

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON SHRAKE,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

05-CR-133-S

On January 5, 2007 this court held the final pretrial conference. Defendant Jason Shrake was present with his attorney, Jonas Bednarek. The government was represented by Assistant United States Attorney Elizabeth Altman.

We started with an unscheduled *ex parte* hearing at which the court explored at length with Shrake and Bednarek whether Shrake would be trying this case *pro se* or keeping Bednarek as his attorney (Shrake posited a third option, the appointment of another attorney to replace Bednarek, which the court summarily rejected). For reasons stated on the record, Shrake has agreed to continue with Bednarek as his representative at trial. Shrake understands that Attorney Bednarek will be conducting the voir dire, making the opening statement and closing argument, and examining all witnesses.

With the government present, we proceeded with the final pretrial conference. The government had no proposed changes to the court's voir dire, except to correct the statement of the case. Attorney Bednarek had no additional proposed changes or objections. Shrake asked for three more questions; I have added two. Shrake asked for a question that I have

not included, but agreed to front with the trial judge: whether any potential juror believes that he or she might suffer psychological damage from viewing child pornography during trial. The court's view is that voir dire questions 1 and 7 adequately cover this, but Shrake is free to raise this with the trial judge.

We discussed the universe of jury instructions. The parties had no major proposed changes or objections. Shrake, by counsel, has reserved his right to present a theory of defense instruction at the close of the government's case-in-chief.

Then we ran through the many *in limine* disputes. To frame the disputes more clearly for the final hearing, the parties may present letter briefs in support of their *in limine* contentions not later than January 9, 2007, with responses due by January 11, 2007 at noon. Same-hour service is required. The court should consider moving the final hearing to earlier in the afternoon to allow sufficient time to hear and rule on these disputes.

Shrake, by counsel, filed a four-part motion in limine. *See* Dkt 114. The government does not dispute paragraph 1, although the parties might seek court direction on how best to front this issue with the jury. The government disputes paragraphs 2, 3 and 4 and wishes to be heard on them.

The government filed a 20-part motion in limine. *See* Dkt. 117. Shrake, by counsel, does not dispute subparts 1, 2, 3, 5, 8, 11, 12, or 16. Shrake, by counsel, dispute and wishes to be heard on subparts 4, 6, 7, 10, 13, 14, 15, and 17-20. As for subpart 9, the government is not entitled to know whether a defendant intends to offer a theory of defense instruction

until the close of the government's case. If Shrake chooses pro-actively to front this issue with the court at the final hearing then he may do so, but if he chooses not to, then he must be given the opportunity at the close of the government's case-in-chief to front any theory of defense instructions with the court.

The government also filed a notice of intent to offer evidence. *See* Dkt. 118. Shrake, by counsel, objects and wishes to be heard on this at the final hearing.

Finally, the government announced that it will be asking the court to close the courtroom to the public during the presentation to the jury of the alleged images of child pornography. The parties may wish to be heard on this at the final hearing.

We then discussed housekeeping issues. Both attorneys are predicting three full days of trial because Shrake has not stipulated to anything, every point must be proved to the jury, and both sides must call several expert witnesses. The parties have requested two alternate jurors. Shrake is aware that it is his obligation to obtain street clothes for trial.

The parties had no other substantive matters to bring to the court's attention.

Entered this 5th day of January, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON SHRAKE,

Defendant.

STATEMENT OF THE CASE
AND VOIR DIRE

05-CR-133-S

Statement of the case: This is a criminal case, in which the defendant, Jason shrake, is charged with unlawfully possessing child pornography on his computer and computer disks, and with sending images of child pornography over the Internet. The defendant has entered a pleas of not guilty to these charges.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

- i. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?
- ii. Scheduling: this case will begin today (Tuesday) and will conclude on Thursday. Are any of you actually unable to sit as jurors because of this schedule?
- iii. The court reads from the Seventh Circuit's Pattern Instructions:

The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is

not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The indictment in this case is the formal method of accusing the defendant of a crime and placing the defendant on trial. It is not evidence against the defendant and does not create any implication of guilt.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

iv. Ask counsel to introduce themselves, the defendant, and the case agent. Ask whether jurors know them.

v. Invite each juror, in turn, to stand and provide the following information:

Name, age, and city or town of residence.

Marital status.

Current occupation (former if retired).

Current (or former) occupation of your spouse.

Number of children and/or grandchildren, their ages and gender.

Current occupation of any adult children.

Any military service, including branch, rank and approximate date of discharge.

[list continues on next page]

Level of education, and major areas of study, if any, including any specialized training in or knowledge of computers or software.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you regularly listen to talk radio and if so, to which programs.

Your estimates of how often you use the Internet, how often you download information, and how often you make purchases over the Internet.

- vi. Do any of you in the jury box know each other from before today?
- vii. The evidence that will be presented in this case includes visual depictions of what the government contends are children under the age of 18 engaging in sexually explicit conduct. Is there anything about the nature of such evidence that would prevent you from serving impartially in this case?
- viii. Do any of you have strong opinions or feelings about adult pornography, which is legal, or about the dissemination of adult pornography on the Internet, which also is legal, that might affect your ability to be fair to both sides in a prosecution involving child pornography on the Internet? [*Sidebar if necessary*]
- ix. Have any of you, while on your computer, attempted to reach a website by clicking on an icon and been re-directed to a different website that you did not wish to visit? Would this affect your ability to be impartial in this case?
- x. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense? [*Sidebar for follow-up*]. Would this affect your ability to be impartial in this case?
- xi. Have any of you, your relatives, or close friends ever been incarcerated? Please describe the circumstances briefly. [*Sidebar for follow-up*]. Would this affect your ability to be impartial in this case?

- xii. Have any of you, or to your knowledge any of your relatives or close friends, ever been sexually abused as children or as adults? [Sidebar for follow-up]. Would this affect your ability to be impartial in this case?
- xiii. Do any of you, by virtue of past dealings with the United States government or federal agencies such as the Postal Service or the FBI, or for any reason, have any bias for or against the government in a criminal case?
- xiv. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?
- xv. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement agency, such as the FBI or Postal Inspection Service, or any investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?
- xvi. Other than what you have already told us, have any of you, your family or close friends ever worked within the criminal justice system?
- xvii. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, or religion?
- xviii. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other

witnesses solely because of his or her official position?

- xix. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was the defendant who was testifying?
- xx. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?
- xxi. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?
- xxii. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?
- xxiii. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.
- xxiv. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?
- xxv. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

xxvi. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

xxvii. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

JURY INSTRUCTIONS

v.

05-CR-133-S

JASON SHRAKE,

Defendant.

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow my instructions on the law, even if you disagree with them. Each of the instructions is important. You must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. Do not allow any person's race, color, religion, national ancestry or sex to influence you.

Nothing I say now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider among other things: the witness's age; the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

You should judge the defendant's testimony in the same way as you judge the testimony of any other witness.

You should use common sense in weighing the evidence. Consider the evidence in light of your own observations in life. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

Some of you have heard the phrases “circumstantial evidence” and “direct evidence.” Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts that tend to show whether a defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. You should consider all the evidence in the case, including the circumstantial evidence, in reaching your verdict.

Certain things are not evidence. I will list them for you:

First, testimony and exhibits that I struck from the record or that I told you to disregard are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and must not influence your verdict.

Third, questions and objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your collective memory is what counts.

It is proper for a lawyer to interview any witness in preparation for trial.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

You have received evidence of a statement said to be made by the defendant to _____ . You must decide whether the defendant did make the statement. If you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself and the circumstances under which the statement was made.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of the defendant's testimony in this trial.

You have heard [reputation/opinion] evidence about the character trait of _____ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to _____'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc]. You should consider character evidence together with all the other evidence in the case and in the same way.

You have heard evidence of acts of the defendant other than those charged in the indictment, specifically _____. You may consider this evidence only on the question of _____. You should consider this evidence only for this limited purpose.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

_____ has admitted lying under oath. You may give his testimony such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all of the other evidence in the case.

THE INDICTMENT

The defendant is charged in the indictment as follows:

COUNT 1

On or about March 20, 2005, in the Western District of Wisconsin, the defendant, Jason Shrake, knowingly transported and shipped in interstate commerce by computer visual depictions, and the producing of such visual depictions involved the use of a minor engaging in sexually explicit conduct, and such visual depictions were of such conduct.

COUNT 2

On or about September 9, 2005, in the Western District of Wisconsin, the defendant, Jason Shrake, knowingly possessed a CD-R and a computer hard drive containing video depictions that was produced using materials which have been shipped in interstate and foreign commerce, specifically said CD-R and hard drive, and the production of such visual depictions involved the use of a minor engaging in sexually explicit conduct, and the depiction are of such conduct.

The defendant has entered a plea of not guilty to these charges.

The indictment in this case is the formal method of accusing the defendant of crimes and placing the defendant on trial. It is not evidence against the defendant and does not create any implication of guilt.

The defendant is not on trial for any act or conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome as to the defendant unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

The indictment charges that the offenses were committed "on or about" certain dates. The government must prove that an offense happened reasonably close to the date charged but it is not required to prove that an alleged offense happened on that exact date.

ELEMENTS OF THE CHARGE: COUNT 1

To sustain the charge in Count 1, the government must prove these elements:

1) That on or about the date charged in Count 1 the defendant used a computer to transport in interstate commerce a visual depiction of a minor engaged in sexually explicit conduct;

2) The production of this visual image involved using a minor engaged in sexually explicit conduct; and

3) the defendant transported this image knowing that it depicted a minor engaging in sexually explicit conduct.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 1.

ELEMENTS OF THE CHARGE: COUNT 2

To sustain the charge in Count 2, the government must prove these elements:

1) The defendant knowingly possessed the CD-R or the hard drive identified in Count 2;

2) Either this CD-R or this hard drive contained a visual depiction of a minor engaging in sexually explicit conduct;

3) The production of this visual depiction involved the use of a minor engaging in sexually explicit conduct;

4) The defendant knew that this CDR or this hard drive contained a visual depiction of a minor engaging in sexually explicit conduct; and

5) This visual depiction had been produced using materials that had been shipped and transported in interstate or foreign commerce as specified in Count 2.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 2.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of Count 2.

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

For the defendant to know something means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.

An object has traveled or been transported in interstate commerce if it has traveled between one state and any other state, or across a state boundary line. An object has traveled or been transported in foreign commerce if it has traveled from some other nation into the United States, or from the United States to some other nation, by any physical or electronic medium. Knowingly sending computer data by means of the Internet to some other data-receiving Internet address that is located in a different state or a foreign nation constitutes transportation in interstate or foreign commerce, even if the sender does not realize that the receiving address is located in a different state or a foreign country.

“Computer” means an electronic, magnetic, optical, electrochemical or other high speed data processing device performing logical, arithmetic, or storage functions, and includes and data storage facility or communications facility directly related to or operating in conjunction with such device.

“Lascivious” means arousing sexual interest; indicating sexual interest; expressive of lust or lewdness.

“Minor” means any person under the age of eighteen years.

“Producing” means producing, directing, manufacturing, issuing, publishing, or advertising.

“Sexually explicit conduct” means actual or simulated—

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; or

(2) bestiality

(3) masturbation

(4) sadistic or masochistic abuse; or

(5) Lascivious exhibition of the genitals or pubic area of any person.

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

Not every exposure of the genitals or pubic area of a minor, and not every image of a naked child constitutes a lascivious exhibition. It is for you to decide, based on the overall content of a particular picture or image, whether that picture or image constitutes a lascivious exhibition of the genitals or pubic area. While the following factors are not all-inclusive and do not apply to every situation, they may help you determine whether a particular image or picture contains a lascivious exhibition of the genitals or pubic area:

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

Visual depictions of adults engaging in sexually explicit conduct are protected by the First Amendment to the United States Constitution. Visual depictions of minors engaged in sexually explicit conduct are not protected by the First Amendment.

In Count 1, the government does not have to prove that each of the images transported and shipped in interstate commerce was a depiction of a minor engaging in sexually explicit conduct, it only has to prove that one of the images constituted such a depiction. Before you may find that the government has proved this point, you must unanimously agree on at least one specific image depicting a minor engaged in sexually explicit conduct. It is not sufficient for some of you to find that one image depicts a minor engaged in sexually explicit conduct, while the rest of you agree on a different image. All twelve of you must agree on at least one image.

Similarly, in Count 2, the government does not have to prove that both the CD-R and the hard drive contained depictions of a minor engaging in sexually explicit conduct, or that every image on either the CD-R or the hard drive depicted a minor engaged in sexually explicit conduct. It is the government's burden to prove that at least one of the images on either the CD-R or the hard drive constituted such a depiction. Before you may find that the government has proved this point, you must unanimously agree on at least one specific image on either the CD-R or the hard drive depicting a minor engaged in sexually explicit conduct. It is not sufficient for some of you to agree on one image, while the rest of you agree on a different image. All twelve of you must agree on at least one image on either the CD-R or on the hard drive.

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court. A verdict form has been prepared for you.

[Form of verdict read.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign it.

Each count of the indictment charges the defendant with having committed a separate offense. You must consider each count and the evidence relating to it separate and apart from the other count. You should return a separate verdict as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to the other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person –not even to the court– how the jury stands, numerically or otherwise, on the question before you until after you have reached a unanimous verdict.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

VERDICT

v.

05-CR-133-S

JASON SHRAKE,

Defendant.

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Jason Shrake,

("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Jason Shrake,

("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

Presiding Juror

Madison, Wisconsin

Date:_____