

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENE JIRAK,

Defendant.

No. 11-CR-2041-LRR

FINAL JURY INSTRUCTIONS

Ladies and Gentlemen of the Jury:

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

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. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 1

In considering these instructions, attach no importance or significance whatsoever to the order in which they are given.

INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action or remark that I have made during this trial have I intended to give any opinion or suggestion as to what the facts are or what your verdicts should be.

INSTRUCTION NO. 3

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

INSTRUCTION NO. 4

I have mentioned the word “evidence.” The “evidence” in this case consists of the following: the testimony of the witnesses and documents and other things received as exhibits.

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 the lawyers are not evidence.
2. Anything that might have been said by jurors, the attorneys or the judge during the jury selection process is not evidence.
3. Objections are not evidence. The parties 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.
4. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
5. Anything you saw or heard about this case outside the courtroom is not evidence.

During the trial, documents were referred to but they were not admitted into evidence and, therefore, they will not be available to you in the jury room during deliberations.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

INSTRUCTION NO. 5

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 6

The jurors are the sole judges of the weight and credibility of the testimony and the value to be given to the testimony of each witness who has testified in this case. 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.

INSTRUCTION NO. 7

In a previous instruction, 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 are to consider the testimony of certain witnesses.

A witness may be discredited or impeached by contradictory evidence; by showing that the witness testified falsely concerning a material matter; by showing the witness has a motive to be untruthful; 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.

INSTRUCTION NO. 8

Exhibits have been admitted into evidence and are to be considered along with all of the other evidence to assist you in reaching your verdicts. You are not to tamper with the exhibits or their contents, and you should leave the exhibits in the jury room in the same condition as they were received by you.

INSTRUCTION NO. 9

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

Expert testimony should be considered just like any other testimony. You may accept it 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. 10

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. 11

You have heard evidence that the defendant previously forged his wife's name on an Iowa tax refund check. 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 knowledge or intent to forge the check at issue in this case, or whether the defendant's act of signing the check at issue in this case was the result of a mistake or accident. You should give the evidence of the defendant's prior act the weight and value you believe it is entitled to receive. If you find that the evidence of the defendant's prior act is not more likely true than not true, then you must 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 crimes charged, and you may consider the evidence of prior acts only on the issue of knowledge, intent, mistake or lack of accident.

INSTRUCTION NO. 12

The Indictment in this case charges the defendant with five separate crimes.

Under Count 1, the Indictment charges that, on or about January 9, 2009, in the Northern District of Iowa, the defendant made and presented to the United States Treasury Department and the Internal Revenue Service a claim against the United States for payment of a tax refund in the amount of \$56,999.00, which the defendant knew to be false, fictitious and fraudulent. The defendant's false claim was contained in a false amended United States Individual Income Tax Return Form 1040X for the tax year 2005, which was presented to the Treasury Department through the Internal Revenue Service.

Under Count 2, the Indictment charges that, on or about March 27, 2009, in the Northern District of Iowa, the defendant made and presented to the United States Treasury Department and the Internal Revenue Service a claim against the United States for payment of a tax refund in the amount of \$53,787.00, which the defendant knew to be false, fictitious and fraudulent. The defendant's false claim was contained in a false United States Individual Income Tax Return Form 1040 for the tax year 2008, which was presented to the Treasury Department through the Internal Revenue Service.

Under Count 3, the Indictment charges that, on or about March 9, 2009, in the Northern District of Iowa, the defendant, with the intent to defraud, did pass, utter or publish, or attempt to pass, utter or publish, as true a Treasury Department check of the United States, check number 06024358 dated March 6, 2009, bearing the falsely made and forged endorsement of "J.K." thereon.

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INSTRUCTION NO. 12 (Cont'd)

Under Count 4, the Indictment charges that, on or about January 9, 2009, in the Northern District of Iowa, the defendant, for the purpose of executing and attempting to execute a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations, did knowingly place in an authorized depository for mail, to be sent and delivered by the Postal Service, an amended joint tax return, Form 1040X, for the tax year 2005.

