IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 27696

JOHN PENTECOST,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE CRAIG PFEIFLE, Circuit Court Judge

APPELLANT'S BRIEF

Jamy Patterson
The Law Office of Jamy Patterson, LLC
816 6th St.
Rapid City, South Dakota 57701
Attorney for Appellant

Mark Vargo
Pennington County State's Attorney
300 Kansas City Street
Rapid City, South Dakota 57701

and

Marty Jackley
Attorney General
State Capitol Building
Pierre, South Dakota 57501

Attorneys for Appellee

The Notice of Appeal was timely filed on December 15, 2015.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

IN THE SUPREME COURT

OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
vs. NO. 27696
JOHN PENTECOST,
Defendant and Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, John Pentecost, will be referred to as "Pentecost." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." References to documents in the record herein will be designated as "SR" followed by the appropriate page number. References to the transcript of a motion hearing will be designated as "MH," followed by the date of the motion hearing, and then followed by the appropriate page number. References to the Arraignment hearing of May 21, 2012 will be referenced at "ARR," followed by the appropriate page number. References to the transcript of the Plea hearing of November 5, 2012 will be designated as "PLEA" followed by the appropriate page number. References to the transcript of the Sentencing hearings of December 3, 2012, July 31, 2014, and November 24, 2015 will be designated as "SENT," followed by the date of the hearing, and then followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Pentecost appeals from a final second amended judgment of conviction for Second Degree Burglary, after a remand from the South Dakota Supreme Court on the issue of the Court's jurisdiction to hear the appeal. State v. Pentecost, 2015 S.D. 71, ¶ 10, 868 N.W.2d 590, 593. On November 16, 2015, the Trial Court entered Findings of Facts and Conclusions of Law consistent with this Court's remand order, and formally re-sentenced Pentecost, under SDCL 23A-27-51, to the same terms and conditions as was in his original sentence on December 3, 2012. SENT (11/16/15) 2, 5; SR 246.

The judgment was entered on December 1, 2015, effective November 24, 2015 before the Honorable Craig Pfeifle, Seventh Judicial Circuit Court Judge, Rapid City, Pennington County, South Dakota and filed on December 2, 2015. SR 246. Appeal is by right pursuant to SDCL 23A-32-2.

Notice of appeal was filed on December 15, 2015. SR 248.

STATEMENT OF LEGAL ISSUES

I. WHETHER IT IS A LEGAL IMPOSSIBILITY FOR A HOMEOWNER TO BURGLARIZE HIS OWN HOUSE?

It is a legal impossibility for a homeowner to burglarize his own house.
State v. Anders, 2009 S.D. 15, 763 N.W.2d 547.
Honomichl v. State, 333 N.W.2d 797 (S.D.1983).

State v. Wilson, 155 S.D. 186, 186 (S.D.1915).

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PENTECOST'S MOTION TO SET ASIDE JUDGEMENT OF CONVICTION AND ALLOW WITHDRAWAL OF PLEA?

The Trial Court's abused its discretion when it denied Pentecost's Motion to Withdraw his plea.
State v. Lohnes, 344 N.W.2d 686 (S.D.1984).
State v. Grosh, 387 N.W.2d 503 (S.D.1986).
SDCL 23A-27-11.

III. WHETHER THE TRIAL COURT ACCEPTED PENTECOST'S GUILTY PLEA WITHOUT ESTABLISHING A FACTUAL BASIS FOR THE OFFENSE OF SECOND DEGREE BURGLARY?

The Trial Court accepted Pentecost's guilty plea without an adequate factual basis.
North Carolina v. Alford, 400 U.S. 25 (1970).

State v. Nachtigall, 2007 S.D. 109, 741 N.W.2d 216.
State v. Apple, 2000 S.D. 120, 759 N.W.2d 283.

STATEMENT OF CASE AND FACTS

Pentecost was arrested on April 19, 2012 for entering his marital home after the divorce from his ex-wife, Lisa Sea (hereinafter "Sea"), had become final, but before the marital home had been sold, or even listed on the market for sale.

Pentecost was charged by Indictment with one count of Second Degree Burglary under SDCL 22-32-3; and two misdemeanor counts of Stalking under SDCL 22-19A-1(1) and (3) respectively. SR 9. Pentecost was also charged with a Habitual Information/Part II Information. SR 15. On May 21, 2012, Pentecost pled not guilty to all counts and denied the Part II Information. ARR 8. The Honorable Craig Pfeifle, Circuit Court

Judge, presided.

Several status and motions hearings were held in Pentecost's case. One of the main issues raised to the Trial Court was whether the charge of Second Degree Burglary was legally permissible against Pentecost. As Dennis Groff (hereinafter "Groff"), one of Pentecost's former lawyers stated: "Obviously, on behalf of my client, we believe that we cannot commit a burglary of our own residence." MH (8/29/12) 7. Groff asked the Trial Court, "whether or not this matter of charging [Pentecost] with a burglary of a marital residence that he was still a joint owner on is legally possible." MH (7/16/12) 3-4. As Groff explained:

> The parties when they were divorced had a stipulation and had a Judgment and Decree of Divorce. Now, in the stipulation there was a provision that said their house that they owned jointly would be sold . . . There's nothing in the stipulation that says she has the use —or exclusive use and possession of the house . . . The legal deed is that this property that he is alleged to have burglarized is held jointly by he and his wife. The issue that's going to come up is whether you can burglarize your own property, period, that you legally own.

MH (5/31/12) 7-8.

On August 23, 2012, Groff filed a Motion to Dismiss the Second Degree Burglary charge. SR 74. The State filed a brief in opposition to the Motion to Dismiss the Second Degree Burglary charge. SR 34.

On August 29, 2012, a motions hearing was held on Pentecost's Motion to Dismiss the Second Degree Burglary charge. The Trial Court heard from both sides. On behalf of Pentecost, Groff argued:

> . . .You'll note, and I haven't been able to get current with all California law, you'll note that in People versus Gauze they said, You know, you can't burglarize your own home.

With regard to my client, at least on the quitclaim deed, and we'll get to some other matters, he was a joint owner. With regard to this entry, at the time he was a joint owner . . . He was going into his own residence

. . .

Obviously on behalf of my client, we believe that we cannot commit a burglary of our own residence. We believe that there was nothing in these proceedings that gave her exclusive use, and I want to address that factual matter because it will probably have to be brought to a jury anyway.

At the tine of their divorce, we were left with a very—-I don't know if I would call it a complicated or simply confusing situation . . . Having some familiarity with ending divorces, in looking at that stipulation you find certain things are not there. You don't find a specific award of the house from one spouse to the other. You don't find any language about a quitclaim deed. All you find is some language about what's going to be done with the house . . . But then you see this language which is kind of our cornerstone language here, whatever it means, and its says that basically this provision shall affectively, that's with an "A," go ahead and transfer his interest in that home. And then you look at the judgment and the judgment talks about John shall go ahead, when the house is listed, he will sign all documents necessary to have a listing, all closing documents.

I know that's kind of a—-that's kind of what makes this case unique to some extent. You might say, Well, is there even an issue of ownership? Does Lisa have it? You've got a quitclaim deed versus this language, okay. And I can't decide that the other than to argue it. But I do know it does not carry any specific language, it never did in this divorce, as to exclusive use.

. . .

In fairness, these two dance, maybe not a voluntary dance, but they dance for about a year. And that simply means they talk. Maybe Lisa's annoyed with him. But the bottom line is, the house does not get sold. The property does not get returned. In fact, for a period of time they're still making the payments out of the same joint account and splitting it them. Ultimately Lisa says, Hey, it's my house. I'm making the payments. She won't take any money from John, and on the day of she's the only one making payments and John goes into that house and changes the locks.

> So, I don't mean to waste the Court's time. I feel like I've made more of an argument to a jury than a Court, but that's where we're at. Nothing ever appears in this file that says John can't be on the property.

MH (8/29/12) 4-5, 7-9.

At the conclusion of the August 29, 2015 motion hearing, the Trial Court denied Pentecost's Motion to Dismiss. MH (8/29/12) 11. The Trial Court stated:

> At this point in time, I cannot dismiss the burglary charge. It certainly appears to me that the issues that arose during the post-divorce suggest, at a minimum, that there is an issue that can be presented to the jury on the question under the statute whether the defendant was licensed or privileged to enter the property, which is the language of the relevant charging statute.
>
> In this particular case, there very clearly is evidence based upon the divorce documents that, at minimum, the defendant's possessory interest in the property may have been relinquished as part of the divorce proceeding. That relinquishment in my mind raises a jury question on the issue again under the statute as to whether or not the defendant is licensed or privileged to enter into the property.

MH (8/29/12) 11.

After this hearing, Pentecost retained new counsel, Ellery Grey. SR 80. Thereafter, on November 5, 2012, Pentecost entered a change of plea to guilty to Count I of the Indictment charging him with Second Degree Burglary. PLEA 5. In exchange, the State dismissed the remaining charges and agreed to cap its request at six years in the South Dakota State penitentiary. PLEA 2. While Pentecost pled guilty, he insisted to the Trial Court that he still owned the marital home at the time of the alleged burglary, that he had a legal right to be there because, for example, most of his personal property remained in the marital home. PLEA 9-10. At no

time during the plea hearing did Pentecost admit he committed any crime. Nevertheless, the Trial Court accepted Pentecost's plea of guilty. PLEA 13-14.

At the sentencing hearing, the Trial Court sentenced Pentecost to six years in the South Dakota State penitentiary. SENT (12/3/12) 16. The Judgement was filed on December 28, 2012, but subsequent counsel, Randall Connelly, failed to timely file the Notice of Appeal. SR 43. Thereafter, Pentecost's appeal was dismissed. SR 43.

Pentecost filed a Petition for Writ of Habeas Corpus with the Seventh Judicial Circuit on January 24, 2014, alleging "Ineffective Assistance of Counsel and the Denial of Due Process, Failure to file Appeal." SR 100.

