IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Appeal No. 29712

STATE OF SOUTH DAKOTA
Appellee,

vs.

TRISTIN ALAN LARSON
Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE BOBBI RANK
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed July 22, 2021

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I. PRELIMINARY STATEMENT

Throughout this brief, Defendant/Appellant, Tristin Alan Larson, shall be referenced to herein as "Defendant, Appellant or Larson." The State shall be referred to herein as "State, Appellee or Prosecutor." References to transcripts and records will be referred to as follows:

Settled Record.....SR

Trial Transcript.....JTT

Each citation will be followed by the appropriate page number(s) and line number(s).

II. JURISDICTIONAL STATEMENT

On April 28, 2020, an Indictment was filed in Hughes County, South Dakota charging Defendant with COUNT 1A: Second Degree Murder, a violation of SDCL 22-16-7, a Class B felony, COUNT 1B: Manslaughter, a violation of SDCL 22-16-15(1), a Class C felony, COUNT 1C: Manslaughter, a violation of SDCL 22-16-15(2), a Class C felony, and COUNT 2: Aggravated Battery of an Infant, a violation of SDCL 22-18-1.4, a Class 2 Felony. (SR 11).

On February 22, 2021, a Part II Information was filed alleging Defendant to be a Habitual Offender. (SR 40).

On May 11, 2021, Defendant pled not guilty to each count contained within the Indictment. Trial took place May 25-28, 2021, at the Hughes County Courthouse. (SR 1075,

1257, 1372, 1474).

The jury returned its verdict on May 28, 2021, finding Defendant guilty of Second-Degree Murder and Aggravated Battery of an Infant. (SR 792).

Sentencing occurred June 25, 2021, Judgment of Conviction was entered June 25, 2021. (SR 807).

Defendant admitted to the allegations set forth in the Part II Information.

Notice of Appeal was filed July 22, 2021. (SR 1021).

III. STATEMENT OF LEGAL ISSUES:

1. WHETHER THE TRIAL COURT ERRED DENYING LARSON'S OTION TO SUPPRESS STATEMENTS MADE TO LAW ENFORCEMENT.

Trial Court denied Defendant's Motion to Suppress.

RELEVANT CASE LAW:

1. State v. Little Long, 2021 S.D. 38
2. State v. Brim, 2010 S.D. 74, 789 N.W.2d 80
3. Lawrence v. Weber, 2011 S.D. 19, 797 N.W.2d 783
4. State v. Johnson, 2007 S.D. 86, 739 N.W.2d 1

RELEVANT STATUTES:

1. SDCL 23A-23-1
2. SDCL 23A-23-3

2. **WHETHER THE TRIAL COURT ERRED DENYING LARSON'S MOTION FOR JUDGMENT OF ACQUITTAL; WAS THE EVIDENCE SUFFICIENT TO SUSTAIN LARSON'S CONVICTION.**

Trial court denied Defendant's Motion to Suppress.

RELEVANT CASE LAW:

1. State v. Ludemann, 2010 S.D. 9, 778 N.W.wd 618
2. State v. Stanga, 2000 S.D. 129, 617 N.W.2d 486
3. State v. Tuttle, 2002 S.D. 94, 650 N.W.2d 20

RELEVANT STATUTES:

1. SDCL 22-18-1.4
2. SDCL 22-22-16-7
3. SDCL 22-102(1)(e)

IV. STATEMENT OF THE CASE

Defendant was indicated by a Hughes County grand jury on April 28, 2020, for Second Degree Murder SDCL 22-15-(7); Manslaughter SDCL 22-16-15(1); Manslaughter SDCL 22-16-15(1); and Aggravated Battery of an Infant SDCL 22-18-1.4. (SR 11). The Honorable Bobbi Rank presided over this matter. This case was tried before a Hughes County jury May 25 through 28, 2021. (SR 1075, 1257, 1372, 1474). On the final day of trial, the jury returned a verdict of guilty to the crimes set forth in the Indictment. Defendant admitted the Part II Information alleging him to be a habitual offender.

V. STATEMENT OF FACTS

In April, 2020, Elizabeth Felix and Tristin Larson had been in a relationship for 10 to 11 months. JTT 29:16-20. They were living at 129 Case Drive, Pierre, South Dakota. JTT 26:16-23. Elizabeth had a two-year-old son, Easton, who live with them, as well. JTT 28:21-23. 129 Case Drive was the residence of Larson's mother; the four of them were living there together. JTT 28:19-23.

Felix and Larson had a good relationship. JTT 30:51-3. Felix was employed at a local sports store in Pierre, Hibbett Sports, during their relationship. JTT 30:14-25; 31:1-7. When Felix was working at Hibbett Sports, she would leave Easton at home with Tristin. JTT 30:16-20. She was comfortable leaving Easton with Larson; she trusted him to care for Easton while she was at work. JTT 31:2-7.

On April 16, 2020, Felix was scheduled to work at Hibbett Sports in the morning. JT 32:2-7. Larson and Eaton took her to work that morning. JT 32:2-9. About 20 to 30 minutes after she had been dropped off at work, she received a phone call from Larson. JTT 32:10-17. Larson told Felix that he had pushed Easton down and that he was not getting up. JTT 32:18-20. Felix told Larson to call law enforcement but he did not want to do that. JTT 33:6-10. She did not want Larson to come pick her up because she did

not want him to leave Easton alone. JTT 33:6-13. Felix's store manager was gone making a deposit so she had to wait for him to return whereupon she walked home. JTT 33:6-13. It took about 20 minutes for her to walk home. JTT 34:24-25; 35:1-7.

According to Felix's testimony at trial, Larson pushed Easton because he was not listening. JTT 36:3-6. Easton landed on his back, stood up, started crying and then he collapsed. JTT 36:8-10. Felix indicated that Larson was freaking out. JTT 36:17-21. Although Larson did not want Felix to call the cops, there is no evidence that Felix was prevented from calling law enforcement, which she failed to do.

When Felix arrived home Easton was lying on the couch. She could tell he was breathing and could hear him grunting. JTT 38:12-15. Felix asked Larson to call his mother, which he did. JTT 38:19-25. Larson's mother came over immediately at which time Easton was taken to the hospital. JTT 39:1-11.

At the hospital, the parties were informed that Easton had a brain bleed. JTT 40:1-2. Easton was subsequently flown to Sioux Falls. JTT 40:1-2. While the parties were still at the hospital and before they left for Sioux Falls, they were approached by Det. Charles Swanson, P.P.D.

Initially, Det. Swanson interviewed Larson. JTT 89:8-25. Larson told Swanson that he had been jumping on the bed with Easton and when the family dog became excited and humped on the bed with them knocking Easton off the bed resulting in his head hitting the floor. JTT 90:1-8. Larson and his mother, Melissa Marmo, met Swanson at 129 Case Drive where Swanson took additional photos. JTT 91:14-25. Swanson continued to interview Larson. He denied any direct involvement in Easton's accident and injuries. JTT 92:21-25. Swanson also interviewed Felix and she provided essentially the same story as Larson. JTT 97:2-9.

After the parties arrived in Sioux Falls, Felix spoke to Kirsten Person with Child's Vice and told her what happened.

Easton passed away on April 18, 2020. JTT 77:19-25; 78:1-4.

On the same day that Easton passed away Larson was interviewed by Det. Dusty Pelle. JTT 135:1-4. The interview was conducted at the Pierre Police Department. JTT 135:5-6. During Det. Pelle's testimony at trial, he stated:

1. Larson came to the police department voluntarily and spoke with him. JTT 145:18-24.
2. Larson knew there was a problem but did not run away. JTT 148:2-8.

3. Larson was emotional during the interview. JTT 148:14-16.

4. Larson's emotions were genuine. JTT 148:14-18.

5. Larson was apologetic and continuously reiterated that this was an accident. JTT 148:17-24.

6. Pelle believed that Larson was being truthful. JTT 149:1-8.

7. Larson was very remorseful. JTT 149:12-13.

8. Larson had some strong feelings for Easton. JTT 149:14-16.

9. Larson cared for Easton, clothed him, bathed him. JTT 149:23-25; 150:2-3.

10. No evidence of any prior abuse. JTT 150:6-8.

11. Larson did not intend for Easton to die. JTT 150:11-19.

12. Pelle did not believe that Larson is the type of person who intended for something like this to happen. JTT 150:20-25; 151:1-4.

13. At the end of Pelle's interrogation of Larson, he placed Larson under arrest for manslaughter because he believed that it was not a murder. JTT 153:20-25; 154:104.

VI. STATEMENT OF THE ISSUES

ISSUE 1. Whether the trial court erred denying Larson's motion to suppress statements made to law enforcement.

Larson filed a motion to suppress statements made to Det. Pelle. (SR 366). At the time he was interrogated, he was mentally and emotionally distraught. He was unable to voluntarily, intelligently or knowingly understand or waive his Miranda rights. (SR 366). Following a hearing on the motion, the court entered its Findings of Fact and Conclusions of Law (SR 357). Larson filed his proposed Findings of Fact and Conclusions of Law. (SR 1011). The court denied Larson's motion to suppress. (SR 446).

The court made the following findings:

#14. Almost immediately, Larson became very emotional and remorseful ...

#15. When Larson became highly emotional …

#16. There was "intermittent emotional periods …

#19. Larson told Pelle several times that it was an accident and that he never meant to hurt or kill E.F.

#22. … at times he appeared to be sleeping.

The court also made the following conclusions:

#15. The Defendant's demeanor during the interview as revealed by a recording, is often a relevant part of this totality of the circumstances analysis.

#17. Additionally, although Larson was emotional at times during the interview, it did not affect his ability to understand his rights, the waiver of his rights, or Pelle's questions.

#18. Larson's demeanor, actions, and responses during the interview revealed an individual who was intelligent, focused, and engaged in the dialogue with Pelle. He had no problem responding to Pelle regarding the understanding and waiver of his rights and clearly expressed his desire to waive his rights and speak to Pelle.

#20. Having considered the totality of the circumstances, Larson was fully aware of his *Miranda* rights and the consequences of waiving them. His will was not overborne, and he voluntarily relinquished his *Miranda* rights and spoke to Pelle.

#27. Additionally, although Larson was emotional at times during the interview and seemed to sleep when Pelle stepped out to talk to his mother, there is no indication that these matters eradicated his capacity to resist pressure. He was focused and able t quickly and completely respond to Pelle's questions throughout the interview.

#28. In considering the totality of the circumstances, the State has met its burden of proving that Larson's interview with Pelle was voluntary.

(SR 357).

Larson's proposed Findings of Fact and Conclusions of Law established that Larson's waiver of Miranda was not voluntary, intelligent or knowingly made. Larson was clearly impaired by his emotions and exhaustion. (SR 1011).

In *State v. Juarez-Ralios*, 2010 S.D. 43, N.W.2d 647, this Court noted and held:

"This court reviews the denial of a motion to suppress alleging a violation of a constitutionally protected right as a question of law by applying the de novo standard." *State v. Ludemann*, 2010 S.D. 9, ¶14, 778 N.W.2d 618, 622 (quoting *State v. Madsen*, 2009 S.D. 5, ¶11, 760 N.W.2d 370. 374). We review the voluntariness of a custodial admission and the validity of a defendant's Miranda waiver-of-rights separately, but as parallel inquiries. *State v. Stanga*, 2000 S.D. 129, ¶8, 617 N.W.2d 486, 488 (citing 2 S. Childress & M. Davis, Federal Standards of Review § 11-13, at 11-54, 55 (3d ed. 1999)). The State has the burden to prove by a preponderance of the evidence that a defendant's admissions were voluntary. *State v. Tuttle*, 2002 S.D. 94, ¶21, 650 N.W.2d 20, 30 (citing *Nix v. Williams*, 467 U.S.

431, 444 n5, 104 S.Ct. 2501, 2509 n5, 81 L.Ed.2d 377, 387-88 n5 (1984); *United States v. Matlock*, 415 U.S. 164, 178 n14, 94 S.Ct. 988, 996 n24, 39 L.Ed.2d 242, 253 n14 (1974)). On review, we consider the totality of the circumstances surrounding the interrogation as factual determinations, *Id.* ¶20 (citing *Miller v. Fenton,* 474 U.S. 104, 116, 106 S.Ct. 445, 452-53, 88 L.Ed.2d 405 (1985)), giving deference to the trial court's findings of fact. *State v. Cottier*, 2008 S.D. 79, ¶19, 755 N.W.2d 120, 128 (citing *State v. Johnson*, 2007 S.D. 86, ¶29, 739 N.W.2d 1, 11). However, the issue of whether the interrogation was ultimately voluntary is a legal question. *Tuttle*, 2002 S.D. 94, ¶20, 650 N.W.2d at 30.

A valid waiver requires a "knowing and intelligent relinquishment or abandonment of a known right or privilege." *Edwards v. Arizona*, 451 U.S. 477, 482-83, 101 S.Ct. 1880, 1884, 68 LEd2d 378 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). "To establish that a defendant validly waived his Miranda rights 'the State must show by a preponderance of the evidence that (1) the relinquishment of the defendant's rights was voluntary and (2) the defendant was fully aware that those rights were being waived and of the consequences of waiving them'" *Cottier,* 2008 S.D. 79, ¶18,

755 N.W.2d at 128 (quoting *Tuttle*, 2002 S.D. 94, ¶9, 650 N.W.2d at 26). The determination is based "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Edwards*, 451 U.S. at 481, 101 S.Ct. at 1884, 68 L.Ed.2d 378 (quoting *Johnson*, 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. 1461). "For a waiver determination, a court should consider a defendant's age, experience, intelligence, and background, including familiarity with the criminal justice system, as well as physical and mental condition.", 2002 S.D. 94, ¶7, 650 N.W.2d at 25-26 (citing *Fare v. Michael C.*¸442 U.S. 707, 724-25, 99 S.Ct. 2560, 2571-72, 61 L.Ed.2d 197 (1979)).

As the trial court correctly pointed out in Conclusion of Law Number 15, "the Defendant's demeanor during the interview, as revealed by a recording, is often a relevant part of this totality of the circumstances analysis." (SR 357). Further, as pointed out in Larson's Conclusions of Law Number 10 (SR 1011), "In *United States v. Goddy*, No. 07-2625 p7 (8th Cir. Filed July 14, 2008) (citations omitted) (noting that "[S]leeplessness, alcohol use and drug use are relevant", however, they do not automatically render a confession involuntary." "[T]he test is whether these mental impairments caused the Defendant's will to be

overcome.") *Tuttle*, 2002 S.D. 94, ¶14, 650 N.W.2d at 28; *Johnson*, 2007 S.D. 86, ¶29, 739 N.W.2d at 11.

Clearly, Larson was distraught and exhausted, i.e., impaired when asked by Det. Pelle if he understood his rights and if he wished to waive them, he stated, "Um, yeah." (Finding of Fact #12, SR 357). "Um, yeah" is not a clear and unequivocal "yes." Pelle asked two questions: 1) do you understand your rights? and 2) do you wish to waive your rights? Larson provided one answer. It is unclear precisely what he was responding to which is apparent by his emotional impairment. Appropriate responses to questions that followed do not answer the question if Larson understood Miranda and agreed to waive his right.

The trial court's findings identified herein, #14, 15, 16, 19 and 22 were not erroneous, however, the court's conclusions were inconsistent with these findings and erroneous as a matter of law, specifically Conclusions #17, 18, 20, 27 and 28. In *New Jersey v. Portash*, 440 U.S. 450, 459, 99 S.Ct. 1292, 1297, 59 L.Ed.2d 501, 510 (1979) the United States Supreme Court noted that the use of a defendant's involuntary statement in a criminal trial is a denial of due process.

Issue 2. Whether the trial court erred denying Larson's motion for judgment of acquittal; was the evidence sufficient to sustain Larson's conviction.

SDCL 23A-23-1 provides:

> 23A-23-1 (Rule 29(a)) Motion for directed verdict abolished--Judgment of acquittal entered with or without motion on close of evidence for either side--Defendant's right to offer evidence after denial of motion.
>
> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. A court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in an indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of the offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecuting attorney is not granted, the defendant may offer evidence without having reserved the right.

SDCL 23A-23-3 provides:

> 23A-23-3. (Rule 29(c)) Motion made after discharge of jury--Setting aside guilty verdict--Prior motion not required.
>
> If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged or within such further time as the court may fix during the ten-day period. If a verdict of guilty is returned a court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned a court may enter judgment of acquittal. In order to make such a motion it is not necessary to have made a similar motion prior to the submission of the case to the jury.

In *State v. Little Long*, 2021 S.D. 38, this Court noted and held:

We review a circuit court's denial of a motion for judgment of acquittal de novo to determine whether there is sufficient evidence to sustain the conviction. *State v. Brim*, 2010 S.D. 74, ¶6, 789 N.W.2d 80, 83 (citation omitted). This standard requires that we ask "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." *Lawrence v. Weber*, 2011 S.D. 19, ¶8, 797 N.W.2d 783, 785 (citation omitted). When reviewing the evidence, we accept the "most favorable inferences fairly drawn therefrom, which will support the verdict." *State v. Harruff*, 2020 S.D. 4, ¶15, 939 N.W.2d 20, 25 (citation omitted). "Moreover, 'the jury is … the exclusive judge of the credibility of the witnesses and the weight of the evidence." *State v. Johnson*, 2009 S.D. 67, ¶10, 771 N.W.2d 360, 365 (citation omitted).

Accordingly, this Court will not resolve conflicting evidence, assess the credibility of witnesses, or reevaluate the weight of the evidence. *Id.*

A. Second Degree Murder, a violation of SDCL 22-16-7.

a. SDCL 22-16-7 provides:

> Homicide is murder in the second degree if perpetrated by an act imminently dangers to others and evincing a depraved mind, without regard for human life, although without any premediated design to affect the death of any particular person, including an unborn child.

There is no evidence that Larson's actions were "imminently dangerous to others and evincing a depraved mind." Jury instruction 21 defined this phrase as follows:

> "Evincing a depraved mind, regardless of human life" means conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but also a lack of regard for the life of another.

(SR 740)

A depraved mind required, "less culpability than the element of premeditation required for first-degree murder." *State v. Harruff*, 2020 S.D. 4, ¶39, 939 N.W.2d 20, 30 (citing *State v. McCahren*, 2016 S.D. 34, ¶10, 878 N.W.2d 586, 592). "If a person is able to act with a lack of regard for the life of another, then that person can be convicted of second-degree murder." *State v. Laible*, 1999 S.D. 58, ¶13, 594 N.W.2d 328, 332 (internal quotation marks omitted). {fn8} "[W]hether conduct is imminently dangerous to others and evincing a depraved mind regardless of human

life is to be determined from the conduct itself and the circumstances of its commission." *Id.* ¶14, 594 N.W.2d at 333.

Throughout his interview with Detective Pelle, Larson maintained that what had occurred was an accident. Pelle believed that it was an accident and believed that Larson was not the type of person that would do this. Pelle also testified that when Larson pushed Easton, the push was intentional. However, what occurred after the push was accidental. The death and any injuries of Easton were unintended consequences of the push, i.e., accidental. This is inconsistent with having a "depraved mind."

Larson was Easton's caretaker, a father figure. He did everything that one of good parenting skills would expect a father to perform. This is also true on the day of Easton's death. During his interview with Pelle, he explained how he was attempting to get Easton to take a bath. There is no evidence of prior physical abuse and no history of violent behavior. Larson and his mother took Easton and his mother in to their home as part of their family and they became one family. One push resulting in unforeseen and unintended injuries and death is not second-degree murder because there is no evidence of a depraved mind. It was error for the court to deny Larson's motion for acquittal, there was

no evidence of "depraved mind" and therefore the evidence was not sufficient to support a guilty verdict.

B. Aggravated Battery of an Infant, a violation of SDCL 22-18-1.4.

a. SDCL 22-18-1.4 provides:

> Any person who intentionally or recklessly causes serious bodily injury to an infant, less than three years old, by causing any intracranial or intraocular bleeding, or swelling of or damage to the brain, whether caused by blows, shaking, or causing the infant's head to impact with an object or surface is guilty of aggravated battery of an infant.

There is no evidence that Larson acted intentionally, Nor is there any evidence that he acted "recklessly." Jury Instruction 36 defined "recklessly" as follows:

> The words "reckless" or "recklessly" or any derivative thereof mean a conscious and unjustifiable disregard of a substantial risk that one's conduct may cause a certain result or may be of a certain nature.
>
> A person is reckless with respect to circumstances when the person consciously and unjustifiably disregards a substantial risk that such circumstances may exist.

(SR 740).

The evidence fails to show that when Larson pushed Easton that there was a substantial risk that Easton would fall causing him injury. The room in which they were located was carpeted and there were no dangerous objects on the floor or in the vicinity that

he could predictably hit his head on. Larson may have been negligent or even careless, but the statute requires him to act "recklessly." See SDCL 22-1-2(1)(e). However, the evidence supports a conclusion that this was an accident.

In *State v. Armstrong*, 2020 S.D. 6, ¶28, this court discussed the difference between specific intent and general intent. *Citing State v. Huber*, 356 N.W.2d 468, 472-73 (S.D. 1974), this court in *Armstrong* noted that, "[w]hether one consciously desires a result or is practically certain that a particular result will follow an act goes toward determining whether an act was done knowingly, purposely, recklessly or negligently." There is no evidence that Larson intended to cause serious bodily injury to Easton or death. As Detective Pelle testified the push was intentional but he believed that Larson was telling the truth when he stated the injuries and death were accidental. JTT 148:22-25; 149:1-8. Pelle concluded this was not a murder but a manslaughter. JTT 153:20-25; 154:1-4. At no time did Detective Pelle or any other law enforcement officer conclude that Easton's injuries and death were the result of an intentional or reckless act by Larson. An accident is not the equivalent of a reckless act. In trying to define "accident," this court in *State v.*

Cameron, 1999 S.D. 70, ¶8, 596 N.W.2d 49, ____ relied in part on the definition of "accident" from Black's Law Dictionary as:

> Black's Law Dictionary defines "accident" in the popular sense as:
> [A] fortuitous circumstance, event, or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; fortune; mishap[.]
> Black's Law Dictionary 15 (6th Ed 1990).

The facts of this case fit an "accident" and not a reckless act.

VII. CONCLUSION

The video of the interview of Larson clearly depicts a young man who is emotional and distraught, all of which was acknowledged by Detective Pelle who was interviewing Larson. It is not clear from either his demeanor or response at the beginning of the interview whether he understood what Detective Pelle was asking him. Appropriate responses to questioning later in the interview do not mean that he understood his constitutional rights or that he knew he was waiving them or that he even knew what it meant to waive his right to remain silent. For those reasons the

motion to suppress should have been granted. In accordance with *State v. Brings Plenty*, 459 N.W.2d 390 (S.D. 1990) this case should be reversed and remanded for a new trial.[1]

Further, the evidence was not sufficient to sustain the verdicts in this case. The State's case lacked evidence of "depraved mind" for a Second-Degree Murder conviction and lacked evidence of "reckless" conduct for a conviction of Aggravated Battery of an Infant. For these reasons Larson's Motion for Judgment of Acquittal should have been granted. The convictions should be reversed.

Dated December 16, 2021.

THE SCHREIBER LAW FIRM, Prof. L.L.C.
Attorney for Appellant

_____

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[1] *Brings Plenty* held that using the defendant's statement for impeachment purposes was a denial of due process of law and reversed on those grounds and remanded for a new trial.

CERTIFICATE OF SERVICE

I, Brad A. Schreiber, hereby certify that on December 16, 2021, I caused a copy of the foregoing **APPELLANT'S BRIEF** to be served upon

Robert Mayer
Brent Kempema
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by electronic service.

_____
Brad A. Schreiber

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
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COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	32Cri20-203
vs.	)	
	)	**JUDGMENT OF CONVICTION**
TRISTIN LARSON, DOB: 03/15/1999	)	
Defendant.	)	

An Indictment was filed with this Court on the 28th day of April, 2020, charging the Defendant with the crimes of Second Degree Murder (SDCL 22-16-7), a Class B Felony, or in the alternative First Degree Manslaughter (SDCL 22-16-15(1) or (2), a Class C Felony, and Aggravated Battery of an Infant (SDCL 22-18-1.4), a Class 2 Felony, committed on or about 16th day of April, 2020.

Defendant was arraigned on said Indictment, on the 11th day of May, 2020. The Defendant, the Defendant's attorney, Brad Schreiber, and Roxanne Hammond, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all of the constitutional and statutory rights pertaining to the charges that had been filed against the Defendant, including but not limited to the right against self-incrimination, the right of confrontation, and the right to a jury trial. The Defendant pleaded not guilty by reason of insanity to the charges in the Indictment.

A pre-trial motions hearing was held on the 14th day of May, 2021. The Defendant, the Defendant's attorney, Brad Schreiber, and the prosecuting attorneys, Hughes County State's Attorney Jessica LaMie, Deputy Attorney General Robert Mayer, and Assistant Attorney General Brent Kempema were present. The Defendant amended his plea to not guilty to the charges in the Indictment.

A trial commenced on the 20th day of May, 2021 in Pierre, South Dakota on the charges. On the 28th day of May, 2021, the jury returned a verdict of guilty of Second Degree Murder (SDCL 22-16-7), a Class B Felony, and Aggravated Battery of an Infant (SDCL 22-18-1.4), a Class 2 Felony.

On the 28th day of May, 2021 the Court advised Defendant of all his statutory and constitutional rights pertaining to the Part II Information. Defendant admitted the allegations contained within the Part II Information for Habitual Offender, making the sentencing level for

the crime of Aggravated Battery of an Infant (SDCL 22-18-1.4), as a Class C Felony. It is therefore,

ORDERED, that a Judgment of guilty is entered as to the following: Second Degree Murder (SDCL 22-16-7), a Class B Felony, and Aggravated Battery of an Infant (SDCL 22-18-1.4), a Class 2 Felony

SENTENCE

On the 25th day of June, 2021, the Court asked the Defendant, if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

SECOND DEGREE MURDER

ORDERED, that the Defendant, Tristin Larson, shall serve **life imprisonment** in the South Dakota State Penitentiary, for the charge of Second Degree Murder (SDCL 22-16-7, a Class B Felony, and he shall receive **credit for four hundred thirty-three (433) days previously served**. It is further

ORDERED, that the Defendant shall pay court costs of $106.50 dollars; and shall pay restitution in the amount of $9,178.57 to Hughes County for costs of prosecution, 104 E. Capitol Ave., Pierre, SD 57501; and court appointed attorney fees as submitted by Brad Schreiber according to a schedule prescribed by the South Dakota Department of Corrections. It is further

ORDERED, that the sentence shall run **concurrent** with the sentence announced for Aggravated Battery of an Infant.

AGGRAVATED BATTERY OF AN INFANT

ORDERED, that the Defendant, Tristin Larson, shall serve **fifty-five (55) years** in the South Dakota State Penitentiary, and he shall receive **credit for four hundred thirty-three (433) days previously served**. It is further

ORDERED, that the Defendant shall pay court costs of $106.50 dollars. It is further

ORDERED, that the sentence shall run **concurrent** with the sentence announced for Second Degree Murder.

DATED this 25th day of June, 2021, in Pierre, Hughes County, South Dakota.

ATTEST:
Kelli Sitzman
Clerk of C
By:
(SEAL)

BY THE COURT:

Bobbi J. Rank
Circuit Court Judge

NOTICE OF RIGHT TO APPEAL

You, Tristin Larson, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of South Dakota and the State's Attorney of Hughes County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within thirty (30) days from the date that this Judgment is filed with said Clerk.

STATE OF SOUTH DAKOTA) SS.		IN CIRCUIT COURT
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, PLAINTIFF,	)	
VS.	)	ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS
TRISTIN ALLAN LARSON, DEFENDANT.	)	C20-203

This matter having come before the court on February 22, 2021; the Defendant appearing in person via ITV and by and through his attorney, Brad Schreiber; the State appearing by and through Deputy Attorney General Robert Mayer, Assistant Attorney General Brent Kempema, and Hughes County State's Attorney Jessica LaMie; the Court having considered the evidence and arguments at the hearing and the briefs of the parties, and being in all things duly advised, now therefore:

IT IS HEREBY ORDERED that Defendant's Motion to Suppress in this matter is hereby denied. It is further,

ORDERED that the Court's written findings and conclusions dated the 4th day of May, 2021 are incorporated herein by this reference as if set forth in full.

Dated this 19th day of May, 2021, in Pierre, Hughes County, South Dakota.

BY THE COURT:

Bobbi J. Rank

Bobbi J. Rank
Circuit Court Judge

Attest:
Marshall, Stephanie
Clerk/Deputy

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29712

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TRISTIN ALLAN LARSON,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
6th JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE BOBBI RANK
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed July 22, 2021

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TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

PRELIMINARY STATEMENT

The transcripts of Larson's trial and confession will be referenced as TRIAL and CONFESSION respectively followed by citation to the pertinent page/line number.

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

DID THE TRIAL COURT ERR IN DENYING LARSON'S MOTION TO SUPPRESS HIS CONFESSION?

State v. Ralios, 2010 SD 43, 783 N.W.2d 647

State v. Cottier, 2008 SD 79, 755 N.W.2d 120

United States v. Jimenez, 478 F.3d 929 (8th Cir. 2007)

State v. Lundy, 195 So.3d 587 (Ct.App.4th La.)

The trial court found that Larson's emotional state during his interrogation did not vitiate the voluntariness of his confession.

WAS THE EVIDENCE SUFFICIENT TO SUSTAIN LARSON'S CONVICTIONS FOR SECOND-DEGREE MURDER AND AGGRAVATED BATTERY OF AN INFANT?

State v. Trogdon, 715 S.E.2d 635 (Ct.App.N.C. 2011)

State v. Huggins, 321 S.E.2d 584 (Ct.App.N.C. 1984)

State v. Miller, 2014 SD 49, 851 N.W.2d 703

State v. Wilcox, 441 N.W.2d 209 (S.D. 1989)

The trial court denied Larson's motion for judgment of acquittal.

STATEMENT OF THE CASE AND FACTS

That Tristin Larson killed 25-month-old Easton Felix is not in dispute, nor are most of the facts and circumstances surrounding the killing described in Larson's brief. Larson admits to striking a fatal blow to Easton's head, not calling 911 for approximately 40 minutes after the

child became unresponsive, and trying to cover up the crime. For purposes of this appeal, the operative disputed fact concerning the killing is whether Larson's state of mind at the time he killed Easton Felix met the *mens rea* elements of second-degree murder and aggravated battery of an infant.

The principal evidence of Larson's state of mind at the time of Easton's killing comes from Larson's belated confession. Which is why Larson sought to suppress it. Given the option of either second-degree murder or first-degree manslaughter, the jury convicted Larson of the former, as well as the aggravated battery charge. Larson now appeals.

ARGUMENT

Larson challenges the trial court's denial of his motion to suppress his confession and the sufficiency of the evidence supporting his convictions for second-degree murder and aggravated battery of an infant. Neither ground is a basis for relief.

A. The Trial Court Did Not Err In Denying Larson's Motion To Suppress His Confession

Larson claims that he was incapable of voluntarily, knowingly and intelligently waiving his *Miranda* rights at the time of his interrogation because he was mentally and emotionally distraught. APPELLANT'S BRIEF at 8. Larson further argues that his response ("Um, yeah") to the question of whether he wished to waive his rights and speak to the investigating detective was not a clear and unequivocal affirmative response. APPELLANT'S BRIEF at 13.

The trial court's findings of fact reflect that it took account of Larson's emotional state at the time of his confession. Indeed, Larson concedes that most of the trial court's findings of fact in this regard (FOF 14, 15, 16, 19 and 22) are not erroneous. Thus, the issue is simply whether the legal conclusions the trial court drew from these facts are in error.

A suspect's mental state "is one of the circumstances to be considered by the trial judge in [the] determination of voluntariness." *State v. Waloke,* 2013 SD 55, ¶ 23, 835 N.W.2d 105, 112. But the fact that a suspect is "visibly upset is not enough to override h[is] specific consent to waive h[is] rights" and speak to law enforcement. *United States v. Jimenez,* 478 F.3d 929, 933 (8th Cir. 2007). An impaired mental state does not render a *Miranda* waiver "*per se* involuntary." *Waloke,* 2013 SD 55 at ¶ 23, 835 N.W.2d at 112. Rather, the inquiry's focus is on whether a suspect "had sufficient mental capacity at the time to know what he was saying and to have voluntarily intended it." *Stinson v. Dooley,* 2008 WL 4200132, *10 (D.Ct.S.D.). Being "visibly upset" or "tired" are not grounds to find a waiver involuntary so long as a suspect appears "coherent and engaged" during an interrogation. *Jimenez,* 478 F.3d at 933; *Stinson,* 2008 WL 4200132 at *11; *United States v. Sutherland,* 2008 WL 11519026, *13 (D.Ct.S.D.)(facts that suspect was crying and upset were "not enough to vitiate waiver").

For example, in *State v. Lundy,* 195 So.3d 587, 597 (Ct.App.4th La.), the court found that a defendant "although upset, was not apparently so distraught that he could not make a rational choice to waive [his] rights and speak to police." Likewise, in *State v. Cottier,* 2008 SD 79, ¶¶ 19-23, 755 N.W.2d 120, 129-130, the defendant's sleeplessness, alcohol and drug use did not "automatically render [his] confession involuntary." Where there was no evidence that the defendant "was too tired to voluntarily speak with law enforcement," or that his "mental or physical conditions made him overly susceptible to the pressures of the interrogation," the trial court did not err in finding that the defendant's statements had been voluntary. *Cottier,* 2008 SD 79 at ¶¶ 21, 23, 755 N.W.2d at 129-130; *Waloke,* 2013 SD 55 at ¶ 23, 835 N.W.2d at 112 (lack of sleep and intoxication did not vitiate voluntariness where defendant provided coherent responses to questioning).

Consistent with these authorities, the trial court properly found that, despite his displays of emotion, Larson understood Detective Pelle's questions, was able to focus and engage in a dialogue with Pelle, answer questions appropriately, acted according to his will and did not succumb to pressure (COL 17, 18, 20, 27, 28). The trial court's conclusions are supported by its findings that:

- "When Larson became highly emotional, Pelle waited patiently for Larson to compose himself before moving on with his questions." FOF 15; *Lundy,* 195 So.3d at 597 (although "upset at the

beginning," defendant "composed himself and intelligently responded to questions").

- "[D]espite intermittent emotional periods, Larson was fully engaged with Pelle and clearly understood Pelle's questions." FOF 17; *Stinson,* 2008 WL 4200132 at *11 (though tired, the defendant was "coherent and engaged").
- "Larson was able to give detailed responses and demonstrations" in regard to questions about pertinent facts. FOF 18; *Lundy,* 195 So.3d at 597 (suspect able to provide "a coherent account of his whereabouts and activities during the days surrounding the armed robbery").
- "Larson never told Pelle that he wanted to stop questioning or invoke his right to counsel." FOF 20; *State v. Strozier,* 2013 SD 53, ¶ 18, 834 N.W.2d 857, 863 (suspect's head injury did not vitiate voluntariness where he never appeared to be in pain or asked to stop questioning because of head pain).

In light of these facts, the trial court correctly concluded that Larson's mental and emotional state at the time of his interrogation did not vitiate the voluntariness of his admissions. *Cottier,* 2008 SD 79 at ¶¶ 21, 23, 755 N.W.2d at 129-130; *Waloke,* 2013 SD 55 at ¶ 23, 835 N.W.2d at 112.

Larson further alleges that his *Miranda* waiver is invalid because "Um, yeah" is not a clear and unequivocal waiver. CONFESSION, Exhibit 16A at 2/2; RECORD at 537/2. According to Larson, he was asked a

compound question – whether he (1) wished to waive his rights and (2) speak to Detective Pelle – so the answer "Um, yeah" is "unclear [about] precisely what he was responding to." APPELLANT'S BRIEF at 13.

State v. Ralios, 2010 SD 43, ¶ 32, 783 N.W.2d 647, 657, disposes of Larson's argument. First, the law does not require "a clear and unequivocal 'yes'" to effect a *Miranda* waiver.[1] An "express verbal . . . waiver from a defendant is not required to satisfy the constitutional requirements of a knowing, intelligent and voluntary waiver." *Ralios,* 2010 SD 43 at ¶ 34, 783 N.W.2d at 657. *Ralios* and other cases have found that "[a] simple 'yeah' . . . [is] enough to express a waiver verbally." *Ralios,* 2010 SD 43 at ¶ 32, 783 N.W.2d at 657; *Lundy,* 195 So.3d at 597; *State v. Tuttle,* 2002 SD 94, ¶ 15, 650 N.W.2d 20, 29.

Here, Larson's waiver is supported by more than an "Um, yeah." After receiving full *Miranda* warnings, Larson was asked if he understood his rights, to which he unequivocally answered "Yes." CONFESSION, Exhibit 16A at 1/47; RECORD at 536/47. "A valid *Miranda* waiver can be inferred when the defendant understands the rights and engages in a course of conduct reflecting a desire to give up those rights." *Ralios,* 2010 SD 43 at ¶ 32, 783 N.W.2d at 657. Larson's "Um, yeah" response, and subsequent conversation with Detective Pelle, reflect a free and voluntary waiver of his *Miranda* rights.

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[1] Larson confuses the clear and unequivocal statement required to invoke *Miranda* and assert the right to counsel after questioning has begun with the standard applicable to initial waivers. *State v. Lewandowski,* 2019 SD 2, ¶ 29, 921 N.W.2d 915, 923.

Second, the compound nature of the question of whether Larson wished to waive his rights and speak to Detective Pelle did not render Larson's affirmative response unknowing, unintelligent or involuntary. To begin with, the question was not actually compound because waiver and speaking to the detective are essentially the same thing. *State v. Diaz,* 2014 SD 27, ¶ 47, 847 N.W.2d 144, 160 (waiver can be inferred by speaking to investigator after affirmatively signifying understanding of rights). Thus, Pelle was not asking two different questions in one sentence but the same question two different ways. But, even if the question was compound, "an officer may use a compound question such as 'do you wish to waive these rights and do you want to talk to me at this time?'" *Ralios,* 2010 SD 43 at ¶ 32, 783 N.W.2d at 657. "An affirmative response to the compound question can then constitute a voluntary and knowing waiver." *Ralios,* 2010 SD 43 at ¶ 34, 783 N.W.2d at 657. The trial court did not err in finding that Larson's "Um, yeah" answer to the "compound" waiver question, after affirmatively signifying that he understood his rights, did not render his confession involuntary. *Diaz,* 2014 SD 27 at ¶ 47, 847 N.W.2d at 160.

B. The Evidence Was Sufficient To Support Larson's Conviction Of Second-Degree Murder

Larson argues that the evidence was insufficient to meet the *mens rea* elements of second-degree murder and aggravated battery of an infant. The *mens rea* of second-degree murder involves acting with "a

depraved mind, without regard for human life." SDCL 22-16-7. Aggravated battery of an infant entails "recklessly" "causing any intracranial or intraocular bleeding, or swelling of or damage to the brain, whether caused by blows . . . or causing the infant's head to impact with an object or surface." SDCL 22-18-1.4. As the jury found, the evidence was sufficient to sustain Larson's convictions of both charges.

One need look no further than Larson's own confession for evidence of depravity, disregard for human life and reckless infliction of intracranial/intraocular injury. Larson is someone with "anger issues." CONFESSION, Exhibit 16A at 12/5; RECORD at 547/5. Larson was "tired" of watching Easton while his mother went to work. CONFESSION, Exhibit 16A at 4/29; RECORD at 539/29; RECORD at 506/EXHIBIT 4A at 3/20, 3/26, 4/26; TRIAL 1 at 31/15. When Easton did not want to take a bath and started whining, Larson threatened to spank him, which caused Easton to start crying. CONFESSION, Exhibit 16A at 3/36-45, 9/35-47; RECORD at 538/36-45, 544/35-47. In his brief, Larson says he "got mad" and "pushed" Easton. CONFESSION, Exhibit 16A at 3/42, 22/41; RECORD at 538/42. Easton fell backward and hit his head on the floor. CONFESSION, Exhibit 16A at 3/44-45; RECORD at 538/44-45.

For Larson to characterize what he did as a "push" puts it rather too mildly. In truth, an enraged Larson told Easton to "get the f*ck away

from me" and delivered a "solid hit" to "the top of [Easton's] forehead" that "dropped him." CONFESSION, Exhibit 16A at 10/35, 23/50-24/6; RECORD at 545/35, 558/50-559/6; RECORD at 506/EXHIBIT 4A at 3/8, 22/41. Larson's blow was "hard," "too hard," so hard that it knocked Easton off his feet and he "flew back" and hit his head on the floor "pretty hard," making a "loud" sound. CONFESSION, Exhibit 16A at 9/46, 15/5, 15/10, 22/33-41; RECORD at 544/46, 550/5, 550/10, 557/33-41.

Easton tried to get back to his feet but instantly crumpled and became unresponsive. Larson watched as Easton "started f*ckin' shakin' and shit." CONFESSION, Exhibit 16A at 11/45-49; RECORD at 546/45-49. Easton's eyes rolled back in his head and he started convulsing and seizing. CONFESSION, Exhibit 16A at 16/33-34; RECORD at 551/3-34. Easton threw up and urinated himself. RECORD at 510/EXHIBIT 11A at 2/32; TRIAL 1 at 39/4. His breathing became slow and labored. CONFESSION, Exhibit 16A at 19/34; RECORD at 554/34.

As Easton was dying at his feet, Larson only tried to revive him by shaking him and yelling at him to wake up. CONFESSION, Exhibit 16A at 3/20; RECORD at 538/20. Larson did not call 911 because he was "scared" for his own self. CONFESSION, Exhibit 16A at 18/49, 19/3, 19/10-25; RECORD at 553/49, 554/3, 554/1-25; TRIAL 1 at 33/6, 37/3, 38/8, 38/20.

Larson himself recognized the obvious depravity and reckless indifference to infant life of his actions. Larson "know[s] what people think about people that do shit like this." CONFESSION, Exhibit 16A at 19/13; RECORD at 554/13. Easton was "just a baby." CONFESSION, Exhibit 16A at 15/15; RECORD at 550/15. Inherent in SDCL 22-18-1.4 is common knowledge that children under three are vulnerable to fatal intracranial bleeding if struck in the head "too hard." Larson knew the risk associated with hitting Easton's forehead because his first thought was "f*ck. He's f*cking dead." CONFESSION, Exhibit 16A at 11/47; RECORD at 546/47; *State v. Falkenberg*, 2021 SD 59, ¶35, 965 N.W.2d 580, 590 (defendant's comment that he "knew right away" that victim was dead after striking her head evidenced consciousness of depravity).

"That was my girlfriend's kid," Larson told Pelle, "What the f*ck? Who does that? What the f*ck?" CONFESSION, Exhibit 16A at 11/45-49; RECORD at 546/45-49. Who hits someone "so small" so "hard?" CONFESSION, Exhibit 16A at 16/42, 19/47; RECORD at 544/46, 551/42. In the jury's estimation, someone who is depraved and recklessly indifferent to tender life.

The autopsy confirms the depravity, recklessness and indifference to life of Larson's behavior . . . and also calls into question that he "pushed" or struck Easton only once. The autopsy found three separate contusions on Easton's left cheek, left ear and left jaw and significant intracranial and intraocular hemorrhaging consistent with blunt force

trauma to the head. EXHIBIT 41/RECORD at 601-602; EXHIBIT 10; TRIAL 1 at 88/12; TRIAL 1 at 116/5-17; TRIAL 2 at 196/17-198/7, 199/18; EXHIBITS 33, 34, 37. In particular, the autopsy found bilateral hemorrhaging in the frontal lobes just behind the top of Easton's forehead where Larson admits to hitting him. TRIAL 1 at 116/9, 126/7-127/22; EXHIBIT 41/RECORD at 602. The three separate contusions to Easton's left ear, jaw and cheek (which Larson did not admit to) were "highly concerning for physical abuse." TRIAL 2 at 197/10, 197/20, 198/7.

Evidence of "ADDITIONAL BLUNT FORCE INJURY" of unexplained origin – three contusions on the right upper arm, elbow and forearm, four contusions on the right and left legs – suggest that Larson delivered more than one "push"/blow to Easton's head and body. EXHIBIT 41/RECORD at 602; EXHIBITS 6, 7, 8, 9; TRIAL 1 at 85/15-88/6; TRIAL 2 at 199/10; EXHIBIT 37.

According to Larson's logic, only intentionally striking an infant in the forehead intentionally "too hard" is depraved and reckless, but intentionally striking an infant in the forehead unintentionally "too hard" is not. Larson's logic fails to appreciate the depravity and recklessness of intentionally hitting an infant in the forehead at all – period – given the potential for serious injury inherent in such conduct. Case authorities, however, have long recognized the depravity and recklessness of such abuse:

- In *State v. Trogdon,* 715 S.E.2d 635 (Ct.App.N.C. 2011), the court found that, where a defendant resented his girlfriend's child, was jealous of her relationship with the child's father, and the child suffered four impacts to his head while in the defendant's sole custody, the evidence was sufficient for the jury to find the malice element of second-degree murder. The court remarked that "while malice is not necessarily inferred where death results from an attack upon a strong or mature person, malice may be inferred where death results from an attack made by a strong person and inflicted upon a young child, because '[s]uch an attack is reasonably likely to result in death or serious bodily injury' to the child." *Trogdon,* 715 S.E. 2d at 643, quoting *State v. Elliot,* 475 S.E.2d 202, 213 (1996).
- In *State v. Huggins,* 321 S.E.2d 584 (Ct.App.N.C. 1984), the defendant admitted to striking a 2½-year-old child hard with a clenched fist. The defendant claimed lack of malice sufficient to sustain his conviction of second-degree murder. The *Huggins* court found that "in a fight between men, the fist . . . would not . . . be regarded as endangering life or limb. But it is manifest, that a willful blow with the fist of a strong man, on the head of an infant . . . producing death, would import malice from the nature of the injury, likely to ensue." *Huggins,* 321 S.E.2d at 587; *Falkenberg,*

2021 SD 59 at ¶ 35, 965 N.W.2d at 590 (strength of defendant relative to victim an indicium of depravity and recklessness).

- In *State v. Miller,* 2014 SD 49, ¶ 29, 851 N.W.2d 703, 709, this court found that, where a defendant became frustrated with his four-month-old child and shook or struck him, that the evidence was sufficient to sustain the defendant's conviction of second-degree murder and aggravated assault.
- In *State v. Wilcox,* 441 N.W.2d 209 (S.D. 1989), this court found that the evidence of three blows to a child's abdomen, which resulted in septic shock, was sufficient to sustain the defendant's conviction for second-degree murder. Wilcox admitted striking the child while she was alone in his care but claimed that her fatal injuries were caused when she fell down the stairs after being struck. While the depraved or reckless nature of the defendant's actions were not directly at issue in *Wilcox,* the court's descriptions of child battering as "a disgrace to civilized society" and "attacks . . . so cowardly that they are hidden from [a child's] parents" leave little doubt of the law's and society's view of such conduct. *Wilcox,* 441 N.W.2d at 214.

Here, the evidence that Larson delivered at least one "solid hit" to 2-year-old Easton's forehead was sufficient to meet the elements of depravity and recklessness. Larson's acknowledgement that striking a baby is inherently wrong ("Who does that?") and failure to call 911 evidence his

consciousness of the depravity and recklessness of his actions. *Falkenberg,* 2021 SD 59 at ¶ 35, 965 N.W.2d at 590 (after-the-fact conduct can evidence consciousness of guilt).

CONCLUSION

While understandably emotional and upset from the realization that he had killed an infant with his bare hands, and the consequences that incident would have on the remainder of his life, Larson was not so distraught that he was unable to understand and voluntarily waive his *Miranda* rights. The law has recognized and condemned the depravity and recklessness of Larson's conduct for long enough to affirm the sufficiency of the evidence against him in this case. Larson has not identified availing grounds for relief from his convictions for second-degree murder and aggravated battery of an infant.

Dated this 5th day of January 2022.

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

/s/ Paul S. Swedlund
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CERTIFICATE OF COMPLIANCE

1. I certify that 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 3,008 words.

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

Dated this 5th day of January 2022.

/s/ Paul S. Swedlund
Paul S. Swedlund
Solicitor General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellee's Brief was served via electronic mail on Brad Schreiber, counsel for Appellant, at brad@xtremejustice.com.

Dated this 5th day of January 2022.

/s/ Paul S. Swedlund
Paul S. Swedlund
Solicitor General

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Appeal No. 29712

STATE OF SOUTH DAKOTA
Appellee,

vs.

TRISTIN ALLAN LARSON
Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE BOBBI RANK
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed July 22, 2021

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TABLE OF CASES

CASES:

OTHER CITATIONS

I. PRELIMINARY STATEMENT

Throughout this brief, Defendant/Appellant, Tristin Allan Larson, will be referred to as "Defendant, Appellant or Larson." The State will be referred to herein as "State, Appellee or Prosecutor." References to transcripts and records will be referred to as follows:

Settled Record ..... SR

Trial Transcript ..... TT

Each citation will be followed by the appropriate page number(s) and line number(s).

II. JURISDICTIONAL STATEMENT

Appellant relies on the jurisdictional statement set forth in Appellant's Brief.

III. ISSUES:

1. **WHETHER THE TRIAL COURT ERRED DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS MADE TO LAW ENFORCEMENT.**

2. **WHETHER THE TRIAL COURT ERRED DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.**

IV. STATEMENT OF THE CASE

Appellant relies on the statement of the case set forth in Appellant's Brief.

V. STATEMENT OF FACTS AND STATEMENT OF LAW

Appellant relies on the statement of the facts set forth in Appellant's Brief.

1. DID THE TRIAL COURT ERR DENYING THE MOTION TO SUPPRESS?

To establish that a defendant validly waived his Miranda rights the state must show by a preponderance of the evidence that 1) the relinquishment of the defendant's rights was voluntary and 2) the defendant was fully aware that those rights were being waived and of the consequences of waiving them. *State v. Cottier*, 2008 S.D. 79, ¶ 18, 755 N.W.2d 20, 218. Sleeplessness is relevant to the inquiry. *Cottier*, 2008 S.D. 79, ¶ 19, 855 N.W.2d at _____. Other mental impairments are relevant also. *Id.* A Miranda waiver may be inferred from the defendant's understanding of the rights coupled with a course of conduct reflecting a desire to give up those rights. (citations omitted). A defendant's understanding of Miranda rights is an essential component to inferring waiver. *State v. Tuttle*, 2002 S.D. 54, ¶ 16, 650 N.W.2d 20 _____.

