No. _____

IN THE
Supreme Court of the United States

COLTON BAGOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX

JASON J. TUPMAN
Federal Public Defender
DAVID S. BARARI
Assistant Federal Public Defender,
Counsel of Record
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
655 Omaha Street, Suite 100
Rapid City, SD 57701
David_Barari@fd.org
605-343-5110

Attorneys for Petitioner

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United States Court of Appeals
For the Eighth Circuit

No. 23-2689

United States of America

Plaintiff - Appellee

v.

Colton Bagola

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota

Submitted: June 13, 2024
Filed: July 19, 2024

Before LOKEN, ERICKSON, and GRASZ, Circuit Judges.

GRASZ, Circuit Judge.

Colton Bagola shot Sloane Bull Bear point-blank in the back of the head. A jury later convicted him of first-degree murder and discharge of a firearm during a

crime of violence. The district court[1] sentenced Bagola to life imprisonment. On appeal, Bagola raises various challenges to his conviction. We affirm.

I.

On December 16, 2019, several people, including Bagola, gathered at the home of William Reddy in Pine Ridge, South Dakota. Also present were Casandra Goings, Ben Freeman, Jesse Buckman, Thelma Pond, and Sloane Bull Bear.

At some point during the evening, Buckman went to the bathroom to inject drugs. After he returned to the living room, Buckman saw Bagola holding a gun behind his back. Seeing this, Buckman decided to leave. But before he could get to the door, Reddy, Goings, and Bull Bear also decided to leave to buy cigarettes and shoot guns. As Goings was leaving the house, Bull Bear was behind her, and Bagola was behind Bull Bear. Reddy and Buckman testified that Bagola then moved directly behind Bull Bear and shot him in the back of the head, from approximately one inch away.

Bagola, Freeman, and Buckman ran from the house. Reddy searched Bull Bear's body for car keys and fled in Bull Bear's vehicle with Pond and Goings. Hours later, at approximately 3:30 a.m., Goings called 911. Bull Bear ultimately succumbed to his injuries, and law enforcement found his body in the exterior doorway.

Bagola was indicted for first-degree murder in violation of 18 U.S.C. §§ 1111(a) and 1153, the discharge of a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii), and for tampering with evidence in violation of 18 U.S.C. § 1512(c)(1). A grand jury returned a Second Superseding Indictment against Bagola, adding a count of conspiracy to distribute a

[1]The Honorable Jeffrey L. Viken, United States District Judge for the District of South Dakota.

controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 846. After the district court severed the conspiracy count, a jury trial was held in October 2022. The district court granted Bagola's motion for judgment of acquittal on the tampering count, but the jury convicted Bagola of first-degree murder and discharge of a firearm during the commission of a crime of violence.

After the verdict, Bagola filed a motion for judgment of acquittal, which the district court denied. And on July 6, 2023, the district court sentenced Bagola to life imprisonment. Bagola subsequently filed this appeal.

II.

On appeal, Bagola argues: (1) the district court admitted unreliable expert testimony, (2) the jury instructions did not adequately explain the "Indian" status element, (3) there was insufficient evidence to support the guilty verdict on premeditated first-degree murder, and (4) premeditated first-degree murder is not a crime of violence. We disagree and affirm the district court.

A.

Bagola claims the district court improperly admitted certain expert testimony. "The admission or exclusion of expert testimony is reviewed for abuse of discretion." *United States v. Merrell*, 842 F.3d 577, 582 (8th Cir. 2016). When considering expert testimony, a district court must ensure that "all scientific testimony is both *reliable* and *relevant*." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8th Cir. 2006) (emphasis added). To satisfy the reliability requirement, the party offering expert testimony "must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid." *Id*. at 757–58. To satisfy the relevance requirement, the proponent must show that the expert's reasoning or methodology was applied properly to the facts at issue. *Id*. at 758.

Bagola argues Bureau of Alcohol, Tobacco, Firearms and Explosives Special Agent Brent Fair's methodology was unreliable. Specifically, Agent Fair testified that a firearm depicted in a photograph from Bagola's Facebook page could fire the bullet that was found in Bull Bear's head. Bagola claims Agent Fair had no scientific or technical information about this specific firearm, however, because neither Agent Fair nor the ATF Library had access to an exemplar of the weapon. Since the ATF did not have a copy of the firearm, Bagola claims Fair could not adequately render an expert opinion. Whether or not Bagola's contentions hold water, we need not resolve. Any alleged error was harmless.

Under Federal Rule of Criminal Procedure 52(a), "[a]n evidentiary error is harmless when . . . [a court] determine[s] that the substantial rights of the defendant were unaffected, and that the error did not influence or had only a slight influence on the verdict." *United States v. Farish*, 535 F.3d 815, 820 (8th Cir. 2008) (quotation omitted). Even without Agent Fair's testimony, ample evidence connected Bagola to the shooting. First, there was evidence linking the Facebook firearm with Bull Bear's death. Reddy described the firearm used to murder Bull Bear as a "silver revolver with a black handle . . . [that had] black tape on the handle." This description matches the gun depicted in Bagola's Facebook post. Second, several eyewitnesses testified Bagola was the shooter. Reddy, for example, testified he saw Bagola's "arm in the air . . . with the pistol . . . above [Bull Bear's] head." And Buckman testified he saw Bagola shoot Bull Bear from approximately one inch away. Moreover, the defense was able to cross examine Agent Fair extensively about the limits of his firearm identification, including that he had not observed a model like that depicted in the Facebook photo. Agent Fair's testimony was a small part of the evidence that helped to identify Bagola as the shooter, but it was far from the only evidence, and certainly not the most crucial.

B.

Bagola also takes issue with the district court's handling of the "Indian" status element of his first-degree murder charge. Because Bagola did not object to this

below, plain error review applies. *United States v. Refert*, 519 F.3d 752, 756 (8th Cir. 2008). To establish plain error, Bagola must show "(1) the district court committed an error; (2) the error is plain; and (3) the error affects his substantial rights." *United States v. Smith*, 4 F.4th 679, 686 (8th Cir. 2021). "Assuming the first three prongs are met, '[courts] will exercise . . . discretion to correct such an error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020)). Bagola "bears the burden of establishing all four prongs of plain-error review." *Id.*

To convict Bagola of first-degree murder, the government had to prove: (1) Bagola unlawfully killed Bull Bear; (2) he acted with malice aforethought; (3) the killing was premeditated; and (4) the killing occurred in Indian country and Bagola is an Indian. *See* 18 U.S.C. §§ 1111 and 1153. The generally accepted test for determining one's "Indian" status requires the government prove "the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both." *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009).

