

Chapter 18.00

Transmission of a Threat to Kidnap or Injure

Introduction

The pattern instructions cover the offense codified in 18 U.S.C. § 875(c) with Instruction 18.01 Transmission of a Threat to Kidnap or Injure.

Title 18 U.S.C. § 875 also establishes other offenses under subsections (a), (b), and (d). Based on frequency of prosecution, the pattern instructions do not cover these offenses. The Committee recommends caution in adapting Instruction 18.01 to apply to these subsections.

18.01 Transmission of a Threat to Kidnap or Injure (18 U.S.C. § 875(c))

(1) Count ___ of the indictment charges the defendant with transmitting a communication containing a threat to kidnap or injure. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant knowingly transmitted a communication; and

(B) Second, the communication contained a threat to [kidnap] [injure] a particular person [a particular group of individuals]; and

(C) Third, the defendant transmitted the communication [for the purpose of making a threat] [knowing the communication would be viewed as a threat]; and

(D) Fourth, the communication was transmitted in interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The word “threat” means a statement that is a serious expression of intent to inflict bodily harm on a particular person [a particular group of individuals] that a reasonable observer would perceive to be an authentic threat. [To qualify as a threat, the statement need not be communicated to the targeted individual.]

(B) To transmit something in interstate commerce merely means to send it from a place in one state to a place in another state. [The government need not prove that the defendant knew that the communication would be transmitted across state lines.]

(3) [The government need not prove that the defendant [intended to carry out the threat or was capable of carrying out the threat at the time it was made] [made the targeted individual feel threatened or that the targeted individual knew about the threat against him.]]

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on count _____. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

In paragraph (1)(D) on transmission in commerce, the instruction presumes that the commerce involved is “interstate” commerce; the bracketed term “foreign” should be substituted if warranted by the facts. In that case, paragraph (2)(B) defining transmission in commerce should be altered as well, as discussed in the commentary below.

Paragraphs (1)(B) and (2)(A) presume the threat was directed to a particular “person”; the

bracketed term “a particular group of individuals” should be substituted if warranted by the facts.

The bracketed provisions stating what the government need not prove in paragraphs (2)(A), (2)(B) and (3) should be used only if relevant.

Brackets indicate options for the court.

Committee Commentary
(current as of October 1, 2021)

Title 18 U.S.C. § 875(c) provides:

(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

In paragraph (1), the elements are drawn from the statute and case law. In paragraph (1)(A), the requirement that the defendant transmitted a communication is based on the statute and *United States v. Howard*, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element transmission in commerce). The mens rea of “knowingly” in paragraph (A) is based on *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (“The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication.”); *United States v. Doggart*, 906 F.3d 506, 510 (6th Cir. 2018) (“Element one is [met because defendant] knowingly sent a message in interstate commerce”); and *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (stating that defendant must make a “knowing communication”), *abrogated in part by* *Elonis v. United States*, 135 S. Ct. 2001 (2015).

In paragraph (1)(B), the language requiring the communication to contain a threat to kidnap or injure is based on the statute. *See also* *United States v. Howard*, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element that the communication contained a true threat to murder a person). The reference to a particular person or a particular group of individuals is based on *Virginia v. Black*, 538 U.S. 343, 359 (2003) (stating that threats are not protected by the First Amendment “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”).

In paragraph (1)(C), the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis, supra* at 2012 (“There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.”) and *United States v. Howard*, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element a mental state of purpose or knowledge).

Paragraph (1)(D), which states the jurisdictional base to require that the communication was transmitted in interstate [foreign] commerce, is from § 875(c); *see also* *United States v. Howard*, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element transmission in interstate commerce). The instruction presumes that the commerce involved is “interstate” commerce; the bracketed term “foreign” should be substituted if warranted by the facts.

Paragraph (2)(A) defines “threat” as a statement that is a serious expression of intent to inflict bodily harm on a particular person or a particular group that a reasonable observer would perceive to be an authentic threat. This definition is based on case law defining a “true threat” that is not protected by the First Amendment. *See* *Virginia v. Black*, 538 U.S. 343, 359 (2003); *United States v. Watts*, 394 U.S. 705, 708 (1969). *See also* *United States v. Howard*, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction that jury should consider “whether in light of the context a reasonable person would believe that the statement was a serious expression of an intention to inflict bodily injury”); *United States v. Doggart*, 906 F.3d 506, 510 (6th Cir. 2018); *United States v. Houston*, 683 F. App’x 434, 438 (6th Cir. 2017) (unpublished), *citing* *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997), *abrogated in part by Elonis, supra* and *United States v. Jeffries*, 692 F.3d 473, 477-478 (6th Cir. 2012), *abrogated in part by Elonis, supra*. The specific words in the first part of the definition (“a serious expression of intent to inflict bodily harm on a particular person [a particular group of individuals]”) are drawn from *Virginia v. Black*, 538 U.S. at 359; the specific words in the second part of the definition (“that a reasonable observer would perceive to be an authentic threat”) are drawn from *Doggart*, 906 F.3d at 511 (“The relevant question is whether a reasonable observer would take [the] words to be an authentic threat.”). The pattern definition omits the word “true” as unnecessary. *Cf.* Tenth Circuit Pattern Instruction 2.37.1 INTERSTATE TRANSMISSION OF THREATENING COMMUNICATION – 18 U.S.C. § 875(c) (stating in Use Note that the word “true” is omitted to avoid jury confusion).

The bracketed provision at the end of paragraph (2)(A), that the statement need not be communicated to the targeted individual to qualify as a “threat,” is based on *Doggart*, 906 F.3d at 511 (“Section 875(c) does not require the defendant to communicate the threat to the victim.”).

Paragraph (2)(B) defines the jurisdictional base of transmission in interstate commerce as requiring that the threatening communication be sent from a place in one state to a place in another state. A panel of the Sixth Circuit quoted this instruction and held it was “proper” in *United States v. Houston*, 683 F. App’x 434, 436, 438 (6th Cir. 2017) (unpublished). *See also* *United States v. Houston*, 792 F.3d 663, 670 (6th Cir. 2015) (finding sufficient evidence that the threat traveled in interstate commerce where the defendant’s call from Tennessee to Tennessee was routed through a server in Louisiana). The bracketed provision in paragraph (2)(B) stating that the government need not prove that the defendant knew that the communication would be transmitted across state lines was also approved by the panel in *Houston*, 683 F. App’x at 438. The pattern instruction omits the word “actually” based on *Houston, id.* (“[W]e hold that the . . . jury instructions were proper because conviction under § 875(c) does not require any showing that [defendant] knew that his communications would be routed across state lines.”)

The definition of transmission in commerce in paragraph (2)(B) presumes, consistent with paragraph (1)(C), that the commerce involved is “interstate” commerce. Interstate commerce also includes commerce among territories, possessions, and the District of Columbia, *see* 18 U.S.C. § 10 (defining interstate and foreign commerce). If the case involves territories, possessions or the District of Columbia, the definition of interstate commerce may be modified. If the case involves foreign commerce, and paragraph (1)(C) is modified to use the term “foreign,” paragraph (2)(B) defining transmission in commerce may be similarly altered to provide: To transmit something in foreign commerce merely means to send it [from a place in the United States to a place in a foreign country][from a place in a foreign country to a place in the United States].

Paragraph (3) includes two bracketed items that the government need not prove based on *United States v. Howard*, 947 F.3d 936, 946-947 (6th Cir. 2020) (characterizing the instructions as “proper and certainly not in plain error”). The language in the pattern instruction was adjusted slightly for overall consistency.

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Court held that for conviction under § 875(c), the government must prove the defendant’s mental state that the communication contained a threat. *Elonis* at 2011 (“The mental state requirement must therefore apply to the fact that the communication contains a threat.”). In defining what mental state was sufficient, the Court noted that generally the mental state must involve “*awareness* of some wrongdoing.” *Elonis* at 2011, *quoting* *Staples v. U.S.*, 511 U.S. 600, 606-607 (1994). The Court then applied this conclusion by eliminating negligence as an option, *Elonis* at 2011, stating that purposely or knowingly were sufficient, and declining to address recklessness because it had not been briefed. *Elonis* at 2012. As noted above, this is the basis for the mental state of purposely or knowingly required in paragraph (1)(C).

Regarding the mental state of recklessness, in discussing mental states, the Court cited the definitions in Model Penal Code § 2.02. *Elonis* at 2011. The Model Penal Code definition of recklessly is:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

M.P.C. § 2.02(c). This mental state includes both subjective awareness (defendant must consciously disregard a risk) and objective risk (disregard of the risk is a gross deviation from the standard of conduct of a law-abiding person). In leaving the sufficiency of the reckless mental state unresolved, the *Elonis* opinion allows some use of objective factors in evaluating the sufficiency of the defendant’s mental state.

In *Elonis*, the Court did not consider any First Amendment limits on prosecutions of § 875(c), *see Elonis* at 2012 (“Given our disposition, it is not necessary to consider any First Amendment issues.”). Other Supreme Court cases indicate that only “true threats” can be prosecuted. *See United States v. Watts*, 394 U.S. 705, 708 (1969); *see also Virginia v. Black*, 538 U.S. 343, 359 (2003). Instruction 18.01 implements this limit by defining the term “threat” in paragraph (2)(A) to reflect those cases.

In the wake of *Elonis*, the Sixth Circuit or a panel of the court considered the § 875(c) offense in *United States v. Howard*, 947 F.3d 936 (6th Cir. 2020); *United States v. Doggart*, 906 F.3d 506 (6th Cir. 2018); *United States v. Houston*, 792 F.3d 663 (6th Cir. 2015) and *United States v. Houston*, 683 F. App’x 434 (6th Cir. 2017) (unpublished). In the unpublished *Houston* opinion, the panel relied on two cases decided before *Elonis*, *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997) and *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012). *See Houston*, 683 F. App’x at 438. In citing these cases, the *Houston* panel characterized them both as “abrogated in part by *Elonis*.” *Id.* In addition, in *Doggart*, 906 F.3d at 510 & 512, the court cited *Jeffries* with approval but abrogated an additional part of *Alkhabaz*. The pattern instruction relies on the parts of the *Alkhabaz* and *Jeffries* opinions that continue to be good law after *Elonis* and *Doggart*.

The pattern instruction does not offer a definition of “knowingly.” Other Sixth Circuit pattern instructions that offer a definition include Instructions 10.03A and 10.03B on Bank Fraud, both of which provide a definition of “knowingly” in paragraph (2)(C) as follows: “An act is done knowingly if it is done voluntarily and not because of mistake or some other innocent reason.” The authority for this definition is described in the Bank Fraud instructions’ commentaries. Another possible definition of knowingly is, “An act is done knowingly if it is done with awareness, understanding or consciousness.” *See Arthur Andersen v. United States*, 125 S. Ct. 2129, 2135-36 (2005) (“‘[K]nowledge’ and ‘knowingly’ are normally associated with awareness, understanding, or consciousness.”) (citations omitted) (construing term “knowingly” in 18 U.S.C. § 1512). The definition of knowingly from *Arthur Andersen* focusing on “awareness” is consistent with the *Elonis* Court’s emphasis on awareness, *see Elonis* at 2011 (discussing “the conventional requirement for criminal conduct—*awareness* of some wrongdoing.”) (citations omitted) (emphasis in *Elonis*).