

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW MARK ARMSTRONG

Defendant.

Criminal No. 4:03-cr-246

FINAL JURY INSTRUCTIONS

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INSTRUCTION 1

INTRODUCTION

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.

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 the trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier 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 2

DUTY OF JURY

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 3

EVIDENCE

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses and the 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 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.

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

INSTRUCTION 4

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence--such as the testimony of an eyewitness. The other is circumstantial evidence--the proof of a chain of circumstances pointing to the commission of the offense.

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 5

STIPULATED FACTS

The Government and the Defendant have stipulated -- that is, they have agreed -- that certain facts are as counsel have stated. You must therefore treat those facts as having been proved.

INSTRUCTION 6

DEMONSTRATIVE SUMMARIES

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

INSTRUCTION 7

CREDIBILITY OF WITNESSES

In deciding what the facts are, you will 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.

The testimony of government investigators should be considered in the same manner as any other witness.

INSTRUCTION 8

INTERVIEWS BY GOVERNMENT ATTORNEYS

During the trial, you have heard testimony that Government Attorneys or federal agents have interviewed, or attempted to interview, some witnesses who testified on behalf of the United States, in order to prepare for trial. No adverse inference should be drawn from that conduct.

INSTRUCTION 9

DEFENDANT'S PRIOR SIMILAR ACTS

You have heard a certain category of evidence called "other acts" or "similar acts" evidence. Here, that evidence is that the defendant has previously been found criminally responsible for actions similar to or related to the matters being considered in this trial. You may not use this "other acts" or "similar acts" evidence to decide whether the defendant carried out the acts involved in the crime charged in the indictment. In order to consider "other acts" evidence at all, you must first unanimously find beyond a reasonable doubt, based on the rest of the evidence introduced, that the defendant carried out the acts involved in the crime charged in the indictment. If you make that finding, then you may consider the "other acts" or "similar acts" evidence to decide whether the defendant acted willfully and not by accident or mistake, or acted with intent, motive or plan. "Other acts" or "similar acts" evidence must be proven by a preponderance of the evidence; that is, you must find that the evidence 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 proven by a preponderance of the evidence, you should give it the weight and value you believe it is entitled to receive. If you find that it is not proven by a preponderance of the evidence, then you shall disregard such evidence.

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 issue of whether the defendant acted willfully and not by accident or mistake, or acted with intent, motive or plan

INSTRUCTION 10

INDICTMENT

The Indictment alleges that at all times relevant All Tech, Inc., (hereinafter "ATI") was in the business of repairing hydraulic systems and selling oil furnaces and that ATI was essentially controlled by defendant ANDREW MARK ARMSTRONG. The Indictment alleges that defendant exercised control over every aspect of ATI's business affairs, including approving all payments by the company and controlling all of ATI's bank accounts.

The United States of America charges ANDREW MARK ARMSTRONG with seven offenses:

(Counts 1 - 5) Count One through Count Five charges that beginning on or about October 1, 1999, and continuing up to and including on or about November 22, 2000, in the Southern District of Iowa, the defendant, ANDREW MARK ARMSTRONG, did willfully fail to truthfully account for and pay over to the Internal Revenue Service all of the federal income taxes withheld and Federal Insurance Contributions Act ("FICA") taxes due and owing to the United States on behalf of ATI and its employees, for each of the following quarters, with each calendar quarter constituting a separate count of this Indictment:

Count One: Last quarter of 1999

Count Two: First quarter of 2000

Count Three: Second quarter of 2000

Count Four: Third quarter of 2000

Count Five: Fourth quarter of 2000

Each of these counts is a separate violation of Title 26, United States Code, Section 7202.

(Count 6) Count Six charges that from on or about May 2000, up to and including in or

about October 2000, in the Southern District of Iowa, ANDREW MARK ARMSTRONG, defendant herein, did embezzle, steal and unlawfully and willfully abstract and convert to his own use and the use of others the monies, funds, securities, premiums, credits, property and other assets of ATI's 401(k) Plan, an employee pension benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA), to wit, the sum of approximately \$15,526, which was withheld during said period from ATI employees' wages and salaries as contributions toward the Pension Plan. This is a violation of Title 18, United States Code, Section 664.

