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CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>ROBERT JOHN HULSCHER and NICHOLAS RYAN HEMSHER,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">4:16-CR-40070-KES</p> <p style="text-align: center;">FINAL INSTRUCTIONS TO THE JURY</p>
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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.

Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant. Also keep in mind that you must consider, separately, each crime charged against each individual defendant, and you must return a separate verdict for each of those crimes charged.

FINAL INSTRUCTION NO. 2 – STEALING A FIREARM

For you to find Robert John Hulscher guilty of stealing a firearm, as charged in Count 1 of the Second Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that on or about February 18, 2016, Hulscher did steal a firearm, to wit: (1) Winchester, Model Super X2, 12 gauge shotgun bearing serial number 11AMZ09144; (2) Browning, Model A-Bolt, .243 WSSM caliber rifle bearing serial number 34610MX351; (3) Browning, Model Gold, 10 gauge shotgun bearing serial number 08312NVR91; (4) Remington, Model 700, .22-250 caliber rifle bearing serial number A6378843; (5) Winchester, Model SX3, 12 gauge shotgun bearing serial number 11HMN17008; (6) DPMS, Model Panther LR-308, .308 caliber semi-automatic rifle bearing serial number 52223; (7) a Browning, Model BAR II, .300 Winchester Magnum caliber rifle bearing serial number 107NR07930; (8) Glock, model 22, .40 Smith & Wesson caliber, semi-automatic pistol bearing serial number NPX196; (9) Henry, model Golden Boy, .17 HMR caliber rifle bearing serial number GB045097V; (11) Remington, Model 700, .243 caliber rifle bearing serial number G6354866; or a (12) Mossberg pump-action 12-gauge shotgun bearing serial number R886605;

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

Two, that the firearm was transported across a state line at some time during or before Hulscher’s possession of it; and

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than 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.

Three, that Hulscher did so unlawfully.

If all of these elements have been proved beyond a reasonable doubt as to Hulscher, then you must find Hulscher guilty of the crime charged in the

Second Superseding Indictment; otherwise, you must find Hulscher not guilty of that crime.

Hulscher may also be found guilty of the crime of stealing a firearm even if Hulscher personally did not do every act constituting the offense charged, if Hulscher aided and abetted the commission of stealing a firearm.

In order to have aided and abetted the commission of a crime Hulscher must, before or at the time the crime was committed:

One, have known the crime of stealing a firearm was being committed or going to be committed;

Two, have had enough advance knowledge of the extent and character of the crime that Hulscher was able to make the relevant choice to walk away from the crime before all elements of stealing a firearm was complete;

Three, have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of the crime of stealing a firearm;

And four, have acted knowingly and intentionally.

For you to find Hulscher guilty of the crime of stealing a firearm by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the essential elements of the crime of stealing a firearm were committed by some person or persons and that Hulscher aided and abetted the commission of that crime.

You should understand that merely acting in the same way as others or merely associating with others does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being

committed or is about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

FINAL INSTRUCTION NO. 3 – FELON IN POSSESSION OF A FIREARM

For you to find Robert John Hulscher guilty of felon in possession of a firearm, as charged in Count 2 of the Second Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that Hulscher had been convicted of a crime punishable by imprisonment for more than one year;

The parties have agreed that Hulscher was convicted of a crime punishable by imprisonment for a term exceeding one year, on about February 5, 2010.

Two, that on or about February 18, 2016, in the District of South Dakota Hulscher knowingly possessed a firearm, to wit: (1) Winchester, Model Super X2, 12 gauge shotgun bearing serial number 11AMZ09144; (2) Browning, Model A-Bolt, .243 WSSM caliber rifle bearing serial number 34610MX351; (3) Browning, Model Gold, 10 gauge shotgun bearing serial number 08312NVR91; (4) Remington, Model 700, .22-250 caliber rifle bearing serial number A6378843; (5) Winchester, Model SX3, 12 gauge shotgun bearing serial number 11HMN17008; (6) DPMS, Model Panther LR-308, .308 caliber semi-automatic rifle bearing serial number 52223, (7) a Browning, Model BAR II, .300 Winchester Magnum caliber rifle bearing serial number 107NR07930, (8) Glock, model 22, .40 Smith & Wesson caliber, semi-automatic pistol, bearing serial number NPX196; (9) Henry, model Golden Boy, .17 HMR caliber rifle bearing serial number GB045097V; (11) Remington, Model 700, .243 caliber rifle bearing serial number G6354866; or a (12) Mossberg pump-action 12-gauge shotgun bearing serial number R886605;

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

And three, that the firearm was transported across a state line at some time during or before Hulscher’s possession of it.