Because Bagola's "Indian" status remained an element to be determined by the jury, the district court was required to instruct the jury on how to establish whether Bagola is an Indian person. *See Stymiest*, 581 F.3d at 763–64. The district court, however, failed to include language explaining how this determination should be made or what factors should be considered. Although "there is no single correct way to instruct a jury on this issue," this was error. *Id.* at 764; Model Crim. Jury Instr. 8th Cir. 6.18.1153 (2021). But the error did not affect Bagola's substantial rights. "[A]n instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999). An "error [does] not warrant correction in light of . . . 'overwhelming' and 'uncontroverted' evidence supporting [the omitted element]." *Id*. (quoting *Johnson v. United States*, 520 U.S. 461, 470 (1997)).

Here, there was uncontroverted evidence supporting the omitted "Indian" status element. For example, the government offered testimony from the director of enrollment for the Oglala Sioux Tribe. The director testified there are two prerequisites for tribal membership. First, a person must have at least one parent who is already enrolled in the tribe. Second, the candidate must submit various documents proving such is true—a family tree, a notarized application, and a state-certified birth certificate. Only after these requirements are met does the tribe acknowledge membership by issuing a Certificate Degree of Indian Blood. During the director's testimony, the government presented a certificate of tribal enrollment showing Bagola was an enrolled member of the Oglala Sioux Tribe (the director of enrollment affirmed the certificate's accuracy). Thus, by presenting this certificate, the government met both elements outlined in *Stymiest*—Bagola would not have a certificate unless he had "some Indian blood" and was "recognized as an Indian by the [Oglala Sioux Tribe]." *See Stymiest*, 581 F.3d at 762. Thus, there was ample evidence supporting the omitted "Indian" status element and we will not reverse under the plain error standard.

C.

Bagola also maintains there was insufficient evidence to support his premeditated first-degree murder conviction. "We review the sufficiency of the evidence supporting a conviction de novo, 'viewing the evidence most favorably to the verdict, resolving conflicts in favor of the verdict, and giving it the benefit of all reasonable inferences.'" *United States v. Hensley*, 982 F.3d 1147, 1154 (8th Cir. 2020) (quoting *United States v. Riepe*, 858 F.3d 552, 558–59 (8th Cir. 2017)). "The verdict must be upheld 'if there is an interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt.'" *Id.* (some internal quotation marks omitted) (quoting *Riepe*, 858 F.3d at 559).

Bagola argues there was insufficient evidence to support premeditation. "An offender acts with premeditation when his conduct is the result of planning or deliberation." *United States v. Nichols*, 76 F.4th 1046, 1059 (8th Cir. 2023). And "proof of premeditation [does] not require the government to show that the defendant

deliberated for any particular length of time." *United States v. Slader*, 791 F.2d 655, 657 (8th Cir. 1986). "[S]wift but deliberate actions before shooting [can] demonstrate that [a defendant] acted with the requisite premeditation." *United States v. Greer*, 57 F.4th 626, 629 (8th Cir. 2023) (citation omitted).

The facts of this case sufficiently show premeditation. Bagola brought a loaded firearm into Reddy's house and attempted to conceal it. Immediately before the shooting, Buckman saw Bagola with a gun in his hand, hidden behind his back. Then, when Bull Bear got up to leave, Bagola was "[r]ight behind him[,]" and Reddy saw "Colton's arm in the air" with the pistol behind "[Bull Bear's] head." These are "swift but deliberate actions" that show premeditation.

Moreover, earlier in the day, Bagola made several statements indicating his desire to kill somebody. He went to Reddy's home on the morning of the shooting. While there, he took out a silver pistol, put it on the table with the barrel pointed toward Reddy and said he needed to take Reddy's soul.[2] If that was not a possibility, "he needed to kill . . . either Ben or Skud or someone else." That same evening, Bagola went to his cousin Devon Janis's trailer and told Janis there were "[b]ig things coming" and he was "doing this for the family."[3] These facts show premeditation. Thus, the evidence was sufficient for a reasonable jury to convict Bagola.

[2]Although the parties disagree on the meaning of Bagola's comment, we view the evidence in the light most favorable to the verdict and give it the benefit of all reasonable inferences. *United States v. Hensley*, 982 F.3d 1147, 1154 (8th Cir. 2020). Combining the fact that Bagola pointed a gun at Reddy with the testimony that Bagola wanted to kill various people convinces us there was sufficient evidence for a jury to conclude Bagola was threatening to kill someone.

[3]Even though these words could be given more than one interpretation, we must view the evidence in the light most favorable to the verdict. *Hensley*, 982 F.3d at 1154.

D.

Lastly, Bagola argues first-degree murder is not a "crime of violence" under 18 U.S.C. § 924(c). We review de novo whether first-degree murder qualifies as a "crime of violence." *See Janis v. United States*, 73 F.4th 628, 629 (8th Cir. 2023).

Under 18 U.S.C. § 924(c)(3)(A), the government had to prove the underlying alleged crime of premeditated first-degree murder was a "crime of violence." To make this determination, courts usually apply the categorical approach, which compares the elements of first-degree murder with the "crime of violence" definition. *United States v. Taylor*, 596 U.S. 845, 850 (2022). Section 924(c)(3)(A) defines "crime of violence" as "a felony" that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ." The only relevant inquiry "is whether [first-degree murder] always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Taylor*, 596 U.S. at 850.

This case is controlled by our decision in *Janis*. There, we ruled that "[h]omicides committed with malice aforethought involve the 'use of force against the person or property of another[.]'" *Janis*, 73 F.4th at 636 (quoting 18 U.S.C. § 924(c)(3)(A)). *Janis* concluded, "[m]alice aforethought, murder's defining characteristic, encapsulates the crime's violent nature" and renders second-degree murder a crime of violence. *Id.* That conclusion controls here. First-degree murder, like its second-degree counterpart, also requires malice aforethought and "always involves 'consciously directed' force and thus constitutes a 'crime of violence' under § 924(c)'s force clause." *Id*. at 631 (quoting *Borden v. United States*, 593 U.S. 420, 431 (2021) (plurality opinion)). Federal premeditated first-degree murder is categorically a "crime of violence."

III.

We affirm Bagola's convictions.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. COLTON BAGOLA, Defendant.	CR. 20-50012-01-JLV ORDER

INTRODUCTION

Following a five-day jury trial, defendant Colton Bagola was convicted of count I: first degree murder in violation of 18 U.S.C. §§ 1111(a) and 1153; and count II: discharge of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(l)(A)(iii). (Docket 209). Defendant timely filed a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(c)(1). (Docket 215). Briefing is complete. (Dockets 225 & 234). For the reasons stated below, defendant's motion is denied.