The trial court found that Larson was very emotional, highly emotional, there were intermittent emotional periods, and at times he appeared to be sleeping. (SR 357). Neither the court's findings of fact or conclusions evidence that Larson was "fully aware" that his rights were being waived or the consequences of waiving them. *Cottier*, 2008 S.D. 79, ¶ 18, N.W.2d 828. The state has completely

failed to direct this court to any facts in this case that show Larson was "fully aware" that his rights were being waived and that he understood the consequences of waiving them. A response of "Um, yeah" does not satisfy either of these factors. (SR 357, Finding of Fact #12). Pelle testified at the hearing regarding Larson's motion to suppress. The following colloquy took place.

Q. As you began to speak with the defendant in the interview room, what advisements, if any, did you give him?

A. I read him his Miranda Rights.

Q. And when you say you read him his Miranda Rights, was that something you had memorized or did you physically read something?

A. I read it off of a Miranda Rights card.

Q. And is that a card that you typically use in your duties as a law enforcement officer?

A. Yes.

Q. And to your knowledge, does that card that you use contain all of the rights that are expressed in Miranda?

A. Yes.

Q. As you understand them?

A. As I understand them, yes.

Q. Sure. Following your reading of the Miranda advisement to the defendant, what, if anything, did you ask him?

A. I asked him if he understood his rights to which he stated yes, and I asked him if he wished to waive his rights to speak with me. I believe his - I believe he stated umm and then stated yeah.

Q. During the course of your interview with the defendant, did he give you any indication at any point that he didn't understand his rights?

A. No.

Q. As you're interviewing the defendant, did he ever give you any indication that he would like questioning to stop?

A. No.

Q. As you're going through the interview, at some point, he's placed under arrest; correct?

A. Yes.

Q. Okay. At what point in the interview was that?

A. At the end.

MHT 12:7-24, 13:1-14.

None of the questions propounded by the prosecutor give any indication or inference that Larson understood the

consequences of a waiver. The record is void of such evidence.

An inference that he understands his rights is not the equivalent of understanding the consequences of a waiver. The trial court erred in failing to suppress Larson's statements.

2. Did the trial court err denying Larson's motion for judgment of acquittal.

A. Second Degree Murder

In *State v. Little Long*, 2021 S.D. 38, this Court noted and held:

We review a circuit court's denial of a motion for judgment of acquittal de novo to determine whether there is sufficient evidence to sustain the conviction. *State v. Brim*, 2010 S.D. 74, ¶6, 789 N.W.2d 80, 83 (citation omitted). This standard requires that we ask "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." *Lawrence v. Weber*, 2011 S.D. 19, ¶8, 797 N.W.2d 783, 785 (citation omitted). When reviewing the evidence, we accept the "most favorable inferences fairly drawn therefrom, which will support the verdict." *State v. Harruff*, 2020 S.D. 4, ¶15, 939 N.W.2d 20, 25 (citation

omitted). "Moreover, 'the jury is … the exclusive judge of the credibility of the witnesses and the weight of the evidence." *State v. Johnson*, 2009 S.D. 67, ¶10, 771 N.W.2d 360, 365 (citation omitted).

There is no evidence that Larson's actions were imminently dangerous to others and evidencing a depraved mind. Detective Pelle was consistent in his testimony that he believed this was an accident, Larson was not the type of person that would do this, the injuries and death of Felix were unintentional consequences. TT 148:22-25; 149:1-8. Even the testimony of Dr. Brad Randall, pathologist, supported Pelle's testimony that arriving at conclusion of whether or not the injuries and death of the child were intentional or accidental could not be determined. TT 309:16-20; 310:2-25; 311:1-3. Dr. Randall went so far as to state that there was evidence that the child lost his footing and fell over backwards. TT 310:2-12. This evidence is inconsistent with jury instruction 21 which states in part:

> "Evincing a depraved mind, regardless of human life" means conduct demonstrating an indifference to the life of other, that is not only disregard for the safety of another but also a lack of regard for the life of another.

(SR 740). An accident does not fit within this definition of a "depraved mind." Accident, is defined in Black's Law Dictionary 15 (6th Ed. 1990).

> Black's Law Dictionary defines "accident" in the popular sense as:
> [A] fortuitous circumstance, event, or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; fortune; mishap[.] (Emphasis added).

Black's Law Dictionary 15 (6th Ed 1990). This was an unusual and unexpected result; a mishap.

Pelle's testimony gives no indication that Larson acted in disregard for the safety of another or lacked regard for the life of another. Pelle did not believe this was a murder but rather manslaughter. Pelle did not provide any testimony that would be consistent with a belief or opinion that Larson acted with a depraved mind.

Detective Pelle testified as follows:

Q. And from what we saw in the video you would agree that he was emotional during the entire interview?

A. Yes.

Q. Okay. Genuinely so?

A. I believe so.

Q. Okay. Did a lot of apologizing during that interview; correct?

A. Yes.

Q. He was consistent telling you that this was an accident, fair?

A. That he did not mean to cause the death, yes.

Q. Correct. Now, he told you the truth about what was going

JTT 148:14-25

on or what happened; correct?

A. From what I knew of the situation, I had to take his word for it, but I believed it to be the truth.

Q. You believed what he told you was the truth?

A. I believe so.

Q. No doubt in your mind that he had some strong feelings for this young boy?

A. I believe he did.

Q. In the information that you had prior to him getting there is that he was actually a father figure for Easton, wasn't he?

A. I don't know if I ever head the term father figure, but I knew that they lived in the home together and he watched the child.

JTT 149:14-22.

Q. No other evidence that he had ever abused or done anything to Easton prior to this occasion; correct?

A. Other than spank him.

Q. Other than spank him for disciplinary reasons?

A. Not that I'm aware of.

Q. And he told you that he did not mean for this to happen; right?

A. Didn't mean for the child to die, yes.

Q.

JTT 150:6-12.

Q. At one point in time - tell me if you recall this. At one point in time, I think you said to him, you did not think he was that - well, let me back up. He had expressed to you that he did not intend for this to happen. You agree he told you that?

A. I believe so.

JTT 150:20-25

Q. And do you recall your response being that you did not think he was that kind of person. You did not see him as that type of person.

A. Yes.

JTT 151:1-4.

Dusty Pelle's father was a Pierre police officer and also served as a sheriff of Haakon County. He's been around

law enforcement for years, learning from his father and other friends who might be in law enforcement. He's had a lot of training and this was not his first manslaughter death investigation. He has interviewed many suspects of various cases. At the end of his interview of Tristin Larson he placed him under arrest for manslaughter because he felt that that fit the statute at the time. He also indicated that he has been reading South Dakota statutes for years and has been trained in those statutes to understand them.

JTT 153 and 156.

B. AGGRAVATED BATTERY OF AN INFANT.

The State did not brief this argument and Larson will rely upon the argument set forth in the Appellant's Brief.

VIII. CONCLUSION

The trial court erred denying Larson's motion to suppress. In addition, there was not sufficient evidence to support a conviction for either Second Degree Murder or Aggravated Assault of an Infant.

Dated February 21, 2022.

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CERTIFICATE OF SERVICE

I, Brad A. Schreiber, hereby certify that on February 21, 2022, I caused a copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served upon

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