IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #30929

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

KELLY D. WARFIELD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDUCUAL CIRCUIT
BONHOMME COUNTY, SOUTH DAKOTA

THE HONORABLE CHERYLE GERING
Circuit Court Judge

APPELLANT'S BRIEF

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Filed: 9/10/2025 3:37 PM CST Supreme Court, State of South Dakota #30929

TABLE OF CONTENTS

TABLE OF CASES & AUTHORITIES

Cases: **Page**

Statutes:

Other:

PRELIMINARY STATEMENT

For purposes of identification in this Brief, the Appellant, Kelly Warfield, will be referred to as "Kelly". Reference to the settled record will be "SR". Reference to a Hearing Transcript will be "HT". Reference to the trial transcript will be "TT". Reference to Trial Exhibits shall be "TE". Reference to the Appendix shall be referred to as "Appendix". References to the Appendix Index shall refered to as "Index".

JURISDICTIONAL STATEMENT

This matter comes before the Court pursuant to Kelly's appeal of the Amended Judgment of Conviction and Sentence entered by Judge Cheryle Gering on November 27, 2024. Kelly filed his Notice of Appeal of Amended Judgment of Conviction and Sentence on December 13, 2024. The Clerk of the South Dakota Supreme Court acknowledged receipt of certified copies of the Notice of Appeal on December 18, 2024. Transcripts were requested on December 13, 2024. Transcripts of the motions hearings as well as the jury trial were transmitted on July 25, 2025.

STATEMENT OF THE CASE

Kelly was indicted on April 21, 2021, for Simple Assault Against Department of Corrections Employee (SDCL 22-18-1(1)), Simple Assault Against Department of Corrections Employee (SDCL 22-18-1(5)) and Intentional Damage to Property. A Part II Information was filed alleging that Kelly was a habitual offender. At the arraignment held on October 19, 2021, Kelly plead not guilty and requested a jury trial. Numerous motions hearings were held during the intervening period between date of arraignment and the commencement of the jury trial on November 14, 2023. On November 16, 2023, a jury returned a verdict of guilty on Counts 1 and 3 and an acquittal on Count 2. On August 15, 2024, the Part II Information was dismissed.

On August 20, 2024, Kelly filed his Motion for Relief from Judgment pursuant to SDCL

23A-27-4.1. On August 16, 2024, Kelly was originally sentenced and a Judgment of Conviction and Sentence was entered on August 20, 2024. A Certificate of Service with a copy of the Judgment of Conviction and Sentence Notice of Entry of Judgment of Conviction and Sentence was served on August 30, 2024. A Notice of Appeal was filed on September 25, 2024. The State filed a Motion to Dismiss Appeal. That Motion was granted and the appeal dismissed on October 4, 2024. A Petition for Reinstatement of Appeal was filed and denied by this Court. On November 4, 2024, Kelly filed a Motion and Affidavit in Support of Motion to be Resentenced pursuant to SDCL 23A-27-51. That Motion was granted on November 1, 2024. On November 25, 2024, Judge Gering denied Defendant's Motion for Relief from Judgment. Kelly was resentenced on November 26, 2024. Notice of Appeal of Amended Judgment of Conviction and Sentence was filed on November 27, 2024. Notice of Appeal was timely filed on December 13, 2024, as to the Amended Judgment of Conviction and Sentence.

STANDARD OF REVIEW

The application of facts to a legal standard presents a mixed question of fact and law requiring the Court to apply a de novo standard of review. *State v. DeLaRosa,* 2003 SD 18; 657 N.W.2d 683.

MOST RELEVANT CASES

State v. DeLaRosa, 2003 SD 18; 657 N.W.2d 683

State v. Bruger, 2004 SD 12, 676 N.W.2d 112

State v. Bogenreif, 465 N.W.2d 777

Means v. Solem, 646 F.2d 322 (8th Cir. 1980)

STATEMENT OF FACTS

On or about January 15, 2021, Kelly was incarcerated at the Mike Durfee State

Prison in Springfield, South Dakota. At that time, Kelly was serving a lengthy sentence out of Pennington County, South Dakota. Kelly had been housed at the South Dakota State Penitentiary in Sioux Falls, South Dakota, on "the Hill" for the majority of his prison sentence. After being in custody for a number of years, Kelly was transferred to Mike Durfee. While in custody over the

preceding eighteen (18) years, Kelly had developed medical issues. Kelly had been treated medically in Sioux Falls for those neurological issues. After being transferred to Mike Durfee, Kelly was not provided the medical treatment previously offered in Sioux Falls.

Mike Durfee State Prison, formerly a college campus, houses its inmates in dorm rooms with a number of inmates to each room. The dorm rooms are, for all intents and purposes, prisoner "cells". Kelly's cell was located on the third floor of the West Crawford Cell Hall dorm building.

On or about January 15, 2021, while searching Kelly's room, Correction Officer Day seized Kelly's television set because it did not have the appropriate "security stickers" on it. That television set had previously been purchased through the appropriate vendor for prison inmates. Kelly had that television set while he was housed on The Hill in Sioux Falls and the television set had been transferred, with Kelly, down to Mike Durfee State Prison when he was relocated.

Kelly's room had been previously searched on a number of occasions and no issues had been noted with Kelly's television set. On January 15, 2021, Correction Officer Day noted that Kelly's television set did not have the special security sticker on it as required by prison regulations. Officer Day seized Kelly's television. Kelly was outside of his room while the search was ongoing. Noting that the television was being seized, Kelly confronted Correction

Officer Day. There is a discrepancy as to whether Officer Day made a statement that the television was going to be confiscated in order to put the security sticker on it or whether it was being removed permanently from Kelly.

Officer Day carried the television set down three (3) flights of stairs to the day hall area of that dorm and placed it on the desk of the day hall officer. Kelly followed Officer Day down the hallway, past other correctional officers and inmates, down three (3) flights of stairs to the day hall area.

Upon reaching the day hall area, Kelly struck a computer monitor with his hot pot breaking the monitor and continued into the day hall and struck the flat screen television that was hanging on the wall in the day hall.

Kelly turned from the wall mounted television and there were several correctional officers lined up facing him. One (1) or more of those officers had pepper spray on their person. Pepper spray was deployed against Kelly.

Mike Durfee State Prison has a security system which videotapes hallways, stair wells and the day hall areas. A portion of the actions in the day hall area were preserved by the prison security system. The day hall had three (3) security cameras videotaping that area on January 15, 2021. The State provided Kelly's trial counsel with videos from two (2) of the three (3) cameras located in the day hall. The videos provided reflect some of the interaction between Kelly and the correctional officers. However, in the video tape provided by the State, there is a four (4) second gap in the video.

The security video provided shows Kelly hitting the computer monitor, walking away from the desk, hitting the flat screen wall television in the day hall and turning around. At one (1) point, the video reflects that Kelly is standing facing several officers. The video "glitches"

and the next images show Kelly laying on the floor of the day hall. Kelly is then hand cuffed and removed from the day hall area to restrictive housing.

Due to Kelly's neurological issues; Kelly has memory problems and memory lapses. Kelly maintains that he did not assault Correctional Officer Day. Kelly maintains that if he did strike Officer Day; it was in self-defense. Unfortunately, the security video of the incident has a "glitch" at the exact moment when whatever occurred between Kelly and Officer Day happened.

The State backs up its security videos on two (2) separate servers; one (1) with the State Department of Corrections (DOC) and one (1) with the Bureau of Information Technology (BIT). Kelly contends that the State committed a *Brady* violation by failing to preserve all of the videos from January 15, 2021, and by refusing to allow Kelly and his trial counsel access to the second server at BIT which "backed up" the videos from the location and time of the incident.

Kelly, through his trial counsel, sought access to the State servers to see what, if anything, caused the "glitch" and to determine whether that "glitch" was "organic" or caused by outside influences. Despite Kelly's requests of trial counsel to retain an electronic technology expert; that did not occur. The servers as well as the security videos were under the sole possession and control of the State and its agents.

Kelly testified at trial. It is apparent from his testimony that Kelly's memory is impaired. Kelly admitted at trial that he intentionally struck the computer monitor and the flat screen television so that he would get a "major write up". Kelly testified that a "major write up" would result in his being transferred back to the "Hill" in Sioux Falls so he could receive his medical treatment. Kelly testified that he did not intend to hit any correctional staff.

Kelly, through his trial counsel, sought a jury instruction for self-defense. The trial court denied the request for a self-defense jury instruction.

At the conclusion of the jury trial, Kelly was convicted of Counts 1 (Simple Assault upon a Correctional Officer) and 3 (Intentional Damage to Property).

Kelly was originally sentenced on August 16, 2024. On August 30, 2024, the State served a Certificate of Service reflecting that the Judgment of Conviction and Sentence were filed on August 20, 2024. A Notice of Appeal was filed on September 25, 2024. The State filed a Motion to Dismiss Appeal which was granted by this Court. A Petition to Reinstate Appeal was filed and denied. Thereafter, a Motion to be Resentenced and Affidavit in Support of Motion to Be Resentenced was filed on November 4, 024. The Motion to Be Resentenced was granted. Kelly was resentenced on November 26, 2024. The Amended Judgment and Sentence was filed on November 27, 2024. Notice of Appeal was timely filed on December 13, 2024.

STATEMENT OF ISSUES

1. Whether Kelly should have been tried for any alleged assault upon a correctional officer when the four (4) second gap in the prison's security video does not reflect any assault upon any correctional officer?

   Trial Court Ruled in the affirmative and Kelly was tried for two (2) charges of simple assault upon a law enforcement officer.

   Most Relevant Cases: *State v. Johnson*, 509 N.W.2d 681 (SD 1993)
   State v. Engresser, 2003 SD 47

2. Whether Kelly should have been tried for any alleged assault upon a correctional officer when the security video in the sole possession of the State of South Dakota contains a four (4) second gap which may have reflected an unprovoked assault upon Kelly?

   Trial Court ruled in the affirmative and the security video, in the sole control of the State, and containing the four (4) second gap was used over Kelly's counsel's objection.

   Most Relevant Cases: *State v. Johnson*, 509 N.W.2d 681 (SD 1993)
   State v. Engresser, 2003 SD 47

3. Whether the Trial Court erred by refusing to give the jury Kelly's requested self-defense instruction when it is apparent that the four (4) second gap in the security

video may have reflected an assault upon Kelly by the correctional officer prior to Kelly striking back at the correctional officer?

Trial Court ruled in the affirmative and refused to give a self-defense instruction even though the security video, in the sole control of the State, contained a four (4) second gap which was used over Kelly's counsel's objection.

Most Relevant Cases: *State v. Bogenreif*, 465 N.W.2d 777
State v. Bruger, 2004 SD 12, 676 N.W.2d 112

4. Whether the State committed a *Brady* violation by failing to provide Kelly access to the second source of the prison's recorded security video which is simultaneously "backed up" on both the DOC servers at Springfield and at the Bureau of Information Technology (BIT) when such second source may have provided Kelly with exculpatory evidence showing a physical assault upon Kelly by a correctional officer?

Trial Court ruled in the affirmative and the security video, in the sole control of the State, and containing the four (4) second gap was used over Kelly's counsel's objection.

Most Relevant Cases: *State v. Engresser*, 2003 SD 47
Brady v. Maryland, 373 U.S. 83; 83 S.Ct. 1154
Thompson v. Weber, 2013 SD 87; 851 N.W.2d 2
Kyles v. Whitley, 514 U.S. 419; 115 S.Ct. 1555

5. Whether Kelly faced double jeopardy in violation of the 5th Amendment to the United States and South Dakota Constitutions when both counts charged in the Indictment refer to the same statutes (SDCL 22-6-5.1; 22-11A-1; 22-18-1(1) and 22-18-1.05) in both counts?

Trial Court ruled in the affirmative and determined that Kelly would not be facing double jeopardy so long as he was only sentenced for one (1) charge if convicted on both charges of simple assault.

Most Relevant Cases: *State v. McMillen*, 2019 SD 40
State v Chavez, 2002 SD 84

DISCUSSION

1. Kelly should not have been tried for an alleged assault upon a correctional officer when the security video in the sole possession of the State of South Dakota contains a four (4) second gap which may have reflected an unprovoked assault upon Kelly.

The facts in this case are undisputed. On January 15, 2021, Kelly was an inmate at the

Mike Durfee State Prison. (TT140; lines 13 -15). On that date, Kelly's cell was searched for contraband. (TT147; lines 2 - 16) and Kelly's television was confiscated by Correction Officer Day. (TT149; lines 15 – 18). Kelly followed Officer Day down the hallway (TT150 – 151; lines 24 – 25; 1 – 2), down three (3) flights of stairs (TT151; lines 7 - 11) and down to the day hall area where another correctional officer was seated. (TT152; lines 5 - 11). Kelly used a hot pot to strike the computer monitor that was sitting on the desk in the day hall area breaking the monitor. (TT131; lines 6 – 8; 139; lines 8 – 11; 172; lines 19 – 23; 196; lines 8 – 10; 210; lines 18 – 21; 141; lines 15 -22). Kelly then went into the day hall and used his fist to hit the flat screen television that was hanging on the wall in the day hall. (TT131; lines 8 – 9; 153; lines 8 – 11' 196; lines 10 – 12; 385; lines 19 - 21). The flat screen television was damaged beyond repair. (TT214; lines 2 - 3).

Kelly turned around and was confronted by several correctional officers. (TT387; lines 6 - 16 and TE#1).

One (1) or more of the correctional officers deployed pepper spray toward Kelly. (TT153; lines 16 - 19).

The security video reflects that Kelly was standing facing the line of correctional officers. (TE#1). The security video "skips". (TT128; lines 15 – 18; TE#1). There is a four (4) second gap in the security video. (TT128; lines 17 – 25; TE#1). When the video resumes, Kelly is lying on the floor of the day hall. (TE#1).

Unfortunately, we will never know what really happened during that four (4) second gap in the security tape. (TT166; lines 4 - 24). The only unbiased record of the events that occurred on January 15, 2021, was in the hands of the State and that video was flawed and contains a "glitch". That "glitch" is coincidentally at the exact moment when whatever happened that date

happened.

Unfortunately, we will never have an unbiased record of what occurred. None of the incident reports that were prepared and submitted by any Mike Durfee staff references any skip, lag or glitch in the video. (TT204; lines 14 – 25; TT205; lines 1 – 7; TT243; lines 21 – 24).

Moreover, two (2) of the State's witnesses testified that there was "no skip" in the video when they viewed it shortly after the incident at Mike Durfee. (TT 188; lines 5 – 13; TT241; lines 3 – 5). It stretches the Court's credulity that the exact moment of either an assault upon a correctional officer or an unprovoked assault upon an inmate the State's security video "fails" or "glitches". When the security video goes "live" again; the inmate is laying on the floor.

Given that there was no visual documentation of the alleged assault; the State should have used its prosecutorial discretion and pressed forward with the charge of intentional damage to property which clearly occurred and is memorialized on the existing security tape. There is no question that Kelly intentionally damaged both the computer monitor as well as the wall mounted flat screen television. That charge was clearly supported by the actual security video. Moreover, Kelly testified and admitted that he did that.

In this instance, the evidence of the alleged assault as well as any evidence of Kelly's innocence was under the sole control of the State of South Dakota. As such, the fact that the security tape had a "glitch" in it rises to the level of "spoilation" of the evidence.

Although the spoilation in this instance is distinguishable from that which would occur in a drug case; it is similar in some respects. The evidence was in the hands or possession of the State. Something happened to the evidence while in the possession of the State. In *State v. Engresser*, 2003 SD 47, this Court held that when evidence is destroyed, it "creates an inference or presumption that that it would not have supported the charge against the Defendant". *State v.*

Engresser, citing State v. Johnson, 509 N.W.2d 681, 687 (SD 1993).

In this instance, the evidence was in the sole possession and control of the State and/or its agents. The security video was viewed by at least two (2) other correctional officers who did not notice a skip or glitch in the video when they viewed it shortly after the incident. (TT 188; lines 5 – 13; TT241; lines 3 – 5). Yet, when it is viewed later; there is a "glitch".

Given that the "glitch" occurred at the exact moment of the alleged assault; that spoiling of the evidence should be held against the State. Kelly should have been tried only for the offense of intentional damage to property. The State would easily have received a conviction for that charge. The additional sentence for that offense would have, by statute, been imposed consecutive to Kelly's already existing lengthy sentence. The interests of justice would have been adequately served by a conviction for intentional damage to the State's property.

2. Kelly should not have been tried for any alleged assault upon a correctional officer when the security video in the sole possession of the State of South Dakota contains a four (4) second gap which may have reflected an unprovoked assault upon Kelly.

As set forth above, the "glitch" occurred at the exact moment of the alleged assault. (TE#1). However, absent the "glitch" in the security video, there would be irrefutable evidence as to what actually happened in the day hall on January 15, 2021. Absent the "glitch" we would all know whether Kelly assaulted a correctional officer or whether a correctional officer assaulted Kelly.

Although there was testimony by a number of other correctional officers as to what they say happened that day; that testimony is suspect to a degree due to the likelihood of bias or favoritism among fellow law enforcement officers.

Correction Officer Day left the employ of the State following the incident. The other correctional officers who were involved in the incident and who testified at trial were all

promoted in rank following the incident and prior to the date of trial. (TT123; lines 8 – 12 [Jennifer (Matin) Buchannon], TT145; lines 17 – 18 [Christopher Day]; TT170; lines 17 – 18; 171; lines 1 – 2 [Wallace Kemnitz]; TT193; lines 15 – 20 [Brian Salts]; TT208; lines 9 - 15 [Tiffany Voight]; TT 246; lines18 – 22 [Lee Kaufenberg]; TT258; lines 19 -23 [Daniel Sestal]).

The Trial Court erred in allowing the State to present the prison's security video to be viewed by the jury when the security video, under the sole control of the State, included a four (4) second gap. The Trial Court should have refused to allow the video to be played for the jury inasmuch as the State had failed and neglected to preserve all of the videos of the incident which were kept on two (2) separate servers and which were eventually "taped over". Playing the video with the "glitch" violated Kelly's right to a fair trial.

3. The Trial Court erred by refusing to give the jury Kelly's requested self-defense instruction when it is apparent that the four (4) second gap in the security video may have reflected an assault upon Kelly by the correctional officer prior to Kelly striking back at the correctional officer.

The jury, as the trier of fact, should have been allowed to consider whether Kelly acted in self-defense or not. Given that the State had the burden of establishing beyond a reasonable doubt that Kelly had assaulted a correctional officer; the Trial Court should have given the trier of fact the opportunity to decide what ***they*** believed happened.

The four (4) second gap in the security video concealed whatever did actually happen on January 15, 2021. Had the jury been allowed to consider the requested self-defense instruction; the jury may have found Kelly not guilty "beyond a reasonable doubt". However, because that four (4) second gap effectively concealed whatever did happen; the jury was not given that option. Because of the "glitch"; there is no proof either way to establish what actually happened.

Because the Trial Court did not provide the jury with the self-defense instruction; the jury was prevented and prohibited from making the determination that the correctional officer could have assaulted Kelly. Furthermore, the failure to give the self-defense instruction gave the jury no choice but to find Kelly guilty of assault.

This Court has held that criminal defendants are entitled to instructions on their theory of the case when evidence exists to support that theory. *State v. Charles*, 2001 SD 67, P40, 628 N.W.2d 734, 738 (*citing State v. Charger*, 2000 SD 70, 611 N.W.2d 221, 229).

In the instant action, Kelly testified that he was afraid. (TT 412; lines 15 - 16). Trial Counsel did request the self-defense instruction. (TT440 - 441). Trial Counsel verily believed that sufficient evidence had been submitted through Kelly's direct testimony at trial. (TT440 - 441). The Trial Court denied that request. (TT445). The Trial Court determined that Kelly did not present sufficient evidence to warrant a self-defense instruction. (TT445). In reviewing Kelly's testimony, it is apparent that Kelly has cognitive issues. (TT373; lines 18 - 19). In fact, Kelly apologizes for his memory issues during his testimony. That does not, however, obviate Kelly's theory of the case which was that the correctional officer acted first and Kelly responded in self-defense.

As previously set forth in *State v. Bogenreif*, 465 N.W.2d 777, this Court has ruled that:

> "A defendant is entitled to an instruction on his or her theory of defense if there is evidence to support it and a proper request is made. Conversely, he is not entitled to an instruction if there is no evidence to support his or her theory. The defense of self-defense is available only to prevent imminent danger of great personal injury, or to prevent an offense against one's self or property."

In *State v. Bruger*, 2004 SD 12, 676 N.W.2d 112, this Court reversed the Trial Court

when it refused to give a self-defense instruction when an assault occurred. In the instant action, you had a single inmate faced with five (5) or six (6) correctional officers lined up against him who had already deployed pepper spray. Because of the "glitch", no-one will ever know what really happened.

As set forth in *Bruger*, whether Kelly feared great personal injury was a question for the jury. The jury should have been allowed, at the very least, to consider whether Kelly would have been justified in striking back at the correctional officer who was lined up against him along with several other officers and given that he had been subjected to pepper spray. Frankly, because the "glitch" was in the evidence which was in the sole control of the State and its agents; there would have been no harm had the Trial Court given a self-defense instruction.

In this instance, it appears that the Trial Court used a heightened standard in determining whether to allow Kelly's self-defense instruction. That higher standard was not appropriate or warranted. The heightened standard is to be utilized in homicide cas¶es. (See, *State v. Bruder*, 2000 SD 12, ¶10). The standard applied by this Trial Court was incorrect. The Trial Court committed reversible error. As stated in *Means*, "denial of a defendant's request for an instruction on self-defense where such a request is properly submitted and supported by the evidence is reversible error because it infringes on a defendant's constitutional right to due process. *Means*, 646 F.2d 322, 326 (8th Cir. 1980).

4. The State committed a *Brady* violation by failing to provide Kelly and his trial counsel access to the second source of the prison's recorded security video which is simultaneously "backed up" on both the DOC servers at Springfield and at the Bureau of Information Technology (BIT) when that second source may have provided Kelly with exculpatory evidence showing a physical assault upon Kelly by a correctional officer.

The Due Process clause of the 14th Amendment includes the implied guarantee that "criminal defendants be afforded a meaningful opportunity to present a complete defense". *State*

v. Zephier, 2020 S.D. 54, ¶28; 949 N.W.2d 560, 565 (*quoting California v. Trombotta*, 467 U.S. 479, 485; 104 S.Ct. 2528, 2532; 81 L.Ed.2d 413 (1984).

It has long been held that cases that involve a defendant's "guaranteed access to evidence generally fall into two (2) categories – cases in which the exculpatory value of the undisclosed evidence is known and cases where it is not". *State v. Turner*, 2025 SD 13, 18 N.W.3d 673, (*quoting California v. Trombotta*, 467 U.S. 479, 485; 104 S.Ct. 2528, 2532; 81 L.Ed.2d 413 (1984)).

A *Brady* violation occurs when 1) the evidence at issue (i)s favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) the evidence has been suppressed by the State either willfully or inadvertently; and 3) prejudice has ensued. *Thompson v. Weber*, 2013 SD 87, ¶38, 851 N.W.2d 2, 12 (*quoting Brady v. Maryland*, 373 U.S. 83, 87; 83 S.Ct. 1154, 1191; 10 L.Ed.2d 215 (1963). The Supreme Court has held that the individual prosecutor has a ***duty*** to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 432; 115 S.Ct. 1555, 1567; 131 L.Ed.2d 490 (1995).

In the case at bar, the State was clearly aware that there were security cameras throughout Mike Durfee State Prison. As a result, the State was aware that security videos existed as to occurrences at Mike Durfee. The State, through its agents, were aware of the placement of all of the security cameras. In fact, the State's witnesses admit that there were more camera angles available. (TT133 - 134; lines 24 – 25; 1 – 4). However, only two (2) video angles were provided. (TT218; lines 11 – 20). The State's witnesses admitted that they had the ability to preserve video at the facility; and they did not do so. (TT251; lines 16 – 20; 255; lines 6 – 9).

Once the incident occurred on January 15, 2021, the State, through its agents, should

have taken affirmative actions to preserve ***all*** of the videos relative to the location of the alleged incident; but they did not. The State, via its agents, knew whether or not it intended to prosecute Kelly. If the State had taken action to preserve those videos; there would be no question what happened in that day hall. If the State had done so, Kelly would not now be concerned that his due process rights had been violated by the State.

The State was aware that the security cameras recorded onto two (2) different servers; one (1) at Mike Duree and one (1) at Bureau of Information Technology (BIT). Both were under the sole control of the State. The State could have, and more importantly, should have, retrieved the security camera videos off ***both*** servers before they were taped over. The State was aware that the video retention was only for a period of thirty (30) days. (TT292; lines 14 – 19; TT297; lines 15 – 18; TT396; lines 16 – 17). To use the excuse that the videos had been "taped over" as the reason why those videos were not unavailable and produced by the State is indefensible.

Kelly has been convicted of assault upon a correctional officer when the proof of what really happened or, even what might have happened, was under the sole control of the State. As such, it appears that a *Brady* violation has occurred and Kelly's conviction should be set aside.

5. Kelly faced double jeopardy in violation of the 5th Amendment to the United States and South Dakota Constitutions when both counts charged in the Indictment refer to the same statutes (SDCL 22-6-5.1; 22-11A-1; 22-18-1(1) and 22-18-1.05) in both counts.

Kelly was charged in an Indictment with two (2) counts of simple assault upon a correctional officer in violation of SDCL 22-6-5.1; 22-11A-1; 22-18-1(1) and 22-18-1.05). Both counts allege essentially the same crime.

The Indictment charged Kelly with two (2) counts of essentially the same offense against the same correctional officer arising out of one (1) incident which occurred at the Mike Durfee State Prison. Kelly verily believes that being charged twice with the same offense against the

same correctional officer subjected him to double jeopardy in violation of his constitutional right against double jeopardy in violation of the 5th Amendment.

The Trial Court ruled, out of the presence of the jury, that even if convicted of both counts; Kelly could only be sentenced on one (1) of those counts. That, however, does not change the fact that Kelly was being charged twice in the same court for the same crime – thus, double jeopardy. Kelly maintains that under *State v Chavez*, 2002 SD 84, Counts 1 and 2 should have been dismissed and not even gone to the jury.

CONCLUSION

The State exceeded it prosecutorial discretion when it prosecuted Kelly on both the assault as well as the charge of intentional damage to property. There is no doubt that intentional damage to property occurred. There is no question that Kelly intentionally damaged both the computer monitor as well as the wall mounted flat screen television. That charge was clearly supported by the security video that was available. The interests of justice would have been adequately served by a conviction for intentional damage to the State's property.

The "glitch" in the State's security equipment at the exact moment of the purported assault on the correctional officer warranted the Trial Court giving the self-defense instruction. The Trial Court erred in not giving that instruction to the trier of fact.

The failure to give the self-defense instruction virtually guaranteed that the jury would convict Kelly of at least one (1) of the charges in the indictment even though the proof that might have acquitted Kelly was in the sole possession of the State. Kelly's due process rights were violated by the State's failure to preserve ***all*** of the security videos off all of the servers.

Given the Trial Court's failure to give the self-defense instruction coupled with the "glitch" in security video; Kelly was not offered a fighting chance to prevail against the State.

The evidence that could have acquitted Kelly was made unavailable by the State through the State's actions, ineptitude or negligence.

The Trial Court committed reversible error. Kelly was denied due process. The conviction as to the assault should be vacated and the case remanded back to the Trial Court with instructions to proceed only on the charge of intentional damage to property.

Dated this 10th day of September, 2025.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Wanda Howey-Fox, hereby certify pursuant to SDCL 15-26A-66(b) (4), that the Appellant's Brief was typed using Times New Roman – 12 point font; and contains 14 pages inclusive of this page, has 5,380 words exclusive of the Certificate of Compliance and the Certificate of Service and 26,584 characters, exclusive of the spaces and words contained in the Certificate of Service and the Certificate of Compliance.

CERTIFICATE OF SERVICE

I, Wanda Howey-Fox, hereby certify that the original and two (2) copies were served upon the South Dakota Supreme Court and two (2) photocopies upon counsel for the Appellee, Grant Flynn as well as Sara Show, via first class mail, postage pre-paid, to the following addresses on the 10th day of September, 2025, as follows:

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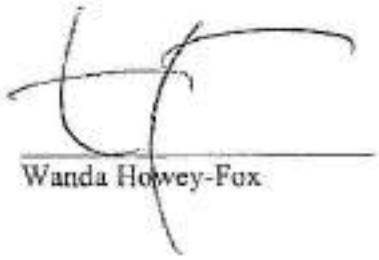
FL Inmate #O-J92755
P.O. Box 800
2398 NW 83rd Avenue
Raiford, FL 32083



Wanda Howey-Fox

APPENDIX

TABLE OF CONTENTS

FILED

NOV 27 2024

Bon Homme County Clerk of Courts
First Judicial Circuit Court of SD

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BON HOMME	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	04CRI21-0026
v.	AMENDED JUDGMENT OF CONVICTION AND SENTENCE
KELLY D WARFIELD, DOB 02/25/73	
Defendant.	

On April 21, 2021, an Indictment was filed with this Court charging the above named Defendant with Count 1: Simple Assault Against Department of Corrections Employee in violation of SDCL 22-18-1(1), and SDCL 22-18-1.05, a Class 6 Felony; Count 2: Simple Assault Against Department of Corrections Employee in violation of SDCL 22-18-1(5), and SDCL 22-18-1.05, a Class 6 Felony; and Count 3: Intentional Damage to Property in violation of SDCL 22-34-1(1), a Class 2 Misdemeanor for the offenses having occurred on or about January 15, 2021, in Bon Homme County, South Dakota. An Information for Habitual Offender was filed with this Court on May 4, 2021.

At the Defendant's arraignment on October 19, 2021, the court advised the Defendant of all his constitutional rights, the charges against him, and the maximum penalties. Defendant Kelly D. Warfield entered a not guilty plea and a denial to the Information for Habitual Offender.

A jury trial commenced on November 14, 2023, in Tyndall, South Dakota. The Defendant was personally present and was represented at trial by Ryan Kolbeck. The State was represented through counsel, Katie L. Mallery and Lindsey S. Quasney, prosecuting attorneys. On November 16, 2023, a Bon Homme County jury returned a verdict of guilty to Counts 1 and 3 of the Indictment. Defendant was acquitted as to Count 2.

On August 15, 2024, the State filed a dismissal of the Information for Habitual Offender. It is therefore

ORDERED, ADJUDGED AND DECREED that a JUDGMENT is entered against the Defendant adjudging him guilty of **Count 1: Simple Assault Against Department of Corrections Employee** in violation of SDCL 22-18-1(1), and SDCL 22-18-1.05, a Class 6 Felony and **Count 3: Intentional Damage to Property** in violation of SDCL 22-34-1(1), a Class 2 Misdemeanor.

Thereafter, on November 26, 2024, pursuant to SDCL 23A-27-51, the Defendant Kelly D. Warfield, appeared with his attorney, Wanda Howey-Fox of Yankton, South Dakota and Katie L. Mallery, Assistant Attorney General, appeared on behalf of the State for the Defendant's re-sentencing hearing. The court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the court pronounced the following sentences:

SENTENCE AS TO COUNT 1

ORDERED, ADJUDGED AND DECREED that the Defendant Kelly D. Warfield be imprisoned in the South Dakota State Penitentiary for a term of two (2) years, there to be kept, fed and clothed according to the rules and regulations governing that institution. No portion of this period of imprisonment is to be suspended and Defendant shall receive credit for the time served between August 16, 2024, and November 26, 2024. It is further

ORDERED, ADJUDGED AND DECREED that as to Count 1, the Defendant shall pay $116.50 in court costs to the Bon Homme County Clerk of Court's Office. It is further

ORDERED, ADJUDGED AND DECREED that as to Count 1, the Defendant will pay prosecution costs in the amount of $90.00 for grand jury transcript to the Bon Homme County Clerk of Courts to be forwarded by the Clerk upon payment by Defendant to the South Dakota Attorney General's Office, c/o Finance Division, 1302 E. Highway 14, #1, Pierre, South Dakota 57501. It is further

ORDERED, ADJUDGED AND DECREED that as to Count 1, the Defendant shall abide by the rules and regulations of the Department of Corrections, shall sign any required agreements, and shall obey all conditions imposed by them even though these conditions may not have been specifically set by the Court. It is further

ORDERED, ADJUDGED AND DECREED that the sentence pronounced as to Count 1 shall run consecutive to the three convictions in Pennington County file 51CRI02-2123. This sentence is ordered consecutive pursuant to SDCL 24-15-7.1 and 24-15A-20, and that while the Court has to discretion to deviate pursuant to SDCL 24-15A-20, the Court finds the offense to be serious and affecting the safety of inmates, guards and the institution therefore affecting the safety of general public necessitating a consecutive sentence in the exercise of the Court's discretion.

SENTENCE AS TO COUNT 3

ORDERED, ADJUDGED AND DECREED that the Defendant shall make restitution in this matter in the amount of $278.00 as set forth in the restitution claim form on file herein. Restitution shall be paid to the Bon Homme County Clerk of Court. It is further

ORDERED, ADJUDGED AND DECREED that the Defendant shall pay $78.50 in court costs to the Bon Homme County Clerk of Court's Office. It is further

SENTENCE APPPLICABLE TO BOTH COUNTS

ORDERED, ADJUDGED AND DECREED that as to Counts 1 and 3, the Defendant shall reimburse Bon Homme County for the costs of the Defendant's court appointed attorney fees and expenses.[1] The amount of the attorney's fees and expenses shall be determined by

[1] The Court notes that as SDCL 23A-40-8 is applicable effective July 1, 2024, Defendant would not be required to repay Bon Homme County for those fees and expenses to the extent that DOC, rather than Bon Homme County, pays for any court-appointed attorneys fees and expenses in this case.

reviewing the vouchers filed in this court file and with the Bon Homme County Auditor. All of the legal expenses paid by the Bon Homme County Auditor shall be repaid by the Defendant to the Bon Homme County Auditor. It is further

ORDERED, ADJUDGED AND DECREED that as to Counts 1 and 3, Defendant shall pay all financial obligations as ordered by the court. Defendant shall work out a payment schedule with parole, and if requested, Defendant shall execute a wage assignment form. It is further

ORDERED, ADJUDGED AND DECREED that as to Counts 1 and 3, Defendant was advised of his right to appeal on November 26, 2024, and that right is also stated below. The Court has appointed attorney Wanda Howey-Fox to represent Defendant as to Defendant's appeal to the South Dakota Supreme Court.

THE DEFENDANT HAS A RIGHT TO APPEAL FROM THIS JUDGMENT WITHIN 30 DAYS AFTER IT IS SIGNED, ATTESTED AND FILED. IF THE DEFENDANT WAITS MORE THAN 30 DAYS IT WILL BE TOO LATE TO APPEAL, AND THAT IF THEY ARE INDIGENT, THIS COURT WOULD APPOINT AN ATTORNEY TO HANDLE THAT APPEAL FOR THEM UPON THEIR APPLICATION.

Dated the 27th day of November, 2024.

BY THE COURT:

Hon. Cheryle Gering
Circuit Court Judge

ATTEST: Heather Young
Heather Young
Bon Homme County
Clerk of Court

By Nancy Hernandez
Deputy Clerk

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30929

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KELLY WARFIELD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BON HOMME COUNTY, SOUTH DAKOTA

THE HONORABLE CHERYLE GERING
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed December 13, 2024

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30929

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KELLY WARFIELD,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Kelly Warfield, is called "Warfield." Plaintiff and Appellee, the State of South Dakota, is called "State." References to documents are as follows:

Bon Homme County Criminal File No. 21-26 ..... SR

Warfield's Appellant Brief ..... WB

Video Exhibit 1 ..... Exh. 1

All document designations are followed by the appropriate page numbers. All Video Exhibit references are followed by the time they occur in the video.

JURISDICTIONAL STATEMENT

The Honorable Cheryle Gering, Bon Homme County Circuit Court Judge, entered an Amended Judgment of Conviction in Bon Homme County Criminal File 21-26 on November 27, 2024. SR:1152-56.

Warfield filed a Notice of Appeal on December 13, 2024. SR:1166-67.

This Court has jurisdiction to hear the appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER REVIEWING THE STATE'S PROSECUTORIAL DISCRETION IS OUTSIDE THE SCOPE OF THIS COURT'S APPELLATE JURISDICTION?

The circuit court did not rule on this issue.

State v. Bettelyoun, 2022 S.D. 14, 972 N.W.2d 124

II.

WHETHER IT WAS APPROPRIATE FOR THE CIRCUIT COURT TO NOT SUA SPONTE EXCLUDE THE SECURITY CAMERA FOOTAGE AS EVIDENCE?

The circuit court allowed Exhibit 1 with no objection from Warfield.

State v. Fifteen Impounded Cats, 2010 S.D. 50, 785 N.W.2d 272

State v. Engesser, 2003 S.D. 47, 661 N.W.2d 739

III.

WHETHER THE CIRCUIT COURT PROPERLY DENIED WARFIELD'S SELF-DEFENSE JURY INSTRUCTIONS?

The circuit court denied Warfield's proposed jury instructions on self-defense.

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

State v. Bogenreif, 465 N.W.2d 777 (S.D. 1991)

IV.

WHETHER THE STATE COMMITTED A *BRADY* VIOLATION?

The circuit court did not rule on this issue.

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

State v. Turner, 2025 S.D. 13, 18 N.W.3d 673

V.

WHETHER A DOUBLE JEOPARDY VIOLATION OCCURRED FROM THE CIRCUIT COURT'S DENIAL OF WARFIELD'S MOTION TO DISMISS ONE OF HIS SIMPLE ASSAULT COUNTS?

The circuit court denied Warfield's motion to dismiss.

State v. Chavez, 2002 S.D. 84, 649 N.W.2d 586

State v. Tuopeh, 2025 S.D. 16, 19 N.W.3d 37

STATEMENT OF THE CASE

The State filed an Indictment in April 2021 charging Warfield with three counts:

- Count 1: Simple Assault against a Department of Corrections Employee, violating SDCL 22-18-1(1) (recklessly causing bodily injury) and 22-18-1.05;
- Count 2: Simple Assault against a Department of Corrections Employee, violating SDCL 22-18-1(5) (intentionally causing bodily injury without causing serious bodily injury) and 22-18-1.05; and
- Count 3: Intentional Damage to Property, violating SDCL 22-34-1(1).

SR:1-4. The State filed a Habitual Offender Information alleging Warfield had prior convictions for Kidnapping, First Degree Burglary, and Second

Degree Rape. SR:7-9.

A jury trial occurred in November 2023. SR:1553, 1789. The jury found Warfield guilty of Counts 1 and 3, and not guilty on Count 2. SR:849. The State dismissed the Habitual Offender Information on August 14, 2024. SR:1065. The circuit court filed an Amended Judgment of Conviction in November 2024 sentencing Warfield to two years' imprisonment consecutive to his current sentence as well as costs and restitution. SR:1154-56.

STATEMENT OF THE FACTS

Department of Corrections staff at the Mike Durfee State Prison selected Warfield's cell for a random search in January 2021. SR:1591, 1615. During the search, the two officers examining Warfield's cell discovered his television did not have a security sticker on it that was required to prevent the USB port from being used. SR:1591. This violated the prison's policies, which were meant to prevent obscene material, such as child pornography, from being viewed inside the prison. SR:1591-92. Officer Christopher Day confiscated Warfield's television and began walking out of the cell with it. SR:1592-93. But Warfield, who was standing outside the cell, blocked Officer Day's path. SR:1592-93. Warfield balled his fists, took a fighting stance, and yelled that Officer Day could not take the television. SR:1570, 1592-93. The officers told Warfield he could talk to the prison staff located at the front desk about what was going on. SR:1570. Warfield went toward the

desk, so Officer Day was able to leave Warfield's cell with the television. SR:1570. But Warfield went back to his cell, dumped the water out of a small electric tea kettle known as a "hot pot," then started back down the hallway armed with the hot pot. SR:1594-96.

Officer Day arrived at the front desk, which was near the entrance of the prison overlooking a recreational area with a mounted wall television known as the "Day Hall." SR:1571; *see generally* Exh. 1. Security cameras recorded the front desk and Day Hall. SR:1571; *see generally* Exh. 1. Officer Day gave Warfield's television to the staff at the desk and explained what was going on. SR:1595; Exh. 1: 8:31:52-8:32:34. Warfield then ran up to the desk screaming and swung his hot pot, which smashed into a computer monitor at the desk. SR:817, 1575, 1681; Exh. 1: 8:32:34-8:32:37. Warfield then ran to the Day Hall and punched the mounted television multiple times, shattering the screen. SR:816, 1575; Exh. 1: 8:32:34-8:32:37. Both the computer monitor and the mounted television were destroyed. SR:816, 817, 1601.

Officer Day and other officers rushed into the Day Hall while Warfield punched the television. SR:1598; Exh. 1: 8:32:37-8:32:40. Officer Don Schwindt sprayed Warfield with pepper spray, but it did not incapacitate him. SR:1681. Officer Day ordered Warfield to submit to handcuffing, but Warfield lunged at Officer Day instead. SR:1598. Officer Schwindt again sprayed Warfield with pepper spray to no avail. SR:1681. Warfield threw multiple punches at Officer Day. SR:1681;

Exh. 1: 8:32:47-8:32:51. Officer Day put his fists up and backed away, but he never swung back at Warfield. SR:1642; Exh. 1: 8:32:47-8:32:51. Warfield landed punches to Officer Day's face and chest multiple times. SR:1598; Exh. 1: 8:32:47-8:32:51. Warfield's assault ended when Officer Brian Salts approached him from behind and performed a takedown. SR:1641; Exh. 1: 8:32:47-8:32:51. The officers then handcuffed Warfield and escorted him to solitary confinement. SR:1599; Exh. 1: 8:32:51-8:37:28. Officer Day suffered from whiplash, bruising, and face swelling because of the assault. SR:1599-1600.

The security cameras overlooking the Day Hall captured Warfield's attack, but because of technical issues they skipped during the four seconds where Warfield initially turned around, got sprayed, and lunged at Officer Day. SR:1693; Exh. 1: 8:32:41. The skip occurred because of a "bottlenecking" issue that often happens with the Milestone Camera System used by the prison, where too much data is uploaded at the same time by the prison's 800 cameras to the recording system, and thus short skips in recordings occur. SR:1705, 1724, 1727-28.

Prior to this case going to trial, the State retrieved the footage, which included the four-second skip because the moment where the bottlenecking occurred never got recorded. SR:691-92, 1430-31, 1727-28. The prison preserved the footage by accessing it from its servers where the prison video data is stored and uploading it onto a USB drive. SR:1708-09. Due to the encryption process used to protect surveillance

footage, it was impossible for anyone to alter the recording during that process. SR:1726. Three cameras recorded the incident, but because one did not capture it in its entirety, prison staff preserved footage from the two cameras that showed all the footage and did not save the footage from the third camera. SR:1577-78, 1662, 1700. Eventually, the footage from the servers was deleted. SR:1709.

As Warfield awaited trial, he moved for an expert to inspect the camera system, and the circuit court ordered Computer Forensic Resources, Inc. to inspect the prison's servers. SR:582, 655-56. But because of a breakdown in Warfield's relationship with his computer expert, Computer Forensic Experts, Inc. never inspected the camera system or issued a report. SR:691. Warfield eventually abandoned his desire to have a server inspection occur unless it was done by Hewlett-Packard, but he failed to get that company to do an inspection for him. SR:691. It is unclear if Warfield ever performed an inspection, but the record does not contain an inspection report from the defense.

At trial, the State presented the testimony of six correctional officers from the prison. SR:1570-71, 1574-75, 1591, 1596-97, 1615, 1639-40, 1653-55. These officers described Warfield destroying the computer monitor and Day Hall television because his television was confiscated, and then assaulting Officer Day after being pepper sprayed, who never threw a punch back at him. SR:1570-71, 1574-75, 1591, 1596-97, 1615, 1639-40, 1653-55. The State also showed the video

footage, including the four-second skip. *See generally* Exh. 1. The State further provided Exhibits showing the damage to the computer monitor and Day Hall television, and Officer Day's injuries. SR:815-17. The State called witnesses to explain the camera system to the jury, why the skip occurred, and why the recordings cannot be altered or have footage deleted. SR:1705, 1708-09, 1726-29. Testimony was also presented as to why only two of the three camera recordings were saved. SR:1700.

Warfield cross-examined the State's witnesses about the use of pepper spray, the video retention policies of the prison, and the skip in the recording. SR:1584-85, 1609-10, 1685, 1708-09, 1734-42. Warfield called Jason Kloucker, a technician and salesman from Johnson Controls, which was the company that provided video surveillance equipment and services to the prison. SR:1732, 1801-02. Kloucker testified that he was involved with selling the prison its camera system. SR:1802. Kloucker testified he was unaware if the prison requested any maintenance of its systems during January 2021. SR:1806-07. He claimed the prison could have altered the footage, but did not express any knowledge about the prison's encryption or data protection policies. SR:1808. Warfield also called Marc Jones, an inmate at the prison. SR:1813. Jones, who never saw the videos showing Warfield charge at Officer Day and punch him, claimed Warfield turned around to be handcuffed in the Day Hall before a guard picked him up and slammed him. SR:1818, 1823.

Warfield testified in his defense. SR:1838. He claimed his television had security stickers and was unfairly taken from him. SR:1851. He testified that he wanted to get sent to a different prison because he thought he would get better healthcare, so he purposefully tried to get written up. SR:1852-53. He admitted to destroying the computer monitor and Day Hall television. SR:1853. He described being pepper sprayed in the Day Hall and claimed he put his hands down at his sides and walked to the officers as that happened. SR:1857-58. He testified he did not remember rushing at or punching Officer Day and that he never attempted to harm him. SR:1859-60, 1866, 1868.

At trial, the circuit court denied requests made by Warfield, including a motion to dismiss. SR:1900. Among a flurry of pro se motions Warfield made while awaiting trial, he moved to dismiss one of the simple assault counts, arguing he could not be charged for two assaults arising from the same transaction. SR:10, 1900. Because the motion was not signed and was untimely, and because Warfield retained counsel shortly after making it, the circuit court did not consider the pro se motion at the time he made it. SR:1900-01. But the circuit court allowed Warfield's counsel to renew the motion at trial. SR:1901. The circuit court denied the motion, ruling that the State could submit both charges to the jury, but it could not seek two sentences if two convictions occurred. SR:1901. Yet the circuit court instructed the jury that it could not convict Warfield of both charges if it convicted him of one, rendering

that potential sentencing consideration irrelevant. SR:885, 1901-02. Warfield also proposed self-defense instructions. SR:842-43, 1891. The circuit court ruled that self-defense instructions were not appropriate because Warfield presented no evidence in furtherance of the affirmative defense. SR:872-904, 1916.

ARGUMENTS

I.

REVIEWING THE STATE'S PROSECUTORIAL DISCRETION IS OUTSIDE THE SCOPE OF THIS COURT'S APPELLATE JURISDICTION.

A. Background

Warfield argues that the State should have declined to prosecute him for simple assault by exercising prosecutorial discretion. WB:7-9. Warfield points to the four-second skip in the security camera footage. WB:9. He argues there is no documentation of his assault on Officer Day so the State could only serve the interests of justice by prosecuting him for intentional destruction of property. WB:9. This argument is not within the scope of issues this Court reviews under SDCL 23A-32-9, and is thus outside this Court's jurisdiction.

B. Standard of Review

"This Court reviews issues concerning a court's jurisdiction as questions of law under the de novo standard of review." *State v. Gutnik*, 2010 S.D. 82, ¶ 47, 90 N.W.2d 495, 496.

C. Analysis

SDCL 23A-32-9 provides:

> On an appeal from a judgment the Supreme Court may review any order, ruling, or determination of the trial court, involving the merits and necessarily affecting the judgment and appearing upon the record including an order denying a new trial, and whether any such order, ruling, or determination is made before or after judgment[.]

"In conducting statutory interpretation, [this Court gives] words their plain meaning and effect, and read statutes as a whole." *State v. Rus*, 2021 S.D. 14, ¶ 13, 956 N.W.2d 455, 458 (*quoting Reck v. S.D. Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 11, 932 N.W.2d 135, 139). "[I]f the words and phrases in the statute have plain meaning and effect, [this Court] should simply declare their meaning and not resort to statutory construction." *Id.* (*quoting Reck*, 2019 S.D. 42, ¶ 11, 932 N.W.2d at 139). "[T]he starting point when interpreting a statute must always be the language itself." *Id.* (quoting *State v. Livingood*, 2018 S.D. 83, ¶ 31, 921 N.W.2d 492, 499).

The plain language of SDCL 23A-32-9 limits the scope of this Court's appellate review to rulings, orders, and determinations made by the circuit court. Here, there is no order, ruling, or determination for this Court to review regarding the exercise of prosecutorial discretion. Whether the State's Attorney would have better served the interests of justice by declining to prosecute for simple assault was not and could not have been ruled on by the circuit court because prosecutorial

discretion rests with the State's Attorney. *See* SDCL 7-16-9; *see also State v. Bettelyoun*, 2022 S.D. 14, ¶ 35, 972 N.W.2d 124, 134-35 (acknowledging "that prosecutorial discretion is 'well-established' within our criminal justice system")(internal citation omitted). As such, Warfield's argument is outside the scope of this Court's jurisdiction on appeal and should not be considered. SDCL 23A-32-9.

II.

IT WAS APPROPRIATE FOR THE CIRCUIT COURT TO NOT SUA SPONTE EXCLUDE THE SECURITY CAMERA FOOTAGE AS EVIDENCE.

A. Background

Warfield alleges that because the skip in Exhibit 1 occurred at the time of his assault, and because the footage was in the sole possession of the State, the missing footage amounts to spoliation. WB:9-10. He also argues that the testimony of all the officer witnesses is biased, so the only possibility for a fair trial was if the entirety of the footage would have been available, and because it was not Exhibit 1 should have been excluded. WB:10-11. Warfield concludes that the circuit court allowing Exhibit 1 violated his right to a fair trial. WB:11.

B. Standard of Review

Warfield never tried to exclude Exhibit 1's admission, and he even stated through counsel "I would have no objection" to Exhibit 1. SR:1573. Warfield then relied on Exhibit 1 to argue the four-second skip created reasonable doubt that he committed any assault. SR:1573,

1956. This amounts to affirmatively assenting to the inclusion of Exhibit 1, and Warfield thus waived appeal of this issue. SR:1573, 1956; *State v. Heer*, 2024 S.D. 54, ¶16 n.4, 11 N.W.3d 905, 910. But assuming for the sake of argument that this issue was merely forfeited by Warfield's failure to object, "when an issue has not been preserved by objection at trial, [this Court's review] is limited to whether the trial court committed plain error." *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11, 785 N.W.2d 272, 277 (quoting *State v. Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d 56, 69–70); *Heer*, 2024 S.D. 54, ¶ 16 n.4, 11 N.W.3d at 910. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court." *Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11, 785 N.W.2d at 277 (quoting *Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d at 69–70). "[This Court invokes] discretion under the plain error rule cautiously and only in 'exceptional circumstances.'" *Id.* (quoting *Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d at 69–70)(other citation omitted).

"Plain error requires (1) error, (2) that is plain, (3) affecting substantial rights; and only then may [this Court] exercise [its] discretion to notice the error if (4) it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d at 69–70)(other citation omitted). "When plain error is alleged, the defendant bears the burden of showing the error was

prejudicial." *Id.* (quoting *Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d at 69–70).

C. Analysis

i. There was no error.

Warfield's contends Exhibit 1 should not have been included because the four-second skip "rises to the level of 'spoilation[.]'" WB:11. "Intentional destruction of evidence, a form of obstruction of justice, is called 'spoliation.'" *State v. Engesser*, 2003 S.D. 47, ¶ 44, 661 N.W.2d 739, 753 (internal citation omitted). "This Court has recognized that mere negligence in the loss or destruction of evidence does not result in a constitutional violation." *State v. Bousum*, 2003 S.D. 58, ¶ 16, 663 N.W.2d 257, 263. For spoliation to occur, there must be bad faith, which "means that the state deliberately destroyed the evidence with the intent to deprive the defense of information; that is, that the evidence was destroyed by, or at the direction of, a state agent who intended to thwart the defense." *Id.* (quoting *State v. Steffes*, 500 N.W.2d 608, 613 (N.D. 1993)).

Here, there was never a deliberate destruction of evidence, and thus no spoliation. *Engesser*, 2003 S.D. 47, ¶ 44, 661 N.W.2d at 753. Rather, the skip occurred because of the bottlenecking issue where the prison's bandwidth could not handle the amount of data uploaded at the same time by the prison's 800 cameras. SR:1705, 1724, 1727-28. Thus, the footage Warfield alleges was destroyed never existed to begin

with. SR:1728-29. There cannot be an intentional destruction of something that does not exist. Yet the circuit court still included an instruction telling the jury it could infer the alleged footage was unfavorable to the State if it believed Warfield's argument that the skip was due to intentionally deleted footage. SR:891. This instruction ensured Warfield received a fair trial despite Exhibit 1 including a brief skip due to a technical failure.

It should be noted that Warfield predicated much of his defense upon the video having a skip. SR:1956. His trial strategy revolved around trying to create reasonable doubt by arguing the skip was intentionally excluded because it proved Warfield's innocence. SR:1956. Because Warfield never moved to exclude Exhibit 1, and even relied on it, and because nothing in the record shows intentional destruction of evidence to thwart the defense, Warfield failed to show the circuit court committed error by allowing Exhibit 1. *Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11, 785 N.W.2d at 277.

Warfield also argues that the officers' testimony regarding the assault was biased, so a fair trial could not occur without a video showing the entire incident. WB:10-11. But Warfield testified about his own version of events and called an inmate witness to support his theory of the case. SR:1813-22, 1838-69. Warfield's argument therefore asks this Court to invade the jury's determination of the credibility of witnesses and the weight of evidence. This Court has long declined to re-

weigh the credibility of witnesses and weight of evidence on appeal in reviewing sufficiency of the evidence, and should not do so here to evaluate Warfield's due process argument. *State v. Buchholz*, 1999 S.D. 110, ¶ 33, 598 N.W.2d 899, 905 (quoting *State v. Knecht*, 1997 S.D. 53, ¶ 22, 563 N.W.2d 413, 421). Warfield has simply failed to carry his burden showing any error occurred. *Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11, 785 N.W.2d at 277.

ii. Any alleged error could not have been plain.

Assuming for the sake of argument error did occur, it is not "plain" on this record. "An error is 'plain' when it is clear or obvious." *State v. Wilson*, 2020 S.D. 41, ¶ 18, 947 N.W.2d 131, 136 (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d 725, 732). This "means that [circuit] court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the Rule's scope." *Id.* (quoting *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 732). An error is plain when the Supreme Court of the United States or this Court have resolved the issue beyond debate. *Id.* (citations omitted).

This Court relied on United States Supreme Court when it ruled "the State's destruction of evidence favorable to [the defense] is a violation of due process if the evidence requested by [the defense] and destroyed by the State is material either to guilt or punishment." *Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d at 262 (citing *State v. Lyerla*, 424 N.W.2d 908, 910 (S.D. 1988); *Brady v. Maryland*, 373 U.S. 83

(1963); *United States v. Agurs*, 427 U.S. 97 (1976)). This Court also adopted the United States Supreme Court reasoning that "[the defense] must show that the State acted in bad faith in releasing the [evidence]." *Id.* (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). Thus, this Court and the Supreme Court of the United States have ruled evidence must be destroyed in bad faith for there to be spoliation. *Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d at 262; *see also Brady*, 373 U.S. at 83; *see also Agurs*, 427 U.S. at 97; *see also Youngblood*, 488 U.S. at 58.

Because Warfield's alleged footage proving his innocence never existed to begin with, there could be no bad faith destruction of evidence under both this Court's and the United States Supreme Court's precedents. *Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d at 262; *see also Brady*, 373 U.S. at 83; *see also Agurs*, 427 U.S. at 97; *see also Youngblood*, 488 U.S. at 58; SR:1705, 1724, 1727-28. Thus, as much as this Court and the United States Supreme Court have engaged the issues, they have been resolved beyond debate against Warfield. *Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d at 262; *see also Brady*, 373 U.S. at 83; *see also Agurs*, 427 U.S. at 97; *see also Youngblood*, 488 U.S. at 58. So even if this Court holds the circuit court should have excluded Exhibit 1, the error was not clear and obvious. *Wilson*, 2020 S.D. 41, ¶ 18, 947 N.W.2d at 136. Plain error doctrine therefore cannot apply, and Warfield has failed to carry his burden. *Id.*; *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729; *Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11,

785 N.W.2d at 277.

iii. Warfield's substantial rights were unaffected.

Warfield must show any alleged error by the circuit court affected his substantial rights. *See McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729. This requires Warfield to establish prejudice. *State v. Guziak*, 2021 S.D. 68, ¶ 21, 968 N.W.2d 196, 202-03. "'Prejudice' in the context of plain error requires a showing of a 'reasonable probability' that, but for the error, the result of the proceeding would have been different." *Id.* (quoting *State v. Babcock*, 2020 S.D. 71, ¶ 45, 952 N.W.2d 750, 763).

Had the circuit excluded Exhibit 1, the State still presented testimony from six correctional officers that Warfield destroyed the computer monitor and Day Hall television because his television was confiscated. SR:1570-71, 1574-75, 1591, 1596-97, 1615, 1639-40, 1653-55. These same witnesses explained that Warfield assaulted Officer Day after being pepper sprayed, and that Officer Day never threw a punch at Warfield. SR:1570-71, 1574-75, 1591, 1596-97, 1615, 1639-40, 1653-55. The State also provided Exhibits showing the damage to the computer monitor and Day Hall television, as well as Officer Day's injuries. SR:815-17. The State's other prison staff witnesses explained how the security camera technology of the prison worked and why footage from two cameras was saved. SR:1690-91, 1700, 1705, 1727. The jury would have looked at this evidence and

concluded what was obvious: Warfield attacked Officer Day during an outburst of violent rage because his television was being confiscated, not because he needed to defend himself. SR:815-17, 1570-71, 1574-75, 1591, 1596-97, 1615, 1639-40, 1653-55. Thus, even if Exhibit 1 had been excluded, the result of the proceeding would not have been different. *Guziak*, 2021 S.D. 68, ¶ 21, 968 N.W.2d at 202-03. Warfield again failed to carry his burden. *Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11, 785 N.W.2d at 277.

iv. The fairness, integrity, and reputation of the proceedings are not affected.

Warfield has not satisfied his burden on this prong. *Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11, 785 N.W.2d at 277. He offers statements that "spoiling of the evidence should be held against the State" and "absent the 'glitch' we would all know whether [Warfield] assaulted a correctional officer or whether a correctional officer assaulted [Warfield]." WB:10. But again, nothing shows that bad faith destruction of evidence occurred to thwart Warfield's defense. *Bousum*, 2003 S.D. 58, ¶ 16, 663 N.W.2d at 263. And in addition to seeing the injuries to Officer Day and the damage to the computer monitor and Day Hall television, the jury heard testimony from correctional officers, prison staff, Warfield, and another inmate, and it found Warfield guilty of assault beyond a reasonable doubt. SR:815-17, 849, 1570-71, 1574-75, 1591, 1596-97, 1615, 1639-40, 1653-55, 1813-22, 1838-1869. Warfield

did not put forth an argument that behooves this Court to find that this is an exceptional circumstance of plain error. *Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 11, 785 N.W.2d at 277.

III.

THE CIRCUIT COURT PROPERLY DENIED WARFIELD'S SELF-DEFENSE JURY INSTRUCTIONS.

A. Background

Warfield proposed self-defense jury instructions. SR:842-43, 1891. The circuit court ruled that self-defense instructions were not appropriate because Warfield did not present sufficient evidence in furtherance of the affirmative defense. SR:872-904, 1916. Warfield argues that because Exhibit 1 contained the four-second skip and he testified he was afraid, sufficient reason existed to allow him to instruct the jury on self-defense. WB:11-12.

B. Standard of Review

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

32, ¶ 22, 993 N.W.2d 576, 584 (quoting *State v. Rodriguez*, 2020 S.D. 68, ¶ 41, 952 N.W.2d 244, 256).

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

C. Analysis

"Criminal defendants are entitled to instructions on their theory of the case when evidence exists to support that theory." *State v. Bruder*, 2004 S.D. 12, ¶ 8, 676 N.W.2d 112, 115. "The defense of self-defense is available only to prevent imminent danger of great personal injury[,] or to prevent an offense against one's self or property [under] SDCL 22-18-4." *State v. Bogenreif*, 465 N.W.2d 777, 781 (S.D. 1991). "Unless the individual situation required an immediate response necessary to prevent unlawful force from being inflicted upon [the defendant] or

another, the statute [SDCL 22-18-4] is not applicable." *Id.* (quoting *State v. Rich*, 417 N.W.2d 868, 871 (S.D.1988)).

Warfield did not have a right to a self-defense instruction because he never faced a threat of unlawful force. *Id.* Prior to him attacking Officer Day, Warfield ran amok around the prison pulverizing things. SR:816, 817, 1575, 1681; Exh. 1: 8:32:34-8:32:37. He smashed the computer monitor with his hot pot and punched the Day Hall television multiple times, destroying both. SR:816-17, 1575, 1681; Exh. 1: 8:32:34-8:32:37. He ignored Officer Day's command to submit to handcuffing. SR:1598. Further, the evidence demonstrated that Officer Day never attacked him, and in fact showed enormous restraint by taking a defensive posture without striking back after Warfield started punching him. Exh. 1: 8:32:47-8:32-51; SR:1642. Warfield's evidence countering this was Marc Jones saying he did not see everything that occurred, and Warfield's testimony that he did not remember what happened during his assault other than that he put his hands at his sides and walked toward Officer Day while being pepper sprayed. SR:1818, 1823, 1857-60, 1866, 1868.

It is true that Officer Schwindt pepper sprayed Warfield, who then assaulted Officer Day. SR:1681. But in *State v. Huber*, this Court held that placing an individual in handcuffs was within the scope of duties in

carrying out an arrest in a case involving a traffic stop.[1] 356 N.W.2d 468, 474 (S.D. 1984). Thus, the defendant was not acting in self-defense when he kicked at the officer and was not entitled to submit the issue to the jury. *Id.* Similarly, Officer Schwindt acted within the scope of his duties by pepper spraying Warfield to stop his rampage through the Day Hall. *See id.* Warfield never faced an unlawful use of force and did not put forth evidence warranting a self-defense instruction, so the circuit court did not make a choice outside the range of permissible choices by denying his request for one. *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584; *Bruder*, 2004 S.D. 12, ¶ 8, 676 N.W.2d at 115. And even if this Court rules the circuit court should have permitted a self-defense instruction, Warfield must show prejudice to prevail. *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51. Given the weight of the State's evidence just described, the inclusion of a self-defense instruction would not have changed the outcome of this case. *See id.*

Warfield compares the circuit court's ruling to *Bruder*, where this Court held it was inappropriate in a non-homicide case to apply the heightened standard for a self-defense instruction of whether actions were "done to prevent imminent danger of great personal injury." 2004 S.D. 12, ¶ 10, 676 N.W.2d at 115-16; WB:13. Warfield does not point to

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[1] A portion of *Huber* ruling that intentional damage to property is a general intent crime has been overturned, but the self-defense aspect of the case remains good law. *State v. Vandyke*, 2023 S.D. 9, ¶ 14 n.5, 986 N.W.2d 772, 775 n.5 (citing *Huber*, 356 N.W.2d at 468).

specific language that the circuit court used that showed it applied the homicide standard, and nowhere in the record did the circuit court say Warfield's actions had to be done to avoid "great personal injury." SR:1915-16; WB:11-13. Rather, the circuit court stated, "the evidence is not sufficient to warrant the presentation of the self-defense instructions to the jury," because "Mr. Warfield, on his direct examination, indicated that the officers were simply directing him to cuff up, and that there was no indication of any kind that they were attempting to assault him in any way[.]" SR:1916. The circuit court did not err by refusing Warfield's proposed instructions.

IV.

THE STATE DID NOT COMMIT A *BRADY* VIOLATION.

A. Background

Warfield moved to retain a computer forensics expert, and the circuit court ordered Computer Forensic Resources, Inc. to inspect the prison's servers. SR:565-67, 655-56, 702. But because of a breakdown in his relationship with his computer expert, Warfield encountered difficulties with getting the inspection done. SR:655-56, 691. Warfield demanded an inspection specifically by Hewlett-Packard, but he could not get that company to do an inspection for him. SR:565-67, 691. An inspection by Computer Forensic Resources, Inc. was scheduled by the circuit court, but it is unclear

whether it ever occurred.[2] SR:655-56, 702. The circuit court noted the passage of time affected the ability to inspect the servers, and delays in the inspection were all because of Warfield. SR:701. Eventually the footage from the servers was deleted and the last remaining location for the videos was the USB Drive to which prison staff uploaded the footage. SR:1708-09.

The State provided Warfield with camera footage from two of the three cameras that recorded his assault. *See generally* Exh. 1; SR:1700. Both contained the four-second skip because no camera captured the beginning of Warfield's assault due to the bandwidth overload that caused the skip. SR:1728-29. Prison staff did not save footage from the third camera because that camera did not record everything the other two did. SR:1700. Warfield now alleges the State committed a *Brady* violation by failing to provide him access to backup servers in addition to the prison's servers, and by not saving footage from the third camera. WB:13-15. Warfield claims he was denied the Fourteenth Amendment Due Process right to present a complete defense by this alleged failure. WB:13-14.

B. Standard of Review

Although Warfield moved to have an expert appointed for

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[2] John Kloucker of Johnson Controls testified for Warfield, but his testimony was about the agreement between the prison and his company and how the technology involved worked generally, not whether he inspected any servers. SR:1801-09.

inspection, he does not specify any ruling made by the circuit court in making this argument, instead alleging a general violation of his Fourteenth Amendment right to present a defense. WB:13-14. "[I]ssues of constitutional and statutory interpretation are[,] subject to de novo review." *State v. Waldner*, 2024 S.D. 67, ¶ 18, 14 N.W.3d 229, 236 (quoting *In re Implicated Individual*, 2023 S.D. 16, ¶ 11, 989 N.W.2d 517, 521).

C. Analysis

"A *Brady* violation occurs when (1) the evidence at issue [i]s favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence [has] been suppressed by the State, either willfully or inadvertently; and (3) prejudice [has] ensued." *State v. Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d 103, 109-10. "The cases that involve a defendant's 'guaranteed access to evidence' generally fall into two categories—'cases in which the exculpatory value of the undisclosed evidence is known and cases where it is not.'" *State v. Turner*, 2025 S.D. 13, ¶ 56, 18 N.W.3d 673, 691 (quoting *State v. Zephier*, 2020 S.D. 54, ¶¶ 20-21, 949 N.W.2d 560, 565). The first category of cases "is illustrated by the prototypical violation[,] where a prosecutor does not share information or evidence that is, nevertheless, identifiable and intact, and is 'either material to the guilt of the defendant or relevant to the punishment to be imposed.'" *Id.* ¶ 57, 18 N.W.3d at 691 (quoting *California v.*

Trombetta, 467 U.S. 479, 485 (1984)). Because the camera footage from the third camera and the servers no longer exists, this case does not fall under this category. *Id.*; SR:1728-29.

The recordings here fall under the second category, which is "cases where the exculpatory value of undisclosed evidence is unknown because it has been destroyed, lost, or compromised in some way." *Turner*, 2025 S.D. 13, ¶ 58, 18 N.W.3d at 691. To determine materiality in such cases, "[the] evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (quoting *Trombetta*, 467 U.S. at 488–89). Nothing known about the footage from the third camera points to an inherent exculpatory value because everything in the record indicates that camera shows what the other two recorded—Warfield attack Officer Day after a four-second skip caused by the bandwidth issue. *See generally* Exh. 1; SR:1728-29. Further, the State provided Exhibit 1, which was the same incident recorded by the two other cameras and thus comparable evidence. *Turner*, 2025 S.D. 13, ¶ 58, 18 N.W.3d at 691; *see generally* Exh. 1. It also bears mentioning that the State never prevented Warfield from looking at any servers at the prison or otherwise—his failure to inspect them was due to his breakdown in relations with his expert. SR:691. Warfield therefore failed to

establish the requirements that exculpatory evidence had been suppressed by the State. *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109-10

"[The] materiality test will not resolve all due process challenges in cases of lost or destroyed evidence." *Turner*, 2025 S.D. 13, ¶ 59, 18 N.W.3d at 691-92 (quoting *Zephier*, 2020 S.D. 54, ¶ 24, 949 N.W.2d at 566). "In some instances, this evidence cannot satisfy the materiality test, and the most that could be said is that it 'could have been subjected to tests, the results of which might have exonerated the defendant.'" *Id.* (internal citation omitted). "In cases 'involving only "potentially useful" lost or destroyed evidence[,] a defendant must show that law enforcement acted in bad faith to establish a due process violation[.]'" *Id.* (quoting *Zephier*, 2020 S.D. 54, ¶ 24, 949 N.W.2d at 566)(other citation omitted). Warfield has produced nothing to show that law enforcement acted in bad faith. WB:13-15.

Even if Warfield could establish exculpatory evidence had been suppressed, he still must show prejudice. *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109-10. "Prejudice exists when the error 'in all probability must have produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'" *Id.* ¶ 31, 929 N.W.2d at 110-11. Testimony from the State's witnesses and Exhibit 1 both showed Warfield assaulted Officer Day, who never

punched him. SR:1570-71, 1574-75, 1591, 1596-97, 1615, 1639-40, 1653-55. The inclusion of another camera showing the same events from a different angle would not have changed the verdict. There are no due process violations here, and Warfield's convictions should not be set aside.

V.

NO DOUBLE JEOPARDY VIOLATION OCCURRED FROM THE CIRCUIT COURT'S DENIAL OF WARFIELD'S MOTION TO DISMISS ONE OF HIS SIMPLE ASSAULT COUNTS.

A. Background

Warfield pro se moved to dismiss one of the simple assault counts, arguing he could not be charged for two assaults arising from the same transaction. SR:10, 1900. Warfield retained counsel shortly after making this motion, so the circuit court did not consider the pro se motion at the time it was made. SR:1900-01. The circuit court allowed Warfield's counsel to renew the motion at trial. SR:1901. The circuit court denied the motion, ruling that the State could submit both charges but it could not seek two sentences in the event of two convictions. SR:1901. The circuit court instructed the jury that it could not convict Warfield of both charges if it convicted him of one, so the double-sentencing situation never occurred. SR:885, 1901-02.

B. Standard of Review

Issues "regarding multiplicity of charges are questions of law, which [this Court reviews] de novo." *State v. Chavez*, 2002 S.D. 84, ¶ 10,

649 N.W.2d 586, 591-92.

C. Analysis

This Court's "more recent cases addressing double jeopardy claims have recognized that the primary issue is not how multiple counts are submitted to the jury, but rather whether multiple convictions and sentences for the same act are entered for the same conduct." *State v. Tuopeh*, 2025 S.D. 16, ¶ 20, 19 N.W.3d 37, 47. This Court has "thus noted that the principles safeguarding the right to be free from double jeopardy do not preclude the prosecution from charging multiple separate counts arising from the same conduct 'in order to meet the evidence which may be adduced[.]'" *Id.* (quoting *State v. Washington*, 2024 S.D. 64, ¶ 61, 13 N.W.3d 492, 510). The circuit court was therefore not prohibited from allowing the jury to consider multiple counts arising from the same conduct. *Id.* Instead, the prohibition against double jeopardy prevented the circuit court from entering multiple convictions and sentences against Warfield—something that never happened. *Id.*; SR:1152-53. Further, the circuit court instructed the jury to pick one conviction, so Warfield never even faced multiple convictions, let alone two sentences. SR:885, 1901-02. No double-jeopardy violation occurred. *Tuopeh*, 2025 S.D. 16, ¶ 20, 19 N.W.3d at 47.

Warfield cites *Chavez* without explaining how that case supports his position. WB:16; 2002 S.D. 84, 649 N.W.2d at 586. This Court held

in that case "we have acknowledged that two convictions for the same crime cannot stand without specific legislation to that effect." 2002 S.D. 84, ¶ 17, 649 N.W.2d at 593. But this Court explained "it is not[,] permissible *to punish* a defendant more than once for one offense in violation of a single statute," and, "if, under the same set of facts, a defendant is wrongly *convicted and sentenced* under more than one subsection of SDCL 22-18-1.1, the erroneous convictions must be vacated by the trial court." *Chavez*, 2002 S.D. 84, ¶¶ 16-19, 649 N.W.2d at 593 (emphasis added). Again, because Warfield was never convicted and sentenced twice for the same offense, he never endured a double jeopardy violation. *Id.* Warfield's argument simply has no grounding in the law.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 6,685 words.

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

Dated this 24th day of October 2025.

/s/ Jacob R. Dempsey
Jacob R. Dempsey
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 24th, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kelly Warfield*, Appeal No. 30929, was served via electronically through Odyssey File and Serve upon Wanda Howey-Fox at whfoxlaw@midco.net.

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