Under Count 5, the Indictment charges that, on or about January 9, 2009, in the Northern District of Iowa, the defendant did knowingly use without lawful authority a means of identification of another person during and in relation to the offense set out in Count 4, specifically, the defendant used his ex-wife's name and Social Security number without her permission on the amended joint tax return, Form 1040X, for the tax year 2005.

The defendant has pleaded not guilty to each of these charges.

As I told you at the beginning of the trial, an 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 crime charged.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

There is no burden upon the defendant to prove that he is innocent. Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.

INSTRUCTION NO. 13

The crime of making a false claim for a tax refund, as charged in Counts 1 and 2 of the Indictment, has four elements, which are:

One, on or about the date alleged in the count under consideration by you, the defendant made and presented to the United States Treasury Department and the Internal Revenue Service a claim against the United States for a tax refund;

Two, the claim was false, fictitious or fraudulent;

Three, the defendant knew that the claim was false or fraudulent; and

Four, the false, fictitious or fraudulent matter was material to the United States Treasury Department and the Internal Revenue Service.

A claim is “false” or “fictitious” if any part of it is untrue when made, and then known to be untrue by the person making it or causing it to be made. A claim is “fraudulent” if any part of it is known to be untrue, and made or caused to be made with the intent to deceive the governmental agency to which it is submitted.

A claim is “material” if it has a natural tendency to influence, or is capable of influencing the United States Treasury Department and the Internal Revenue Service. However, whether a claim is “material” does not depend on whether the United States Treasury Department and the Internal Revenue Service was actually deceived.

If the government proves all of these elements beyond a reasonable doubt as to the count under consideration by you, then you must find the defendant guilty of that count. Otherwise, you must find the defendant not guilty of the count under consideration by you.

INSTRUCTION NO. 14

The crime of uttering a forged Treasury check, as charged in Count 3 of the Indictment, has four elements, which are:

One, on or about March 9, 2009, the defendant passed, uttered or published, or attempted to pass, utter or publish, as true a United States Treasury Department check, check number 06024358 dated March 6, 2009, bearing the falsely made and forged endorsement of J.K. thereon;

Two, the defendant knew at the time that the endorsement was falsely made or forged;

Three, the defendant did so with the intent to defraud; and

Four, the face value of the United States Treasury Department check is \$1,000 or more.

To “pass” or “utter” a check includes any attempt to cash the check or otherwise place it in circulation while stating or implying, directly or indirectly, that the check and the endorsement are genuine.

The phrase “falsely made or forged” means deceitfully created, signed or changed in order to imitate or resemble something else.

To act with “intent to defraud” means to act with the intent to deceive or cheat, for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant or another. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded, or that anyone actually obtained money from the United States.

If the government proves all of these elements beyond a reasonable doubt as to Count 3, then you must find the defendant guilty of that count. Otherwise, you must find the defendant not guilty of Count 3.

INSTRUCTION NO. 15

The crime of mail fraud, as charged in Count 4 of the Indictment has three elements, which are:

One, the defendant voluntarily and intentionally devised or made up a scheme to defraud another out of money by means of material false representations or promises, which scheme is described as follows: the defendant devised a scheme to obtain a tax refund under false pretenses by submitting fabricated 1099-OID forms purporting to show substantial funds had been withheld for taxes when no such forms were issued and no such taxes were withheld, and the defendant carried out the scheme in part as follows:

- (a) On or about January 9, 2009, the defendant fabricated five false 1099-OID forms purported to be from four financial institutions and purporting to show those financial institutions withheld \$70,919.66 in taxes; and
- (b) On or about January 9, 2009, the defendant created a false amended joint tax return, Form 1040X, for the tax year 2005, referencing and attaching the fabricated and false 1099-OID forms, which tax return purported to show the defendant and his ex-wife were entitled to a tax refund of \$56,999.00.

