

27178
Vancouver Registry

In the Supreme Court of British Columbia
(BEFORE THE HONOURABLE MADAM JUSTICE HOLMES AND JURY)

Vancouver, B.C.
June 27, 2017

REGINA

v.

PATRICK HENRY FOX

PROCEEDINGS AT TRIAL
(Excerpt - From 10:31:57 A.M. to End of Day)
(Including Charge to the Jury)

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Defence Counsel:

A.J. Lagemaat

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RULINGS

Nil

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Vancouver, B.C.

June 27, 2017

(EXCERPT COMMENCES AT 10:31:57 A.M.)

(JURY IN)

THE SHERIFF: The jury, My Lady.

CHARGE TO THE JURY:

THE COURT: Good morning, members of the jury. To assist you in your deliberations, I have prepared a written copy of my instructions or charge and, Mr. Sheriff, if you could begin the process of handing that out, please.

I will be reading this to you so that you can follow along if you wish, it is up to you. But if you do follow along, I ask that you not read ahead.

As I am reading these instructions, I may discover some minor errors that I didn't catch earlier. The charge or the instructions that you must follow will be what I say to you in this courtroom and not what is written in the written version that you now have, if there are any differences between the two.

You will see at the front there is a table of contents. That is simply for your reference later if there is anything that you wish to go back to while you are in your deliberations.

So I will begin at what is page 3 in the written version.

You will soon be leaving this courtroom and you will start discussing the case in the jury room. It is time for me to tell you about the law you must follow in making your decision.

When we started this case, and at various times during the trial, I told you about several rules of law that apply in general, or to some of the evidence as it was received. Those instructions still apply.

I am now going to give you further instructions. These instructions will cover a number of topics. Consider them as a whole. Do not single out some as more important and pay less or no attention to others. I am giving you the

Charge to the Jury

1 instructions to help you make a decision, not to
2 tell you what decision to make.

3 First, I will explain your duties as jurors,
4 and tell you about the general principles and
5 rules of law that apply in all jury cases.

6 Second, I will advise you of the specific
7 rules of law that govern this case. I will
8 explain how the rules apply to the evidence. Even
9 if I do not refer to all of the evidence governed
10 by a specific rule, you must apply each rule to
11 all the evidence to which it relates.

12 Next, I will explain to you what the Crown
13 must prove beyond a reasonable doubt in order to
14 establish the guilt of Mr. Fox. As I do that, I
15 will discuss with you the issues you need to
16 decide, and I will review for you the evidence
17 that relates to those issues. I will also tell
18 you what verdicts you may return on each of the
19 charges.

20 After that, I will summarize the positions
21 that counsel have put forward in their closing
22 addresses, and I should say Mr. Fox as well, and I
23 will end by explaining how you should approach
24 your discussion of the case in the jury room.

25 I expect that I will suggest a break probably
26 not quite halfway through these instructions. It
27 probably will fall a tiny bit later than our usual
28 break because we had a later start.

29 In this trial, I am the judge of the law.
30 You are the judges of the facts.

31 As judge of the law, it is my duty to preside
32 over the trial. I am the sole judge of the law,
33 and it is your duty to accept the law as I explain
34 it to you. If I am wrong about the law, my error
35 can be corrected by the Court of Appeal, because
36 my instructions are recorded and they will be
37 available if there is an appeal. However, your
38 deliberations are secret. If you wrongly apply
39 the law, there will be no record of your
40 discussions for the Court of Appeal to review. It
41 is therefore important that you accept the law
42 from me without question; you must not use your
43 own ideas about what the law is or should be.

44 It is your duty to decide whether the Crown
45 has proven Mr. Fox's guilt beyond a reasonable
46 doubt. It is not my role to express any view on
47 the guilt or innocence of Mr. Fox. If I do so

Charge to the Jury

1 inadvertently, you must ignore that view.

2 You have now heard all the evidence that will
3 be called in this case. There will be no more
4 evidence. You must make your decision based on
5 all the evidence presented to you in the courtroom
6 and only on that evidence. I might comment or
7 express an opinion about the evidence. If I do
8 that, you do not have to agree with me.

9 You must consider the evidence, and make your
10 decision without sympathy, prejudice, or fear.
11 You must not be influenced by public opinion.
12 Your duty as juror is to assess the evidence
13 impartially.

14 The only information that you may consider is
15 the evidence that has been put before you in the
16 courtroom. You must disregard completely any
17 information from any other source, whether radio,
18 television, newspaper, internet, Twitter,
19 Facebook, social media of any kind, that you may
20 have heard or seen or read in relation to this
21 case, or concerning any of the people or places
22 involved or mentioned in the case. Any
23 information about the case from outside the
24 courtroom is not evidence.

25 Possible penalties for the offence have no
26 place in your discussions or in your decision.

27 As you approach your task, it is your duty to
28 consult with one another and try to reach a just
29 verdict according to the law. Your foreperson
30 will preside and assist you in the orderly
31 discussion of the issues. You should each have
32 the opportunity to express your own points of view
33 without being unnecessarily repetitive. When you
34 are discussing the issues, you should listen
35 attentively to what your fellow jurors have to
36 say. Approach your duties in a rational way and
37 put your own points of view forward in a calm and
38 reasonable manner. Avoid taking firm positions
39 too early in your deliberations. Consider the
40 views of your fellow jurors with an open mind
41 before reaching your own decision.

42 Any verdict you reach must be unanimous.
43 Unless you are unanimous in finding Mr. Fox not
44 guilty, you cannot acquit him. Nor can you return
45 a verdict of guilty unless you agree unanimously
46 that he is guilty.

47 Each of you must make your own decision about

Charge to the Jury

1 whether Mr. Fox is guilty or not guilty. You
2 should reach your decision only after
3 consideration of the evidence with your fellow
4 jurors. Your duty is to try to reach a unanimous
5 verdict. However, you are entitled to disagree if
6 you cannot reach a unanimous verdict after a
7 sincere consideration of the facts and the law,
8 and an honest discussion with your fellow jurors.

9 In my instructions to you, I will briefly
10 review parts of the evidence and, in some areas,
11 will relate them to the issues you have to decide.
12 I might mention evidence you think is
13 insignificant or overlook evidence you think is
14 important. I might make a mistake about what a
15 witness said. You should always remember that it
16 is only your memory and understanding of the
17 evidence that counts in this case, not mine, not
18 that of counsel or Mr. Fox. I remind you that you
19 must consider all of the evidence, not just the
20 parts of it that I mention.

21 I may also comment on or express an opinion
22 about issues of fact. If I do that, however, you
23 do not have to reach the same conclusion. You,
24 not I, decide what happened in this case.

25 I will turn now to the general principles of
26 law that apply in all criminal jury cases, in all
27 criminal cases.

28 The first and most important principle of law
29 applicable to every criminal case is the
30 presumption of innocence. Mr. Fox enters the
31 proceedings presumed to be innocent, and the
32 presumption of innocence remains throughout the
33 case unless the Crown, on the evidence put before
34 you, satisfies you beyond a reasonable doubt that
35 he is guilty.

36 Two rules flow from the presumption of
37 innocence. One is that the Crown bears the burden
38 of proving guilt. The other is that guilt must be
39 proven beyond a reasonable doubt. These rules are
40 linked with the presumption of innocence to ensure
41 that no innocent person is convicted.

42 The burden of proof rests with the Crown and
43 never shifts. There is no burden on Mr. Fox to
44 prove that he is innocent. He does not have to
45 prove anything.

46 So what does the expression "beyond a
47 reasonable doubt" mean? A reasonable doubt is not

Charge to the Jury

1 an imaginary or frivolous doubt. It is not based
2 on sympathy for or prejudice against anyone
3 involved in the proceedings. Rather, it is based
4 on reason and common sense. It is a doubt that
5 arises logically from the evidence or from an
6 absence of evidence.

7 It is virtually impossible to prove anything
8 to an absolute certainty, and the Crown is not
9 required to do so. Such a standard would be
10 impossibly high. However, the standard of proof
11 beyond a reasonable doubt falls much closer to
12 absolute certainty than to probable guilt. You
13 must not find Mr. Fox guilty unless you are sure
14 he is guilty. Even if you believe that Mr. Fox is
15 probably guilty or likely guilty, that is not
16 sufficient. In those circumstances, you must give
17 the benefit of the doubt to Mr. Fox and find him
18 not guilty, because the Crown has failed to
19 satisfy you of his guilt beyond a reasonable
20 doubt.

21 Later, I will explain the essential elements
22 of the offences that the Crown must prove beyond a
23 reasonable doubt to establish Mr. Fox's guilt.
24 There are five elements of the charge in Count 1,
25 and four elements of the charge in Count 2. For
26 the moment, the important point for you to
27 understand is that the requirement of proof beyond
28 a reasonable doubt applies to each of those
29 essential elements. It does not apply to
30 individual items of evidence.

31 In carrying out your task to decide whether
32 the Crown has proven Mr. Fox's guilt beyond a
33 reasonable doubt, you must look at the evidence as
34 a whole.

35 If you have a reasonable doubt about Mr.
36 Fox's guilt arising from the evidence, the absence
37 of evidence, or the credibility or the reliability
38 of one or more of the witnesses, then you must
39 find him not guilty.

40 So in short, first, the presumption of
41 innocence applies at the beginning and continues
42 throughout the trial, unless you are satisfied,
43 after considering the whole of the evidence, that
44 the Crown has displaced the presumption of
45 innocence by proof of guilt beyond a reasonable
46 doubt.

47 Second, if, based upon the evidence, you are

Charge to the Jury

1 sure that Mr. Fox is guilty of the offence in
2 issue, that demonstrates that you are satisfied of
3 his guilt beyond reasonable doubt, and you must
4 find him guilty of the offence.

5 Third, if you have a reasonable doubt about
6 whether Mr. Fox is guilty of the offence, you must
7 give him the benefit of that doubt and find him
8 not guilty.

9 I will speak now about assessing the
10 evidence.

11 To make your decision, you should consider
12 carefully, and with an open mind, all the evidence
13 presented during the trial. It will be up to you
14 to decide how much or little of the testimony of
15 any witness you will believe or rely on. You may
16 believe some, none, or all of the evidence given
17 by a witness.

18 When you go to the jury room to consider the
19 case, use your collective common sense to decide
20 whether the witnesses know what they are talking
21 about and whether they are telling the truth.
22 There is no magic formula for deciding how much or
23 how little to believe of a witness's testimony or
24 how much to rely on it in deciding this case. But
25 I will give you a few questions you might keep in
26 mind during your discussions.