On January 23, 2014, then Presiding Judge, the Honorable Jeff Davis, decided:

> I am in receipt of Petitioner's Writ of Habeas Corpus on the above file. It appears that Petitioner's appellate counsel missed the deadline for filing his appeal. Because the two year jurisdictional time frame has not ended, I am going to remand the case back to Judge Pfeifle for re-sentencing. This will allow for a new appeal period consistent with South Dakota law.

SR 120.

Prior to the re-sentencing, former counsel, Matthew Stephens (hereinafter "Stephens"), filed a Motion to Set Aside Judgement of Conviction and Allow Withdrawal of Plea. SR 166. At the re-sentencing hearing held on July 31, 2014, the Trial Court denied Pentecost's motion to withdraw his plea, and sentenced Pentecost to the same terms and conditions as Pentecost had been sentenced on December 3, 2012. SENT

(7/31/14) 3-8.

Thereafter, Stephens timely filed Pentecost's Notice of Appeal. SR 180. However, the South Dakota Supreme Court found it was without "authority to review the merits of this case based on SDCL 23A-31-1 or [Pentecost's] motion to withdraw his plea, which was denied." State v. Pentecost, 2015 S.D. 71, ¶ 10, 868 N.W.2d 590, 593. This Court then remanded Pentecost's case back to the Trial Court to make a record whether it was re-sentencing Pentecost under SDCL 23A-27-51.

On November 16, 2015, the Trial Court entered Findings of Facts and Conclusion of Law consistent with this Court's remand order, and formally re-sentenced Pentecost, under SDCL 23A-27-51, to the same terms and conditions as was in his original sentence on December 3, 2012. SENT (11/16/15) 2, 5; SR 246.

Pentecost timely filed his Notice of Appeal from the Trial Court's Second Amended Judgement. SR 248.

ARGUMENT

I. IT IS A LEGAL IMPOSSIBILITY FOR A HOMEOWNER TO BURGLARIZE HIS OWN HOUSE.

1. Preservation of Objection/Standard of Appellate Review

"Whether this Court has jurisdiction is a legal issue which is reviewed *de novo*." State v. Anders, 2009 S.D. 15, ¶ 5, 763 N.W.2d 547, 549. "Jurisdictional issues can be raised at any time and determination

of jurisdiction is appropriate." Id., ¶ 5, 763 N.W.2d at 549– 50. Further, subject-matter jurisdiction cannot be acquired by agreement, consent, waiver, or estoppel. Honomichl v. State, 333 N.W.2d 797, 799 (S.D.1983).

2. Analysis

Whether a homeowner can burglarize his own home, where there is joint ownership in the marital residence that has not been sold, is an issue of first impression in the State of South Dakota. Pentecost submits that the the State of South Dakota lacked subject-matter jurisdiction to prosecute him for burglarizing his marital home, and his conviction for Second Degree Burglary must be vacated. See e.g., State v. Wilson, 155 S.D. 186, 186 (S.D.1915)(discussing the charging document in a burglary case needs to be sufficiently clear on the point of the ownership of the building so that it "shows that the property entered is not the property of the accused.")

In this case, there was no Order giving Sea exclusive possession of the marital home; nor any specific language prohibiting Pentecost from entering the marital home. Pentecost and Sea were the joint and exclusive owners of the marital home. SR 44. While the Divorce Stipulation stated that "the Judgement and Decree of Divorce shall operate as affective transfer of Defendant's interest in said property," SR 55, this stipulation was drafted by Sea's attorney; and Pentecost signed the Stipulation without representation of counsel. See October 16, 2013 Transcript of Divorce Evidentiary Hearing, filed December 21, 2015, pg

51. Further, the language in the Divorce Decree conflicts with the language in the Divorce Stipulation: the Decree grants Pentecost continued joint ownership to the marital home until it was sold ("this Judgement and Decree shall operate as authority for Plaintiff to actualize said sale and to transfer *the parties' interest* in said property."). SR 48. (emphasis added).

Where there is a variance in the language between the Divorce Decree and the Divorce Stipulation, and the Stipulation was drafted by the spouse that was represented by counsel, any ambiguity must be given against the scrivener, and language of the Divorce Decree should control. See e.g., Forester v. Weber, 298 N.W.2d 96, 87 (S.D.1980); Clements v. Gabriel, 472 N.W.2d 480, 483 (S.D.1991)(upholding a jury instruction stating "Where a contract is ambiguous, it is interpreted most strongly against the party who drafted the contract and caused the uncertainty to exist.").

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PENTECOST'S MOTION TO SET ASIDE JUDGEMENT OF CONVICTION AND ALLOW WITHDRAWAL OF PLEA.

1. Preservation of Objection/ Standard of Appellate Review

"The decision to allow a defendant to withdraw a guilty plea is a matter solely within the discretion of the trial court and is reviewed under an abuse of discretion standard." State v. Goodwin, 2014 S.D. 75, ¶ 4, 681 N.W.2d 847, 849.

Pentecost preserved this issue for appeal when he filed the Motion to Set Aside Judgement of Conviction and to Allow Withdrawal of Plea, SR 166, and the Trial Court denied the motion. SENT (7/31/14) 4-7. Pentecost then filed his Notice of Appeal a second time. SR 180. After the remand from the South Dakota Supreme Court on the issue of the Court's jurisdiction to hear the appeal, the Trial Court entered Findings of Facts and Conclusion of Law consistent with this Court's remand order, and formally re-sentenced Pentecost under SDCL 23A-27-51, to the same terms and conditions as was in his original sentence on December 3, 2012. SENT (11/16/15) 2, 5; SR 246.

Because SDCL 23A-27-51 is a statute authorizing a limited remand for the purposes of re-sentencing the defendant to the same terms and conditions as in the original sentence to allow the defendant to pursue a direct appeal that was prohibited because of a constitutional deprivation, such as in this case, where former counsel failed to file the Notice of Appeal in a timely fashion, Pentecost's Motion to Withdraw his plea is still properly before this Court. Pentecost could not re-litigate the denial of his motion to withdraw his plea under this limited remand to re-sentence under SDCL 23A-27-51.

2. Analysis

South Dakota Statute 23A-27-11 states:

> Time for withdrawal of plea of guilty or nolo contendere. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice a court after sentence may set

aside a judgment of conviction and permit the defendant to withdraw his plea.

In this case, Pentecost sought to withdraw his plea after sentence had already been pronounced in 2012. In State v. Grosh, 387 N.W.2d 503, 506 (S.D.1986), this Court stated that "[t]he reasons why a guilty plea is sought to be withdrawn must be examined; the defendant must state a persuasive reason why withdrawal should be permitted; and the reason must show more than the mere desire to have a trial."

In Pentecost's motion, he stated that when he entered his plea, a factual basis was not properly laid. In fact, Pentecost maintained his innocence during his plea, insisting he did nothing to violate the law. In Pentecost's motion to withdraw his plea, he asserted:

> 4. At the time of the entry of the plea, in an effort to establish the factual basis for the plea, the Court dealt at length with the issue of whether Mr. Pentecost violated the law when he entered or remained in the structure which he owned with his wife, pending the resolution of their divorce proceedings.
>
> 5. The Court and Mr. Pentecost's legal counsel engaged in a conversation which addressed whether Mr. Pentecost did in fact violate the law by entering into the marital home; and attempted to establish that the State would be able to prove at trial that in fact he did violate the law by so entering or remaining in the property; however, when Mr. Pentecost was asked as to whether or not he violated the law by entering the property, Mr. Pentecost explained that the home was to be sold on the market and that he had not moved but was improperly being denied entry to his home, and that all his belongings still remained in the home.
>
> 6. Mr. Pentecost further explained to the Court that he and his wife had agreed to stay in the home together pending the finalization of the divorce.

SR 166-167.

In State v. Lohnes, the South Dakota Supreme Court stated:

> When, however, a defendant moves to withdraw his guilty plea *after sentence has been imposed*, the trial judge will set aside the judgment of conviction and permit defendant to withdraw his plea only to correct manifest injustice. SDCL 23A-27-11. The purpose of this stringent standard for post-sentence plea withdrawal motion is "to prevent a defendant from testing the weight of potential punishment, and then withdrawing the plea if he finds the sentence unexpectedly severe.

344 N.W.2d 686, 687-688 (S.D.1984). (emphasis added).

Pentecost's proclamation of innocence during the plea, coupled with the fact that the issue of whether Pentecost could commit the crime of burglary in a marital home he still owned with his ex-wife, is one of first impression in the State of South Dakota. Like in Lohnes, this fact pattern creates the kind of "manifest injustice" that warrants allowing a defendant to withdraw his guilty plea under SDCL 23A-27-11.

The factors the Trial Court found persuasive to warrant withdrawal of the guilty plea in Grosh are present in this case: Pentecost did "assert his innocence," he did "assert that the plea was contrary to the truth," and he did "assert a misapprehension of the facts." 387 N.W.2d 503, 506.[1] Further, other factors Grosh listed as a basis to allow a defendant to withdraw a plea exist in this case. Id. The Trial Court was aware, at the time Pentecost's former lawyer had filed a motion to allow Pentecost to withdraw his plea, that Pentecost asserted in two letters he had sent to the Trial Court, that Pentecost had received incorrect advice from his

[1] Even though Grosh dealt with a motion to withdraw a plea before sentencing, and therefore, the burden is less than is required in this case, the analysis of Grosh is still germane.

prior counsel; and he felt forced into entering a plea. SR 125-143, 148-152.

Finally, in deciding to grant a withdrawal of the a guilty plea, the trial court should consider whether "the state has detrimentally relied upon that plea and the prosecution of the defendant has been thereby prejudiced." State v. Losieau, 266 N.W.2d 259, 262 (1978). In Losieau, the Court found that that the State had detrimentally relied upon the plea when it "returned most of the evidence of the larceny to the owner" after the plea. Id.

While the State had made similar arguments against Pentecost's motion to withdraw his plea, SENT (7/31/14) 6, the real issue in this case does not lie with the physical evidence needed to prove the State's case, but whether it is even legally possible that a burglary can be committed by a defendant when entering a marital home that the defendant still jointly owns with his ex-wife. This is a legal issue, not a factual issue, which is of central importance to the prosecution of the charge of burglary in Pentecost's case.

For all the forgoing reasons, Pentecost argues the Trial Court abused its discretion when it denied his motion to withdraw his guilty plea.

III. THE TRIAL COURT ACCEPTED PENTECOST'S GUILTY PLEA WITHOUT ESTABLISHING A FACTUAL BASIS FOR THE OFFENSE OF SECOND DEGREE BURGLARY.

Under applicable South Dakota codified law:

> SDCL 23A-7-2: Pleas permitted to defendant--Requirements for plea of guilty or nolo contendere. A defendant may plead:
> (1) Not guilty;
> (2) Not guilty and not guilty by reason of insanity;
> (3) Guilty;
> (4) Nolo contendere; or
> (5) Guilty but mentally ill.
> Except as otherwise specifically provided, a plea of guilty or nolo contendere can only be entered by a defendant himself in open court. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or nolo contendere, the court shall enter a plea of not guilty. The court may not enter a judgment unless it is satisfied that there is a factual basis for any plea except a plea of nolo contendere.
>
> SDCL 23A-7-14. Factual basis required before acceptance of plea other than nolo contendere. The court shall defer acceptance of any plea except a plea of nolo contendere until it is satisfied that there is a factual basis for the offense charged or to which the defendant pleads.

Two statutes require an adequate factual basis before a guilty plea will be accepted. SDCL 23A-7-2 and SDCL 23A-7-14. "The purpose of establishing a factual basis for a plea is to 'protect a defendant who is in a position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within that charge.' " State v. Thin Elk, 2001 S.D. 106, ¶ 16, 631 N.W.2d 603, 608-09.

Even when the trial court properly advises the defendant of his Boykin rights prior to entry of the guilty plea, the plea may still not be intelligent or voluntary because there is an inadequate factual basis for the plea. As this Court has said:

> Establishing *a factual basis for each element of an offense is essential to a knowing and voluntary plea*. State v. Nachtigall, 2007 S.D. 109, ¶ 11, 741 N.W.2d 216, 220-21 (citations omitted). In State v. Nachtigall, we reversed because *the defendant did not understand the elements of the charges against him as related to the facts*.

State v. Apple, 2000 S.D. 120, ¶ 18, 759 N.W.2d 283, 289. (emphasis added)

In State v. Nachtigall, this Court explained:

> Our standard of review in a challenge to the adequacy of the factual basis for accepting a guilty plea is well settled. "Before accepting a guilty plea, a court must be subjectively satisfied that a factual basis exists for the plea. *The court must find a factual basis for each element of the offense*. The factual basis must appear clearly on the record." State v. Schulz, 409 N.W.2d 655, 658 (S.D.1987)(citations omitted).
>
> The factual basis may come from "anything that appears on the record." Id. (noting "[i]t is not necessary that a defendant state the factual basis in his own words.") Moreover, "[r]eading the indictment to the defendant coupled with his admission of the acts described in it is a sufficient factual basis for a guilty plea, *as long as the charge is uncomplicated, the indictment detailed and specific, and the admissions unequivocal.* Id. *(citations omitted)*
>
> *In cases where defendants proclaim their innocence while at the same time pleading guilty, the factual basis to support such pleas must be "strong."* Gregory v. State, 325 N.W.2d 297, 299 (S.D. 1982)(quoting North Carolina v. Alford, 400 U.S. 25, 38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

2007 S.D. 109, ¶ 5, 741 N.W.2d 216, 219. (emphasis added).

In Pentecost's case, the factual basis was not strong, the charge for Second Degree Burglary was complicated, as the facts in this case raise an issue of first impression in the State of South Dakota. Further, Pentecost's admission was equivocal; and Pentecost professed his innocence throughout his colloquy with the Trial Court:

THE DEFENDANT: It's a long story, Your Honor. I was just trying to get a piece of my life back. That home was supposed to be sold on the market. There's been some things back and forth between me and my ex and the home was supposed to be sold. I was denied entry to the home after I briefly saw my family. When I came home, I was not allowed back in. I don't know. But I was denied entry to my home. All my things, my belongings are still there. I had asked for this home to be sold numerous time and it was never done. And I was trying to get back in my house.

THE COURT: You understood at the time that the house was in Pennington County, correct?

THE DEFENDANT: Yes.

THE COURT: Okay. And you had communicated with Ms. Sea previously and understood, at least to the extent we take the ownership issue out of the equation, that she did not desire your presence in the home. You understood that.

THE DEFENDANT: After—we both had agreed to live in the home until it was sold. The divorce decree said the home was to be immediately sold on the market. Her and I were—we were staying in the home together before the divorce was finalized. That was the agreement.

THE COURT: But at some point you moved to the State of Florida as I understand correctly.

THE DEFENDANT: I went to see my family for a short time, for about three weeks, and came back. And then—

THE COURT: Go ahead.

THE DEFENDANT: And then the locks were changed, the garage door closer changed, and I could not get back in my house.

PLEA 9-10. (emphasis added)

Nachtigall explained:

In plea hearings, the record must demonstrate that defendants not only understand the constitutional and statutory rights they are waiving by pleading guilty, but also fully understand the charges for which they are admitting guilt. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot

> be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

2007 S.D. 109, ¶ 9, 741 N.W.2d at 220. (citations omitted)

> Where the record shows that 'circumstances as they existed at the time of the guilty plea, *judged by objective standards,* reasonably justified [a defendant's] mistaken impression,' *a defendant must be held to have entered [the] plea without full knowledge of the consequences and involuntarily*.

State v. Engelmann, 541 N.W.2d 96, 101 (S.D.1995). (emphasis added).

In this case, the record is clear that Pentecost misapprehended the facts and the law, as even the Trial Court told him during the plea exchange, it was taking "this ownership issue out of the equation." PLEA 9. The Trial Court then went on to state, on its own accord, it *was* considering the ownership issue when finding a factual basis for the plea. PLEA 10.

Another important point is the fact that the Trial Court never canvassed, nor received, a factual basis from Pentecost on the element of stalking as contained in Indictment, which was the underlying felony needed to be established to prove the burglary charge. Even the Deputy State's Attorney at the plea hearing was worried this omission would render the plea unknowing and involuntary. PLEA 11.

Instead of the Trial Court asking Pentecost what he did to stalk, or "harass" Sea, as charged in the Indictment as an element necessary to prove the burglary count, the Trial Court told Pentecost:

> THE COURT: Well, let's discuss that a little bit, then Mr. Pentecost, because I do—while I appreciate Mr. Grey's representation that this isn't in the nature of an *Alford* plea, in the event that someone else determines that it is, you understand that in the event that you enter this plea, even though your statements indicate that you were doing so simply to gain access to your home, Mr. Hyronimus has set forth and there's been some discussion here about the fact that the State would have had certain evidence that they would intend to present at the time of trial with which they can substantiate the charge, and you understand that part of the agreement here today would be that while you are suggesting to me that the entry into the home was not done with an illegal purpose, very clearly the State would have had evidence to suggest and convict—suggest that to the jury and convict at the time of trial.
>
> Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. And then that in entering this plea, you are doing so in exchange for the State giving up additional charges that they would intend to present. So, in other words, this is the benefit of the bargain to you.
>
> THE DEFENDANT: Yes. Yes, sir.

PLEA 11-12.

There was no benefit of the bargain when the Trial Court accepted the plea. What further charges the State would intend to pursue, other than the dismissed charges, were never specified nor clear from the record. The State dismissed two class one misdemeanors, that would only have been two class six felonies, if he was convicted the Part II Information. The Trial Court failed to explain on the record any significant benefit to Pentecost. Pentecost pleaded guilty to the greatest offense, a class three felony that carried a maximum of 15 years in prison, while the dismissed lesser charges would have only exposed

Pentecost to a maximum of four years in the South Dakota State Penitentiary. This does not constitute an adequate *Alford* plea under North Carolina v. Alford, 400 U.S. 25 (1970). Yet an *Alford* plea is exactly what the Trial Court stated occurred: "and that plea from the Court's perspective is in the nature of an *Alford* plea." PLEA 13.

CONCLUSION

Pentecost asks that this Court reverse his conviction.

REQUEST FOR ORAL ARGUMENT

Pentecost requests to present oral arguments on these issues.

Dated this 29 day of February, 2016.

Respectfully submitted,

/s/ Jamy Patterson
THE LAW OFFICE OF JAMY PATTERSON, LLC
816 6th St.
Rapid City, SD 57701
Phone (605) 390-8918

CERTIFICATE OF SERVICE

1. I certify that the Appellant's Brief is within the limitation provided for in SCDL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Brief contains 26, 264 characters.

Dated this 29 day of February, 2016.

/s/ Jamy Patterson_____
Jamy Patterson
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29 day of February, 2016, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. John Pentecost* was served by electronic mail on Ann Mayer at ann.meyer@state.sd.us.

