

**FILED**

FEB - 5 2008

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**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY JONGEWAARD,

Defendant.

No. CR 07-30095-01-KES

**FINAL  
INSTRUCTIONS  
TO THE JURY**

**TABLE OF CONTENTS**

**FINAL INSTRUCTIONS**

|   |    |
|---|----|
| NO. 1 - INTRODUCTION .....                              | 1  |
| NO. 2 - INTERSTATE COMMUNICATION .....                  | 2  |
| NO. 3 - INTOXICATION .....                              | 4  |
| NO. 4 - THE DEFENDANT'S PRIOR SIMILAR ACTS .....        | 5  |
| NO. 5 - IMPEACHMENT .....                               | 6  |
| NO. 6 - PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF .. | 7  |
| NO. 7 - REASONABLE DOUBT .....                          | 8  |
| NO. 8 - DUTY TO DELIBERATE .....                        | 9  |
| NO. 9 - DUTY DURING DELIBERATIONS .....                 | 11 |

**VERDICT FORM**

## FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 - INTERSTATE COMMUNICATION

The indictment charges that, on or about between September 23, 2007, and September 24, 2007, in the District of South Dakota, Larry Jongewaard did willfully and knowingly transmit in interstate commerce from the State of Nebraska, to Mellette County, South Dakota, a telephone communication to Ted Schmidt, which contained a threat to injure Richard Jongewaard.

***Elements***

For you to find Larry Jongewaard guilty of Interstate Communication, as charged in the indictment, the prosecution must prove each of the following two essential elements beyond a reasonable doubt:

**One, that on or about between September 23, 2007, and September 24, 2007, Mr. Jongewaard sent or transmitted in interstate commerce a communication containing a threat to injure the person of another; and**

To transmit something in “interstate commerce” means to send it from a place in one state to a place in another state.

As used in these instructions, “threat” means a serious threat as distinguished from idle or careless talk, or something said in a joking manner. A statement is a threat if it is made under such circumstances that a reasonable person would construe it as a serious expression of an intent to injure another person. The essence of the offense is the willful transmission of a threat in interstate or foreign commerce. It is not necessary that anyone actually intended to carry out the threat.

The First Amendment protects speech, however offensive, if it is not a true threat. In determining whether a statement constitutes a true threat to injure, you may consider the following factors: the reaction of the recipient of the alleged threat and of other listeners, whether the alleged threat was conditional, whether an objectively

reasonable recipient would view the message as a threat, whether the alleged threat was communicated directly to its alleged victim, whether the maker of the alleged threat had made similar statements to the victim in the past, whether the alleged victim had reason to believe that the maker of the statement had a propensity to engage in violence, and whether the recipient of the alleged threat could reasonably conclude that it expressed a determination or intent to hurt presently or in the future. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.

**Two, that Mr. Jongewaard did so willfully and knowingly.**

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

For you to find the defendant guilty of Interstate Communication, the government must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this offense.

### FINAL INSTRUCTION NO. 3 - INTOXICATION

One of the issues in this case is whether the defendant was intoxicated at the time the act charged in the indictment was committed. Being under the influence of alcohol provides a legal excuse for the commission of a crime only if the effect of the alcohol makes it impossible for the defendant to have specific intent to commit the offense of interstate communication. Evidence that the defendant acted while under the influence of alcohol may be considered by you, together with all the other evidence, in determining whether or not he did in fact have specific intent.

#### FINAL INSTRUCTION NO. 4 - THE DEFENDANT'S PRIOR SIMILAR ACTS

You have heard evidence that the defendant made a threat to Richard Jongewaard between September 30, 2004, and October 1, 2004. You may consider this evidence only if you find it is more likely true than not true. This is a lower standard than proof beyond a reasonable doubt. If you find that this evidence is more likely true than not true, you may consider it to help you decide whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment; whether the defendant had a motive to commit the crime charged in the indictment; or whether the defendant's acts as charged in the indictment were not a mistake or accident. You should give it the weight and value you believe it is entitled to receive. If you find that it is not more likely true than not true, then you shall disregard it.

Remember, even if you find that the defendant may have committed a similar act in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. The defendant is on trial only for the crime charged, and you may consider the evidence of prior acts only on the issues of state of mind or intent, motive, and absence of mistake or accident.

## FINAL INSTRUCTION NO. 5 - IMPEACHMENT

In Preliminary Instruction No. 7, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 6 - PRESUMPTION OF INNOCENCE AND BURDEN  
OF PROOF

Larry Jongewaard is presumed innocent and, therefore, not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact that he is here in court. The presumption of innocence remains with Mr. Jongewaard throughout the trial. That presumption alone is sufficient to find him not guilty. The presumption of innocence may be overcome as to Mr. Jongewaard only if the prosecution proves, beyond a reasonable doubt, each element of the crime charged against him.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. Therefore, the fact that the defendant did not testify must not be discussed or considered by you in any way when deliberating and arriving at your verdict. A defendant is not even obligated to produce any evidence by cross-examining the witnesses who are called to testify by the prosecution.

Unless the prosecution proves beyond a reasonable doubt that Larry Jongewaard committed each and every element of the offense charged in the indictment against him, you must find him not guilty of that offense.

## FINAL INSTRUCTION NO. 7 - REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced by the prosecution. 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 in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

## FINAL INSTRUCTION NO. 8 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to the defendant must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To bring twelve minds to an unanimous result, you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish the defendant's guilt beyond a reasonable doubt on the offense charged against him, then the defendant should have your vote for a not guilty verdict on the offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for the defendant on the offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt on the offense charged, then your vote should be for a verdict of guilty against the defendant on the charge,

and if all of you reach that conclusion, then the verdict of the jury must be guilty for the defendant on the charge. As I instructed you earlier, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of a crime charged.

Remember also that the question before you can never be whether the government wins or loses the case. The government, as well as society, always wins, regardless of whether your verdict is not guilty or guilty, when justice is done.

Finally, remember that you are not partisans; you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest that you carefully consider all of the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

## FINAL INSTRUCTION NO. 9 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

*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*, if the defendant is guilty, the sentence to be imposed is my responsibility. You may not consider the punishment of Larry Jongewaard in any way in deciding whether the prosecution has proved its case beyond a reasonable doubt.

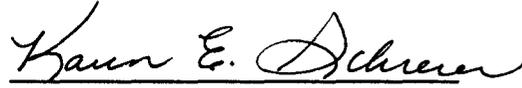
*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible, either in writing or orally in open court. **Remember that you should not tell anyone—including me—how your votes stand numerically.**

*Fourth*, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or guilty, must be unanimous.** Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

*Finally*, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each

of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated February 5, 2008.

A handwritten signature in cursive script that reads "Karen E. Schreier". The signature is written in black ink and is positioned above a horizontal line.

Karen E. Schreier  
Chief Judge