IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30569

LYDELLE EDMOND TURNER,

Defendant/Appellant,

vs.

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee.

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

The Honorable Jon C. Sogn and Honorable Robin J. Houwman, Presiding Judges

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APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this brief Appellant will be referred to as "Defendant," "Appellant," or "Turner". Appellee will be referred to as "State" or "Appellee". All other individuals involved will be referred to by name. The trial transcripts will be referenced as "JT" followed by the transcript volume and page number. The settled record will be referenced as "SR" followed by the page number. Citations to other transcripts will be:

Defendant's Motion to Suppress (December 28, 2022).....MS

Motions Hearing (July 5, 2023).....MH1

Motions Hearing (August 11, 2023) MH2

Defendant's Motion for a New Trial (November 29, 2023) .....MH

All transcript citations will include a page number.

Exhibits will be referred to as "E" followed by the exhibit letter or number.

JURISDICTIONAL STATEMENT

Turner appeals the Judgment and Sentence entered on December 8, 2023, by the Honorable Jon Sogn, Circuit Court Judge, Second Judicial Circuit, regarding the following convictions: Count 1 – Aggravated Assault, Dangerous Weapon; Count 2 – Aggravated Assault, Physical Menace; and Counts 3, 4, 5, and 6 – Discharge Firearm at Occupied Structure or Motor Vehicle. SR 662-4. Turner's Notice of Appeal was timely filed on December 27, 2023. SR 786-7. This Court has jurisdiction over the appeal pursuant to SDCL 15-26A-3, SDCL 23A-32-2, and SDCL 23A-32-9.

STATEMENT OF THE ISSUES

I. Whether the trial court erred in denying Defendant's Motion to Suppress.

The trial court denied Defendant's Motion to Suppress the identification by James Driver.

State v. Red Cloud, 2022 S.D. 17, 972 N.W.2d 517
State v. Osman, 2024 S.D. 15, 4 N.W.3d 558
State v. Abdo, 518 N.W.2d 223 (S.D. 1994)

II. Whether the trial court erred by denying Defendant's Motion to Dismiss.

The trial court denied Defendant's Motion to Dismiss or Alternatively, Motion to Exclude, the testimony and report of Frans Maritz.

State v. Adamson, 2007 S.D. 99, 738 N.W.2d 919
State v. Delehoy, 2019 S.D. 30, 929 N.W.2d 103
State v. Hofman, 1997 S.D. 51, 562 N.W.2d 898
State v. Richard, 2023 S.D. 71, 1 N.W.3d 654

SDCL 23A-13-15
SDCL 23A-13-17

III. Whether the trial court erred by admitting E100.

The trial court admitted State's Exhibit 100 over Defendant's foundation and hearsay objections.

State v. Dickerson, 2022 S.D. 23, 973 N.W.2d 249
State v. Reeves, 2021 S.D. 64, 967 N.W.2d 144

IV. Whether the trial court erred in denying Defendant's Motion for Judgment of Acquittal.

The trial court denied Defendant's Motion for Judgment of Acquittal on Counts 3-6.

State v. Danielson, 2012 S.D. 36, 814 N.W.2d 401
State v. Armstrong, 2020 S.D. 6, 939 N.W.2d 9
Argus Leader Media v. Hogstad, 2017 S.D. 57, 902 N.W. 2d 778

State through Attorney Gen. v. Buffalo Chip, 2020 S.D. 63, 951 N.W.2d 387

SDCL 22-14-20
SDCL 22-1-2

V. Whether the trial court erred by denying Defendant's Proposed Jury Instructions 101, 109, and 110.

The trial court denied Defendant's Proposed Jury Instruction 101, 109, and 110.

State v. Brings Plenty, 490 N.W.2d 261 (S.D. 1992)
State v. Swan, 2019 S.D. 14, 925 N.W.2d 476

SDCL 22-14-20

VI. Whether the trial court erred in denying Defendant's Motion for a New Trial.

The trial court denied Defendant's Motion for a New Trial.

State v. Zephier, 2020 S.D. 54, 949 N.W.2d 560
State v. Bousum, 2003 S.D. 58, 663 N.W.2d 257
State v. Danielson, 2012 S.D. 36, 814 N.W.2d 401
State v. Leisinger, 2003 S.D. 118, 670 N.W.2d 371

STATEMENT OF THE CASE

On August 11, 2023, Defendant was indicted by a Minnehaha County Grand Jury on two counts of aggravated assault, four counts of shooting at an occupied structure or motor vehicle[1], possession with intent to distribute a Schedule II controlled substance, possession of two ounces or less of marijuana (Count 8), reckless discharge of a firearm (Count 9), and use or possession of drug

[1] The allegations in Count 3-6 is that Defendant shot at motor vehicles. SR 7-9.

paraphernalia (Count 10). SR 7-9. A Part II Habitual Information was filed pursuant to SDCL 22-7-8.1. SR 10.

The Honorable Jon Sogn presided over the five-day jury trial held September 15–21, 2023. *See generally* JT1 – JT4. Prior to the reading of the Indictment, Counts 8, 9, and 10 were dismissed. JT1 16-7. Defendant was found guilty of Counts 1-6, and not guilty of Count 7. JT4 85-8.

The Part II was dismissed, and Defendant proceeded to sentencing on December 1, 2023. SR 662-4. Defendant was sentenced as follows:

1) Count 1: Fifteen years in the South Dakota State Penitentiary ("SDSP") with 489 days credit for jail time previously served. SR 663.
2) Count 2: Fifteen years in the SDSP, concurrent to the sentence in Count 1. *Id.*
3) Count 3: Fifteen years in the SDSP, consecutive to the sentences in Count 1 and 2. *Id.*
4) Count 4: Ten years in the SDSP, all suspended and consecutive to the sentences in Counts 1, 2, and 3. *Id.*
5) Count 5: Ten years in the SDSP, all suspended and concurrent to the sentences in Count 1, 2, 3, and 4. *Id.*
6) Count 6: Ten years in the SDSP, all suspended and concurrent to the sentences in Counts 1, 2, 3, 4, and 5. *Id.*

Judgment and Sentence was entered on December 8, 2023. SR 662-4.

STATEMENT OF THE FACTS

1. Substantive Facts

On the morning of July 30, 2022, Theresa Walters viewed Summit Avenue ("Summit") from her bedroom window after hearing a "ruckus". JT1 32. Walters lived at 308 S. Summit. *Id.* Walters saw a gold suburban-type vehicle on Summit. *Id.* As Walters was going to her closet, she heard two booms that sounded like gunshots. *Id.* Walters grabbed her phone to call 911 and saw the vehicle leave the area. *Id.* While Walters was on the phone with 911, she saw the vehicle come back and fire gunshots. *Id.*, 33. [2] When the dispatch officer asked Walters whether it was a male or female shooting, Walters answered she did not know. E1. When the dispatch officer asked Walters "the guy that was shooting, was it a male or female" Walters said "um, male[.]" *Id.*

At approximately 9:44 a.m. on July 30, 2022, Sioux Falls Police Department officers were dispatched to 307 S. Summit for a report of a gunshot. JT2 62. Officer Eric Kimball spoke to Angel Haffner. Haffner lived at 309 S. Summit and had a security camera that recorded the incident. JT1 107; JT2 107. Kimball used a cell phone to take a video of Haffner's security video. JT2 107; E2. It is undisputed that this video shows several people standing in the parking lot of 307 S. Summit while a gold suburban style vehicle travels north on Summit. It is also undisputed that the video shows the vehicle stop at the intersection of

[2] Walters's call to 911 was admitted as E1. Neither E1 nor Walters's testimony established the time Walters made the 911 call.

Summit and 11th Street ("11th"), then make a right hand turn onto 11th, and then again travel north on Summit. E2. There is also no dispute that shots were fired from the vehicle and that Donald White was hit by one of these shots. Lastly, based on Walter's statements to officers and her testimony at trial, it is undisputed that the vehicle depicted in E2 is a tan GMC Yukon registered to Defendant. However, as explained herein, two issues are disputed 1) the total number of people in the vehicle during the shooting and 2) that Defendant was in the vehicle.

James Driver was standing in the parking lot before the shooting. Driver told Officer Richard Smith, that he "knew where that moth*****ker stay at" and that "he drive that Tahoe."[3] Exhibit A from Defendant's Motion to Suppress[4], "R Smith BWC_1" (2:32-2:41).[5] Driver also told Smith three times that the individual lived at the first house on the right-hand side of 22nd Street ("22nd"), in Sioux Falls, after turning left from Grange Avenue ("Grange"). *Id.* (3:55 – 4:39). Driver said several times that the individual had a vehicle just like his. *See generally Id.* Driver also told Smith that the individual driving the vehicle stopped at the corner of 11th and Summit for a while, then backed up and started shooting. *Id.* (6:40 – 6:58).

[3] Unless stated otherwise herein, Driver did not clarify whether he was describing the driver of the vehicle, the shooter, or some other individual entirely.
[4] "Exhibit A" as referenced herein is citing to the Exhibit A from the hearing on Defendant's Motion to Suppress.
[5] Unless stated otherwise herein, any citation to a time stamp cites to the play time on the Exhibit, and not any timestamps on the video or photograph (i.e., the supposed time according to times shown on a body camera, dash camera, or security video).

Driver specifically described the vehicle's driver as having a beard, being a little bit darker complected than Driver, short, and maybe in his forties. *Id.* (7:28 – 7:55). Driver also said the driver had a little afro, using his fingers to indicate 1 to 1.5 inches. *Id.*, JT1 66-7. Driver said he did not see any distinguishing tattoos or marks. R Smith BWC_1. (7:56 – 8:02). When asked if he had seen any other occupants in the vehicle, Driver said "just him[.]" *Id.* (8:08 – 8:15).

Following the shooting, Sioux Falls Metro Communications informed officers via dispatch that the suspect vehicle from the shooting was a silver-goldish SUV, had a big white sticker in the driver's side rear window, two large stickers in the rear window, and was being driven by a larger/heavy-set black male. JT1 148, 150-1. Sometime following the dispatch, Officer Thomas Brandt followed what he believed to be the suspect vehicle from 33rd Street to the Speedway gas station at 41st Street and Kiwanis Avenue, where the vehicle, unprompted, pulled into the parking lot. *Id.* 151-3. Defendant was the sole occupant of the vehicle when it pulled into the Speedway. *Id.* 154.

Officer Alexander Ivancevic eventually took Driver to the Speedway for a show up identification. MS 6. Prior to the identification, Smith told Driver "they found him" and that law enforcement was likely going to take Driver to where they had the individual pulled over so that Driver could do a "check." R Smith BWC_1. (7:56 – 8:02) (33:22 – 33:37). Another officer told Driver he was being taken down to "where [law enforcement] had the vehicle stopped." Exhibit A, "Neises BWC_1" (22:30-22:47). On the way to the show up, Ivancevic told

Driver that law enforcement had caught the individual at the Speedway and that Driver was being taken to the Speedway because "[law enforcement] believed they have the [person] [from the shooting]". Exhibit A, "Ivancevic BWC_5" (3:30 – 4:02; 5:05 – 5:25).

Prior to Defendant being shown to Driver, Driver observed multiple police cars surrounding the suspect vehicle. MS 17. While Defendant was being shown to Driver, Driver first said "That ain't him. That ain't him. He had an afro." *Id.* 18; Ivancevic BWC_5 (13:50-13:58). Driver asked Ivancevic if there was a hat in the car; in response to Driver's question Ivancevic asked if the individual he saw at the shooting was wearing black. MS 19; Ivancevic BWC_5 (14:00-14:22). Driver had not mentioned anything about a hat or the color of clothing the individual was wearing before this interaction. After Ivancevic's question, Driver said to himself "that's got to be him," makes some additional inaudible comments to himself, and finally says, "yup, that's him." Ivancevic BWC_5 (14:22 – 14:31-14:45). Driver was advised by another officer on scene that Defendant had a black hat on; after hearing this comment Driver says "yeah, that's him. He took the hat off." MS 21. During the identification, Defendant was dressed in all black, in handcuffs, standing at the back of one of five police vehicles in the parking lot of the Speedway, and surrounded by two officers. Exhibit A, "Ivancevic Front 2352" (13:52).

Following Driver's identification, Defendant was transported to the Sioux Falls Police Law Enforcement Center ("Law enforcement center"). JT1 156. At

the law enforcement center, Defendant was interviewed by Detective Branch. E98.[6] When asked if he remembered "being at the stop sign" Defendant said "ya, that's my route" and that he often drives that road regardless of where he is going. E98 (12:02-12:21). Immediately after this exchange, Branch and Defendant discussed whether 11th and Summit is Defendant's routine route. E98 (12:22 – 14:22). Branch asked Defendant if his routine included driving down Summit that morning; Defendant responded "yup, anytime." E98 (14:21-14:30). Branch then asked, "and it was just you in the car this morning" to which Defendant responded "yes." *Id.* Towards the end of the interview as shown on E98, Branch states "you were just at that stop sign when it happened, but didn't see it"; Defendant states "stop sign, there was nothing going on[.]" E98 (22:16-22:28).

2. Procedural Facts

Defendant filed a Motion to Suppress Driver's identification, arguing the identification was impermissibly suggestive and therefore inadmissible. SR 26-27, 30-37. During the evidentiary hearing on Defendant's motion, Driver testified that prior to the shooting, he had told someone with him in the parking lot that the person in the suspect vehicle lived on 29th Street and Grange. MS 27. Defendant's residence was 1205 W. 22nd, which is the third house off of Grange. JT3 175. Although Driver testified that he only saw one person in the car *and* that he got a good look at the shooter, when asked if the shooter and the driver were

[6] The information provided immediately herein regarding Branch's interview of Defendant is taken from E98. Additional information about the interview between Branch and Defendant will be developed below as relevant to the issues before the Court.

the same person, he answered "I can't say that. I can say he's the only one I seen in the car. When the shooting started, I was running." MS 28-9. Driver also testified as follows at the suppression hearing:

Question:	Okay. And the individual they had, you are stating that that was the same guy?
Answer:	That was the same guy.
Question:	The driver/shooter?
Answer:	Driver, yes.

Id. 30.

Driver testified during the hearing that he asked Ivancevic if there was a hat because "I had seen it *before* in the *truck*. Because I had seen him a couple of times before in the neighborhood." *Id.* 30 (emphasis added). Driver also testified that he only saw the driver of the vehicle during the first time the vehicle drove by, from more than twenty feet away, and for "just a couple of seconds." *Id.* 35, 37. Driver acknowledged that before the shooting happened, in addition to looking at the vehicle for just a couple of seconds, he was also talking to the people around him. *Id.* 35. The trial court denied Defendant's motion, concluding that although the show-up identification was unduly suggestive, under a totality of the circumstances, "the factors [to consider when determining whether an in-court identification has been purged of any taint] far outweighed the corruptive effect of the suggestive prior identification." SR 61, 65, 68. The trial court found that all of the factors weighed in favor of admissibility. SR 60-68.

At trial, Driver first testified that Defendant lived at the second house from the corner on 22nd and Grange, but switched his testimony to at the first house,

then at the second house, then finally at the first or the second house. JT1 50, 53, 61-2. At the suppression hearing Driver testified that he could not be certain the driver and the shooter were the same person; at trial Driver first testified that he had no doubt that Defendant was the shooter, that Defendant was the only person in the vehicle, and that Defendant was the driver; Driver testified on cross that "I didn't say I seen him shoot the gun." *Id.* 51-2, 58; MS 29. Driver testified at trial that he was taken to the Speedway about an hour after the shooting; at the suppression hearing he testified he was taken maybe 30 minutes after the shooting. JT1 83; MS 29.

Defendant filed his First Motion for Discovery ("Defendant's First Discovery Motion") on September 30, 2022, and requested production of all scientific testing results that the State intended to use at trial, disclosure of all exculpatory material known to the State or any law enforcement agency involved in investigating the matter, and production of all other material discoverable pursuant to SDCL chapter 23A-13. SR 18-20. Defendant again requested copies of all scientific testing on January 12, 2023. SR 57-8. Defendant's Second Motion for Discovery on January 23, 2023, requested the same material as requested in Defendant's First Discovery Motion. SR 76-8. During a motions hearing on July 5, 2023, the court orally ordered the State to provide any testing results to Defendant. MH1 8.

Trial was set to begin on August 18, 2023. *Id.* 18. On August 7, 2023, in response to an email from defense counsel, the State advised it would be calling

Frans Maritz "to testify that the cartridge found in [Defendant's] vehicle matched the cartridges found at the scene of the shooting[.]"[7] SR 210-1. The State's email also said "I do want you to know that in [Maritz's] report he does state 'Results and Conclusions: ***Items 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 28, 31, 32, 33, 34 and 35 fired rimfire cartridge cases were fired in the same firearm (firearm not submitted).***'" *Id.* (emphasis in original). The State first provided Defendant with Maritz's report on August 8, 2023.[8] Defendant was unaware the State had conducted any ballistics testing before this exchange. MH2 6.

On August 9, 2023, Defendant filed a Motion to Dismiss based on the State's untimely disclosure of Maritz's report. SR 205-6. Alternatively, Defendant requested the court exclude Maritz's testimony and report from being admitted at trial. *Id.* As a second alternative, Defendant requested a continuance. *Id.* During the August 11, 2023, hearing on Defendant's motion, the court orally denied Defendant's request for a dismissal or exclusion and advised Defendant that "I'm leaving it up to you. Either the testimony comes in and we don't delay trial, or we delay trial and give you the chance to see what you want to do as far as that expert is concerned." MH2 17, 21-2. Of the choices presented, Defendant

[7] Frans Maritz is a forensic scientist employed by the State of South Dakota. Maritz practices in forensic firearms and tool mark identification. JT3 68.
[8] The State received Maritz's report in March 2023. MH2 14.

accepted a delay of trial. *Id.*, 22. During trial, Maritz testified that all twenty-one .22 long rifle caliber casings[9] he tested were fired from the same firearm. JT3 73.

Before opening statements, Defendant filed Defendant's Amended Motion in Limine, requesting the State be prohibited from entering the interview between Defendant and Branch, arguing Branch's statements were hearsay. SR 282.[10] The court's initial ruling on Defendant's motion was that any statements of fact Branch made during the interview, whether true or not, were excluded as hearsay statements. SR 345. The court later advised the parties that it would be excluding an additional three minutes of video that it had become aware of since making its previous ruling. SR 346-354.

On the second substantive day of trial, the State called Arely Flores, who had witnessed the shooting from her car parked on Summit. JT2 90-91. Prior to trial, the State informed Defendant that Flores had witnessed the shooting from her parked car outside a barbershop on Summit, and provided Defendant with a report authored by the case's lead detective Logan Gooch, about his August 18, 2023 conversation with Flores. SR 647-8; *see generally* Defendant's Motion for a New Trial, Exhibit C ("Gooch Report"). According to the report, Flores told Gooch that she saw three dark skinned individuals inside the suspect vehicle, that two were in the front seat, and that the one in the backseat had pulled out a gun. *See*

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[9] Officer Paige Bullerman ("Bullerman") testified that E19 was a .22 casing recovered from the driver's side floor of the suspect vehicle. JT2 24. Although not expressly testified to by any witness, Item 1 identified in Maritz's report (E97) (and which Maritz testified he tested) is E19.

[10] Defense counsel advised the court that the interview had not been identified as an intended exhibit by the State until two nights prior. JT1 10-11.

Id. During trial, the State asked Flores how many people she saw in the vehicle, to which she stated, "I didn't see how many people were in the vehicle." JT2 92. The State asked Flores no additional questions regarding the number of individuals in the vehicle during the shooting. *See generally* JT2 92-4. Defendant called Alejandra Hight, a legal assistant with defense counsel's firm, to testify to her conversations with Flores. *See generally* JT3 194-201. Hight testified that Flores initiated contact with defense counsel's firm and advised Hight she did not want to testify because she was scared she would be asked about her immigration status. JT3 198, 200. Hight testified that she had previously translated two conversations between defense counsel and Flores from Spanish to English and that during these two conversations, Flores said that she saw a person in the backseat of the vehicle pick up a gun and do the shooting. *Id.* 196–201.

Later during trial, Defendant filed a Third Motion in Limine, seeking to prohibit the State from entering a photograph labeled "XProtect Smart Client 2020 R3 Surveillance Report" (referred to herein as "Milestone Document[11] or E100) because the State had not identified the photograph as an intended exhibit, and because no substantive information about the photograph had been provided. JT3 21, SR 316-7. Defendant (through counsel) advised the court that the State first produced the Milestone Document via email August 23, 2023, and that the only other substantive information received about the document was from a report

[11] The information provided in the State's argument against Defendant's motion was the first time Defendant had received any information about Milestone. JT3 21-25.

authored by Gooch that stated "[i]n conducting trial prep, I was *made aware* that there was a picture shown in the interview with [Defendant] that was conducted by Det. Branch." JT3 23-4; SR 319-322. (emphasis added). Defendant further advised that even though the State still had not identified the Milestone Document as an intended exhibit, based off an email they received the night before, they believed the State intended to introduce it. JT3 23-24; *See* SR 342, Defendant's Third Motion in Limine, Exhibit 11. Defendant argued that because none of the State's three varying exhibit lists identified the Milestone Document as an intended exhibit, it would be prejudicial to allow it to be admitted. JT3 23; SR 316. Defendant also argued that Gooch would not be able to lay proper foundation for the Milestone Document because he obtained it from Branch; Defendant also argued that the Milestone Document should not be admitted because the purported date and time of when the photograph was taken and printed were hearsay. JT3 113-4.

In response to Defendant's motion, the State advised that the Milestone Document was a printout, or screenshot, of footage from the Milestone System ("Milestone"), depicting a vehicle on 11th at 9:43:38 on July 13, 2022. JT3 150-1.[12] The State asserted that Milestone is a system of traffic cameras throughout Sioux Falls that law enforcement use in their investigations. *Id.* 151-2. The State

[12] Any statements of fact about what the "XProtect Smart Client 2020 R3 Surveillance Report" is are taken from the State's arguments or Gooch's testimony. These statements of fact are being provided as required so as to provide the Court with information to consider this matter. Defendant does not concede the statements of fact regarding the Milestone Document as true.

further said that it had not identified the Milestone Document as an exhibit because it thought it would be able to play the portion of the interview where Branch shows Defendant a photograph; the State further advised that because the trial court excluded that portion of the interview, it did now intend to introduce the Milestone Document. JT3 23-4, 114.[13] The State further argued that Gooch would be able to provide testimony sufficient to lay foundation for the photograph and to prove the purported date and time stamp fall within the business records exception to hearsay statements. JT3 115-6.

An offer of proof on the Milestone Document was conducted outside the presence of the jury. *See generally* JT3 119-134. Outside the presence of the jury, Gooch testified that the Milestone Document was a

> [P]rint out from the Milestone camera system capturing a moment in time from the camera system. [And that] [i]t's dated in this particular instance as being from 9:43 a.m. and 38 seconds on July 30th, 2022.

JT3 122.

Gooch further testified that the Milestone Document was specifically a screenshot of *video footage*, and that although he had watched the video from which the Milestone Document was printed from, he did not watch Branch

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[13] The following is from the State's opening argument:

> But there are traffic cameras in Sioux Falls, and they can take pictures and there were pictures taken of the defendant's vehicle that morning near 11th and Summit. Actually in front of the Lucky Lady Casino. And that picture in this interview was shown to the Defendant.

JT1 26. Opening statements were made prior to any ruling by the court on Defendant's Amended Motion in Limine. *See* JT1 1-31; SR 345.

actually print out the screenshot. *Id.* 122-3, 125-6 (emphasis added). According to Gooch, Milestone is a software run by a company that the City of Sioux Falls pays a subscription "to have access to[.]" *Id.* 126. Gooch could not identify which of the multiple City of Sioux Falls IT servers the Milestone Document, or the underlying video footage, came from. *Id.* 126-7, 130. Gooch testified that he did not know how Milestone was maintained, whether the location Milestone purports to show is verified, whether Milestone is maintained to ensure that the time listed on the photograph is correct, or how the Milestone clock is set. *Id.* 129, 131.

Gooch also testified that while some Milestone cameras show live footage only, others have a playback mode. *Id.* 123. According to Gooch, Sioux Falls detectives access Milestone every week, it is their regular practice to save video footage and screenshots from video footage, and video footage can be saved up to 90 days. *Id.* 123-4, 127.

The court found that Gooch's testimony established that Milestone was regularly used in the normal course of business by the City of Sioux Falls and that the Milestone Document accurately depicted a still shot from the video footage, and therefore admitted the Milestone Document. *Id.* 133. The trial court overruled Defendant's later foundation and hearsay objections to E100. *Id.* 134, 155.

At the close of the State's evidence, Defendant moved for a judgment of acquittal on Counts 3-6, arguing that to prove Defendant violated SDCL 22-14-20,

the State had to prove that Defendant shot at an occupied vehicle and that because the State had failed to produce sufficient evidence that the vehicles in question were occupied at the time of the shooting, a judgment of acquittal was warranted. *Id.* 183-5. The trial court denied Defendant's motion. *Id.* 187.

Defendant filed several proposed jury instructions. SR 363-76. Defendant's Proposed Instruction 101 was consistent with Defendant's interpretation of SDCL 22-14-20, instructing the jury that the State must prove Defendant shot at an occupied motor vehicle. JT4 36. Defendant's Proposed Instructions 109 and 110 provided factors for the jury to consider when determining the accuracy of a witness's identification, as well as a specific instruction related to Driver's identification. JT4 41. The court denied Defendant's Proposed Instruction 101, 109, and 110. SR 387, 389, 390; JT4 43-4. Defendant was found guilty of Counts 1 through 6. JT4 87-8.

Following trial, Defendant filed a Motion for a New Trial, arguing that the State had violated the *Brady* rule by failing to produce, and assumingly preserve, the video the Milestone Document was screenshotted from, and by eliciting testimony from Flores that the State knew to be false. *See generally* SR 530-630. The court issued a memorandum decision denying Defendant's motion, concluding that the video the Milestone Document was screenshotted from was not material to Defendant's case, and therefore the State's failure to preserve it was not prejudicial, and further that Defendant was not prejudiced by the change in Flores's earlier unsworn statements to that of her trial testimony. SR. 654-661.

ARGUMENT AND AUTHORITIES

I. The trial court erred when it denied Turner's Motion to Suppress.

The trial court's denial of Defendant's motion to suppress Driver's identification violated Defendant's due process rights under the Fourteenth Amendment to the United State Constitution and Article VI, Section 2 of the South Dakota Constitution. "[A] defendant's due process rights may be violated when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *State v. Osman*, 2024 S.D. 15, ¶ 23, 4 N.W.3d 558, 566. The denial of a motion to suppress based on the alleged violation of a constitutionally protected right is reviewed under the de novo standard. *Id.* at ¶ 22. The trial court's factual findings are reviewed under the clearly erroneous standard. *Id.*

"Show-up identifications are inherently suspect: the practice of showing suspects singly to persons for purposes of identification has been consistently condemned as an affront to the requirements of due process and good police procedure." *Id.* at ¶ 26 (quotations omitted). This Court has previously advised law enforcement to not use show-up identifications:

> [W]e take this opportunity to discourage the unnecessary use of this type of identification process by law enforcement. It is advantageous to use a more reliable process, such as a photo line-up, when it is reasonably possible to do so. The penalty for failure to do so may be suppression of the impermissible identification.

State v. Red Cloud, 2022. S.D. 17, ¶ 36, 972 N.W.2d 517, 529.[14]

The Court conducts a two-step inquiry when determining whether an identification must be suppressed because police conduct resulted in a substantial likelihood of misidentification. *Osman*, 2024 S.D. 15, ¶ 24-5. Because the trial court concluded that the identification was unduly suggestive and unnecessary, the Court can proceed with the second step of the inquiry and consider the reliability of Driver's identification. An identification should be suppressed if the indicators of a witness's ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion. *Id.* The reliability of an identification is considered under the totality of the circumstances. *State v. Abdo*, 518 N.W.2d 223, 226 (S.D. 1994). The Court considers the following factors to determine the reliability of an eyewitness's identification:

1) The opportunity of the witness to view the criminal at the time of the crime;
2) The witness's degree of attention;
3) The accuracy of the witness's prior description of the criminal;
4) The level of certainty demonstrated by the witness at the confrontation; and
5) The length of time between the crime and the confrontation.

Id.

The trial court concluded that although the show up was unduly suggestive, under a totality of the circumstances, Driver's identification was reliable. SR 64-5. However, reviewing Driver's identification under the relevant factors, it is

[14] The show-up in the instant case occurred four months after the *Red Cloud* decision.

apparent that the identification was unreliable. Whereas the trial court concluded in its memorandum opinion that Driver viewed the shooter during both rounds of shooting, Driver testified at the suppression hearing that the only time he saw an individual in the vehicle was during the first round of shooting. SR 66, MS 37. Driver testified that he only saw the *vehicle* the second time. MS 37 (emphasis added). Driver also testified that when he did see the individual in the vehicle, it was just for a couple of seconds and from more than twenty feet away. *Id.* 35-6.

The circumstances here are considerably different than those that occurred in *Red Cloud*. In *Red Cloud* the Court concluded that even though the witness's opportunity to view the suspect was very brief – 45 to 75 seconds – this opportunity was sufficient to support identification, because at one point the witness was within four feet of the suspect and viewed suspect's tattooed back, which was how the witness identified the defendant. *Red Cloud*, 2022 S.D. 17, ¶ 26-7, 972 N.W.2d at 527. Driver viewed the individual in the car for a couple of seconds and from more than twenty feet away. Driver also had divided attention when he observed the individual in the car, as he was having a conversation with the people around him. Driver did not have an opportunity to meaningfully observe the individual in the car.[15]

Driver's prior description also renders his subsequent identification unreliable. Prior to the show up identification, Driver said that the individual in

[15] Regarding Driver's prior experience with Defendant, Driver again had varying and conflicting testimony. At the suppression hearing, Driver testified that he had seen the *truck* plenty of times before, but that he had only seen the *Defendant* a couple of times. MS 27, 30, 33.

the car lived at the first house on the right of 22nd after taking a left on Grange. During the suppression hearing and at trial, he testified the individual he witnessed lived on 29th Street, then on the second house on 22nd, then at the first house on 22nd, then finally at the first or second house on 22nd. Defendant resided at 1205 W. 22nd, which is none of the above. Driver also described the individual as having a beard, being darker complected than him, in his forties, short, and having an inch to an inch and a half afro. Defendant was 42 at the time of the incident, however he did not have an inch to an inch and a half afro, and although he had some facial hair, it was not a complete beard.[16]

Driver's identifications during confrontation had no level of certainty. Driver testified at the suppression hearing that he did not know if the driver and the shooter were the same person, then at trial he first testified he had no doubt that the driver and the shooter were the same person, but then on cross testified that he "[never said he] seen [Defendant] shoot the gun." Although it did not occur during a confrontation, perhaps the most important fact is that during the show up identification Driver repeatedly said that Defendant was not the person he had seen in the suspect vehicle until Ivancevic asked him whether the individual he had seen was wearing black, the same color the Defendant had on.

[16] Because a description about an individual's height and complexion are subjective, Defendant does not take a position on what effect Driver's statements regarding these two features has on the reliability of his identification.

Under all these facts, Driver's in-court identification was irreparably tainted by the impermissibly suggestive show-up, and accordingly the trial court erred in admitting the identification.

II. The trial court erred when it denied Turner's Motion to Dismiss for Violation of SDCL 23A-13 and alternative request for exclusion of evidence.

SDCL 23A-13-15 provides:

> If, prior to or during trial, a party discovers additional evidence or material previously *requested or ordered*, which is subject to discovery or inspection under §§ 23A-13-1 to 23A-13-14, inclusive, he shall *promptly* notify the other party or his attorney or the court of the existence of the additional evidence or material.

(emphasis added).

Pursuant to SDCL 23A-13-17[17],

> If, at any time during the course of a proceeding, it is brought to the attention of a court that a party has failed to comply with an applicable discovery provision, the court may order [...] grant a continuance, or prohibit the party from introducing evidence not disclosed, or [...] enter such order as it deems just under the circumstances."

"[W]hen a discovery order is violated, the inquiry is whether the defendant suffered any material prejudice as a result of the late disclosure." *State v. Richard*, 2023 S.D. 71, ¶ 33, 1 N.W.2d 654, 662. "A violation of a discovery order and the court's resultant choice of, or failure to grant a remedy, is reviewed under an abuse of discretion standard." *State v. Smithers*, 2003 S.D 128, ¶ 21, 670 N.W.2d 896, 900. "An abuse of discretion is a fundamental error of judgment, a choice outside

[17] Appellant recognizes the Court has held that dismissal of an indictment for reasons not set forth in SDCL 23A-8-2 would constitute an error of law. *State v. Vatne*, 2003 S.D. 31, ¶ 14, n.1, 659 N.W.2d 380, 384.

the range of permissible choices, a decision, which on full consideration, is arbitrary or unreasonable." *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109.

The trial court reasoned he was denying Defendant's request to exclude Maritz's testimony and report because "[he didn't] think that there was anything about this that should be considered a surprise." MH2 19. The trial court's reasoning is analogous to that by the trial court in *State v. Hofman*, 1997 S.D. 51, ¶ 17, 562 N.W.2d 898, 902. However, the trial court's ruling was an abuse of discretion. Prior to receiving Maritz's report, Defendant had no knowledge that ballistics testing had been done on the recovered casings or that there was supposed scientific evidence linking him to the crime scene, and therefore he had no reason to believe that the casing found in his vehicle was "probably going to be focused on[.]" MH2 5-6; *Hofman*, 1997 S.D. 51, ¶ 17. When considering whether a defendant has been prejudiced by undisclosed evidence, the Court has examined the nature of the testimony and its effect on the jury. *State v. Krebs*, 2006 S.D. 43, ¶ 20, 714 N.W.2d 91, 99. Maritz's report and testimony regarding the recovered shell casings is the only scientific evidence presented by the State connecting Defendant to the crime scene and therefore unquestionably had an effect on the jury. The casings were even more significant because the weapon used was never found.

The probable effect of inculpatory evidence on a jury is also in part evidenced by its prominence in the State's final argument. *State v. Adamson*, 2007

S.D. 99, ¶ 45, 738 N.W.2d 919, 929 (Meierhenry, J., dissenting and concurring in part). In its closing statement, the State discussed the shell casings for almost a full two pages of transcript, during which it twice said they were all fired from the same weapon. JT4 50-52.

"An accused is entitled as a matter of right to a reasonable opportunity to secure evidence on his behalf." *State v. Letcher*, 1996 SD 88, ¶ 32; 552 N.W.2d 402, 407 (S.D. 1996). The trial court orally denied Defendant's motion to dismiss and/or to exclude the testimony of Maritz, and advised Defendant that the evidence was going to come in. MH2 17, 19, 22. The trial court advised Defendant that because of the late disclosure of Maritz's report, the court could grant a continuance if the Defendant wanted one, however "[the court would try and] get the trial scheduled as soon as [it] can and [it would] try to do it within 30 days." *Id.* 22. After receiving Maritz's late disclosed report, Defendant was faced with the choice of proceeding to trial in 7 days or in 30 days. This timeframe was not sufficient to afford Defendant a "meaningful opportunity to present a complete defense." *Adamson*, 2007 S.D. 99, ¶ 46, 738 N.W.2d at 929 (Meierhenry, J., dissenting and concurring in part). "When inculpatory evidence is included [...] without affording a defendant an opportunity to respond to the State's case against him, he is effectively deprived of a fundamental constitutional right to a fair opportunity to present a defense." *Id.* (quotations omitted).

For these reasons, the trial court erred by denying Defendant's motion to dismiss or exclude the testimony and report of Frans Maritz.

III. The trial court erred by admitting E100.

The trial court also erred by admitting E100. "Evidentiary rulings are reviewed for an abuse of discretion and are presumed to be correct." *State v. Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d 144, 147. "To necessitate reversal, not only must error be demonstrated, but it must also be shown to be prejudicial." *Id.* (quotation marks omitted). "An error is prejudicial when in all probability the error produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (quotation marks omitted). "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." *Id.* at ¶ 12 (quotation marks omitted).

"Business records qualify for a hearsay exception if they are records of a regularly conducted business activity." *State v. Dickerson*, 2022 S.D. 23, ¶ 45, 973 N.W.2d 249, 264. "The exception requires that:

> (A) The record was made at or near the time by – or from information transmitted by – someone with knowledge;
> (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) Making the record was a regular practice of that activity;
> (D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule or a statute permitting certifications; and
> (E) The opponent does not show that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness."

Id. 973 at 264-5.

The Milestone Document and the instant matter before the Court is analogous to the document and circumstances in *State v. Dickerson*. In *Dickerson*, the State sought to admit a printout purportedly from the victim's bank which supposedly included the times and dates of transactions that were attempted using the victim's debit card after he had been assaulted and the card was stolen. *Dickerson*, 2022 S.D. 23, ¶ 17-18, 973 N.W.2d 249, 255-6. In *Dickerson*, the trial court overruled the defendant's hearsay objection to the printout and allowed it in under the business records exception. *Id.* at ¶ 17, 973 N.W.2d at 255. This Court reversed the trial court, holding that the State failed to lay adequate foundation. *Id.* at ¶ 46, 973 N.W.2d at 265. The following passage from *Dickerson* is particularly analogous to the instant case

> [The victim] did not claim to be familiar with [his bank's] recordkeeping practices or with how the transaction list was prepared. [...]
>
> Similarly, although [the detective] testified about these records, he had no firsthand knowledge of the existence of the transactions or how the list was created and could only make assumptions about the date and time stamps on the document. While the phrase "another qualified witness" is given a very broad interpretation, the witness must nonetheless possess enough familiarity with the record-keeping system of the entity in question to explain how the record came into existence in the course of regularly conducted activity of the entity.

Id.

As previously stated, Gooch did not watch the Milestone Document be screenshotted or printed out, nor could he identify which of the multiple City of Sioux Falls IT servers the Milestone Document, or the footage from which it was

supposedly screenshotted from, came from. JT3 125-7, 130. Gooch also did not know how the Milestone system was maintained, whether the location the Milestone system purports to show is verified, whether the system is maintained to ensure that the time listed on the photograph is correct, or how the Milestone system clock is set. JT3 126-7, 129-31. Gooch had no firsthand knowledge of the creation of the report or how the system was maintained, and most importantly could only make assumptions about the date and time stamps on the document. *See Dickerson*, 2022 S.D. 23, ¶ 46, 973 N.W.2d at 265. Therefore, he could not lay proper foundation for E100, or prove that the date and time stamps on the document were business records qualifying as a hearsay exception and it was error for the trial court to allow E100 to be admitted. *Id.* Prior to the Milestone Document being admitted, the only evidence placing Defendant at the shooting was the unreliable testimony of Driver. According to Gooch, the Milestone Document was a photograph purportedly of Defendant near 11th and Summit at the time of the shooting. Unquestionably, this influenced the jury's verdict. For such reasons, the trial court erred by admitting E100, which had a prejudicial effect on Defendant.

IV. The trial court erred by denying Defendant's Motion for Judgment of Acquittal on Counts 3-6.

The trial court further erred by denying Defendant's Motion for Judgment of Acquittal. The denial of a judgment of acquittal and questions of statutory interpretation are both questions of law reviewed under the de novo standard.

State v. Danielson, 2012 S.D. 36, ¶ 8, 814 N.W.2d 401, 405; *State v. Armstrong*, 2020 S.D. 6, ¶ 12, 939 N.W.2d 9, 12.

SDCL 22-14-20 criminalizes the discharge of a firearm "at an occupied structure or motor vehicle." SDCL 22-14-20. In 2005, the South Dakota Legislature amended SDCL 22-14-20, SL 2005, ch 120 § 147. Prior to the amendment, the statute criminalized the discharged of a firearm at "an occupied structure, structure capable of being occupied, or motor vehicle[.]" *Id.* In addition to deleting "structure capable of being occupied" from the statute, the amendment also increased a violation of SDCL 22-14-20 from a Class 5 or 4 felony respectively, to a Class 3 felony. *Id.*; SDCL 22-14-20.

"It is … an established principle of statutory construction that, where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a different construction." *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶ 17, 709 N.W.2d 824, 831.[18] "The 'series-qualifier canon [of construction]' provides that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." *Argus Leader Media v. Hogstad*, 2017 S.D. 57, ¶ 8, n. 2, 902 N.W.2d 778, 780 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 146 (2012)). "In the absence of

[18] *But See State through Attorney General v. Buffalo Chip*, 2020 S.D. 63, ¶ 32, n. 19, 951 N.W. 2d 387, 398 ("The Court has discretion to determine whether a […] amendment has any bearing on a statute's meaning as originally expressed.")

some other indication, the modifier reaches the entire enumeration [... regardless of] whether the modifier is an adjective or an adverb. *Reading Law* 147.

"Perhaps more than most of the other canons, the series-qualifier canon is highly sensitive to context." *Argus Leader Media*, 2017 S.D. at ¶ 8, 902 N.W.2d at 781. With the 2005 amendment, the Legislature deleted the portion of the statute illegalizing the discharge of a structure capable of being occupied as well as increased the level of offense for the discharge of a firearm. Prior to 2005, SDCL 22-14-20 illegalized the shooting at a motor vehicle, whether occupied or not as evidenced by the statute's language regarding shooting at a structure; the pre-2005 version of SDCL 22-14-20 criminalized the shooting at a "motor vehicle", not distinguishing that the motor vehicle had to be occupied or unoccupied, whereas it also criminalized the shooting at a structure two different ways: the shooting at an "occupied structure" or "structure *capable* of being occupied" (i.e., an unoccupied structure at the time the offense occurred). (emphasis added). The 2005 amendment's deletion of "structure capable of being occupied" and of both commas made "occupied" a modifier of both "structure" and "motor vehicle," thus criminalizing the shooting at a motor vehicle only if it was occupied at the time of the incident; had the Legislature desired to continue with the status quo (i.e., the criminalization of discharging a firearm at a motor vehicle, whether occupied or not), following the 2005 amendment, it would have included a determiner such as

a comma or "a" to limit the modifier. *See Reading Law* 148.[19] This position is further supported by a violation of the statute being increased from a Class 5 or 4 felony to a Class 3. *Cf. Lewis & Clark*, 2006 S.D. 7, ¶ 17.

Because SDCL 22-14-20 only criminalizes the discharge of a firearm at a motor vehicle that is occupied at the time of the incident, and because the State failed to provide sufficient evidence to prove that the four vehicles in question were occupied at the time of the incident, the trial court erred by denying Defendant's Motion for Judgment of Acquittal.