/s/ Jamy Patterson
Jamy Patterson
Attorney for Appellant

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	File No. 51C12001483A0
Plaintiff,	)	
vs.	)	**SECOND AMENDED JUDGMENT**
JOHN T. PENTECOST, DOB: 7/17/63 CR#: 12-113289	)	
Defendant.	)	

On the 24th day of November, 2015, the Defendant, JOHN T. PENTECOST, being present personally and being represented by and through his attorney, Jamy Patterson, Rapid City; the State being represented by Deputy State's Attorney, Tracey Dollison Decker; the Defendant having previously been arraigned on an Indictment alleging the offense of COUNT 1: SECOND DEGREE BURGLARY (CLASS 3 FELONY) committed on or about April 19, 2012, in violation of SDCL 22-32-3; the Defendant having entered a plea of guilty on July 31, 2014, to Count 1 of the Indictment as charged; the Court finding the plea to have been entered knowingly, freely, and voluntarily; a factual basis having been found for accepting the plea; the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the sentence is that you, JOHN T. PENTECOST, upon your conviction for the crime of COUNT 1: SECOND DEGREE BURGLARY (CLASS 3 FELONY), be and you hereby are sentenced to serve Six (6) years in the South Dakota State Penitentiary, Sioux Falls, South Dakota; and it is further

ORDERED, that the Defendant receive credit for time already served in the Pennington County Jail and the South Dakota State penitentiary in the amount of **One Thousand Two Hundred Six-One Days (1,261)**; and it is further

ORDERED, that the Defendant reimburse Pennington County for the Grand Jury transcript costs in this matter in the amount of One Hundred One Dollars and Twenty-Five Cents ($101.25) to be paid through the Pennington County clerk of Court's Office; and it is further

ORDERED, that the Defendant pay through the Pennington County Clerk of Courts liquidated court costs pursuant to SDCL 23-3-52 which have been incurred in these proceedings in the amount of Forty Dollars ($40.00); plus the crime victims' compensation surcharge pursuant to SDCL 23A-28B-42 in the amount of Two Dollars and Fifty Cents ($2.50); plus the unified judicial system court automation surcharge pursuant to SDCL 16-2-41 in the amount of Sixty-one Dollars and Fifty Cents ($61.50); and it is further

ORDERED, that any bond which has been posted in this matter be discharged and the bondsman exonerated; and it is further

ORDERED, that the Defendant be remanded to the custody of the Pennington County Sheriff for transportation and delivery to the Warden of the South Dakota State Penitentiary, Sioux Falls, South Dakota.

Dated this 1 day of DECEMBER, 2015, effective the 24th day of November, 2015.

BY THE COURT:

The Honorable Craig A. Pfeifle
Circuit Court Judge
Seventh Judicial Circuit

State of South Dakota } Seventh Judicial Circuit Court
County of Pennington }
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

DEC - 8 2015

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

ATTEST:
Ranae Truman, Clerk of Courts

By _____ (Deputy)

(SEAL)

NOTICE OF RIGHT TO APPEAL

You, JOHN T. PENTECOST, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Second Amended Judgment is filed with said clerk.

Pennington County, SD
FILED
IN CIRCUIT COURT

DEC - 2 2015

Ranae Truman, Clerk of Courts

By _____ Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27696

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOHN PENTECOST,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CRAIG PFEIFLE
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Ann C. Meyer
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Jamy Patterson
Law Office of Jamy Patterson
816 6th Street
Rapid City, SD 57701
Telephone: (605) 487-7645
E-mail: jamypattersonlaw@gmail.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed December 15, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 27696

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOHN PENTECOST,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, State of South Dakota, Plaintiff and Appellee, will be referred to as "State." John T. Pentecost, Defendant and Appellant, will be identified as "Defendant" or "Pentecost." The victim will be designated by the abbreviation "L.S."

References to the transcripts of the May 2, 2012 Grand Jury proceedings; April 26, 2012 morning court hearing; the May 21, 2012 arraignment proceedings; the May 31, 2012 status/bond hearing; the June 13, 2012 motions hearing; the July 16, 2012 status hearing; the August 2, 2012 status hearing; the August 29, 2012 motion hearing; the October 29, 2012 status hearing; the November 5, 2012 change of plea proceeding; the December 3, 2012 sentencing hearing; the July 31, 2014 resentencing proceeding; and the November 24, 2015 status

hearing will be identified as "GJT," "MC," "ART," "SB," "MH1," "SH1," "SH2," "MH2," "SH3," "CPT," "SNT," "RST," and "SH4," respectively. Citations to the settled record, presentence folder and Defendant's brief will be designated as "SR," "PSF," and "DB," respectively. All references will be followed by the appropriate page number(s). State has combined Defendant's three complaints into two issues for the sake of brevity.

JURISDICTIONAL STATEMENT

Defendant appeals from a Second Amended Judgment (SR 246-47), which was filed on December 2, 2015, by the Honorable Craig Pfeifle, Seventh Judicial Circuit, Pennington County, after remand based upon *State v. Pentecost,* 2015 S.D. 71, ¶¶ 6-11, 868 N.W.2d 590, 592-94. On November 24, 2015, this judge conducted a status hearing and imposed the same sentence as previously ordered with updated credit for time served. SR 246-47; SNT 2-16; RST 2-8; SH4 2-5. The court filed Findings of Facts and Conclusions of Law on November 16, 2015. SR 240-43. On December 15, 2015, Pentecost filed a Notice of Appeal. SR 248. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE STATE LACKED SUBJECT MATTER JURISDICTION TO PROSECUTE DEFENDANT FOR SECOND DEGREE BURGLARY AFTER HE MADE AN UNAUTHORIZED ENTRY INTO THE LOCKED MARITAL HOME, WHERE HIS EX-WIFE HAD BEEN LIVING, AND

SEND THE VICTIM NUMEROUS PHONE CALLS AND TEXT MESSAGES WHICH TERRIFIED HER?

Pentecost did not raise this issue below.

State v. McMillan, 973 A.2d 287 (N.H. 2009)

State v. Hagedorn, 679 N.W.2d 666 (Iowa 2004)

II

WHETHER JUDGE PFEIFLE ERRED WHEN HE REJECTED DEFENDANT'S MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND TO ALLOW WITHDRAWAL OF PLEA BECAUSE (1) PENTECOST PURPORTEDLY HAD INSISTED, DURING THE NOVEMBER 5, 2012 CHANGE OF PLEA HEARING, THAT HE WAS INNOCENT AND PLEADING GUILTY IN CONTRAVENTION OF THE TRUTH, HAD MISAPPREHENDED THE FACTS AND LAW IN HIS CASE, HAD BEEN FORCED TO PLEAD GUILTY, AND HAD RECEIVED INCORRECT ADVICE FROM HIS PRIOR COUNSEL; AND (2) NO FACTUAL BASIS SUPPOSEDLY EXISTED FOR DEFENDANT'S GUILTY PLEA TO SECOND DEGREE BURGLARY, OR ANY BENEFIT OF THE BARGAIN, DUE TO HIS MISTAKEN INTERPRETATION OF THE FACTS AND LAW BELOW?

The lower court's decision was proper.

State v. Kvasnicka, 2016 S.D. 2, ___ N.W.2d ___ (Jan. 6, 2016)

McDonough v. Weber, 2015 S.D. 1, 859 N.W.2d 26

State v. McMillan, 973 A.2d 287 (N.H. 2009)

State v. Hagedorn, 679 N.W.2d 666 (Iowa 2004)

STATEMENT OF THE CASE

This appeal involves Defendant's obsession with his ex-wife L.S., and uninvited entry into her home after both parties were living separately and Pentecost invaded the premises, which put the welfare of

his former spouse at risk. SR 1-2, 9-10, 15, 44-71, 91-93, 170-71, 173-74; MC 10-11; ART 5-8; SB 2-14; MH2 2-13; CPT 2-17; SNT 2-16; RST 2-8; PSF police reports and photographs. On April 26, 2012, the Pennington County State's Attorney filed a Complaint, which charged Pentecost with: Count 1—Second Degree Burglary (with the intent to commit Stalking), Class 3 felony, in violation of SDCL 22-32-3; or in the alternative, Count 2—Second Degree Burglary (with the intent to commit Intentional Damage to Private Property), in violation of SDCL 22-32-3; Count 3—Stalking, Class 1 misdemeanor, in violation of SDCL 22-19A-1(3); and Count 4—Threatening or Harassing Contact, Class 1 misdemeanor, in violation of SDCL 49-31-31(4). SR 1-2. The Honorable Scott M. Bogue, Magistrate Judge, conducted a morning court proceeding on April 26, 2012. MC 1-11. This judge filed an Order, which appointed the Pennington County Public Defender's Office to represent Pentecost on April 26, 2012. SR 4. On April 26, 2012, the court filed a No Contact Order, which prevented Defendant from having any communication with L.S., his ex-wife. SR 6.

Grand Jury proceedings were held on May 2, 2012.[*] GJT 1-26. The Pennington County State's Attorney filed an Indictment on the same date, which charged Pentecost with: Count 1—Second Degree

---

[*] On December 16, 2014, the Honorable Craig A. Pfeifle gave counsel for the State permission to review the sealed folder, in Pennington County Crim. File No. 12-1483, to respond on appeal. This folder contains the May 2, 2012 grand jury transcript, police reports and photographs.

Burglary (with intent to commit Stalking), Class 3 felony, in violation of SDCL 22-32-3; Count 2—Stalking, Class 1 misdemeanor, in violation of SDCL 22-19A-1(1); or in the alternative, Count 3—Stalking, Class 1 misdemeanor, in violation of SDCL 22-19A-1(3). SR 9-10; GJT 1-26. On May 14, 2012, the Honorable Craig A. Pfeifle filed an Order, which allowed the Pennington County Public Defender's Office to withdraw as counsel for Defendant and Pentecost retained another attorney, Dennis Groff, to represent him. SR 12-14. On May 8, 2012, the Pennington County State's Attorney signed a Part 2 Information (filed on May 22, 2012), which charged Defendant with: Stalking (Subsequent Offense), Class 6 felony, in violation of SDCL 22-19A-1. SR 15. The court conducted an arraignment hearing on May 21, 2012. ART 1-9.

On May 31, 2012, Judge Pfeifle held a status and bond hearing, which reflected that L.S. did not want anything to do with the Defendant; that Pentecost had suddenly shown up at the victim's residence, where he had not lived for some time; and that Defendant had brought a number of items with him that could have been used to restrain his ex-wife. GJT 2-26; SB 1-14; CPT 2-15; SNT 11-13; PSF police reports and photographs. Both parties filed a number of pretrial motions from June 4 through October 1, 2012. SR 16-86. Two of the most pertinent motions in this case include Defendant's July 16, 2012, Motion for Production of Records Concerning Marital Residence and an August 23, 2012, Motion to Dismiss Second Degree Burglary

Charge. SR 33-71, 74-75. This judge conducted a series of status motion hearings, which related to the May 12 through August 2, 2012 pleadings. MH1 1-10; SH1 1-7; SH2 1-6; SH3 1-4. On August 29, 2012, the court considered arguments from both sides, with respect to Defendant's Motion to Dismiss Second Degree Burglary Charge, and rejected this request because a jury question existed on whether Pentecost had relinquished any privilege to enter the marital property in question, based upon the April 8, 2011 Stipulation and Property Settlement Agreement and April 8, 2011 Judgment and Decree of Divorce. SR 44-71, 74-75; MH2 2-12.

