

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

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STATE OF WISCONSIN,

Plaintiff,

-vs-

INSTRUCTIONS TO THE JURY

Case No. 20 CF 983

**FILED**

KYLE H. RITTENHOUSE,

NOV 15 2021

Defendant.

REBECCA MATOSKA-MENTINK  
CLERK OF CIRCUIT COURT

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**OPENING INSTRUCTIONS**

Members of the jury:

The court will now instruct you upon the principles of law which you are to follow in considering the evidence and in reaching your verdict.

It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.

If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

## **INFORMATION NOT EVIDENCE**

An Information is nothing more than a written, formal accusation against a defendant charging the commission of one or more criminal acts. You are not to consider it as evidence against the defendant in any way. It does not raise any inference of guilt.

## **THE CHARGES**

The Information contains six counts of charged unlawful behavior against the defendant and to each, he has entered a plea of "Not Guilty," which is a demand that the state prove every element of each charge beyond a reasonable doubt.

## **PRIVILEGE: SELF-DEFENSE**

### **State's Burden of Proof**

Self-defense is an issue in this case. As to each of counts 1 through 5, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

### **General Principles of Self Defense**

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and

- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

### **Determining Whether Beliefs Were Reasonable**

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

### **No Duty to Retreat**

There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

### **Provocation**

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

However, if the attack which follows causes the person reasonably to believe that he is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death unless he reasonably

believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.

## **CRIMES REQUIRING INTENT**

Counts 4 and 5 require intent to kill.

### **Meaning of "Intent to Kill"**

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that his conduct was practically certain to cause the death of another human being.

### **When May Intent Exist?**

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

### **Deciding About Intent**

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### **Intent and Motive**

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something.

While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

**COUNT 1: FIRST DEGREE RECKLESS HOMICIDE — § 940.02(1)**

The first count of the Information charges that on or about Tuesday, August 25, 2020, in the City of Kenosha, Kenosha County, Wisconsin, the defendant recklessly caused the death of Joseph D. Rosenbaum, under circumstances which show utter disregard for human life, contrary to sec. 940.02(1), 939.50(3)(b), 939.63(1)(b) Wis. Stats.

**Statutory Definition of the Crime**

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

**State's Burden Of Proof**

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant caused the death of another.

"Cause" means that the defendant's act was a substantial factor in producing the death.

2. The defendant caused the death by criminally reckless conduct.

"Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm to another person;
  - and
  - the risk of death or great bodily harm was unreasonable and substantial; and
  - the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.
3. The circumstances of the defendant's conduct showed utter disregard for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.

#### **Jury's Decision**

If, as to the first count, you are satisfied beyond a reasonable doubt that all three elements of this crime have been proved, and that the defendant was not acting lawfully in self defense, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

#### **COUNTS 2 & 3      FIRST DEGREE RECKLESSLY ENDANGERING SAFETY - § 941.30(1)**

Counts 2 & 3 of the Information accuse the defendant of the crime of Recklessly Endangering Safety. Although the elements of each of these crimes are identical, the rules of self defense which apply to them are not.

The second count of the Information charges that on or about Tuesday, August 25, 2020, in the City of Kenosha, Kenosha County, Wisconsin, the defendant

recklessly endangered the safety of Richard McGinnis, under circumstances which show utter disregard for human life, contrary to sec. 941.30(1), 939.50(3)(f), 939.63(1)(b) Wis. Stats.

The third count of the Information charges that on or about Tuesday, August 25, 2020, in the City of Kenosha, Kenosha County, Wisconsin, the defendant recklessly endangered the safety of an unknown male, under circumstances which show utter disregard for human life, contrary to sec. 941.30(1), 939.50(3)(f), 939.63(1)(b) Wis. Stats.

### **Statutory Definition of the Crime**

First degree recklessly endangering safety, as defined in § 941.30(1) of the Criminal Code of Wisconsin, is committed by one who recklessly endangers the safety of another human being under circumstances that show utter disregard for human life.

### **State's Burden of Proof**

Before you may find the defendant guilty of first degree recklessly endangering safety, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

### **Elements of the Crime That the State Must Prove**

1. The defendant endangered the safety of another human being.
2. The defendant endangered the safety of another by criminally reckless conduct.

“Criminally reckless conduct” means:

- the conduct created a risk of death or great bodily harm to another person;
- and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

“Great bodily harm” means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.

3. The circumstances of the defendant’s conduct showed utter disregard for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.

