

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. MCKENZIE BIG CROW, Defendant.</p>	<p>5:24-CR-50092-KES FINAL INSTRUCTIONS TO THE JURY</p>
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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 – SECOND DEGREE MURDER

For you to find McKenzie Big Crow guilty of the offense of Second Degree Murder, as charged in Count 1 of the Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

One, on or about August 20, 2023, the defendant, McKenzie Big Crow, unlawfully killed Ashton Provost;

Two, Big Crow did so with malice aforethought;

As used in these instructions, “malice aforethought” means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but “malice aforethought” does not necessarily imply any ill will, spite or hatred towards the individual killed.

In determining whether Ashton Provost was unlawfully killed with malice aforethought, you should consider all the evidence concerning the facts and circumstances preceding, surrounding and following the killing which tend to shed light upon the question of intent.

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the Defendant, and all the facts and circumstances in evidence which may aid in a determination of the Defendant’s intent. You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Three, the killing took place near Porcupine, in Indian country, in the District of South Dakota;

Counsel for the United States, counsel for Big Crow, and Big Crow have agreed or stipulated that that the alleged killing occurred near Porcupine, in Indian country, in the District of South Dakota.

The defendant has not, by entering into this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to present to the jury the fact that the

alleged killing occurred near Porcupine, in Indian country, in the District of South Dakota.

And four, Big Crow is an Indian.

Counsel for the United States, counsel for Big Crow, and Big Crow have agreed or stipulated that Big Crow is an Indian.

The defendant has not, by entering into this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to present to the jury the fact that Big Crow is an Indian.

For you to find Big Crow guilty of the offense charged in Count 1 of the Indictment, Second Degree Murder, the prosecution must prove all four of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the elements, then you must find Big Crow not guilty of Second Degree Murder.

If your verdict under this instruction is not guilty, or if, after all reasonable efforts, you are unable to reach a verdict, you should record that decision on the verdict form and go on to consider whether Big Crow is guilty of the crime of Involuntary Manslaughter under this instruction. The crime of Involuntary Manslaughter, a lesser-included offense of the crime of Second Degree Murder, has five elements which are:

One, Big Crow caused the death of Ashton Provost;

Two, Big Crow did so in the commission of a lawful act which might produce death, done without due caution and circumspection, to wit: Big Crow mishandled a loaded firearm, causing the bullet to be expelled from the firearm and killing Ashton Provost;

Three, Big Crow acted grossly negligently, in that he acted with a wanton or reckless disregard for human life, knowing that his conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject others;

A person acts in a grossly negligent manner when that person acts with a wanton or reckless disregard for human life. If the death in this case was due to ordinary negligence, the existence of gross negligence should not be found.

Ordinary negligence is defined as doing some act that a reasonably prudent person would not do or the failure to do something that a reasonably prudent person would do under the circumstances.

The Government must also prove beyond a reasonable doubt that the defendant had actual knowledge that his conduct was a threat to the lives of others, or had actual knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his acts might subject others.

In determining whether or not the defendant is guilty of Involuntary Manslaughter, you must measure his conduct against all of the circumstances existing at the place and time alleged in the indictment and determine from these whether what the defendant did was grossly negligent.

Four, the killing occurred near Porcupine, South Dakota, in Indian country;

Counsel for the United States, counsel for Big Crow, and Big Crow have agreed or stipulated that that the alleged killing occurred near Porcupine, in Indian country, in the District of South Dakota.

The defendant has not, by entering into this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to present to the jury the fact that the alleged killing occurred near Porcupine, in Indian country, in the District of South Dakota.

And five, the defendant is an Indian person.

Counsel for the United States, counsel for Big Crow, and Big Crow have agreed or stipulated that Big Crow is an Indian.

The defendant has not, by entering into this agreement or stipulation, admitted his guilt of the offense charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to present to the jury the fact that Big Crow is an Indian.

For you to find Big Crow guilty of Involuntary Manslaughter, the prosecution must prove all five of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the elements, then you must find Big Crow not guilty of Involuntary Manslaughter.

FINAL INSTRUCTION NO. 3 – DISCHARGE OF A FIREARM DURING A CRIME
OF VIOLENCE

For you to find McKenzie Big Crow guilty of the offense of Discharge of a Firearm During a Crime of Violence, as charged in Count 2 of the Indictment, the prosecution must prove the following two essential elements beyond a reasonable doubt:

One, on or about August 20, 2023, Big Crow committed a crime of violence, that is, Second Degree Murder;

You are instructed that Second Degree Murder, as charged in Count 1, is a crime of violence. If you reached a verdict of guilty on Second Degree Murder as charged in Count 1, only then may you consider this charge. If you did not reach a verdict of guilty on Count 1, you must return a verdict of not guilty on this charge. The lesser-included offense of Involuntary Manslaughter is not a crime of violence.

And two, Big Crow knowingly discharged a firearm in furtherance of that crime.

An act is done “knowingly” if the defendant is aware of the act and does not act, or fail to act, through ignorance, mistake, or accident. You may consider evidence of the defendant’s words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Knowledge is further defined above in Instruction No. 2.

For a firearm to be “discharged,” it must fire a projectile or bullet.

In determining whether a defendant discharged a firearm, you may consider all of the facts received in evidence in the case including the nature of the underlying crime of violence alleged, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime alleged, and the circumstances surrounding the presence of the firearm.

The phrase “in furtherance of” means furthering, advancing, or helping forward. This means the government must prove that the defendant possessed the firearm with the intent that it advance,

assist, or help commit the crime, but the government need not prove that the firearm actually did so.

For you to find Big Crow guilty of the offense charged in Count 2 of the Indictment, the prosecution must prove both of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the elements, then you must find Big Crow not guilty of Count 2 as charged in the Indictment.

FINAL INSTRUCTION NO. 4 – UNBORN VICTIMS OF VIOLENCE ACT

For you to find McKenzie Big Crow guilty of violating the Unborn Victims of Violence Act, as charged in Count 3 of the Indictment, the prosecution must prove the following two essential elements beyond a reasonable doubt:

One, on or about August 20, 2023, Big Crow did commit second-degree murder, as alleged in Count 1, or the lesser-included offense of Involuntary Manslaughter;

You must first consider the evidence pertaining to Count 1 of the Indictment and determine whether the government has proved Count 1 or the lesser included offense beyond a reasonable doubt. If you reach a verdict of guilty on Second Degree Murder, as charged in Count 1 or the lesser included offense, only then may you consider this charge. If your verdict was not guilty on Count 1 and not guilty on the lesser included offense, you must return a verdict of not guilty on this charge.

And two, as a result of Big Crow's commission of that offense, Big Crow caused the death of a child who was in utero at the time of the commission of the offense.

For you to find Big Crow guilty of the offense charged in Count 3 of the Indictment, the prosecution must prove both of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the elements, then you must find Big Crow not guilty of Count 3 as charged in the Indictment.

FINAL INSTRUCTION NO. 5 – POSSESSION OF AN UNREGISTERED
FIREARM

For you to find McKenzie Big Crow guilty of the offense Possession of an Unregistered Firearm, as charged in Count 4 of the Indictment, the prosecution must prove the following five essential elements beyond a reasonable doubt:

One, on or about on or about August 20, 2023, Big Crow knew that he had the firearm in his possession;

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

"The firearm" here refers to a weapon made from a rifle, more particularly described as an altered .22 Long Rifle caliber Savage Arms Model 62, semiautomatic rifle, bearing serial number 3801617.

Two, Big Crow knew the firearm was a short-barreled rifle;

Three, the firearm had a barrel length of less than 16 inches;

Four, the firearm was capable of operating as designed;

And five, the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.

For you to find Big Crow guilty of the offense charged in Count 4 of the Indictment, the prosecution must prove all five of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the elements, then you must find Big Crow not guilty of Count 4 of the Indictment.

FINAL INSTRUCTION NO. 6 – PRIOR ACTS

You have heard evidence of prior alleged assaults and firearm use by Big Crow. You may consider this evidence only if you (unanimously) find it is more likely true than not true that the defendant committed the acts. This is a lower standard than proof beyond a reasonable doubt. You decide that by considering all of the evidence relating to the alleged act, then deciding what evidence is more believable.

If you find that this evidence has not been proved, you must disregard it. If you find this evidence has been proved, then you may consider it only for the limited purpose of deciding whether Big Crow had the intent necessary to commit the crime charged in the indictment or whether Big Crow committed the acts he is on trial for by accident or mistake. You should give it the weight and value you believe it is entitled to receive.

Remember, even if you find that Big Crow may have committed similar acts in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. Big Crow is on trial only for the crimes charged, and you may consider the evidence of prior acts only on the issues stated above.

FINAL INSTRUCTION NO. 7 – IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight, if any, you think it deserves.

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

FINAL INSTRUCTION NO. 8 – PRESUMPTION OF INNOCENCE AND BURDEN
OF PROOF

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

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

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

- This burden never, ever shifts to a defendant to prove his innocence.
- This burden means that a defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if a defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.

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

FINAL INSTRUCTION NO. 9 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or a defendant, keeping in mind that a defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove a defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 10 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that a defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that a defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 11 – DUTY DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether a defendant is guilty or not guilty. If a defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider a defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against a defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom. Good luck with your deliberations.

Dated January 23, 2025.

BY THE COURT:

A handwritten signature in cursive script that reads "Karen E. Schreier". The signature is written in black ink and is positioned above a horizontal line.

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH DAKOTA
 WESTERN DIVISION

UNITED STATES OF AMERICA, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> MCKENZIE BIG CROW, <p style="text-align: center;">Defendant.</p>	5:24-CR-50092-KES VERDICT
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We, the Jury, unanimously find the defendant, **McKenzie Big Crow**, as follows:

SECOND DEGREE MURDER		VERDICT
Step 1:	On the charge of "Second Degree Murder" as explained in Final Instruction No. 2, please mark your verdict.	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty
	If you have found Big Crow guilty of this offense, please move to Step 3. If you have found Big Crow not guilty of this offense or if you are not able to reach a unanimous verdict, please move to Step 2.	

INVOLUNTARY MANSLAUGHTER		VERDICT
Step 2:	On the lesser-included offense, as described in Final Instruction No. 2, please mark your verdict. If you have found Big Crow not guilty of Second Degree Murder and Involuntary Manslaughter, you MUST also mark not	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty

	<p>guilty on Steps 3 and 4. Then proceed to Step 5.</p> <p>If you have found Big Crow not guilty of Second Degree Murder, but guilty of Involuntary Manslaughter, then you MUST mark not guilty on Step 3 and proceed to Step 4.</p>	
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DISCHARGE OF A FIREARM DURING A CRIME OF VIOLENCE		VERDICT
Step 3:	<p>On the charge of “Discharge of a Firearm During a Crime of Violence” as explained in Final Instruction No. 3, please mark your verdict.</p> <p>Please move to Step 4</p>	<p>____ Not Guilty</p> <p>____ Guilty</p>

UNBORN VICTIMS OF VIOLENCE ACT		VERDICT
Step 4:	<p>On the charge of “Unborn Victims of Violence Act” as explained in Final Instruction No. 4, please mark your verdict.</p> <p>Please move to Step 5</p>	<p>____ Not Guilty</p> <p>____ Guilty</p>

POSSESSION OF AN UNREGISTERED FIREARM		VERDICT
Step 5:	<p>On the charge of “Possession of an Unregistered Firearm” as explained in Final Instruction No. 5, please mark your verdict.</p> <p>Please sign and date the verdict form.</p>	<p>____ Not Guilty</p> <p>____ Guilty</p>

Please sign and date the Verdict Form.

_____ Date

_____ Foreperson