The Pennington County State's Attorney extended a plea offer to Defendant and his defense attorney, Ellery Grey, on October 16, 2012. SR 80, 88, 182; SH3 2-4. On November 5, 2012, Judge Pfeifle held a change of plea proceeding. SR 88, 182; CPT 1-17. This judge made certain that Defendant understood his statutory and constitutional rights there; that Pentecost was knowingly, voluntarily and intelligently pleading guilty to Second Degree Burglary pursuant to a written plea agreement with the State; and that no threats or promises had influenced Defendant's plea. SR 88, 182; CPT 2-5. The court also carefully evaluated the factual basis for Defendant's guilty plea; pointed out that both Defendant and his counsel had "agreed here in open court [that] the State would have [had] sufficient evidence to convict [Pentecost]" of Second Degree Burglary, at trial; and that a "sufficient"

record existed for Defendant's decision based upon the pleadings, the Grand Jury transcript, and the police reports in this case. SR 44-71, 74-75, 88, 182; GJT 2-26; CPT 11-15; PSF police reports and photographs.

On December 3, 2012, Judge Pfeifle conducted a sentencing hearing. SR 91-93, 107-71; SNT 1-16. This judge emphasized that Defendant had "issues with obsessive conduct" toward L.S. and his family members; that the "large volume of harassing behaviors" that Pentecost had instigated, with respect to the victim, was "alarming;" that Defendant had created a "significant amount of traumatic stress" for L.S. under these circumstances, despite the victim's demands that Defendant stop contacting her; and that both L.S. and society needed to be protected from Pentecost's criminal actions. SR 91-93, 170-71; SNT 4-16. Judge Pfeifle required that Defendant serve a prison sentence of six years for Second Degree Burglary; gave him credit for 228 days of jail time served; and imposed certain costs. SR 91-93, 170-71; SNT 14-16. The court filed a Judgment on December 28, 2012. SR 91-93, 170-71; SNT 14-16.

On July 30, 2014, Defendant, while represented by Matthew T. Stephens, filed a Motion to Set Aside Judgment of Conviction and to Allow Withdrawal of Plea. SR 166-68. Judge Pfeifle held a resentencing proceeding on July 31, 2014. SR 173-74; RST 1-8. This judge indicated that he had reviewed Defendant's criminal file, which

contained the November 5, 2012 change of plea transcript and presentence report; that he had "very clearly made reference to and relied upon additional materials outside the plea colloquy itself," as part of the factual basis for Pentecost's guilty plea; and found that these items included the police reports, grand jury transcript, and the divorce paperwork, which related to the defense's motion to dismiss. SR 34-79, 166-68, 173-74; GJT 2-6; CPT 11-15; RST 2-7; PSF police reports and photographs. In addition, Judge Pfeifle rejected Defendant's request to withdraw his guilty plea and specified that there had been "significant discussion," during the November 5, 2012 change of plea hearing, "as it related to both the home ownership issues [and] the burglary charge," as well as about the underlying crime of stalking. SR 34-79, 166-68, 173-74; CPT 2-15; RST 4-7; PSF police reports and photographs. The court also noted that "[w]e are on the cusp of two years" following the original change of plea and sentencing proceedings; that the Defendant had already served part of his sentence; that the State released or destroyed most of the evidence, in Pentecost's case, which resulted in "significant prejudice" to the State; and ordered that Defendant serve the same sentencing penalty. SR 91-93, 166-68, 170-71, 173-74; SNT 14-16; RST 5-8.

Defendant appealed his conviction and this Court remanded his case to Judge Pfeifle, as reflected in *Pentecost,* 2015 S.D. 71, ¶¶ 6-11, 868 N.W.2d at 592-94. On November 16, 2015, this judge filed

Findings of Fact and Conclusions of Law, with respect to the reinstatement of Pentecost's appeal. SR 240-43. Judge Pfeifle also held a status hearing on November 24, 2015, and required that Defendant serve the same sentence as previously ordered with updated credit for time served. SR 246-47; SNT 2-16; RST 2-8; SH4 2-5. On December 2, 2015, the court filed a Second Amended Judgment. SR 246-27. Pentecost filed a Notice of Appeal on December 15, 2015. SR 248.

STATEMENT OF FACTS

The facts in this case are detailed in *Pentecost,* 2015 S.D. 71, ¶¶ 2-3, 868 N.W.2d at 591. To recapitulate, Defendant was forty-eight years old at the time of his crime; had prior experience with the criminal justice system; had been a successful salesman; had been divorced for over a year and staying with relatives in Florida; had been trying to reconcile with his ex-wife, L.S.; and was obsessed with the victim and stalking her by sending "hundreds of text messages and hours of voicemails." SR 15, 34-79; ART 5-8; SB 3-14; MH2 2-11; CPT 2-15; SNT 2-16; RST 2-8; PSF police reports and photographs. *State v. Olson*, 2012 S.D. 55, ¶ 21, 816 N.W.2d 830, 836-37 (previous experience with the criminal justice system counts). On April 19, 2012, Pentecost, who had a shotgun with ammunition in his vehicle and a sales slip in his jacket pocket for the recent purchase of a handgun at Cabela's (that had not yet been picked up), broke into the residence, which he had shared with L.S. before their divorce; sent the victim a

text message, which informed her that he had changed the locks to their former home; and moved his clothes, luggage and personal items inside this property, because he wanted "to get a piece of [his] life back." SR 34-79; MC 10-11; ART 5-8; SB 3-14; MH2 2-13; CPT 9-15; SNT 2-16; RST 2-8; PSF police reports and photographs. In addition, Defendant was upset because he apparently had been staying with family members in Florida; Pentecost returned to Rapid City, South Dakota, and discovered that "the locks were changed and the garage door closer changed, and [that he] could not get back into [his] house;" Defendant had brought a rope, cable wraps, duct tape and four packs of zipties with him, which could have been used to "detain" L.S.; and he was carrying a suicide note and his Last Will and Testament. MC 10-11; SB 10-12; MH2 2-13; CPT 9-15; SNT 2-16; RST 2-8; PSF police reports and photographs. Although the marital residence remained unsold, Pentecost's ownership interest in his former home had been severed, based upon the April 8, 2011 Judgment and Decree of Divorce, April 8, 2011 Stipulation and Property Settlement Agreement and March 31, 2011 Affidavit of Plaintiff and Defendant in Support of Divorce, because both parties had agreed that if the ownership of this property was not transferred to someone else, then the Decree of Divorce would operate as an effective transfer of his property interest. SR 47-60; SB 7-14; MH2 2-13; CPT 2-15; SNT 2-16; RST 2-8. Defendant also had moved to an apartment in Rapid City, but left some

of his belongings behind; the parties had continued to communicate about the disposition of their former property, although L.S. could have sold the premises at any point without input from Pentecost and she was making the house payments; and Defendant was aware that the victim no longer wanted him on the premises, but he still remained in verbal and electronic contact with her. SR 34-79; SB 7-14; MH2 2-13; CPT 2-15; SNT 2-16; RST 2-8.

As previously mentioned, Judge Pfeifle conducted a change of plea proceeding on November 5, 2012. SR 88, 182; CPT 2-17. Pentecost, while represented by counsel, waived his statutory and constitutional rights during this hearing, and pled guilty to Second Degree Burglary. SR 88, 182; CPT 2-15. In addition, Defendant's attorney explained that "although Mr. Pentecost believed at that time subjectively that he could go into the house because he had a mistake of law, a mistake of law would not have provided him with a defense at trial;" that "we believe that the State would have met the elements of [SDCL 22-32-3], at trial;" and that this is "just simply a clarification [that] ignorance of the law would not have been an excuse, we don't believe, at trial." SR 88, 182; CPT 6-7. Defendant also maintained that he had been visiting his family in Florida for about three weeks; that the marital residence, which he had shared with L.S. before their divorce was finalized, had not yet been sold; and that he "was just trying to get back into [his] house," despite the fact that "the locks [and] garage door

closer" had been changed. SR 88, 182; CPT 9-10. Judge Pfeifle, however, made sure that Defendant understood and was admitting that the State would have had sufficient evidence to convict him of Second Degree Burglary at trial, and that the underlying crime was Stalking in this case; that a factual basis existed for Pentecost's guilty plea based upon "the materials attached to the [defense's] motion to dismiss and various pleadings filed therewith," the Grand Jury transcript, "[and] the police reports;" and that Defendant wanted to take advantage of a beneficial plea deal with the prosecution. SR 34-79, 88, 182; CPT 6-14. *State v. Rowley*, 2010 S.D. 41, ¶ 9, 783 N.W.2d 50, 52 (factual basis for a guilty plea may come from anything in the record and need not be in the defendant's own words). The court also confirmed that Defendant had continued to repeatedly communicate with L.S. by phone and text message, who "did not desire [his] presence in the home," and that Pentecost had entered the property with the intent to commit stalking. SR 34-79, 88, 182; CPT 9-11. *State v. Blakney*, 2014 S.D. 46, ¶¶ 3-4, 851 N.W.2d 195, 196-97; *State v. Thin Elk*, 2005 S.D. 106, ¶ 22, 705 N.W.2d 613, 619-20 (factual basis may be attained by an inquiry of the prosecution).