V. The trial court erred by denying Defendant's Proposed Jury Instructions 101, 109, and 110.

A trial court's denial of a proposed jury instruction is reviewed under an abuse of discretion standard. *State v. Swan*, 2019 S.D. 14, ¶ 12, 925 N.W.2.d 476, 479. "Jury instructions are satisfactory when, considered as a whole, they properly state the applicable law and inform the jury." *Id.* "Error in declining a proposed instruction is reversible only if it is prejudicial[.]" *Id.*

A. Proposed Instruction 101

Defendant's Proposed Instruction 101 was consistent with Defendant's interpretation of SDCL 22-14-20. SR 387. Should the Court interpret SDCL 22-14-20 consistent with Defendant's position, Defendant was prejudiced by the trial

[19] Appellant recognizes that SDCL 22-1-2 defines both "motor vehicle" and "occupied structure". *See* SDCL 22-1-2(26) and SDCL 22-1-2(28). However for the reasons argued herein, Appellant believes the Legislature intended the 2005 amendment to SDCL 22-14-20 to constitute a substantive amendment, criminalizing the shooting at a motor vehicle only if the motor vehicle is occupied at the time of the crime.

court's denial of Defendant's Proposed Instruction 101, because the jury instructions as presented did not inform the jury on the applicable law.[20]

B. Proposed Instructions 109 and 110

Defendant's Proposed Instructions 109 and 110 both related to eyewitness identifications. SR 389-90. The State objected to both instructions arguing that Proposed Instruction 109 is proper only when an identification has been made by one eyewitness, and that 110 was not needed because the trial court's intended instructions properly instructed the jury on how to judge the credibility of a particular witness. JT4 42. The trial court denied Defendant's Proposed Instructions 109 and 110. *Id.* 44.

Errors in instructing the jury which go to the heart of a defendant's theory of defense can infringe upon the defendant's right to due process and jury trial. *Miller v. State*, 338 N.W.2d 673, 676 (S.D. 1983). Defendant's Proposed Instructions 109 and 110 were identical to South Dakota Pattern Jury Instruction 1-15-15 and a modified version of South Dakota Pattern Jury Instruction 1-15-16. "It is well established that an identification instruction is not mandated in all eyewitness cases." *State v. Brings Plenty*, 490 N.W.2d 261, 267 (S.D. 1992). "In order to determine whether the identification instruction should have been given, [the Court] review[s] whether the eyewitness testimony is essential to support a

[20] Should the Court conclude Defendant's interpretation of SDCL 22-14-20 is correct, the prejudice of the trial court's denial of Defendant's Proposed Instruction 101 is evidenced by the second jury question received during deliberations, which stated "We would like clarification on Instruction 22 and 23 in regards to charge 3-6. Does the 'Motor Vehicle' need to meet all a,b,c, definitions of 'occupied structure'?". SR 436-9.

conviction." *Id.* "When the eyewitness identification is the sole basis for the conviction, there is the possibility of misidentification, and the trial court did not instruct on the crucial role the eyewitness identification played in the case, then a reversible error has been committed." *Id.*

Throughout the proceedings, Defendant conceded that it was his vehicle used in the shooting, however his theory of defense was that he himself was not personally involved in the shooting. *See generally* JT1–JT4. Other than the Milestone Document, the State's evidence that Defendant did the shooting at issue relied solely on Driver's identification. The trial court provided no instruction to the jury informing them that they must be satisfied beyond a reasonable doubt of the accuracy of the Driver's testimony before convicting Defendant. *See generally* SR 392-430. Therefore, Defendant's right to a fair trial was prejudiced by the trial court's failure to present the proposed instructions.

VI. The trial court erred by denying Defendant's Motion for a New Trial.

Defendant moved for a new trial based on the State's failure to preserve and produce the video from which the Milestone Document came and its elicitation of testimony from Flores that it knew to be false. A new trial may be granted for any of the following causes:

> 1) Irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial; […]
> 3) Accident or surprise which ordinary prudence could not have guarded against;
> 4) Newly discovered evidence, material to the party

> making the application, which he could not with reasonable diligence have discovered and produced at trial[.]

SDCL 15-6-59(a).

A denial of a motion for a new trial is reviewed under the abuse of discretion standard. *State v. Timmons*, 2022 S.D. 28, ¶ 19, 974 N.W.2d 881, 888. "[T]o determine whether a defendant was denied the constitutional right to a fair trial based on the cumulative effect of trial errors, [the Court] review[s] the entire record to determine if a fair trial was held." *Delehoy*, 2019 S.D. 30, ¶ 20, 929 N.W.2d at 108.

a. Milestone System Video

"The Due Process Clause of the Fourteenth Amendment imposes upon states the requirement to ensure that criminal prosecutions … comport with prevailing notions of fundamental fairness." *State v. Zephier*, 2020 S.D. 54, ¶ 20, 949 N.W.2d 560, 565 (quotation marks omitted). "Suppression of evidence by the prosecution goes directly to the fundamental fairness of the trial, the basic due process rights of the accused." *State v. Steele*, 510 N.W.2d 661, 665 (S.D. 1994). "A *Brady* violation occurs when (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence has been suppressed by the State, either willfully or inadvertently; and (3) prejudice has ensued." *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109. The individual prosecutor has a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.*,

929 N.W.2d at 109-10. The State and its agents also have the duty to preserve evidence that is material to a suspect's guilt or punishment, and that might be expected to play a significant role in their defense. *State v. Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d 257, 262. Evidence is material under the duty to preserve if it possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.*

The State had a duty to preserve the video in question. Defendant denied being involved in any shooting or being near 11th and Summit that day. Undoubtedly, law enforcement knew that the identity of the shooter was going to play a significant part in the Defendant's defense. Law enforcement also knew that Defendant would not be able to access the video on his own. JT3 124. Accordingly, law enforcement's failure to preserve the Milestone video violated Defendant's due process rights.

If the Court believes the exculpatory value of the video was not known at the time it was destroyed, then Defendant must show that law enforcement officers acted in bad faith in destroying the video in order to establish a due process violation warranting a new trial. *Zephier*, 2020 S.D. 54, ¶ 23-4, 949 N.W.2d at 566. "[M]ere negligence in the loss or destruction of evidence does not [prove bad faith] [...] bad faith [...] means the state deliberately destroyed the evidence with the intent to deprive the defense of information; that is, that the evidence was

destroyed by, or at the direction of, a state agent, who intended to thwart the defense." *Danielson*, 2012 S.D. 36, ¶ 37, 814 N.W.2d at 412.

Gooch testified that law enforcement access Milestone every week, it is in their regular practice to save video footage (and screenshots from video footage) from Milestone, and that a video from Milestone can be saved up to 90 days. JT3 123-4, 127. Even though it is the *regular practice* of law enforcement to save videos during investigations, and the videos can be saved up to 90 days from the time they are taken, and even though Defendant denied being near 11th and Summit (or being involved in a shooting), and further even though Defendant's First Discovery Motion requested such (within 90 days of the shooting), law enforcement still failed to preserve the video. When considering the late disclosure of Maritz's report, the late disclosure of E100, the late identification of the interview between Branch and Defendant as an intended exhibit, the false statements by the State regarding when it first intended to use E100, the false testimony the State elicited from Flores, it is apparent that the State and law enforcement repeatedly acted in bad faith throughout this case. When considering all of these acts and all of the circumstances surrounding the video that the Milestone Document was a supposed screenshot of, it is clear that law enforcement and the State's failure to preserve the video was not mere negligence, but was a deliberate bad faith failure to act in order to thwart Defendant's defense.

b. Flores testimony

"[A] *Brady* violation not only results from the government's suppression of favorable evidence, but also, where previously undisclosed evidence reveals that the prosecution introduced trial testimony that it knew or should have known was perjured." *State v. Leisinger*, 2003 S.D. 118, ¶ 19, 670 N.W.2d 371, 375 (quoting *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555 (1995)). "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*

The State knew Flores's testimony at trial about many people she saw in the car was false, and yet the State did nothing to correct it. The State informed the Defendant that Flores had told law enforcement and the State that she saw three individuals in the suspect vehicle during the shooting. While Defendant conceded his vehicle was used, he consistently denied being personally involved in the shooting. Based on the information the State provided about Flores, Defendant anticipated being able to call her to testify that there were multiple people in the vehicle at the time of the shooting, and that the gunshots came from the backseat; however, because the State elicited false testimony from Flores in its case-in-chief, and did nothing to correct the testimony, Defendant was snuffed from calling Flores in support of his defense theory. Rather than being able to call a witness in support of his defense, Defendant was only allowed to try and

impeach Flores's testimony. Unquestionably, the State's elicitation of false testimony from Flors was prejudicial to Defendant.

Because the State violated Defendant's due process rights by failing to preserve the video from which the Milestone Document was supposedly derived, and by eliciting false testimony, the trial court erred in denying Defendant's Motion for a New Trial.

CONCLUSION

The trial court erred in a number of respects as outlined in the brief. These errors, individually and cumulatively, effected the result of this case and prejudiced the defendant. For such reasons, Defendant respectfully requests the court remand this matter to the trial court for a new trial and with appropriate instructions.

Dated May 29, 2024.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Josey M. Blare*
Josey M. Blare
Attorneys for Appellant
110 N. Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
605-332-5999
jblare@lynnjackson.com

ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, Josey M. Blare, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 38 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word-processing system used to prepare this brief indicates that there are a total of 9555 words and 48,521 characters (no spaces) in the body of the brief.

Josey M. Blare

Josey M. Blare

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Brief of Appellant in the above-entitled action was duly served by serving a true copy thereof by Notice of Electronic Filing generated by the Odyssey File & Serve System, on the 29th day of May, 2024, to the following named persons at their last known post office addresses as follows:

Marty J. Jackley
Office of the Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501
atgcircuitcourt@state.sd.us

Randy R. Sample
Thomas G. Nelson
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Sioux Falls, SD 57104
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tnelson@minnehahacounty.org

The undersigned further certifies that pursuant to SDCL 15-26A-79, the original of the Brief of Appellant in the above-entitled action was mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date above written.

Josey M. Blare

Josey M. Blare

APPENDIX

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STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
		PD 22-016474 & 22-016476
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI22005160
vs.	+	JUDGMENT & SENTENCE
LYDELLE EDMOND TURNER, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on August 11, 2022, charging the defendant with the crimes of Count 1 Aggravated Assault-Dangerous Weapon on or about July 30, 2022; Count 2 Aggravated Assault-Physical Menace on or about July 30, 2022; Count 3 Discharge Firearm at Occupied Structure or Motor Vehicle on or about July 30, 2022; Count 4 Discharge Firearm at Occupied Structure or Motor Vehicle on or about July 30, 2022; Count 5 Discharge Firearm at Occupied Structure or Motor Vehicle on or about July 30, 2022; Count 6 Discharge Firearm at Occupied Structure or Motor Vehicle on or about July 30, 2022; Count 7 Possess W/Intent to Distribute Drugs on or about July 30, 2022; Count 8 Possession of Marijuana-2 oz or Less on or about July 30, 2022; Count 9 Reckless Discharge of Firearm or Bow and Arrow on or about July 30, 2022; Count 10 Possession or Use of Drug Paraphernalia on or about July 30, 2022 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on August 15, 2022, Lisa Capellupo appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Randy Sample, Deputy State's Attorney appeared for the prosecution and, Mindy Werder and Josey Blare, appeared as co-counsel for the defendant. The State dismissed Count 8, 9 and 10 prior to commencement of trial. A Jury was impaneled and sworn on September 15, 2023 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on September 21, 2023 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, LYDELLE EDMOND TURNER, guilty as charged as to Count 1 Aggravated Assault-Dangerous Weapon (SDCL 22-18-1.1(2)), guilty as charged as to Count 2 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)); guilty as charged as to Count 3 Discharge Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20); guilty as charged as to Count 4 Discharge Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20); guilty as charged as to Count 5 Discharge Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20); guilty as charged as to Count 6 Discharge Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20) and not guilty as to Count 7 Possess W/Intent to Distribute Drugs ." The Sentence was continued to December 1, 2023, after completion of a presentence report.

Thereupon on December 1, 2023, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 1 AGGRAVATED ASSAULT-DANGEROUS WEAPON : LYDELLE EDMOND TURNER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years with credit for four hundred eighty-nine (489) days served.

AS TO COUNT 2 AGGRAVATED ASSAULT-PHYSICAL MENACE : LYDELLE EDMOND TURNER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years; concurrent to Count 1.

AS TO COUNT 3 DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE : LYDELLE EDMOND TURNER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years; consecutive to Counts 1 and 2.

AS TO COUNT 4 DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE : LYDELLE EDMOND TURNER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with the sentence suspended; consecutive to Counts 1, 2 and 3.

AS TO COUNT 5 DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE : LYDELLE EDMOND TURNER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with the sentence suspended; concurrent to Counts 1, 2, 3 and 4.

AS TO COUNT 6 DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE : LYDELLE EDMOND TURNER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with the sentence suspended; concurrent to Counts 1, 2, 3, 4 and 5.

It is ordered that the defendant shall pay court costs of $116.50 as to each count ($699.00 total) through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

It is ordered that the defendant enter into and comply with all terms of Parole Agreement as established by the Department of Corrections.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary or the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

It is ordered that the Part II Habitual Criminal Offender Information in this matter be and hereby is dismissed.

The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the South Dakota State Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the Penitentiary.

12/8/2023 2:25:49 PM

BY THE COURT:

JUDGE JON C. SOGN
Circuit Court Judge

Attest:
Hagert, Eve
Clerk/Deputy

STATE OF SOUTH DAKOTA
: SS
COUNTY OF MINNEHAHA

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MAGISTRATE DIVISION

STATE OF SOUTH DAKOTA, Plaintiff vs. LYDELLE EDMOND TURNER Defendant(s).	PD22-016474; PD22-016476 **INDICTMENT** CRI 22-5160

COUNT 1: AGGRAVATED ASSAULT - DANGEROUS WEAPON - CLASS 3 FEL as to LET
COUNT 2: AGGRAVATED ASSAULT - PHYSICAL MENACE - CLASS 3 FEL as to LET
COUNT 3: DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE - CLASS 3 FEL as to LET
COUNT 4: DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE - CLASS 3 FEL as to LET
COUNT 5: DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE - CLASS 3 FEL as to LET
COUNT 6: DISCHARGE FIREARM AT OCCUPIED STRUCTURE OR MOTOR VEHICLE - CLASS 3 FEL as to LET
COUNT 7: POSSESS W/ INTENT TO DISTRIBUTE DRUGS – SCHEDULE II – CLASS 4 FEL as to LET
COUNT 8: POSSESSION OF MARIJUANA (2 OZ OR LESS) - CLASS 1 MISD as to LET
COUNT 9: RECKLESS DISCHARGE OF FIREARM OR BOW AND ARROW- CLASS I MISD as to LET
COUNT 10: POSSESSION/USE DRUG PARAPHERNALIA - CLASS 2 MISD as to LET

THE MINNEHAHA COUNTY GRAND JURY CHARGES:

COUNT 1

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Aggravated Assault (SDCL22-18-1.1(2)) in that the Defendant did knowingly cause or attempt to cause bodily injury to another, DONALD WHITE, with a dangerous weapon, HANDGUN, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 2

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Aggravated Assault (SDCL 22-18-1.1(5)) in that the Defendant did attempt by physical menace with a deadly weapon, HANDGUN, to put another person, DONALD WHITE, in fear of imminent serious bodily harm, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 3

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Discharge of Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20) in that the Defendant did willfully, knowingly, and illegally discharge a firearm at an occupied structure, A PONTIAC, Sioux Falls, Minnehaha County, SD, a

structure capable of being occupied, or a motor vehicle, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 4

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Discharge of Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20) in that the Defendant did willfully, knowingly, and illegally discharge a firearm at an occupied structure, A TOYOTA CAMRY, Sioux Falls, Minnehaha County, SD, a structure capable of being occupied, or a motor vehicle, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 5

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Discharge of Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20) in that the Defendant did willfully, knowingly, and illegally discharge a firearm at an occupied structure, A FORD PICKUP, Sioux Falls, Minnehaha County, SD, a structure capable of being occupied, or a motor vehicle, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 6

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Discharge of Firearm at Occupied Structure or Motor Vehicle (SDCL 22-14-20) in that the Defendant did willfully, knowingly, and illegally discharge a firearm at an occupied structure, A MITSUBISHI, Sioux Falls, Minnehaha County, SD, a structure capable of being occupied, or a motor vehicle, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 7

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Possession with Intent to Distribute a Schedule II Controlled Substance (SDCL 22-42-2) in that the Defendant did possess with intent to distribute a substance listed in Schedule II, METHAMPHETAMINE , contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 8

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Possession of Two Ounces or Less Marijuana (SDCL 22-42-6) in that the Defendant did knowingly possess two ounces of marijuana or less, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 9

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, then and there did recklessly discharge a firearm, which conduct was in violation of SDCL 22-14-7(1),, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 10

That the Defendant, LYDELLE EDMOND TURNER, in Minnehaha County, State of South Dakota, on or about the 30th day of July, 2022, did commit the public offense of Use or Possession of Drug Paraphernalia (SDCL 22-42A-3) in that the defendant did, knowing the drug related nature of the object, use or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body any controlled substance or marijuana, BAGGIES AND/OR PIPE, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

Dated this 11th day of August, 2022

A True Bill
"A TRUE BILL"

This indictment has the concurrence of at least six members of the Minnehaha County Grand Jury.

Foreperson
Minnehaha County Grand Jury

Witnesses who testified before the Grand Jury in the matter:

~~DONALD WHITE~~ CV

JAMES DRIVER

~~OFFICER INZITARI~~ CV

OFFICER BRANDT

OFFICER NEISES

OFFICER BULLERMAN

LYDELLE EDMOND TURNER 02/14/1980 1205 W 22ND ST SIOUX FALLS, SD 57105

DEMAND FOR NOTICE OF ALIBI

The undersigned (Deputy) State's Attorney states that the charged offense is alleged to have occurred on the ____ day of _____, _____, at or about _____ o'clock __.M., at _____. Pursuant to SDCL 23A-9-1, demand is herby made upon defendant and defendant's counsel to give notice of intent to offer a defense of alibi.

(Deputy) States Attorney
Minnehaha County, South Dakota

FILED
AUG 11 2022
Minnehaha County, S.D.
Clerk Circuit Court

App. 6

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, v. LYDELLE TURNER, Defendant.	**49CRI22-5160** **MEMORANDUM OPINION**

This matter came before the Court on December 28, 2022. At issue was *Defendant's Motion to Suppress* filed on October 20, 2022. Lydelle Turner was personally present and represented by Mindy Werder. The State of South Dakota was represented by and through Randy Sample. The Court heard the testimony of witnesses, the parties' oral arguments, reviewed all of the written submissions and relevant authorities, and took the matter under advisement. The Court now issues the following opinion.

FACTUAL BACKGROUND

On July 30, 2022, at 9:44 A.M., law enforcement was dispatched to a reported drive-by shooting near 307 S. Summit Avenue in Sioux Falls, South Dakota. Law enforcement was advised that someone in an SUV had driven by the location and shot at multiple people who were standing outside in the parking lot. One victim was shot in the leg. The suspect vehicle was described as a gold colored SUV last seen driving northbound. Officer Richard Smith ("Officer Smith") was one of the reporting officers who spoke with witnesses including James Driver ("Driver"). Driver informed Officer Smith that he saw a Chevy Tahoe that was traveling northbound pull up to the stop sign at the intersection of S. Summit Avenue and W. 11th Street

and begin shooting. Driver said that he recognized the vehicle because he had the same make and color SUV and recognized the vehicle and driver.

After the first round of shooting, the suspect then drove around the block and came back and shot again at the group six or seven times. The suspect then drove northbound on Summit and turned left of 10th Street. Driver said he got a look at the suspect and stated the suspect was alone in the vehicle, appeared to be a shorter black male in his 40s, and had a beard and short afro.

Both incidents can be viewed on surveillance video and phone cameras. The first incident lasted about 17 seconds, and the second lasted approximately 10 seconds. At approximately 9:50 A.M., law enforcement apprehended Lydelle Turner ("Defendant") at the Speedway gas station located at the intersection of 41st Street and Kiwanis Avenue in Sioux Falls. Defendant was placed in handcuffs.

Officer Ivancevic picked up Driver from the scene at 10:24 A.M. and drove him to the Speedway for a "show-up" identification. Shortly before leaving the scene of the shooting, Driver asked if "they got him pulled over?" and Officer Smith responded "yeah, they found him." On the way to Speedway, Officer Ivancevic stated to Driver, "we believe we have the one from just now."

After arriving at the Speedway and viewing the Defendant from a distance, that appeared to be a similar distance from the scene according to testimony, Driver stated, "Nah man, that's not him. That's not him, he had an afro." Driver then asked "could you tell him to turn around?" Officer Ivancevic responded, "one second, they are going to tell me when I can come forward." Driver then asked "Did he have a hat in the car? He had a hat on, he got a hat in the car?" Law enforcement asked Driver, "was he wearing black?" Driver responded, "I think so.

A black hat. That's got to be him, man, because he had the little beard thing, yeah that's, that's.... yeah, that's him man." Officer Ivancevic repeated, "yep?" and Driver responded "yep that's him. Have him face me so I can see him."

Officer Ivancevic interrupted and said they have to get him out of the handcuffs first, or adjust them, and then they were going to walk the suspect over so Driver could get a better look. Officer Ivancevic asked another officer if there was a black hat in the car and the officer replied that the suspect had a black hat. Driver then asked again "was there a black hat in the car?" When the officers replied yes, Driver said "Yep, that him, he took the hat off."

