IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 29711

JACQUELINE LYNELL KROUSE

Defendant/Appellant,

vs.

STATE OF SOUTH DAKOTA

Plaintiff/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Jerome Eckrich, Presiding Judge

PRINCIPAL BRIEF OF APPELLANT JACQUELINE KROUSE

Shawn M. Nichols
Claire E. Wilka
Cadwell Sanford Deibert & Garry LLP
200 E. 10th Street, Suite 200
Sioux Falls SD 57104
(605) 336-0828

Attorneys for Defendant-Appellant

Jason R. Ravnsborg
Attorney General
1302 E Hwy 14, Suite 1
Pierre SD 57501-8501
(605) 773-3215

Attorneys for Plaintiff-Appellee

Notice of Appeal Filed July 14, 2021

TABLE OF CONTENTS

Page #

TABLE OF AUTHORITIES

Page #

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This is a novel case of first impression involving a second-degree arson charge based on an intent to collect insurance for fire damage. Despite a specific intent requirement in SDCL § 22-33-9.2(2), the trial court found Jacqueline Krouse guilty. The State simply failed to present evidence of Krouse's intent to cause fire damage to collect insurance for the loss. More troubling, State Farm, the interested insurance carrier, supplanted its biased judgment for that of law enforcement, denying Krouse of many constitutional safeguards along the way.

Simply put, Krouse was convicted of a Class 4 felony by her insurance company and denied her due process rights throughout this case. After Krouse submitted an insurance claim for a fire in her home, State Farm, directly adverse to Krouse's interests on the insurance loss, hired a private investigator at $200 per hour to conclude that coverage did not apply. Conducting his own investigation his own way, that investigator falsely told Sioux Falls law enforcement that he had a video of Krouse starting the fire. But it was too late: Krouse could not properly trace that investigator's work, remove State Farm's bias, backtrack to invoke her constitutional rights, or accurately preserve the entirety of the evidence that was used against her.

These egregious errors demand reversal of Krouse's criminal conviction. Krouse requests oral argument on these novel issues.

REQUEST FOR ORAL ARGUMENT

Krouse respectfully requests the privilege of being heard on oral argument on all of the issues raised in this appeal.

STATEMENT REGARDING CITATION CONVENTIONS

Appellant Krouse adopts the following citation conventions: Citations to the settled record of the Clerk's Record Index will be denoted "R-____". Citations to the Motions Hearing Transcript will be denoted "MHT:____." Citations to the Court Trial Transcript will be denoted "TV1:___," "TV2:___," "TV3:___," or "TV4:___." Citations to Exhibits offered and admitted at the trial will be denoted "Ex. ___."

JURISDICTIONAL STATEMENT

After a three-day court trial, the Court returned a verdict of guilty on the charge Second Degree Arson pursuant to SDCL § 22-33-9.2(2). TV4:2, 5. The Court imposed a sentence on May 28, 2021. R-655. Suspended Execution of Sentence was entered on June 22, 2021 by the Honorable Jerome Eckrich, Circuit Court Judge, Second Judicial Circuit. *Id.* Krouse timely filed her Notice of Appeal on July 14, 2021. R-661. This Court has jurisdiction over the appeal pursuant to SDCL § 23A-32-2.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred when it denied Krouse's Motion for Judgment of Acquittal on the charge of Second-Degree Arson.

The Circuit Court denied Defendant's motion for a judgment of acquittal.

Authority: SDCL § 22-33-9.2(2)
State v. Halverson, 394 N.W.2d 886 (S.D. 1986)
State v. LaCroix, 423 N.W.2d 169 (S.D. 1988)

II. Whether the Circuit Court's factual findings are legally sufficient to support a finding of guilt under SDCL § 22-33-9.2(2).

Following a bench trial, the Circuit Court *sua sponte* issued factual findings in finding Krouse guilty under SDCL § 22-33-9.2(2), but the Circuit Court's findings are legally insufficient because the Circuit Court issued no findings on Krouse's intent at the time of starting the fire.

Authority: SDCL § 22-33-9.2(2)
SDCL § 23A-18-3
State v. Nekolite, 2014 S.D. 55, 851 N.W.2d 914
State v. Jackson, 2009 S.D. 29, 765 N.W.2d 541

III. Whether Krouse's constitutional right to due process was violated.

Nearly the entirety of the State's case-in-chief relied upon the private investigation conducted by State Farm, which was biased in favor of State Farm's own civil interests and was not subject to the same constitutional parameters, procedures, and attacks to which law enforcement's public, criminal investigations are held. The totality of the circumstances prevented Krouse from a fair trial, resulting in a violation of her constitutional right to due process.

Authority: U.S. Const. amend. V
California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528 (1984)
State v. Huber, 2010 S.D. 63, 789 N.W.2d 283

STATEMENT OF THE CASE

On September 3, 2019, the Lincoln County Grand Jury indicted Defendant, Jacqueline "Jackie" Krouse (hereinafter "Krouse"), charging her with one count of Second Degree Arson in violation of SDCL § 22-33-9.2(2), a Class 4 felony. R-2. Waiving her right to trial by jury, Krouse proceeded to a court trial in the Second

Judicial Circuit Court, the Honorable Jerome Eckrich presiding, which began on March 16, 2021, and concluded with the Court's decision on March 19, 2021. *See* MHT:30, TV1:1, TV4:1. At the close of the State's case-in-chief, Krouse moved for a judgment of acquittal on the only charge in the Indictment, Second-Degree Arson, based on the insufficiency of the evidence with respect to both elements of the charge. TV2:139. The Circuit Court denied Krouse's Motion. TV2:148. On March 19, 2021, the Court issued its decision, concluding that Krouse was guilty of Second-Degree Arson. TV4:2-5. Krouse was sentenced on May 28, 2021. R-468. The Suspended Execution of Sentence order was filed on June 22, 2021. R-655. Krouse timely filed her Notice of Appeal on July 14, 2021. R-661.

STATEMENT OF FACTS

A. The Background Leading up to the Fire

Krouse, a resident of Sioux Falls, owns her longtime family home, located at 2501 W. Brentridge Circle. *See* Ex. 102. She has two grown children. TV3:7. At the time of the incident subject to this appeal, Krouse's daughter attended college in Boston, Massachusetts, and her son, nearing his high school graduation, lived with his father. *Id.* Krouse was the only full-time resident of her home, but her boyfriend, Steve Veenhof, stayed at her house approximately 3 nights per week. TV3:4-5, 14. Krouse had three family pets living in her home as well: one dog and two cats. TV3:7.

Krouse is self-employed as an artist. TV3:6-9. At the time of the fire, Krouse was current on her house's mortgage and had no second mortgages or liens on the property. TV1:75; TV2:129. Krouse received $21,000 in alimony from her ex-

husband per month ($252,000 per year). TV1:64, 79. In the three months before the fire, an unremarkable $118,989.53 was deposited in Krouse's bank account and $102,568.18 was withdrawn from her account. TV1:143-44.

In the spring of 2019, Krouse began formulating plans to sell her house. TV3:10. She always planned to keep the house until her children graduated from high school, so it was nearly time for her to start downsizing. *Id.* Preparing to put her house on the market, Krouse hired a realtor, hired professional painters, started to replace the carpet in downstairs bedrooms, and re-stained the baseboards in a bedroom. TV3:14-15; TV2:119-120. She hired and paid for a home inspector, Brad Horstman of HouseMaster Home Inspections, who completed his inspection of Krouse's home on February 26, 2019. TV3:68-69; Ex. 116. Following his inspection, Horstman reported general maintenance items that needed to be completed, but he did not report any major issues with the house to Krouse. TV3:71.

Krouse's realtor advised Krouse to move her 120-pound Labrador out of her house before the property was listed and potential buyers came through. TV3:26. So Krouse moved her dog to her mom's house before beginning the painting and carpet projects. *Id.* Krouse also hired professional movers, who were scheduled to move a substantial amount of Krouse's furniture the day after the fire, March 14, 2019, in order to prepare her house for staging. TV3:19. Also prior to the fire, Krouse and Veenhof emptied the theater room in her basement and moved "junk" to middle of the basement family room. TV3:25, 27. Much of this "junk" ended up in a pile of debris or trash on flattened carboard boxes on the concrete floor of Krouse's

mechanical room in her basement. TV3:27-28. In addition, Krouse's furniture was moved away from the walls to allow the professional painters access to the walls, who had spent a day painting portions of Krouse's house on March 13, 2019. TV3:18; *see also* Ex. 14-15.

B. The Fire on March 13, 2019

During the day on March 13, 2019, a considerable rainstorm hit Sioux Falls, and there was already a substantial amount of snow on the frozen ground. TV2:107; TV3:29. Multiple homeowners across the city reported serious flooding issues and ice dams blocked water flow around the city. TV2:120; TV3:29. Many Sioux Falls residents submitted claims for water damage to State Farm due to this storm. TV2:120. Like many other Sioux Falls residents, Krouse's basement theater room flooded that evening. TV3:26, 31. Krouse was not very concerned about the water in the theater room since it would be recarpeted anyway. TV3:31-32.

On the evening of March 13, 2019, Krouse went downstairs and Veenhof sat in the kitchen working on his computer. TV3:32. As Krouse later explained to Tyler Tjeerdsma (Sioux Falls Fire), Myra Olson, and Jeff Blomseth (State Farm investigators), she went into the theater room to look at the painters' paint job while she was downstairs, when she noticed water on the floor. TV1:23, TV2:92, TV2:49. She also explained that she had been flipping circuit breakers in the mechanical room because the fireplace had not been working. TV1:23. At some point while downstairs, Krouse smelled smoke. TV2:49. Krouse walked into the mechanical room, where she discovered a small fire in the pile of debris on the floor. TV2:49. She left the

mechanical room to grab a wet towel, but the fire spread when Krouse tried to smother it. TV2:50.

At some point, Veenhof remembers Krouse came back upstairs looking for something, possibly the flashlights. TV3:36. He also remembers that Krouse came upstairs a different time, possibly for a towel, and he remembers smelling smoke and hearing the fire alarm go off. TV3:33, 36. Upon walking downstairs after Krouse, Veenhof saw the fire in the mechanical room, noticed that Krouse was "visibly startled by the size of the fire," and realized the towel she brought in was not going to successfully smother the fire. TV3:38. Despite Krouse's attempt to put the fire out, the fire ignited a wood bedframe right next to it and instantly grew. TV3:39. Krouse and Veenhof immediately began searching for a bucket to fill with water but were unsuccessful. TV3:40. Simultaneously, they saw the fire hit the ceiling rafters and realized it was too big to contain or put out themselves. TV3:41.

Veenhof called 911, and the dispatch directed Veenhof and Krouse to leave the house immediately. TV3:43. Veenhof struggled to convince Krouse to leave, who was still desperately trying to figure out how to put the fire out and find her two cats. TV3:44. Then all the power went out as circuits blew, leaving the house in total darkness so Veenhof forcefully pulled Krouse out of the house. TV3:45. Both Krouse and Veenhof were barefoot, were not wearing coats, and did not have any of their personal belongings, absent the cell phone that Veenhof used to call 911. TV3:46, 53.

Krouse's two cats died in the fire. TV1:99. All of the mementos of Krouse's two children burned in the fire. TV3:20. All of her clothing in the house was lost and hardly any personal belongings were salvageable due to smoke damage. *Id.*; TV3:55.

C. Sioux Falls Fire and Rescue's Initial Investigation

Tyler Tjeerdsma, a fire investigator with Sioux Falls Fire and Rescue and the first investigator on scene, responded to the fire at Krouse's house on the night of March 13, 2019. TV1:13-14. Tjeerdsma investigated the source of the fire, determining the point of origin was near the east wall of the mechanical room in Krouse's basement. TV1:18, 21. During this initial investigation, Tjeerdsma located a security system type of battery on the floor in the mechanical room, but he eliminated the battery as the source of ignition because there was no fire damage to it. TV1:19-20; Ex. 8. Tjeerdsma next spoke with Krouse, who was crying, very worried, and willing to share any information that Tjeerdsma needed. TV1:23. Tjeerdsma and the fire captain responding to the scene generated reports based on their investigation, in which they concluded that the fire started in the mechanical room but the cause was undetermined. TV1:24-25; 36-37. *See also* Ex. 102, Ex. 103.

Because many of the items in Krouse's mechanical room burned during the fire, Tjeerdsma was not able to see or verify what materials—potential ignition sources—were in the area of origin. TV1:49. He confirmed, however, that if rags or cloths with linseed oil, were in the pile of materials (that subsequently burned), such materials could have created a spontaneous combustion environment. *Id.* Spontaneous combustion is a phenomenon in which certain substances and materials,

such as oily rags, produce enough heat on their own to spontaneously start a fire. TV1:29-30. The chemicals in the oily rags are tightly compacted together, and after heating for a certain amount of time, a fire can start. *Id.* A spontaneous combustion fire is a slow phenomenon that takes days to create enough heat to generate smoke. TV1:50. Once oxygen is introduced to that smoke/heated area as an accelerate, a fire will ignite. TV1:50-51.

Importantly, because such materials would have been burned, and thus the evidence showing spontaneous combustion no longer existed, Tjeersdma agreed that he could not eliminate spontaneous combustion as a source of the fire. *Id.* Tjeerdsma's report provided that the fire damage "contributed to the inability to identify some of the available ignition sources. As a result, the competent ignition source remained undetermined." Ex. 103 at 6. The fire captain determined that the "cause of ignition" was "unintentional." Ex. 102. Tjeerdsma concluded his investigative report by stating:

> Analysis of all the evidence and information revealed was sufficient to support that the fire was the result of an unintentional act. During the course of this investigation, no evidence or information was discovered that would support any deliberate act which would have caused this fire.

Ex. 103 at 8; *see also* TV1:42.

Accordingly, Krouse was not initially charged with a crime—nor was she a suspect.

D. Krouse Submits an Insurance Claim to State Farm

Krouse had a homeowner's insurance policy on her house, valued at more than $1 million, through State Farm Insurance. TV1:61, 109. Krouse formerly worked

in the auto claim division for State Farm when she lived in the Chicago area, and her sister still worked for State Farm. TV1:65. The day after the fire, Krouse submitted a claim to State Farm for the damage. TV1:118-19.

Myra Olson, the State Farm fire representative in the Sioux Falls area, was the first State Farm Insurance representative to inspect the fire damage at Krouse's residence. TV1:59, 84. Upon receipt of Krouse's claim, Olson met with Krouse and Veenhof late in the morning on March 14, 2019, walked through the house to assess the damage, and began her review of the claim. TV1:86. Because she did not find a source for the fire ignition, Olson explained to Krouse and Veenhof that State Farm would need to hire an origin and cause inspector to investigate how the fire may have started in order to process the claim. TV1:104.

Prior to reviewing Tjeerdsma's report, State Farm hired Whitemore Fire Consultants to conduct the origin and cause investigation at Krouse's residence, who assigned Jeff Blomseth to investigate the fire. TV1:70-72, 104-05. Whitemore is hired by clients, including insurance companies, attorneys, and product manufacturers, to investigate the origin and cause of fires and explosions throughout the United States. TV2:40, 42. State Farm paid Blomseth $200 per hour, plus travel time and expenses, to investigate the fire at Krouse's residence. TV2:94.