ANALYSIS

MOTION FOR JUDGMENT OF ACQUITTAL

Fed. R. Crim. P. 29(c) gives the district court authority to set aside a guilty verdict and enter a judgment of acquittal upon a defendant's post-trial motion. "A district court has very limited latitude in ruling upon a motion for judgment of acquittal." United States v. Baker, 367 F.3d 790, 797 (8th Cir. 2004) (citation and internal quotation marks omitted). "A motion for judgment

of acquittal should be granted only if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." United States v. Boesen, 491 F.3d 852, 855 (8th Cir. 2007) (citations and internal quotation marks omitted). This standard is very strict and the court should not overturn a jury verdict lightly. Id.

The district court must enter an acquittal if the evidence presented at trial is insufficient to sustain a conviction. Id. Evidence may be direct or circumstantial. Baker, 367 F.3d at 798. "Evidence supporting a conviction is sufficient if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Boesen, 491 F.3d at 856 (citation and internal quotation marks omitted). The district court must not weigh the evidence or assess the credibility of witnesses. Baker, 367 F.3d at 797; see also Boesen, 491 F.3d at 857 ("In ruling on a motion for a judgment of acquittal, the role of the court is not to weigh the evidence . . . but rather to determine whether the Government has presented evidence on each element to support a jury verdict.") (citations and internal quotation marks omitted; ellipses in original).

The district court "views the entire record in the light most favorable to the government, resolves all evidentiary conflicts accordingly, and accepts all reasonable inferences supporting the jury's verdict." Boesen, 491 F.3d at 856. In short, the court upholds the jury verdict if "drawing all reasonable inferences in favor of the verdict, there is an interpretation of the evidence that

would allow a reasonable minded jury to find the defendant[] guilty beyond a reasonable doubt." Id. (citations and internal quotation marks omitted; alteration in original). "Importantly, it is not necessary for the evidence before the jury to rule out every reasonable hypothesis of innocence. It is enough if the entire body of evidence be sufficient to convince the fact-finder beyond a reasonable doubt of the defendant's guilt." United States v. Wright, 739 F.3d 1160, 1167 (8th Cir. 2014) (internal citation, quotation marks and brackets omitted).

THE TRIAL EVIDENCE

Accepting the directive of Boesen, 491 F.3d at 856, and viewing the evidence "in the light most favorable to the government . . . and accept[ing] all reasonable inferences supporting the jury's verdict," the following evidence was presented at trial.

On the morning of December 16, 2019, Colton Bagola went to Billy Reddy's home. (Docket 217-1 at p. 166:15-25).[1] Mr. Bagola pulled out a gun, placed it on the table with the barrel pointed at Mr. Reddy, and said he needed to take a soul, Mr. Reddy's soul. Id. at p. 166:15-21. According to Mr. Reddy, "[t]aking a soul" was a reference to using drugs intravenously for the first time.

[1]Because the transcript is filed as a separate document for each day of trial, the court will refer to the docket number, the page of the entry and the lines of testimony, e.g., Docket ** at p. *:**-**, as opposed to the pages of the transcript itself.

Id. at p. 167:1-5. Mr. Reddy testified Mr. Bagola also needed to kill "either me, Ben or Skud[2] . . . he didn't know who the fourth person." (Docket 217-1 at p. 205:12-14). After that, Mr. Bagola said "I think I found out who it is . . . and he said it was himself." Id. at p. 205:14-15. Mr. Bagola announced "he was going to go down to his house and sit in his car and shoot himself." Id. at 205:17-18. Mr. Reddy offered Mr. Bagola housing, money or drugs to help him out. Id. at p. 205:20-21.

On the evening of December 16, Mr. Bagola appeared at the trailer of his cousin Devon Janis. (Docket 217 at p. 250:11-251:21). Mr. Janis testified Mr. Bagola was high on methamphetamine because he was "fast talking, just skittish." Id. at p. 257:5-10. They smoked a couple of cigarettes together. Id. at p. 253:15-19. During this time, Mr. Bagola told Mr. Janis "[b]ig things coming . . . [and] he's doing this for the family." Id. at p. 254:10-13. Mr. Bagola indicated he was going to the Reddy's place later that evening. Id. at p. 254:23-255:3.

Also during in the evening hours of December 16, 2019, Sloane Bull Bear drove to Star Village in Rapid City to pick up Cassandra Goings.[3] Id. at pp. 158:19-159:7. Mr. Bull Bear and Ms. Goings got high smoking

[2]Dale Martin's nickname is "Skud." (Docket 217-2 at p. 105:13-17).

[3]Ms. Goings met Sloane Bull Bear a couple of weeks earlier. (Docket 217 at p. 157:11-13).

methamphetamine. Id. at p. 159:23-25. Enroute to the Pine Ridge Reservation, Mr. Bull Bear showed Ms. Goings a ball of methamphetamine weighing about three to four grams. Id. at p. 160:3-18. They went to Billy Reddy's home in North Ridge.[4] Id. at p. 166:3-11.

At Mr. Reddy's residence, Ms. Goings observed methamphetamine on the table around which several people were seated. Id. at p. 166:18-25. Those seated around the table were Ben Freeman, Mr. Bull Bear and Mr. Reddy. Id. at p. 167:20-168:7. She sat down with them. Id. at p. 167:12-15. Ms. Goings testified neither she nor any of the other people at the table used any of the methamphetamine. Id. at p. 168:21-25. There was a scale on the table. Id. at p. 170:12-13.

Ms. Goings chair was broken so she stood up, walked over near the doorway and stood there. Id. at p. 168:7-20 (referencing Trial Exhibit 35). Someone at the table told Ms. Goings to go outside and look for a nickel.[5] Id. at p. 169:11. While she was searching Mr. Bull Bear's car, Colton Bagola showed up.[6] Id. at p. 170:21-22. He peeked through the front windshield

[4]Ms. Goings knew Mr. Reddy and Thelma Pond, his girlfriend. (Docket 217 at p. 155:12-23).

[5]Nickels are commonly used to recalibrate digital scales. (Docket 217-1 at p. 137:1-5).

[6]Ms. Goings knew Mr. Bagola because they had been in the same school class when younger. (Docket 217 at p. 156:17-22).

and waved at her. Id. at p. 171:12-22. With Mr. Bagola was a "guy with a cowboy hat."[7] Id. at p. 173:20-21.