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than 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 Hulscher, then you must find Hulscher guilty of the crime charged in the Second Superseding Indictment; otherwise, you must find Hulscher not guilty of that crime.

FINAL INSTRUCTION NO. 4 – POSSESSION OF A STOLEN FIREARM

For you to find Nicholas Ryan Hemsher guilty of possession of a stolen firearm, as charged in Count 3 of the Second Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that on or about February 20, 2016, continuing until on or about February 22, 2016, in the District of South Dakota, Hemsher knowingly possessed a firearm, to wit: (1) Winchester, Model Super X2, 12 gauge shotgun bearing serial number 11AMZ09144; (2) Browning, Model A-Bolt, .243 WSSM caliber rifle bearing serial number 34610MX351; (3) Browning, Model Gold, 10 gauge shotgun bearing serial number 08312NVR91; (4) Remington, Model 700, .22-250 caliber rifle bearing serial number A6378843; (5) Winchester, Model SX3, 12 gauge shotgun bearing serial number 11HMN17008; (6) DPMS, Model Panther LR-308, .308 caliber semi-automatic rifle bearing serial number 52223; (7) a Browning, Model BAR II, .300 Winchester Magnum caliber rifle bearing serial number 107NR07930; or a (8) Glock, model 22, .40 Smith & Wesson caliber, semi-automatic pistol, bearing serial number NPX196

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

Two, that at the time Hemsher possessed it, the firearm was stolen and Hemsher knew or had reasonable cause to believe that the firearm was stolen;

And three, that the firearm had at some time traveled in interstate commerce.

If all of these elements have been proved beyond a reasonable doubt as to Hemsher, then you must find Hemsher guilty of the crime charged in the Second Superseding Indictment; otherwise, you must find Hemsher not guilty of that crime.

FINAL INSTRUCTION NO. 5 – FELON IN POSSESSION OF A FIREARM

For you to find Nicholas Ryan Hemsher guilty of felon in possession of a firearm, as charged in Count 4 of the Second Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that Hemsher had been convicted of a crime punishable by imprisonment for more than one year;

The parties have agreed that Hemsher was convicted of a crime punishable by imprisonment for a term exceeding one year, on or about June 24, 2015.

Two, that on or about February 20, 2016, continuing until on or about February 22, 2016, in the District of South Dakota ~~Hulseher~~ Hemsher knowingly possessed a firearm, to wit: (1) Winchester, Model Super X2, 12 gauge shotgun bearing serial number 11AMZ09144; (2) Browning, Model A-Bolt, .243 WSSM caliber rifle bearing serial number 34610MX351; (3) Browning, Model Gold, 10 gauge shotgun bearing serial number 08312NVR91; (4) Remington, Model 700, .22-250 caliber rifle bearing serial number A6378843; (5) Winchester, Model SX3, 12 gauge shotgun bearing serial number 11HMN17008; (6) DPMS, Model Panther LR-308, .308 caliber semi-automatic rifle bearing serial number 52223; (7) a Browning, Model BAR II, .300 Winchester Magnum caliber rifle bearing serial number 107NR07930; or a (8) Glock, model 22, .40 Smith & Wesson caliber, semi-automatic pistol, bearing serial number NPX196;

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

And three, that the firearm was transported across a state line at some time during or before Hemsher’s possession of it.

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than 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 Hemsher, then you must find Hemsher guilty of the crime charged in the Second Superseding Indictment; otherwise, you must find Hemsher not guilty of that crime.

FINAL INSTRUCTION NO. 6 – POSSESSION

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.

In addition, mere presence where the firearm was found or mere physical proximity to the firearm is insufficient to establish that the defendant had “possession” of the firearm. The defendant’s knowledge of the presence of the firearm, at the same time the defendant has control over the firearm or the place in which it was found, is required. Thus, in order to establish “possession” of a firearm, in addition to knowledge of the presence of the firearm, the prosecution must establish that, at the same time, (a) the defendant intended to exercise control over the firearm or place in which it was found; (b) the defendant had the power to exercise control over the firearm or place in which it was found; and (c) the defendant knew that he had the power to exercise control over the firearm or place in which it was found. Constructive possession requires knowledge of an object, the ability to control it, and the intent to do so.