1. State Farm's March 19, 2019 Inspection

Blomseth arrived in Sioux Falls for his first inspection on March 19, 2019. TV2:44. Krouse and Olson were also present during this initial inspection. TV1:106. Upon arrival, he interviewed Krouse, took photographs, documented the scene, and

processed the fire debris. TV2:47. Blomseth interviewed Krouse in his pickup truck on March 19, 2019. TV1:106-107. He did not record his interview with Krouse. TV2:99. Blomseth "systematically processed" the fire debris by himself, by moving each item in the area of origin, layer by layer, top to bottom, to determine if he could find a "competent ignition source" for the fire. TV2:67-68. Neither Krouse nor anyone else was present while he "processed" the debris pile to determine what started the fire. *Id.*

Blomseth testified that he found canvas-type cloth material, charred pieces of cardboard, furnace filter materials, and other "ordinary combustible" papers in the pile. TV2:68. Blomseth testified that Krouse told him that these items—cardboard, furnace filters, possibly a box of wood stick-type matches, some rags—would possibly be in the pile. TV2:84. He also testified that Krouse told him there would have been painting and staining materials in the pile of debris from a project she purportedly completed approximately five weeks prior, which she had placed in the pile approximately seven to ten days before the fire occurred. TV2:69. In this context of reporting what he found in the pile of debris, Blomseth further testified: "If you know what you are looking at and what you are looking for, you will find – identify all kind of things." TV2:70.

Importantly, Blomseth testified that he knew exactly what caused the fire during his first visit on March 19, 2019. TV2:71. Specifically, Blomseth stated that he did not "have an accidental ignition source within this fire debris." *Id.* Outright dismissing the plausible theory of spontaneous combustion, Blomseth further opined

that "stain rags or anything of that nature couldn't have caused this fire" because the "timeline doesn't fit for that to happen." TV2:72. When asked to elaborate, Blomseth testified that Krouse told him she had been staining five weeks prior to the fire, and she placed the stain rags in the pile of debris seven to ten days before the fire.TV2:72-73.

In addition to the timeline, Blomseth opined that self-heating stain rags, or spontaneous combustion, did not start the fire in Krouse's mechanical room because they produce smoke for a long period of time and Krouse's narration did not match. TV2:74. But Krouse did tell Blomseth that she smelled smoke prior to searching for the source of the fire. *Id.* Blomseth testified that "you should be able to see that smoke for quite some time leading up to that." TV2:92.

Due to what Olson refers to as "red flags" of the fire from her perspective as a claims representative,[1] Olson contacted Julie Mrozle, a member of the special investigative unit for State Farm to further investigate. TV1:112.

[1] Such "red flags" included the furniture moved to the middle of the room, Olson's perception that personal items or clothes were purportedly missing, the windows that needed some repairs, no known ignition source, items that Krouse had left in her vehicle, and the fire starting at night. TV1:112. Olson testified that she believed an area of the sunken kitchen floor next to the sink was likely related to a previous water leak, but admitted that she was speculating and the sunken kitchen floor was only a few feet away from the unstable dining room floor, which sustained severe structural damage from the fire. TV1:121-123. During his home inspection, Mr. Horstman with HouseMaster did not find any issues with the kitchen floor near the stove or sink, such as sagging in the floor or floor instability. TV3:74. Olson also admitted that she knew Krouse had hired a local contractor to redo the wood flooring, and she knew that professional painters were in the middle of painting the house, which is why the furniture was moved to the middle of the room. TV1:121-123.

2. State Farm's April 1, 2019 Inspection

Blomseth returned to Krouse's house on April 1, 2019 to conduct a second investigation, and brought Dan Choudek, an electrical engineer at On-Site Engineering & Forensic Services to provide an electrical investigation. TV2:4, 7-8, 75. As Choudek testified, "Jeff Blomseth was the lead fire investigator, and he's the one that's running the investigation for the client at that time." TV2:7-8. Choudek did not identify an electrical cause of the fire. TV2:20.

Julie Mrozle and Olson were also present during the April 1, 2019 inspection. TV1:62, 69-70, 131. Mrozle testified that some of the concerns surrounding the fire included: it occurred late in the evening, the house was going to be for sale soon, where the fire started, and "there may have been some other things that just didn't make sense for the fire where it started." TV1:61-62. Mrozle testified that she noticed "outstanding bills" in "large amounts"[2] at the house, and she asked Krouse about the mortgage on the large house, Krouse's sources of income, and other financial questions. TV1:64. In Mrozle's words, Mrozle "couldn't put together the large home, where the money was coming from" because Krouse had a "fairly large mortgage" and "worked as an artist." *Id.*

After checking Krouse's credit history, Mrozle learned that Krouse had a large amount of credit. TV1:67. Speculating further, she testified:

[2] Mrozle testified that she saw a past due notice for a swimming pool repair that "may have been in the amount of" $15,000-$20,000. TV1:74. In reality, that particular bill was only for $1,039.73. TV3:85. Mrozle did not remember the specifics of any other bills she may have seen. TV2:74-75.

Q: Did it appear that [Krouse] had a lot of outstanding debt?
A: On the surface.
Q: Okay. Was that anything that gave you concern in moving forward with your investigation?
A: Well, I guess a little bit, yeah.
Q: How so?
A: Well, I guess you would have to ask the question, you know, whether she was in over her head on the mortgage and payment of the bills and how that would relate, you know, if she had any involvement in causing the fire.

TV1:67-68.

But Mrozle knew as of April 1, 2019 that Krouse received $21,000 per month in alimony ($252,000 per year) from her ex-husband and she was current on her mortgage. TV1:64, 75, 79.

During the April 1, 2019 inspection, Blomseth and Choudek took Krouse's home surveillance system with Krouse's consent, which had three cameras: one interior and two exterior. TV2:85. Choudek subsequently delivered Krouse's home surveillance video system to Shawn Sieben, a technician with Onsite Engineering & Forensic Services, to review. TV2:34-36. After turning on the video system through his computer monitor, Sieben watched and exported the three videos from Krouse's surveillance system. TV2:37-39. *See* Exs. 13, 14, 15. After viewing the videos, Blomseth provided his report to State Farm, in which he opined that this was an incendiary fire, and contacted Sioux Falls law enforcement, indicating that he had a video of Krouse starting the fire. *See* Ex. 121; Ex. E; TV2:106.

The video in Ex. 14 is accelerated. TV2:88-89. The video in Ex. 15 is a real-time video. TV2:122. At trial, Blomseth testified about Krouse's movements, as can be seen in the video. TV2:88-89; *see also* Ex. 121 (Blomseth report). According to

Blomseth, approximately 2 minutes and 20 seconds after Krouse enters the mechanical room, smoke can be seen on the video coming out of the mechanical room. TV2:89. When Krouse exits the mechanical room, she stands at the doorway looking into the mechanical room for 20-24 seconds. *Id.* Then Krouse is seen walking upstairs, and subsequently comes back downstairs with a towel in her hand as she walks into the mechanical room. *Id.* Right before the video cuts off, another individual, later identified as Veenhof, is seen walking downstairs. *Id.*

When asked about the video and screenshot photos of the video, Exs. 16 and 17, Blomseth then testified:

> A: Yes. It appeared to me – Ms. Krouse, when I was interviewing her, she had stated to me that within the debris, there may be a box of wooden stick-type matches. I didn't recover that or an item consistent with that in the debris. However, when she's walking into the mechanical room, she's holding an item in her hand she retrieved that is, in my opinion, consistent with a box of stick-type matches. She retrieves an item from that box, and she makes what appears to me to be a striking motion with that as she walks into the mechanical room.

TV2:90; *see also* Ex. 121.

But on cross-examination, Blomseth did not testify to seeing any flame associated with Krouse's purported "striking motion," as seen on the video. TV2:123. Blomseth also admitted that he did not know why Krouse would strike a match in the hallway in order to light the pile of debris in the mechanical room on fire, several feet away. TV2:124. Tjeerdsma, the Sioux Falls Fire investigator, could not identify what Krouse was carrying after he watched the video. TV1:51-52.

After the State rested, Krouse moved for a judgment of acquittal under SDCL § 23A-23-1. TV2:139. Krouse argued that the State did not present sufficient

evidence to prove that she started the fire or acted with the requisite intent to cause damage in order to collect insurance for the loss. TV2:139-144. The Court denied Krouse's motion. TV2:148.

E. Defense Testimony

Krouse kept little boxes of flashlights from the Sioux Empire Community Theater, where she and Veenhof volunteered, in her house. TV3:5-6, 60. Veenhof testified that the object in Krouse's hand on the surveillance video looks like one of the small flashlight boxes that she had at her house. TV3:61. Veenhof remembers the flashlight boxes to be about the size and shape of a box of highlighters. *Id.* A person could open the flashlight box by flipping the lid mechanism open at the top. TV3:64. Veenhof also explained how Krouse frequently crawled under the AV rack connecting the theater room to the mechanical room, a space that is not viewable on the surveillance video. TV3:58-59. Notably, Blomseth never acknowledged this crawl space, testifying instead that Krouse's explanation that she had been in the theater room when she smelled smoke was not consistent with the surveillance video. *See* TV2:88.

Cliff Dahl, a certified fire investigator and Krouse's expert in this case, concluded that he believed the fire was caused by a spontaneous combustion. TV2:150, 159; *see also* Ex. EE. He testified that staining rags, which contained MINWAX, a type of staining product that Krouse had been using, were balled up, started heating, and likely ignited once hit with oxygen. TV2:160-62, 172. Upon investigating the area of origin of the fire, Dahl noted that everything in the pile of

debris had been burned. TV2:165. That, Dahl testified, indicates that the fire started in the pile—not on top of the pile or on the outside of the pile—because fire burns up and out once it starts. TV2:165-66.

Dahl was not able to inspect the fire scene until a year after the fire occurred,[3] which created difficulty conducting "a full-blown investigation." TV2:154. Dahl testified that "other investigators had been in there and moved stuff around." *Id.* In addition, while concluding that he did not believe the battery caused the fire here, Dahl did not even know a battery had been in the mechanical room until right before trial because that battery was removed from the mechanical room before he investigated the scene. TV2:169-171. Blomseth and State Farm had not even mentioned the battery as a potential cause—even an excluded cause—of the fire in their reporting. TV2:171-72; Ex. 121. And NFPA 921 requires fire investigators to identify all potential sources of ignition and document the elimination of each potential source. TV2:171. NFPA 921 also recognizes "expectation bias" for fire investigators, who must enter an investigation with an "open mind and look at all of the facts and all of the evidence that we have. We can't come in and presume that something started the fire without doing a complete investigation." TV2:191-192.

F. The Circuit Court Finds Krouse Guilty

The Circuit Court, after considering all the evidence, *sua sponte* entered factual findings on March 19, 2021. *See* TV4:1-5. Specifically, the Circuit Court found that Krouse, "a former State Farm Insurance employee, had insured her home with State

[3] Krouse was not indicted until September 3, 2019, almost six months after the fire. *See* R-2.

Farm. She submitted a claim with State Farm for the fire damage to her home. Her home was valued at 1 million dollars or more." TV4:3. The Court issued findings as to what the surveillance video appeared to show and explained why he rejected Mr. Dahl's opinion. TV4:4-5. The Circuit Court issued no factual findings with respect to Krouse's intent. *See* TV4:1-5. "In sum," the Circuit Court found that Krouse was guilty of the crime charged. TV4:5.

STANDARDS OF REVIEW

The Court reviews a denial of a motion for judgment of acquittal de novo, which presents a question of law. *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 14, 772 N.W.2d 117, 122).

While findings of fact are reviewed under the clearly erroneous standard, conclusions of law are reviewed de novo. *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239. Once the lower court has determined the facts, "the application of a legal standard to those facts is a question of law." *Id.*

Alleged violations of a defendant's constitutional right to due process are reviewed de novo. *State v. King*, 2014 S.D. 19, ¶ 4, 845 N.W.2d 908, 910.

ARGUMENT

I. The Circuit Court erred as a matter of law in denying Krouse's motion for judgment of acquittal.

To convict Krouse of second-degree arson, the factfinder must have found beyond a reasonable doubt that Krouse (1) started a fire, and (2) acted with the intent to destroy or damage property, whether her own or another's, to collect insurance for such loss. SDCL § 22-33-9.2(2). The State failed to present evidence from which a

rational factfinder could make either finding, and the trial court erred in denying Krouse's motion for judgment of acquittal. *See* TV2:148.[4]

" 'The denial of a motion for judgment of acquittal presents a question of law' that [the Supreme Court] review[s] de novo." *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 14, 772 N.W.2d 117, 122). In measuring the sufficiency of the evidence, the Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The Court "accept[s] the evidence and the most favorable inferences fairly drawn therefrom, which will support the verdict." *Id.* (quoting *State v. Jensen*, 2007 S.D. 76, ¶ 7, 737 N.W.2d 285, 288). In addition, the Court does not resolve conflicts in the evidence, assess witness credibility, or evaluate the weight of the evidence. *Id.* The Court gives "no deference to the circuit court's determination regarding the sufficiency of the evidence." *State v. Chipps*, 2016 S.D. 8, ¶ 50, 874 N.W.2d 475, 492. This standard applies to both jury trials and bench trials. *See State v. Most*, 2012 S.D. 46, ¶ 29, 815 N.W.2d 560, 568.

If the Court concludes that the evidence was insufficient to sustain the conviction, a judgment of acquittal must be entered and the State is constitutionally

[4] The Circuit Court denied Krouse's motion for judgment of acquittal after the State rested through a general finding. *See* TV2:148. If this Court concludes that the Circuit Court's ultimate finding of guilt was presented through factual findings (*see* Section II *infra*), the Court is limited to those factual findings in reviewing the sufficiency of the evidence. Such findings will not be set aside unless clearly erroneous. *State v. Rodriguez*, 952 N.W.2d at 259-60. But if this Court concludes the Circuit Court entered a general finding of guilt, it may view all of the evidence to determine if sufficient evidence supported Krouse's conviction. Thus, Krouse addresses each argument separately.

prohibited from retrying the defendant. *State v. Frazier*, 2001 S.D. 19, ¶ 43, 622 N.W.2d 246, 261. Based on double jeopardy principles, the Court must also examine the sufficiency of the evidence first. *Id.* No South Dakota case has analyzed a conviction under SDCL § 22-33-9.2(2) in its current form, or what constitutes sufficient evidence to sustain the conviction.

A. The State presented insufficient evidence to show that Krouse started the fire.

Under the first element, the State was required to prove beyond a reasonable doubt that Krouse "started a fire." SDCL § 22-33-9.2(2). To prove this element, the State relied upon the biased opinion of Jeff Blomseth following his investigation into the cause of the fire and the home surveillance video. The State put on no additional evidence to show that Krouse intentionally started this fire in her house.

There was no evidence of accelerants, burn degree, or burn patterns to suggest arson. In fact, both the fire captain and the first investigator at the scene, Tyler Tjeerdsma, trained in fire investigation, reported that the fire was accidental and the cause was undetermined. *See* Exs. 102, 103; TV1:42. The night of the fire, Tjeerdsma reported that he was unable to identify some of the available ignition sources because of fire damage. Ex. 103 at 6. In addition, Tjeerdsma concluded: "During the course of this investigation, no evidence or information was discovered that would support any deliberate act which would have caused this fire." Ex. 103 at 8; TV1:42-43. The conflicting opinions between Tjeerdsma and Blomseth as to the cause belie any reasonable finding that the State proved beyond a reasonable doubt that Krouse started the fire.

The only evidence connecting Krouse to starting the fire is the home surveillance video and Blomseth's biased opinions about what can purportedly be seen in the video, which is insufficient to prove beyond a reasonable doubt that Krouse started the fire. Blomseth testified that, in his opinion, Krouse can be seen on the surveillance video walking into the mechanical room holding an item "consistent with a box of stick-type matches." TV2:90. Blomseth also testified that, in his opinion, Krouse "retrieved an item from that box, and she makes what appears to me to be a striking motion with that as she walks into the mechanical room." *Id.* Notably, the unbiased state investigator could not make such a claim. When Tjeerdsma was asked about the video, he declined to speculate as to what Krouse was holding in her hand as she was seen walking into the mechanical room. TV1:51-52.

To determine if the State presented sufficient evidence that Krouse started the fire, the Court must review the video in Exhibits 14 and 15. *See State v. Quist*, 2018 S.D. 30, ¶ 15, 910 N.W.2d 900, 904 (explaining what a surveillance video showed in determining if the circuit court erred in denying a defendant's motion for judgment of acquittal); *State v. Dahl*, 2012 S.D. 8, ¶ 9, 809 N.W.2d 844, 846 (analyzing the video evidence to determine whether there was sufficient evidence). The Court is not bound by Blomseth's self-serving opinions as to what Krouse can be seen holding or doing in the video, which are rife with subjective speculation. *See State v. Halverson*, 394 N.W.2d 886, 888 (S.D. 1986) ("The determination of the sufficiency of the evidence to submit a case to the fact finder may depend upon the difference between pure speculation and legitimate inference from proven facts." (internal quotation

omitted)); *Bridge v. Karl's, Inc.*, 538 N.W.2d 521, 525 (S.D. 1995) (noting an expert's opinion "proves nothing if its factual basis is not true."). Krouse is seen carrying a rectangular object. But to conclude that the rectangular object is a matchbox is a speculative, subjective belief of Blomseth—not a legitimate inference based on the evidence. And the Circuit Court's findings of guilt were based on the same unsubstantiated assumptions and conclusion of evidence that was debatable even between the State's two fire investigator witnesses. *See* TV4:1-5. As such, the evidence was insufficient to support a finding that Krouse started the fire.

B. The State presented insufficient evidence to show that Krouse acted with the intent to collect insurance.

The second element required the State to prove beyond a reasonable doubt that Krouse had the intent to destroy or damage her property in order to collect insurance for the loss. *See* SDCL § 22-33-9.2(2). It unquestionably failed to do so. The plain language of this statute requires proof of a mental state beyond intentionally starting the fire itself. The State, however, presented nothing more than rank speculation, thinly veiled as evidence, as to Krouse's purported criminal state of mind.

This Court has held, "[s]pecific intent crimes require that the offender have 'a specific design to cause a certain result.' General intent crimes only require that the offender 'engage in conduct' that is prohibited by the statute, 'regardless of what the offender intends to accomplish.' " *State v. Liaw*, 2016 S.D. 31, ¶ 11, 878 N.W.2d 97, 100 (quoting *State v. Schouten*, 2005 S.D. 122, ¶ 13, 707 N.W.2d 820, 824). "Specific intent requires some intent beyond the intent to do the physical act involved in the

crime, whereas general intent requires only an intent to do the physical act." *Id.* (citation omitted). For example, larceny and burglary are specific intent crimes. *State v. Huber*, 356 N.W.2d 468, 473 (S.D. 1984).

> Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but in addition it must be shown that there was an "intent to steal" the property. Similarly, common law burglary requires a breaking and entry into the dwelling of another, but in addition to the mental state connected with these acts it must also be established that the defendant acted "with intent to commit a felony therein."

Id. (quoting LaFave & Scott, *Handbook on Criminal Law* § 28, at 202 (1972)).

Similar to common law larceny and burglary, second-degree arson under SDCL § 22-33-9.2(2) contains an additional intent element. The plain language requires an intent to destroy or damage property to collect insurance for the loss, which is indicative of requiring proof of intent to do something beyond the physical act of starting a fire. Thus, the State was required to prove that Krouse had the specific intent to destroy or damage property to collect insurance for a loss at the time of committing the physical act of starting the fire. *See Huber*, 356 N.W.2d at 473 (noting that specific intent crimes require "a specified intention in addition to the intentional doing of the *actus reus* itself" for guilt). Evidence that Krouse had the general intent to start the fire is insufficient to sustain a conviction under SDCL § 22-33-9.2(2).

South Dakota law wholly supports reversal in this case. In fact, this Court has reversed numerous criminal convictions that required proof of an addition specific intent. For example, in *State v. LaCroix*, 423 N.W.2d 169, 172 (S.D. 1988), this Court

reversed a defendant's burglary conviction because the evidence and all reasonable inferences drawn from the evidence only permitted "conjecture or speculation as to defendant's intent," which was too tenuous to support the conviction. The State charged LaCroix with first-degree burglary, alleging that he entered "an occupied structure in the nighttime with intent to commit a crime therein, to-wit: . . . assault." *Id.* at 171. The Court concluded, however, that the State failed to present sufficient evidence to establish LaCroix had the intent to commit an assault at the time that he "entered" the building because there is a "difference between mere speculation and legitimate inference from proven facts." *Id.* Thus, based on the evidence, "one can only speculate whether defendant entered" the building "with intent to assault" another. *Id.* Likewise, in *State v. Kessler*, this Court reversed Kessler's theft by deception conviction because the State failed to present sufficient evidence that, at the time that Kessler entered into a loan agreement, he acted with the intent to defraud. 2009 S.D. 76, ¶¶ 18-19, 772 N.W.2d 132, 138.

Similar to *LaCroix* and *Kessler*, Krouse's conviction is based on pure conjecture and speculation as to her intent. The evidence of Krouse's financial circumstances, in particular, falls flat as it failed to account for Krouse's comfortable alimony, supplemental income, the equity in her home, and the fact that she planned to list the home for sale. The State failed to present sufficient evidence to establish that, at the

time that Krouse started the fire, she intended to destroy or damage property to collect insurance for the loss.[5]

Mrozle confirmed that Krouse was current on her $3,600 monthly mortgage leading up to the fire. TV1:75, 136. There was no evidence that Krouse had second mortgages or additional liens on her house before the fire. There was no evidence that Krouse's equity in her home was deficient. There was no evidence that Krouse was facing a dire or immediate financial situation. Krouse's bank account, which is merely a partial snapshot of her financial picture of the time, showed that Krouse had more money deposited in her bank account than she spent in the three months leading up to the fire. TV1:143-44. She had already taken substantial steps toward selling her home, paying for an inspection, paying for painters, hiring a realtor, and hiring movers. None of those facts are at all consistent with the intent required by SDCL § 22-33-9.2(2). And Krouse was still receiving $21,000 in alimony payments per month, plus supplemental income from a separate Morgan Stanley account. TV1:79; TV1:144. The State presented *no* additional evidence with respect to Krouse's intent at the time that she purportedly started the fire. Krouse's motion for judgment of acquittal should have been granted.

[5] In opposition to Krouse's motion for judgment of acquittal, the State argued that it presented sufficient evidence of both elements of this crime, in part, because Krouse "did an intentional act of claiming the insurance for the fire." TV2:144. Further, the State argued: "And the circumstantial evidence that she intended to actually collect the insurance proceeds is because she filed a claim, and then she attempted to go through the entire process to collect those assets." TV2:147. As Krouse notes in Section II *infra*, Krouse cannot be convicted of second-degree arson under SDCL § 22-33-9.2(2) based on an action she took or an intent she purportedly had the day *after* the fire was started. The State was required to show that Krouse had the requisite intent at the time that the act itself, starting the fire, occurred.

II. The Circuit Court erred as a matter of law in finding Krouse guilty because its factual findings do not establish that Krouse acted with the requisite intent at the time that the crime was committed.

Not only did the State fail to present sufficient evidence of Krouse's intent in its case-in-chief, but the Circuit Court erred as a matter of law in finding Krouse guilty because its factual findings cannot legally support a conviction under SDCL § 22-33-9.2(2). The Court must look "at the trial court's written findings" following a bench trial to determine if the guilty conviction stands. *State v. Calin*, 2005 S.D. 13, ¶ 8, 692 N.W.2d 537, 542. South Dakota law provides:

> In a case tried without a jury a court shall make a general finding and shall in addition, on request made before submission of the case to the court for decision, find facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

SDCL § 23A-18-3.

South Dakota's statute is modeled after Federal Rule of Criminal Procedure 23(c), and this Court has frequently looked to federal decisions applying Rule 23(c) when applying SDCL § 23A-18-3. *State v. Nekolite*, 2014 S.D. 55, ¶ 11, 851 N.W.2d 914, 917 (internal citation omitted). Following a bench trial, the defendant in *Nekolite* was convicted in magistrate court of being in actual physical control of a vehicle while under the influence of alcohol. *Id.* ¶ 1-2, 851 N.W.2d at 915. The defendant appealed to the circuit court, which affirmed the conviction but did so by relying on evidence that was not included in the magistrate court's findings of fact because, in the circuit court's view, the magistrate court only issued a general finding of guilt. *Id.* ¶¶ 5-6, 851 N.W.2d at 916-17. The defendant appealed the issue to the Supreme Court, which

first analyzed whether the magistrate court made specifical factual findings under SDCL § 23A-18-3. *Id.* ¶¶ 7-8, 851 N.W.2d at 917.

Expressly rejecting the State's argument otherwise, the Court agreed with federal courts applying Fed. R. Crim. P. 23(c), that "a trial court may make *sua sponte* findings under SDCL 23A-18-3" despite no request for such findings from either party. *Id.* ¶ 10, 14, 851 N.W.2d at 917-18, n.3. The Court then reasoned that the magistrate court had not made a general finding of guilt similar to a jury verdict because the magistrate court "clearly stated that its ultimate finding of guilt was 'based upon' its [specific] oral findings of fact made on the record." *Id.* ¶ 14, 851 N.W.2d at 918. "Because the magistrate court made specific factual findings on conflicting evidence, and because those findings were not clearly erroneous, they were the applicable facts for appellate review." *Id.* ¶ 15, 851 N.W.2d at 918-19. And thus, the Supreme Court continued, the circuit court erred in relying on other evidence in the record—not included in the magistrate court's findings—to affirm the magistrate court's ultimate finding of guilt when the circuit court did not first conclude that the magistrate court's findings were clearly erroneous. *Id.*

Here, while the record does not indicate that either party formally requested findings of fact, the Circuit Court clearly made specific findings in its decision *sua sponte*. *See* TV4:1-5. Specifically, the trial court issued factual findings on conflicting evidence by explaining why it did not believe Krouse's version of events (TV4:3) and why it did not find the opinion of Krouse's expert to be credible. TV4:5. The trial court also made specific findings regarding Krouse's movements and the object

purportedly in her hand according to the home surveillance video. TV4:4. At the conclusion of its findings, the trial court stated: "In sum, the Court finds no reasonable doubt. The Court finds the State has met its burden of proof and concludes the defendant is guilty of the crime charged." TV4:5.

The Circuit Court's ultimate finding of guilt was erroneous as a matter of law because the Circuit Court's factual findings are insufficient to support a conviction of second-degree arson under SDCL § 22-33-9.2(2). And, under *Nekolite*, if this Court agrees that the Circuit Court issued factual findings of guilt, this Court cannot look to evidence outside the Circuit Court's factual findings for purposes of appellate review, unless it first finds those factual findings were clearly erroneous.

As noted above, SDCL § 22-33-9.2(2) requires proof beyond a reasonable doubt that Krouse acted with the intent to damage or destroy property to collect insurance for the loss. The Circuit Court's only conceivable finding on Krouse's intent was that she ultimately presented a claim to her insurance company a day after the fire, as any person would have in response to a fire loss. *See* TV4:3 (finding that Krouse, "a former State Farm Insurance employee, had insured her home with State Farm. She submitted a claim with State Farm for the fire damage to her home. Her home was valued at 1 million dollars or more."). Such garden variety facts, while true, are hardly related to an accused's criminal state of mind. The Circuit Court made no additional findings as to Krouse's intent.

The post-crime rationale of Krouse's supposed intent is also troubling. In *State v. Jackson*, 2009 S.D. 29, ¶ 21, 765 N.W.2d 541, 547, the Court concluded that the

State failed to present sufficient evidence of intent to convict Jackson of theft by deception, a specific intent crime. *Id.*; *see also State v. Swalve*, 2005 S.D. 17, ¶ 9, 692 N.W.2d 794, 797(noting that theft by deception requires "the specific intent to defraud [to exist] at the time the property was received."). Specifically, the Court concluded that there was insufficient evidence to prove that Jackson had the specific intent to deceive "at the time" that he received the money—i.e., at the time that the criminal act itself occurred. *Id.* In doing so, the Court noted several pieces of evidence in the record, such as Jackson's failure to complete the roofing project by a certain time, his spending of the down payment on other items, and his failure to order foam. *Id.* ¶ 21, 765 N.W.2d at 547. But as the Court emphasized, "[t]his [was] all post-inducement conduct." *Id.*

It is axiomatic that one cannot be convicted of a crime through evidence of intent that occurs post-criminal act. South Dakota law is well-established that the mens rea, or the mental state, must accompany the actus reus itself to constitute a crime. *See State v. Huber*, 356 N.W.2d 468, 472 (S.D. 1984) (noting that the concept of intent denotes "the type of mens rea which accompanies the act"); *State v. Lassiter*, 2005 S.D. 8, ¶ 52, 692 N.W.2d 171, 186 (noting that "intent accompanies the actus reus").

Thus, South Dakota law confirms that evidence proving specific intent *after* the actus reus of the crime itself is insufficient as a matter of law to establish a criminal conviction. But here, that is exactly what the Circuit Court relied upon—Krouse's post-fire conduct—in concluding that Krouse was guilty. The fire occurred

in the late evening on March 13, 2019. TV1:13-14. Krouse submitted the claim to State Farm under her insurance policy on March 14, 2019. TV1:84. To convict Krouse under SDCL § 22-33-9.2(2), the Circuit Court needed to find that Krouse had the intent to damage property to collect insurance for the loss *at the time* that she started the fire. It failed to do so. Thus, the Circuit Court's findings are insufficient as a matter of law, and Krouse's conviction cannot stand.

III. The totality of the circumstances surrounding the investigation and prosecution of Krouse deprived her of her constitutional right to a fair trial.

Under the Due Process Clause, the South Dakota Supreme Court has repeatedly acknowledged that someone accused of a crime is constitutionally entitled to a fair opportunity to defend against the charges that he or she faces. *State v. Huber*, 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 295l. "An accused must be 'afforded a meaningful opportunity to present a complete defense.' Those denied the ability to respond to the prosecution's case against them are effectively deprived of a 'fundamental constitutional right to a fair opportunity to present a defense.' " *State v. Packed*, 2007 S.D. 75, ¶ 27, 736 N.W.2d 851, 860 (quoting *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988); *State v. Lamont*, 2001 S.D. 92, ¶ 16, 631 N.W.2d 603, 609-09); *see also State v. Logue*, 372 N.W.2d 151, 158 (S.D. 1985) ("Not every accused is guilty, but every accused, innocent or guilty, is entitled to a fair trial.").

A bedrock principle of our legal system requires all criminal investigations conducted by law enforcement and governmental prosecutions to comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485,

104 S. Ct. 2528, 2532 (1984). These principles are exemplified and protected through numerous governmental obligations, such as the "*Brady* doctrine," properly maintaining the chain of custody of evidence, and operating within constitutional boundaries in conducting searches, seizures, and custodial interrogations. *See, e.g.*, U.S. Const. amend. IV; U.S. Const. amend. V; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); *State v. Reay*, 2009 S.D. 10, ¶ 25, 762 N.W.2d 356, 364. Even firefighters are required to follow the Fourth Amendment when investigating the cause of a fire. *See Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 1948 (1978) ("[T]here is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman . . . ."). Citizens, likewise, know that they are entitled to constitutional protections in facing criminal investigations or interacting with law enforcement.