LEGAL AUTHORITIES AND ANALYSIS

I. Identification

The South Dakota Supreme Court utilizes a two-part inquiry to address challenges to identification procedures: "(1) [w]as the lineup impermissibly suggestive, and (2) if so, was the subsequent in-court identification tainted?" *State v. Abdo*, 518 N.W.2d 223, 225 (S.D. 1994) (citing *State v. Iron Thunder*, 272 N.W.2d 299, 301 (S.D. 1978)). The suggestiveness of an identification procedure must be determined from the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 196 (1972). The purpose of suppressing identifications "is to prevent a substantial likelihood of irreparable misidentification." *State v. Iron Necklace*, 430 N.W.2d 66, 73 (S.D. 1988) (citations omitted). Only when a pre-trial identification procedure is so unnecessarily suggestive that it is "conducive to irreparable mistaken identification" does the procedure violate due process. *Kirby v. Illinois*, 406 U.S. 682, 691 (1972).

a. Pre-Trial Identification Procedure

The party seeking suppression holds the burden of establishing impermissible suggestiveness. *Abdo*, 518 N.W.2d at 225-26. The South Dakota Supreme Court has stated that "[t]he practice of showing suspects singly to persons for the purposes of identification has been consistently condemned as an affront to the requirements of due process and good police procedure." *State v. Reiman*, 284 N.W.2d 860, 871 (S.D. 1979) (citations omitted). "The considerations against approval of such 'show-ups' are particularly compelling where the victim is the witness. *Id.* "The primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

In *State v. Clabaugh*, the South Dakota Supreme Court upheld the use of "show up" identifications, similar to the one utilized in this case, finding:

> This court has set forth the rule that an in-court identification of an accused is not admissible at trial if it stems from a pretrial lineup held without the presence of counsel, unless it can be established that the identification had an independent origin or that its admission was harmless error. In both *Bullis* and *Iron Shell, we recognized an exception to the rule—where the suspect is returned to the scene of the crime immediately upon apprehension and where such apprehension occurs within a reasonably short time after commission of the alleged offense*. The rationale for this exception is that it is in the best interests of both the suspect and law officers when an identification takes place immediately. If the wrong man was apprehended, the suspect can be freed and the police can continue their search; if the suspect is positively identified as the perpetrator, the police can curtail their search activities. Furthermore, the dangers of misidentification are remote when there is an immediate confrontation.

346 N.W.2d 448, 451-52 (internal citations omitted) (emphasis added).[1]

[1] In *Clabaugh*, the Supreme Court broadened this rule, extending the "show-up" identification exception to instances where the witness identifies the suspect at the scene of his apprehension:

> Although this show-up did not occur at the scene of the crime, it occurred at the scene of appellant's detention very shortly after the crime was committed and shortly after appellant was apprehended, thus minimizing any danger of misidentification. Had appellant not been positively identified, the police could have immediately resumed their search.

Id. at 452.

Although show-up identifications are valid, the South Dakota Supreme Court has recently expressed skepticism on their continued use. In *State v. Red Cloud*, the Court held that "[s]how-up identifications are inherently suspect[,]" as "[t]he practice of showing suspects singly to persons for purposes of identification has been consistently condemned as an affront to the requirements of due process and good police procedure." *State v. Red Cloud*, 2022 S.D. 17, ¶ 22, 972 N.W.2d 517, 526 (quoting *Reiman*, 284 N.W.2d at 871). Following *Red Cloud*, the South Dakota Supreme Court has thus "discourage[d] the *unnecessary* use" of show-up identification stating "[i]t is advantageous to use a more reliable process, such as a photo line-up, when it is reasonably possible to do so. The penalty for failure to do so may be suppression of the impermissible identification." *Id.* ¶ 36, 972 N.W.2d at 529 (emphasis added). Notably, the *Red Cloud* court did not hold that show-ups are *per se* suggestive. Even if show-up procedures may be suggestive in some instances, "suggestive procedures, without more, do not require a holding that the due process clause has been violated." *Id.* ¶ 24, 972 N.W.2d 517, 526-27 (quoting *United States v. Hadley*, 671 F.2d 1112, 1115 (8th Cir. 1982)).

Here, Driver was brought to the scene where Defendant was arrested approximately 45 minutes after the shooting, which Defendant concedes is not unreasonably remote in time. However, the Defendant contends that law enforcement's use of a show-up removed any alternative for Driver other than identification because the Defendant was standing handcuffed next to a patrol vehicle.

This Court finds that the show-up conducted was unduly suggestive. Similar to *Red Cloud*, the Defendant was shown in handcuffs next to a patrol vehicle and shown as the sole suspect. Additionally, responding officers commented about how they had "found him," in

reference to the Defendant. However, the second portion of the test, the totality of the circumstances, ultimately determines whether the show-up identification was reliable.

b. In-Court Identification

When a show-up identification is deemed impermissibly suggestive, the Court next considers "whether under the totality of the circumstances[,] the identification was reliable even though the confrontation procedure was suggestive." *State v. Doap Deng Chuol*, 2014 S.D. 33, ¶ 21, 849 N.W.2d 255, 261 (citations omitted) (internal quotation marks omitted). Here, the burden shifts to the State to prove, by clear and convincing evidence, "that the in-court identification had an independent origin[.]" *Id.* ¶ 20, 849 N.W.2d at 261. If the State shows, under the totality of the circumstances, that the in-court identification has been "purged of any taint arising from the out-of-court identification[,]" the in-court identification is admissible. *Reiman*, 284 N.W.2d at 871.

The linchpin of this analysis is the reliability of the eyewitness identification. *Doap Deng Chuol*, 2014 S.D. 33, ¶ 21, 849 N.W.2d at 261. The key inquiry in determining the reliability of eyewitness identification is

> whether, prior to the improper station-house show-up, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor and in making this subtle determination much will depend on the witness' initial opportunity for observation and also whether he was motivated to make a careful observation of the perpetrator.

Reiman, 284 N.W.2d at 872 (citation omitted) (internal quotation marks omitted). In assessing the reliability of eyewitness identification, the United State Supreme Court considers five factors:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil, 409 U.S. at 199-200; *Doap Deng Chuol*, 2014 S.D. 33, ¶ 22, 849 N.W.2d at 261. These factors are weighed against the corruptive effect of the suggestive prior identification procedure. *Id.* If the factors are outweighed by the corruptive effect of the prior identification, the in-court identification should be suppressed. *Id.*

1. *Opportunity of Witness to View the Criminal at the Time of the Crime*

Defendant contends that Driver only had a few seconds to view the shooter at the time of the crime, because in total, the two events lasted 27 seconds. Additionally, Defendant contends that the video shows Driver talking to another person when the initial shooting occurs, and that after shots were fired, many people, including Driver, were ducking down to avoid any errant shots. However, Defendant does not claim Driver could never see the shooter, only that he was "only able to see the suspect during the first round of gun shots." While the event was not long, Driver watched the suspect as he drove up to the location before the shooting began. Additionally, Driver watched as the suspect drove by a second time, giving him another opportunity to view the suspect and the suspect's vehicle at the time of the shooting. The opportunity to view factor weighs in favor of admissibility.

2. *Witness's Degree of Attention*

Defendant contends that Driver's degree of attention was limited, because Driver was speaking with someone during the shooting and was also ducking from the gun shots. Although Driver was speaking to another person before the crime occurred, the video shows Driver look in the direction of the suspect's vehicle a few times during the first shooting. Additionally, Driver had a second opportunity to view the suspect when the vehicle came by the second time. In fact, Driver was the one that pointed out the vehicle circling back to the scene and found cover. The degree of attention factor weighs in favor of admissibility.

3. *Accuracy of Witness's Prior Description of the Criminal*

Defendant contends that the description given by Driver changed, because Driver only mentioned that the suspect was wearing a hat after officers suggested he was wearing one. Driver's description of the suspect's age, ethnicity, and the model and color of the vehicle never changed. Additionally, after reviewing the body cam footage Driver's mention of the hat occurred prior to and not due to any law enforcement suggestion. Driver mentioned a hat and asked if a hat was present after which law enforcement mentioned the color black and that a black hat was found in the vehicle.

Defense counsel asked Driver on cross if he saw the Defendant's tattoo on his neck and Driver admitted he did not. However, the Court does not find that fact alone has an impact on Driver's prior description. The distance Driver reported to be away from the SUV was approximately 20 to 30 feet. It is not unreasonable based upon the color of the Defendant's skin compared to the color of the tattoo along with the distance that the tattoo would not be prominently visible. The accuracy factor weighs in favor of admissibility.

4. *Level of Certainty Demonstrated by the Witness at the Confrontation*

Driver, upon arrival a Speedway, stated twice that it was "not him." However, once Driver had more time to view the Defendant and the presence of the hat was confirmed, Driver was confident in his identification. Not only that, but Driver was highly familiar with the vehicle the suspect was driving, as he owns the same model and color. Further, Driver noted seeing the suspect specifically around the neighborhood. Driver was able to describe where the suspect lived with detailed specificity and that there had been waiving or some sort of acknowledgement between the two men on at least one prior occasion. The certainty factor weighs in favor of admissibility.

5. Length of Time Between the Crime and the Confrontation

The length of time between the crime and confrontation was only 45 minutes, which the Defendant concedes is not unreasonably remote. The time factor also weighs in favor of admissibility.

CONCLUSION

This Court finds that when applying the factors under a totality of the circumstances test, the factors far outweighed the corruptive effect of the suggestive prior identification.

ORDER

Based on the foregoing, it is hereby ORDERED that the Defendant's *Motion to Suppress* the identification is DENIED.

Dated this 12th day of January, 2023.

BY THE COURT:

Robin J. Houwman
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

FILED
JAN 12 2023
Minnehaha County, S.D.
Clerk Circuit Court

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
Minnehaha County
425 N. Dakota Ave.
Sioux Falls, SD 57104

November 30, 2023

Mindy Werder & Josey Blare *Via Email*
110 N. Minnesota Ave. # 400
Sioux Falls, SD 57104

Randy Sample & Tom Nelson *Via Email*
State's Attorney's Office
415 N. Dakota Ave.
Sioux Falls, SD 57104

Re: State v. Lydelle Turner (CRI 22-5160)

Dear Ms. Werder and Mr. Sample:

This letter sets forth my decision on the motiors regarding Defendant Lydelle Turner's motion for a new trial. As outlined below, I deny the motion.

Facts and Procedural Background

On July 30, 2022, law enforcement was dispatched to a reported drive-by shooting near 307 South Summit Avenue in Sioux Falls. A reporting party had advised that someone in a gold Chevy Tahoe had driven by the address and shot at several people who were in a nearby parking lot. The driver circled around the block and again shot at the group. The reporting party also provided police with the vehicle's license plate number.

Not long after the shooting, an officer spotted the suspect vehicle and followed it to a convenience store parking lot near 41st Street and Kiwanis Avenue. The officer apprehended the driver, who was identified as Defendant.

On August 11, 2022, Defendant was indicted on two counts of Aggravated Assault, four counts of Discharge Firearm at Occupied Structure or Motor Vehicle, one count of Possession with Intent to Distribute Drugs, one count of Possession of Marijuana, one count of Reckless Discharge of Firearm, and one count of Possession/ Use of Drug Paraphernalia.

Leading up to trial, Defendant filed two Motions for Discovery, the first on September 30, 2022, and the second on January 23, 2023.

Trial was scheduled to begin August 18, 2023. On August 8, 2023, however, the parties realized that the State had not provided to defense counsel a report from the State's ballistics expert. The report included a conclusion that a shell casing found in Defendant's vehicle was fired from the same handgun that fired shell casings found at the scene of the shooting. As a result, trial was delayed until September 18, 2023, to give the defense an opportunity to consult with an expert regarding the ballistics report.

In preparing for trial, the State learned of another potential witness to the shooting, so on August 18, 2023, Detective Logan Gooch of the Sioux Falls Police Department conducted an interview with Arely Flores. Through an interpreter, Flores told Gooch that Flores observed three individuals in the suspect vehicle and gave descriptions of each. Flores was not under oath during the interview. Gooch's report and an audio recording of his interview with Flores was timely provided to defense counsel.

Flores repeated this version of events in subsequent conversations with the defense counsel's paralegal.

Further, on August 23, 2023, the State sent two emails to the defense counsel, one which contained a photograph that showed Defendant driving the suspect vehicle near the location of the shooting, and one which contained an accompanying report from Gooch, which stated:

> In conducting trial prep, I was made aware that there was a picture shown in the interview with Lydelle Turner that was conducted by Det. Branch. Det. Branch was able to look back in his files and located the picture. This was turned over to me. I have scanned this document to the case and have tagged the original into evidence.

The photo was a "screen shot" taken from a traffic camera video. The State asserts it shows Defendant alone in the suspect vehicle, near the scene of the shooting, immediately after the shooting.

Although the photo had been shown to Defendant in his interview with law enforcement, and a video recording of that interview had been provided to the defense, this was the first time the defense received a copy of the photograph. In anticipation of the State attempting to introduce the photo at trial, Defendant filed a motion in limine to prohibit its use In an offer of proof conducted outside the presence of the jury, Gooch testified regarding the photo, after which the Court found there was sufficient foundation for admitting the photograph through Gooch's testimony.

Gooch further testified that the photograph was a screen shot from the Milestone System, a traffic camera system in Sioux Falls. The City of Sioux Falls has a subscription to access the Milestone System. Gooch stated that videos stay on the Milestone System server for 90 days and that copies of video can be made and saved. Gooch also testified

that such videos are regularly kept and referred to during investigations. The video in this case, however, was not saved. Instead, the video was automatically deleted from the Milestone System's server after 90 days and is no longer available.

At trial, during its case in chief, the State called Flores as a witness. Flores, through an interpreter, testified she witnessed only one individual in the suspect vehicle. Defense counsel cross-examined Flores regarding her earlier version of seeing three individuals in the car. Defense also cross-examined Gooch, who confirmed Flores' earlier version of three individuals in the vehicle. The Court further allowed defense counsel's paralegal to testify that Flores' trial testimony was contradictory to what Flores had previously told the paralegal.

The trial concluded on September 21, 2023. The jury found Defendant guilty on six of the seven counts. On November 15, 2023, Defendant filed his Motion for New Trial on Counts I-VI.

LAW AND ANALYSIS

The decision whether to grant a new trial is within the sound discretion of the trial court, whose superior knowledge of all the facts and circumstances of the case enables him to know the requirements of justice. *State v. Peltier*, 2023 S.D. 62.

I. Milestone Traffic Camera Video Evidence

Defendant argues that the State should have produced the Milestone System traffic camera video from which the screen shot photograph was taken and not doing so resulted in a due process violation under the *Brady* rule. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). "A *Brady* violation occurs when (1) the evidence at issue [i]s favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence [has] been suppressed by the State, either willfully or inadvertently; and (3) prejudice [has] ensued." *State v. Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d 103, 109 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

"Undisclosed evidence is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Thompson v. Weber*, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 12 (citing *Strickler*, 527 U.S. at 280). "Prejudice ensues when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Thompson*, 2013 S.D. 87, ¶ 42 at 13 (citation omitted). A "reasonable probability" exists when evidence reasonably could "be taken to put the whole case in such a different light [so] as to undermine confidence in the verdict." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995)). The test is not for sufficiency of the evidence, but instead, an examination of the cumulative effect of the suppression, viewing the error in

the context of the entire record. *Id.* (citing *Kyles*, 514 U.S. at 434-35). Furthermore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109-10 (citing *Kyles*, 514 U.S. at 437). However, "it is well settled that the good faith or bad faith of the prosecution is immaterial to a determination whether a *Brady* violation occurred." *Id.* ¶ 24 at 109.

The following quote from *State v. Zephier*, 2020 S.D. 54 is quite lengthy, but applicable:

> [¶20] The Due Process Clause of the Fourteenth Amendment imposes upon states the requirement to ensure that "criminal prosecutions . . . comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532, 81 L. Ed. 2d 413 (1984). Implicit in this standard is the necessity that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* The resulting body of decisional law from the United States Supreme Court and this Court exist under a topical heading that "might loosely be called the area of constitutionally guaranteed access to evidence." *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193 (1982)); see also *State v. Jackson*, 2020 S.D. 53, ¶ 26, ___ N.W.2d ___.
>
> [¶21] Within in the broad category of these decisions, two distinct lines of cases have developed—cases in which the exculpatory value of the undisclosed evidence is known and cases where it is not. The former is illustrated by the prototypical violation of the rule set out in *Brady v. Maryland* where a prosecutor does not share information or evidence that is, nevertheless, identifiable and intact and is "either material to the guilt of the defendant or relevant to the punishment to be imposed." *Id.* (citing *Brady*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963)); see also *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342 (1976) (holding that prosecutors must disclose exculpatory evidence that would raise a reasonable doubt about the defendant's guilt, even in the absence of a specific request). Whether the prosecution's suppression of this type of evidence will lead to a due process violation that results in a new trial turns on the materiality of the suppressed evidence—not the good faith or bad faith of the prosecutor. *See State v. Birdshead*, 2016 S.D. 87, ¶ 18, 888 N.W.2d 209, 215 (citation omitted) (holding Brady evidence "is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"); *Thompson v. Weber*, 2013 S.D. 87, 841 N.W.2d 3 (applying *Brady* to a child rape victim's undisclosed counseling records).

[¶22] However, materiality and good faith are viewed differently in the second type of access-to-evidence cases. Included in this grouping are cases where the exculpatory value of the undisclosed evidence is unknown because it has been destroyed, or lost, or compromised in some way. As a consequence, courts seeking to assess the materiality of the lost evidence face a practical complication:

> Whenever potentially exculpatory evidence is permanently lost, the courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing the State's most probative evidence.

Lyerla, 424 N.W.2d at 910-11 (quoting *Trombetta*, 467 U.S. at 486-87, 104 S. Ct. at 2533).

[¶23] In *Trombetta*, the United States Supreme Court held that law enforcement officers did not violate a defendant's due process right to access evidence by failing to preserve breath samples in prosecutions for driving while under the influence. 467 U.S. at 491, 104 S. Ct. at 2535. As part of its analysis, the Supreme Court created a test for determining the materiality of evidence that no longer exists:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. at 488-89, 104 S. Ct. at 2534 (internal citation omitted).

[¶24] However, *Trombetta's* materiality test will not resolve all due process challenges in cases of lost or destroyed evidence. *See Jackson*, 2020 S.D. 53, ¶¶ 28-30, ___ N.W.2d ___. In some instances, this evidence cannot satisfy the materiality test, and the most that could be said is that it

> "could have been subjected tc tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). For these cases involving only "potentially useful" lost or destroyed evidence, the Supreme Court contrasted the rule of *Brady* that "makes the good or bad faith of the State irrelevant" and held that a defendant must show that law enforcement officers acted in bad faith to establish a due process violation:
>
> > [R]equiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.
>
> *Id.* at 58.

Bad faith is defined in *State v. Bousum*, 2003 S.D. 58:

> Bad faith, as used in cases involving destroyed evidence or statements, means that the state deliberately destroyed the evidence with the intent to deprive the defense of information; that is, that the evidence was destroyed by, or at the direction of, a state agent who intended to thwart the defense.

Id. ¶ 16 (citing *State v. Steffes*, 500 N.W.2d 608, 613 (N.D. 1993)).

While the Court recognizes that in this case it would be better if the traffic camera video had been saved, the Court finds that there is not a reasonable probability that had the video been saved and disclosed to the defense the result of the proceeding would have been different. The evidence was overwhelming against Defendant. There were two videos of the shooting (Exhibits 2-3). There was video of Defendant hurriedly stopping at his home shortly after the shooting, staying for less than a minute (Exhibit 5), during which the State asserts he was getting rid of the handgun. There was eyewitness testimony that Defendant was the shooter. There was ballistics testing matching a shell casing on the floorboard of Defendant's vehicle with shell casings at the scene of the shooting.

The deleted traffic cam video was not material to Defendant's case and the State's failure to preserve the video was not prejudicial to Defendant.

Further, there was no faith as it relates to the traffic camera video not being saved and / or being automatically deleted after 90 days.

Accordingly, Defendant's motion for a new trial on the issue of the deleted traffic camera video is denied.

II. Witness Testimony

Defendant also argues that the State violated Defendant's constitutional rights when it continued its direct examination of Flores at trial, despite knowing her testimony was inconsistent with what she had previously stated. Defendant points to *State v. Leisinger*, 2003 S.D. 118, 670 N.W.2d 371, which provides that "a *Brady* violation not only results from the government's suppression of favorable evidence, but also, 'where previously undisclosed evidence reveal[s] that the prosecution introduced trial testimony that it knew or should have known was perjured [.]'" *Id.*, 2003 S.D. 118, ¶ 19, 670 N.W.2d at 375 (quoting *Kyles*, 514 U.S. at 433).

The Supreme Court has held that if changed testimony does not materially undercut a theory of defense, no *Brady* violation has occurred. *State v. Birdshead*, 2015 S.D. 77, ¶ 45, 871 N.W.2d 62, 78. In *State v. Birdshead*, the State did not notify the defendant of material changes in its witness's testimony, which was contradictory to her previous statements to law enforcement. *Id.* ¶ 42 at 77. While finding the first prong of *Brady* satisfied because the evidence was impeaching, the Court stated, "even if we assume that the State willfully or inadvertently suppressed the information, [the defendant] has not met his burden of proving that he was prejudiced by the change in [the witness's] testimony." *Id.* ¶ 45.

Here, Defendant's argument fails for several reasons. Flores was not under oath at the time of her previous statements and the interview was conducted through an interpreter. Defense counsel was provided with Gooch's report of his interview with Flores and a copy of the audio recording of the interview shortly after the interview was completed. The State asserts it called Flores as a witness in its case-in-chief as a strategic move, not knowing that she would tell a different story on the stand. In many ways Flores' testimony was consistent with what she told Gooch. Defense counsel cross-examined Flores regarding her earlier statements. Defense counsel solicited testimony from Gooch confirming Flores' earlier statements. Defense counsel's paralegal testified regarding Flores' earlier statements to the paralegal.