#### **Special Rule of Self-Defense as To Richard McGinnis**

There is evidence in this case that the defendant was acting in self-defense as to Joseph Rosenbaum. The fact that the law may allow the defendant to use force in self-defense as to Joseph Rosenbaum does not necessarily mean that recklessly endangering the safety of Richard McGinnis was lawful. You must consider the law of self-defense in deciding whether the defendant's conduct as to Richard McGinnis was criminally reckless conduct which showed utter disregard for human life, but the defendant does not have a privilege of self-defense as to Richard McGinnis.

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,



- the defendant believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

### **Determining Whether Beliefs Were Reasonable**

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

You should consider the evidence relating to self-defense along with all the other evidence in the case in deciding whether the defendant's conduct created an unreasonable risk of death or great bodily harm to Richard McGinnis. If the defendant was acting lawfully in self-defense with respect to Joseph Rosenbaum, his conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.

You should consider the evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is - on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-

defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.

### **Jury's Decision**

If, as to each of these counts, you are satisfied beyond a reasonable doubt that each element of this crime have been proved, and that the defendant was not acting lawfully in self defense, you should find the defendant guilty of first degree reckless endangerment.

If you are not so satisfied, you must find the defendant not guilty.

### **COUNT 4: FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE: FIRST DEGREE RECKLESS- - HOMICIDE — § 940.01(2)(b); § 940.05; § 940.02(1)**

The fourth count of the Information charges that on or about Tuesday, August 25, 2020, in the City of Kenosha, Kenosha County, Wisconsin, the defendant cause the death of Anthony M. Huber, with intent to kill that person, contrary to sec. 940.01(1)(a), 939.50(3)(a), 939.63(1)(b) Wis. Stats.

### **Crimes To Consider**

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide or first degree reckless homicide which are less serious degrees of criminal homicide.

### **Intentional and Reckless Homicide**

The crimes referred to as first and second degree intentional homicide and first degree reckless homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates homicides into different types and degrees, there are certain elements which are common to each crime. Both intentional and reckless homicide require that the defendant caused the death of another. First and second degree intentional homicide require the State to prove the additional fact that the defendant acted with the intent to kill. First degree reckless homicide require that the defendant acted recklessly and that the circumstances of the defendant's conduct showed utter disregard for human life. It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

### **Self-Defense**

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his person by the other person. However, he may intentionally use only such force as he reasonably believes is necessary to prevent or terminate the interference. He may not intentionally use force which is intended or likely to cause death unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

As applied to this case, the effect of the law of self-defense is:

- The defendant is not guilty of any homicide offense if the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to himself..

- The defendant is guilty of second degree intentional homicide if the defendant caused the death of another with the intent to kill and actually believed the force used was necessary to prevent imminent death or great bodily harm to himself, but the belief or the amount of force used was unreasonable.
- The defendant is guilty of first degree intentional homicide if the defendant caused the death of another with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.
- The defendant is guilty of first degree reckless homicide if the defendant caused the death of the other by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life.
- You will be asked to consider the privilege of self-defense in deciding whether the elements of first degree reckless homicide are present.

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide or for first degree reckless homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The facts necessary to constitute each crime will now be defined for you in greater detail.

### **Statutory Definition of First Degree Intentional Homicide**

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.

### **State's Burden of Proof**

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

#### **Elements of First Degree Intentional Homicide That the State Must Prove**

1. The defendant caused the death of another.

"Cause" means that the defendant's act was a substantial factor in producing the death.

2. The defendant acted with the intent to kill the other.
3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.

#### **Actual Belief That The Force Used Was Necessary**

The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires the State to prove either:

- 1) that the defendant did not actually believe he was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to himself.

When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.

### **Jury's Decision**

If, as to the fourth count, you are satisfied beyond a reasonable doubt that the defendant caused the death of another with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

### **Make Every Reasonable Effort To Agree**

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

### **Second Degree Intentional Homicide**

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of Second Degree Intentional Homicide That the State Must Prove**

1. The defendant caused the death of another.
2. The defendant acted with the intent to kill another human being.
3. The defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself.

You have already been instructed on the definitions of "causing death" and "with intent to kill." The same definitions apply to your consideration of second degree intentional homicide.

**Reasonable Belief That The Force Used Was Necessary**

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires that the State prove any one of the following:

- 1) that a reasonable person in the circumstances of the defendant would not have believed that he was preventing or terminating an unlawful interference with his person; or
- 2) that a reasonable person in the circumstances of the defendant would not have believed he was in danger of imminent death or great bodily harm; or
- 3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to himself.

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

### **Jury Decision**

If, as to the fourth count, you are satisfied beyond a reasonable doubt that the defendant caused the death of another with the intent to kill and did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to himself, you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide, in violation of § 940.02 of the Criminal Code of Wisconsin, which is also a lesser included offense of first degree intentional homicide.

### **Make Every Reasonable Effort To Agree**

You should make every reasonable effort to agree unanimously on the charge of second degree intentional homicide before considering the offense of first degree reckless homicide. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of second degree intentional homicide, you should consider whether the defendant is guilty of first degree reckless homicide.

### **Statutory Definition of First Degree Reckless Homicide**



First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

### **State's Burden Of Proof**

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

#### **Elements of the Crime That the State Must Prove**

1. The defendant caused the death of another human being.

"Cause" means that the defendant's act was a substantial factor in producing the death.

2. The defendant caused the death by criminally reckless conduct.

"Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm to another person;
- and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act

lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.

3. The circumstances of the defendant's conduct showed utter disregard for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct. You should consider the evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.

Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.

### **Jury's Decision**

If, as to the fourth count, you are satisfied beyond a reasonable doubt that the defendant caused the death of another human being by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life and that the defendant's conduct was not privileged under the law of self defense, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

**COUNT 5: ATTEMPTED FIRST DEGREE INTENTIONAL HOMICIDE:  
SELF-DEFENSE: ATTEMPTED SECOND DEGREE INTENTIONAL  
HOMICIDE: RECKLESSLY ENDANGERING SAFETY— § 940.01(2)(b);  
§ 940.05; § 939.32**

The fifth count of the Information charges that on or about Tuesday, August 25, 2020, in the City of Kenosha, Kenosha County, Wisconsin, the defendant attempted to cause the death of Gaige P. Grosskreutz, with intent to kill that person, contrary to sec. 940.01(1)(a), 939.50(3)(a), 939.32, 939.63(1)(b) Wis. Stats.

**Crimes To Consider**

The defendant in this case is charged with attempted first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of attempted first degree intentional homicide, you must consider whether or not the defendant is guilty of attempted second degree intentional homicide or first degree endangering safety, which are less serious degrees of criminal homicide.

**Intentional Homicide**

The crimes referred to as attempted first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of attempted homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates attempted intentional homicides into two degrees, there are certain elements which are common to each crime. Both attempted first and second degree intentional homicide require that:

- the defendant intended to kill another person; and
- the defendant did acts toward the commission of that crime which indicate unequivocally, under all the circumstances, that he had formed that intent and would

have caused the death of the other except for the intervention of another person or some other extraneous factor.

It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

### **Self-Defense**

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another under the following circumstances:

- force is used for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his person by the other person; and,
- the person uses only the amount of force that he reasonably believes is necessary to prevent or terminate the interference; and,
- the person may not intentionally use force which is intended or likely to cause death unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

If you find that the elements of attempted first or second degree intentional homicide have been proved in this case, the effect of the law of self-defense is as follows:

- The defendant is not guilty of either attempted first or second degree intentional homicide if the defendant:
  - (1) reasonably believed that he was preventing or terminating an unlawful interference with his person, and
  - (2) reasonably believed the force used was necessary to prevent imminent death or great bodily harm to himself.

- The defendant is guilty of attempted second degree intentional homicide if the defendant actually believed the force used was necessary to prevent imminent death or great bodily harm to himself, but the belief or the amount of force used was unreasonable.
- The defendant is guilty of attempted first degree intentional homicide if the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to him.

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has proved the necessary facts to justify a finding of guilty for attempted first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The elements of each crime will now be defined for you in greater detail.

### **Attempted First Degree Intentional Homicide**

Before you may find the defendant guilty of attempted first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

### **Elements of Attempted First Degree Intentional Homicide**

#### **That the State Must Prove**

1. The defendant intended to kill another human being.

2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that he had formed that intent and would have caused the death of the other except for the intervention of another person or some other extraneous factor.

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

"Another person" means anyone but the defendant and may include the intended victim.

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.

#### **Actual Belief That The Force Used Was Necessary**

The third element of attempted first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires the State to prove either:

- 1) that the defendant did not actually believe he was in imminent danger of death or great bodily harm; or
- 2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to himself.

When attempted first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of attempted second degree intentional homicide.

### **Jury's Decision**

If, as to the fifth count, you are satisfied beyond a reasonable doubt that the defendant intended to kill another human being, and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed the other except for the intervention of another person or some other extraneous factor, and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself, you should find the defendant guilty of attempted first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of attempted first degree intentional homicide, and you must consider whether the defendant is guilty of attempted second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of attempted first degree intentional homicide.

### **Make Every Reasonable Effort To Agree**

You should make every reasonable effort to agree unanimously on the charge of attempted first degree intentional homicide before considering the offense of attempted second degree intentional homicide. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of attempted first degree intentional homicide, you should consider whether the defendant is guilty of attempted second degree intentional homicide.

### **Attempted Second Degree Intentional Homicide**

Before you may find the defendant guilty of attempted second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

### **Elements of Attempted Second Degree Intentional Homicide**

### **That the State Must Prove**

1. The defendant intended to kill another.
2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that he had formed that intent and would have caused the death of the other except for the intervention of another person or some other extraneous factor.
3. The defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself.

You have already been instructed on the definitions of “intent to kill,” “unequivocally,” “another person,” and “extraneous factor.” The same definitions apply to your consideration of attempted second degree intentional homicide.

### **Reasonable Belief That The Force Used Was Necessary**

The third element of attempted second degree intentional homicide requires that the defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires that the State prove any one of the following:

- 1) that a reasonable person in the circumstances of the defendant would not have believed that he was preventing or terminating an unlawful interference with his person; or
- 2) that a reasonable person in the circumstances of the defendant would not have believed he was in danger of imminent death or great bodily harm; or



3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to himself.

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

### **Jury's Decision**

If, as to the fifth count, you are satisfied beyond a reasonable doubt that the defendant intended to kill and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed another except for the intervention of another person or some other extraneous factor, and that the defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to himself, you should find the defendant guilty of attempted second degree intentional homicide.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of attempted first or second degree intentional homicide, you must consider whether the defendant is guilty of the lesser included crime of first degree recklessly endangering safety, as defined in § 940.30 of the Criminal Code of Wisconsin, which is a lesser included offense of attempted first and second degree intentional homicide.

### **Statutory Definition of the Crime**

First degree recklessly endangering safety, as defined in § 941.30(1) of the Criminal Code of Wisconsin, is committed by one who recklessly endangers the safety of another human being under circumstances that show utter disregard for human life.

### **State's Burden of Proof**

Before you may find the defendant guilty of first degree recklessly endangering safety, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

#### **Elements of the Crime That the State Must Prove**

1. The defendant endangered the safety of another human being.
2. The defendant endangered the safety of another by criminally reckless conduct.

“Criminally reckless conduct” means:

- the conduct created a risk of death or great bodily harm to another person;
- and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

“Great bodily harm” means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.

3. The circumstances of the defendant's conduct showed utter disregard for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant

was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.

If you are satisfied beyond a reasonable doubt that each element of first degree reckless endangerment has been proven and that the defendant was not acting lawfully in self defense, you should find the defendant guilty of first degree reckless endangerment, as submitted.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

**COUNTS 1 THROUGH 5 QUESTION: USING OR POSSESSING A DANGEROUS WEAPON — § 939.63**

The Information alleges not only that the defendant committed the crimes charged in counts 1 through 5, but also that the defendant did so while using a dangerous weapon.

If you find the defendant guilty on any of these counts, you must answer the following questions:

"Did the defendant commit the crime while using a dangerous weapon?"

"Dangerous weapon" means any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant committed the crime while using a dangerous weapon.

If you are not so satisfied, you must answer the question "no."

## **BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE**

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

### **Presumption of Innocence**

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

### **State's Burden of Proof**

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

### **Reasonable Hypothesis**

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you must do so and return a verdict of not guilty.

### **Meaning of Reasonable Doubt**

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a

reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

Examine the evidence and search for the truth, giving the defendant the benefit of every reasonable doubt.

## **EVIDENCE DEFINED**

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.

Second, the exhibits the court has received, whether or not an exhibit goes to the jury room.

Third, any facts to which the lawyers have agreed or stipulated or which the court has directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial.

## **IMPROPER QUESTIONS**

Disregard entirely any question that the court did not allow to be answered. Do not guess at what the witness' answer might have been. If the question itself suggested that certain information might be true, ignore the suggestion and do not consider it as evidence.

## **OBJECTIONS OF COUNSEL; EVIDENCE RECEIVED OVER OBJECTION**

Attorneys for each side have the right and the duty to object to what they consider are improper questions asked of witnesses and to the admission of other evidence which they believe

is not properly admissible. You should not draw any conclusions from the fact an objection was made.

By allowing testimony or other evidence to be received over the objection of counsel, the court is not indicating any opinion about the evidence. You jurors are the judges of the credibility of the witnesses and the weight of the evidence.

### **CHARGES DISPOSED OF DURING TRIAL**

At the beginning of the trial, I described the charges against the defendant. Count 7, charging a Curfew violation,, has been disposed of and is no longer part of this case. The other counts remain. Do not guess about or concern yourselves with the reasons for this disposition. It must not affect your consideration of the charges that remain.

Do not consider evidence that related only to the count that has been disposed of.

### **STRICKEN TESTIMONY**

During the trial, the court has ordered certain testimony to be stricken. Disregard all stricken testimony.

### **EXHIBITS**

An exhibit becomes evidence only when received by the court. An exhibit marked for identification and not received is not evidence. An exhibit received is evidence, whether or not it goes to the jury room.

### **REMARKS OF COUNSEL**

Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion.

### **CLOSING ARGUMENTS OF COUNSEL**

Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence, and decide upon your verdict according to the evidence, under the instructions given you by the court.

### **JUDICIALLY NOTICED FACTS**

The court has taken judicial notice of certain facts and you are directed to accept them as true.

### **STATEMENTS ATTRIBUTED TO THE DEFENDANT**

The State has introduced evidence of statements which it claim were made by the defendant. It is for you to determine how much weight, if any, to give to each statement.

In evaluating each statement, you must determine three things:

- whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
- whether the statement was accurately restated here at trial.
- whether the statement or any part of it ought to be believed.

You should consider the facts and circumstances surrounding the making of each statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

## **WEIGHT OF EVIDENCE**

The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses.

## **JUROR'S KNOWLEDGE**

In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.

## **EXPERT OPINION TESTIMONY: GENERAL**

Ordinarily, a witness may testify only about facts. However, a witness with specialized knowledge in a particular field may give an opinion in that field.

In determining the weight to give to this opinion, you should consider:

- the qualifications and credibility of the witness;
- the facts upon which the opinion is based; and
- the reasons given for the opinion.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion.



## CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime. Use the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

### **IMPEACHMENT OF WITNESS: PRIOR CONVICTION**

Evidence has been received that two of the witnesses in this trial have been convicted of crime. This evidence was received solely because it bears upon the witness's character for truthfulness. It must not be used for any other purpose.

### **CLOSING INSTRUCTION**

Now, members of the jury, the time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors, selected for this most important duty. You will not be swayed by sympathy, prejudice, passion or political beliefs. You will disregard any opinions which you may have regarding what you believe to be my opinions on the guilt or innocence of the defendant. You will disregard the claims or opinions of any other person or media or social networking site. You will pay no heed to the opinions of anyone, even the President of the United States or of the President before him. The Founders of Our Country gave you, and you alone, the power, and the duty, to decide this case based solely on the evidence presented in this court. You will fearlessly keep faith with those who have entrusted to you the fair rendition of justice and the protection of our freedom. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and, as upright Americans, render just and true verdicts.

You are to decide only whether the defendant is guilty or not guilty of the offenses charged. Any consequences of your verdict are matters for the court alone to decide and must not affect your deliberations.

**VERDICTS SUBMITTED: SEPARATE VERDICT ON EACH COUNT REQUIRED**

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the Information. Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

**UNANIMOUS VERDICT AND SELECTION OF PRESIDING JUROR**

This is a criminal, not a civil, case; therefore, before the jury may return a verdict which may legally be received, the verdict must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict.

When you retire to the jury room, select one of your members to preside over your deliberations. The presiding juror's vote is entitled to no greater weight than the vote of any other juror.

If you need to communicate with the court while you are deliberating, send a note through the bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you communicate with the court only by a written note. If you have questions, the court will talk with the attorneys before answering so it may take some time. You should continue your deliberations while you wait for an answer. The court will answer any questions in writing or orally here in open court.

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside.

After you have reached a verdict:

- The presiding juror will notify the bailiff that a verdict has been reached.
- Everyone will return to the courtroom.
- The verdict will be read into the record in open court.
- The court may ask each of you if you agree with the verdict.

Final