27 Did the witness seem honest? Is there any
28 reason why the witness would not be telling the
29 truth?

30 Does the witness have any reason to give
31 evidence that is more favourable to one side than
32 to the other?

33 Was the witness in a position to make
34 accurate and complete observations about the
35 event? Did he or she have a good opportunity to
36 do so? What were the circumstances in which the
37 observation was made? Was the event itself
38 unusual or routine?

39 Did the witness seem to have a good memory?
40 Does the witness have any reason to remember the
41 things about which he or she testified? Did any
42 inability or difficulty that the witness had in
43 remembering the events seem genuine, or did it
44 seem made up as an excuse to avoid answering
45 questions?

46 Did the witness's testimony seem reasonable
47 and consistent? Did the witness say or do

Charge to the Jury

1 something different on an earlier occasion?

2 Do any inconsistencies in the witness's
3 evidence make the main points of the testimony
4 more or less believable and reliable? Is the
5 inconsistency about something important or a minor
6 detail? Does it seem like an honest mistake? Is
7 it a deliberate lie? Is the inconsistency because
8 the witness said something different, or because
9 he or she failed to mention something? Is there
10 any explanation for it? Does the explanation make
11 sense?

12 What was the witness's manner when he or she
13 testified? Do not jump to conclusions, however,
14 based entirely on how a witness has testified.
15 Looks can be deceiving. Giving evidence in a
16 trial is not a common experience for many
17 witnesses. People react and appear differently.
18 Witnesses come from different backgrounds. They
19 have different abilities, values, life
20 experiences. There are simply too many variables
21 to make the manner in which a witness testifies
22 the only or most important factor in your
23 decision.

24 These are only some of the factors you might
25 keep in mind when you go to your jury room to make
26 the decision. These factors might help you decide
27 how much or little of a witness's evidence you
28 will believe or rely on. You may consider other
29 factors as well.

30 In making your decision, do not consider only
31 the testimony of the witnesses. Take into
32 account, as well, the exhibits that have been
33 filed, and decide how much or little you will rely
34 on them to help you decide this case. Take into
35 account also the admissions, which set out facts
36 that you must take as proven, and I will remind
37 you about the admissions a bit later.

38 I am going to speak to you for just a moment
39 about reasonable doubt and credibility.

40 Reasonable doubt applies to the issue of
41 credibility. On any given point, you may believe
42 a witness, disbelieve a witness, or not be able to
43 decide. You need not fully believe or disbelieve
44 one witness or a group of witnesses. If you have
45 a reasonable doubt about Mr. Fox's guilt arising
46 from the credibility of the witnesses, then you
47 must find him not guilty.

Charge to the Jury

1 I will speak now about types of evidence.

2 You must consider only the evidence presented
3 in the courtroom. Evidence is the testimony of
4 witnesses and the things entered as exhibits and
5 the admissions.

6 The evidence of witnesses includes what each
7 witness said in response to questions asked. The
8 questions are not evidence, unless the witness
9 agreed that what was asked is correct.

10 The indictment that you heard read out when
11 we started the case is not evidence. What the
12 lawyers or Mr. Fox or I say when we speak to you
13 during the trial is not evidence.

14 As I explained at the beginning of the trial,
15 you may rely on direct evidence and on
16 circumstantial evidence in reaching your verdict -
17 - and I will remind you of what those terms mean.

18 Usually, witnesses testify about what they
19 personally saw or heard. For example, a witness
20 might say that he or she saw it raining outside.
21 That is direct evidence.

22 Sometimes, however, witnesses say things from
23 which you are asked to draw certain inferences --
24 and I will use the same example I used before. A
25 witness might say that he or she had seen someone
26 come into the courthouse lobby wearing a raincoat
27 and carrying an umbrella, both of which were
28 dripping wet. If you believed that witness, you
29 might infer that it was raining outside, even
30 though the evidence was indirect or circumstantial
31 evidence.

32 Exhibits may provide direct or circumstantial
33 evidence.

34 In reaching a verdict, you can take both
35 kinds of evidence into account. Your job is to
36 decide what conclusions you will reach, based upon
37 the evidence as a whole, both direct and
38 circumstantial.

39 However, you cannot reach a verdict of guilty
40 based on circumstantial evidence alone, unless you
41 are satisfied beyond a reasonable doubt that Mr.
42 Fox's guilt is the only rational conclusion to be
43 drawn from the whole of the evidence.

44 When you are considering circumstantial
45 evidence, keep in mind that circumstantial
46 evidence can lead you to the wrong conclusion. So
47 in the umbrella example, suppose you also saw film

Charge to the Jury

1 crews just outside the courthouse. An equally
2 reasonable inference in those circumstances might
3 be that the person you saw with a wet umbrella and
4 raincoat was an actor who had just been filmed in
5 a movie shoot, where artificial means were used to
6 make the weather seem rainy.

7 As I said, you may rely on circumstantial
8 evidence, as well as direct evidence, but you must
9 not base a verdict of guilt on circumstantial
10 evidence alone, unless you are satisfied beyond a
11 reasonable doubt that guilt is the only reasonable
12 inference from the whole of the evidence.

13 Also, your verdict must be based on the
14 evidence, whether direct, circumstantial, or both.
15 It must not be based on speculation.

16 I will turn now to some of the more specific
17 rules of evidence that apply in this case.

18 During the testimony of Constable Jason
19 Potts, an audio recording was played of an
20 interview he conducted with Mr. Fox on June 16,
21 2016. You were given a transcript of the
22 recording.

23 As I said at the time, the transcript was
24 just an aid to help you follow the recording as it
25 was played. Although we have given the
26 exhibit -- the transcript -- an exhibit number,
27 and you will have the transcript with you in the
28 jury room, the transcript is not evidence. Only
29 the audio recording itself is evidence.

30 The audio recording will be available to you
31 in the jury room, and you can listen to it if you
32 need to. It is up to you to decide whether and
33 how often you want to listen to it or to any part
34 of it again. You may listen to it as many times
35 as you wish to help you determine who is speaking
36 and what he is saying.

37 You may take the transcript with you to the
38 jury room to help you determine what is actually
39 on the audio recording. But remember that if you
40 find any differences between the audio recording
41 and the transcript, you must rely on what you hear
42 on the audio recording, rather than on what is in
43 the transcript.

44 I will now explain what use you may make of
45 remarks or statements made by Mr. Fox in the
46 interview with Constable Fox -- with Constable
47 Potts.

Charge to the Jury

1 If you find that Mr. Fox made a particular
2 remark or statement, you can use that statement as
3 evidence. The hearsay rule that I told you about
4 during the trial, and I will remind you about
5 shortly, does not apply to out-of-court statements
6 made by an accused person.

7 But unless you decide that Mr. Fox made a
8 particular remark or statement and meant it in the
9 way the Crown suggests, you must not use the
10 remark or statement against Mr. Fox in deciding
11 this case.

12 Some or all of the interview with Constable
13 Potts may be evidence that helps Mr. Fox in his
14 defence. You must consider those statements or
15 remarks that may help Mr. Fox, along with all the
16 other evidence. Take into account statements or
17 remarks that might help Mr. Fox, even if you are
18 not sure whether he said them.

19 In listening to the audio recording, be
20 careful to distinguish between what Mr. Fox said
21 and what Constable Potts said. What Constable
22 Potts said may help you figure out what Mr. Fox
23 said and what his words mean. In other words,
24 what Constable Potts said may provide a context
25 for understanding what Mr. Fox says. But only Mr.
26 Fox's words, as understood in this context, are
27 evidence of what Mr. Fox did or intended to do.
28 Mr. Fox can be held responsible only for what he
29 actually said, not for what Constable Potts said.

30 In deciding what Mr. Fox actually said, and
31 what he meant when he said it, use your common
32 sense. Take into account his condition and all
33 the circumstances at the time.

34 I will talk now about hearsay statements
35 ostensibly made by people who are not witnesses.

36 You will remember that during the trial I
37 told you that certain evidence Ms. Capuano gave
38 was hearsay evidence. It was evidence about a job
39 offer from Pima Community College being withdrawn.
40 I told you during the trial that Ms. Capuano's
41 evidence about why the offer was withdrawn was
42 hearsay evidence, because nobody from Pima was
43 called to testify and be cross-examined about the
44 reason.

45 As I told you during the trial, you must not
46 use Ms. Capuano's hearsay evidence about why the
47 offer was withdrawn as evidence of why, in fact,

Charge to the Jury

1 the offer she described was withdrawn. You can
2 use her hearsay evidence only as evidence of what
3 she believed the reason to be.

4 The same instruction applies to hearsay
5 evidence Ms. Capuano gave about losing her job at
6 Apollo. Ms. Capuano testified that it was because
7 the website made her a security risk. However,
8 that was hearsay evidence because nobody from
9 Apollo testified in the trial to say that this was
10 the reason. You can use Ms. Capuano's evidence on
11 that point only as evidence of what she believed
12 the reason to be, and not as evidence of what the
13 actual reason was.

14 There was also hearsay evidence given by
15 Constable Jean-Philippe Dupont, who testified that
16 he monitored an interview between RCMP Constable
17 Huggins and Mr. Fox on July 20, 2015. Constable
18 Dupont testified that he heard Constable Huggins
19 tell Mr. Fox certain things about how Ms. Capuano
20 was feeling as a result of Mr. Fox's actions
21 connected with his emails and the website. As I
22 told you at the time, this evidence was tendered
23 and you can use it only as evidence that Mr. Fox
24 was told these things on July 20, 2015. You must
25 not use Constable Dupont's evidence as evidence
26 that Ms. Capuano actually felt the way Constable
27 Huggins described.

28 I will speak now about previous inconsistent
29 statements of a witness and how they relate to
30 credibility.

31 If you find that a witness said one thing in
32 the witness box and something different about the
33 same subject on an earlier occasion, this may be a
34 factor in assessing the witness's credibility.

35 For example, in her direct evidence, or
36 evidence in chief, in the trial, Ms. Capuano
37 testified that after the separation from Mr. Fox,
38 who was then Mr. Riess, in 2001, custody hearings
39 led to a joint custody order under which {GR}
40 spent alternating time with Ms. Capuano in Florida
41 and Mr. Fox in California. She testified that
42 after a while, she did not have the funds to fly
43 {GR} back and forth, and Mr. Fox ended up with
44 custody by default. She testified that Mr. Fox
45 stopped communicating with her, and she was unable
46 to locate him and {GR}, despite various efforts
47 and contact with lawyers, police, missing persons

Charge to the Jury

1 authorities, and child protection services. She
2 testified that she had no contact with {GR}
3 between 2001 and 2011, except that she spoke with
4 him on the telephone twice, when Mr. Fox arranged
5 that telephone contact through Ms. Capuano's
6 mother.

7 In cross-examination, portions of a letter
8 were read to Ms. Capuano that she agreed she wrote
9 to Mr. Fox in 2011 after he wrote to re-initiate
10 contact. It was suggested to her in cross-
11 examination that the letter tells a different
12 story about the 10-year separation. For example,
13 in the letter Ms. Capuano said that it tore her
14 apart to be away from {GR}, and I am quoting,
15 "so I let you have him." She also said, "I'm
16 completely prepared for him to have a lot of
17 questions and to not think the world of me," and,
18 "he is completely justified in whatever feelings
19 or opinions he has toward me." She said, "I could
20 search him out, that is true," and, "I will hope
21 for a phone call one day, but I'm not going to
22 initiate it"

23 Asked about the apparent inconsistencies
24 between the letter and her testimony, Ms. Capuano
25 said that, in the letter, she was referring to a
26 stage when there was a joint custody arrangement,
27 and then to another stage, when she lacked the
28 funds for flights for visits with {GR}. She
29 also testified that there is a difference between
30 locating {GR} and making contact with him,
31 which requires more delicate handling.

32 In another example, in Ms. Capuano's
33 examination in chief, she testified that the
34 emails and the website affected her profoundly in
35 various ways, and she cried at times as she gave
36 her evidence. In cross-examination, she was asked
37 about an interview with RCMP Corporal Wilcott, and
38 she agreed that a number of times she laughed
39 during that interview when she spoke about the
40 emails, and that she described the emails as
41 ridiculous. Ms. Capuano agreed that she also
42 laughed in the interview when she spoke about the
43 custody proceedings in court in which she was
44 able to represent herself and win, and that she
45 laughed when she spoke about her co-workers
46 telling her that her LinkedIn profile said that
47 she was a stripper.

Charge to the Jury

1 You heard some short excerpts from the
2 recording of the interview. You also heard Ms.
3 Capuano's explanations in her cross-examination
4 about why she laughed in the earlier interview.

5 It is for you to determine what effect any
6 differences will have on your overall assessment
7 of the witness's credibility. They may have a
8 huge effect or no effect, or somewhere in between.
9 Not every difference is important. Consider the
10 extent and nature of any difference. Was it on a
11 central point or something peripheral? Consider
12 any explanation the witness gave. Was the
13 explanation satisfactory?

14 Generally, the earlier statement may be used
15 only in assessing the witness's credibility.
16 However, there is an exception when the witness,
17 while testifying at the trial, accepts all or part
18 of the earlier statement as true. In that
19 situation, the earlier statement may also be
20 considered as evidence of what happened, but only
21 to the extent the witness accepted the statement
22 as true. It is for you to decide what weight, if
23 any, to give to the part of the earlier statement
24 that the witness accepts as true.

25 I will talk now about the admissions.

26 The Crown and the defence have agreed to
27 certain admissions and they are these:

28 First, the -- that the material in Exhibit 1,
29 which is the Crown book of materials, the blue
30 book, is an accurate representation of some of the
31 material found on the Desiree Capuano website as
32 of May 26, 2016. You may remember that that
33 admission was made on the first day of the trial.
34 It was not reduced to writing and I am reminding
35 you of it now.

36 Second, that from July 21, 2015, until
37 October 27, 2015, Patrick Fox was bound by an
38 undertaking forbidding him from having direct or
39 indirect contact with Desiree Capuano, except for
40 communications regarding travel plans for {GR}
41 Riess -- and that also was not reduced to writing.

42 And third -- and these admissions were
43 reduced to writing, they are in Exhibit 12 -- and
44 they are admissions concerning firearms in a
45 document called "Admissions of Fact". And they
46 say, essentially, and I am simply summarizing,
47 that the four firearms relating to the charge in

Charge to the Jury

1 Count 2 are -- fall within the definition of
2 "restricted firearms" in the *Criminal Code*.
3 You must accept all of those facts as proven.
4 I will say something now about the fact that
5 Mr. Fox represented himself during large parts of
6 the trial, conducting his own defence, except that
7 Mr. Lagemaat conducted the defence cross-
8 examination of Ms. Capuano and also made the
9 defence closing submissions to you concerning
10 Count 1.
11 Do not try to guess why Mr. Fox did not have
12 a lawyer for the other portions of the trial.
13 The fact that Mr. Fox was not represented by
14 a lawyer for those portions has nothing to do with
15 your decision in this case. It is not evidence
16 for you to consider in reaching your verdict.
17 Take nothing from it, nothing at all, one way or
18 another.
19 I will speak now about the fact that Ms.
20 Capuano testified behind a screen and with a
21 support person.
22 As I told you at the time, procedures of this
23 type are used simply to help a witness give
24 evidence by providing a comfortable situation for
25 them in the courtroom.
26 The fact that we used the procedures has
27 nothing to do with the guilt or innocence of Mr.
28 Fox. The procedures are not evidence of anything.
29 The fact that they were used must not affect your
30 assessment of the evidence.
31 Now, next, I will be moving on to tell you
32 about the offences that you are to consider, and
33 the elements of those offences that the Crown must
34 prove beyond a reasonable doubt.
35 This is a logical time to break to have the
36 morning recess. If we find that the remainder of
37 the instructions is more than you want to take in
38 without a further break, we can consider having a
39 short break a little later on. But I propose that
40 we take the ordinary morning break now and then
41 resume after the break.
42 I am going to ask you to leave the written
43 copies of these instructions in the courtroom.
44 Nobody will have access to them, and they will be
45 there untouched, unviewed, when you come back
46 after the break. Thank you for your attention
47 thus far.

Charge to the Jury

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(JURY OUT)

THE COURT: Madam Registrar, could I see the original indictment, please? I want to make sure that both amendments were actually made on the original. Thank you. Yes, they have been made. I should initial that one.

Anything thus far, counsel? Mr. Fox?

We will take the morning break, thank you.

THE CLERK: Order in court. This court stands adjourned for the morning recess.

(PROCEEDINGS ADJOURNED FOR MORNING RECESS)

(PROCEEDINGS RECONVENED)

THE SHERIFF: The jury, My Lady.

(JURY IN)

CHARGE TO THE JURY, CONTINUING:

THE COURT: Members of the jury, continuing on, I am at page 18 now, and beginning to address Count 1.

In that count, Mr. Fox is charged with criminal harassment. The charge was amended in a minor way after you were excused, I believe it was last Monday, to delete a reference to Surrey, British Columbia, which was included in error. So the charge as amended reads as follows:

Patrick Henry FOX stands charged that . . . between January 11, 2015 and May 27, 2016, inclusive, at or near Burnaby, in the Province of British Columbia, did without lawful authority and knowing that another person was harassed or being reckless as to whether another person was harassed, engage in conduct that caused that other person, Desiree Capuano, to reasonably fear for her safety or the safety of anyone known to her . . .

You must find Mr. Fox guilty -- back up and I am going to correct that. You must not find Mr. Fox guilty of criminal harassment unless the Crown has proven beyond a reasonable doubt that Mr. Fox

Charge to the Jury

1 is the person who committed the offence during the
2 time period and in the place described in the
3 indictment. Specifically, the Crown must prove
4 each of the following essential elements beyond a
5 reasonable doubt:

6 First, that Mr. Fox (a) communicated
7 repeatedly, whether directly or indirectly, with
8 Ms. Capuano or anyone known to her, or (b) engaged
9 in threatening conduct directed at her or her
10 family.

11 Second, that one or both of those forms of
12 conduct harassed Ms. Capuano.

13 Third, that Mr. Fox was aware that the
14 conduct harassed Ms. Capuano.

15 Fourth, that the conduct caused Ms. Capuano
16 to fear for her own safety or the safety of
17 members of her family.

18 And fifth, that Ms. Capuano's fear was
19 reasonable in the circumstances.

20 Unless you are satisfied beyond a reasonable
21 doubt that the Crown has proven all these
22 essential elements, you must find Mr. Fox not
23 guilty of criminal harassment.

24 If you are satisfied beyond a reasonable
25 doubt of all these essential elements, you must
26 find Mr. Fox guilty of criminal harassment.

27 To determine whether the Crown has proven
28 these essential elements, consider the following
29 questions -- and there are going to be five of
30 them corresponding with the five elements that I
31 outlined.

32 First, did Mr. Fox (a) communicate
33 repeatedly, whether directly or indirectly, with
34 Ms. Capuano or anyone known to her, or (b) engage
35 in threatening conduct directed at Ms. Capuano or
36 her children?

37 This first question relates to two types of
38 conduct, which I will discuss separately. The
39 Crown must prove beyond a reasonable doubt one or
40 both of these types of conduct, that is, (a) or
41 (b).

42 So, I will first address (a). Did Mr. Fox
43 communicate repeatedly, whether directly or
44 indirectly, with Ms. Capuano or anyone known to
45 her?

46 To communicate repeatedly with another person
47 means to communicate with him or her more than

Charge to the Jury

1 once. It might be in the same words or by the
2 same means each time, but it does not have to be.

3 The communication may be direct or it may be
4 indirect. The communication may be with Ms.
5 Capuano or with anyone she knows.

6 A direct communication with Ms. Capuano could
7 include an email sent intentionally to her, if she
8 received and read it.

9 An indirect communication with Ms. Capuano
10 could include posting material on a website or
11 sending an email to other people, so long as the
12 person who posted the material or sent the email
13 intended the person who read or received it to
14 bring it to Ms. Capuano's attention, and they did.

15 Consider the evidence of emails. Consider
16 also the evidence of material on the website, but
17 keep in mind that that material is not direct or
18 indirect communication by Mr. Fox with Ms. Capuano
19 unless he intended the material to come to her
20 attention and it did. Consider all of the
21 evidence about communications from Mr. Fox to Ms.
22 Capuano or anyone known to her that came to her
23 attention.

24 The other form of conduct: (b) did Mr. Fox
25 engage in threatening conduct directed at Ms.
26 Capuano or her family?

27 Threatening conduct can include words as well
28 as physical acts and non-verbal conduct. A single
29 incident may constitute threatening conduct.

30 To be threatening conduct in this case, Mr.
31 Fox's conduct must have been directed at Ms.
32 Capuano or her family with an intention to
33 intimidate her or to instil a sense of fear in
34 her. The fear can relate to her own or her
35 family's physical safety, or to her own or their
36 psychological or emotional security or well-being.

37 Also, conduct is threatening only if a
38 reasonable person, in the same circumstances as
39 Ms. Capuano, would find it threatening.

40 Consider the relationship between Mr. Fox and
41 Ms. Capuano, and the conduct -- the context in
42 which the conduct occurred. Decide whether Mr.
43 Fox intended the conduct to intimidate or instil a
44 sense of fear in Ms. Capuano. If you find that he
45 did, decide also whether the conduct would cause a
46 reasonable person to be intimidated in Ms.
47 Capuano's circumstances.

Charge to the Jury

1 When you are deciding whether a reasonable
2 person in the same circumstances would be
3 intimidated, you must take into account only what
4 Ms. Capuano knew. You must not take into account
5 the evidence relating to the charge in Count 2,
6 where the Crown alleges that Mr. Fox sent his
7 firearms from Burnaby to a residence in
8 California, because Ms. Capuano did not know about
9 these events.

10 The conduct that the Crown says was
11 threatening conduct directed at Ms. Capuano
12 includes various statements in emails to Ms.
13 Capuano telling her of a goal to make her life
14 miserable, to ruin her reputation, and to bring
15 about various other negative results, referring
16 her to the website and to material on it,
17 referring to hiring a person to develop a
18 relationship with Ms. Capuano who would take
19 intimate photographs of her to be added to the
20 website, referring to a billboard campaign, and an
21 email saying Mr. Fox had no qualms about shooting
22 Ms. Capuano, except for the risk of being caught
23 and for the fact that such an act would be illegal
24 and immoral.

25 The Crown says that threatening conduct
26 directed at Ms. Capuano's family includes an email
27 about potentially taking steps to cause Mr.
28 Pendleton's security clearance to be reviewed, and
29 posting pictures of Ms. Capuano's son {SC}.

30 Consider all of the evidence and decide
31 whether Mr. Fox engaged in threatening conduct
32 that he directed at Ms. Capuano or her family that
33 would cause a reasonable person to be intimidated.

34 Unless you are satisfied beyond a reasonable
35 doubt that Mr. Fox communicated repeatedly,
36 whether directly or indirectly, with Ms. Capuano
37 or anyone known to her, or engaged in threatening
38 conduct directed at her or her family, you must
39 find Mr. Fox not guilty of criminal harassment.
40 Your deliberations would be over.

41 If you are satisfied beyond a reasonable
42 doubt that Mr. Fox communicated repeatedly,
43 whether directly or indirectly, with Ms. Capuano
44 or anyone known to her, or engaged in threatening
45 conduct directed at her or her family, you go on
46 to Question 2.

47 You do not have to all -- I am going to back

Charge to the Jury

1 up and correct that. You do not have to all agree
2 on whether (a) Mr. Fox communicated repeatedly
3 with Ms. Capuano or anyone known to her, or on
4 whether (b) Mr. Fox engaged in threatening conduct
5 directed at her or her family. It is sufficient
6 if you all agree that the Crown has proven beyond
7 a reasonable doubt that Mr. Fox engaged in at
8 least one of these types of conduct, that is (a)
9 or (b).

10 If you do, you go on to the next question.

11 And that is, second, did Mr. Fox's conduct
12 harass Ms. Capuano?

13 And from now on, when I say, "Mr. Fox's
14 conduct," I mean his repeated communication with
15 Ms. Capuano or anyone known to her, or his
16 threatening conduct directed at her or her family
17 -- in other words, the conduct that I have just
18 described in the first element of the offence. So
19 now addressing the second element. Did Mr. Fox's
20 conduct harass Ms. Capuano?

21 To prove that Mr. Fox's conduct harassed Ms.
22 Capuano, the Crown must prove beyond a reasonable
23 doubt that his conduct distressed, tormented, or
24 troubled her. It is not enough if his conduct
25 merely annoyed her, or if it made her angry
26 without also making her distressed, tormented, or
27 troubled.

28 Consider Ms. Capuano's evidence about how Mr.
29 Fox's communications affected her and what she did
30 to make them stop. Consider her cross-examination
31 when she was asked about laughing a number of
32 times when she reported the events during a police
33 interview. Consider also the portions of the
34 recording of that interview that were played back
35 to her. Consider her explanations. Assess her
36 evidence and all the other evidence in the way I
37 described earlier.

38 Unless you are satisfied beyond a reasonable
39 doubt that Mr. Fox's conduct harassed Ms. Capuano,
40 you must find Mr. Fox not guilty of criminal
41 harassment. Your deliberations would be over.

42 If you are satisfied beyond a reasonable
43 doubt that Mr. Fox's conduct harassed Ms. Capuano,
44 you must go on to the next question.

45 And that is the third question, corresponding
46 to the third element: Was Mr. Fox aware that his
47 conduct harassed Ms. Capuano?

Charge to the Jury

1 The Crown must prove beyond a reasonable
2 doubt that Mr. Fox was aware that his conduct
3 harassed Ms. Capuano. Remember, I am still using
4 "Mr. Fox's conduct" to mean the conduct involved
5 in the first element of the offence. And I notice
6 I have written "office" in my written notes, and
7 obviously that should read "offence".

8 To prove these things, the Crown must prove
9 one of the following:

10 First, that Mr. Fox actually knew that his
11 conduct harassed her.

12 Second, that Mr. Fox knew there was a risk
13 that his conduct harassed Ms. Capuano, and that
14 Mr. Fox proceeded in the face of that risk.

15 Third, that Mr. Fox was aware of indications
16 that his conduct harassed Ms. Capuano, but
17 deliberately chose to ignore the indications,
18 because he did not want to know the truth.

19 Any one of these is sufficient to establish
20 that Mr. Fox was aware that his conduct harassed
21 Ms. Capuano. You do not have to all agree on the
22 same one. If each of you is satisfied about any
23 one of them beyond a reasonable doubt, the Crown
24 will have proven the element of awareness and you
25 go on to the next question.

26 You may infer, as a matter of common sense,
27 that a person usually knows the predictable
28 consequences of his or her actions, and means to
29 bring them about. However, you are not required
30 to draw that inference about Mr. Fox. Indeed, you
31 must not do so if, on the whole of the evidence,
32 you have a reasonable doubt about whether Mr. Fox
33 was aware that his conduct harassed Ms. Capuano.
34 It is for you to decide.

35 Consider all the evidence, including the
36 content of the emails themselves and the material
37 on the website. In deciding this third question,
38 you can consider material that Mr. Fox posted on
39 the website, even if that material did not come to
40 Ms. Capuano's attention. This third element of
41 the offence focuses on Mr. Fox's state of mind,
42 namely whether he was aware that Ms. Capuano was
43 harassed, and not on Ms. Capuano's state of mind.

44 Consider also the evidence of Constable Jean-
45 Philippe Dupont, who testified that in the
46 interview of July 20, 2015, Constable Huggins told
47 Mr. Fox that Ms. Capuano did not want any of the

Charge to the Jury

1 contact from the emails and the website, and that
2 she was fearful of Mr. Fox crossing the border and
3 shooting her. Consider Mr. Fox's statements, in
4 the interview with Constable Potts on July 16,
5 2016, that Ms. Capuano cannot possibly have taken
6 his email about having no qualms about shooting
7 her as a real threat, because the email went on to
8 say that he would never shoot her. Consider his
9 statements in that interview that, in a radio
10 interview, Ms. Capuano showed no fear at all in
11 her voice and instead was laughing and joking.
12 You may consider that evidence, if you accept it,
13 as showing the state of Mr. Fox's awareness or
14 lack of awareness at that time. Consider the
15 evidence, elicited in cross-examination, that
16 sometimes Ms. Capuano responded multiple times to
17 Mr. Fox's emails, sometimes in what could be read
18 as a light-hearted manner.

19 Unless you are satisfied beyond a reasonable
20 doubt that Mr. Fox was aware that his conduct
21 harassed Ms. Capuano, you must find Mr. Fox not
22 guilty of criminal harassment. Your deliberations
23 would be over.

24 If you are satisfied beyond a reasonable
25 doubt that Mr. Fox was aware that his conduct
26 harassed Ms. Capuano, you go on to the next
27 question.

28 And this next fourth question relates to the
29 fourth element of the offence, and it asks: did
30 Mr. Fox's conduct cause Ms. Capuano to fear for
31 her own or her family members' safety?

32 The Crown must prove beyond a reasonable
33 doubt that Mr. Fox's conduct caused Ms. Capuano to
34 fear for her own safety or the safety of members
35 of her family. And when I say, "Mr. Fox's
36 conduct", I am still referring to the conduct that
37 is required for the first element of the offence.

38 Fear can reflect a state of uncertainty about
39 what a person is capable of, or what his or her
40 intentions may be, or what consequences may
41 follow.

42 The fear can be for physical safety, or it
43 can be for psychological or emotional security or
44 well-being. The feared result cannot be a trivial
45 one. However, it need not be as serious as ill
46 health or a major life disruption.

47 The Crown says that Mr. Fox's conduct caused

Charge to the Jury

1 Ms. Capuano to fear for her physical safety and
2 for her psychological or emotional safety, as well
3 as for the psychological or emotional safety of
4 Mr. Pendleton and her son {SC}. In addition to
5 the email about having no qualms about shooting
6 Ms. Capuano, if the risk was removed and to do so
7 were not illegal and immoral, the Crown refers to
8 Mr. Fox's stated goal of ruining Ms. Capuano's
9 life by making her unemployable and penniless,
10 turning {GR} against her, and isolating her
11 from friends or co-workers. As to Mr. Pendleton's
12 psychological security, the Crown refers to the
13 email about his security clearance and steps Mr.
14 Fox might take to cause it to be reviewed. As to
15 {SC}, the Crown relies mainly on the pictures
16 posted on the website, where the home address was
17 also given, and Ms. Capuano's evidence that she
18 was afraid for {SC} as a result.

19 Mr. Fox relies on the evidence I have already
20 mentioned, that although Ms. Capuano cried when
21 she gave her evidence in this trial about the
22 effects of the emails and the website, she laughed
23 a number of times when she spoke about them in a
24 media interview and in the interview with
25 Constable Wilcott. Mr. Fox relies also on the
26 evidence, elicited in cross-examination of Ms.
27 Capuano, that in some emails she insulted Mr. Fox
28 in various ways, and often continued an email
29 conversation that she could easily have ignored.
30 He relies on statements Ms. Capuano made in some
31 of those and other emails that showed no fear at
32 all, such as, "I enjoy our banter as much as the
33 next person" or "this has been fun really".

34 In deciding whether this essential element
35 has been proven, consider all of the evidence,
36 including the emails and any website material that
37 you find came to Ms. Capuano's attention.
38 Consider her evidence about the effects on her and
39 decide how much or little of it you accept.

40 Unless you are satisfied beyond a reasonable
41 doubt that Mr. Fox's conduct caused Ms. Capuano to
42 fear for her own safety or the safety of her
43 family, you must find Mr. Fox not guilty of
44 criminal harassment. Your deliberations would be
45 over.

46 If you are satisfied beyond a reasonable
47 doubt that Mr. Fox's conduct caused Ms. Capuano to

Charge to the Jury

1 fear for her own safety or the safety of her
2 family, you must go on to the next question.

3 That is the fifth question, corresponding
4 with the fifth element: was Ms. Capuano's fear
5 reasonable in all the circumstances?

6 You must consider whether Ms. Capuano's fear
7 for her own safety or the safety of her children
8 because of Mr. -- I should say the safety of her
9 family members -- because of Mr. Fox's conduct was
10 reasonable in all the circumstances. Ask
11 yourselves whether a reasonable person in the same
12 circumstances as Ms. Capuano would fear for her
13 own or her family members' safety as a result of
14 what Mr. Fox did.

15 When you are deciding whether a reasonable
16 person in Ms. Capuano's circumstances would fear
17 for her own or her family's safety, as a result of
18 what Mr. Fox did, you must take into account only
19 what Ms. Capuano knew. You must not take into
20 account the evidence relating to Count 2 about Mr.
21 Fox sending boxes by way of The Packaging Depot,
22 and about his firearms being found in a box in a
23 residence in Carson, California, because Ms.
24 Capuano did not know about those events. Nor
25 would a reasonable person in Ms. Capuano's
26 position know about those events.

27 Unless you are satisfied beyond a reasonable
28 doubt that Ms. Capuano's fear for her own safety
29 of the safety of members of her family was
30 reasonable in all the circumstances, you must find
31 Mr. Fox not guilty of criminal harassment.

32 If you are satisfied beyond a reasonable
33 doubt that Ms. Capuano's fear for her own safety
34 or the safety of members of her family was
35 reasonable in all the circumstances, you must find
36 Mr. Fox guilty of criminal harassment.

37 I will now go on to discuss the elements of
38 the offence charged in Count 2.

39 In that count, Mr. Fox is charged with the
40 offence of possessing a firearm in a place other
41 than where he was authorized to possess.

42 You will remember that a small change was
43 made to one of the dates specified in the charge.
44 The charge as amended reads as follows:

45
46 Mr. Fox stands charged that between May 17,
47 2016 and June 3, 2016, inclusive, at or near

Charge to the Jury

1 Burnaby, in the Province of British Columbia,
2 being the holder of an authorization or a
3 licence under which he may possess a
4 prohibited firearm, restricted firearm or
5 non-restricted firearm, prohibited weapon,
6 prohibited device, or prohibited ammunition,
7 did possess firearms, at a place indicated on
8 the authorization or licence as being a place
9 where he may not possess it, or at a place
10 other than that indicated on the
11 authorization or licence as being a place
12 where he may possess it, or at a place other
13 than that where it may be possessed under the
14 *Firearms Act* . . .
15

16 The allegation in this charge is that four
17 firearms which Mr. Fox was licensed to own were
18 packed inside a computer in one of the boxes that
19 went to Ms. Munoz's residence in Carson,
20 California, and that Mr. Fox was in possession of
21 those firearms, contrary to his licence or
22 authorization, while the box containing the
23 firearms went from his residence to The Packaging
24 Depot in Burnaby, B.C., and while the box waited
25 there at The Packaging Depot to be picked up by
26 UPS.

27 I tell you that, as a matter of law, Mr. Fox
28 was not authorized to be in possession of his
29 firearms between his residence and The Packaging
30 Depot, or at the Packaging Depot before pick-up by
31 UPS.

32 You must find Mr. Fox not guilty of
33 possessing a firearm other than where authorized
34 to do so, unless the Crown has proven beyond a
35 reasonable doubt that Mr. Fox committed the
36 offence on the dates or during the time period,
37 and in the place described in the indictment.
38 Specifically, the Crown must prove each of the
39 following essential elements of the offence beyond
40 a reasonable doubt.

41 First, that Mr. Fox was the holder of an
42 authorization or licence allowing him to possess
43 firearms at a place indicated on the authorization
44 or licence.

45 Second, that the items that ATS Agent Frank
46 Spizuoco -- I am going to say, have I got that
47 correctly, Mr. Myhre?

Charge to the Jury

1 MR. MYHRE: I believe so, My Lady.

2 THE COURT: -- found in one of the boxes at the
3 residence of Liz Munoz in Carson, California, were
4 firearms within the meaning of the *Criminal Code*.
5 Third, that the firearms had previously gone
6 from Mr. Fox's residence to The Packaging Depot in
7 Burnaby, and then to UPS for delivery to Carson,
8 California.

9 And fourth, that Mr. Fox was in possession of
10 those firearms while they went from his residence
11 to The Packaging Depot and until they were
12 released to UPS.

13 Unless you are satisfied beyond a reasonable
14 doubt that the Crown has proven all of these
15 essential elements, you must find Mr. Fox not
16 guilty of possessing a firearm other than where
17 authorized to do so.

18 If you are satisfied beyond a reasonable
19 doubt of all these essential elements, you must
20 find Mr. Fox guilty of possessing a firearm at a
21 place other than where authorized to do so.

22 To determine whether the Crown has proven
23 these essential elements, I will take you through
24 four questions corresponding with the four
25 elements that, again, I would ask that you address
26 in the order in which I am going to take you
27 through them.

28 First, did Mr. Fox hold an authorization or
29 licence allowing him to possess firearms at a
30 place indicated on the authorization or the
31 licence?

32 On this question, you have the affidavit of a
33 firearms officer, which is Exhibit 10, which
34 explains in paragraph 5 that Mr. Fox holds a valid
35 PAL, or Possession and Acquisition Licence, that
36 allows him to possess and acquire restricted, as
37 well as non-restricted, firearms, and that he also
38 holds a valid ATT, Authorization to Transport,
39 that allows him to transport his restricted
40 firearms to certain places under certain
41 conditions. You also have Ms. Capuano's evidence
42 that Mr. Fox attached a copy of a PAL, and that is
43 Exhibit 2, to an email that he sent her -- and if
44 you look at that, you will see that the copy shows
45 the same PAL number and other details as are
46 indicated in the affidavit of a firearms officer
47 that is Exhibit 10.

Charge to the Jury

1 You will probably be satisfied beyond a
2 reasonable doubt that Mr. Fox held an
3 authorization or licence allowing him to possess
4 firearms at a place indicated on the authorization
5 or licence.

6 If you are, you then go on to the next
7 question.

8 Second, were the items that Agent Spizuoco
9 found firearms?

10 Under the *Criminal Code*, a firearm is a gun,
11 a weapon with a barrel that can fire a shot, a
12 bullet, or other projectile, and can cause death
13 or serious bodily injury to another person.

14 You have the affidavit of Neena Sharan, that
15 is Exhibit 11, saying that Mr. Fox had four valid
16 firearms registration certificates for four
17 firearms listed and described in Exhibit A to that
18 affidavit. You also have the photographs of the
19 items Agent Spizuoco found showing serial numbers
20 that, if you look at them, you will see are the
21 same as the serial numbers of the firearms in Mr.
22 Fox's registration certificates.

23 You will probably be satisfied beyond a
24 reasonable doubt that the items Agent Spizuoco
25 found in one of the boxes at the residence of Ms.
26 Munoz in Carson, California, were firearms within
27 the *Criminal Code* definition.

28 If you are, you then go on to the next
29 question.

30 Third, did the firearms go from Mr. Fox's
31 residence to The Packaging Depot, in Burnaby, and
32 then to UPS for delivery to Carson, California?

33 As I said earlier, the charge in Count 2
34 alleges that Mr. Fox was in possession of the
35 firearms during the time that they were between
36 his residence and The Packaging Depot, and while
37 the box they were in was waiting to be picked up
38 by UPS. The Crown must therefore prove beyond a
39 reasonable doubt that the firearms Agent Spizuoco
40 found in Carson, California, began their travels
41 to Carson, California, by going from Mr. Fox's
42 residence to The Packaging Depot, and then
43 continuing on with UPS, and that they did not get
44 to Carson, California, by some other route.

45 No witness gave direct evidence of seeing the
46 firearms outside Mr. Fox's residence or on the way
47 to or at the Packaging Depot, whether inside the

Charge to the Jury

1 boxes or not.

2 The Crown relies instead on circumstantial
3 evidence, and asks you to infer that the firearms
4 were in one of the boxes Mr. Fox sent through the
5 Packaging Depot.

6 Consider the evidence of Manvir Mangat, owner
7 of The Packaging Depot, about boxes Mr. Fox
8 shipped on several occasions. Consider Mr.
9 Mangat's evidence about how the boxes were
10 packaged and labelled and shipped. Consider also
11 Agent Spizuoco's evidence about how he found the
12 firearms, packed inside a computer, in one of
13 about 25 boxes at the Carson, California,
14 residence. Consider Agent Spizuoco's evidence,
15 elicited on cross-examination, that he had no
16 knowledge about how many people or who may have
17 come into contact with that box before he opened
18 it, or about whether the box had been opened
19 before, and that he could not comment on whether
20 or not Mr. Fox was or had been present in
21 California at or around the time when the firearms
22 were found. Consider what Mr. Fox said, in his
23 interview with Constable Potts, about shipping his
24 goods.

25 Unless you are satisfied beyond a reasonable
26 doubt that the firearms went from Mr. Fox's
27 residence to The Packaging Depot, and were then
28 released to UPS for delivery to Carson,
29 California, you must find Mr. Fox not guilty of
30 this offence.

31 If you are satisfied beyond a reasonable
32 doubt that the firearms went from Mr. Fox's
33 residence to The Packaging Depot, and were then
34 released to UPS for delivery to Carson,
35 California, you must go on to the next question.

36 Fourth question, was Mr. Fox in possession of
37 the firearms en route to The Packaging Depot, and
38 at The Packaging Depot until UPS took them?

39 A person may have possession of an item by
40 being in actual physical control of it, for
41 example, holding it in his or her hand or keeping
42 it in his or her pocket.

43 Also, a person may have possession of an item
44 that is elsewhere or is in the actual possession
45 or custody of somebody else, provided that the
46 person knows the item is in that other location
47 and has some element of control over it. The

Charge to the Jury

1 person will not be in possession of an item in
2 another place if the item is there through mistake
3 or accident.

4 To decide if Mr. Fox was in possession of
5 firearms while they went from his residence to The
6 Packaging Depot and while they awaited pickup
7 there by UPS, consider all of the evidence about
8 the firearms. Consider the evidence I mentioned
9 when discussing the third element.

10 Unless you are satisfied beyond a reasonable
11 doubt that Mr. Fox was in possession of firearms
12 while they went from his residence to The
13 Packaging Depot and while they awaited pickup
14 there by UPS, you must find him not guilty of this
15 offence.

16 If you are satisfied beyond a reasonable
17 doubt that Mr. Fox was in possession of firearms
18 while they went from his residence to The
19 Packaging Depot and while they awaited pickup
20 there by UPS, you must find Mr. Fox guilty of
21 possessing a firearm other than where authorized
22 to do so.

23 Available verdicts. For each of Counts 1
24 and 2, your verdict will be either guilty or not
25 guilty.

26 Your verdict for a charge will be guilty if
27 the Crown has proven, beyond a reasonable doubt,
28 each of the elements of the offence charged, as I
29 have outlined them earlier.

30 Your verdict will be not guilty if the Crown
31 has failed to prove beyond a reasonable doubt one
32 or more of the elements of the offence charged, as
33 I outlined those elements earlier.

34 There are two remaining sections of my
35 instructions. They will not be lengthy, but I
36 suggest that we take a five-minute break, just to
37 stretch legs, take some deep breaths, and then
38 finish up. I think we -- if we do that, we should
39 be complete by 20 or quarter to one, and if you
40 can wait that long for lunch, then I suggest that
41 is the better way to go. So we will just take
42 five minutes.

43
44 (JURY OUT)

45
46 THE COURT: Anything thus far?

47 MR. MYHRE: No, My Lady.

Charge to the Jury

1 THE COURT: Thank you. Just five minutes, so please
2 don't go too far.

3 THE CLERK: Order in court. This court stands down.
4

5 (PROCEEDINGS ADJOURNED)
6 (PROCEEDINGS RECONVENED)
7

8 THE SHERIFF: The jury, My Lady.
9

10 (JURY IN)
11

12 **CHARGE TO THE JURY, CONTINUING:**
13

14 THE COURT: I am at page 32.

15 Earlier in these instructions, I have
16 outlined the Crown's position and the defence
17 position as they relate to some of the issues that
18 you will be deciding, but I will now give you a
19 more general overview of each party's position.

20 The Crown's position.

21 The Crown's position is that the evidence
22 establishes beyond a reasonable doubt that Mr. Fox
23 committed both of the offences charged.

24 For Count 1, the Crown says that the evidence
25 clearly establishes beyond a reasonable doubt each
26 of the elements of criminal harassment for the
27 period of the charge, January 11, 2015, to May 27,
28 2016.

29 The Crown says that Mr. Fox deliberately
30 engaged in threatening conduct of various kinds
31 that intimidated Ms. Capuano in various ways, as
32 well as repeated communication, mainly by email
33 but often expressly referring in emails to the
34 website, that taunted and denigrated Ms. Capuano.
35 The Crown says that Mr. Fox engaged in these forms
36 of conduct deliberately, meaning to cause Ms.
37 Capuano as much misery as possible, and knowing
38 that his conduct was having a harassing effect on
39 her. The Crown relies on Mr. Fox's own emails and
40 blogs to show this goal, and to show that he knew
41 he was succeeding in reaching it, as well as
42 on -- and the Crown relies also on some of the
43 things Mr. Fox said to Constable Potts in the
44 audio-recorded interview.

45 The Crown submits that, unsurprisingly, Mr.
46 Fox's repeated communication and his threatening
47 conduct caused Ms. Capuano to be harassed or

Charge to the Jury

1 tormented, and to fear for her own safety, both
2 physical and psychological or emotional, and for
3 the safety of her son {SC} and her partner, Mr.
4 Pendleton. The Crown relies on Ms. Capuano's own
5 evidence that she was fearful of various things,
6 and also asks you to infer this from the evidence
7 that she took a number of steps to try to stop Mr.
8 Fox's campaign of harassment.

9 The Crown says Ms. Capuano's fear for her own
10 safety, whether physical or psychological or
11 emotional, and for the safety of members of her
12 family, was a fear that a reasonable person would
13 also have had in her circumstances. The Crown
14 reminded you that the circumstances you can
15 consider, for the purpose of determining whether
16 her fear was a reasonable one, include the
17 communications and events that predated the period
18 of the charge, but they do not include the events
19 relating to the firearms charge, Count 2, because
20 Ms. Capuano did not know about those events
21 relating to Count 2.

22 For Count 2, the Crown says that the only
23 reasonable inference from the evidence as a whole
24 is that Mr. Fox's firearms were in one of the
25 boxes that went from his residence to The
26 Packaging Depot, and then on to Ms. Munoz's
27 residence in California. The Crown says that any
28 suggestion that the firearms could have reached
29 Ms. Munoz's residence in some other way is
30 speculation, with no evidence to support it.

31 The Crown relies also on statements Mr. Fox
32 made to Constable Potts when, and this is in the
33 portion of the interview that corresponds in the
34 transcript to paragraph 1836, statements about
35 shipping or transporting his things to Los
36 Angeles. The Crown submits that although Mr. Fox
37 did not expressly mention firearms in that
38 statement, the full context of the statement
39 indicates that it was his firearms he was speaking
40 about.

41 The Crown asks you to find Mr. Fox guilty of
42 both charges.

43 The defence position.

44 The defence position is that the evidence
45 does not establish either of the charges beyond a
46 reasonable doubt.

47 For Count 1, the defence says that what the

Charge to the Jury

1 Crown says are threats to do such things as to
2 make Ms. Capuano lose her job and be unable to
3 find another, or to turn ██████████ {GR} ██████████ and her friends
4 against her, may all be conduct that would cause
5 Ms. Capuano inconvenience and annoyance, but they
6 were not threats designed to intimidate or --
7 designed to intimidate her or instill a sense of
8 fear. The defence submits that Ms. Capuano's
9 response, by fighting back with insults and
10 taunts, and by failing at that time to contact the
11 police, show that she was not, in fact, harassed
12 or put in fear for her safety.

13 As to Ms. Capuano's evidence that she was
14 afraid that Mr. Fox would shoot her, the defence
15 notes that the email that she said led to this
16 fear took care to make absolutely clear -- and,
17 ah, those are words in the email -- that Mr. Fox
18 would never deliberately cause her physical harm.
19 The defence submits that in this email, Mr. Fox
20 was not threatening Ms. Capuano, he was explaining
21 to her his rules of life, one of them being not to
22 harm other people. The defence submits that this
23 email was not a threat, and Ms. Capuano cannot
24 actually or reasonably have taken it as such.

25 The defence submits that Mr. Fox repeated
26 these life principles in the interview with
27 Constable Potts: both his religion and the law
28 would prevent him from physically harming Ms.
29 Capuano. The interview was after the time period
30 of the charge, but you can consider it in deciding
31 what Mr. Fox meant or intended when he sent the
32 much earlier email.

33 As to the other type of conduct alleged to
34 support Count 1, the defence agrees that Mr. Fox
35 communicated repeatedly with Ms. Capuano.
36 However, the defence says that the communication
37 was necessary and was not unwanted, partly because
38 the two were co-parenting and they needed to
39 communicate frequently for that purpose.

40 The defence says that none of the other
41 elements of the offence, this is Count 1, are
42 proven beyond a reasonable doubt.

43 Mr. Fox's conduct did not harass Ms. Capuano
44 or cause her to be fearful for her own or her
45 family members' safety. Rather, Ms. Capuano took
46 some pleasure in the communications, and sometimes
47 enjoyed the exchange of wit with Mr. Fox. Ms.

Charge to the Jury

1 Capuano sometimes replied within minutes,
2 sometimes sending multiple responses. She
3 responded at almost all times of the day and
4 night, and she initiated some of the email chains.
5 The back and forth communication was nasty at
6 times, but the insults and denigrating remarks
7 went in both directions, with each side wanting to
8 have the last word.

9 For these reasons, the defence submits that
10 Mr. Fox's conduct did not cause Ms. Capuano to
11 actually fear for her safety or the safety of her
12 family, and that a reasonable person, in her
13 circumstances, would not have been in fear.

14 For Count 2, the defence says that there is
15 no direct evidence at all that Mr. Fox's firearms
16 went from his residence to The Packaging Depot,
17 and then on to Carson, California from there. The
18 defence says that Mr. Fox's statements to
19 Constable Potts refer generally to shipping or
20 sending his belongings to his friend's residence,
21 and not specifically to sending his firearms.

22 The defence submits that on the whole of the
23 evidence concerning Count 2, the inference that
24 the Crown wishes you to draw from the
25 circumstantial evidence is a reasonable inference,
26 but it is not the only reasonable inference.
27 Another reasonable inference is, for example, that
28 Mr. Fox himself took the firearms, in his
29 computer, to Ms. Munoz's home in Carson,
30 California, and used one of the boxes to store
31 them in to keep them out of sight and out of Ms.
32 Munoz's way. The defence notes also that Mr.
33 Mangat gave a very different number of boxes that
34 went through The Packaging Depot than the
35 approximately 25 boxes Agent Spizuoco testified he
36 found in Ms. Munoz's home. The defence submits
37 that you cannot be sure that the firearms went
38 with other goods or personal effects from Mr.
39 Fox's home through The Packaging Depot.

40 The defence says that because the evidence
41 supports other reasonable inferences, the Crown
42 has not proven Count 2 beyond a reasonable doubt.

43 The defence asks you to find Mr. Fox not
44 guilty of both charges.

45 I will say a few things about your
46 deliberations.

47 Although the testimony of every witness has

Charge to the Jury

1 been audio recorded, we will not have a written
2 transcript of the evidence available for you to
3 review when you go to the jury room to discuss
4 your decision in this case. I think you will find
5 that your collective memory of the evidence is
6 good. However, if there is something that you
7 cannot recall or your recollections differ,
8 counsel and Mr. Fox and I will try to assist you
9 by reviewing our notes, or I may direct that the
10 evidence be played back from the recorder.
11 Normally, we would play back both the direct
12 evidence and the cross-examination on any point.

13 If, during your discussions, you have any
14 questions, please put them in writing and give
15 them to Mr. Sheriff, who will be outside the door
16 of the jury room. Mr. Sheriff will bring the
17 questions to me, I will discuss them with the
18 lawyers and Mr. Fox. You will be brought back
19 into the courtroom and I will reply to your
20 questions.

21 I ask that you put the questions in writing
22 so that I understand exactly what it is that you
23 want done or answered. Please be as clear and
24 specific as possible, and then I can be more
25 accurate and helpful in my reply.

26 In any note that you may send me, please
27 avoid saying anything that discloses any result or
28 decision reached in your deliberations, or what
29 members of the jury are thinking or saying. For
30 example, if you have voted on the point that you
31 are asking about, do not tell me the result of the
32 vote.

33 A verdict, whether of guilty or not guilty,
34 is the unanimous decision of the jury. To return
35 a verdict in relation to an offence requires that
36 all of you agree on your verdict. While your
37 verdict in relation to an offence must be
38 unanimous, your route to the verdict need not be.
39 You could all be satisfied of Mr. Fox's guilt
40 beyond a reasonable doubt, even though
41 individually you have different views of the
42 evidence. Similarly, you could all have a
43 reasonable doubt about Mr. Fox's guilt but not
44 agree about why. It matters not, provided that
45 your verdict in relation to the offence is
46 unanimous.

47 You should make every reasonable effort to

Charge to the Jury

1 reach a verdict. Consult with one another.
2 Express your own views. Listen to the views of
3 others. Discuss your differences with an open
4 mind. Try your best to decide this case.

5 If you cannot reach a unanimous verdict, you
6 should notify Mr. Sheriff in writing. He will
7 bring me your message.

8 I told you earlier about the verdicts that
9 are open to you. There is a verdict sheet which I
10 would ask that you each be given now.

11 If you reach a unanimous verdict, your
12 foreperson should record it on your verdict sheet
13 and notify Mr. Sheriff. We will come back into
14 court to receive your verdict. Madam Registrar
15 will at that point ask Mr. Foreperson if you have
16 reached a verdict, and Mr. Foreperson will stand
17 and reply in the affirmative. Mr. Foreperson will
18 then be asked the following question for each of
19 Counts 1 and 2, in turn: "Do you find Patrick
20 Henry Fox guilty or not guilty?" And your answer
21 will be either "guilty" or "not guilty".

22 Now, in just a moment, I am going to ask you
23 to retire to the jury room. Please do not begin
24 deliberating until Mr. Sheriff advises you that
25 you may do so. I need to consult the lawyers and
26 Mr. Fox to see if I have overlooked anything. If
27 I have, I will call you back in for further
28 instructions.

29 If there are no further instructions, I will
30 send a message to Mr. Sheriff, who will advise you
31 that you can begin your deliberations, although I
32 rather suspect you are going to be beginning with
33 lunch before.

34 Thank you very much for your attention all
35 through this morning. I invite you now to retire
36 to the jury room.

37
38 (JURY OUT AT 12:46:50 P.M.)
39

40 THE COURT: Before I forget, a copy of those final
41 instructions should be marked as the next lettered
42 exhibit, please.

43 THE CLERK: That will be Exhibit L, My Lady.
44

45 **EXHIBIT L FOR IDENTIFICATION: Document**
46 **titled "Final Instructions to the Jury"**
47

35
(Jury Out)
Proceedings

1 THE COURT: All right. And a copy of the verdict sheet
2 also.

3 THE CLERK: Exhibit M, My Lady.

4 THE COURT: Thank you.

5

6

EXHIBIT M FOR IDENTIFICATION: Verdict Sheet

7

8 THE COURT: Any comments, concerns?

9 MR. MYHRE: No.

10 MR. LAGEMAAT: No, My Lady.

11 THE ACCUSED: No, My Lady.

12 THE COURT: All right. The jury can be advised that
13 they can begin their deliberations or go to lunch,
14 whichever --

15 THE SHERIFF: Yes, My Lady.

16 THE COURT: Thank you. I would ask that counsel other
17 than during mealtimes when the jury is away and
18 not deliberating, I would ask that counsel remain
19 within 10 minutes, at most, of the courtroom in
20 case there are questions. If there are questions
21 I will make copies of the questions, have them for
22 you and consult before giving a response.

23 Anything else before we stand down?

24 MR. MYHRE: So do we know the mealtimes?

25 THE COURT: It's right now.

26 MR. MYHRE: Until?

27 THE CLERK: I will usually, if you give me your phone
28 numbers or email address, I usually will email
29 jury is leaving for lunch and then I'll email jury
30 returns from lunch or dinner, is what I usually
31 do.

32 THE COURT: Experience tells that meals generally take
33 an hour and a half. It's hard to get 12 people
34 in, fed, and out of a restaurant in less than
35 that, so it's usually minimum of an hour and a
36 half.

37 Any other questions, concerns? All right,
38 thank you. Stand down.

39 THE CLERK: Just give me one second, I have to do this
40 thing that I've only done once before. Just one
41 second.

42

43

(PROCEEDINGS ADJOURNED AT 12:49:42 P.M. TO
AWAIT RETURN OF THE JURY)

44

45

(PROCEEDINGS RECONVENED AT 4:46:38 P.M.)

46

47

(JURY OUT)

36
(Jury Out)
Proceedings

1
2 THE COURT: Are we recording?
3 THE CLERK: We are on the record, My Lady.
4 THE COURT: There is a question from the jury. The
5 original can be marked as an exhibit for
6 identification and there are copies here for
7 counsel and Mr. Fox. So where are we on the
8 letters?
9 THE CLERK: It will be Exhibit N, My Lady.
10 THE COURT: Thank you.
11
12 **EXHIBIT N FOR IDENTIFICATION: Question from**
13 **the jury number 1**
14
15 THE COURT: Can these go to counsel and Mr. Fox?
16 THE CLERK: I have, sorry, one extra.
17 THE COURT: It's not entirely clear to me what the jury
18 is struggling with. I assume that when they say
19 line 101 they mean paragraph 101 in the written
20 version of the charge. I assume that it's not the
21 structure of the sentence that's troubling them
22 because that same structure is used in relation to
23 the first issue and this is the second issue or
24 the second element that's under discussion. I can
25 only assume, unless any of you have a different
26 idea, that they want more detail about what is
27 meant by harassment in this element but I am not
28 confident that that is their concern.
29 MR. LAGEMAAT: I would think, My Lady, if that was the
30 question it would have gone earlier on in a
31 paragraph where in the first step was it
32 harassment, back -- back in paragraph 80 where it
33 starts the --
34 THE ACCUSED: Might I suggest maybe they're uncertain
35 about whether we're speaking of the earlier
36 conduct that was found from the first section or
37 if they're not -- they're not sure about referring
38 to that conduct or just conduct overall.
39 THE COURT: That's a good point. Thank you, Mr. Fox.
40 THE ACCUSED: Even though that is, of course, covered
41 in paragraph 98.
42 THE COURT: Mr. Myhre?
43 MR. MYHRE: The thought that occurs to me is maybe
44 they're confused about the difference between a
45 finding that she was harassed and a finding of
46 guilt on criminal harassment. It seems quite
47 clear to me from the way this is laid out but

1 maybe if they have a question about what, you
2 know, whether she was harassed and what that
3 means. It was set out pretty clearly in paragraph
4 99.

5 So my suggestion would be that we could try
6 to clarify line 101 by saying unless you are
7 satisfied beyond a reasonable doubt that Mr. Fox's
8 conduct, and then maybe we could say as set out in
9 paragraph 98, harassed Ms. Capuano, using the
10 definition of harassment in paragraph 99, you must
11 find, etc.

12 THE COURT: There's a danger to giving an answer to a
13 jury when we are not entirely sure what question
14 they are asking and the danger is that if we try
15 to cover all the bases and answer all the
16 questions we believe they may be asking, there may
17 be another one that they were actually asking that
18 hasn't been answered but they don't want to push
19 it by coming back with a further question.

20 I think I need to ask them to be more
21 specific in their question. Perhaps what I should
22 do is say to them that it appears that they may be
23 asking about several different things when -- no,
24 that we were unsure exactly what it is they are
25 asking about. It may be that they are asking in
26 paragraph 101 what is meant by Mr. Fox's conduct
27 or it may be that they are asking what is meant by
28 harassed Ms. Capuano, or it may be that they are
29 asking whether there's a difference between the
30 mention of harassed and the mention of criminal
31 harassment.

32 Or it may be that their question is something
33 else entirely and so it would be helpful if they
34 could make that question more specific, something
35 along those lines. That's agreed?

36 THE ACCUSED: I would agree.

37 MR. MYHRE: I agree.

38 MR. LAGEMAAT: Yes, My Lady.

39 THE COURT: Please.

40 THE SHERIFF: The jury, My Lady.

41

42 (JURY IN AT 4:56:29 P.M.)

43

44 **CHARGE TO THE JURY, CONTINUING:**

45

46 THE COURT: Members of the jury, I have a question from
47 you and I will read it -- I will read it aloud, so

Charge to the Jury

1 that everyone is aware exactly what -- how it
2 reads: "Could you please clarify line 101 of your
3 summation to us?".

4 I have discussed this with counsel and Mr.
5 Fox, and I am afraid we need to ask you a question
6 in response. And that is to be a bit more
7 specific in your question -- and I will explain to
8 you why.

9 We are concerned to answer your -- the
10 question you have in mind, and not some other
11 question, and it appears there are several
12 possibilities of what you may be asking about when
13 you ask for clarification.

14 One possibility is that you are asking -- and
15 I actually probably should first just read aloud
16 paragraph 101, which is what I understand you to
17 be asking about. And it reads: "Unless you are
18 satisfied beyond a reasonable doubt that Mr. Fox's
19 conduct harassed Ms. Capuano, you must find Mr.
20 Fox not guilty of criminal harassment. Your
21 deliberations would be over".

22 Just to put that in context, it is dealing
23 with the second element, the second question
24 dealing with Count 1, the charge of criminal
25 harassment.

26 So one possibility is that you are asking
27 what is meant in that paragraph by "Mr. Fox's
28 conduct". And another possibility is that you are
29 asking for more detail about what is meant by
30 "harassed" -- "harassed Ms. Capuano". And a third
31 possibility is that you are asking whether there
32 is a difference between "harassed Ms. Capuano", in
33 the first part of that sentence, and "criminal
34 harassment" used in the second part when the
35 sentence goes on to say "you must find Mr. Fox not
36 guilty of criminal harassment". Or it may be that
37 your question relates to none of those
38 possibilities.

39 So I am going to ask you to go back to the
40 jury room and please put your question a bit more
41 specifically, so that I can then answer it for
42 you. And I am sorry to make you engage in this to
43 and fro, but I think that is the better course,
44 please.

45
46 (JURY OUT AT 5:00:10 P.M.)
47

39
(Jury Out)
Proceedings

1 THE COURT: I suspect this won't take long, and so
2 please remain around and when something comes back
3 we will make copies, bring it back into court.
4 Thank you. Stand down.

5 THE CLERK: Order in court. This court stands down.

6
7 (PROCEEDINGS ADJOURNED AT 5:00:49 P.M.)
8 (PROCEEDINGS RECONVENED AT 5:13:48)

9
10 (JURY OUT)

11
12 THE COURT: Madam Registrar, we will mark this as
13 Exhibit O, and could I have a copy, please, and
14 give one to counsel, and Mr. Fox. Thank you.

15
16 **EXHIBIT O FOR IDENTIFICATION: Question from**
17 **the jury number 2**

18
19 THE COURT: Suggestions? Mr. Lagemaat?

20 MR. LAGEMAAT: I want to say yes, My Lady, because
21 really if they are not, what is the point of
22 considering the next elements?

23 THE COURT: It ties in with the instruction at
24 paragraph 179. The instruction at paragraph 179
25 expresses the result which is, I think, where you
26 are coming from, Mr. Lagemaat. The jury's
27 question seems to focus a bit more on process.
28 But the result is certainly as you say. Mr.
29 Myhre?

30 MR. MYHRE: It does seem to me that it would be
31 permissible for the jury -- I mean this outlines a
32 structured process that they can follow, it makes
33 a lot of sense. But if they were hung up on it,
34 if they wanted to they could go on to consider the
35 other elements. I mean the requirement --
36 requirement is set out pretty well in paragraph
37 179. Ultimately they would all have to be
38 unanimous. If they were going to convict Mr. Fox
39 they would have to be unanimous on this element.
40 If they were going to acquit Mr. Fox they could --
41 their doubts could arise at different places, I
42 suppose.

43 THE COURT: All right. Mr. Fox, do you have a
44 submission?

45 THE ACCUSED: I think all I can say on that is that it
46 would seem to me that, for example, element -- the
47 third element necessarily depends upon the finding

40
(Jury Out)
Proceedings

1 of the second element and so the jurors who might
2 not find that Ms. Capuano was harassed would
3 necessarily have to conclude the same on the third
4 element. I think -- I think that's going to lead
5 to some complications. Beyond that, though, I
6 would certainly defer to Mr. Lagemaat.

7 THE COURT: Yes.

8 MR. LAGEMAAT: I think, upon consider my friend's
9 comment, I would agree that findings of an
10 acquittal might arise at different stages of the
11 analysis on the -- on the different elements and
12 it would be appropriate to consider those elements
13 to see what the other jurors have to say about the
14 other elements, because we can't expect -- if it's
15 going to be an acquittal, for example, we can't
16 expect it all to be on the same element. It could
17 be but it doesn't necessarily have to be.

18 THE COURT: So how do I instruct the jury on this
19 point? I think I have to distinguish between what
20 is required in order to have a verdict and what is
21 required in the process of the analysis, the
22 staged analysis. I'm not quite sure how to do
23 that in clear, concise terms.

24 MR. LAGEMAAT: I think what might have been confusing,
25 and this might be a solution, 101 could say unless
26 you are all satisfied.

27 Could I take a shot at some wording, My Lady?

28 THE COURT: Yes.

29 MR. LAGEMAAT: The requirement for unanimous verdict is
30 set out in paragraph 179. The charge sets out a
31 suggested process for you to follow in reading
32 your verdict. Ultimately in order to convict Mr.
33 Fox you would all have to be satisfied beyond a
34 reasonable doubt of all elements of the offence.
35 However, if you all individually have doubts about
36 different elements of the offence you would have
37 to acquit Mr. Fox. Requirement is that you be
38 unanimous in your verdict.

39 THE COURT: That is repeating the -- that last part is
40 repeating the substance of 179.

41 MR. LAGEMAAT: Yes, the second to last sentence,
42 similarly you could all have a reasonable doubt
43 about Mr. Fox's guilt but not agree about why,
44 means they could come to a conclusion on different
45 elements.

46 THE COURT: I think, Mr. Myhre, that is a useful
47 starting point and Mr. Lagemaat, useful additions.

41
(Jury Out)
Proceedings

1 I'd like to map it out just a little bit more
2 before delivering it and so we will stand down
3 very briefly.

4 THE CLERK: Order in court. This court stands down.

5
6 (PROCEEDINGS ADJOURNED AT 5:26:06 P.M.)
7 (PROCEEDINGS RECONVENED AT 5:35:19 P.M.)

8
9 (JURY OUT)

10
11 THE COURT: This is what I'm proposing. I ask you all
12 to listen carefully and make any suggestions. And
13 I have decided not to refer to paragraph 179
14 because although it covers the ground, some of the
15 same ground, it also has a focus on evidence,
16 taking different views of the evidence, and we are
17 talking here about in response to a question about
18 elements of the offence. I think better to keep
19 it focused on that.

20 So here is what I propose. Your verdict,
21 whether of guilty or not guilty, must be
22 unanimous. To convict Mr. Fox of an offence you
23 must all be satisfied beyond a reasonable doubt of
24 all the elements of the offence.

25 To acquit Mr. Fox of an offence you must all
26 have a reasonable doubt about one or more of the
27 elements of the offence. You do not have to agree
28 about which element or elements the Crown has not
29 proven beyond a reasonable doubt.

30 The series of questions I gave you, each
31 mirroring an element of the offence, set out a
32 process -- sets out a process for you to follow in
33 your deliberations but at any stage in that
34 process you cannot reach a verdict unless your
35 verdict is unanimous.

36 I am concerned, Mr. Lagemaat, that your
37 answer to the question - which I've lost - could
38 lead to a hung jury very easily without --

39 MR. LAGEMAAT: I -- I agree.

40 THE COURT: All right.

41 MR. LAGEMAAT: That's why upon further thought I ...

42 THE COURT: So do you wish me to read again what I
43 said? And if that's the case, I wonder whether I
44 should give it to the jury in writing, or I could
45 read it twice to them.

46 All right. Your verdict, whether of guilty
47 or not guilty, must be unanimous. To convict Mr.

42
(Jury Out)
Proceedings

1 Fox of an offence you must all be satisfied beyond
2 a reasonable doubt of all the elements of the
3 offence. To acquit Mr. Fox of an offence you must
4 all have a reasonable doubt about one or more of
5 the elements of the offence. You do not have to
6 agree about which element or elements the Crown
7 has not proven beyond a reasonable doubt.

8 The series of questions I gave you, each
9 mirroring an element of the offence, sets out a
10 process for you to follow in your deliberations.
11 At any stage in that process you cannot reach a
12 verdict unless your verdict is unanimous. Or you
13 can only reach a verdict if your verdict is
14 unanimous.

15 MR. MYHRE: My Lady, my submission is that the first
16 paragraph suffices and the second paragraph maybe
17 reintroduces some of the same confusion I think
18 they might have had about whether we have to
19 rigidly stick to this process or whether it would
20 be useful for us to continue on.

21 THE COURT: The series of question -- what do you mean
22 by the second paragraph?

23 MR. MYHRE: Or maybe the last sentence.

24 THE COURT: At any stage in the process you can only
25 reach a verdict if it's unanimous?

26 MR. MYHRE: Yes, because that would then seem to imply
27 you have to stick to the process I have set out.

28 THE COURT: All right, so you suggest deleting that
29 last part.

30 MR. MYHRE: And I think the sentence before that too.

31 THE COURT: The series of questions I gave you --

32 MR. MYHRE: Yes.

33 THE COURT: -- each mirroring, you think?

34 MR. MYHRE: I think the first, what comes before that
35 suffices or should suffice.

36 THE COURT: Mr. Lagemaat?

37 MR. LAGEMAAT: I would agree.

38 THE COURT: Mr. Fox?

39 THE ACCUSED: I defer to Mr. Lagemaat.

40 THE COURT: All right. So the response would be quite
41 short. All right, and it would essentially say
42 the verdict has to be unanimous, convict, must all
43 be satisfied, all the elements; acquit, all have a
44 reasonable doubt, doesn't matter if it's all about
45 the same, if everyone has a doubt about the same
46 element. All right. Thank you.

47 Could we have the jury, please?

Charge to the Jury

1 THE SHERIFF: Yes, My Lady. The jury, My Lady.

2
3 (JURY IN AT 5:42:12 P.M.)
4

5 **CHARGE TO THE JURY, CONTINUING:**
6

7 THE COURT: Thank you, members of the jury, thank you
8 for the follow-up question, which does make much
9 more clear what you were asking. And your
10 question, I will read it aloud: "In paragraph
11 101, does the jury have to be unanimous in order
12 to proceed?"

13 And just to put that in context, paragraph 1
14 is dealing with the second element of the offence
15 in Count 1, the criminal harassment, the question
16 asked is did Mr. Fox's conduct harass Ms. Capuano,
17 and paragraph 1 says, "Unless you are satisfied
18 beyond a reasonable doubt that Mr. Fox's conduct
19 harassed Ms. Capuano, you must find Mr. Fox not
20 guilty of criminal harassment. Your deliberations
21 would be over."

22 Your question, to repeat, is, does the jury
23 have to be unanimous at that point in paragraph
24 1 -- 101, in order to proceed.

25 My answer is this. Your verdict, whether of
26 guilty or not guilty, must be unanimous. To
27 convict Mr. Fox of an offence, you must all be
28 satisfied beyond a reasonable doubt of all the
29 elements of the offence.

30 To acquit Mr. Fox of an offence, you must all
31 have a reasonable doubt about one or more of the
32 elements of the offence. You do not have to agree
33 about which element or elements the Crown has not
34 proven beyond a reasonable doubt.

35 I am going to say that again, because you do
36 not have anything to follow along with, and it is
37 often hard to take things in.

38 My answer is this. Your verdict, and I am
39 emphasizing the word "verdict", whether of guilty
40 or not guilty, must be unanimous. To convict Mr.
41 Fox of an offence, in other words to find him
42 guilty, you must all be satisfied beyond a
43 reasonable doubt of all the elements of the
44 offence. To acquit Mr. Fox of an offence, in
45 other words to find him not guilty, you must all
46 have a reasonable doubt about one or more of the
47 elements of the offence. You do not have to agree

Charge to the Jury

1 about which element or elements the Crown has not
2 proven beyond a reasonable doubt.

3 So I am going to ask you to retire to the
4 jury room, continue your deliberations. If the
5 response I have just given you does not answer
6 your question sufficiently, please give me a
7 further follow-up question and I will try to be
8 more specific and more helpful.

9 Thank you.

10

11 (JURY OUT AT 5:46:36 P.M.)

12

13 THE COURT: Any concerns, anything arising from that?

14 MR. MYHRE: No, My Lady.

15 MR. LAGEMAAT: My Lady, should we wait a few minutes to
16 see if there's an immediate question back or --

17 THE COURT: Might be a good idea. I think perhaps if
18 you wouldn't mind waiting five minutes and we'll
19 see and then at some point, probably 45 minutes
20 from now, they will going for dinner, but you will
21 be notified when that happens. Thank you.

22 THE CLERK: Order in court.

23

24 (PROCEEDINGS ADJOURNED AT 5:47:41 P.M. TO
25 AWAIT RETURN OF THE JURY)

26

27

28

29 Transcriber:

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31 G. Agema, portions not included in Charge to Jury

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I hereby certify the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability.



G. Agema
Court Transcriber