On December 3, 2012, Judge Pfeifle held a sentencing proceeding. SR 91-93, 170-71; SNT 2-16. This judge took into consideration comments from both parties about the Defendant's criminal behavior, which included the State's position that Pentecost's obsessive conduct

had cost L.S. “the feeling of safety in her home”; the prosecution’s input that Defendant had sent the victim “hundreds of text messages [and] hours of voicemails”; and that Pentecost had admitted, during his jail phone calls, that he “intended to do [the victim] harm,” when he broke into her premises. SR 91-93, 170-71; SNT 5-7. In addition, Judge Pfeifle listened to Defendant’s apology for his criminal actions and remarks by his defense attorney, who related that Pentecost “fully understands that what he did was terrifying [to L.S.];” that Defendant “believes that his conduct was morally wrong and that he should not have been going back into the house;” that Pentecost was “embarrassed about what he had put the [victim] through,” given all of the text messages and phone calls; and that Defendant had said that “[i]t crossed my mind about detaining [L.S.],” but that he was just frustrated at the time. SR 91-93, 170-71; SNT 7-14. The court, however, concluded that it could not overlook the Defendant’s compulsive behavior; that both the victim and society needed to be protected from Pentecost’s criminal activities; and sentenced Defendant to a prison term of six years for his crime, gave him credit for time served, and imposed certain costs. SR 91-93, 170-71; SNT 14-16.

After this sentencing process was completed, Pentecost filed a Motion to Set Aside Judgment of Conviction and to Allow Withdrawal of Plea on July 30, 2014. SR 88, 166-68, 182. On July 31, 2014, Judge Pfeifle conducted a resentencing proceeding. SR 88, 166-68,

173-74, 182; CPT 2-15; SNT 2-16; RST 2-8. This judge stressed that his review of the November 5, 2012, change of plea colloquy showed that there was "adequate information to consider the factual basis, which [was] the thrust of the [defense's] request for withdrawal." SR 34-79, 88, 166-68, 173-74; GJT 2-6; CPT 5-15; RST 3-4; PSF police reports and photographs. In addition, Judge Pfeifle pointed out that there was "significant discussion," during the change of plea hearing, about "Mr. Pentecost's plea being an *Alford* or something else;" and that the home ownership issue, as it related to the burglary charge and the "underlying question as it related to the charged crime of stalking," had been covered on the record. SR 34-79, 88, 166-68, 173-74; GJT 2-6; CPT 5-15; RST 4. *See generally North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). This judge also found that "I made it very clear" that the factual basis for acceptance of Defendant's guilty plea encompassed the "long discussion, as it related to the ownership issue, [and] was adequately briefed by both sides;" that additional materials were to be considered, which included the divorce file documents, the police reports, and the Grand Jury transcript; and that there was "no indication that [Pentecost] had any reservations about proceeding forward," with respect to his guilty plea to Second Degree Burglary; and that "[w]e had a long and adequate discussion about the knowing and voluntary nature of the same." SR 34-79, 88, 166-68, 173-74; GJT 2-6; CPT 5-15; RST 4-6; PSF police reports and

photographs. The court further ruled that "[w]e are on the cusp of two years following the original plea and sentencing hearings;" that Defendant already served a portion of his sentence and was out on parole; that this "delay [had] resulted in the potential for significant prejudice to the State," which had released, or destroyed, the evidence in Pentecost's criminal case. SR 88, 91-93, 166-68, 170-71, 173-74; CPT 5-15; SNT 14-16; RST 5-8.

Finally, Judge Pfeifle explained, during the November 24, 2015 status hearing, that he had already filed Findings of Fact and Conclusions (November 16, 2015), in Defendant's case; that he was imposing the "same sentence as previously ordered," with updated credit for time served; and restarting the appeal process. SR 246-47; SNT 2-16; RST 2-8; SH4 2-3. In addition, this judge observed that the October 16, 2013 transcript of Defendant's divorce hearing (Pennington County File Div. 11-40) had never been part of the criminal record (Pennington County Crim. File 12-1483), during the November 5, 2012 change of plea proceeding and "judgment therefrom." DB 10; CPT 2-17; SNT 2-16; RST 2-8; SH4 3-4. The court also noted that it was filing a Second Amended Judgment, in Pentecost's criminal file. SR 246-47.

ARGUMENTS

I

THE STATE DID NOT LACK SUBJECT MATTER JURISDICTION TO PROSECUTE DEFENDANT FOR SECOND DEGREE BURGLARY WHEN HE MADE AN

UNAUTHORIZED ENTRY INTO THE LOCKED MARITAL HOME, WHERE HIS EX-WIFE HAD BEEN LIVING, AND SENT THE VICTIM NUMEROUS PHONE CALLS AND TEXT MESSAGES WHICH TERRIFIED HER.

A. Introduction.

Defendant professes, in his first issue, that the State lacked subject matter jurisdiction to prosecute him for second degree burglary. DB 9-11. In addition, Defendant complains that he and his ex-spouse were "the joint and exclusive owners" of the marital residence, and that Pentecost was not prohibited from entering this home, based upon the paperwork in his divorce action. DB 10-11. Although Defendant admits that the Divorce Stipulation reflects that "the Judgment and Decree of Divorce shall operate as affective [sic] transfer of [his] interest in said property," Pentecost insists that this language conflicts with the Divorce Decree, which granted him continued joint ownership in the marital home until it was sold. DB 10. Defendant also contends that the October 16, 2013 divorce hearing transcript shows that he was not represented by counsel; that any ambiguity must be construed against L.S., who was represented by an attorney; that any confusion must be construed against the scrivener; and that the language of the divorce Decree should control in this case. DB 10-11.

B. Standard of Review.

In South Dakota, beyond the concepts of personal and subject-matter jurisdiction, this Court has defined the term "jurisdiction" more broadly to include "the legal power, right, or authority to hear and

determine a cause or causes, considered either in general or with reference to a particular matter"; the "power to inquire into the facts and apply the law"; and the "right to adjudicate concerning the subject-matter," in a given case. *State v. Medicine Eagle,* 2013 S.D. 60, ¶ 40, 835 N.W.2d 886, 900. In addition, a majority of jurisdictions have found that the unauthorized entry of an estranged spouse into the marital home constitutes burglary and that no right, license, or privilege exists to enter the premises. *State v. Hagedorn,* 679 N.W.2d 666, 668-72 (Iowa 2004). Consistent with this approach, fact finders must look beyond legal title, in burglary prosecutions, and evaluate the totality of the circumstances, when determining whether an estranged spouse has any privilege to enter a marital residence. *State v. McMillan,* 973 A.2d 287, 292-94 (N.H. 2009). Relevant factors also include whether the defendant has left or moved out of the home, is no longer welcome, has removed his personal property, and no longer has a key. *Hagedorn,* 679 N.W.2d at 671-72

C. Legal Analysis.

State asserts that subject-matter jurisdiction exists, in Defendant's situation, despite the fact that he believes that his case is one of first impression in South Dakota, which undermines this reality. DB 9-11. In addition, Defendant disregards that the concepts of personal and subject matter jurisdiction are defined broadly, in South Dakota, and include "the legal power, right, or authority to hear and

determine a cause or causes, considered either in general or with reference to the particular matter"; the "power to examine the facts and apply the law"; and "the right to adjudicate concerning the subject-matter," in a given case. *Medicine Eagle,* 2013 S.D. 60, ¶ 40, 835 N.W.2d at 900. Jurisdiction also encompasses "whether there was power to enter upon the inquiry and not whether the determination by the court of a question of law or fact involved is correct." *Id.*

As reflected in the November 5, 2012 change of plea transcript, Defendant (while represented by counsel) knowingly and voluntarily waived his statutory and constitutional rights, and pled guilty to second degree burglary. SR 88, 182; CPT 2-5. *State v. Outka,* 2014 S.D. 11, ¶¶ 32-33, 844 N.W.2d 598, 607-08. In addition, Defendant's attorney indicated that a mistake of law would not have provided Pentecost with a defense at trial; that the State would have met the elements of SDCL 22-32-3 at trial, because Defendant's ex-wife did not desire his presence in the home where she had been living; and that Defendant's ignorance of the law would not have constituted an excuse for his criminal behavior. SR 34-79, 88, 182; CPT 6-7. *State v. Golliher-Weyer,* 2016 S.D. 10, ¶ 8, __ N.W.2d __ (Feb. 3, 2016) (defendant cannot claim deficient performance on appeal absent exceptional circumstances); *State v. Lachowitzer,* 314 N.W.2d 307, 309 (S.D. 1982) (defendant cannot lie in the weeds with objections). This transcript also confirms that Defendant understood that he was admitting that the State would

have had sufficient evidence to convict him of burglary at trial; that the underlying crime was Stalking in this case; and that a factual basis existed for Pentecost's guilty plea based upon "the materials attached to the [defense's] motion to dismiss and various pleadings filed therewith," the Grand Jury hearing, and the police reports. SR 34-79, 88, 182; CPT 6-14. *State v. Kvasnicka,* 2016 S.D. 2, ¶¶ 11-12, __ N.W.2d __ (Jan. 6, 2016) (lying to a court does not justify withdrawal of a guilty plea); *McDonough v. Weber,* 2015 S.D. 1, ¶ 39, 859 N.W.2d 26, 42-43 (factual basis for a guilty plea may come from anything in the record and need not be in defendant's own words).

Furthermore, Defendant ignores that the "main risk of burglary arises not from the single physical act of wrongfully entering [into his ex-spouse's residence]" but rather from the possibility of a face-to-face confrontation between the burglar and another person, which might include his ex-wife, a police officer, or a bystander who comes to investigate. *State v. Chipps,* 2016 S.D. 8, ¶ 39, __ N.W.2d __ (Jan. 27, 2016). In addition, a majority of courts have determined that the unauthorized entry of an estranged spouse, like Pentecost, into the marital home of an ex-partner, constitutes burglary, and that no right, license, or privilege exists to enter the premises in this context. *McMillan,* 973 A.2d at 292-94; *Hagedorn,* 679 N.W.2d at 668-72. The December 3, 2012 sentencing transcript also substantiates that Defendant had left the marital residence and had been visiting his

family in Florida for three weeks; that the marital home, which he has shared with L.S., before their divorce had not been sold; that Pentecost had wanted to get back into this household against his ex-spouse's wishes; that Defendant had sent his ex-wife extensive phone calls and text messages, which terrified her; and that the "locks [and] garage door closer" had been changed. SR 88, 91-93, 170-71, 182; CPT 9-11; SNT 4-14. *McMillan,* 973 A.2d at 290-94 (totality of circumstances control when defendant invades the premises and terrifies an ex-spouse); *Hagadorn,* 679 N.W.2d at 668-72. Defendant also is trying to improperly supplement the record in this case, by relying upon the October 16, 2013 divorce hearing transcript, in Pennington County Civ. File Div. 11-40, which was not part of Pentecost's criminal file, in Pennington County Crim. File 12-1483, at the time of his November 12, 2012 change of plea proceeding. DB 10; CPT 2-11; SH4 2-3. *Citibank South Dakota, N.A. v. Schmidt,* 2008 S.D. 1, ¶ 21, 744 N.W.2d 829, 834 (Meierhenry, J., concurring in part and dissenting in part) (appellate courts should not supplement the record or retry the case for a defendant). Thus, no so-called jurisdictional defects exist here.

II

JUDGE PFEIFLE DID NOT ERR WHEN HE REJECTED DEFENDANT'S MOTION TO SET ASIDE JUDGMENT OF CONVICTION AND TO ALLOW WITHDRAWAL OF PLEA BECAUSE: (1) PENTECOST PURPORTEDLY HAD INSISTED, DURING THE NOVEMBER 5, 2012 CHANGE OF PLEA HEARING, THAT HE WAS INNOCENT AND PLED GUILTY IN CONTRAVENTION OF THE TRUTH, HAD MISAPPREHENDED THE FACTS IN LAW IN THIS CASE,

HAD BEEN FORCED TO PLEAD GUILTY AND HAD RECEIVED INCORRECT ADVICE FROM HIS PRIOR COUNSEL; AND (2) NO FACTUAL BASIS SUPPOSEDLY EXISTED FOR DEFENDANT'S GUILTY PLEA TO SECOND DEGREE BURGLARY, OR ANY BENEFIT OF THE BARGAIN, DUE TO HIS MISTAKEN INTERPRETATION OF THE FACTS AND LAW BELOW.

A. Background.

As previously mentioned, State has combined Defendant's second and third complaints into one issue with different subsections.

1. *The denial of Pentecost's request to withdraw his guilty plea was proper.*

Defendant protests, in his second issue, that Judge Pfeifle made a mistake when he rejected Pentecost's Motion to Set Aside Judgment of Conviction and to Allow Withdrawal of Plea. DB 11-15. In addition, Pentecost insists that he "maintained his innocence," during the November 5, 2012 plea hearing; pled guilty in contravention of the truth; misapprehended the facts and law in this case; was forced to plead guilty; and received incorrect advice from his previous counsel. DB 13-14. Defendant also claims that "a factual basis was not properly laid," during the November 5, 2012 plea hearing, because the issue of whether Pentecost could commit burglary in a martial home, which he supposedly owned with his ex-wife, is one of first impression in South Dakota, and that this "fact pattern creates the kind of manifest injustice," which warrants the withdrawal of his plea. DB 14-15.

B. Standard of Review.

This Court has repeatedly stressed that SDCL 23A-27-11 does not give a defendant "an automatic right to withdraw a guilty plea." *Kvasnicka,* 2016 S.D. 2, ¶ 8. A stricter standard is utilized when a defendant asks to withdraw his guilty plea after a sentence is imposed, which presents him "from testing the weight of potential punishment," and then withdrawing his plea if his sentence is unexpectedly severe. *Outka,* 2014 S.D. 11, ¶ 7, 844 N.W.2d at 603; *State v. Lohnes,* 344 N.W.2d 684, 686-88 (S.D. 1984). A defendant seeking the withdrawal of his plea after his sentence has been imposed must demonstrate that this result is necessary "only to correct manifest injustice," and based upon "clear and convincing evidence." *Outka,* 2014 S.D. 11, ¶ 6, 844 N.W.2d at 602.

The factual basis for a defendant's guilty plea may come from "anything that appears on the record." *McDonough,* 2015 S.D. 1, ¶ 39, 859 N.W.2d at 42-43. A court may even find a factual basis when "the defendant cannot or will not admit to the facts establishing the elements of the crime." *Id.*

C. Legal Review.

1. *The lower court reached the right result when it denied Defendant's request to withdraw his guilty plea.*

State counters, with respect to Defendant's second issue, that Judge Pfeifle carefully considered Pentecost's Motion to Set Aside

Judgment and to Allow Withdrawal of Plea, during the July 31, 2014 resentencing hearing, and determined that the November 5, 2012 guilty plea colloquy reflected that "the Court had before it adequate information to consider the factual basis, which was the thrust of [Pentecost's] request." DB 11-15; SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; SNT 2-16; RST 3-4; PSF police reports and photographs. *LeGrand v. Weber*, 2014 S.D. 71, ¶¶ 14-23, 855 N.W.2d 121, 127-28 (citing *Alford,* 400 U.S. at 37, 91 S.Ct. at 167) (a defendant may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence, even if he is unwilling to admit his participation in the acts constituting the crime); *Olson*, 2012 S.D. 55, ¶ 42, 816 N.W.2d at 841 (the factual basis may come from anything that appears on the record); *Rowley*, 2010 S.D. 41, ¶ 13, 783 N.W.2d at 53 (manifest injustice must exist based upon clear and convincing evidence). In addition, Judge Pfeifle indicated that he had "very clearly made reference to and relied upon additional materials outside the plea colloquy itself [during the November 5, 2012 change of plea hearing]," which included the divorce file paperwork, police reports, and Grand Jury transcript; and that these items had been "acquiesced in as part of the factual basis" by both parties. SR 34-79, 88, 91-93; 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; SNT 2-16; RST 3-5; PSF police reports and photographs. *McDonough,* 2015 S.D. 1, ¶ 39, 859 N.W.2d at 42-43; *Coon v. Weber*, 2002 S.D. 48, ¶¶ 23-24, 644 N.W.2d 638, 647-48 (guilty

pleas were in the best interests of petitioners). Judge Pfeifle also related that "I will agree that there was some confusion as to the nature of [Defendant's guilty plea] being an *Alford* plea or something else," but that the November 5, 2012 change of plea proceeding, showed that "there was [a] significant and long discussion with Mr. Pentecost assuming one were to take both of those—or either of those avenues, I should say, whether that be a straight guilty plea or an *Alford* plea." SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; SNT 2-16; RST 4; PSF police reports and photographs. *LeGrand*, 2014 S.D. 71, ¶¶ 14-23, 855 N.W.2d at 127-28 (citing *Alford*, 400 U.S. at 37, 91 S.Ct. at 167); *Outka*, 2014 S.D. 11, ¶¶ 6-7, 844 N.W.2d at 602-03. The court further stated that "[i]n either case, there was significant discussion as it related to both the home ownership issue" and the burglary charge, as well as "the underlying crime of stalking." SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; SNT 2-16; RST 4; PSF police reports and photographs. *State v. Stanga*, 2000 S.D. 129, ¶¶ 20-21, 617 N.W.2d 486, 491 (defendant broke into his ex-wife's home after leaving angry messages on her answering machine; came equipped with razor blades, pliers, a knife, scissors and duct tape; and assaulted her).

Moreover, Judge Pfeifle reasoned that:

> I made it very clear that [examination] of the factual basis for acceptance of [Defendant's guilty plea] would include both the motion to dismiss which [had a] long discussion,

> as it related to the [home] ownership issue, was adequately briefed by the parties, and due consideration was given to that particular issue.

SR 34-79, 88, 166-68; CPT 5-15; RST 4-5. *McMillan*, 973 A.2d at 289-94 (totality of the circumstances control when an upset boyfriend burglarizes a shared residence); *Hagedorn*, 679 N.W.2d at 668-72 (a majority of jurisdictions have found that the unauthorized entry of an estranged spouse into the marital home constitutes burglary, and that no right, license, or privilege exists to enter the premises). Equally important, this judge emphasized that the additional materials, which were to be considered as part of the factual basis for Defendant's plea, included the divorce file documents, police reports, and Grand Jury transcript, and that "all of [these items had] developed a significant and in-depth factual basis upon which I could accept Mr. Pentecost's [guilty] plea." SR 34-79, 88, 91-93, 166-68; 170-71, 173-74; GJT 2-6; CPT 5-15; SNT 2-16; RST 4-5; PSF police reports and photographs. *McDonough,* 2015 S.D. 1, ¶ 39, 859 N.W.2d at 42-43. Judge Pfeifle also detailed that the "record very clearly indicates that these materials were discussed not only with [Defendant's attorney], but with Mr. Pentecost himself;" that there was "no indication that [Defendant] had any reservations about proceeding forward" with his plea; and that "[w]e had a long and adequate discussion about the knowing and voluntary nature" of this decision. SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; SNT 2-16; RST 4-5; PSF police reports and

photographs. *Golliher-Weyer,* 2016 S.D. 10, ¶ 8 (deficient performance claims are better addressed in a habeas action). The court further listened to the State's input that Defendant had served a part of his sentence and was on parole; that the prosecution had released, or destroyed, most of the evidence in Pentecost's criminal case, by this point; that the victim had moved on with her life; that the "home that's in question is in other ownership;" and rejected Defendant's request to withdraw his guilty plea. SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; CPT 5-15; SNT 2-16; RST 6-7. *Kvasnicka,* 2016 S.D. 2, ¶¶ 17-18 (prejudice to state counts); *Thin Elk*, 2005 S.D. 106, ¶ 22, 705 N.W.2d at 619-20 (factual basis can come from the prosecution).

Lastly, Judge Pfeifle's analysis dovetails with the transcripts of the November 5, 2012 change of plea proceeding and December 3, 2012 sentencing hearing. SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 2-15; SNT 2-15; RST 3-7; PSF police reports and photographs. Judge Pfeifle made sure that Defendant, who was "just trying to get a piece of his life back," realized, during the November 5, 2012 change of plea proceeding, that L.S. did not want him in her residence after their divorce; that Pentecost was admitting that the victim had "changed the locks [to the house] and the garage door closer," so he could not get inside; and that Defendant understood that the State had evidence, which could have been presented at trial, to support a burglary conviction, even if Pentecost did not believe that he

had entered L.S.'s home with an illegal purpose. SR 34-79, 88, 182; GJT 2-6; CPT 9-14; PSF police reports and photographs. *Kvasnicka,* 2016 S.D. 2, ¶¶ 12-13, 18; *McMillan,* 973 A.2d at 289-94; *Hagedorn,* 679 N.W.2d at 668-72; *World Turner v. Weber,* 2001 S.D. 125, ¶ 14, 635 N.W.2d 587, 592 (defendant cannot claim a better version of facts than his own statements). In addition, this judge heard the prosecution's input that Defendant had sent multiple phone and text messages to L.S., and entered the property with the intent to commit Stalking, based upon the Grand Jury transcript and police reports. SR 34-79, 88, 182; GJT 2-6; CPT 11; PSF police reports and photographs. *McDonough,* 2015 S.D. 1, ¶¶ 38-39, 859 N.W.2d at 42-43. The court also noted, during the December 3, 2012 sentencing hearing, that Defendant had said, during his jail phone calls, that "[i]t crossed my mind about hurting [my ex-wife], or I was thinking about detaining her." SR 91-93, 170-71; SNT 5-6, 14-16. *Hagedorn,* 679 N.W.2d at 668-72; *Stanga,* 2000 S.D. 129, ¶¶ 20-21, 617 N.W.2d at 491. Consequently, Pentecost's claims are without merit.

2. *The lower court correctly rejected Defendant's request to withdraw his guilty plea because a factual basis existed below.*

State replies, with regard to Defendant's third issue, that the transcripts of the November 5, 2012 change of plea and July 31, 2014 resentencing hearings establish that sufficient information supported Pentecost's guilty plea. DB 15-20; SR 34-79, 88, 91-93, 166-68, 170-

71, 173-74; GJT 2-6; CPT 2-17; RST 2-8; PSF police reports and photographs. *McDonough,* 2015 S.D. 1, ¶¶ 38-39, 859 N.W.2d at 42-43 (factual basis exists even when a defendant cannot, or will not, admit to the facts constituting elements of a crime); *LeGrand,* 2014 S.D. 71, ¶¶ 14-23, 855 N.W.2d at 127-28. As previously noted, Judge Pfeifle pointed out that he had extensively reviewed the homeownership issue, which had been fully briefed by both parties in Defendant's case; that he had "very clearly made reference to and relied upon additional materials outside the plea colloquy itself [during the November 5, 2012 plea hearing]," which included the divorce file documents, police reports, and Grand Jury transcript; and that both sides had agreed that these items were part of the factual basis for Pentecost's plea. SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; RST 3-5; PSF police reports and photographs. *Olson,* 2012 S.D. 55, ¶ 42, 816 N.W.2d at 841 (factual basis may come from anything that appears on the record). In addition, this judge reasoned that "there was significant discussion as it related to both the homeownership issue" and the burglary charge, as well as "the underlying crime of stalking." SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; RST 4; PSF police reports and photographs. *McMillan,* 973 A.2d at 289-94 (totality of circumstances controls); *Hagedorn,* 679 N.W.2d at 668-72 (majority of jurisdictions have found that the unauthorized entry into the home of an estranged spouse amounts to

burglary); *Stanga,* 2000 S.D. 129, ¶¶ 20-21, 617 N.W.2d at 491. The court also stated that Pentecost did not have any concerns about "proceeding forward" with his plea; and that "[w]e had a long and adequate discussion about the knowing and voluntary nature" of this decision. SR 34-79, 88, 91-93, 166-68, 170-71, 173-74; GJT 2-6; CPT 5-15; RST 4-5; PSF police reports and photographs. *Kvasnicka,* 2016 S.D. 2, ¶¶ 12-13, 18 (no compelling reason existed for withdrawal of defendant's plea); *McDonough,* 2015 S.D. 1, ¶¶ 38-39, 859 N.W.2d at 42-43.

Finally, Judge Pfeifle found that Defendant had known that L.S. did not want him in her locked residence after their divorce; that Pentecost's attorney had agreed, during the November 5, 2012 plea hearing, that the elements of SDCL 22-32-3 were met when an estranged spouse "kicks the other party out" and that person returns home without permission; and that Defendant had stalked his ex-wife, by sending her extensive phone calls and text messages, which frightened her. SR 34-79, 88, 182; GJT 2-6; CPT 6-7; RST 3-5; PSF police reports and photographs. *McMillan,* 973 A.2d at 290-94; *Hagedorn,* 679 N.W.2d at 668-72; *Lachowitzer,* 314 N.W.2d at 309 (defendant cannot hold back his objections). The court also confirmed that the withdrawal of Defendant's guilty plea would prejudice the State because Pentecost had served a part of his sentence and was on parole; the prosecution had released or destroyed most of the evidence in

Defendant's criminal case; the victim had moved on with her life; and the home in question had been sold. CPT 5-15; RST 6-7. *Kvasnicka,* 2016 S.D. 2, ¶¶ 17-18 (prejudice to the state counts); *State v. Schmidt,* 2012 S.D. 77, ¶ 23, 825 N.W.2d 889, 896. As such, no relief is justified on this record.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully requests that Defendant's conviction and sentence be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Ann C. Meyer
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 6,792 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 1st day of April, 2016.

_____
Ann C. Meyer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of April, 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. John Pentecost* was served via electronic mail upon Jamy Patterson at jamypattersonlaw@gmail.com.

_____
Ann C. Meyer
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 27696

JOHN PENTECOST,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE CRAIG PFEIFLE, Circuit Court Judge

APPELLANT'S REPLY BRIEF

Jamy Patterson
The Law Office of Jamy Patterson, LLC
816 6th St.
Rapid City, South Dakota 57701
Attorney for Appellant

Mark Vargo
Pennington County State's Attorney
300 Kansas City Street
Rapid City, South Dakota 57701

and

Marty Jackley
Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501

Attorneys for Appellee

The Notice of Appeal was timely filed on December 15, 2015.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 27696

JOHN PENTECOST,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Appellee's Brief is cited in this Reply as "AB" followed by appropriate page number. Appellant intends that all arguments contained in his earlier brief be incorporated herein. Appellant will only address a few arguments raised by the Appellee in their brief, and will refer to Appellee hereinafter as "the State."

ARGUMENT

The State argues that "no so-called jurisdictional defects exist here." AB 20. While the issue before this Court has never been decided by the State of South Dakota, cases cited by the State support Pentecost.

For instance, State v. Hagedorn, 679 N.W.2d 666, 671-72 (Iowa 2004), which was relied upon by the State in its brief, lists factors that *help* Pentecost: Pentecost's personal property remained in the marital home; and Pentecost still had the key to the house that existed when he left to visit family in Florida, but which no longer worked upon his return since Sea changed the marital locks without his knowledge or permission. AB 17. See also State v. White, 330 P.3d 482 (Nev. 2014).

The State points out that one of Pentecost's former lawyers, Ellery Grey, "indicated that a mistake of law would not have provided Pentecost with a defense at trial" during Pentecost's plea hearing. AB 18. However, the law in Pentecost's case is one of first impression in the State of South Dakota, so it is disingenuous to argue that "mistake of law" can not be a defense, when the law was not established at the time of the plea.

The State further argues that Pentecost can not cite to the transcript of the divorce hearing between Sea and Pentecost. AB 15. However, the State acknowledges that the circuit court noted on the record it relied upon the divorce materials between the parties when it accepted the factual basis and denied Pentecost's motion to withdraw his plea. AB 23, 25. Since the circuit court was also the same judge presiding over the divorce hearing cited by Pentecost in his brief, and the circuit court noted it had relied upon divorce material in making its decision in Pentecost's case, citation to the divorce material known to the

circuit court judge at the time it issued its decision is relevant and proper in Pentecost's case. RESENT 5.

Finally, Pentecost again stresses how there was no bargain to his plea to the burglary charge, and hence no *Alford* plea. North Carolina v. Alford, 400 U.S. 25 (1970). The State only dismissed two class-one misdemeanor stalking charges per the plea to the class three felony burglary charge. However, these misdemeanor counts were charged in the alternative, meaning the maximum exposure of the dismissed misdemeanor charges was still only one year in the local county jail. While the misdemeanor charges could have exposed Pentecost to two years in the South Dakota State Penitentiary, this was *only if* the Part Two Information had been proven because it related solely to the misdemeanor charges as a subsequent stalking offense. ARR 7. Further, even with this enhancement of the misdemeanor stalking charge to a class six felony, which carried a maximum exposure of two years in the South Dakota State penitentiary, there was no benefit of the bargain. Pentecost faced a maximum exposure of fifteen years in the South Dakota State penitentiary by pleading to the class three felony burglary charge, and indeed, received a six year penitentiary sentence. SENT 16.

For all the reasons discussed herein and in Appellant's earlier brief, Pentecost renews his prayer that this Court reverse his conviction.

Dated this 18 day of April, 2016.

Respectfully submitted,

/s/ Jamy Patterson
Jamy Patterson
The Law Office of Jamy Patterson, LLC
816 6th Street
Rapid City, SD 57701

(605)390-8918

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that the Appellant's Brief is within the limitation provided for in SCDL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Brief contains 653 words.

Dated this 18 day of April, 2016.

/s/ Jamy Patterson_____
Jamy Patterson
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18 day of April 2016, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. John Pentecost* was served by electronic mail on Ann Mayer at ann.meyer@state.sd.us.

/s/ Jamy Patterson
Jamy Patterson
Attorney for Appellant