When they went inside the house, Ms. Goings stood "against the wall next to the doorway" and Mr. Bagola talked to her. Id. at p. 174:8-23. He asked about the car Mr. Bull Bear was driving. Id. at p. 197:1-3. At that time, she noticed a change in his behavior which was not normal for him and thought Mr. Bagola was high. Id. at p. 197:4-13. "[A]fter a while," Mr. Bagola "backed up, . . . was . . . standing by the sink . . . [but] he wasn't talking to nobody." Id. at pp. 174:22-175:2.

Those seated at the table were passing around a bottle of Jose tequila and drinking from the bottle. Id. at p. 175:3-9. Mr. Buckman was standing near the table talking to Mr. Bull Bear. Id. at p. 175:14-16. At some point, Ms. Goings observed that Mr. Buckman left the room and went to the bathroom. Id. at p. 175:25-176:1. Ms. Goings thought everyone was getting along at that point. Id. at p. 176:3-5.

Ms. Goings asked Mr. Bull Bear when the two of them were going to go buy cigarettes. Id. at p. 177:2-9. Mr. Reddy wanted to go with them so Mr. Bull Bear asked Ms. Goings if she wanted to smoke methamphetamine until Mr. Reddy was ready to go. Id. at 177:13-16. Mr. Bull Bear went out to his

[7]The man with the cowboy hat turned out to be Jesse Buckman. (Docket 217-1 at p. 125:3-4). The court will use Mr. Buckman's name anytime Ms. Goings refers to the man in the cowboy hat.

car to grab something and returned to the kitchen. Id. at p. 179:9-10. At the same time, Mr. Bagola moved so he was standing behind Ms. Goings and she again talked to him. Id. at p. 178:18-20.

Mr. Bull Bear and Ms. Goings were planning to go outside. Id. at p. 180:15-17. Ms. Goings was at the door with Mr. Bull Bear immediately behind her and Mr. Bagola was behind Mr. Bull Bear. Id. at p. 180:21-24. At that point, Ms. Goings "heard a loud pop, like a gunshot." Id. at p. 181:4-6. She heard Mr. Reddy ask Mr. Bagola "[w]hat the fuck?" Id. at pp. 197:25-198:7. After hearing the gunshot, Ms. Goings was scared, ran outside looking for help but finding none she ran back into the house. Id. at p. 181:8-9. Mr. Bull Bear "was already on the ground." Id. at p. 181:16-17. Back in the house, Ms. Goings asked Mr. Reddy what had happened and he said "Colton shot Sloane." Id. at p. 199:8-10.

After the shooting as everyone was running in different directions, Ms. Goings saw Mr. Bagola running down the road. Id. at p. 181:19-21. Mr. Buckman followed Mr. Bagola. Id. at p. 184:5-7.

Ms. Goings attempted to call 911 but was unsuccessful. Id. at p. 185:21-23. She asked Mr. Reddy for a phone, but he said he did not have one. Id. at p. 186:8-9. Later, when Mr. Reddy and Ms. Pond were in Mr. Bull Bear's car, with Reddy driving, Ms. Goings saw Mr. Reddy on his cell phone. Id. at p. 187:22-188:5.

After Mr. Reddy met a white SUV and put his personal property in that vehicle, he drove Ms. Goings to Tasheena Jones's house on North Ridge Back Road. Id. at p. 191:4-12. Ms. Goings told Ms. Jones that "Colton shot Sloane." Id. at p. 238:19. About one week before Mr. Bull Bear's death**,** Ms. Jones saw Mr. Bagola with "an old-time looking gun" with a revolving cylinder. Id. at p. 241:6-9 & 13-15.

Ms. Jones and Ms. Goings ran back up to the Reddy house. After seeing Mr. Bull Bear's body, Ms. Jones called 911. Id. at pp. 191:14-18; 192:11-18 & 230:14-16. Because there was an outstanding arrest warrant for Ms. Jones, she wanted Ms. Goings to wait with the body until the police arrived, but Ms. Goings got scared and ran to her Aunt Fern's home. Id. at p. 192:20-25. While at her aunt's home, Ms. Goings called 911 again at about 3:30 a.m. Id. at p. 193:2-7. She told the dispatcher that Colton Bagola shot Sloane Bull Bear. Id. at p. 193:11-14.

Others present that night also testified at trial. Benjamin Freeman told the jury he went to Mr. Reddy's home during the late night hours of December 16, 2019, hoping to sell an audio sound bar to him.[8] (Docket 217-1 at

[8]Billy Reddy and Colton Bagola are Benjamin Freeman's nephews. (Docket 217-1 at p. 31:18-23). He knew Casandra Goings since third grade. Id. at p. 32:9-13.

p. 32:22-33:15). Mr. Buckman also brought with him a set of hair clippers hoping to earn money by cutting someone's hair. Id. at p. 47:8-18. About an hour or two after Mr. Freeman got to the Reddy residence, Ms. Goings and Mr. Bull Bear arrived. Id. at p. 35:4-8 & 22-24. Shortly after their arrival, Mr. Bagola and Jesse Buckman came to the house. Id. at p. 36:11-16.

When people started to leave, Mr. Freeman observed Ms. Goings was the first to go out the door. Id. at p. 40:4-12. Mr. Bull Bear was behind Ms. Goings with Mr. Bagola next in line to go out the door. Id. at p. 40:13-14 & 22-23. Mr. Freeman had his head down but "heard a pop," looked up and saw Mr. Bull Bear "hanging onto [the] door . . . and falling backwards." Id. at p. 41:4-11. Mr. Freeman recalled Mr. Buckman ran out the door ahead of him. Id. at p. 41:14-17. Mr. Freeman did not recall which way Mr. Bagola left the kitchen area. Id. at p. 41:18-20. Mr. Freeman did not see a gun while in the house but once outside he saw Mr. Bagola running with a firearm that appeared to flicker "[l]ike something metal," like "something chrome in his hand." Id. at pp. 42:13-24 and 56:11 & 15.

About one month earlier, Mr. Freeman observed Mr. Bagola with a silver .38 caliber firearm. (Docket 217-1 at p. 45:8-16). Mr. Bagola was observed loading and unloading the firearm. Id. at p. 45:17-19. Mr. Freeman identified the firearm as the one in a photograph marked "8Tray8," meaning a .38 caliber firearm. Id. at p. 46:4-14 (referencing Trial Exhibit 86 at p. 3).

Billy Reddy testified. While the group was at his home, Mr. Reddy got out a digital scale so Mr. Bull Bear could weigh the methamphetamine he was giving to Mr. Reddy. (Docket 217-1 at p. 121:10-20.) Mr. Reddy received about five grams of methamphetamine, some of which he intend to sell. Id. at p. 122:13-20. Mr. Reddy testified that during this time period both Mr. Bull Bear and he were methamphetamine dealers on the Pine Ridge Reservation. Id. at p. 202:4-15.

As Ms. Goings and Mr. Bull Bear started out the side door, Mr. Reddy saw Mr. Bagola's "arm in the air, . . . with the pistol. . . . it looked like he shot above Sloan because the gun was . . . he shot above him, like above his head." Id. at p. 130:17-21. Mr. Reddy described that Mr. Bull Bear started to go down, "[h]is knees buckle . . . he drops halfway down, and then he stands back up. And then he turns and he spins, and he looks at me. And then he falls . . . like stiffens up, falls backward, slams into the door, and slides sideways to the ground." Id. at p. 131:4-8. Mr. Reddy testified you could see blood on the door "from where he slid down to the ground." Id. at p. 131:8-9.

Mr. Reddy told the jury he turned in shock to Mr. Bagola, asked "[w]hat the fuck happened?" and Mr. Bagola looked at him saying "I fucking shot him. He's dead." Id. at p. 131:22-24. Mr. Reddy described the gun as a "silver revolver with a black hand . . . had black tape on the handle." Id. at

p. 132:21-11. He believed it to be the same silver firearm shown in the photograph taken from Mr. Bagola's Facebook page. Id. at p. 133:6-7 (referencing Trial Exhibit 86 at p. 3).

After retrieving Mr. Bull Bear's car keys from his body, Mr. Reddy drove away. Id. at pp. 135:22-136:9. Later at Jaden Lebeaux's home, Mr. Bagola showed up, sat on the couch with a knife in his hand and stared at Mr. Reddy. Id. at p. 146:19-25. Neither Mr. Bagola nor he had guns with them so Mr. Reddy pulled out his knife and placed it on the table where Mr. Bagola could see it. Id. at p. 147:7-12. After about 20-30 minutes, Mr. Reddy and Ms. Pond caught a ride and left. Id. at p. 148:5-13.

Jesse Buckman testified. He knew Colton Bagola since they went to school together. (Docket 217-2 at p. 38:14-19). Mr. Bagola had a relationship with Mr. Buckman's sister, Shiotah, and was hanging out with her on the evening of December 16, 2019. Id. at pp. 39:17-40:1. As Mr. Buckman was leaving to go to Reddy's home, Mr. Bagola asked to walk along. Id. at p. 43:10-23. Mr. Buckman testified that on the way to Reddy's, Mr. Bagola "was talking, but I didn't want to listen to him . . . because . . . it seemed like he wanted to go start trouble or something." Id. at p. 54:17-21. Mr. Buckman was wearing headphones and not paying attention to what Mr. Bagola was saying. Id. at p.54:16-18.

Inside Reddy's house, Mr. Buckman saw "Billy," "Ben" and "that guy that . . . got killed" sitting around the table. Id. at p. 45:4-7 and 12-13. Mr. Reddy

gave Mr. Buckman a $20 bag of methamphetamine which he took to the bathroom. Id. at pp. 47:22-48:5. After injecting the drug, Mr. Buckman walked back into the living room where he saw a gun in Mr. Bagola's hands. Id. at p. 48:10-20. Mr. Bagola was holding the gun behind his back. Id. at p. 49:13. At that point, Mr. Buckman decided he was going to leave because he "knew there was going to be trouble." Id. at p. 48:16-18.

But before Mr. Buckman could leave, Mr. Bull Bear got up to leave with Mr. Bagola "[r]ight behind him." Id. at p. 50:2-8. Mr. Buckman observed Mr. Bagola shoot Mr. Bull Bear in the back of the head at very close range, "[p]robably about an inch" away. Id. at p. 52:8-21. Mr. Buckman described the gun as a "little revolver, like a cowboy gun." Id. at p. 53:1.

Mr. Bull Bear flinched and fell, and at that point Mr. Buckman testified "Colt ran down the steps and I was running right behind Colt." Id. at p. 53:10-12. They went out the front door. Id. at p. 66:19-23. Mr. Buckman testified he believed Mr. Bagola was under the influence of methamphetamine that night. Id. at p. 57:22-24.

When F.B.I. Special Agent ("S.A.") Matt Weber arrived at the Reddy residence on December 17, he observed Mr. Bull Bear's body lying halfway inside the house at the side door with the top half of his body extending outside the residence. (Docket 217 at pp. 33:24-34:2) (referencing Trial Exhibit 8). S.A. Weber observed a firearm entrance wound to the back of Mr. Bull Bear's head with no exit wound. Id. at p. 35:1-3; see also id. at pp. 77:8-

12 and 80:4. Based on blood pooling, S.A. Weber determined bleeding began approximately two and one-half feet to three feet inside the kitchen with blood tracing toward the side door area. Id. at p. 114:2-4 (referencing Trial Exhibit 13).

A cigarette butt, which later was determined to contain Mr. Bagola's DNA, was found in the driveway of the residence. Id. at pp. 120:21-122:1 (referencing Trial Exhibit 57); see also Docket 217-2 at p. 10:24-11:5 (referencing Trial Exhibit 122A).

F.B.I. S.A. Kevin Seymore testified. He gathered Facebook information from Mr. Bagola's cell phone and social media application. (Docket 217-2 at p. 133:6-12). S.A. Seymore told the jury Mr. Bagola's Facebook account was deactivated on December 17, 2019, while linked to the Wi-Fi of a residence immediately in front of Jaden Lebeaux's residence. Id. at pp. 137:18-138:15. Mr. Bagola's account remained deactivated until the records were recovered pursuant to a subpoena. Id. at p. 138:20-24.

Reviewing Mr. Bagola's Facebook records, S.A. Weber concluded the defendant's Facebook was deactivated at 3:33 a.m., approximately two hours after the shooting of Mr. Bull Bear. (Docket 217 at pp. 93:22-94:2) (referencing Trial Exhibit 83). Earlier portions of the defendant's Facebook records showed a photograph displaying a "silver revolver," with "the words '8Tray8' " and a second black revolver with the words "Duece Duece Mag." (Docket 217 at p. 98:10-12) (referencing Trial Exhibit 86 at p. 3). S.A. Weber

identified the "Duece Duece Mag" as "a .22 Magnum revolver." Id. at 98:18-19.

F.B.I. S.A. Chris Corwin testified. He was called to Pine Ridge to assist with a neighborhood canvass following the death of Mr. Bull Bear. Id. at p. 263:17-24. During the course of canvassing the neighborhood, S.A. Corwin learned Herb Bagola had video surveillance of the North Ridge area on the night of Mr. Bull Bear's death. Id. at pp. 264:3-265:20 (referencing Trial Exhibits 93, 143 & 154-55). Videos show that at 1:28 a.m. on December 17, 2019, a man is observed walking in the street near Herb Bagola's home.[9] (Docket 217-1 at p. 19:9-11). As a car pulls through the field of the video system, the man is believed to be entering the vehicle. Id. at p. 19:19-23.