(Count 7) Count Seven charges that from in or about June 2000, up to and including in or about September 2000, in the Southern District of Iowa, ANDREW MARK ARMSTRONG, defendant herein, did embezzle, steal and unlawfully and willfully abstract and convert to his own use and the use of others the monies, funds, securities, premiums, credits, property and other assets of ATI's Fringe Benefit Plan, said plan being a health care benefit program, to wit, the sum of approximately \$10,588, which was withheld during said period from ATI employees' wages and salaries as contributions toward the Fringe Benefit Plan. This is a violation of Title 18, United States Code, Section 669.

The defendant has pleaded not guilty to the offenses charged against him.

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 essential element of

each 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 a 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 verdict.

INSTRUCTION 11

DEFINITION OF "ON OR ABOUT"

The Indictment charges that the offenses were committed "on or about" certain dates.

Although it is necessary for the government to prove beyond a reasonable doubt that each of the offenses were committed on a date reasonably near the dates alleged in the Indictment, it is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

INSTRUCTION 12

COUNT ONE: ELEMENTS OF THE OFFENSE

The crime of failure to account for and pay over employment taxes, as charged in Count One of the indictment, has three essential elements, which are:

- 1) The defendant, ANDREW MARK ARMSTRONG, was required to account for and pay over to the Internal Revenue Service the federal income taxes withheld and the Federal Insurance Contributions Act taxes due and owing to the United States on behalf of ATI and its employees during the fourth quarter of 1999;
- 2) The defendant failed to account for and pay over to the Internal Revenue Service such taxes; and
- 3) The defendant willfully failed to account for and pay over such taxes on or before the time required by law.

For you to find the Defendant guilty of count one charged under the Indictment, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of count one charged under the Indictment.

INSTRUCTION 13

COUNT TWO: ELEMENTS OF THE OFFENSE

The crime of failure to account for and pay over employment tax, as charged in Count Two of the indictment, has three essential elements, which are:

- 1) The defendant, ANDREW MARK ARMSTRONG, was required to account for and pay over to the Internal Revenue Service the federal income taxes withheld and the Federal Insurance Contributions Act taxes due and owing to the United States on behalf of ATI and its employees during the first quarter of 2000;
- 2) The defendant failed to account for and pay over to the Internal Revenue Service such taxes; and
- 3) The defendant willfully failed to account for and pay over such taxes on or before the time required by law.

For you to find the Defendant guilty of count two charged under the Indictment, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of count two charged under the Indictment.

INSTRUCTION 14

COUNT THREE: ELEMENTS OF THE OFFENSE

The crime of failure to account for and pay over employment tax, as charged in Count Three of the indictment, has three essential elements, which are:

- 1) The defendant, ANDREW MARK ARMSTRONG, was required to account for and pay over to the Internal Revenue Service the federal income taxes withheld and the Federal Insurance Contributions Act taxes due and owing to the United States on behalf of ATI and its employees during the second quarter of 2000;
- 2) The defendant failed to account for and pay over to the Internal Revenue Service such taxes; and
- 3) The defendant willfully failed to account for and pay over such taxes on or before the time required by law.

For you to find the Defendant guilty of count three charged under the Indictment, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of count three charged under the Indictment.

INSTRUCTION 15

COUNT FOUR: ELEMENTS OF THE OFFENSE

The crime of failure to account for and pay over employment tax, as charged in Count Four of the indictment, has three essential elements, which are:

- 1) The defendant, ANDREW MARK ARMSTRONG, was required to account for and pay over to the Internal Revenue Service the federal income taxes withheld and the Federal Insurance Contributions Act taxes due and owing to the United States on behalf of ATI and its employees during the third quarter of 2000;
- 2) The defendant failed to account for and pay over to the Internal Revenue Service such taxes; and
- 3) The defendant willfully failed to account for and pay over such taxes on or before the time required by law.

For you to find the Defendant guilty of count four charged under the Indictment, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of count four charged under the Indictment.

