

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA

Plaintiff,

-vs-

MICHAEL HEATH THETFORD,
a/k/a Russ LNU,

Defendant.

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11-30159-RAL

FINAL INSTRUCTIONS TO
THE JURY

INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions. The instructions I am about to give you now are in writing and will be available to you in the jury room.

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.

All instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

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

INSTRUCTION NO. 3

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and the facts that have been stipulated—this is, formally agreed to by the parties.

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 lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers 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.
3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.

When you were instructed that evidence was received for a limited purpose, you must follow that instruction.

INSTRUCTION NO. 4

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 or 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.

You should judge the testimony of the Defendant in the same manner as you judge the testimony of any other witness.

INSTRUCTION NO. 5

You have heard testimony from persons described as experts. A person who, by knowledge, skill, training, education, or experience, has become an expert in some field may state opinions on matters in that field and may also state the reasons for those opinions.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 6

The government and the defense have stipulated—that is, they have agreed—that if Gary Russell Beck Jr. was called as a witness he would testify in the way counsel have stated. You should accept that as being Beck's testimony, just as if it had been given here in court from the witness stand.

The government and the defense have stipulated that certain facts are as counsel have stated. You must therefore treat those facts as having been proved.

By entering into these stipulations, the defense has not conceded Michael Heath Thetford's guilt or conceded that he used the alias of "Russ," and you must not take the stipulations as any admission of guilt by the defense.

Both the government and the defense agreed that certain witnesses could testify by video conference. You are to consider that testimony by video link in the same way that you would consider testimony of witnesses in person.

INSTRUCTION NO. 7

The Superseding Indictment in this case charges the Defendant with four different crimes. Count I of the Superseding Indictment charges that the Defendant committed the crime of Felon in Possession of a Firearm. Count II of the Superseding Indictment charges that the Defendant committed the crime of Impersonating a Federal Officer. Count III of the Superseding Indictment charges that the Defendant committed the crime of Interstate Stalking. Count IV of the Superseding Indictment charges that the Defendant committed the crime of Tampering with a Witness. The Defendant has pleaded not guilty to each of these charges.

As I told you at the beginning of the trial, a Superseding 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 element of the crimes charged.

There is no burden upon a Defendant to prove that he is innocent.

INSTRUCTION NO. 8

The crime of Felon in Possession of a Firearm, as charged in Count I of the Superseding Indictment, has three elements, which are:

One, that before May 25, 2010, Michael Heath Thetford had been convicted of a crime punishable by imprisonment for a term exceeding one year; and

Two, that Michael Heath Thetford thereafter knowingly possessed a firearm in South Dakota on or about between the 25th day of May, 2010, and the 29th day of May, 2010, that is a Sig Sauer P226 9mm handgun, bearing serial number U438764;

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

and

Three, that the firearm was transported across a state line at some time during or before Michael Heath Thetford’s possession of it.

The term “firearm” means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state or country other than the State of South Dakota and that the Defendant possessed that firearm in the State of South Dakota, then you may, but are not required to, find that it was transported across a state line.

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged; otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 9

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, has both the power and the 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 9A

Any conviction which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of the Felon in Possession of a Firearm as charged in Count I of the Superseding Indictment, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

INSTRUCTION NO. 10

The crime of Impersonating a Federal Officer, as charged in Count II of the Superseding Indictment, has three elements, which are:

***One*, that on or about between the 25th day of May, 2010, and the 29th day of May 2010, in South Dakota, Michael Heath Thetford did falsely assume or pretend to be a federal officer, that is a Special Agent of the Federal Bureau of Investigation; and**

***Two*, such pretense was false and Michael Heath Thetford knew it was false; and**

***Three*, that Michael Heath Thetford, while so pretending, acted with the intent to cause Shirley Winslett or William Jack Winslett to follow some course of action or inaction.**

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged; otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 11

The crime of Interstate Stalking, as charged in Count III of the Superseding Indictment, has three elements, which are:

***One*, that on or about between the 25th day of May, 2010 and the 29th day of May, 2010, Michael Heath Thetford traveled between states; and**

***Two*, Michael Heath Thetford traveled with the intent to harass, intimidate, or place under surveillance with intent to intimidate or harass Shirley Winslett or William Jack Winslett; and**

***Three*, in the course of, or as a result of such interstate travel, Michael Heath Thetford caused or would reasonably be expected to have caused Shirley Winslett or William Jack Winslett substantial emotional distress.**

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged; otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 12

The crime of Tampering with a Witness, as charged in Count IV of the Superseding Indictment, has two elements, which are:

***One*, that on or about the 19th day of February, 2013, Michael Heath Thetford knowingly used intimidation, threats, or corrupt persuasion against Shirley Winslett or William Jack Winslett, or attempted to do so; and**

***Two*, Michael Heath Thetford did so with the intent to influence, delay, or prevent the testimony of Shirley Winslett or William Jack Winslett, or with the intent to induce Shirley Winslett or William Jack Winslett to withhold testimony, in criminal case CR 11-30159, entitled United States v. Michael Heath Thetford, a/k/a Russ, LNU.**

If all of these elements have been proved beyond a reasonable doubt as to the Defendant, then you must find the Defendant guilty of the crime charged; otherwise you must find the Defendant not guilty of this crime.