F.B.I. S.A. Jerrick Meyers testified. (Docket 217 at p. 132:12-18). Between 10 and 11 a.m. on December 20, S.A. Myers observed a white Pontiac Grand Am pull up to a Rapid City, South Dakota, residence. The rear door on the driver's side of the vehicle was the closest exit from the vehicle into the residence. Id. at pp. 138:14-24 and 140:12-15. A man got out of "the rear driver's side of the vehicle. . . . wearing black pants, a black hoodie. He had the hood up, with a black hat on under the hood, and dark sunglasses on[.] " Id. at p. 139:10-13. The man "quickly went from the back driver's side of the vehicle into the residence." Id. at p. 139:13-14. The vehicle left the premises

[9]S.A. Corwin testified the time displaced on the video "was two hours ahead of the actual time." (Docket 217-1 at p. 19:2-8).

and S.A. Meyers did not see the man ever exit the residence. Id. at p. 139:14-15.

S.A. Meyers notified other law enforcement officers of his observations and maintained surveillance of the house until a response team arrived. Id. at p. 141:5-24. For "a couple of hours," the response team attempted a "call out" to get the man to exit the residence. Id. at pp. 141:24-142:8. After about two hours, Mr. Bagola walked out of the house. Id. at p. 143:13-15. S.A. Weber and S.A. Meyers transported Mr. Bagola to jail. Id. at pp. 142:17-143:8). S.A. Meyers observed Mr. Bagola's clothing was covered in "dirt and fibrous material" which was insulation from the attic of the residence. Id. at p. 143:13-19.

Later that day law enforcement executed a search warrant. (Docket 217-1 at p. 20:12-15). S.A. Corwin accompanied a Rapid City Police Department photographer during the process of searching the residence. Id. at p. 20:16.

As S.A. Corwin described the search, at the end of the hallway an attic access panel had been removed. Id. at p. 22:17-20 (referencing Trial Exhibits 77 & 78). In one of the bedrooms, "the drywall of the ceiling had [given] way, and some of the insulation [was] hanging down from that hole. And there's also insulation that's strewn about on the floor of . . . that room" Id. at p. 21:18-21 (referencing Trial Exhibit 75). A rational conclusion from Mr. Bagola's physical appearance and S.A. Corwin's observations is that Mr. Bagola

had been hiding from law enforcement in the attic. On the dining room table, SA Corwin observed a note which had the telephone number of Jamie Richards, a person believed to be a potential witness in the case. Id. at p. 23:5-14 (referencing Trial Exhibit 79).

Forensic Pathologist Donald Habbe of the Clinical Laboratory of the Black Hills in Rapid City, South Dakota, testified at trial. (Docket 217-2 at pp. 116:25-117:6. He performed an autopsy of Sloane Bull Bear on December 18, 2019. Id. at p. 118:18-25. Toxicology testing disclosed Mr. Bull Bear's system contained methamphetamine, amphetamine and cocaine. Id. at p. 119:10-15. Dr. Habbe concluded the cause of death was a single gunshot wound with "an entrance over the posterior or back of the head." Id. at pp. 119:23-120:3 (referencing Trial Exhibit 135). Dr. Habbe concluded the "dusty-looking" material, "soot," on the back of the head indicated "a near-contact wound." Id. at p. 121:15-17. Because of the "gunshot residue . . . deposited on the skin surface," Dr. Habbe concluded "the tip of the gun [was] in very close proximity to that skin . . . when the trigger [was] pulled." Id. at p. 122:3-10. X-rays disclosing a bullet lodged in Mr. Bull Bear's neck and sinus region was removed by Dr. Habbe and delivered to S.A. Weber. Id. at p. 125:2-126:8 (referencing Trial Exhibit 70A).

Frans Maritz, a forensic scientist from the South Dakota Forensic Laboratory in Pierre, South Dakota, testified at trial. (Docket 217-1 at

pp. 207:20-208:3. His areas of expertise include forensic firearms and toolmark identification. Id. at p. 208:8-9. Mr. Maritz concluded the bullet removed from Mr. Bull Bear's head was a ".38 caliber class." Id. at p. 212:16-23 (referencing Trial Exhibit 126). Mr. Maritz testified the "base of the bullet" caused him to determine it was "a hollow-based wadcutter." Id. at p. 213:18-23.

Bureau of Alcohol, Tobacco, Firearms and Explosives S.A. Brent Fair testified. (Docket 217-1 at p. 218:5-13). He has specific training in firearms and ammunition identification. Id. at pp. 218:24-219:1. He examined the photograph containing the two firearms pictured in Mr. Bagola's social media. Id. at p. 221:21-222:11 (referencing Trial Exhibit 86 at p. 3). S.A. Fair described the "silver or nickel-colored revolver" as "a top-break revolver." Id. at p. 223:3-7. He identified the firearm as "a Harrington & Richardson brand revolver . . . a first model of their .38 Smith & Wesson caliber top-break revolver. . . . a .38 . . . five-shot cylinder." Id. at p. 224:15-18. S.A. Fair estimated this particular firearm was manufactured between 1886 and 1890. Id. at p. 225:13-14. Considering the ".38 Special wadcutter caliber" bullet removed from Mr. Bull Bear, S.A. Fair concluded the firearm could not be ruled out as the murder weapon.[10] Id. at pp. 234:24-25 & 247:10-14.

[10]Defense counsel mistakenly referenced Trial Exhibit 96 as opposed to Trial Exhibit 86 in posing the question to S.A. Fair. Trial Exhibit 96 is not a photograph of a firearm. See Docket 203 at p. 4.

Norma Reed, director of enrollment for the Oglala Sioux Tribe Enrollment Office at Pine Ridge, South Dakota, testified. (Docket 217-2 at pp. 103:16-104:3). To be eligible for enrollment in the Oglala Sioux Tribe, a person must have one parent who is already enrolled in the tribe. Id. at 105:2-5. The process for enrollment includes a family tree, a notarized application, a state-certified birth certificate and a series of questions. Id. at p. 105:10-16. Once a person is determined to be an enrolled member a certificate degree of Indian blood is created. Id. at p. 106:2-10. Through Ms. Reed, the government presented a certificate of tribal enrollment showing Colton Reid Bagola was an enrolled member of the Oglala Sioux Tribe on December 17, 2019, with his enrollment number and date of birth in 1993. Id. at p. 106:12-21 (referencing Trial Exhibit 138).

