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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:14-cr-10143-WGY

UNITED STATES OF AMERICA

vs.

JOSH A. WAIRI

For Jury Trial Before:
Judge William G. Young

EXCERPT TRANSCRIPT:
Final Juror Question of the Day

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
May 1, 2015

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 (**EXCERPT** begins.)

3 (Jury enters, 4:10 p.m.)

4 THE COURT: Let the record show that the 12
5 deliberating jurors and the one alternate are present in
6 the courtroom. I've received the following question.

7 "For attempted production, would you define child
8 pornography from Wairi's or from the general public's
9 perspective?"

10 Is that the question, Mr. Foreman?

11 THE FOREPERSON: Yes.

12 THE COURT: Is that the question, ladies and
13 gentlemen of the jury?

14 THE JURY: Yes. (In unison.)

15 To that question I make this answer.

16 This a very good question and a difficult one. I
17 dealt with it in my charge and I hope I can deal with it
18 clearly.

19 Whether it is the charge of actually doing child
20 pornography or the charge of attempting to create child
21 pornography, the statute is the same. The words of the
22 statute are exactly the same and they mean the same
23 things.

24 More specifically, as it's been argued and as
25 you've questioned, if you were to focus on the word

1 "lascivious," that word means the same thing in the
2 statute whether you're considering whether Mr. Wairi
3 accomplished the crime of child pornography or was
4 attempting to accomplish the crime of child pornography.
5 Specifically "lasciviousness" is defined objectively,
6 not what's in his mind or what quirk may lead him to get
7 sexual gratification or desire from the visual
8 depiction, but objectively is what was filmed, um,
9 sexually explicit activity? So that statute is and
10 always remains the same.

11 So as to the "Did he do it?" having in mind all
12 the elements of that offense, the verdict is either
13 guilty, or if there is a reasonable doubt about any
14 aspect of it, it must be not guilty. If you were to
15 determine that it's not guilty, I have instructed you to
16 determine "Well, was he attempting to do it?" that is,
17 produce child pornography?

18 Now, when you come to attempt, the government has
19 to prove two things and it's been argued to you that
20 they don't have to prove that there was any film of a
21 naked minor child, frontal or back, they don't have to
22 prove that, but they do have to prove these two things,
23 that -- and for this they have to prove that Mr. Wairi
24 intended to create child pornography, as I've already
25 defined it in detail, that that's what was in his mind,

1 to create and produce child pornography, and you have to
2 take all the evidence you have and ask yourself, "What
3 really was he trying to do?" And the government has to
4 prove, beyond a reasonable doubt, that what was in his
5 mind, what he intended was to produce child pornography,
6 and then the second thing on an attempt is that he took
7 a substantial step to produce the child pornography.

8 I tried to explain it in sum like this. If
9 whatever he did, on the different occasions with the
10 camera, got him what he was looking for, what his
11 attempt was -- what his intent was, and that's not child
12 pornography, then that's not attempted child
13 pornography. However, if what he was -- he had in mind,
14 given all the circumstances of the evidence you believe,
15 was to create a video of a minor child engaged in
16 explicit sexual activity as I have defined it, if that's
17 what he wanted, for attempt we're not concerned about
18 whether that's what he got in the footage that was
19 filmed, just that that's what he wanted to get, and he
20 must have taken a specific -- he must have taken a
21 substantial step to accomplish that end.

22 Now that's how I explained it and that's my answer
23 to your question.

24 Very well, the jury may retire and continue their
25 deliberations.

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THE CLERK: All rise for the jury.

(Jury leaves, 4:15 p.m.)

(**EXCERPT** ends.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes, of
the aforementioned **EXCERPT**, before Judge William G.
Young, on May 1, 2015, to the best of my skill and
ability.

/s/ Richard H. Romanow 05-04-15

RICHARD H. ROMANOW Date