Private investigators, on the other hand, are not held to the same constitutional restraints. That in and of itself is the issue in this case. State Farm and its hired investigator, Blomseth, essentially conducted the entire criminal investigation of Krouse in a manner that was neither subject to the same procedural requirements imposed on law enforcement nor capable of attack under standard criminal procedure. Blomseth, Mrozle, and Olson speculated on matters that no investigator for the fire department or police department could have.

Distinguishing between the investigation and actions of law enforcement and State Farm is critical. The Sioux Falls Fire Department responded to the scene of the

fire immediately on March 13, 2019 as any law enforcement officer does—to protect the public and investigate if a crime occurred. Sioux Falls fire investigator Tyler Tjeerdsma and the fire marshal concluded that the fire was accidental and the cause was undetermined. *See* Ex. 103 at 8 (noting that there was no evidence discovered that would support any deliberate act which would have caused this fire). Tjeerdsma referenced the battery found in the area of origin in his report. *Id.* at 1. If arson is suspected, Sioux Falls Fire hands the investigation over to Sioux Falls Arson Police Department. TV1:27. That did not happen here. Even at trial, after watching the surveillance video, Tjeerdsma could not say what object was in Krouse's hand. TV1:51-52.

Yet, unbelievably, State Farm conducted its own civil investigation under Krouse's insurance policy after Krouse submitted a claim to State Farm, motivated to find no coverage in order to avoid paying over $1 million on Krouse's claim. The bias was acutely obvious in that Blomseth received $200 per hour to help prove the lack of coverage for the loss. *See* TV2:94.

State Farm's hiring of a private investigator to render a cause-and-origin opinion would be a relevant factor in a civil lawsuit against State Farm. But Blomseth did not conduct his investigation to determine if a crime occurred or to enforce our State's criminal laws. And, importantly, he did not follow the same procedural steps that law enforcement officers are constitutionally required to follow when conducting criminal investigations.

Blomseth testified that he knew this was an "incendiary fire" before he ever watched the surveillance video. TV2:71. And the testimony of State Farm representatives Mrozle and Olson confirm that State Farm speculated from the start that Krouse started this fire. They were suspicious of the fact that Krouse, an artist, lived in such a large, expensive home and immediately assumed she was living beyond her means even after she explained that she received $252,000 a year in alimony. *See* TV1:64-68; TV1:75. Mrozle testified that she saw a $15,000-$20,000 overdue pool bill on Krouse's kitchen, when that bill was really only for $1,039.73. *See* TV1:74; TV3:85. They found it unusual that Krouse's furniture was moved to the middle of the rooms, even though Krouse explained that she had hired professional painters. TV1:112, TV1:121-23. Olson assumed the kitchen floor was sunken in due to water damage (after the fire) despite the fact that the home inspector—the expert in the field—did not find any structural damage to the kitchen floor merely two weeks before the fire. *See* TV1:121-23, TV3:74.

That bias laced throughout the entire investigation, and the State's entire case, is incurable. The manipulation of the evidence that Blomseth "systematically processed" by himself is permanent and untraceable. TV2:67-68. Blomseth did not record his interview of Krouse in his truck on March 19, 2019, which is the conversation where Krouse allegedly told Blomseth that a box of matches may be in the pile of debris. TV2:84, 99. It was during this interview, moreover, where Krouse purportedly told Blomseth that she put stain rags in the pile of debris 7-10 days prior to the fire—eliminating even the consideration of spontaneous combustion in

Blomseth's mind. TV2:72-73. No one else was present for that interview, which, again, was conducted for a civil purpose.

If this interview of Krouse would have been conducted by law enforcement, Krouse could have evaluated whether she needed to invoke her rights to remain silent or to have an attorney present. But the investigator was not law enforcement, so she had no way suspecting she was facing an interrogation. *See State v. Bowker*, 2008 S.D. 61, ¶ 26, 754 N.W.2d 56, 64 ("The Fifth Amendment right against self-incrimination is implicated whenever an individual is subject to custodial interrogation by law enforcement."). Tainted with a financial bias, packaged for his paying client, State Farm, for a civil contractual matter, Blomseth effectively acted as an arm of the State without facing the constitutional boundaries that restrain law enforcement's criminal investigations. In no way would Blomseth or State Farm's actions comport with Krouse's constitutional rights in an ordinary criminal charge.

The proposition that an insurance fire investigator acts as an agent of the State for purposes of a criminal investigation has been recognized by other courts. *See Weathers v. American Family Mut. Ins. Co.*, 793 F. Supp. 1002, 1022 (D. Kan. 1992) (noting that insured could properly invoke her Fifth Amendment rights because the insurance company essentially acted as an agent of the State). But in *Weathers*, law enforcement and the defendant/insured's insurance company were conducting their investigations simultaneously, and thus they shared information with one another pursuant to the arson reporting immunity laws. *Id.* at 1021-22. Knowing she was

facing a criminal investigation, the defendant/insured had the opportunity to invoke her constitutional rights in the insurance matter. *See id.*

That was not the case for Krouse. Law enforcement did not suspect Krouse of arson, and she began what she believed was a civil process with her insurer, never knowing or having the opportunity to invoke any constitutional rights for purposes of a criminal investigation. By the time that Blomseth handed his investigation over to Sioux Falls law enforcement, it was too late for Krouse to challenge any of his findings or trace his work. Cliff Dahl, Krouse's expert fire investigator, acknowledged that he could not do a "full-blown investigation" because the scene was one year old and "other investigators had been in there and moved stuff around." TV2:154. And the Circuit Court found that Dahl's late investigation undermined his credibility. *See* TV4:5. Dahl did not even know a battery was in the area of origin during the fire, which was removed from the scene before he investigated, because Blomseth had failed to mention the battery in his report.. TV2:169-172; Ex. 121.

Additionally, the surveillance video, Exhibit 15, was taken by Blomseth and saved or viewed by a private electrical company, On-Site Engineering and Forensic Services. TV2:36-39. The video cuts off shortly after Krouse is seen reentering the mechanical room with a towel in her hand and Veenhof is seen coming down the stairs. *See* Ex. 15. But Veenhof testified that he and Krouse frantically looked for the cats or a bucket to put the fire out and then immediately called 911. TV3:40, 43-44. Veenhof also testified that the power did not go out right when he came downstairs, but it went out later, after the fire grew and he had called 911. TV3:45. Perhaps if the

video did not cut off, the video would have shown Krouse attempting to put the fire out or shown her carrying an object in her hand that was not a box of matches, as Blomseth speculated she was carrying. Krouse did not have this evidence, however, due to State Farm.

SDCL § 22-33-9.2(2) contemplates an insurance carrier as the victim. This case is unusual in the sense that the victim, potentially harmed financially, was also the investigator and the expert determining the cause of the victim's harm. That bias alone, infused throughout the civil matter between Krouse and State Farm, ultimately tainted the entire *criminal* investigation of Krouse.

The Due Process Clause is grounded in fairness. Krouse recognizes that many criminal cases are prosecuted based on the testimony of victims, biased individuals, or private parties. But cloaking the victim as an expert is fundamentally unfair and problematic. Based on the totality of the circumstances, Krouse's due process rights were violated here because a private investigator conducted the entire criminal investigation as a *de facto* arm of the State in a manner that denied Krouse the ability to respond to the State's case or properly defend herself. To hold that a private investigation conducted for a civil matter can be repackaged as part of a criminal investigation, with no procedural safeguards that are baked into our state and federal Constitutions, is breathtakingly unfair. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.

Ct. 1194, 1197 (1963). Krouse was not treated fairly in this case. As such, this Court should vacate her conviction for second-degree arson.

CONCLUSION

For the reasons set forth in this Brief, this Court should vacate Krouse's convictions and order a judgment of acquittal to be entered.

Dated this 22nd day of October, 2021.

CADWELL SANFORD DEIBERT & GARRY, LLP

/s/ Claire E. Wilka

Shawn M. Nichols
Claire E. Wilka
200 E. 10th Street, Suite 200
Sioux Falls, South Dakota 57104
Telephone: (605) 336-0828
Telecopier: (605) 336-6036
Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Principal Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in 13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 9,551 words.

/s/ Claire E. Wilka

Claire E. Wilka

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Principal Brief, with attached Appendix, was sent by e-mail for electronic filing and service to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk
E-mail: *scclerkbriefs@ujs.state.sd.us*

Mr. Jason R. Ravnsborg, Attorney General
E-mail: *Jason.ravnsborg@state.sd.us*

The original and two copies of the Principal Brief, with attached Appendix, were mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

all on October 22, 2021.

/s/ Claire E. Wilka
Claire E. Wilka

APPENDIX
TO
PRINCIPAL BRIEF OF
APPELLANT JACQUELINE KROUSE

TABLE OF CONTENTS

STATE OF SOUTH DAKOTA)
)
COUNTY OF LINCOLN)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

JACQUELINE KROUSE,

Defendant.

JUDGE'S DECISION

CR 19-816

VOLUME 4

BEFORE: THE HONORABLE JEROME ECKRICH
Circuit Court Judge
March 19, 2021.

APPEARANCES:

For the State: Amanda Eden
Deputy State's Attorney
104 North Main
Canton, South Dakota 57013

For the Defendant: Angel Runnels
Attorney at Law
400 N Main Ave #207
Sioux Falls, South Dakota 57104

(WHEREUPON, the following proceedings were duly had:)

THE COURT: Good afternoon.

We're on the record in the matter of the State of South Dakota versus Jacqueline Krouse.

Ms. Eden is here, Ms. Runnels is here, and Ms. Krouse is here.

This is the time and place for the decision to be rendered.

The Court has had the opportunity to deliberate and view the evidence and obviously had the opportunity over the past three or four days as well.

The State of South Dakota charged the defendant, Jacqueline Krouse with second degree arson pursuant to SDCL 22-33-9.2(2).

The defendant pled not guilty.

The defendant waived her rights to a jury trial orally on the record March 15, 2021, pursuant to SDCL 23A-18-1.

The Court trial commenced March 16th, 2021.

The elements of the crime of arson in the second degree, each of which the State must prove beyond a reasonable doubt are at the time and place alleged:

One, the defendant started a fire or caused the explosion.

Two, the defendant acted with the intent to destroy or

damage any property whether his or her own or another to collect insurance for such loss.

Proof beyond a reasonable doubt is proof that leaves the Court firmly convinced of the defendant's guilt. A reasonable doubt is one which would ordinarily impress the judgment of a prudent person so as to cause the person to pause or hesitate to act in the more important affairs of life.

In the late evening hours of March 13, 2019, a fire broke out in Jacqueline Krouse's Lincoln County, South Dakota residence. Fire crews were dispatched about 11 p.m. on March 13th. It was determined the house fire started in a mechanical room of the home. It burned up and out through the walls, through the floor upstairs. Smoke, fire suppression, and the fire itself caused heavy damage to the defendant's house.

The defendant, a former State Farm Insurance employee, had insured her home with State Farm. She submitted a claim with State Farm for the fire damage to her home. Her home was valued at 1 million dollars or more. A State Farm claims rep; fire investigators, public and private, took statements from Ms. Krouse beginning with an hour or two after the fire itself and throughout the next week.

Ms. Krouse's versions of her movements in the minutes prior to the fire's outside break are not consistent with

the evidence. State's Exhibits 13 through 15 is the security camera video which captures her activities and movements in the minutes leading up to and after the fire outbreak. Thirty two minutes into the video, the defendant walked to and crosses the threshold of the mechanical room carrying a small rectangular object which insofar can be seen on the video is approximately the size of kitchen matchbox. She disappears from camera view into the mechanical room.

Approximately two minutes later, thickening smoke is observable emanating from the mechanical room.

About 30 to 45 seconds after smoke is first observed, the defendant reemerges from the mechanical room, turns, and for about 20 seconds, stands watching where there is now obviously a growing fire within the room. She turns and walks slowly upstairs. Her pace, body language, suggests an absence of panic.

Just before the video ends, the defendant returns to the mechanical room, right arm up raised brandishing a towel.

The State alleges the fire was intentionally set by Ms. Krouse.

The defense contends the fire was caused as a result of spontaneous combustion which ignited in the mechanical room. The Court rejects defendant's spontaneous combustion theory.

The Court rejects Mr. Dahl's opinion on at least three grounds. His trial opinion testimony of spontaneous combustion is contradicted by his May 15 report, State's Exhibit EE, quote, if I had to swear under oath that this fire was caused by spontaneous combustion, I would have to say no.

There is no significant evidence of fire origin or cause in the record to explain why Mr. Dahl can now swear under oath otherwise.

Two, Mr. Dahl's investigation was hampered by the passage of time which was over a year post fire.

Three, Mr. Dahl virtually ignored extremely relevant evidence, the security footage.

In sum, the Court finds no reasonable doubt.

The Court finds the State has met its burden of proof and concludes the defendant is guilty of the crime charged.

Ms. Runnels, we're going to have to set a sentencing and I would suggest we do a PSI.

THE CLERK: We put a form up there for you.

THE COURT: I see it. Thank you.

What would you suggest?

MS. RUNNELS: For a date?

THE COURT: Yeah. I don't know how long it takes court services to get things done around here.

MS. EDEN: I think they're doing roughly six to eight weeks.

THE COURT: Say again.

MS. EDEN: Six to eight weeks, Your Honor.

THE COURT: Six to eight weeks.

Does the State have any request or anything on bond? It's a pretty high bond, I see.

MS. EDEN: No, Your Honor. We have no request to modify the bond.

THE COURT: Okay.

All right, Ms. Krouse, I know this is upsetting to you, but there's more to be done and I know very little about you personally. I mean, I've seen what I've seen in the past three or four days, but as Ms. Runnels will be telling you, that there's -- to be known about you as well. There's been some, I mean, indirect evidence on who you are, but in -- for a sentence a court has to know a lot more about who you are. All right. So what I'm going to do is I'm going to order what's called a presentence investigation report. I think I'll do -- I may as well do -- she doesn't have a criminal record, does she, to speak of?

MS. EDEN: No.

THE COURT: Then I'll order a full one. Okay.

And, ma'am, what's going to happen is I'm going to set a date for sentencing about two months down the road. In the meantime, Ms. Runnels still represents you. You will be provided with a packet of information to fill out among

other things. It's a questionnaire. And you'll be required to answer questions.

Now, if you have any problem answering those questions, talk to Ms. Runnels. She can help you out. Ms. Runnels can explain a bit more about things that can go into a presentence investigation, letters, that type of thing, and she'll help you. So what is important to me when I order this, ma'am, is that it be completed and that it be completed on time, because that -- I mean, those things tell me a little bit about a person too. So it's important to me. Okay.

Are you with me, ma'am?

THE DEFENDANT: I am.

THE COURT: All right.

(At which time a discussion was held off the record.)

THE COURT: Ms. Runnels, will that date work for you, May 28th in the morning sometime?

MS. RUNNELS: Yes.

THE COURT: Ms. Eden, will that date work for you?

MS. EDEN: It does, Your Honor.

THE COURT: So I'll set this for May 28th 2021. We'll say 9:30. And you'll have to check on the -- which courtroom that will be. We don't know yet. It will be in the morning here at the courthouse.

I guess just as a side, a court service officer has to

be alerted to get it to me ahead of time. They may have to mail it because I don't have access to Odyssey or any of that stuff.

THE CLERK: Okay.

THE COURT: So if they have any questions, you have my phone number and let me know -- or my email address, either one of the two.

THE CLERK: Okay.

THE COURT: All right.

THE CLERK: They can email it to you or maybe not. It's not a secured email.

THE COURT: However you choose.

THE CLERK: Okay.

THE COURT: Just -- or have them -- he or she -- give me a call.

THE CLERK: We'll do that.

THE COURT: Ms. Eden, anything else for the record?

MS. EDEN: Not from the State, Your Honor.

THE COURT: Ms. Runnels?

MS. RUNNELS: No, Your Honor.

THE COURT: Thank you. We're in recess.

(At which time the proceeding concluded.)

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF LINCOLN)

I, JENA SKORCZEWSKI, Court Reporter and Notary Public in the above-named County and State, do certify that I reported in stenotype the proceedings of the foregoing matter; that I thereafter transcribed said stenotype notes; that the foregoing pages 1-8, inclusive are a true, full and correct transcription of my stenotype notes.

IN TESTIMONY WHEREOF, I hereto set my hand and official seal this 7th day of September 2021.

/s/ Jena Skorczewski
JENA SKORCZEWSKI
Court Reporter
Commission Expires: 09-25-25

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:ss
COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

State of South Dakota, 41CRI19-000816

Plaintiff,

vs. Suspended Execution Of Sentence

JACQUELINE KROUSE,

Defendant.

An Indictment was filed with the Court on the 3rd day of September, 2019, charging the Defendant with Second Degree Arson, SDCL 22-33-9.2(2).

The Defendant was arraigned on said Indictment on the 18th day of November, 2019. The Defendant appeared at her arraignment with attorney Angel Runnels, and the State was represented by prosecuting attorney Amanda D. Eden. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed.

On the 16th, 17th, 18th, and 19th days of March, 2021, the Defendant returned before the Court with attorneys Angel Runnels and Michael W. Strain, and the State was represented by Amanda D. Eden and William H. Golden. On said dates, a Court Trial was held.

On the 19th day of March, 2021, the Defendant was found Guilty of Second Degree Arson, in violation of SDCL 22-33-9.2(2).

It is therefore, ORDERED, ADJUDGED and DECREED, that a Judgment of Guilty shall be entered, in that on or about the 13th day of March, 2019, in the County of Lincoln, State of South Dakota, JACQUELINE KROUSE did commit the public offense of Second

FILED
JUN 22 2021
Lincoln County, S.D.
Clerk Circuit Court

Degree Arson, in violation of SDCL 22-33-9.2(2).

SENTENCE

On the 28th day of May, 2021, the Defendant returned to Court with Angel Runnels, and the State was represented by Amanda D. Eden and William H. Golden. The Court asked the Defendant if any cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court pronounced the following sentence:

IT IS ORDERED AND ADJUDGED by this Court, that as to Count 1, Second Degree Arson, SDCL 22-33-9.2(2), JACQUELINE KROUSE shall be imprisoned in the South Dakota State Penitentiary for a period of 8 years, there to be kept, fed and clothed according to the rules of said institution. It is further,

ORDERED, that execution of said sentence shall be suspended upon the following terms and conditions:

(1) The Defendant shall be placed on supervised probation for a period of 4 years, and is required to sign a probation agreement with the Court Services Officer and follow all standard and special conditions of the agreement, which is hereby incorporated by reference and made a part hereof.

(2) The Defendant shall have no violations of local, state, or federal laws.

(3) The Defendant shall voluntarily submit to random testing of her blood, breath, urine, hair or saliva, upon request of Court Services during the probationary period and pay for all costs associated therewith.

(4) The Defendant shall voluntarily submit to warrantless

search and seizure of her person, residence or property, upon request of Court Services during the probationary period.

(5) The Defendant shall neither possess nor consume alcohol or illegal substances during the probationary period, and shall not enter any establishment where alcohol is the primary item for sale. In addition, the Defendant shall not be present in any vehicles or at any residences where alcohol is present.

(6) The Defendant shall remain gainfully employed.

(7) The Defendant shall successfully complete a chemical dependency evaluation, follow through with said recommendations, be responsible for all costs associated therewith, and authorize a release of information for Court Services to monitor compliance.

(8) The Defendant shall successfully complete any other evaluations as requested by Court Services, follow through with said recommendations, be responsible for all costs associated therewith, and authorize a release of information for Court Services to monitor compliance.

(9) The Defendant shall participate in the 24/7 Sobriety Program at the discretion of Court Services.

(10) The Defendant shall pay $106.50 in court costs and reimburse Lincoln County $45.50 for transcript fees, which shall be paid pursuant to a payment plan established by Court Services.

IT IS FURTHER ORDERED, that Defendant shall be incarcerated in a jail facility as designated by the Sheriff of Lincoln County for a period of 180 days with work release authorized. It is

further,

ORDERED, that the Defendant is hereby remanded to the Lincoln County Sheriff to begin her sentence. It is further,

ORDERED, that any restitution owed in regard to this matter is to be determined.

Dated this 18 day of June, 2021.

BY THE COURT:

Jerome Eckrich - Circuit Court Judge

ATTEST: BRITTAN ANDERSON
~~Kristie Torgerson~~, Clerk of Courts
BY:

Deputy Clerk (SEAL)

SDCL 22-33-9.2 Second degree arson-Felony (South Dakota Codified Laws (2021 Edition))

22-33-9.2. Second degree arson-Felony

Any person who starts a fire or causes an explosion with the intent to:

(1) Destroy any unoccupied structure of another; or

(2) Destroy or damage any property, whether his or her own or another's, to collect insurance for such loss;

is guilty of second degree arson. Second degree arson is a Class 4 felony.

SL 2005, ch 120, §87.

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 29711

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JACQUELINE LYNELL KROUSE,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME ECKRICH
Circuit Court Judge

APPELLEE'S BRIEF

JASON R. RAVNSBORG
ATTORNEY GENERAL

Stephen G. Gemar
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Shawn M. Nichols
Claire E. Wilka
Cadwell Sanford Deibert & Garry LLP
200 E. 10th Street, Suite 200
Sioux Falls, SD 57104
Telephone: (605) 336-0828
Email: snichols@cadlaw.com
cwilka@cadlaw.com

ATTORNEYS FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed July 14, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Statutes

Cases

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29711

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JACQUELINE LYNELL KROUSE,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant/Appellant, Jacqueline Lynell Krouse, is referred to as "Defendant." Plaintiff/Appellee, the State of South Dakota, is referred to as "State." The settled record in the underlying case is denoted as "SR," followed by the e-record pagination. The Defendant's Brief is denoted as "DB." The transcripts from the case are designated as follows:

March 15, 2021 Motions Hearing ..... MH

May 28, 2021 Sentencing .....ST

Trial Transcript Vol. 1 .....TT1

Trial Transcript Vol. 2 .....TT2

Trial Transcript Vol. 3 .....TT3

Trial Transcript Vol. 4 .....TT4

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On May 28, 2021, the Honorable Jerome Eckrich, Lincoln County Circuit Court Judge, Second Judicial Circuit, filed a Temporary Judgment and Sentence. SR:468. On June 22, 2021, the circuit court filed Defendant's Suspended Execution of Sentence. SR:655-58. Defendant filed a notice of appeal on July 14, 2021. SR:661. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE COURT'S FINDINGS AND GUILTY VERDICT?[1]

The circuit court denied Defendant's motion for judgment of acquittal during trial, ultimately finding Defendant guilty.

State v. Falkenberg, 2021 S.D. 59

State v. Hauge, 2013 S.D. 26, 829 N.W.2d 145

State v. Nekolite, 2014 S.D. 55, 851 N.W.2d 914

State v. Rodriguez, 2020 S.D. 68, 952 N.W.2d 244

II.

WHETHER DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED?

This issue is being raised for the first time on appeal.

[1] The undersigned counsel combined Sections I and II of Defendant's brief due to the similarity in the issues presented.

Al-Saka v. Sessions, 904 F.3d 427 (6th Cir. 2018)

Jones v. Delaney, 610 F.Supp.2d 46 (D.D.C. 2009)

State v. Red Star, 2001 S.D. 54, 625 N.W.2d 573

State v. Thunder, 2010 S.D. 3, 777 N.W.2d 373

STATEMENT OF THE CASE

On September 3, 2019, a Lincoln County Grand Jury indicted Defendant on one count of Arson in the Second Degree, in violation of SDCL 22-33-9.2(2). SR:2.

Defendant waived her right to a jury trial on March 15, 2021. MH:28-30. Defendant's court trial commenced on March 16, 2021. TT1:1. At the conclusion of the State's case, Defendant moved for Judgment of Acquittal. TT2:139. Viewing the evidence in the light most favorable to the State, the circuit court denied the motion. TT2:148. Trial concluded with the circuit court's decision finding Defendant guilty of Second-Degree Arson, in violation of SDCL 22-33-9.2(2) on March 19, 2021. TT4:1-2, 5.

The circuit court sentenced Defendant on May 28, 2021, to eight years in prison, all suspended. SR:655-58. The circuit court placed Defendant on probation for a term of four years and ordered her to serve 180 days in jail. SR:655-58. The Suspended Execution of Sentence was filed on June 22, 2021. SR:655-58.

STATEMENT OF THE FACTS

In early 2019, Defendant was planning to sell her house. TT3:10, 14-15. To prepare, she painted the basement, ripped up carpet, re-stained baseboards, and requested a home inspection. TT3:15, 70-71. The home inspection report revealed signs of past water damage, active rodent activity in the attic, and water damage in one of the basement bathrooms. TT3:73; SR:321, 325. The siding and soffit at the rear of the home, interior windows, plumbing beneath the kitchen sink, downspouts, and deck railing post were all rated as being in "poor" condition by the report.[2] SR:348-66. In addition to the items in the report, one of the fireplaces had not been working for months before the fire occurred. TT3:22.

On the night of March 13, 2019, Sioux Falls Fire and Rescue responded to the report of a fire at Defendant's house, located at 2501 W. Brentridge Circle in Sioux Falls. TT1:13-15; SR:228. Tyler Tjeerdsma, a fire investigator for Sioux Falls Fire and Rescue, arrived around 11:00 p.m. TT1:14-15. He investigated the source of the fire and collected information from the firefighters who were initially on scene. TT1:15-16. Tjeerdsma determined the fire had started in the home's mechanical room, which was in the basement. TT1:17, 21.

[2] "Poor" is defined in the HouseMaster report as: "Element requires immediate repair, replacement, or other remedial work, or requires evaluation and/or servicing by a qualified specialist." SR:307.

Tjeerdsma ruled out possible causes of the fire, including a spare battery for the home security system and the breaker box, both located in the mechanical room. TT1:19-21, 40. He also ruled out the paint cans that were in the room because all the lids were on, showing they were contained. TT1:47-48. Tjeerdsma traced the point of origin to a spot along the east wall of the mechanical room near some charred cardboard boxes. TT1:21, 24, 44.

Tjeerdsma then spoke with Defendant, who had been taken to a neighbor's house. TT1:22-23. Defendant stated she had been having problems with the fireplace in the basement tripping circuit breakers and had been in the mechanical room multiple times that night to inspect the panel box. TT1:23-24. Defendant explained that, during one of her trips into the mechanical room, she discovered a small fire had started on the floor. TT1:23. According to Defendant, by the time she returned with a wet towel to smother the fire, it had grown too big, forcing her to call 911. TT1:23. When he concluded his investigation, Tjeerdsma was unable determine the cause of the fire, but he did not consider the fire to be accidental because there were no ignition sources present and nothing suggested human error. TT1:24-25. Tjeerdsma estimated Defendant suffered approximately $250,000 worth of damage to her home and an additional $100,000 in content losses. SR:235.

Defendant's home was valued at over $1 million and was insured through State Farm. TT1:61, 109. She submitted a claim to State Farm

for fire damage the day after the fire. TT1:84-86, 118-19. State Farm claims representative Myra Olson was assigned to Defendant's case in March of 2019. TT1:82-84. Olson, who used to work with Defendant at State Farm, collected information from Defendant concerning the fire. TT1:86-91. Defendant mentioned to Olson that her mother had managed fire claims, and that her sister worked for State Farm. TT1:108-09.

Defendant told Olson she was in the basement the night of the fire after a fight with her boyfriend, Steve Veenhof. TT1:89. Defendant went on to explain that she discovered water on the floor of the theater room, which is adjacent to the mechanical room. TT1:89. Defendant claimed that she called Veenhof about the water, then smelled smoke at about the same time; she followed the smell into the mechanical room, where she saw a small fire on the floor. TT1:89-90. Defendant told Olson that the fire started on a pile of cardboard boxes, stuffed animals, and a headboard leaning against the wall. TT1:90-91. Next, Defendant stated that she left the room and went to grab a towel and attempted to smother the fire with the wet towel, to no effect. TT1:91-92.

After the interview, Defendant, Veenhof, and Olson performed a walk-through of Defendant's home. TT1:93-94. The dining room, which is above the mechanical room, suffered significant amounts of fire damage. TT1:95. The kitchen had substantial smoke damage. TT1:96. Olson discovered the floor in front of the kitchen island was sunken in. TT1:96. Defendant explained that the kitchen sink had been leaking.

TT1:96. As the walk-through continued, Olson noticed that maintenance needed to be performed on the windows in the master bedroom. TT1:96-97. Defendant reported that the fireplace in the basement family room had not been working and that she would flip the breakers to try and get it to work. TT1:100-101.

Olson noted several concerns in her investigation, including: 1) Defendant was trying to sell her house; 2) Conditions in the house which needed to be addressed before it could be sold; 3) Defendant had her purse, laptop, and contacts in her car the night of the fire. TT1: 97-100, 110-12. Olson determined the fire originated in the mechanical room but was unable to discover a cause of the fire. TT1:102-106, 112. Because of this, she hired Jeff Blomseth of Whitmore Fire Consultants, a private fire investigation firm. TT1:104-06; TT2:40, 44. Olson testified that it is normal for State Farm to hire origin and cause investigators to determine the cause of the fire and whether State Farm has coverage. TT1:103-04, 137-38.

Blomseth began his investigation roughly a week following the fire. *See* TT2:44. He conducted an interview with Defendant to obtain background information regarding the fire. TT2:46-51. Her story was like the one she had told Olson, but Defendant added that she was in the theater room for about three to four minutes before she smelled smoke. TT2:49-51, 91. Defendant also told Blomseth she had went to the bathroom right next to the mechanical room for a towel and called for

Veenhof after her attempts to suppress the fire were unsuccessful. TT2:49-51.

After interviewing Defendant, Blomseth investigated the scene using standard procedures of a fire investigator, which include documenting, photographing, and processing evidence. TT2:53-55, 66-67. He examined the debris near the area of origin in the mechanical room, layer by layer, and tried to find an ignition source. TT2:66-67. Blomseth found canvas cloth material, furnace filter materials, charred cardboard, and "ordinary combustibles," such as paper, near the area of origin. TT2:66-68. Defendant told Blomseth he may also find painting and staining materials and possibly a box of wood stick-type matches in the pile. TT2:69, 84. She reported placing all the items in the pile roughly seven to ten days prior to the fire. TT2:69.

After his initial investigation, Blomseth concluded that the fire was not accidental because he could not locate an accidental ignition source in the debris. TT2:70-72. He ruled out electrical and mechanical sources of ignition, candles, and cigarettes. TT2:71-72. He also ruled out spontaneous combustion of the stain rags that were present because the timeline of the fire was inconsistent with that theory. TT2:71-73. Blomseth testified that a spontaneous combustion fire involving stain rags would have smoked for a long period of time before fire was seen. TT2:74. In addition, he explained that the concrete floor likely would have been drawing heat out of a potential pile of rags. TT2:73-74.

Blomseth visited Defendant's house again on April 1, 2019. TT2:75. He concluded the damage to the main floor dining room was caused by the fire in the mechanical room burning up through the floor. TT2:77-78. After his two visits to Defendant's home, Blomseth opined that the fire was an *incendiary fire*, which he defined as a fire that appears when it should not have; an "application of flame to combustible materials." TT85-86.

Olson also asked State Farm claim specialist Julie Mrozle to assist. TT1:58-62. At trial, Mrozle explained that the late timing of the fire, the fact the house was in the process of being put up for sale, and the unknown cause of the fire concerned State Farm. TT1:61-62. Mrozle walked through Defendant's house on April 1, 2019, and discovered Defendant had several outstanding bills and overdue notices for swimming pool repairs and boat-related expenses. TT1:62-64, 74-75. The overdue pool repair bill was $1,039.73. TT3:85.

During the second walk-through, electrical engineer and forensics evaluator Dan Choudek, of Onsite Engineering and Forensic Services, Inc., inspected Defendant's home as an assistant investigator with Blomseth. TT2:4-8. Choudek's findings corroborated Blomseth's: he agreed with Blomseth's designated area of origin and ruled out a potential electrical cause of the fire in the mechanical room. TT2:19-20, 24-25. He also ruled out the battery as an ignition source of the fire because it was not burned. TT2:16, 26-27.

Defendant gave Blomseth permission to take a video from the home's surveillance system from the night of the fire. TT2:84-85; *see generally* Ex.13 – Ex.15. The video footage showed Defendant holding a small rectangular object and walking into the mechanical room. Ex.15 at 31:50-31:57. Thickening smoke emerged from the mechanical room approximately two minutes after Defendant entered and Defendant exited the room roughly a minute and half after smoke is first observable. Ex.15 at 34:02, 35:27. She turned around and gazed back through the door to the mechanical room for 20 seconds, with smoke emanating from the room. Ex.15 at 35:29-35:47; *see also* Ex.14 at 04:30-04:35 (screenshot below).[3]

[3] Exhibit 13 and 14 are the same footage as is in Exhibit 15. Exhibit 15 was recorded off a monitor using a camcorder, while Exhibits 13 and 14 are video files that were exported off the security system files. *See* TT2:34-39, 86-89; *see also* Exhibits 13-15. The footage in Exhibits 13 and 14 is accelerated. *See* TT2:86-89; *see also* Ex. 13, 14.

Defendant then walked halfway to the stairs before turning around and reentering the room two more times in the next 23 seconds. Ex. 15 at 35:48-36:28. Finally, Defendant walked upstairs and then returned to the mechanical room with a towel around one minute later. Ex. 15 at 36:30-37:50. After viewing the video, Blomseth contacted the Sioux Falls Fire Department and turned the video over to law enforcement. TT2:106-07; *see* SR:448.

Tjeerdsma was not aware of the video during his initial investigation. TT1:25-27. He testified that he would have transferred the investigation to the Sioux Falls Police Department had he known about the footage. TT1:26-27. After viewing the video, Tjeerdsma explained that the speed at which the smoke developed was not consistent with a spontaneous combustion fire. TT3:97. A spontaneous

combustion fire heats up over a period of hours and dirty smoke would persist for at least a couple of hours before there would be an open flame. TT3:96-97. He commented that the smoke from the smoldering fire would have set off fire alarms. TT3:96. Tjeerdsma also confirmed he did not work with Blomseth in his investigation. TT1:46.

Defendant hired Cliff Dahl, a retired part-time fire investigator with 25-30 years of experience, to examine the circumstances surrounding the fire. TT2:149, 157. Dahl examined the documents and videos concerning the fire in mid-April to early May of 2020. SR:419-20. After his initial viewing of the documents and video, Dahl speculated the cause was spontaneous combustion but was unable to conclusively state so. SR:420-21. In his initial report, Dahl wrote: "In summary, if I had to swear under oath that this fire was caused by spontaneous combustion, I would have to say no." TT2:197; SR:421.

Dahl interviewed Defendant and Veenhof. TT2:173. Following his on-site investigation, Dahl concluded the fire was accidental and ignited due to spontaneous combustion. TT2:159, 181, 195-96. Dahl noted that MINWAX, an oil used in staining, had been present at the scene and explained that, if not discarded properly, stained soaked rags can heat up and spontaneously combust. TT2:160. Dahl reasoned there was a long period of smoldering before the fire started, one that would come with a smell and potentially gradual smoke. TT2:175. Dahl believed that Defendant kicked the smoldering pile of debris, which would introduce

oxygen and generate more smoke. TT2:175-76. Dahl also ruled out other causes of the fire, including the furnace, hot water heater, battery, and an outlet along the wall close to the point of origin. TT2:167, 170.

At trial, Veenhof stated on the day of the fire, the carpet in the lower level of the theater room had been soaked with water. TT3:26. Veenhof attempted to get the water out but Defendant told him not to worry about it, since new carpet would be installed. TT3:30-32. Veenhof stated that he heard the fire alarm and smelled smoke before Defendant came upstairs to grab a towel. TT3:33. Veenhof then followed Defendant downstairs. TT3:34-36. He explained that he asked her if the fire was real and she said it was. TT3:33-35. Veenhof described Defendant's demeanor as "not concerned" and commented that she was joking about the fire, comparing it to a time she burnt popcorn. TT3:33-35.

DCI Agent Chase Kuhlman testified Defendant had a positive balance of around $16,000 in her account between December 14, 2018, and March 13, 2019. TT1:143-45. Defendant's primary sources of income during this period were alimony payments and supplemental income from Morgan Stanley. TT1:144-45.

At the conclusion of trial, the circuit court found Defendant guilty and made findings related to the credibility of the witnesses and conflicts in the evidence. TT4:1-5. Defendant did not request special findings under SDCL 23A-18-3.

ARGUMENTS

I.

THE EVIDENCE WAS SUFFICENT TO SUPPORT THE COURT'S FACTUAL FINDINGS AND GUILTY VERDICT.

A. *Standard of Review*

"Whether the State has provided sufficient evidence to sustain the conviction is a question of law reviewed de novo." *State v. Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d 145, 149 (citation omitted). "In measuring evidentiary sufficiency, [this Court asks] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Rodriguez*, 2020 S.D. 68, ¶ 54, 952 N.W.2d 244, 260 (citation omitted). "[This Court] accept[s] the evidence and the most favorable inferences fairly drawn therefrom, which will support the verdict." *State v. Riley*, 2013 S.D. 95, ¶ 14, 841 N.W.2d 431, 436 (citation omitted). "If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilty, a guilty verdict will not be set aside." *Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d at 149 (citation omitted) (internal quotation omitted).

Though Defendant did not request special findings under SDCL 23A-18-3, the trial court made oral factual findings to explain the guilty verdict. *See* TT4:3-5; *see also State v. Nekolite*, 2014 S.D. 55, ¶ 14, 851 N.W.2d 914, 918, n.3. (explaining that a trial court may make factual

findings under SDCL 23A-18-3 without a request from either party). "[W]hen factual findings have been made, and those findings are not clearly erroneous, an appellate court may not set aside those findings and imply contradictory findings." *Rodriguez*, 2020 S.D. 68, ¶ 55, 952 N.W.2d at 260 (citation omitted). "On review, this Court defers to the [trial] court, as fact finder, to determine the credibility of witnesses and the weight to be given to their testimony." *Id.*

B. The Evidence in the Record Supports the Circuit Court's Factual Findings, its Denial of Defendant's Motion for Judgment of Acquittal, and its Decision Finding Defendant Guilty of Second-Degree Arson.

Defendant was charged with second-degree arson under SDCL 22-33-9.2(2).[4] To find Defendant guilty, the State was required to show that Defendant (1) started a fire and (2) acted with the intent to destroy or damage hers or another's property to collect insurance for such loss. *See* SDCL 22-33-9.2(2). The circuit court's findings and the evidence presented at trial were more than sufficient to sustain Defendant's conviction. *See Rodriguez*, 2020 S.D. 68, ¶ 60, 952 N.W.2d at 261 (Relying on the trial court's findings and the Court's "close review of the record" to conclude there was "more than sufficient evidence to support the court's findings.").

[4] SDCL 22-33-9.2 provides, in relevant part: "Any person who starts a fire . . . with the intent to: (2) Destroy or damage any property, whether his or her own or another's, to collect insurance for such loss . . . ."

1. Defendant Started the Fire.

The circuit court found Defendant's versions of events prior to the fire were not consistent with the security camera video. TT4:3-4. Each of Defendant's three accounts give a different version of events before the fire started and was inconsistent with the surveillance footage. To Olson and Blomseth, Defendant stated she had been inspecting the water on the floor of the theater room when she smelled smoke; in the tale she told Tjeerdsma, she was attempting to flip the breaker switches to get the fireplace to work when she discovered the fire; there was no mention of smoke.[5] TT1:22-24, 89-91; TT2:48-51, 91. Defendant told Blomseth she grabbed a towel from the bathroom adjacent to the mechanical room; the video footage shows otherwise.

The security camera footage showed Defendant walking into the mechanical room carrying a "small rectangular object" which was "approximately the size of [sic] kitchen matchbox." TT4:4. The circuit court described Defendant's movements during the video. "Approximately two minutes [after she entered the room], smoke is observable emanating from the mechanical room." TT4:4. "About 30 to 45 seconds after smoke is first observed, the defendant reemerges from the mechanical room, turns, and for about 20 seconds, stands watching

[5] Olson testified that Defendant told her during the walk-through of her house she would trip the breakers to her fireplace in an attempt to get it to work but she did not mention it in conjunction with her discovering the fire. TT1:100.

where there is now obviously a growing fire within the room." TT4:4. The circuit court noted Defendant's "pace, body language, suggest[ed] an absence of panic." TT4:4.

Defendant then slowly walked towards the stairs and walked over halfway towards them before turning around and heading back towards the mechanical room. Ex.15 at 35:51-35:57. Defendant calmly reentered the smoke-filled mechanical room twice before finally making her way upstairs. Ex.15 at 36:05-36:28. Defendant finally returned to the mechanical room over a minute later, and nonchalantly entered the room with a towel. Ex. 15 at 37:45-37:50. Notably, there is a bathroom visible in the video right next to the mechanical room. Ex.15 at 0:00-38:18; *see* SR:441. Instead of getting a towel from this bathroom, Defendant went upstairs to get a towel. Ex.15 at 36:30-37:50; *see* SR:441. She passed Veenhof around this time and he testified that Defendant appeared "unconcerned" about the fire. TT3:33-35. The circuit court then made several more findings.

The circuit court specifically rejected Defendant's spontaneous combustion theory, a finding "based on conflicting testimony." TT4:4-5; *Nekolite,* 2014 S.D. 55, ¶ 13, 851 N.W.2d at 917-18 (citation omitted). "All conflicts in the evidence" must be resolved in favor of the circuit court's findings. *Nekolite,* 2014 S.D. 55, ¶ 13, 851 N.W.2d at 917-18 (citation omitted). Blomseth testified that he ruled out spontaneous combustion because the timeline of the fire did not fit that theory.

TT2:73-74. Among other things, he noted the rags would have been sitting on a concrete floor, which would have dispersed heat from the pile, and that a potential spontaneous combustion ignition would have produced copious amounts of smoke for a longer period. TT2:74. Tjeerdsma also opined the fire did not start via spontaneous combustion, citing the speed at which the smoke developed in the security footage. TT3:97.

The fire investigators who testified further ruled out other potential ignition sources. Sources ruled out included the security system battery, breaker box, paint cans, "energized mechanical items," and an electrical cause. TT1:19-21, 47-48; TT2:20, 71-72. Dahl also ruled out several potential causes of the fire. TT2:167, 170.

The court expressly rejected Dahl's opinion, noting how he switched his opinion at trial. TT4:4-5; SR:420-21; TT2:159. The circuit court noted there was no significant evidence of fire origin or cause in the record "to explain why Mr. Dahl can now swear under oath otherwise." TT4:5. The circuit court also cited the passage of time between the fire and Dahl's investigation, which was over a year. TT4:5. Finally, the court observed Dahl "virtually ignored *extremely relevant* evidence, the security footage." TT4:5 (emphasis added).

There is simply no other way the fire could have started other than Defendant igniting it. The circuit court, as the finder of fact, weighed the evidence and made the required determinations. According to the

evidence presented, those determinations should not be disturbed. *Nekolite,* 2014 S.D. 55, ¶ 13, 851 N.W.2d at 917-18 (citation omitted).

2. Defendant started the fire with the intent to collect insurance money.

The fact finder may determine intent from reasonable inferences and deductions drawn from the facts and evidence and "in accordance with common experience and observation." *State v. Holzer*, 2000 S.D. 75, ¶ 16, 611 N.W.2d 647, 652 (further citation omitted).

The condition of Defendant's home, the required repairs, and her lack of income from her job established her motive to start the fire. *See State v. Lassiter*, 2005 S.D. 8, ¶ 20, 692 N.W.2d 171, 177 (discussing that evidence showing motive may be relevant "when used to prove that the act was committed, to prove that the actor had the requisite *mens rea*, or to identify the defendant as the perpetrator of the act."). Defendant intended to sell her home. She had many home renovations she needed to finish. TT3:14-16. A home inspection revealed previous water leaks, an active rodent infestation in the attic, and poor conditions of her interior windows, among other things. TT3:73; SR321-22, 325, 350, 357, 358, 362, 364. Defendant had overdue bills at the time of the fire. TT1:64, 74-75; TT3:85. The foundation around the pool was cracked, and the outdoor kitchen had not been properly cared for. TT1:109-10, 112. At the time of the fire, Defendant had approximately $16,000 in her account and her sources of income were limited. *See* TT1:142-146.

On the day of the fire, water was found leaking into the theater room. TT1:89; TT3:30-32. When Veenhof tried to clean it up, Defendant dissuaded him from doing so, remarking the room would be getting new carpet. *See* TT3:30-32. Defendant's contacts, laptop, and purse were in her car the night of the fire. TT1:112. After starting the fire, as the circuit court observed from the videos: "Her pace, body language, suggest[ed] an absence of panic." TT4:4. Defendant was not panicked because she started it and wanted to make sure damage resulted.

As the circuit court also noted, Defendant used to be a former insurance agent for State Farm, lived in an expensive home valued at $1 million dollars and did, indeed, file an insurance claim for the damage caused by the fire. TT4:3-4. Further, Defendant's mother also formerly worked in fire claims. TT1:87-88.

Defendant needed money to finish the repairs on her home and she was familiar with the insurance process. Because Defendant waited to put out the fire, an estimated $350,000 in damages occurred. SR:235. The reasonable inferences that can be drawn from Defendant's motive, knowledge of insurance claims, actions on the night of the fire, and demeanor during the fire show that she started the fire with the intent to cause damage and collect insurance money.

Defendant asserts placing a claim for insurance is the "only conceivable finding" of intent the circuit court made, and that it cannot be used as evidence of intent because it happened after the crime was

allegedly committed. DB:28. As discussed above, there are circumstances from before the fire that also showed her intent.

Furthermore, evidence arising after the crime is relevant to show intent. In *State v. Falkenberg*, this Court determined that post-death dismemberment of the victim's body, Falkenberg's inconsistent story about how he hurt his hand, and his after-the-fact-comments to his daughter were relevant to proving the elements of second-degree murder, including intent. 2021 S.D. 59, ¶¶ 36-40 (concluding that the post-mortem dismemberment was relevant in showing how Falkenberg killed the victim as well as his resulting consciousness of guilt).

Like the post-murder dismemberment in *Falkenberg*, Defendant's submission of an insurance claim the day after the fire, while not by itself indicative of her intent, should be considered in conjunction with other evidence in the record. *See Falkenberg*, 2021 S.D. 59, ¶¶ 36-40.

Defendant also argues this Court may only use the circuit court's oral findings on the record at the time of its decision and not rely on other evidence in the record. DB:19 n.4, 26-27 (citing *Nekolite*, 2014 S.D. 55, 851 N.W.2d 914). First, Nekolite stands for the proposition that a reviewing circuit court may not make findings indirect conflict with the magistrate court's findings. *Nekolite*, 2014 S.D. 55, ¶¶ 14-15, 851 N.W.2d at 918.

In *Nekolite*, this Court explained that when a trial court makes a general finding of guilty, the appellate court may imply findings if the

evidence so warrants. *Nekolite*, 2014 S.D. 55, ¶ 13, 851 N.W.2d at 917. Thus, similar to the review of jury verdict, a reviewing court may look at the entire record to determine whether sufficient evidence supported a trial court's verdict. *Id.* at ¶ 13, 851 N.W.2d at 917-18. The only thing that changes when the trial court makes findings beyond the finding of guilt is that the reviewing court may not affirm the conviction based on findings *in direct conflict* with the lower court's findings unless the lower court's findings are clearly erroneous. *Id. at* ¶ 15, 851 N.W.2d at 918. Reviewing courts are still allowed to review the record and view the evidence that supports the trial court's findings in the light most favorable to the verdict when reviewing the sufficiency of the evidence. *See id.* at ¶ 13, 851 N.W.2d at 917-18 (explaining the standard of review applicable to a trial court's findings and stating "all conflicts in the evidence must be resolved in favor of the [trial] court's determinations."); *see also Rodriguez,* 2020 S.D. 68, ¶ 60, 952 N.W.2d at 261 (relying on the trial court's findings and the Court's "close review of the record" when concluding there was "more than sufficient evidence to support the court's findings.").

Based on the circuit court's findings and the evidence supporting them, "any rational trier of fact" could have found Defendant intended to start the fire to claim insurance proceeds. *Rodriguez*, 2020 S.D. 68, ¶ 54, 952 N.W.2d at 260 (citation omitted). The State respectfully requests this Court affirm Defendant's conviction.

II.

DEFENDANT WAS GIVEN A FAIR OPPORTUNITY TO DEFEND HERSELF AND HER DUE PROCESS RIGHTS WERE NOT VIOLATED.

A. *Standard of Review*

"An alleged violation of a defendant's constitutional right to due process is reviewed de novo." *State v. King*, 2014 S.D. 19, ¶ 4, 845 N.W.2d 908, 910 (citation omitted). Defendant argues her right to due process was violated because "a private investigator conducted the entire criminal investigation as a *de facto* arm of the State." DB:36. Defendant also asserts her right to a fair trial was violated. DB:30.

B. *Defendant's due process rights were not violated by the State nor by a private fire investigator working on behalf of State Farm.*

"It is well-settled law that when there is no state action, no constitutional violation could be said to have occurred." *State v. Red Star*, 2001 S.D. 54, ¶ 21, 625 N.W.2d 573, 579 (citing *Jones v. Gutschenritter*, 909 F.2d 1208, 1211 (8th Cir.1990)). The Due Process Clause "regulates private individuals only if the government coerces them or otherwise makes common cause with them in a joint activity." *Al-Saka v. Sessions*, 904 F.3d 427, 433 (6th Cir. 2018); *see also State v. Thunder*, 2010 S.D. 3, ¶ 14, 777 N.W.2d 373, 378 (Explaining the Fourth Amendment guarantees no protection from "private nongovernmental searches," even if such searches are "unauthorized or wrongful," unless the private individual is an agent of the State.). "[P]rivate citizens, acting

in their private capacities, cannot be guilty of violating due process rights. The Fifth Amendment is a restraint on the federal government, not on private citizens." *Jones v. Delaney*, 610 F.Supp.2d 46, 52 (D.D.C. 2009); *see also Red Star*, 2001 S.D. 54, ¶ 21, 625 N.W.2d at 579 (holding that statements Red Star made to other inmates who were not state actors were voluntary and not constitutionally protected.).

Defendant paints a picture that State Farm was out to get her through a biased and unfair investigation process. DB:32-33. Defendant asserts it was "unbelievabl[e]" that State Farm "conducted its own civil investigation under [Defendant's] insurance policy after [Defendant] submitted a claim . . . ." DB:32. There is nothing unbelievable about State Farm wanting to further investigate the origin of the fire before paying an insurance claim that may be over $300,000. *See* SR:228. Defendant further argues Blomseth acted as a "*de facto* arm of the State" in conducting his investigation. DB:36.

For Blomseth to have been a *de facto* arm of the State, there must be evidence showing Blomseth was an "agent of the state." *Red Star*, 2001 S.D. 54, ¶ 20, 625 N.W.2d at 579; *see also Sessions*, 904 F.3d at 433-34 (explaining the Fifth Amendment may apply to private citizens if "government coerces them or otherwise makes common cause with them in a joint activity."). A private individual can be an agent of the State "when they act on behalf of or cooperate with law enforcement officers." *Thunder*, 2010 S.D. 3, ¶ 14, 777 N.W.2d at 378.

There is no evidence Blomseth was in communication with law enforcement while conducting his investigation; he only contacted law enforcement upon seeing the security footage. The State did not "coerce" Blomseth or "make common cause with [him] in a joint activity." *Sessions*, 904 F.3d at 433. Blomseth was a private citizen, working for a private corporation, investigating a house fire for a private insurance company. TT2:40-43, 94; *see Delaney*, 610 F.Supp.2d at 52 (D.D.C. 2009). During the duration of Blomseth's investigation, he was not an "agent of the state;" there was no "state action." *Thunder*, 2010 S.D. 3, ¶ 14, 777 N.W.2d at 378; *Red Star*, 2001 S.D. 54, ¶ 21, 625 N.W.2d at 579 (citing *Jones*, 909 F.2d at 1211).

The steps State Farm took in its investigation were normal. The initial State Farm investigator on scene, Olson, explained to Defendant that with a larger fire and when the source is not known, it is normal for State Farm to hire an origin and cause expert. TT1:103-04. Olson testified to the reasons why an origin and cause investigator may be called in. One of the main reasons is to determine how the fire started. TT1:137. Other purposes include finding out whether the fire was accidental or intentional, and identifying any possible subrogation claim if a defective product had caused a fire. *Id.* Tjeerdsma's initial report left the cause of the fire "undetermined." TT1:24; SR:238-39. State Farm had clear reason to conduct a further inquiry.

Blomseth is not a public fire investigator; he is employed by Whitmore Fire Consultants and performs consulting work for many clients. TT2:39-42. Tjeerdsma testified he and Blomseth did not work together on their respective investigations. TT1:46.

Blomseth secured possession of the video footage on his second visit on April 1, 2021, and did not hand over the tape to law enforcement until he had reviewed it. TT2:106. He testified at trial Defendant gave verbal permission to take the video. TT2:107.

Defendant relies on *Weathers v. American Family Mut. Ins. Co.* for the proposition that an insurance fire investigator can act as an agent of the State. DB:34-35. *Weathers* is distinguishable. *Weathers v. Am. Fam. Mut. Ins. Co.*, 793 F. Supp. 1002, 1021-22 (D. Kan. 1992). In *Weathers*, the state and insurance company actively shared information during their respective investigations. *Id.* There were "strong indications" the plaintiff/insured and her son were considered criminal suspects at the time of the investigations. *Id.* The court concluded because of this, the plaintiff/insured's Fifth Amendment rights were implicated and, in conducting examinations of the plaintiff/insured and her son under oath, the insurance company was acting as an agent of the state. *Id.*

State Farm and the city of Sioux Falls did not investigate the fire together. *See* TT1:56. Tjeerdsma's investigation took place on March 13, 2019, the night of the fire. *See generally*, TT1:13-25. Blomseth's

investigation did not start until March 19, 2019. TT2:44. A private inspector was hired because the cause of the fire could not be determined, and the claim was worth a large sum of money. Blomseth only contacted law enforcement after viewing the security footage in Exhibits 13-15 following his second and final visit to Defendant's house. TT2:106-107; s*ee also* SDCL 34-32A-2 (outlining the procedures for an insurance company to follow when it believes a fire may not be accidental). Unlike in *Weather*s, Defendant was not suspected of criminal activity at the time of Blomseth's investigation. Blomseth also did not examine Defendant under oath. *See generally*, TT2:39-139. Defendant admits "Blomseth did not conduct his investigation to determine if a crime occurred or to enforce our State's criminal laws." DB:32.

Defendant asserts she was not treated fairly because a civil investigation was repackaged for use in a criminal case. DB:36. The fact that potential evidence of criminal activity was uncovered during an insurance investigation and was later turned over to authorities does not make Defendant's trial unfair. Moreover, Defendant was not "denied the ability to respond" to the State's charges nor was she denied a fair opportunity to present a defense. *Red Star*, 2001 S.D. 54, ¶ 13, 625 N.W.2d at 578.

Defendant retained counsel and was allowed ample time to prepare for a court trial. She hired an expert, Dahl, in an attempt to refute

Blomseth's and Tjeerdsma's findings. Defendant suggests Blomseth's removal of some of the debris at the scene is "manipulation of evidence." DB:33. But Blomseth testified that "physically processing" – digging through and examining debris in the area around the point of origin – was a "standard operating procedure." TT2:66-67. She had the opportunity to cross-examine Tjeerdsma, Olson, Mrozle, and Blomseth on the witness stand. Defendant also could have taken their depositions to better prepare Dahl. In short, Defendant was afforded a "meaningful opportunity" to present a complete defense. *Red Star*, 2001 S.D. 54, ¶ 13, 625 N.W.2d at 578.

Defendant's due process rights were not violated. The State respectfully requests this Court affirm Defendant's conviction.

CONCLUSION

The State respectfully requests this Court affirm Defendant's Judgment of Conviction.

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

/s/ Stephen G. Gemar
Stephen G. Gemar
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: 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 6,002 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 6th day of December, 2021.

/s/ Stephen G. Gemar
Stephen G. Gemar
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of December, 2021, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Jacqueline Lynell Krouse* was served via electronic mail upon Shawn M. Nichols, snichols@cadlaw.com, and Claire E. Wilka, cwilka@cadlaw.com.

/s/ Stephen G. Gemar
Stephen G. Gemar
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 29711

JACQUELINE LYNELL KROUSE

Defendant/Appellant,

vs.

STATE OF SOUTH DAKOTA

Plaintiff/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Jerome Eckrich, Presiding Judge

APPELLANT'S REPLY BRIEF

Shawn M. Nichols
Claire E. Wilka
Cadwell Sanford Deibert & Garry LLP
200 E. 10th Street, Suite 200
Sioux Falls SD 57104
(605) 336-0828

Attorneys for Defendant-Appellant

Jason R. Ravnsborg
Attorney General
Stephen G. Gemar
Assistant Attorney General
1302 E Hwy 14, Suite 1
Pierre SD 57501-8501
(605) 773-3215

Attorneys for Plaintiff-Appellee

Notice of Appeal Filed July 14, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

ARGUMENT

The State has shown its hand, admitting a fundamental flaw in the entirety of its pursuit of a criminal conviction in this case. The State contends: "There is simply no other way the fire could have started other than [Krouse] igniting it." Appellee Brief at 18. That is *not* our criminal justice system's way of proving a person committed a crime. It was the State's burden to prove Krouse committed the crime of second-degree arson—that Krouse started the fire with requisite criminal intent. Arson is unique in the sense that it requires the State to disprove all causes of a fire in order to prove the defendant intentionally started the fire in question. Blaming Krouse—criminally pursuing Krouse based on the biased investigation of Krouse's insurance carrier—because no other source of ignition makes sense is deeply flawed and not consistent with the legal standards the State is bound to follow.

The evidence in this case is insufficient to sustain a criminal conviction because it is truly a civil matter between Krouse and her insurance carrier. This Court has, several times, reversed convictions for crimes carrying an additional intent element that are largely based on a civil dispute—and this case should be no different. *See, e.g.*, *State v. Suchor*, 2021 S.D. 2, ¶ 24-26, 953 N.W.2d 678, 686-87 (reversing theft by misappropriation of funds by a contractor conviction because the State failed to prove Suchor knowingly used funds improperly and noting that the facts "could conceivably give rise to civil liability on the contract," but a criminal conviction required more); *State v. Jackson*, 2009 S.D. 29, ¶ 21-22, 765 N.W.2d 541, 547 (reversing conviction for theft by deception because the State failed to present evidence that the

defendant had the specific intent to deceive at the time that he obtained another's property); *State v. Kessler*, 2009 S.D. 76, ¶ 15-16, 772 N.W.2d 132, 137 (holding that the State failed to prove the defendant acted with the required intent of the crime following defendant's entering into a loan agreement); *State v. Morse*, 2008 S.D. 66, ¶ 20-23, 753 N.W.2d 915, 922 (reversing theft by deception conviction because mere nonperformance of an agreement to perform a project is not intent to defraud).

Here, the evidence was insufficient to support Krouse's conviction. The State concedes that the Circuit Court entered factual findings in entering its guilty verdict. Appellee Brief, 14. Therefore, this Court is limited to those factual findings for purposes of appellate review, unless it first finds such findings are clearly erroneous. *State v. Nekolite*, 2014 S.D. 55, ¶ 13, 851 N.W.2d 914, 917-18. But those findings, and the evidence upon which they are based, are insufficient to support a conviction under SDCL § 22-33-9.2(2). To bolster the Circuit Court's insufficient findings, the State repeatedly relies on its own speculations, not based on the evidence, and wrongly paints ordinary facts as criminal in nature. This Court should reject the State's arguments and reverse Krouse's conviction.

I. The State failed to prove, and the Circuit Court failed to find, that Krouse acted with the requisite intent to commit second-degree arson under SDCL § 22-33-9.2(2).

The Circuit Court did not make an express factual finding on Krouse's intent to destroy or damage property to collect insurance for the loss. *See* SDCL § 22-33-9.2(2); *see also* TV4. And the Circuit Court's findings—those that are remotely close to referencing the collection of insurance for fire damage—do not establish second-

degree arson under SDCL § 22-33-9.2(2). *See* TV4:3-4. Krouse's employment history in the insurance claims business is not evidence of guilt, intent, or motive, nor is it even circumstantial evidence. And Krouse's actions the day after the fire certainly cannot legally be relied upon as evidence of her intent. Moreover, the fact that her home was valued at $1 million or more is not evidence of a crime; the plain language of § 22-33-9.2(2) permits a conviction when a person starts a fire with the intent to damage property worth any amount of money. None of these facts—either alone or when considered together—are sufficient to establish the criminal mens rea required. On their face, the Circuit Court's factual findings fail to establish a required element of the crime. This fatal flaw demands a reversal and vacation of Krouse's conviction.

A. This Court cannot look to the entire record to fill in the gaps created by the Circuit Court's *sua sponte* factual findings of guilt.

The Circuit Court failed to issue a factual finding on an essential element of the charge in the State's indictment: whether Krouse acted with the requisite intent at the time that the crime was purportedly committed. *See* TV4. The State does not appear to disagree with this point, instead dancing around the issue by pointing to other evidence introduced at trial—evidence that the Circuit Court did not cite in its factual findings. *See* Appellee Brief, at 19-20; TV4. The State argues that *Nekolite* permits an appellate court to essentially fill in the gaps left by the Circuit Court's factual findings by looking to the entire record of evidence in determining sufficiency of the evidence. *See* Appellee Brief, at 21-22. Specifically, the State contends that the Circuit Court's factual findings only prevent this Court from affirming Krouse's conviction based on findings "in direct conflict with the lower court's findings." *Id.* at

22. The State's reading of *Nekolite* is incorrect. *Nekolite* did not expressly hold that an appellate court may still consider the record in its entirety, as the State argues here, in analyzing sufficiency of the evidence.

The purpose of findings of fact under Rule 23(c) is to provide an appellate court with a clear understanding of the trial court's decision. *See* Wright & Miller, *Federal Practice & Procedure*, § 374, n.6 (citing cases); *State v. Nekolite*, 2014 S.D. 55, ¶ 11-12, 851 N.W.2d 917 (noting that South Dakota looks to federal cases applying Rule 23(c) when applying SDCL § 23A-18-3). There is no indication that appellate courts look to the entirety of the record when reviewing the legal sufficiency of such factual findings following a criminal conviction. *See Nekolite*, 2014 S.D. ¶ 14, 851 N.W.2d at 918 ("Because the magistrate court made specific factual findings on conflicting evidence, and because those findings were not clearly erroneous, they were the applicable facts for appellate review."); Wright & Miller, *Federal Practice & Procedure*, § 374 (citing cases). *But see State v. Rodriguez*, 2020 S.D. 68, ¶ 55-56, 952 N.W.2d 244, 260 (reviewing each conviction for sufficiency of the evidence when Rodriguez, on appeal, did not allege that any particular factual finding was erroneous and instead only challenged the sufficiency of the evidence).

In *United States v. Milton*, 421 F.2d 586 (10th Cir. 1970), the United States Court of Appeals for the Tenth Circuit reversed a criminal conviction because the trial court "failed to recognize [an] essential element of the offense" in its factual findings following a trial to the court. The government indicted Milton for violating 18 U.S.C. § 912, alleging that he falsely pretended to be an FBI agent and obtained

money from another individual in such pretended character. *Id.* at 586. The trial court had issued findings *sua sponte*, stating that Milton had represented himself to be an FBI agent, but "[t]he question of why [the other individual] got and gave [Milton] $130 [was] not before the Court." *Id.* at 587. But, the Tenth Circuit noted, the trial court committed a plain error, affecting the substantial rights of the defendant, because the offense charged "was not committed unless the money was obtained 'in such pretended character.' " *Id.* Because the trial court failed to issue a finding on an essential element of the crime charged, the defendant's conviction was reversed. *Id.* Importantly, the Tenth Circuit had summarized the evidence received at trial—including evidence that the other individual had given the defendant the money—but still limited its decision to the trial court's insufficient findings on the essential elements of the crime. *Id.*

Therefore, *Milton*'s holding is clear. Despite the evidence relevant to the second element of the crime charged in the indictment, the appellate court reversed the defendant's conviction because the trial court's factual findings did not include a finding on that essential element. In other words, the appellate court refused to rely upon the entire record when reviewing the sufficiency of the trial court's factual findings. That same reasoning, which aligns with this Court's conclusion in *Nekolite*, should apply in this case.

Here, if this Court agrees that the Circuit Court issued factual findings rather than a general finding of guilt, then this Court must determine whether those factual findings are legally sufficient to support Krouse's conviction under SDCL § 22-33-

9.2(2).[1] Looking to the entire record to fill in the gaps, as the State proposes, is inconsistent with authority applying Rule 23(c). *See Milton*, 421 F.2d at 587. Moreover, such an analysis creates a manifest injustice to Krouse. To successfully show that factual findings are clearly erroneous is a difficult standard of review to meet. *See Leigh*, 2008 S.D. at ¶ 16, 753 N.W.2d at 403 (applying the clearly erroneous standard and stating that the Court "will not reverse even if we were convinced that the opposite finding would have been made had we been the fact finders unless in light of the entire record we are left with a definite and firm conviction that a mistake has been made." (internal quotation omitted)). But permitting the State to rely on those factual findings as a shield, yet still point to the entirety of the record to fill in any gaps left by the Circuit Court's findings on a missing element, undermines fundamental notions of fairness.

Krouse is held to those factual findings for purposes of this appeal. And the substance of those findings, or the lack thereof, is not an insignificant matter. Krouse, the accused, was entitled to a fair trial from start to finish. In the interests of justice, the better view, and the view implicitly recognized by federal courts reviewing factual

[1] This analysis, of course, would be different if Krouse were to argue that the Circuit Court's factual findings were clearly erroneous. If a defendant challenges a trial court's findings as clearly erroneous, the appellate court must review the entire record to answer that question. *See, e.g.*, *State v. Leigh*, 2008 S.D. 53, ¶ 7, 753 N.W.2d 398, 401 (noting that, when reviewing a motion to suppress issue, the Court "will not disturb a circuit court's findings of fact unless they are clearly erroneous in light of the entire record"); *State v. Catch the Bear*, 352 N.W.2d 640, 646 (S.D. 1984) (concluding that a special finding under Rule 23(c) was not clearly erroneous based on the "dearth of evidence"). But that is the crucial difference here: Krouse is not arguing that the Circuit Court's factual findings were clearly erroneous. Rather, those factual findings are legally insufficient to meet the essential elements of second-degree arson under SDCL § 22-33-9.2(2).

findings under Rule 23(c), is to limit appellate review to the trial court's factual findings on this question. Thus, in determining if sufficient evidence demonstrated that Krouse acted with the requisite intent under SDCL § 22-33-9.2(2), this Court should limit its review to the Circuit Court's factual findings at the close of trial.

B. Post-actus reus events cannot, as a matter of law, prove Krouse acted with the intent required under SDCL § 22-33-9.2(2).

Relying on *State v. Falkenberg*, 2021 S.D. 59, ¶ 36-40, 965 N.W2d 580, 590-92, the State contends that evidence arising after the crime is relevant to show intent. *See* Appellee Brief, 21. *Falkenberg*, however, relied upon post-mortem dismemberment conduct to conclude that Falkenberg committed second-degree murder. *Id.* Specifically, the Court provided that such post-crime conduct was relevant to show how the defendant killed the victim and his resulting consciousness of guilt. *Id.* Second-degree murder, which requires the State to prove the defendant acted with a depraved mind, is a general intent crime. *See State v. Primeaux*, 328 N.W.2d 256, 259 (S.D. 1982) ("We believe the 'depraved mind' requirement of our second-degree murder statute requires only the general intent to do the acts which caused the harm, but not the specific intent to do the harm."). Evidence of consciousness of guilt following a general intent crime is not synonymous to the facts of this case. Therefore, *Falkenberg* is distinguishable and reliance upon it here is misplaced.

State v. Jackson and *State v. Swalve*, which both addressed the sufficiency of the evidence in proving a specific intent crime, are more applicable. The State has failed to respond to this distinction or these cases. *Jackson* and *Swalve* emphasized that the defendants could only be guilty if the State proved they had the requisite intent "at

the time" that they received the property of another. *Jackson*, 2009 S.D. at ¶ 18, 765 N.W.2d at 546; *Swalve*, 2005 S.D. 17, ¶ 9, 692 N.W.2d at 797-98; *see also* SDCL § 22-30A-3 (theft by deception statute). *Jackson*, in particular, provided that the defendant's actions after he received the down payment from the purported victim could not show that the defendant had the intent to deceive. *Jackson*, 2009 S.D. at ¶ 21-22, 765 N.W.22d at 547. And, as this Court noted, such post-crime conduct was not sufficient to convict the defendant of the crime anyway. *Id.* While Jackson failed to complete his roofing project on time, his "misfortune of bad luck, unavoidable delays, and perhaps not the ideal characteristics of a businessman do not equate to a specific intent to deprive [another] of his money." *Id.* ¶ 25, 765 N.W.2d at 548.

Here, Krouse's post-crime conduct—submitting a claim to her insurance company the day after the fire—is not proper evidence to prove that she started a fire with the intent to destroy or damage property to collect insurance for such loss. *See* SDCL § 22-33-9.2(2). The State, importantly, has not provided this Court with any binding authority permitting the State to rely on a defendant's subsequent conduct to prove the defendant had the requisite intent at the time of committing the actus reus of the crime charged. Additionally, submitting a claim to her insurance company is not evidence of consciousness of guilt; any reasonable person would do the same after losing their home. As a result, the Circuit Court erred in relying on such post-crime conduct in finding Krouse guilty of second-degree arson. The Circuit Court's reliance on Krouse's post-fire conduct, standing alone, is a legal error that warrants reversal of her conviction.

C. The Circuit Court's factual findings are insufficient to support a conviction.

The Circuit Court, on its own, issued findings that cast a light on the Court's reasoning for finding Krouse guilty. Those findings plainly fail to show Krouse acted with the requisite intent at the time that she purportedly started the fire. The State, impermissibly, appears to act as if it is the finder of fact in this case, arguing that "[t]he reasonable inferences that can be drawn from Defendant's motive, knowledge of insurance claims, actions on the night of the fire, and demeanor during the fire show that she started the fire with the intent to cause damage and collect insurance money." Appellee Brief at 20. None of the State's declarations were included in the Circuit Court's factual findings. Not once did the Circuit Court state that it determined Krouse had the requisite intent based on inferences it drew from the evidence. *See* TV4. The State cannot post hoc supplant its judgment for that of the factfinder to shore up the trial court's shortcomings.

Even if the Court finds that it may consider the entire record, the State failed to present sufficient evidence that Krouse, at the time that she purportedly started the fire, had a criminal mens rea to cause damage in order to collect insurance for the loss. The State points to the condition of Krouse's home, repairs and renovations, and lack of income. None of these garden variety facts establish intent or even motive to commit second-degree arson. Moreover, the State fails to acknowledge the whole truth—that Krouse was actively in the process of performing such repairs, paying for the renovations, and she received $252,000 in alimony per year, plus

supplemental income. She further stood to profit on the sale of her home, making arson for insurance proceeds a completely unnecessary act.

Despite the State's attempts to paint Krouse's financial situation as dire and the state of her home as uninhabitable, that simply is not true. There was no evidence that Krouse defaulted on her mortgage, was in desperate need of cash, faced second liens on her property, or faced condemnation from the City. Krouse paid for the maintenance recommended by the home inspector, hired professionals to paint her house, and took orderly, reasonable steps in preparation to move. She simply had nothing to gain by burning her own house down. The State failed to prove the essential elements of the crime of second-degree arson in this case.

II. There was insufficient evidence to prove that Krouse started the fire.

Similar to its argument regarding the intent element, the State attempts to bolster the Circuit Court's conclusion that Krouse started the fire by relying on assumptions regarding the evidence presented and portions of the record not mentioned by the Circuit Court in its factual findings. *See* Appellee Brief at 16-18. Krouse will briefly address this issue to correct any misconceptions of the record. In arguing that Krouse's version of events was inconsistent with the surveillance video, the State ignores critical pieces of testimony from the State's own witnesses. For example, contrary to the State's argument otherwise, Krouse did, in fact, tell Olson that she had been flipping circuit breakers prior to the fire, consistent with what she had told Tjeerdsma. *See* TV1:128-29. In addition, the State notes that a bathroom is located right next to the mechanical room, insinuating that Krouse should have

retrieved a towel from that bathroom instead of an upstairs bathroom. *See* Appellee Brief at 17. This statement assumes there were towels in the downstairs bathroom—a matter that was not addressed in any of the evidence at trial.

As noted with respect to the intent element, the State cannot rely on evidence in the record that the Circuit Court never referenced in its factual findings. Rather, this Court is limited to the Circuit Court's factual findings in determining if Krouse "start[ed] the fire," an essential element under SDCL § 22-33-9.2(2). The Circuit Court admittedly provided many more factual findings on this element than the intent element. Even assuming the Circuit Court's findings on Krouse's movements in the video are not clearly erroneous, the simple truth remains that the State failed to prove beyond a reasonable doubt that Krouse started the fire.

The video does not show a match light up. The video does not show Krouse ignite the pile of debris on fire. The State's theory on the evidence failed to account for the crawl space connecting the mechanical room to the theater room in an area not visible on the surveillance video, which supports Krouse's version of events and movements immediately before the smoke is visible on the surveillance video. *See* TV3:58-59. The entirety of the evidence, and the Circuit Court's findings regarding that evidence, is based on speculation as to Krouse's actions and movements. Krouse did not start the fire, and the evidence noted in the Circuit Court's findings fails to prove that she started the fire.

III. The State fails to recognize the fundamental fairness issue in Krouse's Due Process argument in this unique criminal case.

The State's argument on state action misses the mark. The State is fastened to Krouse's one use of the phrase "de facto arm of the State" but fails to recognize the larger, fundamental notions of fairness in Krouse's due process argument. *See* Appellee Brief, at 23-25. Krouse did not argue that Blomseth communicated with law enforcement during his initial investigation or jointly acted with the State, and therefore State Farm and Blomseth engaged in state action. *See id.* at 25. Nor is Krouse asking this Court to find that State Farm and Blomseth are subject to the constitutional parameters of law enforcement because they were state actors. Any argument otherwise by the State is a red herring.

The constitutional violation in this highly unique case was embedded in the entirety of the State's criminal prosecution of Krouse and the resulting inability to fairly defend against the criminal charge. As Krouse noted in her principal brief, the constitutional issue is the fact that the private insurance investigators are *not* held to the same constitutional restraints as public investigators or law enforcement, but yet that private investigation was essentially used in substitution by the State with no commensurate procedural safeguards. And the private insurance investigators conducted their own investigation, undoubtedly with a bias to find no coverage existed under Krouse's policy, in a manner that was untraceable to Krouse once she was accused of a crime. The same private insurance investigators constituted the bulk of the State's evidence in this prosecution. *That* is what has undermined Krouse's constitutional right to a fair opportunity to defend against the charge. The entirety of

the State's case-in-chief was laced with an incurable bias by the financially-motivated insurance company—a bias that criminal investigations do not and cannot have.

South Dakota law holds that an expert witness cannot express an opinion on the credibility of a victim. *See, e.g.*, *State v. Raymond*, 540 N.W.2d 407, 409-10 (S.D. 1995) (noting general rule that one witness may not testify about another witness's credibility). Notions of fundamental fairness, therefore, demand that a victim cannot also be the expert witness. In this case, the party motivated to find it did not need to pay out a $1 million claim for its own policyholder was also the party given the power to allege that its policyholder committed a crime. In other words, the victim became both the investigator and the State's expert witness. That party's witnesses went further in their speculation, leaps, and conclusions about Krouse, in disregard of other relevant facts, than any of the State's law enforcement witnesses. The bias in the testimony of the State Farm witnesses is palpable. Again, the dichotomy between Sioux Falls Fire investigator Tjeerdsma's testimony—the first investigator on scene—and that of State Farm's hired investigator, Blomseth, is striking. Krouse is unaware of any South Dakota conviction under similar circumstances. The State fails to address this fundamental issue. This Court should find that Krouse's constitutional due process right was violated in this case and vacate her conviction.

CONCLUSION

For these reasons and the reasons set forth in Krouse's Principal Brief, this Court should vacate Krouse's conviction and order a judgment of acquittal to be entered.

Dated this 5th day of January, 2022.

CADWELL SANFORD DEIBERT & GARRY, LLP

/s/ Claire E. Wilka

Shawn M. Nichols
Claire E. Wilka
200 E. 10th Street, Suite 200
Sioux Falls, South Dakota 57104
Telephone: (605) 336-0828
Telecopier: (605) 336-6036
Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief was prepared using Microsoft Word and uses proportionally spaced font [Garamond] in 13-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 3808 words.

/s/ Claire E. Wilka
Claire E. Wilka

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Reply Brief was sent by e-mail for electronic filing and service to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk
E-mail: *scclerkbriefs@ujs.state.sd.us*

Mr. Jason R. Ravnsborg, Attorney General
Mr. Stephen G. Gemar, Assistant Attorney General
E-mail: *atgservice@state.sd.us*

The original and two copies of the Reply Brief were mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

all on January 5, 2022.

/s/ Claire E. Wilka
Claire E. Wilka