Lionel Weston, an employee of the Bureau of Indian Affairs, Pine Ridge Agency, appeared at trial. (Docket 217-2 at pp. 108:11-18). Mr. Weston testified the address of Mr. Reddy's house in North Ridge Housing in Pine Ridge is within the exterior boundaries of the Pine Ridge Reservation. Id. at p. 111:16-22.

DEFENDANT'S ARGUMENT

A. First Degree Murder

Mr. Bagola argues "if [he] committed a murder . . . that killing was made with 'malice,' but not 'premeditation.' " (Docket 215 at p. 4). Defendant asserts "[t]here is no evidence of premeditation necessary for first-degree

murder, to distinguish this from a malicious or a wanton act of second-degree murder." Id. at p. 6. In other words, defendant argues if he is guilty of any offense, it is second degree murder not first degree murder. Id. at p. 3.

Mr. Bagola "submits the evidence of his specific mental state of 'deliberation' or 'premeditation' is so lacking that no reasonable-minded jury could conclude beyond a reasonable doubt that [he] committed *first*-degree murder." Id. at p. 7 (emphasis in original). He contends "the evidence necessary for conviction is supported by nothing more than mere suspicion or possibility of guilt particularly as respects his intent, motivation, planning, or the nature of the alleged killing." Id.

In response, the government argues it presented evidence in all three categories of premeditation: "planning activit[ies], motive and the particular nature of the killing," with "emphasis on the first and last categories." (Docket 225 at p. 14) (referencing United States v. Blue Thunder, 604 F.2d 550, 553 (8th Cir. 1979). The government asserts these categories of premeditation were properly set forth in the court's jury instructions. Id. (referencing Docket 186 at p. 7).

Addressing planning, the government submits the evidence showed Mr. Bagola "possessed the firearm, displayed the firearm and then warned Reddy that he needed to kill someone." Id. at p. 15. With this testimony before the jury and "[d]rawing all reasonable inferences in favor of the verdict," the government contends there was sufficient evidence of premeditation to permit

"a reasonable jury to find [Mr. Bagola] guilty of first-degree murder beyond a reasonable doubt." Id. at p. 16.

The government acknowledges the evidence presented at trial did not provide "a clear motive for [Mr. Bagola's] actions." Id. The government submits Mr. Bull Bear "was the only person there that night that [Mr. Bagola] did not know." Id. at p. 17. With Mr. Bagola's earlier statement "that he needed to kill someone," the government argues it was "logical to conclude that perhaps [Mr. Bagola] wanted to take someone's life and that instead of taking a friend's life, he took a stranger's life." Id.

Addressing the manner of the killing, the government submits the facts presented at trial were "so particular and exacting that the defendant must have intentionally killed [Mr. Bull Bear] according to a preconceived design." Id. (citing Blue Thunder, 604 F.2d at 553). The government points out "[t]he nature of the killing was a near contact gunshot wound to the back of the victim's head." Id. The government argues Mr. Bagola's hiding the revolver behind his back was contemplative and the near contact wound to the victim's head were both evidence of the defendant's intent to kill Mr. Bull Bear. Id. at p. 19. The government asserts Mr. Bagola "was fully conscious and mindful of killing the victim and willfully set out to do it." Id. "The jury was in the best position" to evaluate the evidence, which the government felt "was sufficient for the jury to find the defendant guilty." Id.

In reply, defendant argues because he did not know Mr. Bull Bear, Mr. Bagola's earlier statement about killing "either himself or other people" could not be planning which would include Mr. Bull Bear. (Docket 234 at p. 1). With this lack of nexus, Mr. Bagola submits the government failed to identify any planning on his part to commit the killing of Mr. Bull Bear, as opposed to "a killing in general." Id. at p. 2.

Regarding motive, defendant submits he "was under the influence of illegal substances at the time" and "was not fully rational, mindful, or aware of his actions." Id. Mr. Bagola contends the evidence fails to establish that from the point when he met Mr. Bull Bear until his death, Mr. Bagola "was 'fully' conscious." Id. at p. 3. "At best," defendant argues "the evidence showed impulsiveness insufficient to carry the government's burden on the claim of first-degree murder." Id. Rather than a premeditated, planned and designed killing, Mr. Bagola submits the evidence shows "an impulsive and wanton killing," that is, second degree murder. Id. at p. 4.

Mr. Bagola did not challenge the primary jury instructions given at the beginning of the case. See, Docket 186. Instruction No. 4 properly laid out the elements of first degree murder. Id. at pp. 6-7. The instruction defined both "malice" and "premeditation." Id. The "malice" required by element two of the instruction stated:

> Malice aforethought means an intent, at the time of a killing, to willfully take the life of a human being, or an intent to willfully act in callous and wanton disregard of the consequences to human life.

> Malice aforethought does not necessarily imply any ill will, spite or hatred towards the individual killed.
>
> In determining whether Sloane Bull Bear 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.

Id. at p. 6. "Premeditation" was defined in element three of the instruction.

> A killing is premeditated when it is intentional and the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for a person, after forming the intent to kill, to be fully conscious of his intent and to have thought about the killing. Any interval of time between forming the intent to kill and acting on that intent which is long enough for the person to be fully conscious and mindful of what he intended and willfully set out to do it is sufficient to justify a finding of premeditation.

Id. at p. 7.

The district court must not weigh the evidence or assess the credibility of witnesses. Baker, 367 F.3d at 797; see also Boesen, 491 F.3d at 857. It was the jury's function to judge the credibility of all the witnesses who observed the killing of Mr. Bull Bear. It was left to the jury to determine whether to accept the testimony as trustworthy.

Whether Mr. Bagola started the evening with a plan to kill Mr. Reddy or others or whether he arrived at that plan in the presence of Mr. Bull Bear is not the end-all of the analysis. "Even in the absence of proof of motive, the jury is generally allowed to infer premeditation from the fact that the defendant

brought the deadly weapon to the scene of the murder." Blue Thunder, 604 F.2d at 553–54.

Mr. Bagola, with a firearm in hand and hidden from those in the kitchen, had sufficient time to form an intent to kill, think about it long enough to be "fully conscious and mindful of what he intended" and then "willfully set out to do it." (Docket 186 at p. 7). "[I]n establishing premeditation the government was not required to show the defendant deliberated for any particular length of time before perpetrating the murder." Blue Thunder, 604 F.2d at 553. The evidence was sufficient for the jury to conclude beyond a reasonable doubt that the killing of Mr. Bull Bear was premeditated. Id. at 554.