INSTRUCTION NO. 13

The crime charged in Count IV of the Superseding Indictment includes an attempt to tamper with a witness. A person may be found guilty of an attempt if he intended to tamper with the witness and voluntarily and intentionally carried out some act which was a substantial step toward such a crime.

A substantial step, as used in this instruction, 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 violate the statute.

INSTRUCTION NO. 14

To “intimidate” someone means intentionally to say or do something that would cause a person of ordinary sensibilities to be fearful of harm to himself or another. It is not necessary for the government to prove that Shirley Winslett or William Jack Winslett was actually frightened.

To “corruptly persuade” someone means to persuade with consciousness of wrongdoing.

To act with “intent to influence” the testimony of a person means to act for the purpose of getting the person to change or color or shade his or her testimony in some way. It is not necessary for the government to prove that the person’s testimony was, in fact, changed in any way.

INSTRUCTION NO. 15

In a prosecution for Tampering with a Witness it is an affirmative defense, as to which the Defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the Defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

Proof by a preponderance of the evidence simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. It is a lesser standard than proof beyond a reasonable doubt.

INSTRUCTION NO. 16

You have heard evidence concerning the Defendant's alleged conduct and personal property that the Defendant allegedly possessed in Alabama. The Defendant is not on trial for any alleged crime that took place in Alabama or South Carolina, but rather is on trial exclusively on the four counts charged in the Superseding Indictment filed in South Dakota. The evidence concerning Defendant's alleged conduct and items seized in Alabama that allegedly had been in Defendant's possession was admitted for the limited purposes of explaining how the investigation in this case proceeded, how certain individuals were or became involved in the investigation, the Defendant's knowledge with respect to Counts I and II, the Defendant's intent with respect to Counts III and IV, and what relationship, if any, the Defendant had with Shirley Winslett and William Jack Winslett. You must not take the testimony and exhibits concerning Defendant's conduct in Alabama and South Carolina as evidence of Defendant's character or evidence that the Defendant acted in accordance or conformity with that character when in South Dakota.

Remember, even if you find that the Defendant may have committed similar acts 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 crimes charged, and you may consider the evidence of prior acts only on the issues stated above.

INSTRUCTION NO. 17

You have heard evidence that the Defendant was previously convicted of crimes in state court in Alabama. You may use that evidence only to decide if the government has proved beyond a reasonable doubt the first element of Count I.

You have also heard evidence that the Defendant was convicted in the Northern District of Alabama of certain felony offenses. You may use that evidence to help you decide whether to believe his testimony and how much weight to give it.

The fact that the Defendant was previously convicted of a crime does not mean that he committed the crimes charged here.

INSTRUCTION NO. 18

You have heard testimony that the Defendant signed plea agreements, made statements during a plea hearing, and pleaded guilty, to offenses in the United States District Court for the Northern District of Alabama. It is for you to decide:

First, whether the Defendant signed the plea agreements and made such 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 plea agreements were entered and statements may have been made and whether they were voluntary or involuntary on the part of Defendant Michael Heath Thetford or otherwise made under duress.

INSTRUCTION NO. 19

You have heard that the witnesses Timothy Lewis and Gregory Perry were once convicted of a crime. You may use that evidence only to help you decide whether to believe those witnesses and how much weight to give their testimony.

You have also heard evidence that Timothy Lewis has made a plea agreement with the Government. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves. Whether or not his testimony may have been influenced by the plea agreement is for you to determine. The guilty plea of Timothy Lewis may not be considered as evidence of Michael Heath Thetford's guilt.

INSTRUCTION NO. 20

Intent may be proved like anything else. You may consider any statements made and acts done by the Defendant, and all the facts and circumstances in evidence which may aid in the determination of the Defendant's intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 21

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 NO. 22

You will note that the Superseding Indictment charges that the offenses were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the case establishes beyond a reasonable doubt that the offenses were committed on a date or dates reasonably near the dates alleged.

INSTRUCTION NO. 23

You have heard testimony about the character and reputation of William Jack Winslett and Shirley Winslett for truthfulness. You may consider this evidence only in deciding whether to believe the testimony of William Jack Winslett and Shirley Winslett and how much weight to give it.

INSTRUCTION NO. 24

In conducting your deliberations and returning your verdict, 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 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.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, 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.