Viewed together, these facts demonstrate that Defendant was not prejudiced by the change from Flores' earlier unsworn statements to her trial testimony. Further, the Court finds the result of the proceeding would not have been different even if Flores had not been allowed to testify.

Accordingly, Defendant's motion for a new trial on the issue of Flores' testimony is denied.

Conclusion and Order Denying Motion To Dismiss

Turner's motion for a new trial is denied.

Sincerely,

Jon Sogn - Circuit Court Judge

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Defendant's Proposed Instruction No. 101

For a structure or motor vehicle to be occupied, it must be

1. The permanent or temporary habitation of any person, whether or not any person is actually present;
2. Specially adapted for the overnight accommodation of any person, whether or not any person is present; or
3. Have a person present in it at the time of the events at issue.

Denied
Jon Sogn
9-21-23

Source: *State* v. *Rosales*, 2015 SD 6, 860 N.W.2d 253.

Defendant's Proposed Instruction No. 109

The burden of proof is on the state to prove beyond a reasonable doubt, not only that the offense was committed as alleged, but also that the defendant is the person who committed it. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

The various factors you may take into considering as to the accuracy of a witness's identification of the defendant and whether it is the product of the witness's own recollection are:

(1) the opportunity of the witness to observe the alleged criminal act and the conditions at the scene of the offense;

(2) the existence of any discrepancy between any prior description and the defendant's actual description;

(3) any prior identification of another person;

(4) the identification by picture of the defendant prior to his identification;

(5) failure of the witness to identify the defendant on a prior occasion;

(6) lapse of time between the alleged act and the identification;

(7) any suggestive procedures in the pre-trial identification;

(8) the stress, if any, to which the witness was subjected at the time of the observation;

(9) whether the witness had prior contacts with the alleged perpetrator.

You are instructed that this list is not intended to be exhaustive, but only includes some of the various factors which you may consider.

If, from the circumstances of the identification, you have a reasonable doubt whether the defendant was the person who committed the offense, you must give the defendant the benefit of that doubt and find the defendant not guilty.

Denied
Jon Sogn
9-21-23

Source: SDCPJI 1-15-15

Filed: 9/21/2023 9:34 AM CST Minnehaha County, South Dakota 49CRI22-005160

Defendant's Proposed Instruction No. 110

Witness James Driver has identified the defendant as the driver or shooter.

As with any other witness, you must first decide whether the witness has testified honestly and truthfully. But you must do more than that.

You must also decide whether the identification is accurate. In deciding those questions you should carefully consider all of the circumstances under which the witness made the observation of defendant either driving or shooting on July 30, 2022 near Mercados, and all of the circumstances under which the witness later identified the defendant as that person.

Source: SDCPJI 1-15-16 (Modified)

Denied
9-21-23

22-14-20. Discharge of firearm at occupied structure or motor vehicle--Felony.

Any person who willfully, knowingly, and illegally discharges a firearm at an occupied structure or motor vehicle is guilty of a Class 3 felony.

Source: SL 1992, ch 160, § 1; SL 2005, ch 120, § 259.

State of South Dakota

EIGHTIETH
LEGISLATIVE ASSEMBLY, 2005

376L0297

SENATE BILL NO. 43

Introduced by: Senator Schoenbeck and Representatives Cutler, Hennies, O'Brien, Rave, and Rounds at the request of the Criminal Code Revision Commission

FOR AN ACT ENTITLED, An Act to revise the South Dakota criminal code.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 22-18-1 be amended to read as follows:

22-18-1. Any person who:

(1) Attempts to cause bodily injury to another, ~~other than a law enforcement officer engaged in the performance of official duties,~~ and has the actual ability to cause the injury;

(2) Recklessly causes bodily injury to another;

(3) Negligently causes bodily injury to another with a dangerous weapon;

(4) Attempts by physical menace or credible threat to put another in fear of imminent ~~serious~~ bodily harm, with or without the actual ability to ~~seriously~~ harm the other person; or

(5) Intentionally causes bodily injury to another which does not result in serious bodily injury; ~~is guilty of simple assault.~~

is guilty of simple assault. Simple assault is a Class 1 misdemeanor. However, if the defendant

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~~is a Class 1 misdemeanor.~~

Section 259. That § 22-14-20 be amended to read as follows:

22-14-20. Any person who willfully, knowingly, and illegally discharges a firearm at an occupied structure, ~~structure capable of being occupied,~~ or motor vehicle is guilty of a ~~Class 5~~ Class 3 felony. ~~However, if a violation of this section results in bodily injury which is directly caused by such discharge, such person is guilty of a Class 4 felony.~~

Section 260. That § 22-14-21 be amended to read as follows:

22-14-21. Any person who willfully, knowingly, and illegally discharges a firearm from a moving motor vehicle within the incorporated limits of a municipality under circumstances not constituting a violation of § 22-14-20 is guilty of a Class 6 felony. ~~However, if a violation of this section results in bodily injury which is directly caused by such discharge, such person is guilty of a Class 5 felony.~~

Section 261. That § 22-14-22 be amended to read as follows:

22-14-22. For the purposes of §§ 22-14-23 to 22-14-28, inclusive, the term, county courthouse, means the state capitol ~~and~~ or any building occupied for the public sessions of a circuit court, with its various offices. The term includes any building appended to or used as a supplementary structure to ~~the~~ a county courthouse.

Section 262. That § 22-14-23 be amended to read as follows:

22-14-23. Except as provided in § 22-14-24, any person who knowingly possesses or causes to be present a any firearm or other dangerous weapon, in any county courthouse, or attempts to do so, is guilty of a Class 1 misdemeanor.

Section 263. That § 22-14-25 be amended to read as follows:

22-14-25. Nothing in this chapter limits the power of a court to punish for contempt or to promulgate rules or orders regulating, restricting, or prohibiting the possession of weapons,

AN ACT

ENTITLED, An Act to revise the South Dakota criminal code.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 22-18-1 be amended to read as follows:

22-18-1. Any person who:

(1) Attempts to cause bodily injury to another and has the actual ability to cause the injury;

(2) Recklessly causes bodily injury to another;

(3) Negligently causes bodily injury to another with a dangerous weapon;

(4) Attempts by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person; or

(5) Intentionally causes bodily injury to another which does not result in serious bodily injury;

is guilty of simple assault. Simple assault is a Class 1 misdemeanor. However, if the defendant has been convicted of, or entered a plea of guilty to, two or more violations of § 22-18-1, 22-18-1.1, 22-18-26, or 22-18-29 within five years of committing the current offense, the defendant is guilty of a Class 6 felony for any third or subsequent offense.

Section 2. That § 22-18-1.1 be amended to read as follows:

22-18-1.1. Any person who:

(1) Attempts to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life;

(2) Attempts to cause, or knowingly causes, bodily injury to another with a dangerous weapon;

(3)

(4) Assaults another with intent to commit bodily injury which results in serious bodily

Section 255. That § 22-14-15 be amended to read as follows:

22-14-15. No person who has been convicted in this state or elsewhere of a crime of violence or a felony pursuant to § 22-42-2, 22-42-3, 22-42-4, 22-42-7, 22-42-8, 22-42-9, 22-42-10 or 22-42-19, may possess or have control of a firearm. A violation of this section is a Class 6 felony. The provisions of this section do not apply to any person who was last discharged from prison, jail, probation, or parole more than fifteen years prior to the commission of the principal offense.

Section 256. That § 22-14-16 be amended to read as follows:

22-14-16. Any person who knows that another person is prohibited by § 22-14-15 or 22-14-15.1 from possessing a firearm, and who knowingly gives, loans, or sells a firearm to that person is guilty of a Class 6 felony.

Section 257. That § 22-14-17 be amended to read as follows:

22-14-17. The provisions of this chapter do not apply to any firearm which has been permanently altered so it is incapable of being discharged.

Section 258. That § 22-14-19 be repealed.

Section 259. That § 22-14-20 be amended to read as follows:

22-14-20. Any person who willfully, knowingly, and illegally discharges a firearm at an occupied structure or motor vehicle is guilty of a Class 3 felony.

Section 260. That § 22-14-21 be amended to read as follows:

22-14-21. Any person who willfully, knowingly, and illegally discharges a firearm from a moving motor vehicle within the incorporated limits of a municipality under circumstances not constituting a violation of § 22-14-20 is guilty of a Class 6 felony.

Section 261. That § 22-14-22 be amended to read as follows:

22-14-22. For the purposes of §§ 22-14-23 to 22-14-28, inclusive, the term, county courthouse, means the state capitol or any building occupied for the public sessions of a circuit court, with its

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
):SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, vs. LYDELLE EDMOND TURNER, Defendant.	49CRI22-5160 Jury Trial Volume 3 of 4 Pages 378-580

PROCEEDINGS: The above-entitled matter commenced on the 20th day of September, 2023, at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

BEFORE: THE HONORABLE JON SOGN
Circuit Court Judge
Sioux Falls, South Dakota

APPEARANCES:

Mr. Randy Sample
Mr. Tom Nelson
Minnehaha County State's Attorney's Office
Sioux Falls, South Dakota

For the State of South Dakota;

Ms. Mindy Werder
Ms. Josey Blare
Lynn, Jackson, Shultz, & Lebrun
Sioux Falls, South Dakota

For the Defendant.

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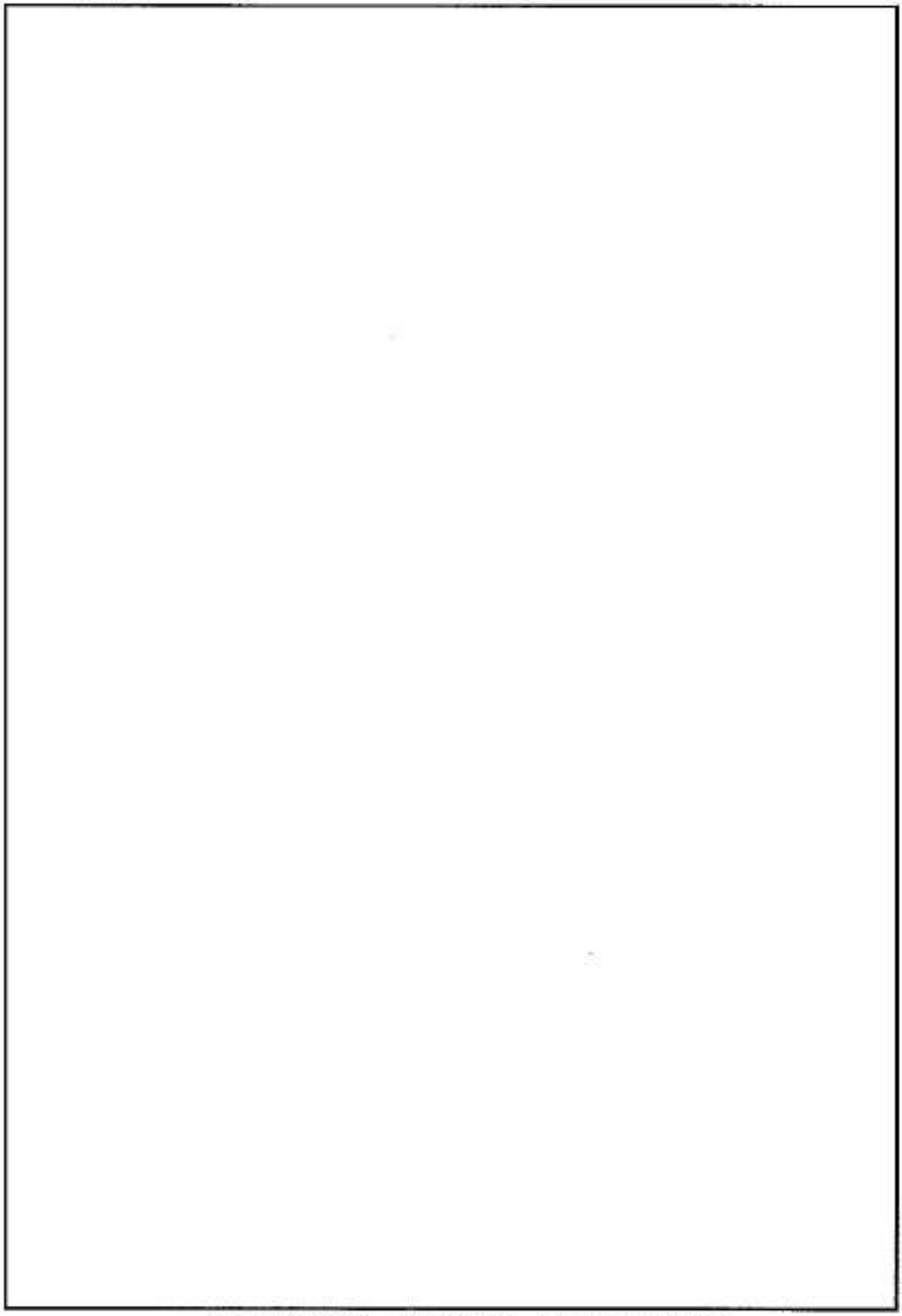

THE COURT: Okay. So this is just an offer of proof obviously and the parties are welcome to go through the same questions when the jury is present. But I do find based upon Detective Gooch's testimony that this camera -- traffic camera system is regularly used in the normal course of business and with investigations done the City of Sioux Falls.

Detective Gooch -- my understanding from the testimony -- personally saw the traffic camera video footage and this still photo fairly and accurately depicts a still shot from that video footage. Detective Gooch was in the room when this picture was printed. And so I do think proper foundation has been laid for the admission of this particular exhibit.

Ms. Werder made many points during her questioning but I think those go to the issue of weight and not admissiblility, and she's welcome to ask those same questions when the jury comes back in. But at least preliminarily I'm ruling that there is proper foundation for this.

Mr. Nelson, you will have to lay that again for the jury.

MR. NELSON: Yes, Your Honor.

MS. WERDER: And, Your Honor, can I just make a brief record about the ruling?

THE COURT: Sure.

MS. WERDER: Your Honor, beginning under the business records exception the Supreme Court recently held that it has to be a custodian of the records. The police department is not the custodian of those records. If they wanted to call whoever is the custodian of those records to lay that proper foundation to get that hearsay portion admitted, they could do that. So I would ask the Court to just reconsider at least the portion of its ruling as it relates to that to the date, to the time, all of that information because Detective Gooch is not a custodian of those records.

THE COURT: Understand the objection. I'm going to overrule that.

Okay. Anything else before we bring the jury in?

MR. SAMPLE: Yes. Could I have that sleeve on your copy that says 98?

MR. NELSON: You can step out.

MR. SAMPLE: Will this still come in as 98? It's the same thing.

THE COURT: I want to make sure. Is this just my copy?

MR. SAMPLE: Yes.

(The jury was escorted into the courtroom.

LOGAN GOOCH

having been duly sworn, testified as follows:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30569

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LYDELLE EDMOND TURNER,

Defendant and Appellant.

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

THE HONORABLE JON C. SOGN
Circuit Court Judge

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Notice of Appeal filed December 27, 2023

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30569

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LYDELLE EDMOND TURNER,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Lydelle Edmond Turner, is called "Turner." Plaintiff and Appellee, the State of South Dakota, is called "State." References to documents and video Exhibits are as follows:

Turner's Brief ..... TB

Minnehaha County Criminal File No. 22-5160 ..... SR

December 28, 2022 Suppression Hearing ..... SH

August 11, 2023 Motions Hearing ..... MH

September 18, 2023 Jury Trial Transcript JT1

September 19, 2023 Jury Trial Transcript JT2

September 20, 2023 Jury Trial Transcript JT3

September 21, 2023 Jury Trial Transcript JT4

Edited Detective Branch Interview Video Labeled 98B 98B

Unedited Branch Interview Video Labeled 98B..... 98BU

Officer Ivancevic Body Camera Labeled Exhibit A ..... Ivan. BC

All document designations are followed by the appropriate page numbers. All Exhibits are followed by their appropriate designation, aside from those listed above that have been given a special designation. All video and audio citations are followed by the appropriate times they occur in the files. All video designations refer to the largest file in the electronic exhibit folder.

JURISDICTIONAL STATEMENT

The Honorable Jon C. Sogn, Minnehaha County Circuit Court Judge, filed a Judgment of Conviction on December 8, 2023. SR:664. Turner filed a Notice of Appeal on December 27, 2023. SR:786. This Court has jurisdiction to hear the appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT PROPERLY DENIED TURNER'S MOTION FOR JUDGMENT OF ACQUITTAL?

The circuit court denied Turner's Motion for Judgment of Acquittal.

State v. Long Soldier, 2023 S.D. 37, 994 N.W.2d 212

State v. Schroeder, 2004 S.D. 21, 674 N.W.2d 827

State v. Smith, 2023 S.D. 32, 993 N.W.2d 576

State v. Webster, 2001 S.D. 141, 637 N.W.2d 392

II.

WHETHER JAMES DRIVER'S IDENTIFICATIONS WERE PROPERLY ADMITTED?

The circuit court denied Turner's Motion to Suppress identifications by eyewitness James Driver.

State v. Osman, 2024 S.D. 15, 4 N.W.3d 558

State v. Red Cloud, 2022 S.D. 17, 972 N.W.2d 517

III.

WHETHER FRANS MARITZ'S REPORT AND TESTIMONY WERE PROPERLY ADMITTED?

The circuit court denied Turner's Motion to Dismiss or Alternatively Exclude the written report and expert testimony of ballistics expert Frans Maritz.

State v. Adamson, 2007 S.D. 99, 738 N.W.2d 919

State v. Oster, 495 N.W.2d 305 (S.D. 1993)

IV.

WHETHER THE MILESTONE CAMERA PHOTOGRAPH WAS PROPERLY ADMITTED?

The circuit court overruled Turner's foundation and hearsay objections to the admission of a still photograph taken from the Milestone Camera System.

State v. Dickerson, 2022 S.D. 23, 973 N.W.2d 249

V.

WHETHER THE CIRCUIT COURT PROPERLY DENIED JURY INSTRUCTIONS 101, 109, and 110?

The circuit court denied Turner's proposed Jury Instructions 101, 109, and 110.

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

VI.

WHETHER THE CIRCUIT COURT PROPERLY DENIED TURNER'S MOTION FOR NEW TRIAL?

The circuit court denied Turner's Motion for a New Trial.

State v. Delehoy, 2019 S.D. 30, 929 N.W.2d 103

State v. Birdshead, 2015 S.D. 77, 871 N.W.2d 62

State v. Bousum, 2003 S.D. 58, 663 N.W.2d 257

STATEMENT OF THE CASE

A grand jury indicted Turner on ten Counts in August 2022:

- Count 1: Aggravated Assault violating SDCL 22-18-1.1(2) (bodily injury);
- Count 2: Aggravated Assault violating SDCL 22-18-1.1(5) (physical menace);
- Count 3: Discharge of Firearm at Motor Vehicle violating SDCL 22-14-20 (Pontiac);
- Count 4: Discharge of Firearm at Motor Vehicle violating SDCL 22-14-20 (Toyota Camry);
- Count 5: Discharge of Firearm at Motor Vehicle violating SDCL 22-14-20 (Ford Pickup);
- Count 6: Discharge of Firearm at Motor Vehicle violating SDCL 22-14-20 (Mitsubishi);
- Count 7: Possession with Intent to Distribute a Controlled Substance violating SDCL 22-42-2 (methamphetamine);
- Count 8: Possession of Two Ounces or Less Marijuana violating SDCL 22-42-6;

- Count 9: Reckless Discharge of a Firearm violating SDCL 22-14-7(1); and
- Count 10: Possession of Drug Paraphernalia violating SDCL 22-42A-3.

SR:7-8. The State filed a Part II Information alleging Turner had three prior felony convictions in Iowa for two convictions of Third Degree Burglary and a conviction for Operating While Intoxicated Third Offense. SR:10.

A four-day jury trial occurred in September 2023 on Counts 1 through 7. SR:V, 431-32. The jury returned guilty verdicts on all Counts but Count 7. SR:431-32. The circuit court entered a Judgment and Sentence in December 2023 sentencing Turner to forty years in prison and dismissing the Part II Information. SR:663-64.

STATEMENT OF THE FACTS

A. Drive-by Shootings

James Driver pulled into a small parking lot near the Mercato Liquor Store in Sioux Falls in July 2022 at about 9:30 am. JT1:47-48; Exh.2:0:35-45. Driver got out to talk to an acquaintance and stood among a group of people. JT1:48; Exh.2:0:35-45. During the conversation, someone asked "who was that" referencing a Yukon driven by Turner that slowed as it approached a nearby stop sign. JT1:48; Exh.2:0:35-45. Driver examined Turner and responded, "that's the guy that stay across the street from your mom." JT1:48. Turner spoke with a man from the parking lot who stepped out into the middle of the street,

then Turner pulled out a gun and opened fire on the crowd. JT1:48; Exh.2:0:35-1:15. Turner shot several shots, one of which hit Donald White and shattered his femur. JT1:48; Exh.2:0:35-1:15; Exh. 92. Driver and the others ran behind vehicles and ducked, and Turner drove off. JT1:48; Exh.2:1:00-20. After Turner left, the group emerged from behind their hiding places. JT1:48; Exh.2:1:15-35. But Turner's rampage was not over—he circled back to the location through a nearby alleyway. JT1:49; Exh.2:1:00-30. Driver saw the approaching Yukon and ran back behind a car. JT1:49; Exh.2:2:00-3:00. Turner then unloaded twenty-three shots at the parking lot, hitting four vehicles and a tree. Exh.3:0:00-17; Exhs.41, 43, 44, 45. The second round of shootings occurred at 9:44 am. *See generally* Exh.3. The only person Driver saw in the vehicle was Turner, who shot for about ten seconds during the first shooting and twenty-seven seconds total. JT1:51; SR:66; Exh.2:0:55-3:00.

Theresa Walters called 911 after the first shooting and spoke with dispatch during the second. Exh.1:0:00-30. She accurately provided Turner's license plate number as WAFF7. Exh.1:1:00-10; Exh.18. Law enforcement arrived on the scene, rendered medical assistance to White before an ambulance picked him up, and investigated. *See generally, e.g.*, Exh.32; Exh.33. They took photographs of the damaged vehicles and expended .22 and 9mm ammunition cartridges strewn about the street. *E.g.*, Exh.43; Exh.61; JT2:350-51. They collected video footage

from a nearby residential security camera and from a cell phone used across the street at a barber shop. *See generally* Exh.2; Exh.3.

Law enforcement also interviewed witnesses at the scene. Walters relayed that the shooter was a "black male, he runs with this lady down here" and gestured toward the other side of the block. Exh.33:2:50-3:00. Driver informed them that he recognized Turner's truck because it looked like his own, and that he had seen Turner around the neighborhood and knew where he stayed. Exh.B:0:00-1:00. Driver reported hearing "about twenty" gunshots, and described Turner as having "a beard, a little afro" and being "maybe just a little darker than me." *Id.* at 3:35-55. When asked the shooter's age, Driver responded "about forties." Exh.B:3:55-4:05.

As the investigation continued, law enforcement obtained security footage from a residence near Turner's that showed him drive up to his home right after the shooting, frantically honk the horn, run up the far side of the driveway, briefly squat down, and run back to his Yukon before quickly driving off. Exh.5:0:00-45. A woman then walked out, yelled in fright, ran to the area Turner had been at, picked something up, and ran back inside. *Id.* at 0:45-1:00. Law enforcement also obtained a still photo from a video recorded by the Milestone camera system at 11th and Duluth. Exh.100. It showed Turner driving the Yukon in the area of the shootings about a minute before they occurred. Exh.100; Exh.3.

While law enforcement investigated the crime scene, Officer Thomas Brandt identified Turner's Yukon driving quickly near the area of the shooting, and he apprehended Turner at a Speedway Gas Station. JT1:149; Exh.7:3:00-5:00. The Yukon had distinctive back window stickers. Exh.8:2:13-16; Exh.18. Officer Brandt's body camera showed that Turner was a black male wearing a black hat, which Officer Brandt took from him. Exh.7:16:20-45. Turner provided a birthdate of February 14, 1980, which would have made him 42 years old on the day of the shootings. *Id.* at 5:40-6:30. A search of Turner's person revealed two unspent .22 caliber bullets in his pocket. JT3:529-30. Inside the Yukon, law enforcement discovered 14.76 grams of methamphetamine, marijuana, drug paraphernalia, baggies, a scale, multiple cell phones, a tin full of unused .22 and 9mm caliber ammunition, and an expended .22 cartridge on the driver's side floor. Exh.7:9:50-55; Exh.11; Exh.15; Exh.17; Exh.47. Officer Aleksander Ivancevic transported Driver to the gas station to do a show-up identification, which occurred at 10:37 am—53 minutes after Turner's shootings. *See generally* Exh.3; Ivan. BC:14:20-25. Driver positively identified Turner, and law enforcement took Turner into custody. Exh.C:13:00-30; *See generally* Exh.98B.

Detective Ian Branch interviewed Turner at the police station. *See generally* 98B. Turner denied being at 11th Street or knowing what happened. *Id.* at 1:10; 98BU:3:10-20. After confronting a photo of the Milestone video that captured him at 11th and Duluth, Turner claimed

that he was in the area of the shooting because he was driving to the store. *Id.* at 2:35-40; 98BU:3:00-6:00. But Turner denied shooting anyone or owning a gun. *Id.* at 5:25-35, 18:00-30. He said he had bullets in his pocket because he was at Fort Thompson shooting guns late into the prior evening and was just getting home. *Id.* at 4:45-5:05.

B. Pretrial

Turner moved to suppress Driver's identification. SR:60. After briefing and argument, the circuit court issued a memorandum opinion stating the show-up was inherently suggestive. SR:64. But the circuit court concluded that, looking at the totality of the circumstances, Driver's identification was still reliable and admissible. SR:64-66. The circuit court denied the Motion to Suppress. SR:68.

Next, Turner filed a Motion for Discovery for the State to disclose all witnesses and exhibits. SR:76-78; MH:5. He also had funds approved for a ballistics expert. SR:70-71. Several months later, Turner informed the State that he had everything from discovery. MH:13-14. Trial was originally scheduled for August 2023, but it emerged that the State had inadvertently failed to provide Turner with a report from its ballistics expert, Frans Maritz, that it planned to use at trial. MH:13-14. The Maritz report stated that the .22 cartridges from the shooting were fired from a single gun and the 9mm cartridges by another gun. SR:309-11. It also verified that the same brand and caliber of ammunition found at the crime scene matched that found in Tuner's vehicle and pocket. *Id.*

Upon learning Turner did not have the Maritz report, the State immediately provided a copy. MH:14. Turner still moved to dismiss the case or to exclude the report and Maritz's testimony. SR:205. The circuit court found no bad faith by the State and that exclusion was inappropriate under SDCL 23A-13-15 and 17. MH:17. The circuit court also gave Turner the option to either have the Maritz report excluded but not his testimony and have trial proceed as scheduled, or to have both included and delay trial to have time to consult and potentially call his own expert. MH:17, 21-22. Turner chose to have trial delayed and the Maritz report included. MH:22. The circuit court issued an Order extending the trial date and denying Turner's Motion in Limine. SR:227. Trial occurred a month later in September 2023, and Turner did not call his expert as a witness. SR:V; *See generally* JT3; JT4.

C. Trial

Prior to the State's case-in-chief, Turner moved to have his interview with Detective Branch excluded, arguing that Branch's statements were hearsay. SR:282. The circuit court agreed that certain statements of fact made by Branch were hearsay, and it had both the hearsay statements and another three minutes of the video redacted. SR:346-54. The State thus presented an edited version of the interview to the jury. *See generally* 98B. Part of what the State redacted was a moment in the interview where Branch showed Turner the Milestone photo. SR:346-52; 98BU:3:20-30.

During its case-in-chief, the State called Arely Flores to testify, a witness parked with her three children at the barbershop across the street during the shootings. JT2:315. Both the State and Turner expected Flores to testify that she had seen three dark-skinned individuals in the Yukon, two in the front and one in the backseat who did the shooting. SR:537-38, 630, 647-48; JT2:319, 372-73. She had provided this version of events to both Detective Logan Gooch and Defense counsel's paralegal Alejandra Hight in interviews before trial. SR:543-44, 630. But Flores, a native Spanish speaker, testified with a translator present that she did not see how many people were in the vehicle, only that she saw three individuals get shot at in the parking lot. JT2:315, 317, 319. The circuit court thus allowed Turner to call Hight to testify via Zoom and impeach Flores. JT2:373-75. Later on, during Turner's case-in-chief, Hight informed the jury that Flores had not wanted to testify because of potential questions about her immigration status, and that she had acted as an English-Spanish translator in two previous conversations where Flores said she saw multiple occupants in the Yukon and the shooting came from the back seat. JT3:562, 564-66.

Turner filed a Motion in Limine regarding the Milestone photo showed to Turner during Detective Branch's interview. SR:316-17; 98BU:3:20-30; Exh. 100. The Defense had been aware of the photo, and had possessed a copy for about a month. SR:319-20, 322; JT3:399-400. The State had not included the Milestone photo in its Exhibit List

because it anticipated playing the entire Branch interview video for the jury and having that be the basis for the Milestone photo's admission. JT3:399-400, 482. Yet the Defense still complained that it had been blindsided by the Milestone photo and therefore prejudiced. JT3:398-400; SR:316. Turner also argued that the Milestone photo had no foundation because Detective Gooch, who would be used to enter the photo, did not print it off himself. JT3:481, 489. Finally, Turner argued that the photo contained hearsay statements about the time and date information. JT3:482. The State called Detective Gooch for an offer of proof outside the presence of the jury. JT3:487. The circuit court ruled that the Milestone System is regularly used in the normal course of business by the city of Sioux Falls, that Detective Gooch knew of it and was in the room when it was printed, and that it accurately depicted the video footage. JT3:501. Thus, the Milestone photo had sufficient foundation to be admitted through Detective Gooch. *Id.*

At the close of the State's case-in-chief, Turner moved for judgment of acquittal regarding Counts 3 through 6 on the grounds that SDCL 22-14-20 stating, "occupied structure or motor vehicle" required a motor vehicle to be occupied when shot at for the statute to be violated. JT3:552-54. The circuit court denied the Motion because "motor vehicle" and "occupied structure" had distinct definitions in SDCL 22-1-2(28) and (49), so the "occupied" modifier in "occupied structure" did not apply to "motor vehicle." *Id.* at 555; JT4:608. During jury instruction

review, the circuit court denied instruction 101, which contained Turner's inaccurate reading of SDCL 22-14-20. JT4:608-09. The circuit court also denied Turner's proposed instructions 109 and 110 regarding eyewitness identifications because the pattern instructions explained the law better. JT4:612-13. The jury ultimately returned guilty verdicts on Counts 1 through 6. SR:431-32.

Following the return of the jury's guilty verdicts, Turner moved for a new trial. SR:530. He argued that the State committed a *Brady* violation by not saving the video from which the Milestone photo was taken. SR:530. Turner also argued that the State elicited "false testimony" from Flores. *Id.* The circuit court denied the Motion. SR:659.

ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY DENIED TURNER'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Background

At the close of the State's case-in-chief, Turner moved for judgment of acquittal regarding Counts 3 through 6 on the grounds that SDCL 22-14-20 stating, "occupied structure or motor vehicle" required a motor vehicle to be occupied when shot at for the statute to be violated. JT3:552-54. The circuit court rejected that reading and denied the Motion, and the jury found Turner guilty of Counts 3 through 6. SR:431-32. Turner's appeal of his Motion for Judgment of Acquittal is

thus two issues combined: a statutory construction argument inaccurately interpreting SDCL 22-14-20, and a sufficiency of the evidence argument based on that erroneous interpretation. TB:28-30.

B. The Circuit Court Correctly Interpreted SDCL 22-14-20

i. Standard of Review.

This Court "review[s] issues of statutory interpretation de novo." *State v. Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d 212, 217. "The rules of statutory interpretation are well settled." *Id.* (quoting *State v. Bettelyoun*, 2022 S.D. 14, ¶ 24, 972 N.W.2d 124, 131). "The purpose of statutory interpretation is to discover legislative intent." *Id.* (quoting *State v. Bryant*, 2020 S.D. 49, ¶ 20, 948 N.W.2d 333, 338). "[T]he starting point when interpreting a statute must always be the language itself." *Id.* (quoting *Bryant*, 2020 S.D. 49, ¶ 20, 948 N.W.2d at 338). "[This Court] therefore defer[s] to the text where possible." *Id.* (quoting *State v. Armstrong*, 2020 S.D. 6, ¶ 16, 939 N.W.2d 9, 13). "When the language in a statute is clear, certain[,] and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Id.* (quoting *Armstrong*, 2020 S.D. 6, ¶ 16, 939 N.W.2d at 13). "In conducting statutory interpretation, [this Court] give[s] words their plain meaning and effect, and read[s] statutes as a whole." *Id.* (quoting *State v. Thoman*, 2021 S.D. 10, ¶ 17, 955 N.W.2d 759, 767).

ii. Analysis.

Turner's reliance on the series-qualifier canon of construction overlooks that "when the language in a statute is clear, certain[,] and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d at 217 (quoting *Armstrong*, 2020 S.D. 6, ¶ 16, 939 N.W.2d at 13); TB:28. SDCL 22-14-20 provides "Any person who willfully, knowingly, and illegally discharges a firearm at an *occupied structure or motor vehicle* is guilty of a Class 3 felony" (emphasis added). But the terms "occupied structure" and "motor vehicle" have distinct definitions in SDCL 22-1-2(28) and (49). Reading the statutes as a whole therefore shows that "occupied structure" and "motor vehicle" are independent terms, and the modifier "occupied" only applies to "occupied structure." SDCL 22-1-2; SDCL 22-14-20.

In *State v. Schroeder*, this Court used a definitions section in a statutory framework to ascertain the plain meaning of "controlled drug or substance." 2004 S.D. 21, ¶ 14, 674 N.W.2d 827, 831. In *Halls v. White*, this Court opined "guidance as to the plain and ordinary meaning of a term in a restrictive covenant may come from statutory definitions." 2006 S.D. 47, ¶ 8, 715 N.W.2d 577, 581.

The circuit court therefore acted in accordance with this Court's precedent by applying definitions section of SDCL 22-1-2 to determine

plain meaning rather than jumping right to a canon of construction. *See Schroeder*, 2004 S.D. 21, ¶ 14, 674 N.W.2d at 831.

Turner also misapplies *Argus Leader Media v. Hogstad*, 2017 S.D. 57,¶ 7, 902, N.W.2d 778, 781; TB:29. In that case, this Court engaged in statutory construction because it found ambiguity in SDCL 1-27-1.5(20). *Argus Leader Media*, 2017 S.D. 57, ¶7, 902 N.W.2d at 781. This Court wrote:

> "Typically, the syntactic canons applicable to this type of phrasing would be the. . . 'Series-Qualifier Canon' . . . [h]owever, Scalia and Garner recognize that '[p]erhaps more than most of the other canons, [the series-qualifier canon] is highly sensitive to context. Often the sense of the matter prevails.'"

Id. at 2017 S.D. 57,¶ 7, 902 N.W.2d at 781 (citation omitted). This Court declined to use the series-qualifier canon because the sense of the matter did not warrant doing so. *Argus Leader Media*, 2017 S.D. 57, ¶ 10, 902 N.W.2d at 782. Thus, *Argus Leader Media* does not support automatically resorting to the series-qualifier canon as requested by Turner. *Id.* at 2017 S.D. 57, ¶¶ 6-8, 902 N.W.2d at 781-82; TB:28-30. This is especially so because the definitions in SDCL 22-1-2(28) and (49) preclude any ambiguity, and therefore any need to resort to canons of construction. *Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d at, 217. The circuit court correctly rejected Turner's interpretation of SDCL 22-14-20. JT3:555-56.

C. The State Presented Sufficient Evidence

i. Standard of Review.

"[This Court] review[s] a denial of a motion for judgment of acquittal de novo." *State v. Frias*, 2021 S.D. 26, ¶ 21, 959 N.W.2d 62, 68 (quoting *Armstrong*, 2020 S.D. 6, ¶ 12, 939 N.W.2d at 12). "In measuring the sufficiency of the evidence, [this Court] ask[s] 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.* (quoting *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83). "[T]he jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence." *Id.* (quoting *Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d at 83). "In determining the sufficiency of the evidence, this Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence." *Id.* (quoting *State v. Bausch*, 2017 S.D. 1, ¶ 33, 889 N.W.2d 404, 413).

ii. Analysis.

The State presented considerable evidence proving that Turner discharged a firearm at four motor vehicles in addition to committing the aggravated assaults of Counts 1 and 2. It submitted a residential security camera depicting Turner twice pulling up to the parking lot in his Yukon with his arm sticking out of the driver's side window, and everyone ducking down and scattering after he did so. Exh.2:0:35-1:15, 2:40-3:00. It also showed a cell phone video from the other side of the

street where his Yukon drives by the parking lot and twenty-three shots ring out. Exh.3:0:00-17. These videos alone are powerful evidence; in *State v. Smith*, a video depicting the defendant committing a shooting helped sustain verdicts for second degree murder and aggravated assault. 2023 S.D. 32, ¶ 49, 993 N.W.2d 576, 592; *See also State v. Bolden*, 2024 S.D. 22, ¶ 51, 6 N.W.3d 238, 249.

The jury also heard audio of a 911 call where Walters read Turner's exact license plate number to dispatch and described the shooter as male. Exh.1:0:20-30; Exh.18. They also saw her subsequent description of a "black male, he runs with this lady down here," which corroborated Driver's testimony. Exh.33:2:50-3:00; JT1:48-51. Walters also testified about seeing Turner drive up before hearing the shootings and her calling 911. JT1:32. The jury saw photographs of expended bullet cartridges from the crime scene and the four vehicles having bullet holes in them, in addition to a photo of White's shattered femur and his testimony about being shot. *Id.* at 100-01; Exhs. 11, 41, 43, 44, 45, 61, 92. The Milestone photo showed Turner driving the Yukon in the area just before the shooting. Exh.100.

Turner's neighbor's residential camera showed him pull up to his driveway, frantically honk, squat as if he dropped something off, and quickly drive away, and then a woman in his home come out and yell when she saw what he left behind. Exh.5:0:10-1:00. Thus, the State presented circumstantial evidence that Turner dropped the guns used in

the shootings off at his house and had the woman that was staying there dispose of them. "Direct and circumstantial evidence have equal weight." *State v. Webster*, 2001 S.D. 141, ¶ 13, 637 N.W.2d 392, 396. Further, no one else exited the Yukon but Turner during this stop. *See generally* Exh.5.

The photos and videos of law enforcement apprehending Turner also provided ample evidence. His vehicle at the Speedway showed the accuracy of Walters' license plate reading and the exact match of Turner's Yukon to the videos at the crime scene. Exh.1:0:20-30; Exh.2:0:35-1:15; Exh.3:0:00-17; Exh.18. Turner was the sole occupant of the Yukon. *See generally Exh.7.* A search of his Yukon revealed a tin full of the same type and brand of ammunition used in the shootings, and an expended cartridge of the .22 ammunition on his driver's side floor. Exhs. 11, 17; SR:309-11. Turner had .22 ammunition in his pocket when apprehended. JT3:529-30; 98B:4:45-5:05.

Frans Maritz testified that the same gun fired all of the .22 rounds and another gun fired the 9mm ammunition. JT3:449-50. James Driver testified about his experience getting shot at by Turner, whom Driver identified for the jury after explaining he was familiar with him from seeing him around the neighborhood, as well as how Turner's Yukon was similar his own vehicle. JT1:48-50. Driver testified about being brought to Speedway for a show-up identification of Turner. JT1:51-52.

Viewing all of this evidence in a light most favorable to the prosecution, a jury could and did rationally conclude beyond a reasonable doubt that Turner shot the four vehicles. *Frias*, 2021 S.D. 26, ¶ 21, 959 N.W.2d at 68. The circuit court therefore did not err when it denied Turner's Motion for Judgment of Acquittal on the Counts of Discharge of a Firearm at a Motor Vehicle.

II.

JAMES DRIVER'S IDENTIFICATIONS WERE PROPERLY ADMITTED.

A. Background

Turner moved to suppress Driver's identifications in October 2022. SR:60. After briefing and argument, the circuit court issued a memorandum opinion stating that the pretrial show-up was inherently suggestive. SR:64. But the circuit court concluded that, looking at the totality of the circumstances, Driver's identification was still reliable and admissible. SR:64-65. The circuit court denied the Motion to Suppress in January 2023. SR:68.

B. Standard of Review

This Court reviews "the denial of a motion to suppress based on the alleged violation of a constitutionally protected right as a question of law by applying the de novo standard of review." *State v. Red Cloud*, 2022 S.D. 17, ¶ 21, 972 N.W.2d 517, 525 (quoting *State v. Angle*, 2021 S.D. 21, ¶ 14, 958 N.W.2d 501, 506). Any underlying factual findings of the circuit court are reviewed "under the clearly erroneous standard." *Id.*

¶ 21, 972 N.W.2d at 525-26 (quoting *State v. Doap Deng Chuol*, 2014 S.D. 33, ¶ 19, 849 N.W.2d 255, 261).

This Court uses a two-step inquiry to determine whether to suppress an identification:

> "First, [the Court] examine[s] whether the identification procedure is both suggestive and unnecessary[.] If the identification procedure is found to be both suggestive and unnecessary, [it] then analyze[s] the reliability of the identification. While a suggestive and unnecessary procedure is improper, suppression is not automatic. The Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a substantial likelihood of misidentification."

State v. Osman, 2024 S.D. 15, ¶ 24, 4 N.W.3d 558, 566 (quoting *Red Cloud*, 2022 S.D. 17, ¶ 22, 972 N.W.2d at 525) (cleaned up). Suppression of an identification should only occur if "the indicators of a witness'[s] ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion[.]" *Red Cloud*, 2022 S.D. 17, ¶ 21, 972 N.W.2d at 525 (quoting *Perry v. New Hampshire*, 565 U.S. 228, 239 (2012)) (cleaned up).

C. Analysis

i. The Procedure Was Not Unnecessarily Suggestive.

In *Red Cloud*, this Court found that removing a suspect from the back of a patrol car in handcuffs and showing him singly to a witness is suggestive. 2022 S.D. 17, ¶¶ 24-25, 972 N.W.2d at 526-27. "However, 'suggestive procedures, without more, do not require a holding that the due process clause has been violated.'" *Osman*, 2024 S.D. 15, ¶ 28, 4

N.W.3d at 567 (quoting *Red Cloud*, 2022 S.D. 17, ¶ 24, 972 N.W.2d at 526–27) (cleaned up). The show-up must be "not only suggestive, but unnecessarily or impermissibly suggestive."[1] *Id.* "This is because the rationale of deterring improper identification procedures . . . is not implicated in cases where the show-up was necessary, as there would be no improper police conduct to deter in those situations." *Id.*

In *Red Cloud*, this Court found the show-up was unnecessary because a "six-person photo lineup containing Red Cloud's picture was used in a separate investigation just hours after the show-up identification." 2022 S.D. 17, ¶ 25, 972 N.W.2d at 527. But in *Osman*, "there was no alternative identification procedure immediately available." 2024 S.D. 15, ¶ 29, 4 N.W.3d at 567. This Court held that "it was important to quickly locate the correct suspect because the crimes under investigation were a DUI and leaving an unattended vehicle at the scene of an accident." *Id.* ¶ 30, 4 N.W.3d at 568. In *State v. Clabaugh*, this Court noted:

> [I]t is in the best interests of both the suspect and law officers when an identification takes place immediately. If the wrong man was apprehended, the suspect can be freed and the police can continue their search; if the suspect is positively identified as the perpetrator, the police can curtail their search activities.

346 N.W.2d 448, 451-52 (S.D. 1984) (internal citations omitted). Applying this reasoning to *Osman*, this Court held:

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[1] The circuit court ruled on this issue prior to this Court releasing the *Osman* opinion.

> [T]he show-up identification occurred within thirty-two minutes of officers arriving on the scene of the crime. This allowed the police to confirm that the identity of the suspect they had detained matched the description given and thus end their search for the driver of the vehicle. The short time span between the crime and the identification, along with the pressing, active search for the perpetrator, demonstrates that the show-up was not unnecessary and the police conduct of using a show-up as an identification method was not improper.

2024 S.D. 15, ¶ 32, 4 N.W.3d at 568.

Turner committed two drive-by shootings where he fired over twenty rounds in a residential neighborhood then fled the scene, which favored tracking down the danger to the community as quickly as possible to eliminate the threat and gather evidence. *Osman*, 2024 S.D. 15, ¶ 32, 4 N.W.3d at 568; Exh.2:0:35-1:15; Exh.3:0:00-17. Driver's identification occurred a mere 53 minutes after the shootings. *See generally* Exh.3; Ivan. BC:14:20-25. Under *Osman*, this "short time span between the crime and the identification, along with the pressing, active search for the perpetrator, demonstrates that the show-up was not unnecessary and the police conduct of using a show-up as an identification method was not improper." 2024 S.D. 15, ¶ 32, 4 N.W.3d at 568. The circuit court did not err by denying Turner's Motion to Suppress.

ii. The Procedure Did Not Result in a Substantial Likelihood of Misidentification.

Because the State passed the first prong of the test, this Court need not examine the second. *Id.* ¶ 24, 4 N.W.3d at 566. But even if

this Court were to entertain the second prong, Turner's argument still fails. To determine whether a show-up should be suppressed because the procedure resulted in a substantial likelihood of misidentification, this Court considers these factors:

- The opportunity of the witness to view the criminal at the time of the crime;
- the witness's degree of attention;
- the accuracy of the witness's prior description of the criminal;
- the level of certainty demonstrated by the witness at the confrontation; and
- the time between the crime and the confrontation.

Id. ¶ 25, 4 N.W.3d at 566 (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

Driver saw Turner, the sole occupant of the Yukon, in the moments before the shootings. JT1:48, 51; SH:27; Exh.7:5:05-15. He then saw Turner during the first shooting, which lasted about ten seconds, and the Yukon approach before he hid behind a car during the second shooting. SH:37; JT1:49, 51; SR:66; Exh.2:0:55-1:10. Driver looked at Turner multiple times before and during the first shooting and had ample opportunity to observe him. Exh.2:0:30-1:10. In *Red Cloud*, the witness having seen the suspect for only a fraction of a 45-75-second encounter was sufficient to support the identification. 2022 S.D. 17, ¶ 27, 972 N.W.2d at 567. Driver told law enforcement and testified at the suppression hearing that he got a "good look" at Turner. MH:29;

Exh.C:9:00-20. Driver already had familiarity with Turner and his Yukon because he had seen both around the neighborhood multiple times before, and the Yukon was similar to his own vehicle. SH:27; JT1:48-49; Exh.B:0:00-1:00. In *Doap Deng Chuol*, familiarity of the witness with the suspect bolstered the opportunity to view factor. 2014 S.D. 33, ¶ 23, 849 N.W.2d at 261. Taken together, the above show Driver's opportunity to view Turner favored admission. *Red Cloud*, 2022 S.D. 17, ¶ 27, 972 N.W.2d at 527.

Driver, like the witness in *Red Cloud*, faced a suspect holding a weapon, and thus "weapon focus effect" factors into his degree of attention while examining Turner. 2022 S.D. 17, ¶ 29, 972 N.W.2d at 527-28. But also like *Red Cloud*, Turner was not a bystander or casual observer—the fact that Turner fired a gun in his direction drew Driver's attention to him. *Id.* ¶ 30, 972 N.W.2d at 528; JT1:49. The degree of attention factor therefore favored admission. *Id.* ¶ 30, 972 N.W.2d at 528.

Driver described Turner as having "a beard, a little afro" and being "maybe just a little darker than me." Exh.B:3:35-55. When asked the shooter's age, Driver responded "about forties." *Id.* at 3:55-4:05. Aside from the afro, these descriptions are an exact match. Exh.7:3:00-6:30. Turner also wore a black hat when apprehended. *Id.* at 16:20-45. Alongside his curly sideburns, it is understandable that Driver first thought the round shape and dark color of the hat resembled a small

afro haircut. *See id.* Further, a prior description can be sufficiently accurate even if there are some discrepancies. *Red Cloud*, 2022 S.D. 17, ¶ 32, 972 N.W.2d at 528.

As Driver pulled up to the identification, he remarked "that's the sticker in the back window on the driver's side" and had absolute certainty that Turner's Yukon was at the shootings. Exh.C:8:55-9:05. But when he first saw Turner, he said, "that ain't him, he had a little afro." Exh.C:10:40-50. This shows Officer Ivancevic saying "that's why we're bringing you down here, just for more verification," did not convince Driver the suspect was the shooter on the way to the show-up. Exh.C:9:00-9:20. Driver also said, with no prompting from law enforcement, "he had a hat on. He got a hat in the car?" *Id.* at 11:00-15. Officer Ivancevic responded, "was he wearing black?" *Id.* Driver replied "I think so, black hat. That's got to be him. 'Cause he had the little beard thing. That's him, man. Yeah, that's him." Then, after law enforcement confirmed Turner had a black hat, Driver reaffirmed "that's him, he took the hat off." *Id.* at 13:00-30. Thus, Driver went from having some doubt to being sure after resolving an initial question. *Id.* This is similar to *Red Cloud*, where the witness went from 90 to 95% sure to totally sure after seeing an identifying tattoo. *Red Cloud*, 2022 S.D. 17, ¶ 33, 972 N.W.2d at 528-29. Driver's level of certainty therefore favored admission. *Id.*

The show-up occurred 53 minutes after the second shooting. *See generally* Exh.3; Ivan.BC:14:20-25. In *Osman*, the show-up occurred within an hour, and this Court said that was a short time frame. 2024 S.D. 15, ¶ 30, 4 N.W.3d at 568; *See also Clabaugh*, 346 N.W.2d at 451-52. The show-up being within an hour of the shootings therefore strongly favored admission. *Clabaugh*, 346 N.W.2d at 451-52. Viewing these factors in totality, Driver's identification was reliable, and the circuit court did not err in denying Turner's Motion to Suppress. *State v. Red Cloud*, 2022 S.D. 17, ¶ 35, 972 N.W.2d at 529.

III.

FRANS MARITZ'S REPORT AND TESTIMONY WERE PROPERLY ADMITTED.

A. Background

Trial was originally scheduled for August 2023, but the State had inadvertently failed to provide Turner with a report from its ballistics expert Frans Maritz. MH:13-14. The Maritz report stated that the .22 cartridges from the shooting were fired from a single gun and the 9mm cartridges by another gun, and also matched the brand and caliber of ammunition found at the crime scene to that in Turner's Yukon. SR:309-10. Turner filed a Motion in Limine to have both the report and Maritz's testimony excluded. SR:205. The circuit court ruled exclusion was inappropriate under SDCL 23A-13-15 and 17, and it denied the Motion. MH:17; SR:227. It also gave Turner the option to either have no

delay in trial and the report excluded but Maritz's testimony included, or to delay trial, have everything included, and have time to consult his own expert and potentially call him as a witness. MH:17, 21-22. Turner chose the latter option. MH:21-22.

B. Standard of Review

This Court's "standard of review for evidentiary rulings requires a two-step process: first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was a prejudicial error[.]" *State v. Richard*, 2023 S.D. 71, ¶ 22, 1 N.W.3d 654, 660 (quoting *State v. Hankins*, 2022 S.D. 67, ¶ 20, 982 N.W.2d 21, 30). An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d at 30. (quoting *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109). Prejudicial error exists when "in all probability [the error] produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (quoting *State v. Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d 144, 147).

C. Analysis

i. The circuit court did not abuse its discretion.

SDCL 23A-13-15 provides "If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered . . . he shall promptly notify the other party . . . of the existence of the

additional evidence or material." The circuit court found no bad faith because there was none. MH:17. And when the State learned that Turner did not have the Maritz report a week before trial, it complied with SDCL 23A-13-15 by immediately providing it. MH:14. In *State v. Adamson*, this Court found no abuse in the lower court allowing a phone record that was provided a week before trial. 2007 S.D. 99, ¶ 25, 738 N.W.2d 919, 926. And while the State in *Adamson* did not possess the phone record until the week it disclosed it, the State here did not know Turner lacked the Maritz report until the week it gave it to Turner. *Id.* ¶ 19, 738 N.W.2d at 926. The circuit court thus did not make a choice outside the range of permissible choices by ruling SDCL 23A-13-15 had not been violated. *Id.*; SR:227. SDCL 23A-13-17 provides:

> If, at any time during the course of a proceeding, it is brought to the attention of a court that a party has failed to comply with an applicable discovery provision, the court . . . may enter such other order as it deems just under the circumstances. The court may . . . prescribe such terms and conditions as are just.

The circuit court prescribed terms it deemed just by giving Turner the option to either have the report excluded and have Maritz testify, or have everything included and trial delayed so he could consult his own expert. MH:17, 20-22. He chose to "accept a delay in trial" so he could explore the option of consulting and calling his expert. MH:17, 22. This delay gave Turner time to strategize as to the ballistics report, and he chose to not call his own expert. *See generally* JT3; JT4. "The remedy

for nondisclosure of discoverable material is left to the sound discretion of the trial court." *State v. Oster*, 495 N.W.2d 305, 309 (S.D. 1993) (overruled in part on an unrelated issue by *State v. DeNoyer*, 541 N.W.2d 725, 732) (S.D. 1995)). The circuit court exercised sound discretion and crafted a just remedy. *Id.*

ii. Turner suffered no prejudice.

Prejudicial error exists when "in all probability [the error] produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d at 30) (quoting *Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d at 147). The strength of the evidence enumerated under Arguments Section I. C. of this brief shows that even if Maritz did not testify and his report was excluded, the jury's verdict would have been the same.

IV.

THE MILESTONE CAMERA PHOTOGRAPH WAS PROPERLY ADMITTED.

A. Background

Turner objected to admission of the Milestone photo on the grounds that it lacked foundation and its time and date information was hearsay. JT3:481-82; Exh.100. After an offer of proof outside the presence of the jury, the circuit court ruled the Milestone photo was admissible under the SDCL 19-19-803(6) business records exemption.

JT3:501. The State used Detective Gooch, the lead detective of the investigation, to enter the Milestone photo into evidence. JT3:489-90.

B. Standard of Review

The standard in Arguments Section III. B. applies to this analysis.

C. Analysis

i. The circuit court did not abuse its discretion.

"Business records qualify for a hearsay exception if they are records of a regularly conducted business activity." *State v. Dickerson*, 2022 S.D. 23, ¶ 45, 973 N.W.2d 249, 264-65 (quoting *State v. Stokes*, 2017 S.D. 21, ¶ 13, 895 N.W.2d 351, 354). The exception requires that:

> (A) The record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) Making the record was a regular practice of that activity;
>
> (D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule or a statute permitting certification; and
>
> (E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Id. ¶ 45, 973 N.W.2d at 265 (citing SDCL 19-19-803(6)).

The Milestone photo shows it was captured at 9:43 am on July 30, 2022, about one minute before the shootings. Exh.100; Exh.3:0:00-0:17.

Detective Branch, who knew about the case because he investigated it under the direction of Detective Gooch, printed the image about two hours after the shootings. JT3:488-89; Exh.100. Detective Gooch identified the Milestone photo at trial and confirmed the time, date, and printing information. JT3:490-91. He testified that the video system that captured the image is used at intersections throughout Sioux Falls, and the police force employed by the City uses it regularly in the conduct of investigations. JT3:488-89.

Using Detective Gooch meant the information about the Milestone photo came from a reliable source. In *Dickerson*, this Court found there was not a qualified witness to admit a bank record under SDCL 19-19-803(6). *Dickerson*, 2022 S.D. 23, ¶ 46, 973 N.W.2d at 265. This was because the witness did not work for the bank that generated the record, knew nothing about the bank's recordkeeping practices, and knew nothing about how the record was prepared. *Id.* By contrast, Detective Gooch worked for the City of Sioux Falls and knew about the Milestone system because he accessed it every week. JT3:488, 491. He also knew how the City used the system to capture images, how the system worked, how to access the system, that access to the system was limited, and that Detective Branch used the system to print the Milestone photo off while working under him. *Id.* at 488-90, 492-93. Detective Gooch's testimony therefore satisfied every requirement of SDCL 19-19-803(6). *See Stokes*, 2017 S.D. 21, ¶¶ 14-15, 895 N.W.2d at 354 (where failing to

have a witness testify about a purported business record meant the exception was not met). The circuit court therefore did not make a choice outside the range of permissible choices by finding the conditions SDCL 19-19-803(6) met. *Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d at 30; *Dickerson*, 2022 S.D. 23, ¶ 46, 973 N.W.2d at 265.

ii. Turner suffered no prejudice.

Prejudicial error exists when "in all probability [the error] produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d at 30) (quoting *Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d at 147). The strength of the evidence enumerated under Arguments Section I. C. shows that even if the Milestone photo had been excluded, the jury's verdict would have been the same.

V.

THE CIRCUIT COURT PROPERLY DENIED JURY INSTRUCTIONS 101, 109, and 110.

A. Background

During jury instruction review, the circuit court denied instruction 101, which contained Turner's inaccurate reading of SDCL 22-14-20 described in Arguments Section I. B. JT4:608-09. The circuit court also denied Turner's proposed instructions 109 and 110 regarding Driver's eye-witness identification because the pattern instructions explained the law better. JT4:612-16.

B. Standard of Review

"'A trial court has discretion in the wording and arrangement of its jury instructions, and therefore [this Court] generally review[s] a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard.'" *State v. Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d 145, 150 (quoting *State v. Roach*, 2012 S.D. 91, ¶ 13, 825 N.W.2d 258, 263). "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584 (quoting *State v. Rodriguez*, 2020 S.D. 68, ¶ 41, 952 N.W.2d 244, 256).

"'[The] jury instructions are to be considered as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient.'" *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51 (quoting *Roach*, 2012 S.D. 91, ¶ 13, 825 N.W.2d at 263). "'Error in declining to apply a proposed instruction is reversible only if it is prejudicial, and the defendant has the burden of proving any prejudice.'" *Id.* (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 25, 693 N.W.2d 685, 695). "In order to show prejudice, the defendant must show that 'the jury would have returned a different verdict if the proposed jury instruction had been given.'" *Id.* (quoting *State v. Engesser*, 2003 S.D. 47, ¶ 43, 661 N.W.2d 739, 753).

C. Analysis

i. Instruction 101.

"'[The] jury instructions are to be considered as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient.'" *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51 (quoting *Roach*, 2012 S.D. 91, ¶ 13, 825 N.W.2d at 263). As discussed in Arguments Section I. B., Turner's proposed jury instruction 101 incorrectly stated the law about SDCL 22-14-20. The circuit court did not decide outside the range of permissible choices by denying an instruction that misrepresented the law. *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51. The circuit court instead chose instructions that correctly stated the law.[2] SR:404-05.

ii. Instructions 109 and 110.

A circuit court does not err simply by refusing "to amplify instructions which substantially cover the principle embodied in the requested instruction." *Id.* (*State v. Klaudt*, 2009 S.D. 71, ¶ 20, 772 N.W.2d 117, 123). In instructions 109 and 110, Turner proposed that the circuit court inform the jury that they must be satisfied beyond a reasonable doubt about the accuracy of Driver's identification to convict

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[2] During deliberations, the jury encountered the same confusion as Turner over the meaning of "occupied structure or motor vehicle," and asked whether a motor vehicle needed to be occupied for the statute to be violated. SR:439. The circuit court told the jury to consider all of the instructions. SR:439. In doing so, they reached the appropriate conclusion that the definition of "motor vehicle" did not require it to be occupied. SR:431-32.

Turner of any of the charged crimes. SR:389. But this type of an instruction would only be logical if identification depended solely on Driver. *Id.* The jury here had far more evidence than just Driver's identification placing Turner at the shootings.

As enumerated under Arguments Section I. C., the jury had Walters' 911 call reading Turner's exact license plate, the video of her identification of him to law enforcement, several videos of his Yukon at the shootings, the Milestone photo, and the ammunition and spent cartridge in his Yukon and his pants pocket all linking him to the crime scene in addition to Driver's identification. The jury was the sole judge of the weight of this evidence. *State v. Jensen*, 2007 S.D. 76, ¶ 12, 737 N.W.2d 285, 289. Instructions 109 and 110 would have misrepresented the law, and the circuit court correctly denied them. *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51. Further, the strength of the evidence enumerated under Arguments Section I. C. precludes any claim that Turner suffered prejudice.

VI.

THE CIRCUIT COURT PROPERLY DENIED TURNER'S MOTION FOR NEW TRIAL.

A. Background

Following the jury's guilty verdicts, Turner moved for a new trial. SR:530. He argued that the State committed a *Brady* violation by not saving the video from which the Milestone photo was taken. SR:530.

Turner also argued that the State elicited "false testimony" from Flores. *Id.* The circuit court denied the Motion. SR:659.

B. Standard of Review

"This Court reviews the circuit court's 'denial of a motion for a new trial under the abuse of discretion standard.'" *State v. Timmons*, 2022 S.D. 28, ¶ 19, 974 N.W.2d 881, 888 (quoting *State v. Zephier*, 2012 S.D. 16, ¶ 15, 810 N.W.2d 770, 773). "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Id.* (quoting *State v. Miller*, 2014 S.D. 49, ¶ 11, 851 N.W.2d 703, 706). "[T]he decision whether to grant a new trial is within the sound discretion of the trial court, 'whose superior knowledge of all the facts and circumstances of the case enables him to know the requirements of justice.'" *Id.* (quoting *State v. Lodermeier*, 481 N.W.2d 614, 626 (S.D. 1992)). "[This Court] review[s] a circuit court's denial of a motion for a new trial under SDCL 23A-29-1, the same as its civil counterpart SDCL 15-6-59(b)." *Id.* (quoting *State v. Shelton*, 2021 S.D. 22, ¶ 27, 958 N.W.2d 721, 730).

C. Analysis

i. The Milestone video.

Turner argues that the State not providing him the full Milestone video from which the Milestone photo came prevented him from having a fair trial. TB:33. Notably, Turner never raised the issue of the absence

of the full video at any point before making his Motion for New Trial. JT3:480-82. But now he alleges a *Brady v. Maryland* violation as the basis for the unfairness. TB:34; *See* 373 U.S 83, 87 (1963). "A *Brady* violation occurs when (1) the evidence at issue [i]s favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence [has] been suppressed by the State, either willfully or inadvertently; and (3) prejudice [has] ensued." *State v. Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109-10.

The evidence is a video from which The Milestone photo emerged. Officer Gooch testified at trial that Milestone videos are automatically deleted after 90 days unless saved. JT3:495. The Milestone photo depicts Turner in his Yukon in the area of the shooting right before it happened. Exh.100. The back windows of the Yukon are rolled up except for a small crack, and nobody else can be seen. *Id.* The video is from a camera at an intersection that Turner momentarily drove by. JT3:489-91. Turner's argument that the video would be exculpatory hinges on there being other people in the vehicle that the camera would have recorded. TB:34. But that would require his windows to be rolled down during the moment he drives by the traffic camera, as well as other people to be depicted in the video. Given that Turner's back windows were still rolled up during the shootings that occurred less than a minute later and then afterward when law enforcement found him alone in the Yukon, there is no way the Milestone video would depict this imaginary

evidence. Exh.2:0:30-1:05; Exh.17:0:00-17; Exh.3:0:00-17; Exh.7:4:00-15. Turner was also the only person in the Yukon in the videos of the shootings and when police pulled him over. Exh.2:0:30-1:05; Exh.17:0:00-17; Exh.7:4:00-15. When he stopped by his home to dispose of his guns, nobody else exited the vehicle. *See generally* Exh.5.

"The state's duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense.'" *State v. Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d 257, 262 (quoting *California v. Trombetta*, 467 U.S. 479, 488-89 (1984)). "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* Nothing about having the Milestone video would provide the evidence Turner seeks because everything shows that he was the only occupant of the vehicle. Thus, the video did not possess an exculpatory value. *Id.* Further, a still image of the Yukon driving by the intersection is comparable evidence to a brief video of it passing by. *See id.* Finally, the strength of the evidence linking Turner to the shootings enumerated under Arguments Section I. C. shows Turner suffered no prejudice from not having the Milestone video. The circuit court did not abuse its discretion in denying Turner a second trial. *Timmons*, 2022 S.D. 28, ¶ 19, 974 N.W.2d at 888. The Defense

alleges deliberate bad faith in not saving the Milestone video.[3] TB:34. "Bad faith . . . means that the state deliberately destroyed the evidence with the intent to deprive the defense of information; that is, that the evidence was destroyed by, or at the direction of, a state agent who intended to thwart the defense." *Bousum*, 2003 S.D. 58, ¶ 16, 663 N.W.2d at 263 (citation omitted). Turner has produced nothing to show that the State deleted the Milestone video for the purpose or thwarting his defense. TB:33-34. In fact, the State did not delete the video at all—it automatically deleted after 90 days. JT3:495. Further, given the strength of the State's case, there was no need to have the video deleted so the defense could be thwarted. *See Supra*, Arguments Section I. C. The circuit court found no bad faith because there was none. SR:659.

ii. Arely Flores' testimony.

Both the State and Turner expected Flores to testify that she had seen three dark-skinned individuals in the Yukon, two in the front and one in the backseat who did the shooting. SR:537-38, 630, 647-48; JT2:319, 372-73. She had said this to both Detective Gooch and Defense counsel's paralegal Alejandra Hight in interviews before trial. SR:543-44, 630. But Flores, a Spanish speaker, testified with a translator present that she did not see how many people were in the

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[3] Notably, the Defense also alleged bad faith over the Maritz report, but the circuit court found none in either instance. MH:17; SR:659.

vehicle, only that she saw three individuals get shot at in the parking lot. JT2:315, 317, 319. The circuit court thus allowed Turner to call Hight to testify via Zoom and impeach Flores. JT2:373-75. Turner alleges this sequence amounts to a *Brady* violation. TB:36.

Turner's argument depends on the State having elicited perjury. *State v. Leisinger*, 2003 S.D. 118, ¶ 19, 670 N.W.2d 371, 375-76. But Flores was not under oath during her initial statement to Detective Gooch, and she had to use interpreters to communicate with English speakers. SR:660. Further, the Detective Gooch's report shows that the State expected her to testify consistently with her initial statements. SR:630. Putting it all together, Flores did not effectively communicate what she saw initially, but clarified when put on the witness stand under oath. JT2:320

Turner must also prove the change in testimony prejudiced him. *State v. Birdshead*, 2015 S.D. 77, ¶ 45, 871 N.W.2d 62, 77-78. Again, he cannot do so in light of the evidence enumerated under Arguments Section I. C. Further, Turner cross-examined Flores and called Hight to impeach her. JT2:320; JT3:562-66. The jury therefore knew about any inconsistencies and got to determine what weight those had in evaluating all the evidence. *Jensen*, 2007 S.D. 76, ¶ 12, 737 N.W.2d at 289. Turner suffered no prejudice and no new trial is necessary.

CONCLUSION

Based on the foregoing arguments and authorities, the State requests that Turner's convictions and sentence be affirmed.

Respectfully submitted,

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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 9,177 words.

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

Dated this 15th day of July 2024.

/s/ Jacob R. Dempsey
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 15, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Lydelle Edmond Turner*, Appeal No. 30569, was served via electronically through Odyssey File and Serve on Josey M. Blare at jblare@lynnjackson.com.

/s/ Jacob R. Dempsey
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30569

LYDELLE EDMOND TURNER,

Defendant/Appellant,

vs.

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee.

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

The Honorable Jon C. Sogn and Honorable Robin J. Houwman, Presiding Judges

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APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Throughout this brief Appellant will be referred to as "Defendant," "Appellant," or "Turner". Appellee will be referred to as "State" or "Appellee". All other individuals involved will be referred to by name. The trial transcripts will be referenced as "JT" followed by the transcript volume and page number. The settled record will be referenced as "SR" followed by the page number. Citations to other transcripts will be:

Defendant's Motion to Suppress (December 28, 2022).....MS

Motions Hearing (August 11, 2023) MH2

Defendant's Motion for a New Trial (November 29, 2023) .....MH

Exhibits will be referred to as "E" followed by the exhibit letter or number.

RESPONSE TO THE STATE'S STATEMENT OF FACTS

Appellant will respond to the factual statements asserted by Appellee as they are relevant to the issues on appeal below.[1]

[1] Though not relevant to the issues on appeal, the State asserts that several months after Defendant's Motion for Discovery, Defendant informed the State that he had all discovery. (Appellee's Br., p. 9). On appeal, the State once again implies that the onerous is on criminal defendants to confirm that the prosecution produces all discoverable evidence. Similar comments were made by the State multiple times during the prosecution and defense of this matter. *See generally* SR 1-2625. A criminal defendant cannot ensure the State has produced something that they (the defendant) do not know exists. Further, the implication that a criminal defendant must see to it that the State has produced all discoverable evidence is improper and contrary to the fundamental principles of due process.

ARGUMENT AND AUTHORITIES

I. The trial court erred when it denied Turner's Motion to Suppress.

In determining whether an identification must be suppressed, the Court first considers whether the identification was suggestive and unnecessary. *State v. Osman*, 2024 S.D. 15, ¶ 24, 4 N.W.3d 558, 566. The State argues that Driver's show-up identification was not unnecessary and is comparable to the circumstances in *Osman*.[2] In *Osman*, the Court provided that "[t]he short time span between the crime and the identification, along with the pressing, active search for the perpetrator, demonstrated that the show-up was not unnecessary[.]" *Id.* at 32.

Osman is not on point in this regard. In *Osman* the Court specifically noted there was no alternate identification procedure immediately available to law enforcement. *Id.* at ¶ 29. That is not the case here. Officer Ivancevic ("Ivancevic") testified that photographs of Defendant and other people could have been obtained and a digital lineup could have been done using one of the officers' cell phones. MS 20. Because an alternate identification procedure was available

[2] The State does not appear to dispute that the show-up was suggestive.

to law enforcement, Driver's show-up identification was unnecessary.[3]

The State also argues that Driver's identification was reliable. Driver's statements to law enforcement after the shooting, during the show-up, at the suppression hearing, and at trial are all different. After the shooting, Driver told an officer that he only saw one person in the car. Exhibit A, R Smith BWC_1. At the show-up, Driver initially said that Turner was not the person he had seen in the vehicle, but after he was goaded by law enforcement several times, he then said Turner was the person he had seen. MS 18-21; *see generally* Exhibit A, Ivancevic BWC_5. At the suppression hearing, Driver testified that Turner was the driver of the vehicle, but that he could not say that the driver and the shooter were the same person. MS 28-30. And finally at trial, Driver testified on direct that he had no doubt Turner was the driver and shooter and was the only one in the vehicle, but on cross he testified that he did not see who shot the gun. JT1 51-52, 58, 69. It is apparent from the inconsistencies in these statements, as well as from the inconsistences in Driver's other statements as explained in Appellant's Brief, that the suggestive and unnecessary show-up created a substantial likelihood of misidentification. *See Osman*, 2024 S.D. 15, ¶ 49, 4 N.W.3.d at 572 (Myren, J.,

[3] *See generally Osman*, 2024 S.D. 15, ¶ 26, 4 N.W.3d at 566 ("Show-up identifications are inherently suspect [...] and ha[ve] been *consistently* condemned as an affront to the requirements of due process and good police procedure" (emphasis added)); *State v. Red Cloud*, 2022 S.D. 17, ¶ 36, 972 N.W.2d 517, 529 ("[W]e take this opportunity to discourage the unnecessary use of this type of identification process by law enforcement.[...] The penalty for failure [to use a more reliable process] may be suppression of the impermissible identification."); *Osman*, 2024 S.D. 15, ¶ 48, 4 N.W.3d at 572 (Myren, J., dissenting) (stating that the reasoning that it is "in the best interests of both the suspect and law officers [for an identification to take] place immediately so that if the wrong suspect is apprehended, the suspect can then be freed and police can continue the search" would result in every suggestive identification procedure being considered necessary).

dissenting) ("Unsurprisingly, Becky and Troy expressed no uncertainty when they identified Osman to the jury fifteen months later. This was the consequence of an impermissibly suggestive identification process.")

The State attempts to bolster Driver's identification by relying on the "weapon focus effect" as recognized by the Court in *Red Cloud*, 2022 S.D. 17, ¶ 29, 972 N.W.2d at 527-28. This argument is misplaced. Driver answered five times at trial that he did not see a gun during the shooting. JT1 67-9.

For these reasons, and for the reasons stated in Appellant's Brief, the trial court erred by admitting Driver's identifications at trial and Defendant was prejudiced by such.

II. The trial court erred when it denied Turner's Motion to Dismiss for Violation of SDCL 23A-13 and alternative request for exclusion of evidence.

The State argues that the trial court gave Defendant the option to have Franz Maritz's report excluded from trial. This is incorrect. During the hearing on Defendant's Motion to Dismiss or Alternatively for Exclusion, the trial court advised the State and Defendant that it believed it had two *possible* remedies it could grant Defendant due to the State's late disclosure of Franz Maritz's ("Maritz") report: 1) exclude the evidence from the report or 2) grant a delay. MH2 17-22. (emphasis added). The trial court thereafter advised Defendant it was going to *choose* one of two options, which were slightly different than the options the trial court had just advised the parties it believed it had available to it: 1) there would be no delay of trial and the testimony would come in or 2) there

would be a delay of trial to allow Defendant time to respond to the expert. *Id.* (emphasis added).

In discussing the options he believed he had available to him, and what remedy he was ultimately going to give Defendant, the judge grouped Maritz's report and his anticipated testimony together, and used "evidence" and "testimony" interchangeably. *Id.* The trial court did not give Defendant the option to have Martiz's report, but not his testimony, excluded; either all of it was going to be admitted or none of it was going to be admitted.

Appellant incorporates the arguments previously set out in Appellant's Brief and as further argued herein in support of Appellant's position that the circuit court erred in denying Defendant's Motion to Dismiss or Alternatively for Exclusion and he was prejudiced by such denial.

III. The trial court erred by admitting E100.

The State argues that the trial court properly admitted E100 because Detective Gooch was a qualified witness under the business records exception. The State argues that because Detective Gooch was an employee of the City of Sioux Falls and accessed the Milestone system every week, that this matter is different from *Dickerson*.

In order to establish the business records exception to hearsay, a qualified witness must establish that:

> (A) The record was made at or near the time by – or from information transmitted by – someone with knowledge;

(B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(C) Making the record was a regular practice of that activity;
(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule or a statute permitting certifications; and
(E) The opponent does not show that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness.

State v. Dickerson, 2022 S.D. 23, ¶ 45, 973 N.W.2d 249, 264.

It does not ultimately matter whether a witness is employed with the entity or not, the question is are they familiar enough with the entity's record keeping practices to explain how the record came into existence in the entity's regular conducted activity, thus proving the circumstantial trustworthiness of the records. *Dickerson*, 2022 S.D. 23, ¶ 46, 973 N.W.2d at 265; *Cf. Plank v. Heirigs*, 156 N.W.2d 193, 197 (S.D. 1968)

Detective Gooch testified that:

1) He did not see Detective Branch print out the Milestone Document;
2) He did not know which City of Sioux Falls IT servers the underlying video or Milestone Document were stored;
3) He did not know how the Milestone System was maintained;
4) He did not know how the location(s) on the Milestone System is verified; and
5) He did not know how the time on the Milestone System is set, if it is verified, or how it would be verified;

JT3 (amended) 116-121.

The State entirely fails to address Detective Gooch's lack of knowledge regarding the supposed time and location information. It is clear that Detective Gooch could not lay proper foundation for E100 or establish that the Milestone

Document fell under the business records exception. The circuit court erred by admitting E100.

The State further argues that Defendant was not prejudiced by the admission of E100 in light of the other evidence presented at trial. The State asserts that "a residential security camera depicting Turner twice pulling up to the parking lot in his Yukon with his arm sticking out of the driver's side window, and everyone ducking down and scattering after he did so" was presented at trial. (Appellee's Br., p. 17; citing E2).[4] Haffner's security camera was far enough away from Summit Ave that it cannot be discerned who or how many people were in the shooting vehicle, or where from the vehicle the shooting came from.

The State further relies on the statements of Theresa Walters to law enforcement as support that Defendant was not prejudiced by the admission of E100. Defendant did not dispute at trial that the suspect vehicle belonged to him, however it was disputed whether he was in the vehicle at the time of the shooting. Walters told law enforcement she had seen a heavy-set black male driving the vehicle; she never identified Defendant as that person.

Appellant incorporates the arguments previously set out in Appellant's Brief and as further argued herein in support of Appellant's position that the circuit court erred in admitting E100 and that Defendant was prejudiced by the admission.

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[4] For clarity, E2 was not video directly from Angel Haffner's ("Haffner") home security system; it was a video taken by Officer Eric Kimball, using a cell phone, of a computer monitor playing back the video taken by Haffner's security system. *See generally* E2.

IV. The trial court erred by denying Defendant's Motion for Judgment of Acquittal on Counts 3-6.

The State argues that the plain language of SDCL 22-14-20 is clear and unambiguous because "occupied structure" and "motor vehicle" have been defined elsewhere in the code. "Ambiguity exists when a statute is reasonably capable of being understood in more than one sense." *Fluth v. Schoenfelder Constr., Inc.*, 2018 S.D. 65, ¶ 16, 917 N.W.2d 524, 529. SDCL 22-14-20 is reasonably capable of being understood in more than one sense; the trial court said this when considering Defendant's Motion:

> It's an interesting argument, and I have thought about that as this trial was proceeding. Whether that means illegal discharging a firearm at an occupied structure or occupied motor vehicle or whether it's discharging a firearm at an occupied structure or an occupied or unoccupied motor vehicle.

JT3 amended 178.

The State cites to *State v. Schroeder* in support of its argument. The Court in *Schroeder* stated that "[the Court] presume[s] that the Legislature changed the wording of the statute for a reason." *State v. Schroeder*, 2004 S.D. 21, ¶ 12, 674 N.W.2d 827, 831. "When an amendment is passed, it is often presumed the legislature intended to change existing law." *Id.*

Prior to 2005, SDCL 22-14-20 read as follows:

> Any person who willfully, knowingly, and illegally discharges a firearm at an occupied structure, structure capable of being occupied, or motor vehicle is guilty of a Class 5 felony. However, if a violation of this section results in bodily injury which is directly caused by such discharge, such person is guilty of a Class 4 felony.

"The rule of common law that penal statutes are to be strictly construed has no application to SDCL Title 22. All its criminal and penal provisions and all penal statutes shall be construed according to the fair import of their terms, with a view to effect their objects and promote justice." *State v. Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d 212, 217 (citations omitted).

In 2005, the Legislature substantively amended the statue by deleting "structure capable of being occupied", commas, and the entire last sentence of the statute, and by increasing the possible punishment under the statute from Class 5 or Class 4 felonies respectively, to a Class 3 felony.

That year the Legislature also amended the definition of "motor vehicle" as follows:

> "Motor Vehicle," ~~an~~ any automobile, motor truck, motorcycle, house trailer, trailer coach, cabin trailer, or any vehicle propelled by power other than muscular power[.]

South Dakota Legislature, 2005 Senate Bill 43, § 357 (as introduced) (addition shown in underline in original, deletion shown in strikethrough in original).

The 2005 Legislature was aware of the effect words like "an" or "a" have. In 2005, both "occupied structure" and "motor vehicle" were statutorily defined. If the Legislature had intended to criminalize the discharge of a firearm at anything falling under the statutory definitions of "occupied structure" and "motor vehicle" it would have used the determiner "a" to signify such. Rather, the Legislature wanted to increase the possible penalty someone faces if they shoot at

a structure or motor vehicle with another person inside of it, and therefore it used the proper language to do so.

Because SDCL 22-14-20 only criminalizes the discharge of a firearm at a motor vehicle that is occupied at the time of the incident, and because the State failed to provide sufficient evidence to prove that the four vehicles in question were occupied at the time of the incident, the trial court erred by denying Defendant's Motion for Judgment of Acquittal.

V. The trial court erred by denying Defendant's Proposed Jury Instructions 101, 109, and 110.

Appellant incorporates and reasserts the arguments presented in Appellant's Brief and herein in reply to Appellee's arguments regarding this issue.

VI. The trial court erred by denying Defendant's Motion for a New Trial.

a. Milestone Video

The State argues that law enforcement and the State did not have a duty to preserve the video that the Milestone Document came from because the other evidence "shows that he was the only occupant of the vehicle."[5] (Appellee's Br., p. 39). The duty to preserve evidence applies to evidence that might be expected to play a significant role in the suspect's defense, has an apparent exculpatory

[5] The State makes note that Defendant did not "raise the issue of the absence of the full video at any point before making" the Motion for New Trial. (Appellee's Br., p. 37-38). There are multiple times in the record that show that Defendant did not know the origin of the Milestone Document (i.e., that it was from the Milestone System) or any other substantive information about it until after he filed his Third Motion in Limine. SR 316. Defendant only learned of the existence of a video during Detective Gooch's testimony at trial. JT3 (amended) 103 – 109; SR 532-630; MH 1-27.

value before it is destroyed, and is of the nature that a suspect would not be able to obtain comparable evidence by other reasonably available means. *State v. Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d 257, 262.

During his interview with law enforcement, Defendant denied being in the area of 11th and Duluth and being involved in the shooting. Law enforcement knew that Defendant's defense was going to be that he was not involved and therefore they should have known that the video in question would play a significant role in Defendant's defense. Law enforcement also knew Defendant would not be able to access evidence comparable to the video. In light of law enforcement's knowledge that Defendant denied any involvement and Detective Gooch's testimony that law enforcement *regularly* saves these videos, it is evident that the State intentionally failed to save the video. JT3 124. The State's intentional failure to save the video becomes even more apparent when considered with the State's overall conduct in the investigation and prosecution of this matter as outlined in Appellant's Brief. (Appellant's Br., p. 36). Defendant was entitled to a new trial and the trial court erred in denying his motion.

b. Arely Flores's testimony

"[A] *Brady* violation not only results from the government's suppression of favorable evidence, but also, where previously undisclosed evidence reveals that the prosecution introduced trial testimony that it knew or should have known was perjured." *State v. Leisinger*, 2003 S.D. 118, ¶ 19, 670 N.W.2d 371, 375 (quoting *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555 (1995)). "[A] conviction

obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*

The State argues that at trial it did not elicit perjury from Arely Flores ("Flores"), because her prior statement to Detective Gooch was not under oath and because it expected her to testify consistent with her prior statement.[6] (Appellee's Br., p. 40-41).

Perjury is codified by SDCL 22-29-1, which provides:

> Any person who, having taken an oath to testify [...] states, intentionally and contrary to the oath, any material matter which the person knows to be false, is guilty of perjury."

SDCL 22-29-1.

It is irrelevant that Flores's prior statements were not under oath; perjury occurs when someone knowingly lies *while testifying* about something that is material to the case.

"A statement made by a witness during the course of a trial is also material if it has a legitimate tendency to prove or disprove some relevant fact [...] or ... is capable of influencing the court, officer, tribunal, or other body created by law on any proper matter of inquiry." *State v. Danielson*, 2012 S.D. 36, ¶ 14, 814 N.W.2d 401, 407 (citations omitted). The State spoke to Flores on at least two occasions

[6] The State also notes that interpreters had to be used for conversations between Flores and English speakers. (Appellee's Br., p. 41). The State does not appear to raise issue with the accuracy of the interpreters used in Flores's statements prior to trial, and therefore this is irrelevant to determining the issue related to Flores's testimony.

prior to trial. SR 646-648. The State knew Defendant intended to call Flores in his defense because he had served a trial subpoena on her. SR 233. Assuming the State did call Flores in its case because it wanted "to be able to look the jury in the eye and argue – we gave you everything, even the witness who testified inconsistent with other witnesses", when she ultimately testified the State knew she was committing perjury and chose to do nothing. SR 648. The State made no attempt to clarify the inconsistency of her testimony with her prior statements or correct her testimony, completely undercutting Defendant's defense and blindsiding him. *See State v. Birdshead*, 2015 S.D. 77, ¶ 45, 871 N.W.2d 62, 77 (citing *State v. Krebs*, 2006 S.D. 43, ¶¶ 21-23, 714 N.W.2d 91, 99-100 "(reversal because the State withheld inculpatory evidence that "completely undercut" the defendant's theory of defense)."

Defendant conceded at trial that his vehicle was used but consistently denied being personally involved in the shooting. The State knew Defendant's defense was that he was not involved in the shooting, and it took away the one witness that was going to allow him to present evidence to give the jury reasonable doubt. Defendant had no evidence to support his defense theory – he was unquestionably prejudiced. The trial court erred in denying Defendant's Motion for a New Trial based on the State's violation of *Brady*.

CONCLUSION

The trial court erred in a number of respects as outlined in the brief. These errors, individually and cumulatively, effected the result of this case and

prejudiced the defendant. For such reasons, Defendant respectfully requests the Judgment and Sentence be vacated and the case remanded to the trial court with appropriate instructions for a new trial.

Dated August 14, 2024.

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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, Josey M. Blare, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 14 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word-processing system used to prepare this brief indicates that there are a total of 3,544 words and 18,141 characters (no spaces) in the body of the brief.

/s/ Josey M. Blare
Josey M. Blare

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Reply Brief of Appellant in the above-entitled action was duly served by serving a true copy thereof by Notice of Electronic Filing generated by the Odyssey File & Serve System, on the 14th day of August, 2024.

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The undersigned further certifies that pursuant to SDCL 15-26A-79, the original of the Reply Brief of Appellant in the above-entitled action was mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date above written.

/s/ Josey M. Blare
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