Because both first degree murder and second degree murder require the element of malice, Mr. Bagola does not argue the killing of Mr. Bull Bear was done other than "with malice aforethought." (Docket 215 at p. 3). There can be no doubt that pointing a loaded firearm at the back of the victim's head and pulling the trigger displayed an intent on Mr. Bagola's part to "willfully take the life of a human being" with a "callous and wanton disregard of the consequences of human life." (Docket 186 at p. 6). It matters not that Mr. Bagola had no "ill will, spite or hatred towards" Mr. Bull Bear. Id.

Based on the trial record, the court finds the evidence supporting the conviction exists and a "rational trier of fact" could find the essential elements of first degree murder "beyond a reasonable doubt." Boesen, 491 F.3d at 856 (internal citation omitted); see Docket 186 at pp. 6-7 (listing the essential

elements). The court comes to this conclusion after "drawing all reasonable inferences in favor of the verdict[.]" Id. at 856 (internal quotation marks omitted).

B. Murder as a Crime of Violence

Defendant also asserts two additional legal arguments in support of his motion for judgment of acquittal. The first is that the "crime of violence" requirement of 18 U.S.C. § 924(c) does not include first degree murder after United States v. Davis.[11] (Docket 215 at p. 7). Mr. Bagola "asks the court to reconsider the 'crime of violence' issue, as it relates to first-degree murder, because the plain statutory definition is not met, now that the 'catch all' or 'residual' clause of 18 U.S.C. § 924(c) has been deemed unconstitutional." Id.

The government disagrees and argues "a crime of violence is defined as 'an offense that has as an element the use, attempted use, or threatened use of physical force against the person . . . of another.' " (Docket 225 at p. 20) (citing 18 U.S.C. § 16(a); other citation omitted). The government submits 18 U.S.C. § 1111(a), murder in the first degree, "is a crime of violence because 'at a minimum . . . [it has] as an element the killing of another human being with malice aforethought.' " Id. (citing United States v. Cooper, No. 99-0266, 2022 WL 2526731, at *4 (D.D.C. June 30, 2022)). "Murder is a crime of violence," argues the government as it "has no comparison 'in terms of moral

[11] ___ U.S. ___, 139 S. Ct. 2319 (2019).

depravity and of the injury to the person' given its 'severity and irrevocability.' " Id. (citing In re Irby, 858 F.3d 231, 237 (4th Cir. 2017) (quoting Kennedy v. Louisiana, 554 U.S. 407, 438 (2008))).

In reply, defendant submits the government's argument is premised on cases decided before Davis. (Docket 234 at p. 4). Rather, Mr. Bagola argues "the statutory analysis provided by Davis should be applied here." Id. at p. 5.

Defendant's reliance on Davis is misplaced. In Davis, the United States Supreme Court was focused on the residual clause of 18 U.S.C. § 924(c)(3)(B). Davis, 139 S. Ct. 2323-24 ("The statute's residual clause points to those felonies 'that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.' "). The Davis court found "§ 924(c)(3)(B) unconstitutionally vague." Id. at 2336.

But the residual clause of § 924(c) is not an issue in this case, it is § 924(c)(3)(A) which is before the court. For purposes of § 924(c)(3)(A), "the term 'crime of violence' means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]"

Murder in the first degree is both a felony and has as an element of the offense "the use . . . of physical force against the person . . . of another." Id. Murder in the first degree leaves no constitutional vagueness as to what § 924(c)(3)(A) means.

Section 924(c)(3)(A) aligns with 18 U.S.C. § 16(a). That section provides: "[t]he term "crime of violence" means . . . an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a).

"[T]he 'critical aspect' of § 16(a) is its demand that the perpetrator use physical force 'against the person . . . of another.' " Borden v. United States, ___ U.S. ___, 141 S. Ct. 1817, 1824 (2021) (internal citation omitted). "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." Id. at 1825.

There can be no serious argument that murder in the first degree is not a crime of violence. Pointing a firearm at a person's head and discharging that firearm execution style to cause the person's death is without a doubt a "use of [physical] force . . . target[ed] [at] another individual." Id. at 1824-25; see also 18 U.S.C. §§ 16(a) and 1111(a).

Defendant's § 924(c) argument is without merit and is denied.

C. Defendant as an Enrolled Indian Person

Defendant's final claim is that the jurisdiction requirement of 18 U.S.C. § 1153 was not satisfied by the evidence presented at trial. (Docket 215 at p. 8). In support of this argument, Mr. Bagola relies solely on the court's statement during the Rule 29(a) hearing at the close of the government's case that the defendant "was a registered member of the tribe 'in December 2019.' " Id. (internal reference omitted). In other words, Mr. Bagola argues "[t]he term

'in December 2019' would also include proof that [he] was an enrolled member on December 31st, weeks after the alleged crime. . . . as [opposed to] the precise date and time of the alleged crime." Id.

The government opposes defendant's challenge to the trial evidence that Mr. Bagola was not proven to be an enrolled member of the Oglala Sioux Tribe, that is, an Indian person, at the time of the offense. (Docket 225 at p. 21). The government argues the evidence showed both that Mr. Bagola has "some degree of Indian blood" and is a member of a federally recognized tribe. Id. at pp. 21-22. "Both prongs of the Rogers[12] test having been satisfied," the government concludes it proved Mr. Bagola's "status as an Indian person." Id. at p. 24.

The government proved through Ms. Reed that Colton Reid Bagola was an enrolled member of the Oglala Sioux Tribe on December 17, 2019, and provided his enrollment number and date of birth in 1993. (Docket 217-2 at p. 106:12-21) (referencing Trial Exhibit 138). This evidence was not challenged at trial and defendant's post-trial challenge is without merit. The government proved beyond a reasonable doubt Mr. Bagola was an Indian and an enrolled member of the tribe at the time he murdered Mr. Bull Bear. This evidence satisfied the jurisdictional requirement of 18 U.S.C. § 1153 that Mr. Bagola was an Indian person.

[12]45 U.S. 567 (1846).

Defendant's motion for a judgment of acquittal on this basis is denied.

ORDER

Based on the above analysis, it is

ORDERED that defendant's motion for a judgment of acquittal (Docket 215) is denied.

NOTICE IS GIVEN that a sentencing scheduling order will be entered.

Dated May 19, 2023.

BY THE COURT:

/s/ *Jeffrey L. Viken*
JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2689

United States of America

Appellee

v.

Colton Bagola

Appellant

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cr-50012-JLV-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 30, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2689

United States of America

Plaintiff - Appellee

v.

Colton Bagola

Defendant - Appellant

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cr-50012-JLV-1)

JUDGMENT

Before LOKEN, ERICKSON, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 19, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik