IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

WILLIAM THOMAN,

Defendant and Appellant.

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

THE HONORABLE JEFFREY CONNOLLY

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes **Page**

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PRELIMINARY STATEMENT

Throughout this Appellant's Brief, Defendant below and Appellant here, William Thoman, will be referred to as "Defendant" or by name. Plaintiff and Appellee, the State of South Dakota, will be referred to as "State" or "prosecution." Citation to the transcript of the jury trial shall be referenced as "JT" followed by the volume number and the specific page number(s). The transcript of the sentencing hearing that took place on September 20, 2019, will be referenced as "ST" followed by the specific page number(s).

This appeal challenges the application of the criminal solicitation statute codified at SDCL 22-4A-1(1), for ease of the reader, frequently this statute will be referred to as the "solicitation statute." Aiding, abetting or advising — Accountability as principal, codified at SDCL 22-3-3 will be referred to as "aiding or abetting." All other documents within the clerk's index/settled record shall be referred to as "SR" followed by the page number.

JURISDICTIONAL STATEMENT

On September 26, 2018, a Pennington County grand jury returned an indictment against Mr. Thoman, alleging one count of attempted murder in the first degree, a violation of SDCL 22-16-4(1) and SDCL 22-4-1 and one count of criminal solicitation, a violation of SDCL 22-4A-1(1). See Indictment at SR 18. The night before trial, the prosecution dismissed the attempted murder in the first-degree count and cited this Court's decision in *State v. Disanto*, 2004 S.D. 112, 688 N.W.2d 112 in an email to the trial court. JT, Jury Selection, at pp. 1-2. On August 22, 2019, a Pennington County jury found Mr. Thoman guilty on the remaining count of criminal solicitation. JT, Vol. IV, at p. 610. Thereafter, on September 20, 2019, the trial court sentenced Mr. Thoman to serve fifteen-years (15) of incarceration in the South Dakota State Penitentiary with ten (10) years suspended. See, Judgment of Conviction at Appendix A1 and SR 18. The Judgment of Conviction was filed on September 26, 2019. Id.

A Notice of Appeal from the Judgment of Conviction was filed on October 7, 2019. See SR 649. Mr. Thoman brings this appeal as a matter of right pursuant to SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUES

1. **The trial court should have granted Mr. Thoman's pre-trial Motion to Dismiss for Failure to Describe a Public Offense and his related post trial Motion to Arrest Judgment. A plain reading of the solicitation statute establishes that the legislature did not intend to criminalize the conduct that occurred in this case.**

   The trial court denied both the defense's written Motion to Dismiss for Failure to Describe a Public Offense and the oral Motion to Arrest Judgment. See, ST, at pp. 5-16.

   State v. DiSanto, 2004 S.D. 112, 688 N.W.2d 201.
   Mizahi v. Gonzales, 492 F.3rd 156 (2nd Cir. 2007).
   United States v. Williams, 553 U.S. 285, 300, 128 S.Ct. 1830 (2008).

2. **The trial court should have instructed the jury on each element of aiding, abetting or advising.**

   The trial court declined to give a jury instruction that contained each element of the crime of aiding, abetting or advising. JT, Vol. IV, at pp. 538-48.

   State v. Jucht, 2012 S.D. 66, 821 N.W.2d 629.
   State v. Shearer, 1996 S.D. 52, 548 N.W.2d 792.
   Vetter v. Cam Wal Elec. Co-op., Inc., 2006 S.D. 21, 711 N.W.2d 612.

3. **The trial court should have granted Mr. Thoman's motion for judgment of acquittal.**

   The trial court denied the defense's Motion for a Judgment of Acquittal. See, ST, at pp. 5-16.

   State v. Carter, 2009 S.D. 65, 771 N.W.2d 329.

4. **The trial court should have sustained the defense objections to Dr. Sahin's victim impact testimony.**

   The trial court permitted the State to present victim impact testimony despite defense objections. JT, Vol. I, at pp. 43-47.

   State v. Berget, 2013 S.D. 1, 826 N.W.2d 1.
   State v. Richmond, 2019 S.D. 62, 935 N.W.2d 79.

SUMMARY

In this case, a jury convicted Mr. Thoman of solicitation after he asked his friend to give him a gun so he could supposedly murder the doctor who had treated his deceased wife. This conviction occurred even though the friend refused to provide a gun or to join into any type of plot to kill the doctor. Moreover, Mr. Thoman himself never went near the doctor and other than simply asking for a gun, he never took any action, let alone a substantial step, towards killing the doctor. The ultimate question this appeal presents is whether the South Dakota State Legislature intended serious criminal liability to attach under the solicitation statute without some form of overt act, substantial step or an attempt

to commit the underlying crime. Based upon the plain language of the solicitation statute, this Court's decisions and the common law principles that govern inchoate crimes such as solicitation, clearly the legislature did not intend for the solicitation statute to be applied in cases such as Mr. Thoman's.

STATEMENT OF THE CASE AND FACTS

After a long battle with cancer, Mr. Thoman's wife Kathy, finally succumbed to the disease on August 4, 2018. JT, Vol. I, at pp. 67-69. Mr. Thoman and his wife had been married for 40 plus years and by all accounts, were best friends. The Thomans lived together in the same home in Rapid City, SD for most of their marriage. Id. at pp. 54-55. What made Kathy's passing even more difficult for Mr. Thoman, was the fact that he believed that he been informed that Kathy had not received proper medical care from her treating physician, Dr. Sahin. Id. at pp. 67-69, JT, Vol., II, at pp.193-94.

Dr. Sahin was a practicing oncologist in Rapid City. When he first started treating Kathy, during the summer of 2017, he claimed that she had been initially misdiagnosed. Id. at pp. 29-32. Later, after his prescribed treatments were not successful at curing the cancer, the Thomans decided to seek treatment in Sioux Falls, SD. Id. at p. 69. While Kathy was undergoing her new cancer treatments, Mr. Thoman understood her new doctors to say that Kathy had not been receiving the correct treatment in Rapid City. After Kathy passed away, Mr. Thoman believed that had Kathy received the correct treatment early on, she might have survived. Id. at p. 69, JT, Vol. II, at pp.193-194. See also, State's Exhibit 9.

Before Kathy was diagnosed with cancer, Mr. Thoman had worked in Rapid City for a number of years as a home inspector. By all accounts, Mr. Thoman was well-respected by the real estate agents he worked with. He also had a good reputation for

doing his job well and keeping the real estate agents out of trouble and saving their bacon by finding any issues with homes that were about to be sold. JT, Vol. II, at pp. 96-97. Mr. Thoman also had the reputation with his co-workers and neighbors of being the kind of guy who would "give you the shirt off his back" and being a "teddy bear." Id. at pp. 126-27. Mr. Thoman was also known to sometimes be cantankerous and to "run his mouth." Id. at p. 58.

Shortly after Kathy died[1], Mr. Thoman did vent his frustrations and "r[a]n his mouth" to neighbors and friends about how upset he was with Dr. Sahin. Mr. Thoman made statements to friends and neighbors about how he wanted to "...go after the doctor with a shotgun." Id. at pp. 56-57. He also talked about wanting to get a gun and that he wanted to kill the doctor. JT, Vol. II, at pp. 201, 208. At least one of Mr. Thoman's friends understood these comments to be Mr. Thoman "just...spouting off." JT, Vol. II, at pp. 205. Initially, Mr. Thoman's closest friend did not report these types of statements to law enforcement given that he "didn't think he would present a genuine danger." Id. at p. 215.

On September 24, 2018, only about seven weeks after Kathy had passed, Mr. Thoman went to Gateway Autoplex, a local used-car dealership in downtown Rapid City to visit Ken Jones. JT, Vol. II, at p. 101. Mr. Jones was an old friend of Mr. Thoman's and a former business colleague. The two men had previously worked together in real estate. Mr. Jones was a real estate agent before he went into the auto sales business and he had frequently used Mr. Thoman's inspection services. Even after Mr. Jones has left the real

[1] Even before Kathy died, Dr. Sahin claimed that Mr. Thoman had threatened to drive his truck through the doctor's office. At the time, Dr. Sahin thought about contacting security, but elected not to for the sake of the patient. JT, Vol. I, at pp. 37-39.

estate business, the two still kept in contact and Mr. Thoman would come to see Mr. Jones occasionally, perhaps once a year or more. Although Mr. Thoman's visits were not always scheduled, Mr. Jones always welcomed them. Id. at pp. 96-101.

When Mr. Thoman showed up at Mr. Jones' office on September 24, Mr. Jones already knew that Kathy had passed away, having received a phone call from Mr. Thoman sometime earlier. Id. at p. 99. Mr. Thoman had mentioned during the call that he would like to "swing by" and talk to Mr. Jones. Mr. Jones told Mr. Thoman "...my door is always open any time you want to talk." Id. at p. 100.

When Mr. Jones met Mr. Thoman on the morning of September 24, they shook hands and "man hug[ged]." Id. at p. 102. They then went into Mr. Jones' office and sat down. Id. at p. 102. Mr. Jones thought Mr. Thoman was "as normal as can be" after having just lost his wife. Id.

After some "normal banter" between the two friends, Mr. Thoman, in an "extremely sober" manner, asked Mr. Jones if he knew anyone that could "do away" with someone. Id. at p.103. Mr. Jones could tell that Mr. Thoman was "going through something." Id. at p. 104. But this topic "went away really quick" and was "dismissed immediately" after Mr. Jones said "no." Id. at p. 106. As well as Mr. Jones could recall at trial, Mr. Thoman made a statement to the effect of "[w]ell, you know this guy..." Id. Mr. Jones then told Mr. Thoman, "that was a joke from 15-some years ago." Id. at p. 104. According to Mr. Jones, back when Mr. Thoman and Mr. Jones had been working together, the pair used to make jokes and laugh together. One of the jokes that Mr. Jones had made was that if you ever needed to get rid of somebody, "[w]ell, I got this friend in New York that could do it for a round-trip ticket and 100 bucks." Id. at p. 105.

Throughout their long history together, joking aside, the pair had always had a professional relationship and had never done anything illegal. Id. at p. 127.

After the joke about "doing away with someone," Mr. Thoman then asked Mr. Jones for a gun. Mr. Jones noticed that Mr. Thoman was "super quiet and a little on the shaky side." At this point, apparently concerned for his friend, and in order to have some privacy, Mr. Jones got up and closed the door to his office. When Mr. Jones sat back down, he told his friend, "Bill, the last thing I'm going to do is get you a gun so you can off yourself." Id. at pp. 108-109.

After Mr. Jones told Mr. Thoman that he would not "get [him] a gun" (Id.), Mr. Thoman explained that the gun was not for him, but that he "holds this doctor personally responsible the loss of his wife." Id. at p. 109. According to Mr. Jones, Mr. Thoman also stated that "he wanted to kill the doctor." Id. at p. 111. Mr. Jones then talked with Mr. Thoman "at length" about grieving and Mr. Jones offered to personally go with Mr. Thoman to seek professional help. Id. at pp. 111-112. Mr. Jones testified that Mr. Thoman appreciated the fact that his friend cared for him, but that he didn't want to seek professional treatment and that he would take care of himself. Id. at p. 112.

Mr. Jones testified that, after discussing mental health treatment, the conversation went back to the issue of Mr. Thoman's anger at the doctor. Mr. Thoman talked about wanting a silencer or how he could saw off the barrel of one his guns so he could "see the doctor's eyes when he was going to die." Id. Mr. Thoman also talked about wanting a gun that was unmarked or untraceable. Id. For his part, Mr. Jones took this discussion seriously. He also noticed that Mr. Thoman was bouncing from "one thing to another like crazy." Id. at p. 113. Mr. Jones testified, "it's just not the Bill I knew. I knew he was going through something major and I really, really wanted to help him get help." Id. at pp. 112-

114. To try to help his long-time friend, Mr. Jones even asked Mr. Thoman, "Hey, you know, would Kathy really want this?" To which Mr. Thoman replied, "Oh, absolutely she would." Id. at p. 115.

At this point, Mr. Jones was "a little shaken and concerned, not only for [Mr. Thoman] but also for the doctor." Id. Mr. Jones testified that he was not sure what to do at that point, so he left the issue "hanging." Id. As the conversation was ending, Mr. Jones said, "Love you, Bill" and the two friends parted ways as Mr. Thoman left Mr. Jones' office. Id. at p.116.

After the conversation was over, Mr. Jones spoke with his nephew who was one of the owners at Gateway Autoplex. Mr. Jones' nephew suggested to Mr. Jones that he should call his cousin who was an officer with the Rapid City Police Department. Based on his nephew's suggestion, Mr. Jones did call the police and reported the conversation that he had with Mr. Thoman. A short time later, law enforcement contacted Mr. Jones and requested that he make a recorded phone call to Mr. Thoman. Although it was a difficult decision, Mr. Jones agreed to assist and met with law enforcement officers at the local Public Safety Building to make the recorded call. Id. at pp.117, 120.

The recorded call took place and was ultimately played for the jury's consideration. During the first part of the recording, Mr. Thoman can be heard answering the phone call with "Hey" as though he were happy to hear from Mr. Jones. Id. 136[2]. During this call, Mr. Jones, and not Mr. Thoman, was the person who brought up the issue of a gun. To start the conversation, Mr. Jones explained to Mr. Thoman that he would not be able to

[2] Mr. Jones testified that Mr. Thoman sounded either happy to hear from him or that it was at least "business as normal."

give him a gun. Mr. Thoman did not complain or protest. In fact, Mr. Thoman did not make any comment or respond to Mr. Jones' refusal to give him a gun. Id. at p. 135.

The recorded call is approximately 24 minutes in length. During this call, Mr. Thoman can also be heard expressing his anger with the doctor over the death of his wife and even going so far as to make statements about wanting the see the doctor dead. For example, Mr. Thoman can be heard talking about wanting to drive his car through the doctor's office. When confronted about these thoughts not being good ones, Mr. Thoman responded that they "gave him comfort." Id. at pp. 138-139.

Although "dark thoughts" were discussed during the recorded phone call, at no point did Mr. Thoman request a gun from Mr. Jones or ask him to aid or abet him in any type of plan to kill the doctor. To the contrary, Mr. Thoman can be heard thanking Mr. Jones for calling him and he also expressed gratitude to Mr. Jones for helping him through his "dark thoughts." At one point, Mr. Jones tells Mr. Thoman about a time when he "was in a really bad spot like that and [he] went to the West Unit..." State's Exhibit 1, 01:17. Mr. Jones went on to tell Mr. Thoman " the dark place I was in, that they helped me, that maybe you could talk to somebody, ya know?" Id. at 02:11. Mr. Thoman responded by saying, "ya know I'm, going to give you a little more credit than you think you deserve, Ken. Just seeing and talking to an old friend makes a hell of a difference." Id. at 02:20. During the undercover call Ken Jones even states to Mr. Thoman, "it sounds like these are just more thoughts and not actual, ya know...which is probably more healthy than you carrying this thing out." Id. at 15:29. Mr. Thoman can even be heard promising Mr. Jones that "if things get super dark, you'll probably be one of the first ones to know." Id. at 19:16. Near the end of the recorded phone conversation, Mr. Thoman stated to Mr.

Jones, "you just have to find a way to get past something and that's what I am trying to do right now." Id. at 20:40.

Toward the end of the call, Mr. Jones asks Mr. Thoman "what are you doing," apparently in an attempt to make sure that Mr. Thoman was not in the process of doing anything to harm himself or the doctor. Mr. Thoman, who apparently was not actively doing anything to kill someone, explained that he was just at his house waiting for volunteers with the Elks Club to show up to gather some of Kathy's things for donation. JT, Vol. II, at p. 124.

After the recorded phone call took place, police officers went to Mr. Thoman's home and conducted surveillance. After a period of time, the officers observed Mr. Thoman leaving his house to take out the garbage. See JT, Vol. II, at p. 276, 281. Police officer's then approached Mr. Thoman and arrested him. Id. As he was being arrested, Mr. Thoman asked, "What is this all about." Id. at pp. 173, 283. Law enforcement informed Mr. Thoman that things would be explained to him later. Law enforcement then searched Mr. Thoman and found a Leatherman-type tool on his belt. Id. Law enforcement later searched Mr. Thoman's house. Although a search of the home found several long guns, including an old .22 caliber rifle that appeared to be inoperable, the search did not find anything to indicate that Mr. Thoman had any plans to kill the doctor. Id. at pp. 174-75.

After his arrest, Mr. Thoman was interviewed by law enforcement. This interview was also recorded and played for the jury. During the recorded interview, Mr. Thoman could be heard again expressing his anger with Dr. Sahin. However, Mr. Thoman denied that he had any plans to kill Dr. Sahin and explained that he was simply "blowing of steam"

and venting his frustrations to a friend that he had known for many years. See, State's Exhibit 9, at 29:57.

While Mr. Thoman was in custody awaiting trial, several inmates contacted law enforcement and claimed that Mr. Thoman had approached them about hiring someone to murder the judge that had been assigned to hear his case. At trial, the State called two individuals as other acts witnesses. The first witness, Dustin Eck, testified that Mr. Thoman approached him in the day room at the jail and asked him if he knew someone that could make the judge on his case "forever disappear." JT, Vol. III, at pp. 343-344. Mr. Eck replied, "I don't know about all of that." However, Mr. Eck testified that Mr. Thoman nonetheless persisted and "pleaded" with Mr. Eck to "just think about it." Id. Mr. Eck claimed that he told Mr. Thoman that he was not sure how to "get a hold of [his] buddy anymore" and to just "drop the subject." Id. However, according to Mr. Eck at least, Mr. Thoman persisted in his request that Mr. Eck try to help him find someone who would murder the judge assigned to his case. Mr. Eck also claimed that Mr. Thoman at one point even requested that someone help him kill his friend, Ken Jones. Id. at pp. 347, 351.

Mr. Eck also claimed that he gave Mr. Thoman a letter that contained the phone number of a supposed hit man. Id. at pp. 352-53. Mr. Eck had been provided this phone number by his attorney who had received the phone number from law enforcement. Id. at p. 352. Law enforcement planned to be ready to have an undercover-recorded conversation about a hit man if Mr. Thoman called the number after he was released on bond. After Mr. Thoman was released from custody, the only calls to the undercover phone were a spam call regarding vehicle insurance and someone with the wrong number. JT, Vol. II, at pp. 152-53. Mr. Thoman never attempted to call while out of custody.

At trial, Mr. Eck appeared in custody, as he had pleaded guilty to being involved in a federal drug conspiracy. Id. at pp. 332-333. He also testified that he was not hoping to receive any benefit from his testimony against Mr. Thoman. Id. at p. 335. He also testified that he had never cooperated with law enforcement on his federal drug conspiracy charges. Id. at pp. 386-87. To the State's credit, after Mr. Eck testified, the State learned that Mr. Eck had actually conducted proffers and had cooperated with law enforcement. Mr. Eck had even received a formal Rule 35 Supplement to his federal plea agreement, a document that informs a sentencing court that a defendant has provided substantial assistance to the government and that a sentence reduction is appropriate. See, Fed. R. Crim. P. 35. After discovering Mr. Eck's false testimony, the State consented to recalling Mr. Eck to correct his false testimony. JT, Vol. III, at pp. 475-480. *See, Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (a prosecutor has a duty to correct false testimony).

Mr. Jerrod Murphy was also called as an other-acts witness by the State. Mr. Murphy was in the Pennington County Jail at the same time as Mr. Thoman and Mr. Eck. Id. at p. 408. Mr. Murphy testified that Mr. Thoman had "asked [him] to have a judge taken care of." Id. at p. 416. Mr. Murphy explained that he was having a hard time at the jail because he knew he was going to prison. In response to his having a hard time, Mr. Murphy was looking for "somebody" to talk to and that he thought Mr. Thoman was a "friendly" person. Id. at pp. 416-17. It was Mr. Murphy's claim that he approached Mr. Thoman and then the discussion occurred about Mr. Thoman wanting "somebody taken care of." Id.

At the time of trial, Mr. Murphy had previously pleaded guilty to burglary and ingestion. The jury also heard that Mr. Murphy had a prior rape offense and a false impersonation change. Id. at pp. 409-411. Even though Mr. Eck testified that he "didn't

really have [a relationship]" with Mr. Murphy (Id. at p. 365), on direct examination, Mr. Murphy described Mr. Eck as a "loyal friend" and that they spoke every two days while they were in custody. Id. at pp. 420, 427. Mr. Murphy also claimed that he and Mr. Eck discussed Mr. Thoman's request to have "someone taken care of" while they were in custody together. Id. at p. 419. Mr. Murphy also testified on direct that he was not motivated by hopes of bond or electronic monitoring when he informed law enforcement about his claims related to Mr. Thoman. Id. at pp. 422-23. Later, on cross-examination, he also denied asking an investigator about bond during his initial proffer. Id. at pp. 438.

To contradict Mr. Murphy's claims on direct examination that he had never sought a benefit in exchange for his cooperation, the defense called Officer Przymus. Officer Przymus was the officer who did the initial proffer with Mr. Murphy. At trial, Officer Przymus acknowledged that Mr. Murphy did ask for a personal recognizance bond or probation in exchange for his assistance against Mr. Thoman. Id. at p. 472.

At sentencing, although the trial court noted that the other acts played some role in the consideration of sentence, the trial court noted that it did not find either of the other acts witnesses to be particularly credible when fashioning Mr. Thoman's sentence. ST, at p. 49.

Initially, Mr. Thoman was charged with attempted murder in the first degree and criminal solicitation. See, Indictment at SR 18, Appendix A1. Before trial, Mr. Thoman filed a Motion to Dismiss for Failure to Describe a Public Offense. SR 55. The trial court entered a written decision denying this motion[3]. SR 95. The night before trial, the State dismissed the attempted murder charge based on this Court's holding in *State v. DiSanto*,

[3] Judge Jane Wipf Pfeifle initially heard and denied this motion. She later recused herself from Mr. Thoman's case after Mr. Eck's allegations were reported.

2004 S.D. 112, 688 N.W.2d 201. JT, Jury Selection, at pp. 1-2. The trial then commenced on the single count of solicitation. At the close of the evidence, the defense proposed pattern jury instruction 3-28-5 which related to the elements of aiding and abetting. JT, Vol. IV, at pp. 538-547. This instruction is based on this Court's decision in *State v. Jucht*, 2012 S.D. 66, 821 N.W. 2d 629. The legal grounds for proposing this instruction was based upon the wording the prosecution had used in drafting the indictment, specifically the language that read Mr. Thoman "...did, with the intent to promote or facilitate the commission of the crime, to wit: Aiding and Abetting First Degree Murder..." SR 18. The State objected to the proposed instruction given that it included all to the elements of aiding or abetting, including the element that requires the principle to complete all of the elements of the underlying crime of murder in the first degree. Id. at pp. 535-548. The trial court declined to give the complete instruction on aiding or abetting. Id.

The defense also requested and received a special interrogatory to the verdict form, which in the event of a guilty verdict required the jury to unanimously elect which theory of guilt they had agreed to. The jury was asked to elect between either that Mr. Thoman had attempted to solicit Mr. Jones to aid and abet him by procuring a hit man, or that Mr. Thoman had attempted to solicit Mr. Jones to aid and abet him by providing a gun. Id. The defense also moved for a Judgment of Acquittal at the close of the evidence and the court held the matter in abeyance until after the verdict. JT, Vol. III, at p. 459.

After the jury completed its deliberations, they returned a guilty verdict, finding that Mr. Thoman had attempted to solicit Mr. Jones to aid and abet him by asking him to provide him with a gun. Id. at p. 610.

Before sentencing occurred, the defense expanded its Motion for Judgment of Acquittal to also include a Motion to Arrest Judgment. The State objected to the substance of the Motion for Judgment of Acquittal and Motion to Arrest Judgment; however, the State did not object to the defense relabeling the Motion from Judgment of Acquittal to a Motion to Arrest Judgment. ST, at pp. 15-18. The trial court granted the defense's oral request to expand the Motion for Judgment of Acquittal into a Motion to Arrest Judgment. Id. The trial court then denied these motions and sentenced Mr. Thoman to serve fifteen (15) years in the South Dakota State Penitentiary, with ten (10) years suspended. ST, at pp. 49-50.

ARGUMENTS

1. The trial court should have granted Mr. Thoman's pre-trial Motion to Dismiss for Failure to Describe a Public Offense and his related post-trial Motion to Arrest Judgment.

Standard of review. Mr. Thoman seeks to have this Court review the meaning of the solicitation statute. "Questions of law, such as statutory interpretation, are reviewed by the Court de novo[.]" *Moss v. Guttormson,* 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17 (quoting *U.S. West Communications, Inc. v. Public Utilities Comm'n,* 505 N.W.2d 115, 122–23 (S.D. 1993) (citations omitted)).

Applicable law. This Court is well versed in the cannons of statutory construction. However, for the sake of completeness, this Court has written,

> The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.

> *Nielson v. AT & T Corp.*, 1999 S.D. 99, ¶ 14, 597 N.W.2d 434, 439 (internal citations omitted).

Additionally, this Court has noted that, "[i]n interpreting our law, all criminal and penal provisions and all penal statutes are to be construed according to the fair import of their terms, with a view to effect their objects and promote justice." *State v. DiSanto*, 2004 S.D. 112, 688 N.W.2d 201 (internal quotations omitted).

Legal analysis. Did a grieving Mr. Thoman commit the crime of solicitation when he asked his friend to give him a gun so he could kill the doctor? Stated in legal terms, did the legislature intend to allow an inchoate crime to serve as the object crime for another inchoate crime? While the analysis below will hopefully clarify this complex-sounding legal question, Mr. Thoman respectfully submits that the answer to this question is "no." Had the legislature intended to break with the longstanding precedent that requires inchoate crimes to have a separate object crime, it would have clearly done so through the plain language of the solicitation statute.

This Court has not yet had the occasion to review South Dakota's solicitation statute. It reads,

> Criminal solicitation--Penalty. Any person who, with the intent to promote or facilitate the commission of a crime, commands, hires, requests, or solicits another person to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense, is guilty of criminal solicitation.
>
> SDCL 22-4A-1.

A plain reading of this statute establishes that the legislature intended criminal solicitation to be an inchoate crime just as it is in other jurisdictions. An inchoate crime is one that has another crime as its object, often referred to as the "object crime." For example, a mere conspiracy is not a crime on its own. Before conspiracy is a crime, it must

have another crime as its object. For example, in the inchoate crime of conspiracy to commit murder, murder is the object crime. Other inchoate crimes include attempts to commit a crime, and aiding or abetting, all of which require object crimes.

Given that criminal liability sometimes attaches before the object crime is complete, inchoate crimes are often described as "incomplete crimes." However, the model penal code and most laws in this area require at least one party to complete a substantial step or undertake an overt act towards completing the object crime before criminal liability will attach. For example, under South Dakota law, in the inchoate crime of aiding or abetting, even if a person has the intent to aid someone with a crime, the crime of aiding or abetting has not occurred unless the underlying principle party has completed all of the elements of the object crime. *See, State v. Jucht*, 2012, S.D. 66, 821 N.W.2d 629.

The United States Court of Appeals for the Second Circuit has stated these principles this way,

> For purposes of our analysis, a notable feature of these inchoate offenses is that the proscribed physical conduct-the solicitation, the attempt, or the concerted endeavor-is never criminal in the abstract. Rather, criminality arises only when the inchoate conduct has the violation of some *other* law as its specifically intended objective.

Mizahi v. Gonzales, 492 F.3rd 156, 160-1 (2nd Cir. 2007)[4].

Turning to the plain language of our solicitation statute, the legislature passed this statute in order to prohibit a person from soliciting another person to "engage in the specific conduct" of the object crime that the soliciting person intends to promote or facilitate. The clearest example of solicitation that has occurred in South Dakota case law

[4] *See also, United States v. Williams*, 552 U.S. 285, 300, 128 S.Ct. 1830, 1843 (2008) (Supreme Court of the United States recognizing that inchoate crimes are "acts that look towards the commission of another crime").

is in *State v. DiSanto*, 2004 S.D. 1112, 668 N.W.2d 201. In *DiSanto*, the defendant hired an undercover law enforcement officer to murder his ex-girlfriend. Although DiSanto was not charged with solicitation, given that his case occurred before the solicitation statute was passed a year later in 2005, this Court noted that DiSanto had engaged in solicitation of murder for hire by offering to pay an undercover police officer to kill his ex-girlfriend. In other words, DiSanto wanted to see the object crime of murder carried out. To carry out his plan, he solicited a third party to do the actual "dirty work" of shooting his ex-girlfriend. Had the third party gone through with the requested shooting, the crime of murder would have been completed. However, under the solicitation statute, even if the murder had not been carried out, DiSanto could still be convicted of solicitation by engaging in the "incomplete crime" of hiring a hit man to carry out his intended object crime of murder.

In Mr. Thoman's case, even though the trial focused on his intent to kill the doctor, the State is not arguing that Mr. Thoman attempted to hire someone else to do his actual "dirty work" for him. The State is taking a much more round-about approach in its attempt to use the solicitation statute. The State's theory is that Mr. Thoman solicited Mr. Jones to give him a gun so that Mr. Thoman could then go and do the "dirty work" himself by carrying out the object offense of killing the doctor. In other words, the State's theory is that Mr. Thoman is guilty of the inchoate crime of solicitation because he solicited Mr. Jones to do the inchoate crime of aiding or betting.

The central question then becomes did the legislature intend for the solicitation statute to be used in this way? Did the legislature intend that criminal liability would attach by asking someone to assist you so that you can do the "dirty work" or object crime yourself? Mr. Thoman respectfully maintains that the answer is "no." A plain reading of

the solicitation statute itself, this Court's decision in *DiSanto* and other related enactments in the area of inchoate law clearly support this answer.

First, the plain language the legislature utilized to draft our solicitation statute indicates that the legislature was specifically trying to prohibit someone from soliciting others to do his or her "dirty work" or to "engage in specific conduct" for them to complete the object crime. However, under the State's reading of the solicitation statute, criminal liability may attach by merely asking someone to aid you so that you can do your own "dirty work." Historically, under the law, merely asking someone to aid you has not been enough for criminally liability to attach. For example, if two people simply talked about robbing a bank, no crime would have occurred because no overt act or substantial step towards the commission of the object offense has occurred. A substantial step or an over act after a conspiratorial agreement have long been requirements under inchoate law. *See, State v. Jenner*, 434 N.W.2d 76, 81 (S.D. 1988) (discussing elements of the inchoate crime of conspiracy); *See, State v. DiSanto*, 2004 S.D. 112, 688 N.W.2d 201 (discussing necessity of a substantial step being taken towards an attempt to complete a crime).

As the State would have this Court interpret the solicitation statute, prosecutors would now no longer need to prove that a party took a substantial step or overt act to establish an inchoate crime. Perhaps in an even greater break with historical precedent, under the State's view, the parties no longer even need to reach an agreement to do the object crime. After all, in this case, Mr. Jones never agreed to help Mr. Thoman. Mr. Jones was adamant that he would not give a gun to his friend so he "can off [him]self." JT, Vol. II, at p. 109.

Had the legislature intended such a broad shift in the use of inchoate crimes to obtain convictions, the legislature would have used clear language to make such a broad change.

Beyond the lack of legislative language clearly indicating an intent to break with historical precedent, the history behind our solicitation statute also makes clear that the legislature was only intending to adopt a historical approach to solicitation. The legislature enacted the solicitation statute in 2005, one year after this Court's decision in *State v. DiSanto*. As discussed above, in *DiSanto* the defendant hired an undercover police officer to murder his ex-girlfriend. The jury convicted DiSanto of attempted murder in the first degree. On review, this Court reversed Mr. DiSanto's attempted murder conviction and found that soliciting a hit man is not enough to establish a substantial step towards the crime of attempted murder. This Court wrote,

> Beyond any doubt, defendant's behavior here was immoral and malevolent. But the question is whether his evil intent went beyond preparation into acts of perpetration. Acts of mere preparation in setting the groundwork for a crime do not amount to an attempt. Under South Dakota's definition of attempt, solicitation alone cannot constitute an attempt to commit a crime. Attempt and solicitation are distinct offenses. To call solicitation an attempt is to do away with the necessary element of an overt act. Worse, to succumb to the understandable but misguided temptation to merge solicitation and attempt only muddles the two concepts and perverts the normal and beneficial development of the criminal law through incremental legislative corrections and improvements. It is for the Legislature to remedy this problem, and not for us through judicial expansion to uphold a conviction where no crime under South Dakota law was committed.
>
> *DiSanto*, *supra* at ¶ 40.

Apparently, in response to this Court's decision in *DiSanto*, the legislature enacted the solicitation statute. Clearly, South Dakota's solicitation law would criminalize DiSanto's act of hiring a hit man to murder his ex-girlfriend. But did the legislature enact the solicitation statute with the intent to permit the merging of the inchoate crimes of

solicitation and aiding or abetting? Mr. Thoman maintains that the legislature did not intend this result and that it merely intended to develop our criminal law "through incremental legislative corrections and improvements," such as enacting a more historically based solicitation law that prohibits the soliciting of third parties from carrying out the object offense.

If the legislature had intended to allow prosecutors to merge solicitation and aiding or abetting in situations such as Mr. Thoman's, the legislature would also have needed to change the elements of aiding or abetting. An essential element of aiding or abetting is that the underlying principle actor must complete all of the elements of the object crime. *State v. Jucht*, 2012 S.D. 66, 821 N.W.2d 629, 634. For example, for someone to aid or abet in the crime of murder, the principle would have to first complete all the elements of his crime by killing his victim.

The necessity of changing the elements of aiding or abetting becomes apparent when reviewing Mr. Thoman's case. In this matter, the State drafted the Indictment to read that Mr. Thoman solicited Mr. Jones to aid or abet him in the crime of murder in the first degree. Therefore, the State is alleging that Mr. Thoman's object crime is *aiding and abetting* murder in the first degree (as opposed to just murder in the first degree on its own). However, to fully understand the State's theory, the Court needs to engage in another layer of analysis. Not only does Mr. Thoman's inchoate crime have an object offense, but under the State's theory, Mr. Jones' inchoate offense of aiding or abetting must also have to have an object offense. In this case, Mr. Jones' object offense is murder in the first degree.

However, under the legal definition of aiding or abetting, before Mr. Jones can complete his crime of aiding or abetting, each element of Mr. Jones' object offense of

murder must be completed by Mr. Thoman. This means that before Mr. Jones can commit the crime of aiding or abetting, the doctor would already need to have been murdered. But when Mr. Thoman asked Mr. Jones for the gun, the doctor was then as he still is now, alive. Therefore, Mr. Thoman could not have legally or factually committed the crime of soliciting Mr. Jones to aid or abet him in the crime of murder in the first degree.

The State's answer to this problem was simple. The prosecution objected to the trial court instructing the jury on each element of the crime of aiding or abetting. When the defense proposed the aiding or abetting instruction that contained the elements that this Court announced in *State v. Jucht*, 2012 S.D. 66, 821 N.W.2d 629, 634, the State objected to the inclusion of the element that required Mr. Thoman to have completed the object crime of murder. The trial court sustained the State's objection. JT, Vol. IV, pp. 547-548. As a result, the trial court, apparently acting on its own authority, changed the legal elements of the crime of aiding or abetting.

If such a change is to occur in the definition of a crime or if inchoate crimes are to merge in order to secure convictions, such a change must come from the legislature and not the courts. *See, DiSanto*, *supra*.

A further difficulty with reading the solicitation statute so as to permit the merger of solicitation and aiding or abetting is the legislature's codification of the renunciation doctrine. The renunciation doctrine is codified at SDCL 22-4A-4. This statute reads,

> 22-4A-4. Renunciation of criminal intent--Requirements. No person may be convicted of criminal solicitation if, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, the defendant:
>
> (1) Notified the person solicited of his or her renunciation; and

> (2) Gave timely and adequate warning to the law enforcement authorities or otherwise made a substantial effort to prevent the commission of the criminal conduct solicited.
>
> The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

By adopting the renunciation statute, the legislature intended to provide a legal defense when a defendant notifies the person that he solicited to commit the object offense, that he has changed his mind and no longer intends to have the other person complete the crime. The elements of renunciation therefore necessarily assume that the defendant solicited someone else to complete the elements of the object crime on his behalf. The plain language of the renunciation statute fits with the historical understanding of solicitation. For example, in *DiSanto* the defendant could renounce his crime by calling off the hit man.

However, the plain language of the renunciation statute does not fit with prosecution's broad reading of the solicitation statute permitting the merger of solicitation and aiding or abetting. Mr. Thoman's case provides an example of how renunciation is a nullity under the prosecution's interpretation of solicitation. During its closing argument, the prosecution argued that the crime scene was Mr. Jones' office and that Mr. Thoman completed the crime of solicitation once he asked Mr. Jones to provide him with a gun. The prosecution argued,

> Now, the fact that...no gun was produced, don't get confused with that. That doesn't matter. It's the State's position that the crime was committed when Mr. Thoman asked Ken Jones for the help. It was committed when he asked [about] getting the gun, and that's because his intent was for murder. Now, the fact that Ken Jones's conscious stopped Ken Jones from participating in this is irrelevant to the defendant's culpability. The crime had already been committed. There is no need, no requirement under these -- under these elements for Ken Jones to have done anything. The crime was committed in Ken Jones's office.

JT, Vol. IV, at p. 570.

Under the prosecution's theory, the fact that Mr. Jones never did anything to complete the crime, such as giving Mr. Thoman a gun, is of no legal significance. As a result, under these facts, Mr. Thoman had no way to legally renounce his supposed crime. For example, had Mr. Thoman told Mr. Jones during the undercover phone call that he no longer wanted a gun to kill the doctor, he would not have legally taken the steps required by the renunciation statute to renounce his crime. This is because the second element of renunciation requires the defendant to make "a substantial effort to prevent the commission of the *criminal conduct solicited."* Legally speaking, Mr. Thoman could not prevent the criminal conduct he solicited because under the State's view, the object crime occurred when he asked Mr. Jones for the gun.

In light of the renunciation doctrine, consider the following absurd result if the legislature had intended that merely asking someone to assist with a crime resulted in criminal liability under the solicitation statute. In *DiSanto*, the defendant hired a hit man to commit murder on his behalf. DiSanto also provided the hit man with the necessary information so the hit man could complete the murder. Under these facts, if the hit man had truly been a hit man, as opposed to an undercover law enforcement officer, actual death would have been imminent. However, if DiSanto had a change of heart, called off the hit man and alerted law enforcement or took "a substantial effort to prevent the commission of the criminal conduct solicited," then under this scenario, DiSanto would have a complete defense to the crime of solicitation.

Compare the hypothetical *DiSanto* case to Mr. Thoman's. Mr. Thoman asked Mr. Jones for a gun. No firearm was ever provided. Beyond asking for a gun, no steps were taken to cause the death of the doctor. Certainly the harm the legislature is ultimately

trying to prevent, specifically death, is much closer in the hypothetical *DiSanto* case, then it is in Mr. Thoman's. And yet, according to the prosecution, Mr. Thoman has already completed the crime of solicitation by merely asking for the gun. Mr. Thoman can't go back in time and prevent his conduct of asking Mr. Jones for the gun. Additionally, Mr. Thoman never received a gun, so he cannot undo that conduct either. Therefore, even though Mr. DiSanto—who is much closer to actually having someone killed— is able to avail himself of the renunciation defense, Mr. Thoman is not, because he has nothing he can renounce. This is an absurd result that the legislature clearly did not intend.

The only way to read both the solicitation statute and the renunciation statute in harmony is to interpret the solicitation statute as requiring a defendant to solicit criminal conduct that is capable of being "prevented" or renounced by him. This leaves the firm impression that the legislature intended the crime of solicitation to prohibit the conduct of soliciting "another person" to "engage in specific conduct," "which would constitute the specific offense." In other words, solicitation means soliciting someone else to complete an object offense and not another inchoate offense that merely seeks aid. Without such a reading, renunciation becomes a nullity in many cases.

Remedy. The legislature clearly did not intend to merge the two inchoate crimes of solicitation and aiding or abetting. If any doubt on this point remained, it evaporated after reviewing the historical backdrop of the statute and the legislature's codification of the doctrine of renunciation. Therefore, the trial court should have granted Mr. Thoman's Motion to Arrest Judgment. Mr. Thoman requests that this Court remand this matter with instructions that the Motion to Arrest Judgment be granted.

2. **The trial court should have instructed the jury on each element of aiding, abetting or advising.**

Standard of review. This Court has clarified the standard of review related to jury instructions and has written,

> A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. *See Luke v. Deal,* 2005 S.D. 6, ¶ 11, 692 N.W.2d 165, 168; *Parker v. Casa Del Rey–Rapid City, Inc.,* 2002 S.D. 29, ¶ 5, 641 N.W.2d 112, 116. However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial. *First Premier Bank v. Kolcraft Enterprises, Inc.,* 2004 S.D. 92, ¶ 40, 686 N.W.2d 430, 448 (citations omitted). Erroneous instructions are prejudicial under SDCL 15–6–61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. Accordingly, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo. Under this de novo standard, "we construe jury instructions as a whole to learn if they provided a full and correct statement of the law." *Id,* 2004 S.D. 92, ¶ 40, 686 N.W.2d at 448(quoting *State v. Frazier,* 2001 S.D. 19, ¶ 35, 622 N.W.2d 246, 259 (citations omitted)).
>
> *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, 711 N.W.2d 612, 615.

Applicable law. The law related to reversible error is also clear.

> On issues supported by competent evidence in the record, the trial court should instruct the jury. The trial court is not required to instruct on issues lacking support in the record. Failure to give a requested instruction that correctly sets forth the law is prejudicial error. Jury instructions are reviewed as a whole and are sufficient if they correctly state the law and inform the jury. Error is not reversible unless it is prejudicial. The burden of demonstrating prejudice in failure to give a proposed instruction is on the party contending error.
>
> *Kuper v. Lincoln–Union Elec. Co.,* 1996 S.D. 145, ¶ 32, 557 N.W.2d 748, 758 (internal citations omitted).

Legal Analysis. The prosecution drafted the charging document to read that Mr. Thoman committed,

> the public offense of CRIMINAL SOLICITATION, in that (s)he did, with the intent to promote or facilitate the commission of a crime, to-wit: Aiding and Abetting First Degree Murder, command, hire, request, or solicit another person, to engage in specific conduct which would constitute the

commission of such offense or an attempt to commit such offense, in violation of SDCL 22-4A-1(1).

See Indictment at SR 18.

At the close of the trial, the defense proposed a jury instruction that correctly listed each element of aiding or abetting, the crime that Mr. Thoman was accused of having solicited. The proposed jury instruction was based on this Court's decision in *State v. Jucht*, 2012 S.D. 66, 821 N.W.2d 629, 634. The prosecution objected to the defense's proposed instruction on the grounds that it contained the element of aiding or abetting that required the principle to complete the underlying crime of murder. JT, Vol. IV, at pp. 547-548. Apparently the prosecution objected to this element given that Dr. Sahin had not been murdered. Had the full pattern instruction been given to the jury, the only possible verdict would have been "not guilty."

Despite this Court's clear language in *Jucht*, the trial court sustained the prosecution's objection. As a result, the jury was given a jury instruction that only contained some of the elements of aiding or abetting. In other words, the trial court simply changed the recognized elements of the crime of aiding or abetting. The jury was therefore given an incomplete statement of the law. More importantly, the State no longer needed to prove that Mr. Thoman had murdered Dr. Sahin as is required under this Court's definition of aiding or abetting.

Mr. Thoman respectfully maintains that the trial court's omitting an essential element of the crime of aiding or abetting is prejudicial. Asking for a gun in order to commit murder is certainly "immoral and malevolent." However, the legislature has not enacted a crime that prohibits merely asking for help. "Aiding or abetting" is a legal term of art with a precise definition. When the legislature enacted the solicitation statute, it was

aware that this Court had addressed this precise definition of "aiding or abetting" years earlier in *State v. Shearer,* 1996 S.D. 52, ¶ 29, 548 N.W.2d 792, 798. Had the legislature intended to pass a law against "merely" seeking assistance to commit a crime, it would have used clear language to do so.

The prosecution seeks to secure a conviction against Mr. Thoman on the grounds that a "...crime was committed when Mr. Thoman asked Ken Jones for the help." JT, Vol., IV, at p. 570. But the full definition of aiding or abetting requires more than just asking for help. Even though the full definition of aiding or abetting prevents a conviction in this case, it is not for the prosecution, or even this Court, to draft new laws to punish "malevolent" behavior. That authority rests solely with the legislature. The trial court did not have legal authority to simply leave out an essential element of the crime that Mr. Thoman is accused of having solicited.

Omitting the essential element of the crime that Mr. Thoman is supposed to have solicited is clearly prejudicial under the standards that this Court set forth in *Vetter v. Cam Wal Elec. Co-op., Inc.*, supra. Had the jury been properly instructed as to all of the essential elements of aiding or abetting, the verdict would have necessarily been "not guilty," as Dr. Sahin was not murdered by Mr. Thoman.

Remedy. Ordinarily, the remedy for an improper jury instruction is to enter an order reversing the conviction and ordering a new trial. However, in this case, based upon the argument related to Mr. Thoman's Motion for Judgment of Acquittal outlined below, the remedy requested is for remand ordering that the Motion for Judgment of Acquittal be granted.

3. The trial court should have granted Mr. Thoman's Motion for Judgment of Acquittal.

Standard of review and applicable law. The applicable law related to this Court's review of a trial court's denial of a Motion for Judgment of Acquittal is well established. This Court considers,

> [W]hether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.... On review, we accept the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict. We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal. If the evidence including circumstantial evidence and reasonable inferences drawn therefrom sustain a reasonable theory of guilt, a guilty verdict will not be set aside.
>
> *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342 (citations omitted).

Legal analysis. Had the trial court considered the entire definition of aiding or abetting, including the element that that Mr. Thoman was required to complete all of the underlying elements of the crime of murder in the first degree, the trial court would have been compelled to grant the motion given that Dr. Sahin appeared in person at trial and therefore could not have been murdered.

4. The trial court should have sustained the defense's objections to Dr. Sahin's victim-impact testimony.

Standard of review. This issue requests that this Court review the trial court's decision to permit the prosecution to present victim-impact testimony to the jury. This Court reviews the circuit court's ruling on the admissibility of evidence under the abuse of discretion standard. *State v. Berget*, 2013 S.D. 1, ¶79, 826 N.W.2d 1.

Applicable law. Regarding the use of victim-impact evidence during the sentencing portion of death penalty cases, this Court has written,

> Victim-impact evidence has its limits. Introduction of overly prejudicial victim-impact evidence has the possibility to rise to the level of a constitutional deprivation.
>
> *Id.* at 83.

The undersigned can find no legal authority in South Dakota that permits victim-impact evidence to be used during the guilt-innocence phase of a jury trial. Indeed, Rule 402 and alternatively Rule 403 would seem to prohibit such evidence unless the proponent of the evidence could identify some particular relevance that was not unfairly prejudicial.

Victim-impact evidence presented at trial. At trial, the prosecution asked Dr. Sahin about concerns he had when he was informed by law enforcement that a "credible" threat had been made against him. The defense objected several times to this line of questioning. The trial court overruled the objections and the following evidence was presented to the jury,

A [Dr. Sahin] I wasn't aware until September 24th when the police detective -- I can't remember his name, came to the cancer center to inform me about the incident.

Q [By Mr. Thielen] Okay. I want to talk about that. So at some point did law enforcement tell you something about Mr. Thoman that caused you concern that has caused you to act in certain ways?

A Well, again, the first time I knew about it was September 24th. I remember the day.

Q Okay.

A In the afternoon, police detective walk in and he told me that they had credible –

MR. GREY: I'd like to object to hearsay and confrontation.

MR. THIELEN: Your Honor, I'm offering it to show affect on the listener.

MR. GREY: Then my objection would be 403.

THE COURT: Overruled.

Q [By Mr. Thielen] Okay. You can answer the question,

sir.

A All right. So he informed me that they received credible information that Mr. Thoman was trying to hire a hit man to have me killed.

Q How did you deal with that information?

MR. GREY: Objection. 403.

THE COURT: Overruled.

MR. GREY: May I have a continuing objection?

THE COURT: You may. Under 403?

MR. GREY: Yes.

THE COURT: You may.

Q [By Mr. Thielen] You may answer the question, sir. The question was, how did you deal with that information?

A It was shocking, obviously, for anybody to hear something like that, especially from the husband of a patient that I did my best -- provided the best possible care. And I was also worried about my mother who was visiting with me at the time.

MR. GREY: Objection. 403.

THE COURT: Overruled.

Q [Mr. Thielen] You can continue, sir.

A And -- but the biggest thing was big disappointment, you know. And I felt like I was stabbed in the back in terms of my profession.

Q So when you received this information, did it cause you to do anything? Did you go somewhere?

A Right. The security was there -- hospital security along with the police detective. They advised me of my options, what to do. At the time there was uncertainty as to what was going on. Mr. Thoman was not in custody

and they advised me to take precautions. So with the security, I immediately rushed to home, collected my mother and we went out of town.

Q Why did you go out of town?

MR. GREY: Same objection.

THE COURT: Overruled, but noted.

Q [Mr. Thielen] You can answer the question.

A Okay. Well, I was worried about my safety and her safety because of the possibility that there was a hired hit man out there.

Q Did you take this information serious?

A I did. I did, because the police detective told me that --

MR. GREY: Objection; confrontation.

THE COURT: Yeah. Sustained.

Q [Mr. Thielen] Okay. Don't focus on --

THE COURT: Or hearsay, one or the other.

Q [Mr. Thielen] Don't focus on what anybody told you. The question is, how did you act based upon what they told you?

A I had to take it seriously. Obviously, this was a serious threat to me and my family. That's how I -- how I saw it, and I felt that I had to protect myself and my mother.

Q Now, you mentioned that this occurred while you were working with oncology at Rapid City Regional?

A Correct.

Q Are you still working with oncology at Rapid City Regional?

A No.

Q Why aren't you still working at that -- at Rapid City Regional?

A Right.

MR. GREY: Object. 401 and 403.

THE COURT: Overruled.

Q [By Mr. Thielen] You can answer the question, sir.

A Okay. Obviously, as I said in the beginning, I have many patients who depended on me, so I tried to continue in spite of this, but over the following months I develop signs and symptoms of -- I don't want to -- I'm not a psychiatrist, I don't want to call it, but post traumatic stress. And it became increasingly difficult. Every time I went to Cancer Center I remembered this incident. And after few months of struggling, I realized that I couldn't continue to work at Rapid City Regional Hospital.

Q Was it directly as a result of this incident?

A Yes.

MR. GREY: Objection. Improper 702, no notice, foundation, 403.

THE COURT: That's sustained. You should disregard that.

Q [Mr. Thielen] Okay. So what conclusion did you draw then? What decision did you make?

A Well, I --

MR. GREY: Object as to relevance. Same objection as before.

THE COURT: That's overruled.

Q [By Mr. Thielen] You can answer the question, sir?

A Well, I thought that the best thing for my peace of mind was to find a job somewhere else, move, you know,

from Rapid City.

Q And is that what you did ?

A Yes, that's what I did.

JT Vol. I, at pp. 43-47.

The prosecution also made use of its victim-impact testimony during its closing argument. The prosecution even elected to start its closing statement by utilizing this evidence:

> I first want to start by talking about some of the statements we heard from the witness stand. Dr. Sahin or Sahin said, "I felt like I had been stabbed in the back. I immediately called my elderly mother and raced home to check on her. We went to Spearfish to spend the night and I just couldn't work at Rapid City Regional Hospital anymore."
>
> JT, Vol. IV, at pp. 561-62.

Legal analysis. This type of victim impact testimony has no place at a jury trial. *See generally*, *United States v. Bolden*, 545 F.3d 609, 619 (8th Cir. 2008) (discussing jury instruction in death penalty case that instructed jury to not consider victim-impact evidence to determine underlying elements). Even during a sentencing phase, where the sentencing jury reviews a much greater range of evidence to determine punishment, "victim-impact evidence still has its limits." *State v. Berget*, 2013 S.D. 1, ¶83, 826 N.W.2d 1. At trial, the prosecution argued that this type of evidence was admissible to establish the "...effect on the listener." JT, Vol. I, at p. 43. However, did Dr. Sahin's emotional reactions and his decision to stop working in Rapid City did not have "any tendency to make a fact more or less probable" when determining the elements of the offense of solicitation. See, Rule 401. The jury's function was to determine Mr. Thoman's criminal intent and his actions related to soliciting someone to aid or abet him to commit murder. The "affect" that Dr. Sahin felt when he was informed by law enforcement that someone had been hired to kill him

does not tell the jury whether or not Mr. Thoman in fact had criminal intent to engage in the crime of solicitation.

In this case, the impermissible victim-impact evidence unfairly prejudiced Mr. Thoman's right to a fair trial. When reviewing for reversible error, this Court uses the following analysis,

> Whether the error was harmless "depends upon a host of factors, all readily accessible to reviewing courts." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986). "These factors include the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony ... [,]the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case." *Id.*; *see also Kihega*, 2017 S.D. 58, ¶ 33, 902 N.W.2d at 527 (discussing the appropriate standard for harmless error).
>
> *State v. Richmond*, 935 N.W.2d 792, 2019 S.D. 62, ¶ 36.

The prosecution started its case with Dr. Sahin and spent a significant amount of time presenting the victim-impact testimony. See, JT Vol. I, at pp. 43-47. Not only did the State start its case with the victim-impact testimony, it also elected to use this evidence at the start of its closing argument. See, JT. Vol. IV, at pp. 561-62. Clearly, the State thought that its victim, Dr. Sahin, was an important witness, and it also must have believed that his victim-impact testimony was important enough to use at the start of its closing argument.

Looking at the strength of the State's case, the jury was asked to consider whether Mr. Thoman was venting his frustrations to Mr. Jones or whether he had actual criminal intent to carry through with murdering the doctor. The case did not present any concrete action on the part of Mr. Thoman to establish criminal intent, such as actually hiring a hit man to commit murder or approaching the doctor while armed with a gun. *Compare*, *State v. DiSanto*, (defendant hired undercover law enforcement officer to act as hit man). To the contrary, even under the State's view, the most that Mr. Thoman did was to "ask

[about] getting the gun, and that's because his intent was for murder." JT. Vol. IV, at pp. 570. The defense respectfully maintains that this is not a case that can be called overwhelming as it relates to evidence of guilt. *Compare*, *State v. Richmond*, 935 N.W.2d 792, 2019 S.D. 62, ¶ 38 (Court finding the State's case "strong" where victim testified to elements of crime and State presented corroborating testimony from other witnesses).

To the contrary, in this case the jury was presented with evidence that Mr. Thoman may well have been simply venting his frustrations "without a filter" to a close friend; something he had been known to do frequently in the past. Moreover, Mr. Thoman did not take a substantial step towards the commission of an actual murder. Against this backdrop, when the jury heard that a doctor had to move his mother to a different town and later decided to quit his medical practice after feeling like he had been "stabbed in the back," the impact was clearly prejudicial.

Remedy sought. Mr. Thoman maintains that the impermissible victim-impact testimony had a significant and unfair impact at trial. If this Court declines to reverse this case on the issues related to the Motion to Arrest Judgment and Motion for Judgment of Acquittal, the case should be reversed for a new trial on the grounds that the victim-impact testimony was not harmless error.

CONCLUSION

The obvious and most direct reading of the solicitation statute is what the legislature intended. No legal grounds exist to ignore the legal definition of "aid, abet or advise" or the doctrine of renunciation. The legislature intended to criminalize soliciting someone else to engage in specific conduct that would complete the elements of an object offense. That did not occur here. Therefore, the conviction should be reversed with instructions to the trial court to enter an order granting both the Motion for Judgment of Acquittal and the

Motion to Arrest Judgment. Alternatively, this Court should reverse and remand this case with instructions that a new trial be granted and that the new trial be held without the admission of victim-impact testimony.

REQUEST FOR ORAL ARGUMENT

Mr. Thoman respectfully requests oral argument on all issues.

Dated this _____day of June 2020.

GREY &
EISENBRAUN LAW

_____

Ellery Grey
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
(605) 791-5454

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

WILLIAM THOMAN,

Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Brief is 37 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates there are a total of 11,412 words in the body of the brief.

Dated this 11th day of June 2020.

GREY &
EISENBRAUN LAW

/s/ *Ellery Grey*
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

WILLIAM THOMAN,

Defendant and Appellant.

The undersigned hereby certifies that he served two true and correct copies of Appellant's Brief upon the persons herein next designated all on the date shown, by mailing said copies in the United States Mail, first-class postage prepaid, in envelopes addressed to said addresses; to wit:

Supreme Court of South Dakota
Office of the Clerk
500 East Capitol Avenue
Pierre, SD 57501

The undersigned further certifies that he served a true and correct copy of the Appellant's Brief upon the persons herein next designated all on the date shown, by e-mailing said copies to said addresses; to wit:

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Supreme Court of South Dakota
Office of the Clerk
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Which are the last known addresses of the addressees known to the subscriber.

Dated this _____day of June 2020.

GREY &
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APPENDIX

Appendix **Page**

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. **WILLIAM THOMAN,** D.O.B.: 03/12/1956 Crim. No.: CR18-213088 Defendant.	)	File No. 51CRI18-4685 **JUDGMENT OF CONVICTION**

An Indictment was filed with this Court on the 3rd day of October, 2018 charging the Defendant with the crime(s) of **COUNT 1: ATTEMPTED FIRST DEGREE MURDER** (SDCL 22-16-4(1) and SDCL 22-4-1), a Class A Felony and **COUNT 2: CRIMINAL SOLICITATION** (SDCL 22-4A-1(1)), a Class 1 Felony. The Defendant was arraigned on said Indictment on the 8th day of November, 2018. The Defendant, and the Defendant's attorney, Matt Laidlaw, and Trevor Thielen, Assistant Attorney General and prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge filed against the Defendant. The Defendant pled not guilty.

Thereafter, on the 19th day of August, 2019 to the 22nd day of August, 2019, the Defendant, Defendant's attorney, Ellery Grey, and Trevor Thielen, assistant Attorney General and prosecuting attorney, appeared before this Court for a Jury Trial. The Jury found, beyond a reasonable doubt, that the

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9/30/19

Defendant was guilty of **CRIMINAL SOLICITATION** (SDCL 22-4A-1(1)), a Class 1 Felony, occurring on or about September 24, 2018.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of **CRIMINAL SOLICITATION** (SDCL 22-4A-1(1)), a Class 1 Felony.

SENTENCE

On the 20th day of September, 2019, the Court asked whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence: It is

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary in Sioux Falls, SD for a period of fifteen (15) years, with ten (10) year suspended, and upon the following conditions:

1. That the Defendant receive credit for time already served in the amount of three hundred and fifty-eight (358) days.

2. That the Defendant pay to the Clerk of Courts (for reimbursement to the Office of Attorney General, 1302 E Hwy 14, Ste. 1, Pierre, South Dakota 57501-8501) for the costs of grand jury transcripts attributable to the Defendant in this action in the amount of one hundred and one dollars and twenty-five cents ($101.25).

3. That the Defendant pay to the Clerk of Courts court costs pursuant to SDCL 23-3-52, 23A-28B-42 and 16-2-41 in the amount of one hundred and six dollars and fifty cents ($106.50).

4. That the Defendant is ordered to pay restitution in the amount of one thousand and two hundred and ninety-four ($1,294) dollars.

5. That all no contact orders for the Defendant remain.

It is further

ORDERED that any bond posted be exonerated. It is

ORDERED that the Court reserves the right to review and make any modifications to the sentence within the statutory time period.

Dated this 25 day of September, 2019, at Rapid City, South Dakota. Nunc pro tunc the 20th day of September, 2019

BY THE COURT:

Honorable Jeff Connolly
Circuit Court Judge

ATTEST:
Clerk of Courts

Pennington County, SD
FILED
IN CIRCUIT COURT
SEP 26 2019
Ranae Truman, Clerk of Courts
By _____ Deputy

RIGHT TO APPEAL

You, **WILLIAM THOMAN**, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota 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 Of Conviction was signed, attested and filed.

THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

WILLIAM THOMAN

Defendant and Appellant.

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

THE HONORABLE JEFFREY CONNOLLY
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed October 7, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

WILLIAM THOMAN,

Defendant and Appellant.

PRELIMINARY STATEMENT

A jury found William Thoman guilty of criminal solicitation. Thoman now appeals. This brief refers to Thoman as "Defendant" and the State of South Dakota as "the State." It refers to documents as follows:

Settled Record (Pennington County File 18-4685) .....SR

Jury Trial Transcript Volume 1..... JT1

Jury Trial Transcript Volume 2..... JT2

Jury Trial Transcript Volume 3 ..... JT3

Jury Trial Transcript Volume 4 ..... JT4

Sentencing Transcript ..... ST

Defendant's Brief..... DB

The appropriate page numbers follow all document designations. This brief also refers to trial exhibits as "Ex." followed by the appropriate identifier.

JURISDICTIONAL STATEMENT

On September 26, 2019, the Honorable Jeffrey Connolly, Pennington County Circuit Court Judge, filed a Judgment of Conviction ordering Defendant to serve fifteen years in prison, with ten years suspended. SR:645-48. Defendant timely filed his Notice of Appeal on October 7, 2019. SR:649-50; SDCL 23A-32-15. Thus, this Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS COUNT TWO OF HIS INDICTMENT AND HIS REQUEST TO ARREST JUDGMENT ON THAT COUNT?

Defendant moved to dismiss Count Two of his Indictment on the alleged ground that it didn't state a public offense. Defendant also requested the circuit court to arrest judgment on the same ground. The court denied the motion and the request.

State v. Everett, 330 P.3d 22 (Or. 2014)

State v. Clements, 2013 S.D. 43, 832 N.W.2d 485

Commonwealth v. Wolcott, 931 N.E.2d 1025 (Mass. Ct. App. 2010)

People v. Harsit, 745 N.Y.S.2d 872 (N.Y. Ct. App. 2002)

SDCL 22-3-3

SDCL 22-4A-1

SDCL 22-4A-2

II

WHETHER THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY ABOUT CRIMINAL SOLICITATION OF AIDING AND ABETTING FIRST DEGREE MURDER?

Defendant proposed a jury instruction that would have instructed the jury that before a person could aid and abet a murder, the principal actor had to first commit the murder. The circuit court refused that instruction and instead instructed the jury on the statutory definition of aiding and abetting.

State v. Armstrong, 2020 S.D. 6, 939 N.W.2d 9

State v. Kryger, 2018 S.D. 13, 907 N.W.2d 800

State v. Jucht, 2012 S.D. 66, 821 N.W.2d 629

SDCL 22-4A-1

SDCL 22-4A-2

III

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

Defendant moved for Judgment of Acquittal on the criminal solicitation charge submitted to the jury. The circuit court denied the motion, concluding there was sufficient evidence for the jury to find Defendant guilty.

State v. Harruff, 2020 S.D. 4, 939 N.W.2d 20

State v. Quist, 2018 S.D. 30, 910 N.W.2d 900

People v. Harsit, 745 N.Y.S.2d 872 (N.Y. Ct. App. 2002)

SDCL 22-4A-1

IV

WHETHER THE CIRCUIT COURT APPROPRIATELY OVERRULED DEFENDANT'S OBJECTIONS TO DR. SAHIN'S TESTIMONY?

Defendant objected when Dr. Sahin began testifying about how he reacted after learning Defendant solicited Ken Jones to help kill him. The circuit court overruled the objections.

State v. Hendrickson, 2015 WL 1514177 (Minn. Ct. App.)

State v. Berget, 2013 S.D. 1, 826 N.W.2d 1

State v. Rhines, 1996 S.D. 55, 548 N.W.2d 415

State v. Kleinsasser, 436 N.W.2d 279 (S.D. 1989)

SDCL 19-19-401

SDCL 19-19-403

STATEMENT OF THE CASE

A Pennington County Grand Jury Indicted Defendant on October 3, 2018. SR:18-19. It charged him with Count One: Attempted First-Degree Murder in violation of SDCL 22-16-4(1) and SDCL 22-4-1; and Count Two: Criminal Solicitation in violation of SDCL 22-4A-1(1). SR:18-19.

Defendant filed a Motion to Dismiss, claiming Count Two didn't describe a crime recognized by South Dakota law. SR:55-61. He also argued that there's no criminal penalty for the criminal solicitation described in his Indictment. SR:60. Defendant also filed a Motion for a

Bill of Particulars. SR:62-66. In turn, the State filed a Response and a Supplemental Response, both refuting Defendant's Motions. SR:67-75.

After considering the matters, the circuit court[1] denied both Motions. SR:95-102. It determined:

- The Indictment sufficiently informed Defendant of the charges against him;
- Criminal solicitation is complete once the request is made, regardless of whether the person solicited carries out the act solicited;
- A criminal penalty exists for criminal solicitation; and
- The Indictment gave Defendant notice of the charges against him by reciting the language of the statutes he was accused of violating.

SR:95-102.

When Defendant's jury trial began, the State only proceeded on Count Two—Criminal Solicitation—of the Indictment; it dismissed Count One—Attempted First-Degree Murder. SR:422, 644. But it proceeded on two separate theories of guilt: (1) Defendant solicited Ken Jones by asking about a hit man; and (2) Defendant solicited Jones by asking for a gun. SR:470.

After the State's case-in-chief, Defendant moved for a Judgment of Acquittal. JT3:459. The circuit court reserved its ruling and held the Motion in abeyance. JT3:460.

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[1] Judge Jane Wipf Pfeifle originally presided over Defendant's case and she denied his Motions. SR:23. But as the case progressed, she recused herself and Judge Connolly took over. *See e.g.*, JT1:1; SR:645-48.

When it came to settling jury instructions, Defendant proposed an instruction that said before a person can be guilty of aiding and abetting murder, the principal actor must commit murder. JT4:538-47. The State objected because neither the crime solicited (aiding and abetting murder) nor the principal crime it would have facilitated (first-degree murder) needed to occur for Defendant to be guilty of solicitation. JT4:543-45. The circuit court agreed with the State and refused Defendant's proposed instruction. JT4:543-46. Instead, it instructed the jury on the statutory definition of aiding and abetting. SR:444.

The court also provided the jury with a verdict form that asked the jury, if it found Defendant guilty, to select which of the State's theories of guilt it found the evidence supported beyond a reasonable doubt. SR:470. The jury found Defendant guilty on the theory that he solicited Ken Jones to aid and abet first-degree murder by asking Jones for a gun. SR:470. But it rejected the State's hit man theory. *Id.*

After trial, Defendant filed a Brief to support his Motion for Judgment of Acquittal. SR:559-72. The State filed a Response opposing Defendant's Motion. SR:573-78.

The circuit court held Defendant's sentencing hearing on September 20, 2019. ST:1. At that hearing Defendant moved to amend his Brief in Support of his Motion for Judgment of Acquittal to be a Brief in Support of a Motion for Judgment of Acquittal and a Motion to Arrest Judgment. ST:15-16. The court allowed the amendment, but denied

Defendant's Motion for Judgment of Acquittal and denied his request to arrest judgment. ST:16.

Regarding his sentence, Defendant asked to receive probation. ST:41. The State requested that Defendant serve twenty years in prison. ST:37. The court sentenced Defendant to fifteen years in prison with ten years suspended. ST:48; SR:646. It also gave Defendant credit for the 358 days he served in jail. ST:48; SR:646.

STATEMENT OF FACTS

Cancer: That was Kathy Thoman's diagnosis. JT1:30. Dr. Mustafa Sahin tried everything he could to save Kathy, but she passed away. JT1:47, 67-69. Defendant blamed Dr. Sahin for Kathy's death and wanted him dead. Ex. 1.

Defendant and Kathy had been married almost forty years when, in the summer of 2017, doctors diagnosed Kathy with glandular lung cancer after they found a tumor in her right lung. JT1:29; JT2:193. But that diagnosis was wrong. JT1:30. Dr. Sahin—an oncologist that specialized in lung cancers—at Rapid City Regional Hospital's Cancer Center diagnosed Kathy with Stage IV small cell lung cancer. JT1:28, 30. It's an aggressive cancer and it's fatal. JT1:30-31.

Dr. Sahin immediately started Kathy on chemotherapy—the only treatment[2] available for her cancer. JT1:32. Kathy went through six cycles of chemotherapy—one cycle every three weeks—and she "responded extremely well." JT1:33. By late October or early November, her cancer wasn't visible on a PET scan. JT1:33. But Dr. Sahin believed "microscopic deposits" remained in Kathy's body since PET scans only detect cancer that's at least a half inch in size, and one million cancer cells can fit on a pin head. JT:33.

With Kathy's lung cancer the question wasn't if it would return, but when. JT1:34. So Dr. Sahin wanted to see her every three months. JT1:34.

Sadly, by January or February 2018, Kathy's cancer returned. JT1:34-36. Dr. Sahin had no idea Kathy's cancer had returned until Defendant called the Cancer Center and left an "angry" and "threatening message" because Kathy was in the hospital. JT1:34. In that message, Defendant threatened to crash his truck into Dr. Sahin's office. JT1:37.

The Hospital's doctors admitted Kathy because of "generalized weakness and confusion." JT1:35. They did a CAT scan that came back negative. JT1:35. But since that scan "can miss small cancer deposits," Dr. Sahin asked the Hospital's doctors to take an MRI. JT1:35. The MRI

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[2] A study came out in December 2018 indicating immunotherapy as another option to treat small cell lung cancer. JT1:32. But Dr. Sahin said it only prolonged survival by two months. JT1:32.

confirmed Kathy's cancer had metastasized into her brain. JT1:36. The cancer had also spread to her chest and liver. JT1:36.

Once he received the MRI results, Dr. Sahin went to talk to Kathy and Defendant about radiation therapy. JT1:36-37. When Dr. Sahin walked into Kathy's hospital room, Defendant repeated his threat of crashing his truck into Dr. Sahin's office. JT1:37. This threat worried Dr. Sahin, and he thought about calling security or the police. JT1:38. But he decided to ignore it because Defendant was Kathy's sole caregiver, and she would suffer if he got in trouble. JT1:38.

Kathy underwent radiation therapy but she wasn't doing well physically. JT1:40-41. Her prognosis was "extremely poor" since her cancer came back within three months of finishing chemotherapy. JT1:41. Dr. Sahin believed the only options for Kathy were experimental treatments at another medical facility or hospice care. JT1:41-42. The Thomans decided to go to Sanford Cancer Center in Sioux Falls. JT1:42-43; Ex. 9. Sanford's doctors treated Kathy from March 2018 to August 2018. JT1:69; Ex. 1, Ex. 9.

Unfortunately, despite the efforts of Dr. Sahin and Sanford's doctors, Kathy passed away on August 4, 2018. JT1:67-69; Ex. 9. Defendant blamed Dr. Sahin for Kathy's death and wanted him dead. JT2:111; Ex. 1, Ex. 9.

On September 24, 2018, Defendant went to see his friend Ken Jones at Gateway Autoplex in Rapid City, where Jones worked. JT2:95,

100. When Defendant walked into Jones' office he was "[n]ormal Bill." JT2:102. But his mood quickly changed: He became "[e]xtremely sober" and "serious." JT2:103. He was no longer the "normal Bill" Jones remembered. JT2:103-04.

After his mood changed, Defendant asked if Jones "knew anyone that could do away with somebody . . . ." JT2:103. Jones thought this meant Defendant wanted someone killed. JT2:104. Defendant asked if Jones knew someone like that because, about fifteen years ago, Jones joked that he knew a hit man who would kill someone for the cost of a plane ticket and $100.00. JT2:104-05.

When Jones said he was joking about knowing a hit man, Defendant asked if Jones could get him a handgun and a silencer. JT2:108, 112. Jones refused; said he didn't want Defendant to use it to kill himself. JT2:109. But Defendant said he didn't want the gun to commit suicide. JT2:109. He wanted it so he could kill Dr. Sahin. JT2:111. And the gun had to be untraceable. JT2:112.

Even though Defendant had ten rifles and shotguns in his home, he couldn't use those to kill Dr. Sahin. JT2:278; Ex. 1, 8, 9. They had sentimental value. Ex. 1. Plus, his guns were too long: Defendant wanted to get close to Dr. Sahin and "see in his eyes when he knew he was going to die." JT2:114.

Defendant and Jones talked for about a half hour, but Defendant left because Jones was "shook up" by his requests. Ex. 9. After

Defendant left, Jones told his boss about Defendant's requests. JT2:117. Jones also called the Rapid City Police Department. JT2:117-18. The detectives assigned to the investigation wanted Jones to make a recorded phone call to Defendant; Jones agreed and made the call that afternoon. JT2:120; Ex. 1.

During their phone call, Defendant made several threatening comments describing what he wanted to do to Dr. Sahin. Ex. 1. He said "one way or the other" Dr. Sahin "will get taken care of," and if he can help that process along, then "by God, I will." Ex. 1. Defendant said he wanted to shoot Dr. Sahin, but since Dr. Sahin was smaller than him, he could just "twist his head off." Ex. 1. Defendant said about a week before Kathy died, he went to the Rapid City Cancer Center to get a medical bill figured out. Ex. 1. Before he left the house, Kathy told him "do not hurt somebody." Ex. 1. Defendant promised to control his temper. Ex. 1. Yet when he got to the Cancer Center, Defendant saw Dr. Sahin; pointed at him; and said, "there's that son of a bitch I'd like to get." Ex. 1. Defendant also sized-up the Cancer Center and decided he could drive his car through its front doors to hit Dr. Sahin. Ex. 1. The only thing stopping him was the possibility of hurting someone other than Dr. Sahin. Ex. 1. And Defendant said that shooting Dr. Sahin would be just like shooting a dog. Ex. 1.

However, Defendant didn't just tell Jones that he wanted to kill Dr. Sahin: He told Ronald Sasso the same thing—two or three times.

JT2:198-200, 203. Also, Daniel Groethe, while at a neighborhood gathering, heard Defendant say, "I would like to go after a doctor with a shotgun." JT1:55-57.

After Jones' phone call with Defendant, detectives warned Dr. Sahin that Defendant "was trying to hire a hit man" to kill him. JT1:43-44. Dr. Sahin "rushed" home to get his mother, who was visiting, and leave town since he feared for their safety. JT1:45. Because of Defendant's threats, Dr. Sahin started experiencing post-traumatic stress and he left his job at the Cancer Center and South Dakota all together. JT1:45-47.

Officers arrested Defendant at his home after hours of surveillance. JT2:146, 275. They took Defendant to the Rapid City Public Safety Building where Detective Evan Harris interviewed him. JT2:276; JT3:321; Ex. 9-11. During that interview, Defendant said he was just "blowing off steam" and "running his mouth" to Jones, but he wasn't going to hurt anyone. Ex. 9.

ARGUMENTS

I

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS AND HIS REQUEST TO ARREST JUDGMENT.

Defendant claims solicitation of aiding and abetting first-degree murder isn't a public offense because it's impossible to solicit aiding and abetting murder when no murder occurs. DB:15-26. He claims the

Legislature didn't intend to criminalize words alone. *Id.* And he claims the Legislature only intended to prohibit situations where a person solicits another to commit a crime on her behalf, not when she solicits help but commits the crime herself. *Id.* Yet a review of South Dakota's solicitation laws, and the solicitation laws in other jurisdictions, reveals Defendant's requests for Ken Jones' help amounted to the criminal solicitation prohibited by SDCL 22-4A-1.

A. Standard of Review.

This Court reviews a circuit court's "decision to grant or deny a motion to dismiss an indictment under [the] abuse of discretion standard." *State v. Carothers*, 2006 S.D. 100, ¶8, 724 N.W.2d 610, 615-16 (citing *State v. Vatne*, 2003 S.D. 31, ¶8, 659 N.W.2d 380, 383). "'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.'" *Knecht v. Evridge*, 2020 S.D. 9, ¶20, 940 N.W.2d 318, 326 (quoting *MacKaben v. MacKaben*, 2015 S.D. 86, ¶9, 871 N.W.2d 617, 622).

This Court hasn't articulated what standard of review applies to the denial of a motion to arrest judgment, but the Wyoming Supreme Court has. It determined the appropriate standard of review is abuse of discretion because a post-trial motion to arrest judgement,[3] like a motion

[3] Wyoming's Arrest of Judgment statute requires a court to arrest a criminal judgment "if the indictment, information or citation does not

(contined . . .)

for a new trial, seeks to set aside a verdict. *Harnetty v. State*, 435 P.3d 368, 375 (Wyo. 2019). And since it reviews the denial of a motion for new trial for an abuse of discretion, it applies the same standard to the denial of a motion to arrest a judgment. *Id.*

B. Defendant's Indictment Charged a Public Offense, Thus, the Circuit Court Properly Denied His Motion to Dismiss and His Request to Arrest Judgment.

SDCL 23A-8-2 provides the exclusive grounds for dismissing an indictment. *State v. Quist*, 2018 S.D. 30, ¶9, 910 N.W.2d 900, 903 (quoting *Vatne*, 2003 S.D. 31, ¶14, 659 N.W.2d at 384). One of those grounds is when an indictment "does not describe a public offense[.]". SDCL 23A-8-2(5). And a circuit court can "arrest" a criminal judgment if a defendant is convicted, but his indictment doesn't charge a criminal offense. SDCL 23A-30-1. What do these statutes mean?

This Court hasn't directly said, but it issued an opinion in *State v. Clements*, that seems to indicate an indictment doesn't describe a public offense if it doesn't sufficiently notify the defendant of the statutory charge against him.[4] 2013 S.D. 43, ¶6, 832 N.W.2d 485, 485 (citing

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(. . . continued)
charge an offense or if the court was without jurisdiction of the offense charged." W.R. Cr. P. Rule 34. This is identical to South Dakota's statute, which says: "A court shall arrest judgment if an indictment or information does not charge an offense or if the court does not have jurisdiction of the offense charged." SDCL 23A-30-1.

[4] Other courts reached this same conclusion. *Heasley v. United States*, 218 F.2d 86, 88-89 (8th Cir. 1955)(affirming denial of motion to dismiss because indictment "clearly advised the defendant of the facts constituting the offense with which he was charged and a conviction or

(contined . . .)

State v. Fisher, 2013 S.D. 23, ¶28, 828 N.W.2d 795, 803). An indictment is sufficient if it "(1) contain[s] the elements of the offense charged and fairly inform[s] the defendant of the charge against him, and (2) enable[s] him to plead an acquittal of conviction in bar of future prosecutions for the same offense." *State v. Bingen*, 326 N.W.2d 99, 100 (S.D. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624 (1980); *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038 (1962)). And "[a]n indictment is generally sufficient if it employs the language of the statute [alleged to have been violated] or its equivalent." *Bingen*, 326 N.W.2d at 100 (citing *State v. Lange*, 152 N.W.2d 635 (S.D. 1967)).

Here, Defendant's Indictment charged:

> That on or about the 24th day of September, 2018, in the County of Pennington, State of South Dakota, WILLIAM THOMAN, did commit the public offense of CRIMINAL SOLICITATION, in that (s)he did, with the intent to promote or facilitate the commission of a crime, to wit: Aiding and Abetting First Degree Murder, command hire, request, or solicit another person, to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense, in violation of SDCL 22-4A-1(1) . . . .

(. . . continued)
acquittal would be a bar to further prosecution for the same offense."); *State v. Munhall*, 798 P.2d 61, 64 (Idaho Ct. App. 1990)(affirming denial of motion to dismiss because "the Information adequately notified Munhall of the criminal acts with which he was charged."); *Johnson v. Commonwealth*, 709 S.W.2d 838, 839 (Ky. Ct. App. 1986), *abrogated on other grounds by Goncalves v. Commonwealth*, 404 S.W.3d 180 (Ky. 2013) (affirming denial of motion to dismiss because "[a]n indictment is sufficient if it fairly informs the defendant of the nature of the charges against him." (citing *Wills v. Commonwealth*, 489 S.W.2d 823 (Ky. 1973))).

SR:18. The Indictment mirrors the language in SDCL 22-4A-1. *Compare* SR:18 *with* SDCL 22-4A-1. Thus, the circuit court properly denied Defendant's Motion to Dismiss. SR:101; *Bingen*, 326 N.W.2d at 100. Likewise, because Defendant was convicted of the public offense described in his Indictment, the court properly denied his request to arrest judgment. ST:16; SDCL 23A-30-1.

But in this appeal Defendant doesn't challenge the circuit court's conclusion that his Indictment was sufficient, which, according to *Clements*, is the question to be asked when faced with a challenge based on SDCL 23A-8-2(5). *See generally* DB:15-26. Defendant also doesn't challenge the court's conclusion that he was convicted of a public offense. *See generally* DB:15-26.

Instead, Defendant goes through a complicated argument that stacks inchoate offense on top of inchoate offense on top of inchoate offense. DB:15-26. At first blush, his argument looks like a nightmare exam problem. But distilled to its essence, Defendant's claim is that it's legally impossible to solicit another to aid and abet murder because that person cannot aid and abet a murder if the murder never occurs. DB:17. Defendant also claims our Legislature didn't intend to criminalize when a person requests another to help her commit a crime. DB:18-19. According to Defendant, the Legislature only criminalized when a person requests another to commit a crime for her. *Id.* But Defendant's claims miss the mark.

First, while this Court hasn't announced when criminal solicitation is complete, other courts and legal scholars have. They agree solicitation is complete when a defendant, with the necessary intent, asks another for help committing a crime or asks another to commit a crime for her. This is the exact conclusion the circuit court reached when it denied Defendant's Motion to Dismiss. SR:98.

For example, the California Supreme Court ruled "'solicitation . . . is complete once the verbal request is made with the requisite criminal intent[.]'"[5] *People v. Wilson*, 114 P.3d 758, 772 (Cal. 2005)(quoting *In re Ryan N.*, 112 Cal.Rptr.2d 620, 635 (Cal. Ct. App. 2001)). Professor LaFave, perhaps the preeminent scholar on criminal law agrees: "For the crime of solicitation to be completed, it is only necessary that the actor with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise encouraged that person to commit a crime." Wayne R. LaFave, *Criminal Law* §11.1, pg. 602 (5th ed. 2010). These authorities mirror this Court recognition that "the general rule 'is . . .

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[5] Other courts agree. *See e.g.*, *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010)(*per curiam*) ("Solicitation . . .is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary." (citing Wayne R. LaFave, *2 Substantive Criminal Law* §11.1 (2d ed. 2009))); *State v. Everett*, 330 P.3d 22, 25 (Or. 2014)(*en banc*)(same); *State v. Johnson*, 640 P.2d 861, 864 (Ariz. 1982)(*en banc*)(same); *People v. Ruppenthal*, 771 N.E.2d 1002, 1005 (Ill. Ct. App. 2002)(same (citing *People v. Edwards*, 611 N.E.2d 1196, 1202 (Ill. Ct. App. 1993))); *State v. DePriest*, 907 P.2d 868, 876 (Kan. 1995)(same); *People v. Crawford*, 591 N.W.2d 669, 673 (Mich. Ct. App. 1998)(same (citing *People v. Vandelinder*, 481 N.W.2d 787 (Mich. Ct. App. 1992))).

solicitation is in the nature of the incitement or encouragement of another to commit a crime in the future and so it is essentially preparatory to the commission of the targeted offense.'" *State v. Disanto*, 2004 S.D. 112, ¶25, 688 N.W.2d 201, 209 (quoting *State v. Otto*, 629 P.2d 646, 648 (Idaho 1981)).

But why is solicitation complete when a defendant makes his request? Because "the speech—asking another to commit a crime—is the punishable act." *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010)(*per curiam*). *See State v. Everett*, 330 P.3d 22, 25 (Or. 2014)(*en banc*)("[T]he underlying rationale . . . is the solicitation itself is considered sufficiently dangerous to justify punishment, regardless of whether the solicitation is successful."); *Wilson*, 114 P.3d at 772 ("'[T]he harm [of solicitation] is in asking . . . .'" (quoting *Ryan N.*, 112 Cal.Rptr.2d at 635)). And "[p]roviding punishment for solicitation aids in the prevention of the harm that would result should the inducements prove successful, and also aids in protecting the public from being exposed to inducements to commit or join in the commission of crimes." LaFave, *Criminal Law* §11.1(b), pg. 604.

Since a defendant commits solicitation once she asks another to commit a crime or help her commit a crime, no other action is necessary. *See e.g.*, *Everett*, 330 P.3d at 25 ("[S]olicitation is complete upon the act of soliciting, regardless of what else does or does not transpire."); *Wilson*, 114 P.3d at 772 (same (quoting *Ryan N.*, 112 Cal.Rptr.2d at 635));

LaFave, *Criminal Law* §11.1, pg. 602 ("The crime solicited need not be committed."). Our Legislature expressly adopted this viewpoint in SDCL 22-4A-2: "It is not a defense to prosecution for criminal solicitation that the person solicited neither committed or attempted to commit the offense solicited nor was capable of committing or attempting to commit the offense solicited." This cuts directly against Defendant's claim that there can be no solicitation in this case since Ken Jones didn't contact a hit man and didn't provide Defendant with a gun. *See* DB:19-20.

Second, when our Legislature adopted SDCL 22-4A-1 it criminalized the command or request a defendant makes for another person to commit or attempt to commit a crime. It adopted that statute in 2005, after this Court held solicitation is a preparation to commit an offense, not an attempt to commit that offense. *Disanto*, 2004 S.D. 112, ¶38, 688 N.W.2d at 212. But our Legislature went one step further than most states, who criminalize solicitation of murder. *See Disanto*, 2004 S.D. 112, ¶27, 688 N.W.2d at 209. Our Legislature criminalized the solicitation of any felony. SDCL 22-4A-1. This broad-sweeping statute defeats Defendant's claim that it's legally impossible to solicit aiding and abetting first-degree murder.

"Legal impossibility refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime." *United States v. Spurlock*, 386 F.Supp.2d 1072, 1081 (W.D. Mo. 2005). Stated differently, "when something is legally impossible, the very thing

the person intended to do is lawful, though he may believe it is not." *Id.* at 1082. For example, it's legally impossible for a person to possess marijuana when she has a baggie of oregano, even if she believes it's full of marijuana. But that's not the situation in Defendant's case.

Defendant asked Ken Jones for help finding a hit man to kill Dr. Sahin or an untraceable gun so Defendant could do it himself. JT2:103-12. As soon as Defendant made those requests, with the intent that Jones facilitates the murder of Dr. Sahin by doing or attempting either act, Defendant committed the crime of solicitation. SDCL 22-4A-1. It doesn't matter that Jones didn't contact a hit man or give Defendant a gun. SDCL 22-4A-2. It doesn't matter that neither a hit man nor Defendant killed Dr. Sahin. And it doesn't matter that Jones couldn't be convicted of aiding and abetting first-degree murder since no murder occurred. *State v. Jucht*, 2012 S.D. 66, ¶22, 821 N.W.2d 629, 634. These points become even more concrete with a discussion of *Everett*, *Commonwealth v. Wolcott*, 931 N.E.2d 1025 (Mass. Ct. App. 2010), and *People v. Harsit*, 745 N.Y.S.2d 872 (N.Y. Ct. App. 2002).

In *Everett*, the defendant solicited Van Alstine to provide the Outsiders Motorcycle Club with information about Piatt, a Club member, who cooperated with police after Everett asked Piatt to kill another person. 330 P.3d at 23. Everett hoped the Club would "'take care of' and 'get rid of' Piatt, [and] that they would 'handle it,' so that 'Piatt would not testify' against him." *Id.* Everett "was charged with soliciting Van Alstine

to commit the aggravated murder and second-degree assault of Piatt." *Id.* Everett claimed the evidence presented at trial "showed that [he] solicited Van Alstine to solicit someone in the Outsiders to murder Piatt, which is not what the [prosecution] charged." *Id.* at 24. The Oregon Supreme Court rejected this claim because "[t]o 'aid and abet' means to advise, counsel, procure, or encourage another to commit a crime." *Id.* at 24 (citing *State v. Rosser*, 91 P.2d 295 (Or. 1939)(*en banc*)). And "'[t]o 'abet' means 'to countenance, assist, or give aid.'" *Everett*, 330 P.3d at 24 (quoting *State v. Start*, 132 P. 512 (Or. 1913)). Thus, the Court concluded the evidence showing that Everett "solicited Van Alstine to advise, counsel, procure, encourage, or countenance, assist, or give aid to someone else—in this case, the Outsiders—to commit aggravated murder is sufficient to establish that [Everett] solicited Van Alstine to commit aggravated murder." *Id.* at 24-25.

In *Wolcott*, the defendant asked John Jamroz "if he knew of anyone who could" make her husband "just disappear." 931 N.E.2d at 1027. Wolcott's indictment charged that she "'did solicit, counsel, advise, entice or induce John W. Jamroz to commit a felony, to wit: MURDER, with the intent that such person commit or procure such felony in violation of the common law.'" *Id.* at 1032. Wolcott claimed she couldn't be convicted of solicitation "without proof of her intent that Jamroz personally kill her husband . . . ." *Id.* at 1033. The Massachusetts Court of Appeals rejected her claim because "[t]here is no legal distinction between

someone who commits a murder as an accessory as opposed to a principal; therefore, an individual who 'procures' a murder also 'commits' murder in the eyes of the law." *Id.* (citing *Commonwealth v. Perry*, 256 N.E.2d 745 (Mass. 1970)). Ultimately, the Court stated:

> [I]f Jamroz had acceded to [Wolcott's] request and had found someone else to murder [Wolcott's] husband, and that person had in turn personally killed her husband, Jamroz would have been indictable for a felony. Whether [Wolcott] solicited Jamroz to personally kill her husband or to find another to do so is thus of no consequence. Either act constitutes a felony, and under either fact pattern, [Wolcott] would be guilty of soliciting a felony.

Wolcott, 931 N.E.2d at 1033. *See Moss v. State*, 888 P.2d 509, 517 (Okla. Ct. App. 1994)(determining solicitation statute prohibits "solicitation of another to find a 'hit man' [because i]f we were to hold otherwise, all one would have to do is place a third (or more) person in the chain and escape judgment; this does not make sense.").

In *Harsit*, the prosecution charged Harsit with solicitation after he sought the help of two undercover police officers to get a gun so he could kill a judge. 745 N.Y.S.2d at 873. Harsit wanted the solicitation count dismissed because "he never asked anyone else to commit a murder[;]" he intended to use the gun himself. *Id.* at 878. The Court rejected this claim, concluding:

> [Harsit] fully informed [the government agents] of his murderous design, and in particular of his specific desire to use the gun and bullets as the murder weapon, [Harsit's] request of both individuals was, in essence, a request that they engage in conduct that would make them an accessory to murder. In particular, the conduct solicited, supplying gun and bullets with full knowledge of [Harsit's] murderous

> plan, was sufficient in law to make them, but for their feigned state of mind, as an accessory to murder.

Id. at 879 (internal citation omitted).

Defendant's solicitation of Ken Jones is identical to the conduct in *Everett, Wolcott,* and *Harsit*. And it's equally as punishable. He sought Jones' help to find a hit man that would kill Dr. Sahin.[6] *Everett*, 330 P.3d at 25; *Wolcott*, 931 N.E.2d at 1033. Defendant also sought Jones' help to obtain an untraceable handgun so Defendant could kill Dr. Sahin himself. *Harsit*, 745 N.Y.S.2d at 879. These are the exact types of requests our Legislature wanted to criminalize when it adopted SDCL 22-4A-1. This is even more evident in light of this Court's conclusion in *Disanto* that a conversation with a feigned hit man wasn't attempted murder—it was solicitation, which wasn't criminalized; yet. *See AEG Processing Center No. 58, Inc. v. S.D. Dep't of Revenue*, 2013 S.D. 75, ¶12, 838 N.W.2d 843, 848 ("'We presume the Legislature acts with knowledge of our judicial decisions.'" (quoting *Sanford v. Sanford*, 2005 S.D. 34, ¶19, 694 N.W.2d 283, 289)).

Third, Defendant's legal impossibility argument is practically identical to the impossibility claim raised in *Clements*. Clements faced a bigamy charge and he argued that since "a bigamous marriage is *void ab*

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[6] Even though the jury rejected the State's theory that Defendant solicited Jones by asking about a hit man (SR:470), that doesn't change the analysis on this issue. At the time the circuit court denied Defendant's Motion to Dismiss, no factual determination had been made and the State's theory remained intact.

initio according to SDCL 25-1-8, he was never legally married the second time, and thus, it is legally impossible to prosecute him for bigamy." *Clements*, 2013 S.D. 43, ¶8, 832 N.W.2d at 487. This Court rejected his argument because it must "construe statutes together to give legal effect to all of the provisions in the statutes." *Id.* And "[d]ismissing the information on the basis that bigamy is a legal impossibility nullifies the statute providing for criminal prosecution of bigamy." *Id.* at ¶9 (citing *In re Collins*, 182 N.W.2d 335, 339 (S.D. 1970)).

Here, if this Court agreed with Defendant's impossibility argument, it would have to refuse to give effect to all provisions of our criminal statutes. Specifically, it would have to disregard the broad definition of solicitation in SDCL 22-4A-1; the announcement, in SDCL 22-4A-2, that the crime solicited need not be carried out; and that aiding and abetting first-degree murder is a crime recognized by our statutes. *See* SDCL 22-4A-1 and SDCL 22-3-3.

Fourth, Defendant's desire to look in Dr. Sahin's eyes before killing him leads directly to his claim that our Legislature only intended to criminalize when a person asks another to do the "dirty work" for her, not asking someone for help so she can do the "dirty work" herself. DB:18-19. This argument would be true had our Legislature, like other states, adopted a solicitation statute that prohibits the solicitation of specific crimes, like solicitation of murder. *See e.g.*, 720 ILCS 5/8-1.2 (Solicitation of murder for hire); I.C.A. §707.3A (Solicitation to commit

murder); LSA-R.S. 14:28.1 (Solicitation for murder); 21 Okl.St.Ann. §701.16 (Solicitation for murder in the first degree).

But our Legislature blazed a different trail. It adopted a broad-sweeping statute that criminalizes when a person, "with the intent to promote or facilitate the commission of *a crime*, commands, hires, requests, or solicits another person to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense . . . ." SDCL 22-4A-1 (emphasis added). Some crimes contemplated by this broad statute include putting the solicitor in touch with a hit man that would carry out a murder or providing the solicitor with a gun to kill the victim. *See Everett*, 330 P.3d at 25; *Wolcott*, 931 N.E.2d at 1033; and *Harsit*, 745 N.Y.S.2d at 879. How do we know the Legislature intended to criminalize those actions? Because first-degree murder is a felony, and an aider and abettor of murder is just as legally responsible as the person that committed the murder. SDCL 22-16-4; SDCL 22-3-3. And it's a crime to solicit *any felony*. *See* SDCL 22-4A-1.

Finally, Defendant argues the Legislature couldn't have intended a solicitation to be completed by speaking words alone since it enacted the renunciation defense. DB:23. He also claims this defense supports his argument that our Legislature intended to criminalize when a person solicited someone to do her "dirty work," but not soliciting someone's help so she can do her own "dirty work." DB:23. Both claims are misplaced.

South Dakota's renunciation defense is found in SDCL 22-4A-4, which provides:

> No person may be convicted of criminal solicitation if, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, the defendant: (1) Notified the person solicited of his or her renunciation; and (2) Gave timely and adequate warning to the law enforcement authorities or otherwise made a substantial effort to prevent the commission of the criminal conduct solicited.

That defense is a Legislative acknowledgement that a "solicitor, by his act of renunciation, has shown that he is not sufficiently dangerous to require application of the corrective processes of the law to him." LaFave, *Criminal Law* §11.1(d), pg. 608. And "by allowing the defense[,] solicitors will be encouraged to prevent the solicited crimes from occurring because they will thereby escape liability altogether." *Id.* This makes sense because the danger in solicitation is the request itself and criminalizing it "aids in protecting the public from being exposed to inducements to commit or join in the commission of crimes." LaFave, *Criminal Law* §11.1(b), pg. 604.

But what's more dangerous than an inducement to commit or join a crime? Committing that crime. Thus, our Legislature adopted the renunciation defense to provide an incentive for a solicitor to avoid this dangerous result and protect society. *See* LaFave, *supra*. It didn't adopt the renunciation defense to indicate that words alone aren't enough to commit the crime of solicitation. If that were true, there's no need for the

Legislature to criminalize solicitation. It already criminalized conspiracies and attempts to commit crimes, both of which require some act beyond mere words. SDCL 22-3-8; SDCL 22-4-1. Plus, Defendant's argument asks this Court to disregard the Legislature's categorical announcement that "[i]t is not a defense to prosecution for criminal solicitation that the person solicited neither committed or attempted to commit the offense solicited . . . ." SDCL 22-4A-2. And this Court has already said it will not disregard statutes when determining if the Legislature has criminalized certain conduct. *Clements*, 2013 S.D. 43, ¶8, 832 N.W.2d at 487.

Nor did the Legislature adopt the renunciation defense to signal that a defendant could only commit criminal solicitation by asking another person to do the "dirty work" on her behalf. *See* DB:23. If the Legislature intended such a limitation, it would have narrowly defined solicitation, not draft an affirmative defense. *See* M.C.L.A. 750.157b (Solicitation of murder or other felony); 21 Okl.St.Ann. §701.16 (Solicitation of murder in the first degree).

In short, because criminal solicitation is completed once the words are spoken, with the necessary intent, the circuit court properly denied Defendant's Motion to Dismiss and his request to arrest judgment. Therefore, this Court should affirm those decisions.

II

THE CIRCUIT COURT DIDN'T ERR WHEN IT INSTRUCTED THE JURY ABOUT SOLICITATION OF AIDING AND ABETTING MURDER.

Defendant claims the circuit court erred when it instructed the jury on aiding and abetting because it didn't instruct that to be convicted of aiding and abetting murder, the principal actor has "to complete the underlying crime of murder." DB:27-28. However, a review of the applicable law reveals the court properly and accurately instructed the jury. The murder didn't have to occur before Defendant could be convicted of solicitation.

A. Standard of Review.

This Court reviews a circuit court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Armstrong*, 2020 S.D. 6, ¶12, 939 N.W.2d 9, 12 (citing *State v. White Face*, 2014 S.D. 85, ¶14 n.1, 857 N.W.2d 387, 392 n.1). It utilizes this standard because a circuit court has discretion to decide how to word and arrange its jury instructions. *State v. Kryger*, 2018 S.D. 13, ¶41, 907 N.W.2d 800, 814 (quoting *State v. Spaniol*, 2017 S.D. 20, ¶49, 895 N.W.2d 329, 345). This Court also reviews the instructions as a whole because "[i]f they 'correctly state the law and inform the jury, they are sufficient.'" *Kryger*, 2018 S.D. 13, ¶41, 907 N.W.2d at 814 (quoting *State v. Jensen*, 2007 S.D. 76, ¶19, 737 N.W.2d 285, 291).

Yet even if a circuit court abuses its discretion regarding jury instructions, it's not an automatic reversal in favor of a defendant. It's reversible error only if a defendant shows the challenged instruction is "'both erroneous and prejudicial, such that in all probability it produced some effect upon the verdict and was harmful to the substantial rights of a party.'" *Spaniol*, 2017 S.D. 20, ¶49, 895 N.W.2d at 346 (quoting *State v. Whistler*, 2014 S.D. 58, ¶13, 851 N.W.2d 905, 910).

If the question is whether the court "gave [an] incorrect or misleading instruction to a defendant's prejudice[, that] is a question of law reviewed de novo." *State v. Diaz*, 2016 S.D. 78, ¶42, 887 N.W.2d 751, 763 (citing *State v. Birdshead*, 2015 S.D. 77, ¶14, 871 N.W.2d 62, 70).

B. The Circuit Court Properly Refused to Instruct the Jury that Aiding and Abetting First Degree Murder Requires the Murder to Occur Before a Person Can Be Convicted of Aiding and Abetting.

The Indictment charged Defendant with soliciting Ken Jones to aid and abet first-degree murder. SR:18-19. The State's theory was Defendant solicited Jones to contact a hit man that would kill Dr. Sahin or provide Defendant with an untraceable gun so Defendant could kill Dr. Sahin himself. JT4:566; SR:467.

Defendant is correct that *Jucht* reaffirmed that "'[t]o be *guilty* of aiding and abetting, the evidence must show the principal offender committed all the elements of the underlying offense.'" 2012 S.D. 66, ¶22, 821 N.W.2d at 634 (quoting *State v. Tofani*, 2006 S.D. 63, ¶36, 719

N.W.2d 391, 400) (emphasis added). But he's wrong to say that because of the circuit court's jury instructions, "the State no longer needed to prove" Defendant killed Dr. Sahin. DB:28.

This is a solicitation case, not an aiding and abetting case and not a murder case. As discussed in Argument I, Defendant completed the crime once he made the request, with the necessary intent, to Ken Jones for the name of a hit man or an untraceable gun. The State never had to prove Defendant killed Dr. Sahin. SDCL 22-4A-1; SR:443. If it had to prove Defendant, or someone else, killed Dr. Sahin, then most of this brief would be a futile academic exercise. Defendant wouldn't be charged with solicitation: He'd be charged with first-degree murder. SDCL 22-16-4.

The circuit court didn't instruct the jury on aiding and abetting because the State had to prove Jones actually aided and abetted Defendant in the murder of Dr. Sahin before Defendant could be guilty of solicitation. *See* SDCL 22-4A-2; SR:443. It instructed the jury on aiding and abetting because the jury had to determine if what Defendant requested Jones to do would amount to aiding and abetting first-degree murder. SDCL 22-4A-1; SR:444, 467. *See Everett*, *Wolcott*, and *Harsit*, *supra*. But the jury didn't have to find that Jones relented and attempted or actually committed the solicited conduct, before it could find Defendant guilty of solicitation. SDCL 22-4A-2; SR:445.

In sum, the jury had to decide if Defendant solicited Jones to aid and abet murder. So, the circuit court properly instructed the jury when it provided the jury with the statutory definition of aiding and abetting. The court also properly refused to instruct the jury that the murder must have occurred before Jones could aid and abet Defendant in Dr. Sahin's murder. This trial wasn't about Jones and his conduct, or lack thereof. It was about Defendant and his criminal conduct, which was completed once he requested Jones' help. *See* Argument I. Therefore, this Court should affirm the circuit court's rejection of Defendant's requested jury instruction.

III

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

Defendant claims the circuit court erred by denying his Motion for Judgment of Acquittal because Ken Jones couldn't aid and abet Defendant until Defendant murdered Dr. Sahin with a gun Jones supplied. DB:29-30. However, a review of all the evidence presented at trial shows there's sufficient evidence to support the jury's guilty verdict.

A. Standard of Review.

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Harruff*, 2020 S.D. 4, ¶15, 939 N.W.2d 20, 25 (citing *State v. Brim*, 2010 S.D. 74, ¶6, 789 N.W.2d 80, 83). It "'determine[s] whether the evidence [is] sufficient to sustain a conviction.'" *Quist*, 2018

S.D. 30, ¶13, 910 N.W.2d at 904 (quoting *State v. Guthmiller*, 2014 S.D. 7, ¶21, 843 N.W.2d 363, 371). It asks "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Harruff*, 2020 S.D. 4, ¶15, 939 N.W.2d at 25 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶14, 772 N.W.2d 117, 122). "'If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside.'" *Quist*, 2018 S.D. 30, ¶13, 910 N.W.2d at 904 (quoting *State v. Martin*, 2017 S.D. 65, ¶6, 903 N.W.2d 748, 751).

But this Court doesn't "'resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence.'" *Harruff*, 2020 S.D. 4, ¶15, 939 N.W.2d at 25 (quoting *Brim*, 2010 S.D. 74, ¶6, 789 N.W.2d at 84).

B. There's Sufficient Evidence to Support the Jury's Verdict that Defendant Solicited Ken Jones' Help to Facilitate the Murder of Dr. Sahin.

To convict Defendant of criminal solicitation the State had to prove:

1. [Defendant], with the specific intent to promote or facilitate the crime of murder in the first degree[;]
2. Commanded, hired, requested, or solicited another person to engage in specific conduct which would constitute the commission of aiding or abetting murder in the first degree[; and]
3. [Defendant] did so intentionally.

SR:443; SDCL 22-4A-1.

Defendant bases his entire argument for this issue on the fact that he didn't murder Dr. Sahin. DB:29-30. Just as in Issue II, above, Defendant incorrectly claims he had to murder Dr. Sahin before the State could convict him for soliciting Ken Jones' help since Jones couldn't aid and abet the murder until it occurred. But, as discussed in Arguments I and II, Defendant completed the solicitation once he made the request to Jones. The State didn't have to prove that Defendant carried out his murderous plan or that Jones actually helped him. SR:443; SDCL 22-4A-2; *Harsit*, 745 N.Y.S.2d at 879 .

The State's evidence shows Defendant blamed Dr. Sahin for Kathy's death and he wanted Dr. Sahin dead. Ex. 1. But Defendant couldn't use one of his own guns to kill Dr. Sahin. Ex. 1, Ex. 8. The police could trace them back to him. JT2:112. Plus, his guns were too long: Defendant wanted a handgun so he could see the look in Dr. Sahin's eyes "when he knew he was going to die." JT2:114. And this wasn't the "normal Bill" that's "cantankerous" and "has no filter." JT2:102; JT4:576-77. This was an "extremely sober" and "serious" Bill that was dead set on getting even for Kathy's death. JT2:102-03.

When Defendant asked Jones for help, he wasn't just joking or "blowing off steam." Ex. 9. His requests were just the most recent, and most serious, ideas in a long list of ideas Defendant had to make Dr. Sahin pay for Kathy's death. He wanted to drive his vehicle into Dr. Sahin's office, and the only thing stopping him was the possibility that

innocent bystanders could be hurt. JT1:34, 37; Ex. 1. Defendant also wanted to shoot Dr. Sahin with a shotgun and "twist his head off." JT1: 55-57; Ex. 1. It's this laundry-list of threats that helps establish Defendant's intent. SR:443, 451.

In short, the evidence presented is more than sufficient to prove Defendant intentionally solicited Ken Jones' help to facilitate Defendant's planned murder of Dr. Sahin. Therefore, this Court should affirm the denial of Defendant's Motion for Judgment of Acquittal.

IV

THE CIRCUIT COURT DIDN'T ABUSE ITS DISCRETION BY OVERRULING DEFENDANT'S OBJECTIONS TO DR. SAHIN'S TESTIMONY.

Defendant claims the circuit court should've sustained his objections to Dr. Sahin's testimony about how he reacted to Defendant soliciting Ken Jones' help to murder Dr. Sahin. Defendant argues this testimony was irrelevant and unfairly prejudicial. But a review of the Rules of Evidence and relevant case law shows Dr. Sahin's testimony was relevant to prove Defendant's intent and its probative value outweighed any dangers of unfair prejudice.

A. Standard of Review.

This Court reviews evidentiary rulings under the abuse of discretion standard. *State v. Scott*, 2019 S.D. 25, ¶11, 927 N.W.2d 120, 125 (citing *State v. Buchholtz*, 2013 S.D. 96, ¶11 n.1, 841 N.W.2d 440, 454 n.1). And those rulings "'are presumed correct.'" *State v. Vargas*,

2015 S.D. 72, ¶30, 869 N.W.2d 150, 161 (quoting *State v. Owen*, 2007 S.D. 21, ¶9, 729 N.W.2d 356, 362).

When undertaking its review, this Court determines if the circuit court actually "'abused its discretion in making an evidentiary ruling.'" *Sedlacek v. Prussman Contracting, Inc.*, 2020 S.D. 18, ¶16, 941 N.W.2d 819, 822 (quoting *Ruschenberg v. Eliason*, 2014 S.D. 42, ¶23, 850 N.W.2d 810, 817). The court only abuses its discretion if it "'misapplies a rule of evidence[.]'" *State v. Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d 488, 497 (quoting *State v. Asmussen*, 2006 S.D. 37, ¶13, 713 N.W.2d 580, 586). If the court didn't misapply a rule of evidence, the inquiry ends. *Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d at 497 (quoting *State v. Bausch*, 2017 S.D. 1, ¶12, 889 N.W.2d 404, 408). But if it misapplied a rule of evidence, this Court asks whether that misapplication "'was a prejudicial error that in all probability affected the jury's conclusion.'" *Sedlacek*, 2020 S.D. 18, ¶16, 941 N.W.2d at 822 (quoting *Ruschenberg*, 2014 S.D. 42, ¶23, 850 N.W.2d at 817). Yet, if the error isn't prejudicial, it isn't reversible. *Sedlacek*, 2020 S.D. 18, ¶16, 941 N.W.2d at 822-23 (quoting *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶59, 764 N.W.2d 474, 491).

B. The Circuit Court Properly Allowed Dr. Sahin to Testify About How He Reacted to Defendant's Solicitation of Ken Jones.

The touchstone of all evidentiary decisions is whether the evidence is relevant. SDCL 19-19-401; SDCL 19-19-402. "'Evidence is relevant if

it has *any tendency* to make a fact more or less probable than it would be without the evidence.'" *State v. Kihega*, 2017 S.D. 58, ¶14, 902 N.W.2d 517, 523 (quoting SDCL 19-19-401)(emphasis added).

In this case, one of the elements the State had to prove was that Defendant intentionally sought Ken Jones' help, in some fashion, to facilitate the murder of Dr. Sahin. SR:443. It also had to prove that Defendant specifically intended to facilitate the murder when he solicited Jones' help. SR:443. But how does the State prove a defendant's intent? By presenting evidence of his words and actions. *State v. Holzer*, 2000 S.D. 75, ¶15, 611 N.W.2d 647, 651 (quoting *State v. McGill*, 536 N.W.2d 89, 94 (S.D. 1995)); SR: 451.

Defendant doesn't deny the requests he made to Ken Jones about wanting to hire a hitman and wanting an untraceable gun so Defendant could murder Dr. Sahin himself. Instead, he claims he was just joking and "blowing off steam" while grieving Kathy's death. JT4:576-77; Ex. 9. That was his sole theory of defense. JT4:576-77. How does the State combat that theory? With evidence showing Defendant's inquiries about a hit man and a gun were serious. *See State v. Abdo*, 2018 S.D. 34, ¶27, 911 N.W.2d 738, 745 ("'[T]he State has the right to present its case in any manner it sees fit so long as it stays within evidentiary rules.'" (quoting *State v. Herrmann*, 2004 S.D. 53, ¶12, 679 N.W.2d 503, 507)); *Holzer*, *supra*. And it did so partly through the testimony of Dr. Sahin.

Dr. Sahin testified that police had "credible information that [Defendant] was trying to hire a hit man to have [him] killed." JT1:43-44. Because of this, he "rushed" home to pick up his mother, who was visiting him. JT1:44-45. He was worried about their safety since a hit man was potentially looking for him. JT1:45. And because this was a "serious threat" against Dr. Sahin and his family, Dr. Sahin began experiencing post-traumatic stress and, ultimately, he had to leave his medical practice in Rapid City and South Dakota altogether. JT1:45-47.

While this Court hasn't addressed the use of victim reaction testimony, others have and they approve of admitting that evidence. For example, the Minnesota Court of Appeals said, "Intent 'is a subjective state of mind usually established only by reasonable inference from surrounding circumstances,' such as *a victim's reaction* to a statement."[7]

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[7] Other courts agree. *See e.g.*, *United States v. Magleby*, 241 F.3d 1306, 1315 (10th Cir. 2001)(recognizing a victim's reaction to a cross burning "is probative of the defendant's intent under 18 U.S.C. §241."); *United States v. Hartbarger*, 148 F.3d 777, 782-85 (7th Cir. 1998), *overruled on other grounds by United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003)(*En Banc*)(same); *United States v. J.H.H.*, 22 F.3d 821, 827-28 (8th Cir. 1994)(same (citing *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401 (1969)(*Per curiam*))); *People v. Bradley*, 14 N.Y.S.3d 612, 615, (N.Y. App. Div. 2015)(concluding "the victim's reactions to defendant's egregiously inappropriate behavior during the period charged" proved defendant's intent); *State v. Geiger*, 2007 WL 461331, *1 (Iowa Ct. App.)("The victim's reaction to the defendant's behavior is relevant to the question of the defendant's intent to harm." (citing *State v. Reynolds*, 670 N.W.2d 405, 414-15 (Iowa 2003))); *State v. Fuller*, 785 A.2d 408 (N.H. 2001)(recognizing a victim's reaction to a threat "may be circumstantial evidence relevant to the element of intent . . . ."); *State v. Marsala*, 684 A.2d 1199 (Conn. App. Ct. 1996)(confirming, in a harassment prosecution, that "[b]ecause we cannot know with certainty the

(contined . . .)

State v. Hendrickson, 2015 WL 1514177, * 2 (Minn. Ct. App.)(quoting *State v. Schweppe*, 237 N.W.2d 609, 614 (Minn. 1975)) (emphasis added). Minnesota's recognition that the prosecution can prove a defendant's intent by circumstantial evidence, including a victim's reaction, tracks South Dakota's well-settled rule that "'[a]ll elements of a crime, including intent, may be established circumstantially.'" *State v. Riley*, 2013 S.D. 95, ¶18, 841 N.W.2d 431, 437 (quoting *State v. Shaw*, 2005 S.D. 105, ¶45, 705 N.W.2d 620, 633). And the *Hendrickson* Court approved the use of victim reaction evidence because "[a] victim's reaction to a defendant's alleged threat 'is circumstantial evidence relevant to the element of intent of the defendant in making the threat.'" *Hendrickson*, 2015 WL 1514177, *2 (quoting *State v. Fischer*, 354 N.W.2d 29, 33 (Minn. Ct. App. 1984)). The same is true here because the State had to prove Defendant's intent at the time he solicited Ken Jones.

Now, Defendant claims Dr. Sahin's testimony was irrelevant and inadmissible victim impact evidence and he relies on *State v. Berget*, 2013 S.D. 1, 826 N.W.2d 1, to support that claim. DB:30, 35. But his argument is incorrect on two fronts. First, victim impact evidence is evidence "offered to illustrate the consequences of [a defendant's]

_____
(. . . continued)
defendant's intent, we must infer it from the reaction of the victim and the circumstances of each call." (citing *State v. Tomasko*, 681 A.2d 922, 926 (Conn. 1996))); *Matter of Juvenile Action No. 55*, 600 P.2d 47 (Ariz. Ct. App. 1979)(recognizing the victim's reaction to defendant's threat "was circumstantial evidence of his intent in making the threat." (citing *Schweppe*, 237 N.W.2d 609)).

actions." *Berget*, 2013 S.D. 1, ¶84, 826 N.W.2d at 26. *See Payne v. Tennessee*, 501 U.S. 808, 821, 111 S.Ct. 2597, 2606 (1991) (recognizing victim impact evidence provides "information about the harm caused by the crime committed by the defendant."). But that's not what Dr. Sahin's testimony was. His testimony described his reaction to Defendant's actions and it negated Defendant's claims that he was just "a cantankerous old man that speaks without a filter" and he was just joking and "blowing off steam" when he talked to Jones. JT1:12-13, 43; JT4:576-77; Ex. 9. Dr. Sahin's testimony didn't describe a hole left in his family or the Rapid City medical community like victim impact evidence that's presented at a sentencing hearing. *See State v. Rhines*, 1996 S.D. 55, ¶136, 548 N.W.2d 415, 446-47.

Second, even if Dr. Sahin's testimony was victim impact evidence, *Berget* offers no help: It didn't categorically prohibit the use of victim impact evidence. 2013 S.D. 1, ¶83, 826 N.W.2d at 26. Rather, it simply reaffirmed that victim impact evidence "has its limits. [And i]ntroduction of *overly prejudicial* victim impact evidence has the possibility to rise to the level of a constitutional deprivation." *Id.* (citing *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608 (1991)) (emphasis added). In fact, this Court believes "victim impact testimony [i]s no different than other evidence for purposes of determining admissibility." *Rhines*, 1996 S.D. 55, ¶132, 548 N.W.2d at 446. *See Moore v. State*, 80 P.3d 191, 198 (Wyo. 2003) (approving the use of victim impact evidence when it's used to prove an

element of the crime charged, not to establish the impact a crime had on the victim's life after it was committed).

Since Dr. Sahin's reaction testimony was relevant, the question becomes should the court have excluded it? The short answer: No.

"A 'court may exclude relevant evidence if its probative value is substantially outweighed' by the danger of 'unfair prejudice.'" *Kihega*, 2017 S.D. 58, ¶22, 902 N.W.2d at 524 (quoting SDCL 19-19-403). Yet Rule 403 favors admitting relevant evidence "'and the judicial power to exclude such evidence should be used sparingly.'" *Kihega*, 2017 S.D. 58, ¶22, 902 N.W.2d at 524 (quoting *Supreme Pork, Inc.*, 2009 S.D. 20, ¶30, 764 N.W.2d at 484). That's because if evidence is relevant, "'the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 'substantially' outweigh probative value.'" *Supreme Pork, Inc.*, 2009 S.D. 20, ¶55, 764 N.W.2d at 490 (quoting *State v. Wright*, 1999 S.D. 50, ¶14, 593 N.W.2d 792, 799). However, evidence is only unfairly prejudicial if it "'persuade[s] the jury in an unfair and illegitimate way.'" *Kihega*, 2017 S.D. 58, ¶23, 902 N.W.2d at 525 (quoting *Supreme Pork, Inc.*, 2009 S.D. 20, ¶30, 764 N.W.2d at 484).

In this case, the lack of unfair prejudice from Dr. Sahin's reaction to Defendant's solicitation of Ken Jones is demonstrated by comparing it with his testimony about his reaction to another of Defendant's threats. Eight months before Kathy's death, Defendant called the Rapid City Cancer Center after doctors admitted Kathy to the hospital. JT1:34, 37.

During that call, Defendant threatened to drive his truck into Dr. Sahin's office. JT1:34, 37. The next day, Dr. Sahin went to see Kathy in the hospital and the first words out of Defendant's mouth were a repeat of his threat to drive his truck into Dr. Sahin's office. JT1:37. Dr. Sahin believed Defendant was serious because "[h]e was quite angry and agitated" when he repeated his threat. JT1:38. Dr. Sahin thought about calling security or the police, but decided against it because Defendant was Kathy's sole caregiver. *Id.* And if he got in trouble, Kathy would suffer. *Id.* Instead, Dr. Sahin ignored Defendant's threat and acted like it didn't happen. JT1:39.

Now, this reaction testimony, albeit a mental reaction, is cut from the same cloth as Dr. Sahin's testimony about his physical reaction to Defendant's solicitation of Jones. JT1:45. Both offer circumstantial evidence to prove Defendant's intent. The only difference is Defendant believed he could use Dr. Sahin's testimony about his reaction to Defendant's threatening message and threatening statement at the hospital to his advantage. Indeed, he tried to impeach Dr. Sahin's credibility by comparing his testimony that he took Defendant's threat seriously, but chose to ignore it for Kathy's sake, with his alleged statement to the police that "'I interpreted him as being very angry but I did not take it personally.'" JT1: 50. So while one portion of Dr. Sahin's testimony may have hurt Defendant's theory of defense more than the other, neither persuaded the jury in an unfair and illegitimate manner.

Kihega, 2017 S.D. 58, ¶23, 902 N.W.2d at 525 ("'Virtually all relevant evidence presented at trial is harmful to the other party. [But t]o cause unfair prejudice, the evidence must persuade the jury in an unfair and illegitimate way.'" (quoting *Supreme Pork, Inc.*, 2009 S.D. 20, ¶30, 764 N.W.2d at 484)).

Since Dr. Sahin's testimony was relevant to prove Defendant's intent and its probative value wasn't substantially outweighed by unfair prejudice, the circuit court properly overruled Defendant's objections.

C. Even If The Circuit Court Misapplied the Rules of Evidence, Defendant Cannot Show He's Prejudiced By the Admission of Dr. Sahin's Testimony.

Before he's entitled to relief, Defendant must show the circuit court's alleged evidentiary error in allowing Dr. Sahin's reaction testimony "'was a prejudicial error that in all probability affected the jury's conclusion.'" *Sedlacek*, 2020 S.D. 18, ¶16, 941 N.W.2d at 822. This he cannot do.

Even if the court excluded Dr. Sahin's testimony about how he reacted to Defendant's solicitation of Ken Jones, the jury still heard how Jones reacted: He was "shook up" by Defendant's requests. Ex. 1. And the jury still heard that when Defendant made his requests, he wasn't "normal Bill." JT2:102. He was an "extremely sober" and "serious" Bill that wanted Dr. Sahin to pay for Kathy's death. JT2:102-03; Ex. 1. In other words, without Dr. Sahin's reaction testimony, the jury still had evidence to find Defendant had the necessary intent to be guilty of

criminal solicitation when he asked Jones for help finding a hit man to kill Dr. Sahin.

Thus, Defendant cannot show Dr. Sahin's testimony affected the jury's verdict to such a degree that had it been excluded, the jury would've found him not guilty. This is especially true considering the jury rejected the State's theory that Defendant solicited Jones by asking about a hit man. SR:470. *See State v. Kleinsasser*, 436 N.W.2d 279, 281-82 (S.D. 1989) (holding Kleinsasser wasn't prejudiced when the prosecution amended its bill of particulars on one count of rape since the jury acquitted on that count).

In sum, the circuit court didn't abuse its discretion when it overruled Defendant's objections. And even if it did commit an evidentiary error, Defendant cannot establish he was prejudiced. Therefore, this Court should affirm the circuit court's evidentiary rulings.

CONCLUSION

The State respectfully requests that this Court affirm the jury's guilty verdict, the circuit court's rulings, and Defendant's Judgment of Conviction.

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 9,889 words.

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

Dated this 24th day of July 2020.

_____
Matthew W. Templar
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of July 2020, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. William Thoman* was served via electronic mail upon Ellery Grey at ellery@greyeisenbraunlaw.com.

_____
Matthew W. Templar
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

WILLIAM THOMAN,

Defendant and Appellant.

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

THE HONORABLE JEFFREY CONNOLLY

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NOTICE OF APPEAL WAS FILED OCTOBER 7, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Cases Cited - Continued

Statutes Page

THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

WILLIAM THOMAN,

Defendant and Appellant.

PRELIMINARY STATEMENT

Appellant's Reply Brief will utilize the same abbreviations as were used in his Appellant's Brief. Additionally, the State's Appellee's Brief will be cited as "SB" for State's Brief followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Mr. Thoman reasserts the Jurisdictional Statement from his Appellant's Brief.

STATEMENT OF THE LEGAL ISSUES

1. **The trial court should have granted Mr. Thoman's pre-trial Motion to Dismiss for Failure to Describe a Public Offense and his related post-trial Motion to Arrest Judgment. A plain reading of the solicitation statute establishes that the Legislature did not intend to criminalize the conduct that occurred in this case.**

   The trial court denied both the defense's written Motion to Dismiss for Failure to Describe a Public Offense and the oral Motion to Arrest Judgment. See, ST, at pp. 5-16.

   State v. DiSanto, 2004 S.D. 112, 688 N.W.2d 201.
   Mizahi v. Gonzales, 492 F.3rd 156 (2nd Cir. 2007).
   United States v. Williams, 553 U.S. 285, 300, 128 S.Ct. 1830 (2008).

2. **The trial court should have instructed the jury on each element of aiding, abetting or advising.**

> The trial court declined to give a jury instruction that contained each element of the crime of aiding, abetting or advising. JT, Vol. IV, at pp. 538-48.
>
> *State v. Jucht*, 2012 S.D. 66, 821 N.W.2d 629.
> *State v. Shearer,* 1996 S.D. 52, 548 N.W.2d 792.
> *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, 711 N.W.2d 612.

3. **The trial court should have granted Mr. Thoman's Motion for Judgment of Acquittal.**

> The trial court denied the defense's Motion for a Judgment of Acquittal. See, ST, at pp. 5-16.
>
> *State v. Carter*, 2009 S.D. 65, 771 N.W.2d 329.

4. **The trial court should have sustained the defense's objections to Dr. Sahin's victim-impact testimony.**

> The trial court permitted the State to present victim-impact testimony despite the defense's objections. JT, Vol. I, at pp. 43-47.
>
> *State v. Berget*, 2013 S.D. 1, 826 N.W.2d 1.
> *State v. Richmond*, 2019 S.D. 62, 935 N.W.2d 79.

SUMMARY

The State correctly notes that at least one of the arguments in Mr. Thoman's Appellant's Brief reads like "a nightmare exam problem." SB 16. However, with all due respect, the reason why the analysis in this case is so complex, is due to the fact that the State is attempting to merge the two inchoate legal concepts, solicitation and aiding or abetting into one crime. Mr. Thoman maintains that our Legislature never intended these two concepts to be merged together.

When the Court reviews the plain language of the solicitation statute along with the renunciation statute and considers the legal definition of aiding and abetting, the conclusion that Mr. Thoman's conviction should be vacated becomes clear.

STATEMENT OF THE CASE AND FACTS

Mr. Thoman reasserts his Statement of the Case and Facts as presented in his Appellant's Brief.

ARGUMENTS

1. The trial court should have granted Mr. Thoman's pre-trial Motion to Dismiss for Failure to Describe a Public Offense and his related post-trial Motion to Arrest Judgment.

Standard of review. The State maintains that the proper standard for this Court to employ on review is whether or not the trial court abused its discretion. SB 13. The State cites persuasive authority from the state of Wyoming. Mr. Thoman maintains that given that this appeal requires this Court to interpret the meaning of the solicitation statute, the standard of review should be de novo. If this Court utilizes the abuse of discretion standard, it will effectively grant deference to the circuit court's statutory interpretation. This Court has not historically granted such deference to the circuit court. "Questions of law, such as statutory interpretation, are reviewed by the Court de novo[.]" *Moss v. Guttormson,* 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17 (citations omitted).

Response to State's arguments[1]. When Mr. Thoman went to see Ken Jones, he had no reason to believe that Ken Jones had a gun, let alone that Ken Jones would actually give him one. When Mr. Thoman asked for a gun, the conversation was so rambling and confusing, Ken Jones thought Mr. Thoman wanted the gun so he "could off himself." For his part, Mr. Jones never even considered attempting to obtain a gun for his friend. Ken Jones also explained to Mr. Thoman that his mob boss "forget about it" statement

[1] The State takes the position that Mr. Thoman does not challenge the circuit court's conclusion that he was convicted of a public offense. SB 16. Mr. Thoman maintains that he has challenged this conclusion and his conviction by making the Motion to Arrest Judgment. See SDCL 23A-30-1 (A court shall arrest judgment if an indictment... does not charge an offense...").

about a "hit-man" from years ago was joke. Even though Mr. Thoman was upset about the death of his wife, Mr. Thoman never asked Ken Jones to kill the doctor. From a legal perspective, the parties never reached any type of agreement, no overt action occurred and no substantial step towards the death of the doctor was taken.

The State's position is that none of this matters. According to the State, a crime occurs when a person merely "askes another...to help her commit a crime, no other action is necessary." SB 18. Under the State's view, the traditional doctrines of overt act, conspiratorial agreements between parties to commit crimes, and substantial steps towards completing a crime are no longer necessary. Under this new "...broad-sweeping statue..." (SB 19), the State now has the power to convict a citizen if he merely asks someone else to help him commit the intended target offense. Interestingly, under this new statute, the potential punishment for merely asking for help to complete the target offense carries, in many cases, the same level punishment as the traditional crime of criminal conspiracy. See SDCL 22-3-8.

The question squarely before this Court is whether the Legislature in fact intended the solicitation statute to be so "broad-sweeping." Curiously, this "broad-sweeping" statute consists of only one sentence. When the Legislature drafted the solicitation statute, it somehow failed to use the words "seeks another's help to commit the target offense" as part of its framework. Even though the Legislature used words like "specific conduct" and "attempt" somehow the legislature also neglected to mention the legal concept of "aiding or abetting" in the statute.

Mr. Thoman respectfully suggests that rather than intending a "broad-sweeping" statute as the State suggests, the Legislature actually intended a much narrower construction. The legislature passed the solicitation statute one year after this Court held in

DiSanto that soliciting a "hit-man" to commit murder was not enough to constitute the crime of attempted murder. Although this Court was deeply troubled by the conduct of the defendant in *DiSanto*, this Court nevertheless reversed the defendant's three attempted murder convictions. Addressing the defendant's immoral conduct in *DiSanto*, this Court wrote, "It is for the Legislature to remedy this problem, and not for us through judicial expansion to uphold a conviction where no crime under South Dakota law was committed." *State v. DiSanto*, 2004 S.D. 112, ¶ 40, 688 N.W.2d 201.

Rather than pass a "broad-sweeping" statute as the State now suggests, the Legislature appears to have merely responded to this Court's deference to the doctrine of separation of powers and accordingly drafted the solicitation statute to punish the type of conduct that occurred in *DiSanto*. In other words, the Legislature appears to have intended to criminalize someone asking someone else to complete a target offense on his behalf. Given the plain language that the Legislature used, the Legislature does not appear to have intended to criminalize a defendant asking a third party to assist him so the defendant can complete the target offense himself.

Had the Legislature intended to criminalize conduct beyond the conduct in *DiSanto*, the Legislature would have used broader language. For example, the Legislature might have used the words "any conduct" or "aiding, abetting or advising" within the solicitation statute. The Legislature may also have addressed this Court's definition of "aiding, abetting or advising" in order to make it clear that a principle was no longer required to complete the underlying intended target offense. The Legislature may have also, in some fashion, noted that criminal conspiracy was now essentially a nullity, given that a "broad-sweeping" solicitation statute had been enacted eliminating the common law

concepts of an agreement between parties to commit a crime and the requirement that an overt act be completed in order to obtain a conviction.

However, as this Court is aware, the Legislature did not use any of this type of language. To the contrary, shortly after this Court wrote,

> ...to succumb to the understandable but misguided temptation to merge solicitation and attempt only muddles the two concepts and perverts the normal and beneficial development of the criminal law through *incremental legislative corrections* and improvements. It is for the Legislature to remedy this problem, and not for us...
>
> Id. at p. 40 (emphasis added),

the Legislature responded with what logically appears to be an "incremental legislative correction," as opposed to a "broad-sweeping" statute.

The conclusion that the Legislature intended a more narrow or "incremental" solicitation statute is strengthened when the renunciation statute is considered. At the same time the Legislature passed the solicitation statute, it also enacted the related legal defense of renunciation.

In order for a defendant to avail himself of the renunciation defense, the defendant must abandon his criminal intent and thereafter, 1) notify the person he solicited to commit the target offense about his renunciation and 2) the defendant must timely and adequately warn law enforcement or make a substantial effort to prevent the commission of the criminal conduct solicited. SDCL 22-4A-4. Given the elements of renunciation, in particular, the element that requires a defendant to prevent the commission of the criminal conduct solicited, clearly, the Legislature intended that the "criminal conduct solicited" was something that could be stopped or prevented even after the initial solicitation had occurred.

DiSanto provides a clear example of the type of criminal conduct that could be solicited and then renounced and prevented by a defendant. Had the defendant in *DiSanto* informed the "hit-man" that he had changed his mind about wanting his ex-girlfriend murdered and then made a substantial effort to stop the target offense of murder from occurring, the defendant would have then been able to avail himself of the renunciation defense.

However, under the State's "broad-sweeping" interpretation of the solicitation statute, renunciation is a legal nullity for Mr. Thoman and for anyone else who "askes another...to help them commit a crime." Mr. Thoman can't renounce asking Mr. Jones for a gun because the conduct he solicited, the asking for gun, has already occurred. As the State continually argues, once a defendant asks for help, the crime is completed. SB. 18. This is unlike the situation in *DiSanto* where the defendant could renounce the target crime of murder by trying to stop the "hit-man." In the "ask for help" situation, once a defendant asks for help, he has nothing to renounce, he has already completed the crime and the renunciation of his criminal intent is irrelevant at that point. Perhaps even more telling for this argument, under the State's broad view of the solicitation statute, a defendant is not able to take a substantial step to prevent the criminal conduct he solicited. For example, if Mr. Thoman were to have called up Mr. Jones after their conversation about the gun and explained to Mr. Jones that he no longer wanted a gun, Mr. Thoman would still not have taken a substantial step towards preventing his crime of asking for the help. This is because under the State's view, the crime was completed the moment he uttered the words asking for help. Mr. Thoman cannot go back in time an prevent his asking for help.

The State appears to agree with the conclusion that renunciation is not available as a defense in the broad-sweeping "ask-for-help" interpretation of the solicitation statute. In

response to Mr. Thomans's argument, the State wrote, "...criminal solicitation is completed once the words are spoken..." (SB 27). In its brief, the State never claimed or argued that renunciation was available as legal possibility to Mr. Thoman or to anyone else in an "ask for help" situation. In other words, under the State's "broad-sweeping" interpretation of the solicitation statute, the Legislature appears to have failed in its attempt to pass a statute that provides a legal defense to the crime of solicitation in many potential cases.

But if this Court adopts an "incremental" reading of the solicitation statute, the Legislature's goal of providing a renunciation defense to the crime of solicitation is met. In any situation where a defendant asks a third party to "engage in specific conduct" to complete a target offense, the defendant would always have some opportunity to attempt to stop the person he solicited from engaging in the solicited "specific conduct."

The State's argument regarding solicitation always being a matter of words and that actions are not necessary (SB 27) also needs to be addressed in the context of the solicitation statute itself. While it is true that solicitation, at its core, is always necessarily asking for someone to provide help to complete a crime, the focus needs to be on the type of help that is being requested by the solicitor. In drafting the solicitation statute and the renunciation statute, the Legislature clearly contemplated criminalizing situations where a defendant asks someone to complete a target crime on his behalf, for example, the facts in *DiSanto*. If the solicitation statute is read in a more "incremental" fashion and in the light of the renunciation statute, the two statutes can be interpreted harmoniously, and each statute can be given full effect. If the State's "broad-sweeping" interpretation is used, the courts will necessarily need to ignore the renunciation statute in any solicitation cases involving accusations that the defendant was "asking for help." "Statutes are to be

construed to give effect to each statute and so as to have them exist in harmony." *State v. Jucht,* 2012 S.D. 66, ¶26, 821 N.W.2d 629.

This point was illustrated in *People v. Terrell*, 792 N.E.2d 357, 339 Ill.App.3d 786 (2003). In *Terrell*, the defendant was convicted of soliciting murder after he planned to kill his ex-lover in order to prevent the relationship from coming to light after the defendant discovered that his ex-lover was pregnant. Initially, the defendant planned to complete the murder at his stepfather's property. However, the defendant did not have a car. The defendant asked his stepfather to dive him and the ex-lover to the property so the plan could be carried out. The stepfather agreed to help with the murder, but instead informed the police.

On appeal, the prosecution argued that the defendant was guilty of solicitation because he solicited his stepfather to aid him in the planned murder by driving the car. The prosecution reasoned that if the stepfather had actually driven the defendant and the victim to the intended murder scene, the stepfather would have been guilty of murder as an accomplice.

The court in *Terrel* rejected this line of reasoning and reversed the solicitation conviction. The solicitation statute in Illinois reads, "A person commits solicitation of murder when, with the intent that the offense of first[-]degree murder be committed, he commands, encourages[,] or requests another *to commit that offense.*" (Emphasis added.) 720 ILCS 5/8–1.1(a) (West 2000). This is similar to South Dakota's solicitation statute that requires a defendant to solicit "specific conduct" that would constitute the offense.

In reversing the solicitation conviction, the *Terrel* court found that the Illinois solicitation-of-murder statute did not encompass solicitation to aid and abet murder. The court wrote,

> ...we believe there are valid reasons to distinguish between requests to aid and abet in the commission of a crime and requests that another actually commit the crime or procure a third person to do so...
>
> ...The primary distinction is the capacity of the solicitor to abandon his criminal attempt when he intends to be the primary actor... To punish the defendant for solicitation under the circumstances presented would be to punish him for entertaining murderous thoughts, no matter how hypothetically.
>
> *Id.* 791-92.

Given the similarities between South Dakota's solicitation statute and Illinois' solicitation statute, especially in light of South Dakota's renunciation statute, this Court should reach the same conclusion.

In contrast to *People v. Terrell*, the State points to persuasive authority from other jurisdictions in support of its "broad-sweeping" interpretation of the solicitation statute. Importantly, none of these cases are interpreting the wording of South Dakota's solicitation statute. Additionally, most of the cases that the State cites have important factual distinctions. For example, in *State v. Everett*, 330 P.3d 22 (Or. 2014)(*en banc*), *Commonwealth v. Wolcott*, 931 N.E.2d 1025 (Mass. Ct. App. 2010) and *Moss v. State,* 999 P.2d 509, 517 (Okla. Ct. App. 1994) each of the defendants were convicted of solicitation after asking another person to help procure a "hit-man" to commit the target offense of murder. By contrast, in this matter, the jury did not find Mr. Thoman guilty of asking Mr. Jones to procure a "hit-man." They found Mr. Thoman guilty of asking Mr. Jones to provide a gun. As a result, the question of whether or not our solicitation statute prohibits a defendant from asking a third party to procure a "hit-man" will have to wait for

another day. "This Court renders opinions pertaining to actual controversies affecting people's rights." *Larson v. Krebs*, 2017 S.D. 39, ¶ 13, 898 N.W.2d 10, 15 (internal citation omitted).

The State also cites a trial court's ruling in *People v. Harsit*, 745 N.Y.S.2d 872 (N.Y. Ct.App. 2002). In *Harsit*, the defendant was charged with solicitation after he informed undercover law enforcement officers of his murderous intent and requested a handgun. Apparently, the undercover law enforcement officers feigned to go along with the defendant's scheme and actually provided him with a 9mm Luger caliber Smith and Wesson semi-automatic pistol. Before trial, the defendant moved to dismiss the solicitation charge. The trial court denied the defendant's pretrial motion based upon the wording of the New York solicitation statute.

The trial judge's decision in *Harsit* was reviewed and considered by the *Terrell* Court *supra*. The Court found that the *Harsit* decision was based upon the wording of New York's solicitation statute given that it expressly proscribed solicitation of any "conduct constituting a Class A Felony." The *Terrell* Court went on to find that "Because our own statute contains no such express provision, *Harsit* does not aid in our decision." *Terrell* at 360-61. This Court should reach the same conclusion here. South Dakota's solicitation statute does not contain any language criminalizing the solicitation of "any conduct." Rather, our statute requires that a defendant solicit "specific conduct" that would constitute the offense.

The State also cites SDCL 22-4A-2 in support of its position. SB 27. This Statute provides that it is not a defense if the person solicited "neither committed or attempted to commit the offense solicited..." This statute can easily be read in harmony with a narrower view of the solicitation statute and in no way requires that this Court adopt a broad view of

the solicitation statute. For example, if the defendant in *DiSanto* had hired a "hit-man" to commit murder, he would still be guilty even if the "hit-man" for some reason did not follow through with the crime. Nothing about this statute indicates that the Legislature intended to criminalize a defendant asking someone to commit a crime on his behalf.

2. The trial court should have instructed the jury on each element of aiding, abetting or advising.

The State concedes that the trial court refused to instruct the jury on each element of aiding or abetting, including the element that the principal offender committed all the elements of the underling offense. SB 29. The State takes the position that the trial court's refusal to fully instruct the jury on each element did not amount to error on the grounds that "[t]his is a solicitation case, not an aiding and abetting case." Id. 30. The State goes on to argue that the jury only needed to be instructed on what would amount to aiding or abetting so the jury could determine if what Mr. Thoman asked Mr. Jones to do would have amounted to adding or abetting. Id.

Mr. Thoman and the State are in agreement, the jury needed to be instructed on what it means to aid or abet. As the State concedes, the trial court instructed the jury that in order for Mr. Thoman to be found guilty of solicitation, he needed to solicit Mr. Jones to "...engage in specific conduct which would constitute the commission of adding or abetting murder in the first degree..." SB 32. What does it mean to commit the crime of adding or abetting murder in the first degree? Aiding or abetting is a legal term of art and this Court has carefully defined it. Among other things, this Court has found that in order for Mr. Jones to be found guilty of aiding or abetting murder, the principle, in this case, Mr. Thoman, must have committed all of the underlying elements of the crime, in this

case, that would include the murder of the doctor. *State v. Jucht*, 2012 S.D. 66, 821 N.W.2d 629.

Despite what the State now claims, this is an aiding or abetting case. The State chose to use the term aiding or abetting when it crafted the Indictment. Although the State wants to change the legal definition of aid or abet to something along the lines of "give help" or "render aid," the State is not free to sit as a legislature or appellate court and to change the elements of aiding or abetting in order to craft a new definition to fit the new crime that it wants to create. The State does not cite any relevant authority for the proposition that Judge was free to give a new or "statutory" definition of the term aid or abet.

Ultimately, the reason that this issue is becoming so confusing, is because the Legislature never intended that solicitation would be merged with aiding or abetting. The Legislature knew what this Court's definition of aiding or abetting was when it drafted the solicitation statute. If the Legislature had wanted to draft a solicitation statute that encompassed the concept of aiding or abetting, it would have clearly done so. However, given the language that the Legislature used in both the solicitation statute and the renunciation statute, it obviously intended to enact a "specific conduct" or "commit that offense" solicitation statute similar to the one in place in Illinois. *See, People v. Terrell*, 792 N.E.2d 357, 339 Ill.App.3d 786 (2003).

3. **The trial court should have granted Mr. Thoman's Motion for Judgment of Acquittal.**

Legal analysis. Had the trial court instructed the jury on the entire definition of aiding or abetting, including the element that that Mr. Thoman was required to complete the crime of murder in the first degree, the trial court would have been compelled to grant

the Motion for Judgement of Acquittal. The trial court's denial of the Motion for Judgement of Acquittal was based upon its erroneous aiding or abetting jury instruction. If this Court agrees with Mr. Thoman's analysis related to the aiding or abetting jury instruction issue, this Court should reverse Mr. Thoman's conviction and remand the case to the circuit court with instructions to enter an order granting the Motion for Judgment of Acquittal on the grounds that the doctor was not murdered.

4. **The trial court should have sustained the defense's objections to Dr. Sahin's victim-impact testimony.**

Legal analysis. The State's theory of the case is that Mr. Thoman went into Mr. Jones' office and asked for a gun in order to murder the doctor. At trial, the State argued that Mr. Jones' office was the crime scene and the crime was completed when Mr. Thoman asked Mr. Jones for help. SB 27. One of the main issues in this case is whether or not Mr. Thoman had criminal intent when he asked Mr. Jones for the gun.

The State claims that in order to prove Mr. Thoman had criminal intent during the discussion that occurred at Mr. Jones' office, it needed to present the jury with how the doctor felt when he learned about a potential "hit-man" hours after Mr. Thoman and Mr. Jones' discussion had occurred. SB 38. Apparently, the State also maintains that it needed to present the jury with the emotional impact that this case had upon the doctor, including the doctor's decision to quickly move his mother to a new location and the doctor's decision to later give up his medical practice in Rapid City. SB 37.

Whatever the doctor's subjective feelings may have been about an earlier conversation that he did not hear does not provide the jury with any helpful information about Mr. Thoman's criminal intent. The State cites several cases, including the unpublished opinion in *State v. Hendrickson*, 2015 WL 1514177 (Minn. Ct. App) in

support of its position. However, in each of the cases that the State cites, the alleged victim appears to have actually heard or directly perceived the threats. In *Hendrickson*, *supra*, the defendant directly threatened the victim and told her that he would "take her off this earth." In *State v. Geiger*, 720 N.W.2d 210 (Iowa Ct. App. 2007) the victim was permitted to testify that she felt threatened after the defendant shook a bowie at her. None of the cases cited by the State appear to stand for its proposition that the doctor's subjective feelings about a conversation he did not hear are relevant to help a jury determine criminal intent.

The State also claims that Dr. Sahin's testimony does not amount to victim-impact testimony. SB 39. Although the State correctly cites *Payne v. Tennessee*, 501 U.S. 808, 821, 111 S.Ct. 2597, 2606 (1991), for the proposition that victim-impact testimony is information about the harm caused by the crime committed by the defendant, (SB 39) the State mischaracterizes Dr. Sahin's testimony. The State claims that Dr. Sahin did not provide victim-impact testimony because he did not testify that he left "a hole...in the Rapid City medical community." Id. But that is exactly what Dr. Sahin testified to. At trial, Dr. Sahin told the jury that he developed signs of post-traumatic stress and that even though he had many patients who depended upon him at the cancer center, he still decided he couldn't continue to work at the Rapid City Regional Hospital. JT Vol. I, at pp. 43-47. By its own analysis, the State clearly elicited victim-impact testimony from Dr. Sahin.

Contrary to the State's assertion, Dr. Sahin's victim-impact testimony provided the jury with absolutely no evidentiary value. The fact that Dr. Sahin was afraid and rushed home to move his elderly mother to a safe location or the fact that Dr. Sahin felt he could no longer maintain his medical practice in Rapid City told the jury nothing about Mr. Thoman's criminal intent or lack thereof. While the jury did hear evidence about a prior

alleged threat from Mr. Thoman, the the victim-impact evidence that the State presented is significantly different.

As a final argument, the State also maintains that the admission of Dr. Sahin's victim-impact testimony was harmless. SB 42. The State's argument on appeal stands in stark contrast to the trial prosecutor's decision to start his closing argument by using the victim-impact testimony. JT Vol. IV, at pp. 561-62. Apparently, the trial prosecutor believed that he would be able to persuade the jury and gain their sympathy by bringing out the fact that Rapid City lost an oncologist due to Mr. Thoman's actions.

The State also cites *State v. Kleinsasser*, 436 N.W. 2d 279, 281-82 (S.D. 1989) for the proposition prejudice does not occur if the prejudice is tied to a count that is not sustained by a jury. *Kleinsasser* is easily distinguishable given that Mr. Thoman was convicted of solicitation and given that the victim-impact testimony was not in any way diminished simply because the police made a report to Dr. Sahin about a "hit-man." The State is not in any way able to demonstrate that the jury was not impacted by the victim impact testimony simply because the jury did not find Mr. Thoman guilty under the "hit-man" theory.

CONCLUSION

Mr. Thoman's conviction should be reversed with instructions to the trial court to enter an order granting both the Motion for Judgment of Acquittal and the Motion to Arrest Judgment. Alternatively, this Court should reverse and remand this case with instructions that a new trial be granted and that the new trial be held without the admission of victim-impact testimony.

REQUEST FOR ORAL ARGUMENT

Mr. Thoman respectfully requests oral argument on all issues.

Dated this 21st day of August 2020.

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_____

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

WILLIAM THOMAN,

Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Reply Brief is 17 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates there are a total of 4,812 words in the body of the brief.

Dated this 21st day of August 2020.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 29151

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

WILLIAM THOMAN,

Defendant and Appellant.

The undersigned hereby certifies that he served two true and correct copies of Appellant's Reply Brief upon the persons herein next designated all on the date shown, by mailing said copies in the United States Mail, first-class postage prepaid, in envelopes addressed to said addresses; to wit:

Supreme Court of South Dakota
Office of the Clerk
500 East Capitol Avenue
Pierre, SD 57501

The undersigned further certifies that he served a true and correct copy of the Appellant's Reply Brief upon the persons herein next designated all on the date shown, by e-mailing said copies to said addresses; to wit:

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Which are the last known addresses of the addressees known to the subscriber.

Dated this _____day of August 2020.

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