

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY BURNS,

Defendant.

No. CR 18-40001-02-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

FINAL INSTRUCTIONS

NO. 1 – INTRODUCTION 1

NO. 2 – IMPEACHMENT 2

NO. 3 – WIRE FRAUD..... 3

NO. 4 – AIDING AND ABETTING 8

NO. 5 – GOOD FAITH 10

NO. 6 – WILLFUL BLINDNESS..... 12

NO. 7 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF 13

NO. 8 – REASONABLE DOUBT..... 14

NO. 9 – DUTY TO DELIBERATE 15

NO. 10 – DUTY DURING DELIBERATIONS 17

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 – 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.

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. 3 – WIRE FRAUD

For you to find Timothy Burns guilty of the offenses charged in Counts Three through Seven in the Indictment, the government must prove the following three essential elements for each count beyond a reasonable doubt:

One, that Burns voluntarily and intentionally devised, made up, or participated in a scheme to defraud, or devised or participated in a scheme to obtain money from another by means of material false representations or promises, or aided and abetted others in committing the scheme, which scheme is described as follows:

Burns knowingly circulated a private placement memorandum (PPM), which contained false and misleading information, and made false and fraudulent misrepresentations, in an effort to solicit investors for an aquaponics facility. Burns used those funds for his own purposes, willfully and for the purpose of personally enriching himself.

Two, that Burns did so with the intent to defraud;

If you find that Burns acted in “good faith” as described in Final Instruction No. 5, this is a complete defense to the crime of wire fraud.

And three, that Burns used, or caused to be used, an interstate wire communication, that is, the electronic transfer of funds through the Federal Reserve Bank or a wire transfer, in furtherance of, or in an attempt to carry out, some essential step in the scheme.

The phrase “scheme to defraud” includes any plan or course of action intended to deceive or cheat another out of money or property by employing material falsehoods, concealing material facts, or omitting material facts. It also means the obtaining of money or property from another by means of material false representations or promises. A scheme to defraud need not be fraudulent on its face but must include some sort of fraudulent misrepresentation or promise reasonably calculated to deceive a reasonable person.

A statement or representation is “false” when it is untrue when made or effectively conceals or omits a material fact.

A fact, falsehood, representation, or promise is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction. But whether a fact, falsehood, representation, or promise is “material” does not depend on whether the person was actually deceived.

To act with “intent to defraud” means to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss or loss of property to another or bringing about some financial gain to oneself or another to the detriment of a third party. With respect to false statements, Burns must have known the statement was untrue when made or have made the statement with reckless indifference to its truth or falsity.

Each separate use of an interstate wire communication in furtherance of the scheme to defraud constitutes a separate offense. The actions charged are set forth as follows:

Count	Date of Wire Transmission	Type of Wire Transmission	Description of Interstate Wire Transmission
3	August 25, 2016	\$25,000 check from D.W.	From Wells Fargo Bank in SD to First Bank & Trust in SD through the Federal Reserve Bank
4	September 12, 2016	\$50,000 check from M.A.	From The Bank of New York Mellon in NY to First Bank & Trust in SD through the Federal Reserve Bank

5	September 17, 2016	\$25,000 check from J.A.	From US Bank in MO to First Bank & Trust in SD through the Federal Reserve Bank
6	September 21, 2016	\$25,000 check from A.C.	From US Bank in MN to US Bank in SD through the Federal Reserve Bank
7	October 19, 2016	\$50,000 wire transfer (on behalf of D.K.)	From IRA Resources in CA to US Bank in SD

It is not necessary that the use of an interstate wire communication by the participants themselves be contemplated or that Burns actually send any interstate wire communication or specifically intend that an interstate wire communication be used. It is sufficient if an interstate wire communication was in fact used to carry out the scheme and the use of an interstate wire communication by someone was reasonably foreseeable.

Interstate wire communications that are designed to lull victims into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are wire communications in furtherance of the scheme.

It is not necessary that the government prove that the wire communication was an essential part of the scheme. A wire communication may be routine or sent for a legitimate purpose so long as it assists in carrying out the fraud.

The wire fraud counts of the Indictment charge that Burns, along with Ritesman, devised or participated in a scheme. The government need not prove, however, that Burns and Ritesman met together to formulate the scheme charged, or that there was a formal agreement among them, in order for them to be held jointly responsible for the operation of the scheme and the use of interstate wire communications for the purpose of accomplishing the scheme. It is sufficient if only one person conceives the scheme and the other knowingly, voluntarily, and intentionally joins in and participates in some way in the operation of the scheme in order for such other to be held jointly responsible.

It is not necessary that the government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme, that the interstate wire communication was itself false or fraudulent, that the alleged scheme actually succeeded in defrauding anyone, or that the interstate wire communication was intended as the specific or exclusive means of accomplishing the alleged fraud.

If the government has proved all three of these elements beyond a reasonable doubt for a count, then you must find Burns guilty of that count as charged in the Indictment. If the government has not proved all three of these elements beyond a reasonable doubt for a count, then you must find Burns not guilty of that count as charged in the Indictment. Keep in mind that

each count in Counts Three through Seven of the Indictment charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

FINAL INSTRUCTION NO. 4 – AIDING AND ABETTING

Burns may also be found guilty of wire fraud even if he personally did not do every act constituting the offenses charged, if he aided and abetted Tobias Ritesman in the commission of the crimes of wire fraud.

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

1. have known that wire fraud was committed or going to be committed;
2. have had enough advance knowledge of the extent and character of the wire fraud that he was able to make the relevant choice to walk away from it before all elements of the offense were complete;
3. have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of wire fraud; and
4. have acted with intent to defraud.

For you to find Burns guilty of wire fraud by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the essential elements of wire fraud were committed by Tobias Ritesman and that Burns aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event, or 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 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. 5 – GOOD FAITH

One of the issues in this case is whether Burns acted in “good faith.” “Good faith” is a complete defense to the crime of “wire fraud” if Burns did not act with the intent to defraud or with the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises, which is an element of Counts Three through Seven of the Indictment. The essence of the good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring fraudulent intent.

Good faith includes, among other things, an opinion or belief that is honestly held, even if the opinion is in error or the belief is mistaken. But even though a defendant honestly held a certain opinion or belief (such as a belief that a business venture would ultimately succeed, that investors would make a profit, or that investors would not lose money), a defendant does not act in good faith if he also knowingly made false or fraudulent representations or promises, or otherwise acted with the intent to defraud or deceive another. Proof of fraudulent intent requires more than proof that Burns only made a mistake in judgment or management, or was careless.

The government has the burden of proving beyond a reasonable doubt that Burns acted with the intent to defraud or with the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises. Evidence that Burns acted in good faith may be considered by you,

together with all the other evidence, in determining whether or not Burns acted with the intent to defraud or the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises.

FINAL INSTRUCTION NO. 6 – WILLFUL BLINDNESS

The government may prove that Burns acted “knowingly” by proving, beyond a reasonable doubt, that Burns deliberately closed his eyes to what would otherwise have been obvious to him. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond a reasonable doubt of an intent of Burns to avoid knowledge or enlightenment would permit the jury to find knowledge. Stated another way, a person’s knowledge of a particular fact may be shown from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact. A willfully blind defendant is one who takes deliberate action to avoid confirming a high probability of wrongdoing.

It is, of course, entirely up to you as to whether you find any deliberate ignorance or deliberate closing of the eyes and any inferences to be drawn from any such evidence.

You may not conclude that Burns had knowledge, however, from proof of a mistake, negligence, carelessness, recklessness, or a belief in an inaccurate position.

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

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

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

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

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.

This burden means that you must find the defendant not guilty of an offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of that offense.

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 defendant, keeping in mind that the defendant never, ever has 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 defendant's 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 – 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 is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is 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.

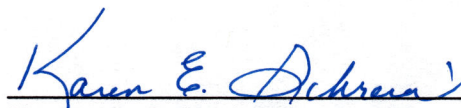
FINAL INSTRUCTION NO. 10 – DUTY DURING DELIBERATIONS

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 defendant is not guilty or guilty. If the defendant is guilty, I will decide what his 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 defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his 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 April 29, 2019.



Karen E. Schreier
United States District Judge