INSTRUCTION 16

COUNT FIVE: ELEMENTS OF THE OFFENSE

The crime of failure to account for and pay over employment tax, as charged in Count Five of the indictment, has three essential elements, which are:

- 1) The defendant, ANDREW MARK ARMSTRONG, was required to account for and pay over to the Internal Revenue Service the federal income taxes withheld and the Federal Insurance Contributions Act taxes due and owing to the United States on behalf of ATI and its employees during the fourth quarter of 2000;
- 2) The defendant failed to account for and pay over to the Internal Revenue Service such taxes; and
- 3) The defendant willfully failed to account for and pay over such taxes on or before the time required by law.

For you to find the Defendant guilty of count five charged under the Indictment, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of count five charged under the Indictment.

INSTRUCTION 17

STATUTE (TITLE 26, UNITED STATES CODE, SECTION 7202)

Title 26, United States Code, Section 7202 provides, in pertinent part, that

Any person required under this title to collect, account for any pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall be guilty of a crime.

INSTRUCTION 18

A FAILURE TO COMPLY WITH ANY ONE OF THE THREE
DUTIES IS A VIOLATION OF THE STATUTE

The Defendant may be found guilty of violating Section 7202 if he had a duty to: (a) collect, (b) account for, *or* (c) pay over a tax, and failed to comply with any one of the above-mentioned duties. In other words, the government need not prove that the defendant was responsible for all three duties. It is enough to prove that the Defendant was responsible for one of the above-mentioned duties. Likewise, the government need only prove that the Defendant failed to comply with one of the three duties for which he was responsible.

For example, a responsible person who collects taxes from his employees and files Forms 941 with the Internal Revenue Service, but willfully fails to pay over the taxes to the United States, is in violation of Title 26, United States Code, Section 7202.

INSTRUCTION 19

COUNT SIX: ELEMENT OF THE OFFENSE

The crime of embezzlement from an Employee Benefit Plan, as charged in Count Six of the Indictment, has three essential elements, which are:

- 1) The defendant, ANDREW MARK ARMSTRONG, did embezzle, steal, unlawfully and willfully abstract or convert to his own use and the use of others the monies, funds, securities, premiums, credits, property, and other assets from a 401(k) plan;
- 2) The monies, funds, securities, premiums, credits, property, and other assets stolen or embezzled were from an employee pension benefit plan within the meaning of the statute; and
- 3) The defendant acted with the specific intent to deprive the plan of its funds.

For you to find the Defendant guilty of the crime charged in Count Six, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of Count Six.

INSTRUCTION 20

STATUTE DEFINING THE OFFENSE CHARGED: SECTION 664

Section 664 of Title 18 of the United States Code provides, in pertinent part, that:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or any fund connected therewith, shall be guilty of a crime.

INSTRUCTION 21

COUNT SEVEN: ELEMENTS OF THE OFFENSE

The crime of embezzlement in connection with a health care benefit program, as charged in Count Seven of the Indictment, has three essential elements, which are:

- 1) The defendant, ANDREW MARK ARMSTRONG, did embezzle, steal, or unlawfully and willfully abstract or convert to his own use and the use of others the monies, funds, securities, premiums, credits, property, and other assets in connection with a health care benefit program;
- 2) The monies, funds, securities, premiums, credits, property, and other assets stolen or embezzled were from a health care benefit program within the meaning of the statute; and
- 3) The defendant acted with the specific intent to deprive the plan of its funds.

For you to find the Defendant guilty of the crime charged in Count Seven, the government must prove these three essential elements beyond a reasonable doubt; otherwise you must find the Defendant not guilty of Count Seven.

INSTRUCTION 22

STATUTE DEFINING THE OFFENSE CHARGED: SECTION 669(a)

Section 669(a) of Title 18 of the United States Code provides, in pertinent part, that Whoever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program, shall be guilty of a crime.

INSTRUCTION 23

EMPLOYEE BENEFIT PLAN

Section 664 and section 669 provide that “[a]s used in this section, the term ‘any employee welfare benefit plan or employee pension benefit plan’ means any employee benefit plan subject to any provision of Title I of the Employment Retirement Income Security Act of 1974.” This act is also referred to as ERISA.

Section 24(b) and 669 of Title 18 provides that, as used in these sections, the term “health care benefit program” means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

Title 29, United States Code, Section 1002 (ERISA) defines “employee welfare benefit plan as any plan, fund or program established or maintained by an employer or by an employee organization which provides for its participants or their beneficiaries “medical, surgical, hospital care or benefit, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship, or other training programs, or day care centers, scholarship funds or prepaid legal services.” An “employee pension benefit plan” is defined as any plan, fund, program established or maintained by an employer or an employee organization which “provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . .”

If you find the 401(k) plan is an employee pension benefit plan as defined in this instruction, you may, but are not required to, consider the second element of the offense charged in Count Six as proven.

If you find the health care benefit program is an employee welfare benefit plan as defined in this instruction, you may, but are not required to, consider the second element of the offense charged in Count Seven as proven.

INSTRUCTION 24
TAXABILITY OF WAGES

The law imposes an income tax, a social security tax, and a hospital insurance (Medicare) tax on the wages of individual employees equal to a percentage of the wages earned by the employee. To assist the government in collecting these taxes, the law requires every employer to deduct these taxes from wages paid to employees and hold them in trust for the United States. Furthermore, the withheld amounts must be deposited with an authorized financial institution or Federal Reserve Bank, at certain intervals that depend on the amounts withheld.

These “trust fund taxes” are for the exclusive use of the government and are not to be held by the employee or the employer.

The law also imposes excise taxes on every employer for social security and hospital insurance (Medicare) equal to a certain percentage of the wages paid to the employee by the employer.

INSTRUCTION 25

REQUIREMENT TO REPORT WITHHOLDING OF
INCOME AND SOCIAL SECURITY TAXES

The law further requires that employers file a Form 941, Employer's Federal Quarterly Tax Return, each calendar quarter. The Form 941 reports the withholding of employee income, social security and Medicare taxes. The employer must file this form 941 on or before the last day of the first calendar month following the period for which it is made. Thus, for the quarter ending March 31, the Form 941 is due by April 30; for the quarter ending June 30, the Form 941 is due by July 31; for the quarter ending September 30, the Form 941 is due by October 31; and for the quarter ending December 31, the Form 941 is due by January 31.

INSTRUCTION 26

REQUIREMENT TO PAY OVER WITHHELD TAXES TO THE UNITED STATES

The law further requires that an employer pay over the withheld income and social security taxes, commonly known as “trust fund taxes,” to the United States before the Form 941 quarterly tax return is due. Once an employer has withheld an employee’s wages, the government deems the employee to have paid the withheld taxes.

INSTRUCTION 27

WAGES - DEFINED

For purposes of determining withholding taxes, the law defines wages as all compensation “for services performed by an employee for his employer, including the cash value of all [compensation, including employee benefits] paid by any [means] other than cash”

INSTRUCTION 28

EMPLOYER - DEFINED

An employer is the person for whom an individual performed a service, of whatever nature. If the person for whom the service was performed did not control the payment of wages, then the employer is the person who did have such control.

INSTRUCTION 29

EMPLOYEE - DEFINED

An employee is defined according to the common sense use of the term, and includes an officer of a corporation.

INSTRUCTION 30

PERSON REQUIRED TO COLLECT, ACCOUNT FOR, AND PAY OVER A TAX

A person is responsible for collecting, accounting for, and paying over trust fund taxes if he has “the authority required to exercise significant control over the employer’s financial affairs, regardless of whether the individual exercised such control in fact.”

Responsibility is a matter of status, duty, or authority, not knowledge. A responsible person need only have significant control over the company finances, not exclusive control. A person has significant control if he has the final or significant word over which bills or creditors get paid.

INSTRUCTION 31

MORE THAN ONE RESPONSIBLE PERSON

Every corporation has one or more persons who are "responsible persons." Responsible persons may be individuals, corporations, or individuals and corporations. A person may be a responsible person even if he is not the only responsible person. More than one individual may be responsible for ensuring the payment of taxes, and the fact that a person may not have been the only responsible person does not excuse him. Thus, if a person's control is exercised jointly with others, the person is no less responsible.

INSTRUCTION 32

SIGNATURE PRESUMED AUTHENTIC

The fact that an individual's name is signed to a tax return shall be sufficient evidence for all purposes that the return was actually signed by him. In other words, you may infer and find that a tax return was, in fact, signed by the person whose name appears to be signed to it. You are not required, however, to accept any such inference or to make any such finding.

INSTRUCTION 33

WILLFULLNESS - DEFINED

The final element that the United States must prove beyond a reasonable doubt in order to establish the offense of failing to collect, truthfully account for, and pay over the employment taxes is that the defendant's failure to collect, truthfully account for, and pay over the employment taxes was "willful."

An act is done "willfully" if done voluntarily and intentionally with the purpose of violating a known legal duty. Willfulness, in the context of a failure to file a federal tax return simply means a voluntary, intentional violation of a known legal duty to make and file a return.

INSTRUCTION 34

WILLFULNESS: RETROACTIVITY AND PROSPECTIVITY

You must determine whether the Defendant's conduct was willful in each quarter charged in the Indictment. If you find evidence that the Defendant willfully failed to collect, truthfully account for, or pay over the employment taxes in a particular quarter, you may consider this evidence as evidence of his willfulness with respect to earlier or later charged quarters.

INSTRUCTION 35

INABILITY TO PAY OVER TAXES

In order to find that a failure to pay over taxes owed was willful, the Defendant, at the time payment of the taxes was due, must possess sufficient funds to enable him to meet his obligation or the lack of sufficient funds on such date must have been created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

INSTRUCTION 36

PROOF OF INTENT OR KNOWLEDGE

Intent or knowledge may be proved like anything else. You may consider statements made and acts done by the defendant, and all facts and circumstances in evidence which may aid in the determination of the defendant's knowledge or 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 37

KNOWINGLY

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

INSTRUCTION 38

EMBEZZLE, STEAL, UNLAWFULLY AND WILLFULLY ABSTRACT AND CONVERT

“Embezzlement” means the voluntary and intentional taking, or conversion to one’s own use, of the property of another, which property came into the defendant’s possession lawfully, by virtue of some office, employment, or position of trust which the defendant held.

“Stealing” is taking property, money, or assets from a rightful owner without permission and depriving the owner of rights and benefits of ownership of the property. Stealing is distinguished from embezzlement in that embezzlement requires that the money or property come into the possession of the embezzler lawfully because of his position of trust. Stealing does not presuppose that trust relationship. Therefore, one who is not in a position of trust may be guilty of violating sections 664 and 669 by converting to his own use or the use of another money or property through the act of stealing.

“Unlawful abstraction” means the withdrawal of monies from the fund without the valid authorization of those having control and custody over the fund.

“Conversion” as used in section 664 and 669 means using monies from or property of the employee pension plan or employee benefit plan without the authorization or right and doing so unlawfully, that is, wrongfully depriving another of the possession of the property.

The phrase “to his own use” means that one has custody and control over money or property and can direct its disposition. It does not mean, nor is the government required to prove, that the defendant pocketed the money. In other words, the defendant need not have benefitted

directly from his act. "To his own use" simply means not to the use for which it was entrusted.

The government need not prove the precise amount that was embezzled, stolen, converted, or abstracted; it need only prove that a substantial amount was embezzled, stolen, converted, or abstracted.

If you find beyond a reasonable doubt that the defendant held a position of trust to the fund and embezzled and put to his own use and the use of others the monies, funds, securities, premiums, credits, property and other assets from an employee pension plan or an employee benefit plan, you may, but are not required to, find the first element of the offenses charged in Count Six and Count Seven as proven.

You may also find the first element of Count Six and Count Seven is satisfied if you find beyond a reasonable doubt that the defendant, by stealing, abstracting, and converting to his own use and the use of others the monies, funds, securities, premiums, credits, property, and other assets from an employee pension plan or an employee benefit plan, took ,without permission, money, property, or assets from an employee pension plan or an employee benefit plan, and that in so doing, the participants in the plan were deprived of the benefits which rightfully belonged to them.

INSTRUCTION 39

GOOD FAITH DEFENSE

One of the issues in this case is whether defendant acted in good faith. Good faith is a complete defense to the charge of failure to account for and pay over employment taxes, embezzlement from an employee benefit plan, and embezzlement in connection with a health care benefit program if it is inconsistent with the specific intent to defraud or the willful failure to account for and pay over employment taxes, which are each essential elements of the crimes charged.

If a person in good faith believes that he is not required to file an income tax return, then that person cannot be guilty of willfully failing to file a return. In this connection, it is for you to decide whether the defendant acted in good faith -- that is, whether he sincerely misunderstood the requirements of the law -- or whether the defendant knew that he was required to file a return and did not do so. Mere disagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it.

One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

Evidence that defendant acted in good faith may be considered by you, together with all the other evidence, in determining whether or not he acted with the specific intent to defraud, or whether he willfully failed to account for and pay over employment taxes.

INSTRUCTION 40
REASONABLE DOUBT

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 41

NOTE-TAKING

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 delivered to the court officer for destruction.

INSTRUCTION 42

ELECTION OF A FOREPERSON/DUTY TO DELIBERATE

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 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, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts 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.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. The forms read: (read forms). You will take these forms to the jury room, and when each of you has agreed on the verdicts, your foreperson will fill in all of the forms, sign and date them, and advise the marshal or bailiff that you are ready to return to the courtroom.

DATE



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANDREW MARK ARMSTRONG
Defendant.

Criminal No. 4:03-cr-246

VERDICT FORM
COUNT ONE

With regard to the crime of failure to account for and pay over employment tax, as charged in Count One of the Indictment, we, the jury, find the defendant ANDREW MARK ARMSTRONG:

_____ GUILTY

_____ NOT GUILTY

DATE

FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW MARK ARMSTRONG

Defendant.

Criminal No. 4:03-cr-246

VERDICT FORM
COUNT TWO

With regard to the crime of failure to account for and pay over employment tax, as charged in Count Two of the Indictment, we, the jury, find the defendant ANDREW MARK ARMSTRONG:

_____ GUILTY

_____ NOT GUILTY

DATE _____

FOREPERSON _____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW MARK ARMSTRONG

Defendant.

Criminal No. 4:03-cr-246

VERDICT FORM

COUNT THREE

With regard to the crime of failure to account for and pay over employment tax, as charged in Count Three of the Indictment, we, the jury, find the defendant ANDREW MARK ARMSTRONG:

_____ GUILTY

_____ NOT GUILTY

DATE

FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW MARK ARMSTRONG

Defendant.

Criminal No. 4:03-cr-246

VERDICT FORM

COUNT FOUR

With regard to the crime of failure to account for and pay over employment tax, as charged in Count Four of the Indictment, we, the jury, find the defendant ANDREW MARK ARMSTRONG:

_____ GUILTY

_____ NOT GUILTY

DATE

FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW MARK ARMSTRONG

Defendant.

Criminal No. 4:03-cr-246

VERDICT FORM

COUNT FIVE

With regard to the crime of failure to account for and pay over employment tax, as charged in Count Five of the Indictment, we, the jury, find the defendant ANDREW MARK ARMSTRONG:

_____ GUILTY

_____ NOT GUILTY

DATE

FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW MARK ARMSTRONG

Defendant.

Criminal No. 4:03-cr-246

VERDICT FORM

COUNT SIX

With regard to the crime of embezzlement from an Employee Benefit Plan, as charged in Count Six of the Indictment, we, the jury, find the defendant ANDREW MARK ARMSTRONG:

_____ GUILTY

_____ NOT GUILTY

DATE

FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW MARK ARMSTRONG

Defendant.

Criminal No. 4:03-cr-246

VERDICT FORM

COUNT SEVEN

With regard to the crime of embezzlement in connection with a Health Care Benefit Program, as charged in Count Seven of the Indictment, we, the jury, find the defendant ANDREW MARK ARMSTRONG:

_____ GUILTY

_____ NOT GUILTY

DATE

FOREPERSON