**FINAL INSTRUCTION NO. 7 – PRESUMPTION OF INNOCENCE AND
BURDEN OF PROOF**

The presumption of innocence means that the defendants are presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendants' arrest, the charges, or the fact that they are here in court.
- This presumption remains with the defendants throughout the trial.
- This presumption is enough, alone, for you to find the defendants not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of an offense charged against them.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendants to prove their innocence.
- This burden means that the defendants do not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if the defendants do not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.
- This burden means that you must find the defendants not guilty of the offenses charged against them, unless the prosecution proves beyond a reasonable doubt that they have committed each and every element of the offenses.

FINAL INSTRUCTION NO. 8 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendants, keeping in mind that the defendants never, ever have the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendants' guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 9 – IMPEACHMENT

In Preliminary Instruction No. 6, 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 has said or done something, or has 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.

You have heard evidence that Nicolas Wingler, Matthew Marshall, and Joel Otten have been convicted of a crime. You may use that evidence only to help you decide whether to believe Nicolas Wingler, Matthew Marshall, and Joel Otten and how much weight to give their testimony.

You should treat the testimony of certain witnesses with greater caution and care than that of other witnesses:

1. You have heard evidence that Nicolas Wingler and Matthew Marshall have made a plea agreement with the government. The testimony of the witnesses was received in evidence and may be considered by you. You may give this testimony such weight as you think it deserves. Whether or not the testimony may have been influenced by the plea agreement is for you to determine.

2. You have heard evidence that Nicolas Wingler and Matthew Marshall hope to receive a reduced sentence on criminal charges pending against them in return for their cooperation with the government in this case. The witnesses entered into an agreement with the government which provides that in return for their assistance, the government will recommend a less severe sentence for the crime or crimes with which they are charged. If the prosecutor handling this witness's case believes he provided "substantial assistance," that prosecutor can file a motion to reduce his sentence. The judge has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, files such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the government, then it is up to the judge to decide whether to reduce the sentence at all, and if so, how much to reduce it. You may give the testimony of this witness the weight you think it deserves. Whether or not testimony of this witness may have been influenced by his hope of receiving a reduced sentence is for you to decide.

3. You have heard testimony from Nicolas Wingler and Matthew Marshall who stated that they participated in the crime charged against Robert John Hulsher and Nicholas Ryan Hemsher. Their testimony was received in evidence and may be considered by you. You may give their testimony such weight as you think it deserves. Whether or not their testimony may have been influenced by their desire to please the prosecution or to strike a good bargain with the prosecution about their own situation is for you to determine.

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.

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

FINAL INSTRUCTION NO. 10 – PRIOR SIMILAR ACTS

You have heard evidence that the defendant Robert Hulscher previously committed an act similar to the one charged in this case. You may consider this evidence only if you unanimously find it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt.

If you find this evidence has been proved, then you may consider it to help you decide whether the similarity between the acts previously committed and the ones charged in this case suggests that the same person committed both of the crimes. Additionally, you can use the evidence to help you decide if defendant Hulscher had the knowledge or intent to commit the crime of stealing a firearm. You should give it the weight and value you believe it is entitled to receive. If you find that this evidence has not been proved, you must disregard it.

Defendant Hulscher is on trial for the crimes charged and for those crimes alone. You may not convict a person simply because you believe he may have committed some acts, even bad acts, in the past. Defendant Hulscher is on trial only for the crimes charged, and you may consider the evidence of prior acts only on the issues stated above.

FINAL INSTRUCTION NO. 11 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant Robert John Hulsher and/or defendant Nicholas Ryan Hemsher are guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant Robert John Hulsher and/or defendant Nicholas Ryan Hemsher are guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 12 – DUTY DURING DELIBERATIONS

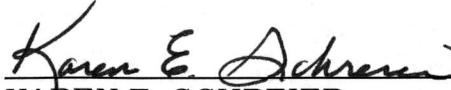
You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendants are not guilty or guilty. If the defendants are guilty, I will decide what their sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendants' race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendants unless you would return the same verdict without regard to their race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 24th day of February, 2017.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Karen E. Schreier", written over a horizontal line.

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE