and transported using any means and facility of interstate and foreign commerce, including by computer, the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct, and such visual depiction was of such conduct.

Count Two alleges that:

On or about September 2, 2011, in the District of Vermont, Donald Ray Boles, the defendant, knowingly accessed and attempted to access with intent to view the following digital files: "2_realfucktube.com[1].jpg" and "large-86[1].jpg" which contained visual depictions that had been shipped and transported using any means and facility of interstate and foreign commerce, and shipped and transported in and affecting interstate and foreign commerce, and that had been produced using materials which had been mailed, and so shipped and transported, by any means including by computer, where the producing of such visual depictions involved the use of minors engaging in sexually explicit conduct and such visual depictions were of such conduct.

Count Three alleges that:

On or about September 4, 2011, in the District of Vermont, Donald Ray Boles, the defendant, knowingly accessed and attempted to access with intent to view the following digital file: "large-86[1][121492].jpg" which contained a visual depiction that had been shipped and transported using any means and facility of interstate and foreign commerce, and shipped and transported in and affecting interstate and foreign commerce, and that had been produced using materials which had been mailed, and so shipped and transported, by any means including by computer, where the producing of such visual depiction involved the use of a minor engaging in sexually explicit conduct and such visual

depiction was of such conduct.

Mr. Boles has entered not guilty pleas to those charges.

Role of the Indictment

At this time, I would like to remind you of the function of a grand jury indictment. An indictment is merely a formal way to accuse the defendant of a crime prior to trial. An indictment is not evidence. The indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the nature of the charges against Mr. Boles.

Mr. Boles has pleaded not guilty to the counts in the Second Superseding Indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the indictment and the denial made by Mr. Boles's not guilty plea. You are to perform that duty without bias or prejudice against Mr. Boles or the government. Moreover, it would be improper for you to allow any emotion or feelings you might have about the nature of the crimes charged to interfere with your decision-making process. Your verdict must be based exclusively upon the evidence or the lack of evidence in this case.

Multiple Counts

A separate crime or offense is charged in each of the three counts of the Second Superseding Indictment. Each charge against

Mr. Boles and the evidence pertaining to each charge should be considered separately. You must return separate verdicts on each count in which Mr. Boles is charged. Whether you find Mr. Boles not guilty or guilty as to one offense should not affect your verdict as to any other offense charged.

Presumption of Innocence, Reasonable Doubt,
and Burden of Proof

The law presumes that Mr. Boles is innocent of the charges against him. The presumption of innocence lasts throughout the trial and during your deliberations. The presumption of innocence ends only if you, the jury, find beyond a reasonable doubt that Mr. Boles is guilty. Should the government fail to prove the guilt of Mr. Boles beyond a reasonable doubt, you must find him not guilty.

The question naturally is what is a reasonable doubt? The words almost define themselves. A reasonable doubt is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse

to avoid the performance of an unpleasant duty. And it is not sympathy. However, reasonable doubt may arise from a lack of evidence.

In a criminal case, the burden is upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crime charged beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government. For each of the offenses charged in the indictment, if after fair and impartial consideration of all the evidence you have a reasonable doubt, you must find Mr. Boles not guilty of that offense. If you view the evidence in the case as reasonably permitting either of two conclusions--one of innocence, the other of guilt--you must find Mr. Boles not guilty. If, however, after fair and impartial consideration of all the evidence you are satisfied of Mr. Boles's guilt of an offense beyond a reasonable doubt, you should vote to convict.

Evidence

You have seen and heard the evidence produced in the trial,

and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been received in evidence, and all the facts which may have been admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses-- something she or he has seen, felt, touched, or heard. Direct evidence may also come in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of Mr. Boles beyond a reasonable doubt, you must find him not guilty.

The arguments of the attorneys and the questions asked by the attorneys are not evidence in this case. The evidence that you will consider in reaching your verdict consists, as I have said, only of the sworn testimony of witnesses, the stipulations made by the parties, and all the exhibits that have been received in evidence.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

Credibility of Witnesses

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward the defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small

number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering more witnesses. Remember, a defendant in a criminal case has no obligation to present any evidence or call any witnesses.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimonies of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you are also free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case, you have heard testimony from several witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented in this case.

Law Enforcement Witnesses

You have heard the testimony of law enforcement officials in this case. The fact that a witness may be employed by the

federal, state, or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of law enforcement officials and to give to that testimony whatever weight, if any, you find it deserves.

Expert Witnesses

You have heard testimony from expert witnesses. An expert is allowed to express an opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts. In weighing the expert's testimony, you may consider his or her qualifications, opinions, and reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether to believe a witness's testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason,

judgment, and common sense. The determination of the facts in this case rests solely with you.

Statements by Defendant

There has been evidence that Mr. Boles made certain statements in which the government claims he admitted certain facts.

In deciding what weight to give Mr. Boles's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. You should give the statements such weight as you feel they deserve in light of all the evidence.