Two, the defendant did so with the intent to defraud; and

Three, the defendant used, or caused to be used, the mail in furtherance of, or in an attempt to carry out some essential step in the scheme. Specifically, on or about January 9, 2009, the defendant placed in an authorized depository for mail, to be sent and delivered by the Postal Service, the amended joint tax return, Form 1040X, for the tax year 2005.

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INSTRUCTION NO. 15 (Cont'd)

The phrase “scheme to defraud” includes any plan or course of action intended to deceive or cheat another out of money by employing material falsehoods or concealing material facts. It also means the obtaining of money 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 or representation 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. However, whether a fact, falsehood or representation 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 to another or bringing about some financial gain to oneself or another to the detriment of a third party. With respect to false statements, the defendant must have known the statement was untrue when made or have made the statement with reckless indifference to its truth or falsity.

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 alleged scheme actually succeeded in defrauding anyone or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

If the government proves all of these elements beyond a reasonable doubt as to Count 4, then you must find the defendant guilty of that count. Otherwise, you must find the defendant not guilty of Count 4.

INSTRUCTION NO. 16

The crime of aggravated identity theft, as charged in Count 5 of the Indictment, has four elements, which are:

One, on or about January 9, 2009, the defendant knowingly used the name and Social Security number belonging to his ex-wife, J.K.;

Two, the defendant knew that the name and Social Security number he used belonged to another person;

Three, the defendant used his ex-wife's name and Social Security number without lawful authority; and

Four, the defendant used his ex-wife's name and Social Security number during and in relation to the crime of mail fraud, as charged in Count 4 of the Indictment. The elements of mail fraud are set forth in Instruction No. 15.

The phrase "without lawful authority" means that the defendant used another's name or Social Security number without that person's permission.

The phrase "during and in relation to" means that the name and Social Security number belonging to defendant's ex-wife, J.K., were used in furtherance of the commission of the crime of mail fraud as charged in Count 4 of the Indictment; it must have been used to some purpose or effect with respect to the commission of the crime of mail fraud; the presence or involvement of J.K.'s name and Social Security number in the commission of the mail fraud offense cannot be the result of accident or coincidence.

If the government proves all of these elements beyond a reasonable doubt as to Count 5, then you must find the defendant guilty of that count. Otherwise, you must find the defendant not guilty of Count 5.

INSTRUCTION NO. 17

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

INSTRUCTION NO. 18

Intent may be proven by circumstantial evidence. It rarely can be established by other means. While witnesses may see or hear and thus be able to give direct evidence of what a person does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit an offense.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so. As I have previously mentioned, it is entirely up to you to decide what facts to find from the evidence.

INSTRUCTION NO. 19

You will note that the Indictment charges that the offenses were committed “on or about” certain dates. The government need not prove with certainty the exact dates or the exact time period of the offenses charged. It is sufficient if the evidence establishes that the offenses occurred within a reasonable time of the dates or period of time alleged in the Indictment.

INSTRUCTION NO. 20

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 21

In conducting your deliberations and returning your verdicts, 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 an agreement if you can do so without violence to individual judgment, because each of your verdicts—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 your verdicts.

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 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.

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INSTRUCTION NO. 21 (Cont'd)

Fifth, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. Each verdict, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be—that is entirely for you to decide.

INSTRUCTION NO. 22

Attached to these instructions you will find the Verdict Forms. These are simply the written notices of the decisions that you reach in this case. The answers to the Verdict Forms must be the unanimous decisions of the Jury.

You will take the Verdict Forms to the jury room, and when you have completed your deliberations and each of you has agreed to the answers to the Verdict Forms, your foreperson will fill out the Verdict Forms, sign and date them and advise the Court Security Officer that you are ready to return to the courtroom. Your foreperson should place the signed Verdict Forms in the blue folder, which the court will provide you, and then your foreperson should bring the blue folder when returning to the courtroom.

Finally, members of the Jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return the Verdict Forms in accord with the evidence and these instructions.

June 21, 2012
Date

Linda R. Reade
Linda R. Reade, Chief Judge
United States District Court
Northern District of Iowa