Fifth, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, Instagram, YouTube, or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

Sixth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. 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 bailiff that you are ready to return to the courtroom.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA

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11-30159-RAL

Plaintiff,

VERDICT FORM

-vs-

MICHAEL HEATH THETFORD,
a/k/a Russ LNU,

Defendant.

We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. We find Defendant Michael Heath Thetford _____ (fill in either “not guilty” or “guilty”) of Felon in Possession of a Firearm as charged in Count I of the Superseding Indictment.
2. We find Defendant Michael Heath Thetford _____ (fill in either “not guilty” or “guilty”) of Impersonating a Federal Officer as charged in Count II of the Superseding Indictment.
3. We find Defendant Michael Heath Thetford _____ (fill in either “not guilty” or “guilty”) of Interstate Stalking as charged in Count III of the Superseding Indictment.
4. We find Defendant Michael Heath Thetford _____ (fill in either “not guilty” or “guilty”) of Tampering with a Witness as charged in Count IV of the Superseding Indictment.

Dated October ____, 2014

Foreperson

INSTRUCTION NO. 25

In view of your verdict that Michael Heath Thetford is guilty of Count I of the Superseding Indictment, you must now render a special verdict concerning whether the defendant must forfeit certain property which the government claims is subject to forfeiture to the United States pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c) because it is a firearm involved in the commission of a firearm offense.

Under federal law, any person who is convicted of the firearm offense for which Michael Heath Thetford has been found guilty shall forfeit to the United States all firearms involved in the commission of such violation.

To be forfeitable, the property need not be used exclusively for illegal activity; property that is used the vast majority of the time for legitimate purposes may nevertheless be forfeited if it facilitates the criminal offense. Facilitation of even a single felony offense is sufficient to justify forfeiture.

You must now consider what verdict to render on the question whether there is a nexus—that is, a connection—between property that the asset forfeiture allegation of the Superseding Indictment alleges shall be forfeited to the United States and the offense for which you have already found Michael Heath Thetford guilty.

You are instructed, however, that your previous finding that Michael Heath Thetford is guilty of committing the firearm offense alleged in the Superseding Indictment is final, conclusive, and binding. Because you are bound by your previous finding that the Defendant is guilty, I direct you not to discuss in your forfeiture deliberations whether the Defendant is guilty or not guilty of the firearm offense.

All of the previous instructions regarding direct and circumstantial evidence, credibility of witnesses, and duty to deliberate apply with respect to your verdicts regarding forfeiture.

INSTRUCTION NO. 26

The previous instruction on the government's burden of proof regarding your verdict on the guilt of Michael Heath Thetford does not apply to your deliberation and verdict regarding forfeiture. In deliberating and deciding your verdict regarding forfeiture, you are instructed that the government need only prove by a preponderance of the evidence that the property listed in the asset forfeiture allegation of the Superseding Indictment is subject to forfeiture as it is a firearm involved in the commission of the firearm offense of which Michael Heath Thetford has been convicted.

You are instructed that, in order for the government to establish by a preponderance of the evidence that the property is subject to forfeiture, it must prove that it is more likely than not that the property constitutes firearms involved in the commission of the firearm offense.

In other words, "preponderance of the evidence" means that the government's evidence when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that the property constitutes a firearm involved in the commission of the firearm offense. Your job is to determine whether it is more likely than not that the property is such property.

INSTRUCTION NO. 27

While deliberating, you may consider any evidence, including testimony, offered by the parties at any time during the trial.

INSTRUCTION NO. 28

In determining whether property is subject to forfeiture, you should not consider what might happen to property that is declared forfeited as that is exclusively a matter for the Court to decide. You should disregard any claims that other persons may have to the property. The interests that other persons may have in the property will be taken into account by the Court at a later time. Any claims that the forfeiture of the property would constitute excessive punishment will also be taken into account by the Court at a later time as will the issue regarding whether or not the property is presently available.

Your sole concern now is to determine whether the firearm was involved in the commission of the firearm offense.

INSTRUCTION NO. 29

You must reach a unanimous verdict as to the question on the Special Verdict Form.

INSTRUCTION NO. 30

The Special Verdict form lists the property which the government asserts the Defendant should forfeit as property involved in the commission of the firearm offense.

You may answer by simply putting an "X" or check mark in the space provided next to the word "YES" or "NO." The foreperson must then sign and date the Special Verdict form.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA

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11-30159-RAL

Plaintiff,

SPECIAL VERDICT FORM

-vs-

MICHAEL HEATH THETFORD,
a/k/a Russ LNU,

Defendant.

We, the jury, in the above-entitled case, find by a preponderance of evidence that Defendant Michael Heath Thetford's interest in the following property is subject to forfeiture to the United States:

We the jury unanimously find the Sig Sauer P226 9mm handgun, bearing serial number U438764, is subject to forfeiture.

___ YES

___ NO

Dated this _____ day of October, 2014.

Foreperson