Defendant Not Testifying

You may have observed that Mr. Boles did not testify in this case. In a criminal case, a defendant has a constitutional right not to testify, and the government may not call him as a witness. Whether a defendant testifies is a matter of his own choosing. A defendant has no obligation to testify or to present evidence because it is the government's burden to prove a defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he is innocent. A defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining Mr. Boles's innocence or guilt of the crimes charged, you are not to consider, in any manner, the fact that

he did not testify. Do not even discuss it in your deliberations.

Race, Religion, National Origin, Sex, or Age

You may not consider any personal feelings you may have about the race, religion, national origin, sex, or age of Mr. Boles or of any of the witnesses in your deliberations over the verdict or in the weight given to any evidence.

Government as a Party

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the Court.

"On or About" -- Explained

The Second Superseding Indictment charges that the offenses were committed "on or about" certain dates.

Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged in the indictment, it is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

Use of Conjunctive

The Second Superseding Indictment charges certain acts in the conjunctive. For example, Mr. Boles is alleged to have accessed with intent to view a visual depiction that "had been shipped and transported using any means and facility of

interstate and foreign commerce." As explained more thoroughly below, in order to prove Mr. Boles guilty of the charged offense, the government is required to prove only one of those factors-- that is, that the visual depiction had been shipped OR transported using any means OR facility of interstate OR foreign commerce.

Other Acts Evidence

The government has offered evidence that Mr. Boles possessed cartoon child pornography, text-based stories regarding the sexual abuse of children, and images of child modeling. The government has also offered evidence of instant messaging chat logs in which Mr. Boles describes a sexual interest in young girls. As a reminder, Mr. Boles is not on trial for those things that were not alleged in the Second Superseding Indictment, and the pieces of evidence described above do not constitute crimes on their own. Accordingly, you may not consider that evidence as substitute proof that Mr. Boles committed the crimes charged. Nor may you consider that evidence as proof that Mr. Boles has a criminal personality or bad character. Such evidence was admitted for a much more limited purpose, that is, that Mr. Boles acted knowingly and intentionally. You may consider it only for that limited purpose.

Punishment

The punishment provided by law for the offenses charged in the Second Superseding Indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict.

Instructions on the Substantive Law of the Case

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that applies to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in the instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

Count One: Possession of Child Pornography

Count One of the Second Superseding Indictment charges Mr. Boles with possession of child pornography. For Mr. Boles to be guilty of that offense, the government must prove each of the following four elements beyond a reasonable doubt:

- (1) Mr. Boles knowingly possessed a visual depiction;
- (2) The visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce;
- (3) The production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and portrays that minor engaged in that conduct; and
- (4) Mr. Boles knew that the production of the visual

depiction involved the use of a minor engaging in sexually explicit conduct, and portrayed a minor engaged in that conduct.

First Element

The first element of Count One that the government must prove beyond a reasonable doubt is that Mr. Boles knowingly possessed a visual depiction.

A "visual depiction" includes any photograph, film, video, or picture, including undeveloped film and videotape, data stored on a computer disk or by electronic means that is capable of conversion into a visual image, and data that is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

To "possess" something means to have it within a person's control. This does not necessarily mean that the person must hold it physically; that is, have actual possession of it. As long as the visual depiction is within the defendant's control, he possesses it. If you find that Mr. Boles either had actual possession of the visual depiction, or that he had the power and intention to exercise control over it, even though it was not in his physical possession, you may find that the government has proven possession.

The government must prove that Mr. Boles possessed the depiction "knowingly." An act is done knowingly when it is done voluntarily and intentionally and not because of accident, mistake, or some other innocent reason.

Second Element

The second element which the government must prove beyond a reasonable doubt is that the visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce.

Simply stated, the phrase "transported in or affecting interstate or foreign commerce" means that the materials used to produce the visual depiction had previously moved from one state to another or between the United States and another country. Here, the government alleges that the computer used to download the visual depictions in question was manufactured in another state. I instruct you that if you find that the computer was manufactured outside Vermont, that is sufficient to satisfy this element. The government does not have to prove that the defendant personally transported the computer across a state line, or that the defendant knew that the computer had previously crossed a state line.

Third Element

The third element which the government must prove beyond a reasonable doubt is that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct and portrays that minor engaged in that conduct.

A "minor" is any person under the age of eighteen (18) years. For purposes of the statute in question, the age that matters is the person's age at the time the visual depiction was made of that person engaging in sexually explicit conduct.

The visual depiction must be of a real person engaging in sexually explicit conduct. The government does not have to prove

the identity of the minor or the exact age of the minor. You may consider all of the evidence, including your viewing of the depiction, in determining whether the depiction portrayed an actual person under the age of eighteen (18) engaging in sexually explicit conduct.

"Sexually explicit conduct" means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between two persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person.

The term "lascivious exhibition" means a depiction which displays or brings to view to attract notice to the genitals or pubic area of children in order to excite lustfulness or sexual stimulation in the viewer. Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In deciding whether the government has proved that a particular visual depiction constitutes a lascivious exhibition, you may consider the following factors:

- Whether the focal point of the visual depiction is on the child's genitals or pubic area, or whether there is some other focal area.
- Whether the setting of the visual depiction makes it appear to be sexually suggestive, that is, in a place or pose generally associated with sexual activity.
- Whether the child is displayed in an unnatural pose, or in inappropriate attire, considering the age of the child.
- Whether the child is fully or partially clothed, or nude, although nudity is not in and of itself lascivious.

- Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity.
- Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

It is not required that a particular visual depiction involve all of those factors to be a lascivious exhibition. The importance which you give to any one factor is up to you to decide.

Fourth Element

The fourth element which the government must prove beyond a reasonable doubt is that the defendant knew both that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and that it portrayed a minor engaged in that conduct.

As stated previously, an act is done knowingly when it is done voluntarily and intentionally and not because of accident, mistake, or some other innocent reason.

In this case, the term "knowingly" refers to an awareness of the sexually explicit nature of the material, and to the knowledge that the visual depictions were in fact of actual minors engaged in that sexually explicit conduct.

The government must show that the defendant had knowledge of the general nature of the contents of the material. The defendant need not have specific knowledge as to the identity or

actual age of the underage performer, but the defendant must have knowledge or an awareness that the material contained a visual depiction of a minor engaging in sexually explicit conduct. Such knowledge may be shown by direct or circumstantial evidence, or both. Eyewitness testimony of the defendant's viewing of the material is not necessary to prove his awareness of its contents; the circumstances may warrant an inference that he was aware of what the material depicts. Furthermore, the defendant's belief as to the legality or illegality of the material is irrelevant.

Counts Two and Three: Accessing with Intent to View

Child Pornography

Counts Two and Three of the Second Superseding Indictment charge Mr. Boles with accessing with intent to view child pornography. For Mr. Boles to be guilty of those offenses, the government must prove each of the following four elements beyond a reasonable doubt:

- (1) Mr. Boles knowingly accessed with the intent to view a visual depiction;
- (2) The visual depiction was transported in or affecting interstate or foreign commerce, or the visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce;
- (3) The production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and portrayed a minor engaged in that conduct; and

- (4) Mr. Boles knew that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and portrayed a minor engaged in that conduct.

First Element

The first element of Counts Two and Three which the government must prove beyond a reasonable doubt is that the defendant knowingly accessed a visual depiction with the intent to view it.

As stated above, a "visual depiction" includes any photograph, film, video, or picture, including undeveloped film and videotape, data stored on a computer disk or by electronic means that is capable of conversion into a visual image, and data that is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The government must also prove that the defendant accessed the depiction "knowingly." Once again, an act is done knowingly when it is done voluntarily and intentionally and not because of accident, mistake, or some other innocent reason.

Additionally, the government must prove that the defendant knowingly accessed the depiction with the specific intent of viewing the depiction.

Second Element

The second element of Counts Two and Three which the

government must prove beyond a reasonable doubt is that the visual depiction was actually transported in or affecting interstate or foreign commerce, or that the visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce.

In order to establish that the visual depiction was actually transported in or affecting interstate or foreign commerce, the government must prove that the visual depiction crossed between one state and another or between the United States and a foreign country. Transmission of photographs or video by means of the Internet constitutes transportation in or affecting interstate commerce. However, you must find beyond a reasonable doubt that the specific depiction in question was actually transmitted by means of the Internet.

By contrast, as stated previously, the government may establish that the visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce by proving that the computer used to download the visual depictions in question was manufactured outside the State of Vermont.

The second element of Counts Two and Three may be satisfied in either of the two ways described above. The first is that the visual depiction was actually transported in or affecting interstate or foreign commerce. The second is that the visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce.

In order to establish the second element of Counts Two and

Three, the government does not need to prove both means of transportation. Rather, it must prove either the first means or the second means. In order to establish second element, however, all twelve of you must agree on the same means of transportation. In other words, you must all agree that the government has proven beyond a reasonable doubt either (1) that the visual depiction was actually transported in or affecting interstate or foreign commerce; or (2) that the visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce. If you are not unanimous as to at least one of those two means of transportation, you must return a verdict of not guilty.

Third and Fourth Elements

As to the third and fourth elements of Counts Two and Three, the instructions I previously gave you as to the third and fourth elements of Count One should be applied here as well.

Notes

You have been permitted to take notes during the trial for use in your deliberations. You may take those notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than the other jurors. Your notes should remain in the jury room and will be collected at

the end of the case.

Conclusion

I caution you, members of the jury, that you are here to determine the guilt or innocence of Mr. Boles solely from the evidence in this case. I remind you that the mere fact that he has been indicted is not evidence against him.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your other jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however, surrender your honest convictions about the case solely because of the opinion of your other jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. If you are able to reach an agreement as to the counts contained in the Second Superseding Indictment, you will have your foreperson record a verdict of guilty or not guilty. Your foreperson will then sign and date the verdict form and you will return to the courtroom.

If, during your deliberations you should desire to communicate with the Court, please put your message or question in writing signed by the foreperson, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

A copy of this charge will go with you into the jury room for your use.

I appoint _____ as your foreperson.

Dated at Burlington, in the District of Vermont this 3rd day of June, 2016.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge