IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30753

JULIUS AUGUSTIN HOLY BEAR, JR.
Defendant/Appellant

vs.

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

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

HONORABLE HEIDI LINNGREN, PRESIDING JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed on July 8, 2024

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Throughout this Appellant's Brief, Julius Holy Bear Jr., Defendant below and Appellant herein, will be referred to as "Mr. Holy Bear" or "Appellant." The State of South Dakota will be referred to as "State." All references to the settled record of Pennington County file number 51CRI22-4085 will be designated as "SR."

JURISDICTIONAL STATEMENT

Mr. Holy Bear appeals from an Amended Judgment, signed and entered by the Honorable Heidi Linngren, Seventh Judicial Circuit, on August 2, 2024. See *Amended*

Judgment at SR 434, attached for convenience. The Amended Judgment states that Mr. Holy Bear was "[f]ound guilty at a stipulated court trial on May 7, 2024" of the offenses of Second Degree Burglary, a Class 3 Felony pursuant to SDCL 22-32-3; Attempted First Degree Burglary, a Class ½ 2 Felony pursuant to SDCL 22-32-1(2) and SDCL 22-4-1; Aggravated Assault, a Class 3 Felony pursuant to SDCL 22-18-1.1(5); and Threatening to Commit a Sexual Offense, a Class 4 Felony pursuant to SDCL 22-22-45 and SDCL 22-24B-1. *Id.*

Notice of Appeal was timely filed on July 8, 2024. This Court has jurisdiction over this matter pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES

I. Whether the Court erred by omitting to first adjudicate whether Mr. Holy Bear was guilty beyond a reasonable doubt as to all elements before adjudicating insanity (an affirmative defense)

In the context of a not-guilty plea, an affirmative defense of not-guilty-by-reason-of-insanity, a stipulation to particular facts (but not elements, including *mens rea*), and a waiver of a jury trial (a "stipulated court trial"), the Court erred by omitting to first adjudicate whether Mr. Holy Bear was guilty beyond a reasonable doubt on all elements before adjudicating insanity (an affirmative defense).

II. Whether the Court erred by not considering voluntary intoxication in determining whether or not the defendant possessed the necessary specific *mens rea*

The Court erred by overbroadly holding that, "[i]t is well settled that voluntary intoxication is not a defense to any crime," in turn, omitting to assess whether the element of specific intent had been met beyond a reasonable doubt, where "under South Dakota law, voluntary intoxication is not a defense to any criminal act…[but] can be considered by the

jury, however, in determining whether or not the defendant possessed the necessary specific *mens rea*." *State v. Kills Small*, 269 N.W.2d 771, 772 (1978).

III. Whether the Trial Court engaged in an unconstitutional invasion of the presumption of innocence

Where the Court did not first find guilt beyond a reasonable doubt on all elements before shifting to the defendant "the burden of proving the defense of insanity by clear and convincing evidence," the trial court engaged in "an unconstitutional invasion of the presumption of innocence." *State vs. Calin*, 2005 S.D. 13, ¶ 17 (Sabers, J., dissenting).

IV. Whether the evidence in this case simply does not support a finding of guilt beyond a reasonable doubt

In light of the Settled Record, the Trial Court erred and abused discretion where "[t]he evidence in this case simply does not support a finding of guilt beyond a reasonable doubt." *State vs. Calin*, 2005 S.D. 13, ¶ 22 (Konenkamp, J., dissenting).

STATEMENT OF THE CASE AND FACTS

Overview

In summary, in this criminal matter Mr. Holy Bear waived his right to a jury trial, stipulated to particular facts, and entered a not-guilty plea. Prior to trial, he asserted the affirmative defense of not guilty by reason of insanity. This case proceeded to a stipulated court trial. On appeal, Mr. Holy Bear respectfully asserts that the Court erred by not first adjudicating whether Mr. Holy Bear was guilty beyond a reasonable doubt at trial before adjudicating the insanity defense, due to erroneously presuming that the Defendant stipulated to both "facts and elements." *Correspondence: Judge Linngren to Counsel* at SR 309 ("The facts and elements of each crime of the Superseding Indictment were stipulated to. The only question for the Court remaining is whether or not, under the law, the Defendant

was Insane at the time of the offenses.") Mr. Holy Bear asserts that he did not stipulate to specific *means rea,* a required element of the charges. See, e.g., Count 1 of the Superseding Indictment at SR 141 ("...SECOND DEGREE BURGLARY, in that (s)he did enter or remain in an occupied structure, with intent to commit any crime, to-wit: rape...").

Mr. Holy Bear respectfully asserts that the Court omitted to adjudicate whether the element of specific intent was satisfied beyond a reasonable doubt, because the Court erroneously considered insanity and intoxication only in the context of an affirmative defense. In *Calin,* Justice Sabers cautioned, "[SDCL 22-5-10, Insanity as affirmative defense] poses a very great danger for jury confusion and for conviction by less than beyond a reasonable doubt..." *State vs. Calin,* 2005 S.D. 13, ¶ 19 (Sabers, J., dissenting). Justice Sabers foresaw that the danger would come to fruition in the case of more serious crimes, because "[m]ost serious crimes contain an element which overlaps sanity." *Id.* at ¶ 18. This danger has been realized in the immediate matter.

Mr. Holy Bear respectfully asserts that the Court erred by omitting to adjudicate *mens rea* and guilt beyond a reasonable doubt before moving on to adjudicate insanity as an affirmative defense. Mr. Holy Bear respectfully asserts that the State was erroneously "relieved of its burden of proving all the elements of the offense beyond a reasonable doubt." *Id.* at ¶ 6. The Court engaged in "an unconstitutional invasion of the presumption of innocence" by, at the outset of trial, shifting to the defendant "the burden of proving the defense of insanity by clear and convincing evidence." *Id.* at ¶ 17 (Sabers, J., dissenting).

Mr. Holy Bear respectfully asserts that the Court arrived at that posture due to an underlying error, whereby the Court overbroadly held that "[i]t is well settled that voluntary intoxication is not a defense to any crime." *Correspondence: Judge Linngren to Counsel* at SR 310. The Court erred in first omitting to consider voluntary intoxication in the context of the

State's burden to prove elements, "in determining whether or not the defendant possessed the necessary specific *mens rea*." *State v. Kills Small*, 269 N.W.2d 771, 772 (1978).

The errors are prejudicial where conviction resulted in a substantial prison sentence. Mr. Holy Bear asks this Court to reverse and remand for a new trial in order to adjudicate the element of specific *mens rea* and guilt beyond a reasonable doubt.

Statement of Facts

The State and Mr. Holy Bear stipulated to a set of facts in this matter. See SR at 148 – 151. According to stipulated facts, Mr. Holy Bear entered a first residence, approached a couple in bed whom he did not know, was chased away after making bizarre *ad hoc* propositions, and then entered a second residence nearby, to be chased off again by a second couple as law enforcement arrived. The stipulation reads in part:

"

- On October 8, 2022, at approximately 7 AM, law enforcement was dispatched to [address omitted] for a burglary in progress.
- Dispatch was then advised that the male subject left [the first address] and was now inside the [second address]. [...]
- Officer Shiroky's observations of the defendant included: he seemed to be under the influence of a substance, he was not making sense, he made a comment that he killed his girlfriend but he was not able to say where she is or what her name was, he would not answer questions related to the statements that he made, and Holybear asked if this was real life or a dream. [...]
- Officer Koch's observations of the defendant included: Holybear seemed to be in a altered state of mind, appeared to be either seeing and/or hearing things that no one

else could see or hear, he made an unsolicited statement about his girlfriend being dead. [...]

- [Alleged victim at first residence] Morgan was awoken around 630 AM to an unknown male in his room at the foot of his bed, wearing a long sleeve green shirt and shorts.
- Morgan asked Holybear what he was doing and Holybear responded by saying that Morgan was his girlfriend and they were going to have sex.
- Hise was in the bed with Morgan.
- Morgan said that Holybear told him 'you are my girlfriend. I am going to fuck you.'
- Holybear began to undo his belt and unbutton his pants, again referencing having sex with either Morgan or Hise.
- Morgan at this time attacked Holybear to prevent a sexual assault from happening.
- Morgan struck Holybear and a scuffle ensued. [...]
- Holybear apologized to Morgan and said that he just came in and wanted to ask before he 'fucked his (Morgan's) wife.'
- Morgan told Holybear that the police were coming and Holybear responded 'the cops are on the way and its ok' and as repayment for hitting him, Holybear can have sex with Hise.
- Morgan continued to try and shove Holybear out of his room.
- Holybear asked if he could have a threesome with Morgan and Hise. [...]
- At this time Morgan grabbed a hatchet and raised it up to get Holybear out of the room.
- After raising the hatchet, Holybear turned and ran out of the house. [...]

- Morgan observed Holybear run to a neighbor's house. [...]
- When [alleged victim at second residence] Saner reached the bottom of the stairs Holybear was standing at the top of the stairs past the entry way of the home. [...]
- Saner yelled at Holybear and instructed him to leave.
- Saner yelled for his wife to get their gun. [...]
- While outside of the house, Holybear grabbed a hammer and turned back towards the house, and in an aggressive manner raised the hammer over his head as he approached Saner, who was standing in the doorway.
- Saner was able to slam the door shut before Holybear could strike him. [...]
- After arriving at booking, it was decided that Holybear would go to Monument Health for an evaluation.
- At the hospital, Holybear admitted to using methamphetamine earlier in the week but did not remember which date.
- While at the hospital, Holybear was fidgety, grinding his teeth and making sudden movements.
- Holybear was unable to have a full conversation without changing the topic.
- After being released from the hospital, Holybear was transported back to the jail.
- While at the jail, Holybear continued to make statements about his girlfriend being murdered." [...]

Factual Stipulation at SR 148, attached hereto for convenience.

Statement of the Case

On February 7, 2024, Mr. Holy Bear was charged by Superseding Indictment with four charges. *Superseding Indictment* at SR 141.

In Count 1, Mr. Holy Bear was charged with Second Degree Burglary, alleging that he did enter or remain in an occupied structure, with intent to commit any crime, to-wit: rape, under circumstances not amounting to First Degree Burglary, in violation of SDCL 22-32-3.

In Count 2, Mr. Holy Bear was charged with Attempted First Degree Burglary, alleging that he did attempt to enter or remain in an occupied structure, with intent to commit any crime to-wit: assault, while armed with a dangerous weapon, to wit: hammer, in violation of SDCL 22-32-1(2) and SDCL 22-4-1. *Id.*

In Count 3, Mr. Holy Bear was charged with Aggravated Assault, in that he did attempt by physical menace with a deadly weapon, to-wit: hammer, to put Joseph Saner in fear of imminent serious bodily harm, in violation of SDCL 22-18-1.1(5). *Id.*

In Count 4, Mr. Holy Bear was charged with Threatening to Commit a Sexual Offense, in that he did then and there directly threatened or communicated specific intent to commit further felony sex offenses, and is a person who has been convicted of a felony sex offense, in violation of SDCL 22-22-45, as defined in SDCL 22-24-B-1. *Id.*

On December 19, 2022, Mr. Holy Bear was arraigned and entered a plea of not guilty. SR 451. A Part II Information for Habitual offender was filed, and he entered a denial to the same. *Id.*

On January 12, 2023, in response to a motion by defense, the Court entered an Order for a psychiatric evaluation by Dr. William A. Moss "for the purposes of determining mental health competency, guilty but mentally ill, and not guilty by reason of insanity." SR 72. The evaluation and report was completed. At a Motions Hearing on March 27, 2023, counsel for Mr. Holy Bear "officially change[d] the plea to not guilty and not guilty by reason of insanity." SR 462. Thereafter, during the court trial, Dr. Moss testified regarding his evaluation and report:

"Dr. Moss testified he met with Holy Bear at his office in March of 2023. CT 15-16. He considered his past treatment of Holy Bear as well as the police reports; body worn and vehicle cameras; medical records and his clinical interview. CT 15-17. Dr. Moss testified that it was his opinion that Holy Bear was competent at the time of his interview but he concluded that Holy Bear did not have the ability to engage in rational thought at the time of the alleged offense. CT 17-21; Exhibit A. Specifically, Dr. Moss found that it is more likely than not that Holy Bear was not sane at the time of the offense. CT 17-21; Exhibit A."

Brief: Defendant's Supplemental Brief For Court Trial, SR 297 – 298 (internal cites to "CT" refer to original page numbers within the Court Trial transcript at SR 184).

After reviewing Dr. Moss' report, the State moved for an Order for a second evaluation by the State's own expert, Dr. Clay Joseph Pavlis "for the purposes of determining mental health competency, guilty but mentally ill, and not guilty by reason of insanity." SR 101. At trial, Dr. Pavlis testified to his own evaluation and report:

"Dr. Pavlis testified he met with Holy Bear over a Zoom connection at the Pennington County Jail almost nine months after the incident. CT 46. He also had the police reports; body worn and vehicle cameras; medical records and his Zoom interview. CT 49. Dr. Pavlis testified that it was his opinion that Holy Bear was competent at the time of his interview. CT 48-21; State's Exhibit 5. Dr. Pavlis testified that is was opinion that Holy Bear did not suffer from a substantial psychiatric disorder at the time of the alleged crime and that he was able to know the wrongfulness of his acts. CT 72; 76-77. State's Exhibit 6.

Brief: Defendant's Supplemental Brief For Court Trial, SR 297 – 298 (again, internal cites to "CT" refer to original page numbers within the Court Trial transcript at SR 184).

Defendant filed a Wavier of Jury Trial on February 12, 2024. SR 146. On February 14, 2024, a court trial was held. In its holding, the Court referred to this proceeding as a "stipulated court trial." *Correspondence: Judge Linngren to Counsel* at SR 309. After trial, each party briefed its position regarding the Defendant's entry of a plea of not guilty by reason of insanity. SR 297, 303. By way of a letter to the parties, the Court ruled:

> "The purpose of this letter is to rule on the Defendant's entry of a Plea of Not Guilty by Reason of Insanity pursuant to SDCL 23A-10-3.
>
> [...]
>
> A stipulation was entered and signed by the State, Defense Counsel, as well as the Defendant, with exhibits attached. The Exhibits are referred to in the Exhibit list as the prior certified record of the Defendant, CD of 911 Audio Call and the Flash Drive of Five Body Worn Camera Clips. The facts and elements of each crime of the Superseding Indictment were stipulated to. The only question for the Court remaining is whether or not, under the law, the Defendant was Insane at the time of the offenses.
>
> [...]
>
> It is well settled that voluntary intoxication is not a defense to any crime. Although there were not confirmed levels of alcohol or any other substance in the Defendant at the time, his admissions to having used Methamphetamine are set forth in the Factual Stipulation agreed to by the parties. The conduct of the Defendant could also be the conduct of one under the influence of drugs or alcohol, particularly Methamphetamine. When drugs or alcohol are mixed with a psychotic disorder, one would not clearly be able to determine which is the acting force.
>
> [...]

Based on the totality of the evidence and testimony presented, the Court finds that the Defendant did not meet the burden to establish the plea of Not Guilty by Reason of Insanity.

Correspondence: Judge Linngren to Counsel at SR 308 – 310.

On June 25, 2024, the Court sentenced Mr. Holy Bear to 15 years in the state penitentiary for Count 1, the second-degree burglary charge. In each of the three remaining counts, the Court sentenced Mr. Holy Bear to 10 years. All sentences run concurrently. *Sentencing* at SR 422.

On June 28, 2024, the Court entered a Judgment, which reflected that Mr. Holy Bear was "found guilty by a jury" (a typographical error regarding the jury, but a substantive error regarding adjudication of guilt at an omitted first stage of a bifurcated trial). SR 379. On August 7, 2024, the Court entered an Amended Judgment, which stated that Mr. Holy Bear was "found guilty at a stipulated court trial." SR 434.

SIGNIFICANT MOTIONS FILED IN THE CIRCUIT COURT

On November 23, 2022, defense counsel filed an Affidavit for a Change of Judge. The request was granted. On January 11, 2023, defense counsel filed a *pro forma* "Motion for Eval for Mental Health Competency; Guilty but Mentally Ill Plea; or Not Guilty By Reason of Insanity." SR 71. The Motion was granted. SR 72. On June 27, 2023, the State also filed a *pro forma* "Motion for Eval for Mental Health Competency; Guilty but Mentally Ill Plea; or Not Guilty By Reason of Insanity." SR 100. The Motion was granted. SR 101. On February 12, 2024, Mr. Holy Bear filed a signed Waiver of his right to a jury trial. SR 146.

ARGUMENT

Analysis of Issue 1: Omitting to Adjudicate Guilt beyond a Reasonable Doubt as to All Elements before Adjudicating Insanity

Statement of Law

"It is a fundamental principle of our law that a defendant in a criminal case is presumed to be innocent. This presumption follows the defendant throughout the trial and must continue unless you are satisfied from all the evidence beyond a reasonable doubt that the defendant is guilty." South Dakota Criminal Pattern Jury Instruction 1-4-1 (2019) (notes citing SDCL 23A-25-3.1, SDCL 23A-22-3, and *State v. Holmes*, 338 N.W.2d 104 (S.D. 1983)).

Likewise, "[t]he state has the burden of proving every element of the offense charged beyond a reasonable doubt. The burden of proof never shifts to the defendant, but rests upon the state throughout the trial…" South Dakota Criminal Pattern Jury Instruction 1-5-1 (2019) (notes citing SDCL 23A-22-3 and *State v. Wilcox*, 48 S.D. 289, 204 N.W. 369 (1925)). The United States Supreme Court has found that the Due Process guarantees of the Fifth and Fourteenth Amendments "protect the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Analysis

Mr. Holy Bear was not found guilty beyond a reasonable doubt of "every element of the offense charged" or "every fact necessary." South Dakota Criminal Pattern Jury Instruction 1-5-1 (2019); *In re Winship*, 397 U.S. 358, 364 (1970). The elements of charges in this matter include specific intent. Counts 1 and 2 of the Superseding Indictment require an element of "intent to commit any crime," to wit, rape and assault with a deadly weapon,

respectively. SR 141. Count 4 requires the element of communication of "specific intent to commit further felony sex offenses." *Id.*

As noted earlier, Mr. Holy Bear pled not guilty. SR 451. A presumption of innocence remained after he waived his right to a jury trial and stipulated to a set of facts, pending adjudication of guilt at trial. South Dakota Criminal Pattern Jury Instruction 1-4-1 (2019). Although Mr. Holy Bear waived his right to a jury trial and requested a Court trial, such waiver did not transform a not-guilty plea to a guilty plea. SR 146.

After the parties stipulated to a set of facts, the Court began to refer to the trial as "a stipulated court trial." See, e.g., *Correspondence: Judge Linngren to Counsel* at SR 309. By way of contrast, in *Kaline,* the Court defined a "stipulated court trial" where the defendant waived his right to a jury trial and admitted to each and every element of a routine drug-possession crime, none of which involved specific intent:

> "Following his unsuccessful attempt to suppress evidence, Kaline and the State began negotiating a plea agreement. The parties agreed to a stipulated court trial. At the trial, which was held on March 27, 2017, Kaline did not formally change his plea, but his attorney told the circuit court that Kaline was 'willing to stipulate [that] methamphetamine was found on him on [September 22, 2016,] and that he knew it was methamphetamine and [that] it was here in Rapid City.'"
>
> *State v. Kaline,* 2018 S.D. 54, ¶ 6.

By contrast, in the immediate matter, the more serious crimes charged require the element of specific intent.

As in *Kaline,* Mr. Holy Bear stipulated to a set of facts. However, further distinguishable from *Kaline,* the facts presented did not satisfy each and every element. A set of facts might satisfy some but not all elements. The Court erred in conclusively presuming

from the outset of trial that, because defendant stipulated to a set of facts, those facts satisfied all elements, including specific intent. As such, the Court omitted to adjudicate guilt beyond a reasonable doubt before moving on to adjudicate the affirmative defense of insanity:

> "And, Mr. Holy Bear, this is your signature – I watched you do it when you were going over the facts with Mr. Andersen, but did you sign this document that indicates the facts of the evening in question?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And you don't dispute any of those facts?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Your understanding is the only reason we're really here today is for me to make a determination as to whether or not you were legally insane at the time of these incidents?
>
> THE DEFENDANT: Yes, Your Honor.
>
> *Transcript: Court Trial 2/14/2024* at SR 195 – 196.

Following trial, the Court asked the parties to submit briefs regarding the affirmative defense of insanity. Thereafter, the Court issued a holding that was also explicitly limited in scope to the insanity defense, explaining, "The purpose of this letter is to rule on the Defendant's entry of a Plea of Not Guilty by Reason of Insanity pursuant to SDCL 23A-10-3." *Correspondence: Judge Linngren to Counsel* at SR 308.

Mr. Holy Bear respectfully asserts that the Court arrived at this posture in error, having presumed that Mr. Holy Bear stipulated that all elements had been met:

> "The facts and elements of each crime of the Superseding Indictment were stipulated to. The only question for the Court remaining is whether or not, under the law, the

Defendant was Insane at the time of the offenses. The standard for the determination of the same is clear and convincing evidence and the burden is on the Defendant to establish the same." *Correspondence: Judge Linngren to Counsel* at SR 309.

Although Mr. Holy Bear clearly stipulated to facts, he did not stipulate to both "facts and elements." More precisely, Mr. Holy Bear did not stipulate to the element of specific intent. In turn, the Court erred by "having found Mr. HolyBear, by way of stipulation, guilty and not accepting the not guilty by reason of insanity." SR 471.

A stipulated court trial is not a *de facto* guilty plea. Numerous cases have involved a stipulated court trial, and in each, the Court nonetheless holds the first stage of a bifurcated trial to find guilt beyond a reasonable doubt. For example, in cases where proof supporting a "Part II Information" is contested, the Court nonetheless holds the initial stage of the stipulated court trial to find guilt beyond a reasonable doubt. See, for example, *State v. Willey*, 2012 S.D. 5, ¶ 4 ("After a stipulated court trial in February 2011, Willey was convicted of DUI based on the August 8, 2010 arrest."); *State v. Olson*, 2016 S.D. 25, ¶ 3 ("A stipulated court trial was held on May 11, 2015. The court found Olson guilty of driving under the influence and of having an open container of alcohol in a motor vehicle."); and *State v. Anderson*, 1996 S.D. 59, ¶ 7, 548 N.W.2d 40, 41 (1996) ("Pursuant to a plea-bargain agreement, a stipulated court trial was held April 6, 1995. [...] The trial court found Anderson guilty of the offense of possession of a controlled substance.")

In sum, the Court erred by adjudicating only that Mr. Holy Bear was not not-guilty-by-reason-of-insanity, a double-negative that is narrower in scope than a finding of guilt beyond a reasonable doubt as to each element.

Analysis of Issue 2: The Court erred by not considering voluntary intoxication in determining whether or not the defendant possessed the necessary specific *mens rea*

Two distinct errors converged to cause the Court to omit a finding of guilt before adjudicating insanity. First, as stated earlier, the Court erroneously presumed Mr. Holy Bear stipulated to both facts and elements (i.e., all elements). Second, the Court did not investigate further whether the element of specific intent was satisfied due to a misstatement of law. The Court held overbroadly and conclusively that, "[i]t is well settled that voluntary intoxication is not a defense to any crime." *Correspondence: Judge Linngren to Counsel* at SR 310. However, in South Dakota, the relationship between voluntary intoxication and specific intent is more complex.

Statement of Law

"Voluntary intoxication is not defense to any criminal act, but can be considered by jury in determining whether defendant possessed necessary specific *mens rea*." *State v. Kills Small*, 269 N.W.2d 771, 772 (1978). In *State vs. Calin*, the Supreme Court of South Dakota provided a survey of applicable law:

> "Most of the facts of this case are not in dispute. At issue is whether the trial court's rejection of the insanity defense is supported by the evidence. Calin entered a plea of not guilty by reason of insanity. Under our statutory scheme, when a defendant enters this plea, he raises insanity as an affirmative defense. SDCL 23A-10-2, 22-5-10. The defendant has the burden of proving he was insane at the time he committed the crime by clear and convincing evidence. SDCL 22-5-10. This is not to say that the State is relieved of its burden of proving all the elements of the offense beyond a reasonable doubt. See *Leland v. Oregon*, 343 U.S. 790, 793-800, 72 S.Ct. 1002, 1005-08, 96 L.Ed. 1302, 1306-10 (1952). A court or jury can only consider the

defense of insanity after finding that the State has proved all the elements of the offense, including *mens rea*, beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 705, 95 S.Ct. 1881, 1893, 44 L.Ed.2d 508, 523 (1975) (Rehnquist, J., concurring). An insanity defense can only be successful if the defendant proves he did not know the wrongfulness of his action at the time he committed the crime. South Dakota defines insanity as follows:

> 'Insanity,' the condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against him, he was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior. SDCL 22-1-2(20).

Consequently, the trial court first had to determine that the State had met its burden of proving beyond a reasonable doubt all of the elements of the crime. Then, the court had to determine if Calin was incapable of knowing the wrongfulness of his acts at the time he committed the crimes."

State vs. Calin, 2005 S.D. 13, ¶ 6.

Analysis

In the immediate matter, the Court did not adjudicate the effect of intoxication on specific intent (as an element, not a defense) due to an overbroad misstatement of law that "voluntary intoxication is not a defense to any crime." However, numerous facts bear more than a reasonable doubt as to whether Mr. Holy Bear had the necessary specific *mens rea*:

> "Officer Shiroky's observations of the defendant included: he seemed to be under the influence of a substance, he was not making sense, he made a comment that he killed his girlfriend but he was not able to say where she is or what her name was, he

would not answer questions related to the statements that he made, and Holybear asked if this was real life or a dream.

[...]

Officer Koch's observations of the defendant included: Holybear seemed to be in a altered state of mind, appeared to be either seeing and/or hearing things that no one else could see or hear, he made an unsolicited statement about his girlfriend being dead."

Stipulation: Factual Stipulation at SR 148.

The testimony of Dr. Moss, a psychiatric expert engaged by Defense Counsel, also supported that Mr. Holy Bear did not have the necessary specific *mens rea*:

"Based on his history of suffering from mental illness, his use of intoxicants that erode the mental functions of a person and -- and their capacity to -- to manage information in a reasonable manner, the information contained within the police reports, and the symptoms that were reported to me, I came to the conclusion that it is more likely than not that he was not sane at the time of the offense.

[...]

What I found that was relevant is when he's faced with the threat of the police coming, you know, after leaving the -- or during the course of the first intrusion, his -- he doesn't try to hide. He doesn't do more than -- than leave. And -- and what does he do, he goes to another house and acts in a similar manner. I think that's very relevant to -- to illustrate his -- his level of -- of thinking. You know, he wasn't -- he wasn't interpreting the threat of being arrested with I could be sent to jail, I need to go, I need to find a safe place. He -- he merely engaged with the same activities based on whatever delusional thought he was experiencing at the time.

[…]

Q Now, am I correct in that there is no evidence anywhere that he had any symptoms after this event occurred?

A He was being treated with a pretty strong antipsychotic medication."

Transcript: Court Trial 2/14/2024 at SR 204.3 – 204.13, SR 211.24 – 212.10, and SR 218.9 – 218.17.

The testimony of the State's psychiatric expert, Dr. Plavis, also supported that Mr. Holy Bear did not have the necessary specific *mens rea*. Dr. Plavis "opined that the event was a brief episode as a result of the intoxication and not a thought disorder." *Transcript: Court Trial 2/14/2024* at SR 264.16 – 264.17.

The Judge acknowledged the concordance of "a psychotic disorder" and "drugs or alcohol," but held – only in the context of an insanity defense – the Court could not discern the "acting force":

> "It is well settled that voluntary intoxication is not a defense to any crime. Although there were not confirmed levels of alcohol or any other substance in the Defendant at the time, his admissions to having used Methamphetamine are set forth in the Factual Stipulation agreed to by the parties. The conduct of the Defendant could also be the conduct of one under the influence of drugs or alcohol, particularly Methamphetamine. […] When drugs or alcohol are mixed with a psychotic disorder, one would not clearly be able to determine which is the acting force."
>
> *Correspondence: Judge Linngren to Counsel* at SR 310.

In sum, beyond stipulated facts, the record contains substantial evidence refuting that the element of specific intent would have been met beyond a reasonable doubt if the Court had adjudicated all elements. However, confusion arose where proof of an element of

the charges overlapped with proof of the affirmative defense. Although the subject matter overlapped (i.e., specific intent and insanity), standards of proof and burdens of proof should have been distinctly different between parties at each stage of a bifurcated trial. Compounding that foundation of confusion, due to an overbroad misstatement of law that voluntary intoxication is no defense to any crime, the State was "relieved of its burden of proving all the elements of the offense beyond a reasonable doubt." *State vs. Calin*, 2005 S.D. 13, ¶ 6 (citing *Leland v. Oregon*, 343 U.S. 790, 793-800, 72 S.Ct. 1002, 1005-08, 96 L.Ed. 1302, 1306-10 (1952).

Analysis of Issue 3: Unconstitutional Burden-shifting in Violation of the Presumption of Innocence

Where the Court did not first assess and find guilt beyond a reasonable doubt, the Court engaged in "an unconstitutional invasion of the presumption of innocence" by first shifting to the defendant "the burden of proving the defense of insanity by clear and convincing evidence." *State vs. Calin*, 2005 S.D. 13, ¶ 17 (Sabers, J., dissenting).

Statement of Law

In *Calin*, Justice Sabers outlined the relevant law in the course of his dissent. Justice Sabers opined:

> "The fatal constitutional defect of SDCL 22-5-10 is that it places upon the defendant 'the burden of proving the defense of insanity by clear and convincing evidence.' The State cannot constitutionally require a defendant to do more than raise a reasonable doubt as to his sanity, i.e., the defendant's burden of persuasion cannot exceed raising 'a reasonable doubt.' It is an unconstitutional invasion of the presumption of innocence to exceed this point. S.D. Const., art. VI § 2; *Robinson v.*

Solem, 432 N.W.2d 246, 252 (S.D.1988) (Sabers, J., concurring in result in part and dissenting in part).

The State must prove each and every element of the crime charged beyond a reasonable doubt. Most serious crimes contain an element which overlaps sanity. Therefore, if the defendant raises a reasonable doubt as to his sanity, it becomes constitutionally inconsistent and impossible for the State to prove the overlapping element of the crime beyond a reasonable doubt.

Therefore, the statute poses a very great danger for jury confusion and for conviction by less than beyond a reasonable doubt and is unconstitutional. S.D. Const., art. VI § 2; *State v. Rough Surface*, 440 N.W.2d 746, 760 (S.D.1989) (Sabers, J., dissenting); *State v. Baker*, 440 N.W.2d 284, 294 (S.D.1989) (Sabers, J., dissenting); *Robinson*, 432 N.W.2d at 252 (Sabers, J., concurring in result in part and dissenting in part)."

State vs. Calin, 2005 S.D. 13, ¶ 16—19 (Sabers, J., dissenting).

Analysis

Distinguishable from the immediate matter, the Court in *Calin* "found the defendant guilty but mentally ill." *State vs. Calin*, 2005 S.D. 13, ¶ 5. Calin was found "guilty [but mentally ill] beyond a reasonable doubt." *Id.* at ¶ 7. Thus, Calin was found guilty. In its holding, the Supreme Court noted, "[T]his appears to be a close case." *Id.* at 9. By contrast, Mr. Holy Bear respectfully argues that the key distinction that tips the scales in the immediate close case is that, while Calin was found guilty beyond a reasonable doubt, Mr. Holy Bear was only found not not-guilty-by-reason-of-insanity, a double-negative narrower in scope than guilt beyond a reasonable doubt.

Where the Court did not first adjudicate whether all elements, including specific intent, had been satisfied and find guilt beyond a reasonable doubt, the trial court engaged in "an unconstitutional invasion of the presumption of innocence" by shifting to the defendant "the burden of proving the defense of insanity by clear and convincing evidence" at the outset of a stipulated court trial. *State vs. Calin*, 2005 S.D. 13, ¶ 17 (Sabers, J., dissenting).

Analysis of Issue 4: The evidence in this case would not have supported a finding of guilt beyond a reasonable doubt

Statement of Law and Analysis

The trial court erred and abused discretion where "[t]he evidence in this case simply does not support a finding of guilt beyond a reasonable doubt." *Id.* at ¶ 22 (Konenkamp, J., dissenting). Based on the foregoing stipulated facts, police observations, experts' opinions, and evidence, Mr. Holy Bear asserts that, if the Court had adjudicated all elements to include specific intent, the evidence in this case simply would not support a finding of guilt beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Mr. Holy Bear asks the Court to reverse the judgment of conviction and remand for a new trial.

SIGNED AND ENTERED this 29th day of October, 2024.

Respectfully submitted,
LAW OFFICE OF THE PUBLIC DEFENDER
For PENNINGTON COUNTY
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
(605) 394-2181 (telephone)
(605) 394-6008 (facsimile)

By: */s/ Joseph Juenger*
Joseph Juenger
Attorney for Defendant/ Appellant

CERTIFICATE OF COMPLIANCE

I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Garamond typeface in 12-point type. The Appellant's Brief contains approximately 6203 words and 22 pages in length.

I certify that the word processing software used to prepare this brief is Microsoft Word 2019.

/s/ Joseph Juenger
Joseph Juenger
Attorney for Defendant/ Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th of October, 2024, a true and correct copy of the Appellant's Brief in the matter of *The State of South Dakota v. Julius Augustin Holy Bear, Jr.*, was served via electronic mail through Odyssey file and serve upon the individuals listed below:

Ms. Lara R. Roetzel
Pennington County State's Attorney
larar@pennco.org

Mr. Marty Jackley
South Dakota Attorney General
atgservice@state.sd.us

/s/ Joseph Juenger
Joseph Juenger
Attorney for Defendant/ Appellant

APPENDIX

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	File No. CRI22-4085
vs.	)	**AMENDED JUDGMENT**
JULIUS AUGUSTIN HOLYBEAR JR, DOB: 7/31/87 Defendant.	)	

Appearance at sentencing:
Prosecutor: Adam Shiffermiller Defense attorney: Bryan Andersen

Count 1:
Date of sentence: June 25, 2024
Date of offense: October 8, 2022
Charge: Second Degree Burglary
Class: 3 Felony SDCL: 22-32-3
Found guilty at a stipulated court trial on May 7, 2024

Count 2:
Date of sentence: June 25, 2024
Date of offense: October 8, 2022
Charge: Attempted First Degree Burglary
Class: ½ 2 Felony SDCL: 22-32-1(2) and SDCL 22-4-1
Found guilty at a stipulated court trial on May 7, 2024

Count 3:
Date of sentence: June 25, 2024
Date of offense: October 8, 2022
Charge: Aggravated Assault
Class: 3 Felony SDCL: 22-18-1.1(5)
Found guilty at a stipulated court trial on May 7, 2024

Count 4:
Date of sentence: June 25, 2024
Date of offense: October 8, 2022
Charge: Threatening to Commit a Sexual Offense
Class: 4 Felony SDCL: 22-22-45 and SDCL 22-24-B-1
Found guilty at a stipulated court trial on May 7, 2024

CRIME QUALIFIER: (CHECK IF APPLICABLE):

☐ Accessory 22-3-5 ☐ Aiding or Abetting 22-3-3 ☐ Attempt 22-4-1
☐ Conspiracy 22-3-8 ☐ Solicitation 22-4A-1

Habitual offender admitted on: _____
☐ SDCL 22-7-7 ☐ SDCL 22-7-8 ☐ SDCL 22-7-8.1

Part 2 Information (DUI) admitted on _____
☐ Third Offense; SDCL 32-23-4 ☐ Fourth Offense; SDCL 32-23-4.6
☐ Fifth Offense; SDCL 32-23-4.7 ☐ Sixth or Subsequent Offense; SDCL 32-23-4.9

Part 2 Information (ASSAULT) admitted on _____
☐ SDCL 22-18-1

Part 2 Information (VPO DV/ VNCO DV) admitted on _____
☐ SDCL 25-10-13

☒ The Defendant having been found guilty at a stipulated court trial and having asked whether any legal cause existed to show why judgment should not be pronounced, and no cause being offered:

IT IS HEREBY ORDERED THAT on Count 1: The Defendant is sentenced to serve:
15 year(s) in the South Dakota State Penitentiary with 0 year(s) suspended and 627 days credit plus each day served in the Pennington County jail.

IT IS HEREBY ORDERED THAT on Count 2: The Defendant is sentenced to serve:
10 year(s) in the South Dakota State Penitentiary with 0 year(s) suspended and 627 days credit plus each day served in the Pennington County jail.

IT IS HEREBY ORDERED THAT on Count 3: The Defendant is sentenced to serve:
10 year(s) in the South Dakota State Penitentiary with 0 year(s) suspended and 627 days credit plus each day served in the Pennington County jail.

IT IS HEREBY ORDERED THAT on Count 4: The Defendant is sentenced to serve:
10 year(s) in the South Dakota State Penitentiary with 0 year(s) suspended and 627 days credit plus each day served in the Pennington County jail.

Check if applicable:
☒ All counts concurrent.
☒ Immediate remand

☒ That Defendant pay court costs of $116.50.
☒ That Defendant's attorney's fees of $2,616.00 will be a civil lien pursuant to SDCL 23A-40-11.
☒ That Defendant pay prosecution costs: UA $___, Drug Test $___, Blood $___, SART Bill $___; Transcript $95.60.
☐ That Defendant pay prosecution costs from dismissed file ___: UA $___, Drug Test $___, SART Bill $___; Blood $___, Transcript $___.
☐ That Defendant pay the statutory fee of $___ DUI, $___ DV.
☐ That Defendant pay fines imposed in the amount of $___.
☐ That the Defendant pay restitution through the Pennington County Clerk of Courts in the amount of $___ to ___.

Other Conditions:

☐ _____

☐ _____

☐ Pursuant to SDCL 22-6-11, a Court shall sentence a Defendant convicted of a Class 5 or Class 6 felony to a term of probation unless the Court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation; and the Court having found the following aggravating factors exist justifying a deviation, to-wit:

☐ Failure to comply with terms of probation
☐ Poor performance on bond
☐ Escalating behavior
☐ Failure to accept responsibility
☐ _____
☐ Criminal history
☐ Multiple files
☐ Picking up new files while on bond
☐ On Parole when committed offense

Pursuant to agreement of the parties, the State's Attorney is dismissing all remaining counts to include any Part II information, if applicable.

8/2/2024 9:29:35 AM

Attest:
Ricke, Jolonda
Clerk/Deputy

BY THE COURT:

HON. HEIDI LINNGREN CIRCUIT JUDGE

You are hereby notified you have a right to appeal as provided for by SDCL 23A-32-15. Any appeal must be filed within thirty (30) days from the date that this Judgment is filed.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE NO. CRI 22-4085
	)	
Plaintiff,	)	
	)	**FACTUAL STIPULATION**
vs.	)	
	)	
Julius Augustin Holybear, Jr.,	)	
Defendant.	)	

COMES NOW, the State of South Dakota by and through its Deputy State's Attorney, Adam Shiffermiller, and the Defendant Julius Holybear by and through his attorney of record Bryan Andersen and hereby stipulates to the following facts:

- On October 8, 2022, at approximately 7 AM, law enforcement was dispatched to the area of 814 Joy Avenue, Pennington County, South Dakota for a burglary in progress.
- Dispatch was then advised that the male subject left 814 Joy Avenue and was now inside the residence of 808 Joy Avenue.
- Officer James Jones met with the owner of 808 Joy Avenue, Joseph Saner ("Saner").
- Saner told officer Jones that the male had left his residence southbound, and the subject was wearing camouflage shorts and a dark colored sweatshirt and had taken a blue handled hammer from the residence.
- Officer Grant Scane located the male subject matching the clothing description standing in the driveway of 714 Joy Avenue.
- The male subject was identified as Julius Holybear ("Holybear").
- Officer Scane observed Holybear throw the hammer as he approached and retrieved it and provided it to other officers on scene.
- Officer Robert Shiroky helped place Holybear in his patrol vehicle.
- Officer Shiroky's observations of the defendant included: he seemed to be under the influence of a substance, he was not making sense, he made a comment that he killed his girlfriend but he was not able to say where she is or what her name was, he would not answer questions related to the statements that he made, and Holybear asked if this was real life or a dream.
- Officer Philip Koch also responded and helped place Holybear in a police vehicle.
- Officer Koch's observations of the defendant included: Holybear seemed to be in a altered state of mind, appeared to be either seeing and/or hearing things that no one else could see or hear, he made an unsolicited statement about his girlfriend being dead.

- Officer Koch went to Holybear's mother's house at 815 Joy Avenue to check on the welfare of his girlfriend.
- Officer Koch contacted Holybear's mother and was informed that his girlfriend was not in the house and everyone inside the house was safe.
- Officer Jones contacted the residents of 814 Joy Avenue. They were Rylin Morgan ("Morgan"), Ivy Hise ("Hise"), and Abigail Morgan.
- Morgan was awoken around 630 AM to an unknown male in his room at the foot of his bed, wearing a long sleeve green shirt and shorts.
- Morgan asked Holybear what he was doing and Holybear responded by saying that Morgan was his girlfriend and they were going to have sex.
- Hise was in the bed with Morgan.
- Morgan said that Holybear told him "you are my girlfriend. I am going to fuck you."
- Holybear began to undo his belt and unbutton his pants, again referencing having sex with either Morgan or Hise.
- Morgan at this time attacked Holybear to prevent a sexual assault from happening.
- Morgan struck Holybear and a scuffle ensued.
- When Morgan got Holybear to the ground, Morgan told Hise to leave the room and call 911.
- Holybear apologized to Morgan and said that he just came in and wanted to ask before he "fucked his (Morgan's) wife."
- Morgan told Holybear that the police were coming and Holybear responded "the cops are on the way and its ok" and as repayment for hitting him, Holybear can have sex with Hise.
- Morgan continued to try and shove Holybear out of his room.
- Holybear asked if he could have a threesome with Morgan and Hise.
- Abigail Morgan entered the room and saw Holybear and she freaked out, this confirmed to Morgan that the defendant did not have permission to be in the house and was not invited in.
- At this time Morgan grabbed a hatchet and raised it up to get Holybear out of the room.
- After raising the hatchet, Holybear turned and ran out of the house.
- Abigail Morgan did not permit Holybear to be in the house.
- Holybear did not have permission to enter the residence.
- Morgan observed Holybear run to a neighbor's house.
- Hise remembered waking up with a strange man in the bedroom who was undoing his belt.
- Hise was told to leave the room and call 911.
- Hise ran to Abigail Morgan's room and woke her up telling her that there is someone in the house.

- Hise and Abigail Morgan went back into the bedroom and observed Holybear in the room.
- A short time later Morgan grabbed a weapon and Holybear left the residence.
- Officer Jones contacted the residents of 808 Joy Avenue. They were Joseph Saner, Geneva Saner and their three juvenile children.
- Saner was awoken to a loud noise on the morning of October 8, 2022.
- Saner and his wife own a split foyer home. When you enter the house, you can either go up a flight of stairs or down a flight of stairs.
- Saner, his wife, and his son sleep on the lower level of the home.
- Saner's two daughters sleep upstairs.
- When Saner reached the bottom of the stairs Holybear was standing at the top of the stairs past the entry way of the home.
- Saner did not know who Holybear was and Holybear did not have permission to be in the house.
- Saner yelled at Holybear and instructed him to leave.
- Saner yelled for his wife to get their gun.
- Saner does not own a gun but yelled this to try to get Holybear to leave the house.
- After hearing this, Holybear left the residence.
- Saner was working on the flooring in the house and had multiple tools and other materials outside.
- While outside of the house, Holybear grabbed a hammer and turned back towards the house, and in an aggressive manner raised the hammer over his head as he approached Saner, who was standing in the doorway.
- Saner was able to slam the door shut before Holybear could strike him.
- Saner had to hold the door shut on Holybear, as the frame was broken from when Holybear broke into the home a few minutes prior.
- Saner felt threatened by Holybear's actions.
- Holybear backed away from the front door and continued to yell at Saner and asking him if he "wanted some" in a threatening manner.
- Law enforcement arrived just after Holybear left the residence.
- Saner agreed to do a show up with law enforcement and was able to positively ID Holybear as the individual who had broken into his home.
- After arriving at booking, it was decided that Holybear would go to Monument Health for an evaluation.
- At the hospital, Holybear admitted to using methamphetamine earlier in the week but did not remember which date.

- While at the hospital, Holybear was fidgety, grinding his teeth and making sudden movements.
- Holybear was unable to have a full conversation without changing the topic.
- After being released from the hospital, Holybear was transported back to the jail.
- While at the jail, Holybear continued to make statements about his girlfriend being murdered.
- Holybear's clothes and the hammer were placed into evidence.
- Holybear has been previously convicted of a felony sex offense. (see exhibit 1).
- Attached is exhibit 1 Defendants prior certified record.
- Attached is exhibit 2 911 calls.
- Attached is exhibit 3 BWC.

Dated this 14th day of February, 2024.

Adam Shiffermiller
Pennington County State's Attorney's Office
130 Kansas City Street, Suite 300
PO Box 6160
Rapid City SD 57701-6160
(605)394-2191

Bryan Andersen
Attorney for Defendant

Julius Holy Bear
Defendant

FILED
Pennington County, SD
IN CIRCUIT COURT

FEB 14 2024

Amber Watkins, Clerk of Courts
By _____ Deputy

Seventh Judicial Circuit Court

P.O. Box 230
Rapid City, SD 57709-0230
(605) 394-2571

May 6, 2024

Adam Shiffermiller
Deputy State's Attorney
Pennington County States Attorney's Office

Bryan T. Andersen
Attorney for Julius Holy Bear Jr.
Law Office of the Public Defender
130 Kansas City Street, Suite 310
Rapid City, SD 57701

Re: State vs. Julius Augustin Holy Bear Jr.,
Pennington County Criminal File 22-4085

Greetings:

Mr. Holy Bear Jr., hereinafter Defendant, was charged in an Indictment with four counts of criminal conduct: First Degree Burglary, Attempted First Degree Burglary, Aggravated Assault, and Threatening to Commit a Sexual Offence. He entered Not Guilty Pleas to the Indictment. A superseding Indictment was filed on or about February 7, 2024 changing the first couth to Second Degree Burglary, and the subsection charged, in the second count of the original indictment was changed, but the spirit of the charge and penalties remained, otherwise, the remaining charges were the same. A Part II Information for Habitual offender was filed. He entered a denial to the same. The purpose of this letter is to rule on the Defendant's entry of a Plea of Not Guilty by Reason of Insanity pursuant to SDCL 23A-10-3. That Notice was filed on or about November 21, 2023. Defendant filed a Wavier of Jury Trial on or about February 12, 2024.

On February 14, 2024, a stipulated court trial was held. A stipulation was entered and signed by the State, Defense Counsel, as well as the Defendant, with exhibits attached. The Exhibits are referred to in the Exhibit list as the prior certified record of the Defendant, CD of 911 Audio Call and the Flash Drive of Five Body Worn Cameral Clips. The facts and elements of each crime of the Superseding Indictment were stipulated to. The only question for the Court remaining is whether or not, under the law, the Defendant was Insane at the time of the offenses. The standard for the determination of the same is clear and convincing evidence and the burden is on the Defendant to establish the same. State vs. Calin, 2005 S.D. 13 ¶ 6, 692 N.W.2d 537, 540. South Dakota defines insanity as the "condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against him, he was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior." *Id.* (see also SDCL §22-1-2(20). This plea is successful only when the Defendant proves by clear and convincing evidence that he did not know the wrongfulness of his action at the time he committed the crime.

The Court takes the facts as set forth in the stipulation as true and the interpretation and reference to the same in Defendant's Supplemental Brief for Court Trial. Although the facts are alarming and may not make sense to those reading or hearing them, however, that is not the burden in whether or not someone was incapable of knowing its wrongfulness. As the guidance in State vs. Baker holds, "[i]nsane people are legally incapable of committing crimes, but those people who are merely 'mentally ill' may be held criminally responsible." 440 N.W.2d 284, 288 (S.D. 1989)

Dr. Moss testified for the defense and Dr, Pavlis testified via zoom for the State. Defendant was seen and evaluated by each doctor for both competency and insanity purposes. Both Dr. Moss and Dr. Pavlis found that Defendant was competent to stand trial and aid in his own defense. Dr. Moss found that due to multiple issues of trauma as a child, as well as feelings of depression, anxiety and anger, the Defendant suffered from Post Traumatic Stress Disorder. He went on to opine that the diagnosis combined with intoxicants can worsen his cognitive functioning. Dr. Moss testified that he met with the Defendant in March of 2023 and also considered his own past treatment of the Defendant. He testified that he reviewed the police reports, the body worn and vehicle cameras, medical records and his clinical interview when he opined that he was competent at the time of his interview, but also concluded that the Defendant did not have the ability to engage in rational thought at the time of the stipulated offense. Dr. Moss gave an opinion with a reasonable degree of medical certainty that the Defenant was suffering from psychosis at the time of his arrest and that he was deprived of rational thought. Dr. Moss testified that not guilty by reason of insanity is a reasonable conclusion.

Dr. Pavlis opined that the event was a brief episode as a result of the intoxication and not a thought disorder. (Court Trial Transcript 80-81). Dr. Palvis goes on to suggest that drug use can exacerbate underlying personality traits such as antisocial disorders, but also exacerbates criminal thinking. He further opined, "[b]ut in this case, it's my belief that the intoxicant, the stimulants caused, I think, you know, an increased propensity to break the law, or, you know, increased the likelihood of that based on his underlying personality construct." (Court Trial

Transcript page 72: lines 6-10). It is well settled that voluntary intoxication is not a defense to any crime. Although there were not confirmed levels of alcohol or any other substance in the Defendant at the time, his admissions to having used Methamphetamine are set forth in the Factual Stipulation agreed to by the parties. The conduct of the Defendant could also be the conduct of one under the influence of drugs or alcohol, particularly Methamphetamine. When drugs or alcohol are mixed with a psychotic disorder, one would not clearly be able to determine which is the acting force. One must also note that the Defendant hadn't clamed to either of the doctors examining him that he had any further psychotherapy or hallucination issues following this event, making it somewhat unusual, as symptoms may fall off if the cause is methamphetamine use. (Court Trial Transcript page 73). The auditory hallucinations that were described from this incident were only during this incident. There are not any other reports of the same, prior or post. Further, Defendant was even taken to the hospital for evaluation and concerns regarding the hallucinations and he was cleared and returned to booking, as evidenced by the body worn cameras submitted as exhibits to the court with the Stipulation of Facts.

The Court finds that Dr. Pavlis' testimony is more compelling and comprehensive in this case and the Court relies on the same. The Court further finds that the testimony of Dr. Moss does not present a situation or conclusion that Defendant did not know right from wrong, by clear and convincing evidence. Based on the totality of the evidence and testimony presented, the Court finds that the Defendant did not meet the burden to establish the plea of Not Guilty by Reason of Insanity.

The Parties will present Findings of Fact and Conclusions of Law unless they determine to waive the same. A further hearing will be set to determine and make the finding of guilt based on the Factual Stipulation and set further proceedings accordingly.

Very truly yours,

Heidi L. Linngren
Circuit Court Judge
Seventh Judicial Circuit

FILED
Pennington County, SD
IN CIRCUIT COURT

MAY - 7 2024

Amber Watkins, Clerk of Courts
By _____ Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30753

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JULIUS AUGUSTIN HOLYBEAR, JUNIOR,

Defendant and Appellant.

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

THE HONORABLE HEIDI L. LINNGREN
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed July 8, 2024

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TABLE OF AUTHORITIES

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30753

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JULIUS AUGUSTIN HOLYBEAR, JUNIOR,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Julius Augustin Holybear, Junior, is referred to as "Defendant." The settled record in the underlying case is denoted as "SR." Trial exhibits are referenced as "Ex" followed by the exhibit number. Defendant's Brief is denoted as "DB." All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On June 28, 2024, the Honorable Heidi L. Linngren, Circuit Court Judge, Seventh Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Julius Augustin Holybear, Junior*, Pennington County Criminal File Number 51CRI22-004085. SR:379-81. Defendant

filed his Notice of Appeal on July 8, 2024. SR:384. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Defendant presents four issue statements related to his court trial and subsequent proceedings. The State reframes the issues as follows:

I.

WHETHER THE CIRCUIT COURT COMMITTED PLAIN ERROR BY HEARING DEFENDANT'S INSANITY DEFENSE BEFORE EXPRESSLY ADJUDICATING GUILT?

On February 14, 2024, the circuit court accepted the factual stipulation and proceeded to hear Defendant's affirmative defense of insanity at his request. On May 7, 2024, the circuit court rejected Defendant's affirmative defense and entered a general finding of guilt based on the stipulation.

Clark v. Arizona, 548 U.S. 735 (2006)

State v. Calin, 2005 S.D. 13, 692 N.W.2d 537

State v. Heer, 2024 S.D. 54, 11 N.W.3d 905

SDCL 22-5-10

II.

WHETHER THE CIRCUIT COURT COMMITTED PLAIN ERROR BY EXCLUDING EVIDENCE FROM THE INSANITY PORTION OF THE TRIAL WHEN DETERMINING DEFENDANT'S SPECIFIC INTENT?

The circuit court did not consider evidence from the insanity portion of the trial when determining specific intent.

Clark v. Arizona, 548 U.S. 735 (2006)

State v. Calin, 2005 S.D. 13, 692 N.W.2d 537

SDCL 22-3-1.1

III.

WHETHER THE STIPULATION ESTABLISHED ALL ELEMENTS OF THE CRIMES TO SUSTAIN DEFENDANT'S CONVICTIONS?

On February 14, 2024, the circuit court accepted the factual stipulation. On May 7, 2024, the circuit court entered a general finding of guilt based on the stipulation on all four counts.

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

State v. Krouse, 2022 S.D. 54, 980 N.W.2d 237

State v. Otobhiale, 2022 S.D. 35, 976 N.W.2d 759

SDCL 23A-18-3

STATEMENT OF THE CASE

On October 26, 2022, in Pennington County Criminal File Number 51CRI22-004085, a grand jury issued an Indictment charging Defendant with four counts. SR:31-32. Count 1 charged First-Degree Burglary in violation of SDCL 22-32-1(3), a Class 2 felony. SR:31. Count 2 charged Attempted First-Degree Burglary in violation of SDCL 22-32-1(3), a one-half Class 2 felony. SR:31. Count 3 charged Aggravated Assault in violation of SDCL 22-18-1.1(5), a Class 3 felony. SR:31. Count 4 charged Threatening to Commit a Sexual Offense in violation of SDCL 22-22-45, a Class 4 felony. SR:31.

The State filed a Part II Information. SR:34. The State alleged Defendant was convicted of two prior felonies arising out of the United States District Court for the District of South Dakota: 1) Sexual Assault with a person mentally or physically unable to decline on April 12, 2010,

and 2) Failure to Register as a Sex Offender on November 21, 2010. SR:34.

On December 19, 2022, Defendant was arraigned on the Indictment and Part II Information. SR:445-51. Defendant entered not guilty pleas and denied the Part II Information. SR:450-52.

On January 11, 2023, Defendant filed a motion for evaluation for mental health competency, guilty but mentally ill plea, and not guilty by reason of insanity plea. SR:71. The circuit court granted the motion, ordering Defendant be examined by Dr. William A. Moss. SR:72-73. At a subsequent hearing, Defendant's counsel stated, "We would officially change [Defendant's] plea to not guilty and not guilty by reason of insanity." SR:462.

On June 27, 2023, the State, too, filed a motion for evaluation. SR:100. The circuit court granted the motion, ordering Defendant be examined by Dr. Clay Pavlis. SR:101-02.

On November 21, 2023, Defendant gave notice to the State of his intent "to introduce expert testimony relating to mental illness or insanity relevant to the issue of whether [Defendant] had the mental state required for the offenses charged." SR:105. The same day, Defendant filed a notice of intent to offer expert testimony of Dr. Moss pursuant to SDCL 23A-13-13. SR:106. On January 31, 2024, the State filed a notice of intent to offer expert testimony of Dr. Pavlis. SR:108.

On February 7, 2024, the Pennington County Grand Jury issued a Superseding Indictment charging Defendant with four counts. SR:141-42. Count 1 charged Second-Degree Burglary in violation of SDCL 22-32-3. SR:141. Count 2 charged Attempted First-Degree Burglary in violation of SDCL 22-32-1(2) and SDCL 22-4-1. SR:141. Counts 3 and 4 remained unchanged from the initial indictment. *Compare* SR:31, *with* SR:141. The State filed an Amended Part II Information. SR:144.

A jury trial was set to commence on February 13, 2024, but did not. SR:193. On February 12, 2024, Defendant signed Defendant's Waiver of Jury Trial, waiving his right to a jury trial in writing. SR:146.

On February 14, 2024, Defendant appeared before the Honorable Heidi L. Linngren, Circuit Court Judge, Seventh Judicial Circuit. SR:184. The circuit court proceeded by addressing its understanding of the case. SR:186. The circuit court noted Defendant's written waiver of a jury trial and the Superseding Indictment. SR:186. At the circuit court's directive, the State read the Superseding Indictment aloud. SR:189-90. The circuit court arraigned Defendant on the new charges as well as the Part II Information. SR:186-93. Defendant agreed he was proceeding with his not guilty by reason of insanity plea. SR:193.

Defendant verified his waiver of a jury trial and understanding of the court proceedings. SR:193-94. The following exchange occurred:

> THE COURT: All right. The other thing I want to talk to you briefly about is you understand that we were scheduled for a jury trial that was supposed to start yesterday. [Counsel] met with me in my office and we were going over some

> logistical things, and [your counsel] advised that not too long ago you had asked [him] to forego or waive your right to a jury trial and just have a trial to the Court. Is that your wish today?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: So that means that -- I know they're going to put into some facts that the State wouldn't have to prove. My understanding is is [sic] you want to just get to the heart of the issue as to whether or not you were legally insane at the time that these crimes occurred. Is that your understanding of what's going on here as well?
>
> THE DEFENDANT: Yes, Your Honor.

SR:193-94.

The parties entered a written factual stipulation. SR:148-51, 194.

The circuit court confirmed:

> THE COURT: All right. Thank you. And, [Defendant], this is your signature – I watched you do it when you were going over the facts with [your counsel], but did you sign this document that indicates the facts of the evening in question?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And you don't dispute any of those facts?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Your understanding is the only reason we're really here today is for me to make a determination as to whether or not you were legally insane at the time of these incidents?
>
> THE DEFENDANT: Yes, Your Honor.

SR:195-96. The circuit court stated, "Since it is a not guilty by reason of insanity, [defense counsel], I will accept the factual stipulation, as has been set forth in this . . . four-page document with the exhibits. And,

[Defendant's counsel], you may proceed on the insanity portion." SR:196.

Defendant called Dr. Moss. SR:147, 196-225. Dr. Moss evaluated Defendant for "estimating [Defendant's] mental status at the time of the offense" and competency. SR:198. Based on the evaluation, Dr. Moss opined that Defendant was competent to stand trial. SR:204. As for Defendant's mental status at the time of the offense, Dr. Moss concluded, "it is more likely than not that he was not sane at the time of the offense." SR:204. Defense rested on the insanity issue. SR:147, 225-26.

The State called Dr. Pavlis. SR:147, 225-26. Dr. Pavlis evaluated Defendant and, like Dr. Moss, concluded Defendant was competent to stand trial. SR:229-30. Dr. Pavlis disagreed with Dr. Moss's insanity conclusion. Dr. Pavlis opined, "defendant did not suffer from a substantial psychiatric disorder at the time of the alleged crime." SR:255, 259-60. Dr. Pavlis stated, "it almost goes without saying in a criminal matter" that a person has impaired judgment, but Defendant's impaired judgment, or loss of reason, was not the result of any substantial psychiatric disorder. SR:259. Ultimately, Dr. Pavlis concluded, "I felt the defendant was able to know the wrongfulness of his acts." SR:260. The State rested. SR:147, 274-75.

At the end of the court trial, the circuit court stated,

> I guess at this point, obviously, I had discussed with counsel, because I haven't had the opportunity to see the video that you've referenced, and I haven't had the opportunity to see this information that has been presented

> other than for the first time today, certainly, there are standards under the law that based on a court trial, and the Court being the finder of fact, not only the finder of fact but also the determination of the legal insanity plea, we were -- I'm going to require that you submit your proposed findings. Clearly, it's a little bit different when you don't have a jury, because the jury doesn't ever get to know and understand that even with a not guilty by reason of insanity, Mr. Holy Bear isn't going anywhere. I mean, this isn't a difference between freedom or not freedom. It's an issue of legal determination and where [Defendant] would be. So I say that for the folks that are here in the courtroom, when we discuss timing of doing this, even -- even if -- whether I find him not guilty by reason of insanity, or I find that -- that [Defendant] didn't meet [his] burden, and that he's guilty based on the stipulation that's been set forth here, because the facts have never been in dispute, Mr. Holy Bear would not be going anywhere.

SR:275-76.

On May 7, 2024, the circuit court ruled on Defendant's entry of a plea of Not Guilty by Reason of Insanity by written letter to the parties. SR:308. The circuit court wrote, "The facts and elements of each crime of the Superseding Indictment were stipulated to. The only question for the Court remaining is whether or not, under the law, the Defendant was Insane at the time of the offenses." SR:309. The circuit court held, "Defendant did not meet his burden to establish the plea of Not Guilty by Reason of Insanity. A further hearing will be set to determine and make the finding of guilt based on the Factual Stipulation and set further proceedings accordingly." SR:310.

Later that day, a hearing was held. SR:470. The circuit court stated, "I have now submitted my written decision wherein the Court did not find that [Defendant] was not guilty by reason of insanity. It's a

stipulated fact trial. So I think procedurally we have the guilty plea or guilt -- finding of guilt, that then would require a PSI." SR:471. It also stated, "I'll order the presentence investigation report having found [Defendant], by way of stipulation, guilty and not accepting the not guilty by reason of insanity." SR:471.

A Presentence Investigation Report ("PSI") was prepared for the circuit court. *See* SR:311-77 (PSI Sealed). On June 25, 2024, Defendant appeared for sentencing. SR:413-32. During the hearing, the circuit court summarized prior proceedings, stating in part, that Defendant had "a trial to the Court in his entry of a not guilty by reason of insanity . . . . [T]he Court, in a written decision, did not find [Defendant] to be insane under the law at the time of these offenses and he was thereby convicted of all four [counts]." SR:414. Defendant's counsel agreed with the background of the proceedings. SR:414.

The circuit court asked both the Defendant and his counsel whether there were any additions or corrections to the PSI. SR:415. Both stated no corrections needed to be made. SR:415. The circuit court gave both the State and Defendant's counsel an opportunity to be heard. SR:414-20. During the State's sentencing arguments, it noted, Defendant "wasn't necessarily fighting what occurred, simply his mental status at the time. So, he did obviously admit to all four counts, and I appreciate that." SR:415. The State later noted, "I mean, essentially he admitted to what happened but obviously entered an admission to all

four of the counts . . . ." SR:417. Defendant and his counsel also addressed the circuit court. SR:420.

After hearing from counsel and Defendant, the circuit court asked if legal cause existed why a sentence should not be pronounced. SR:420. Both parties stated, "No." SR:420. The circuit court sentenced Defendant and entered its written Judgment. SR:379-81, 420-23, 434-36. Defendant appealed. SR:384.

STATEMENT OF FACTS

The following facts are derived from the February 14, 2024, factual stipulation:

On October 8, 2022, at approximately 7:00 a.m., 911 dispatch received calls related to Defendant's actions at two houses located on Joy Avenue, Pennington County, South Dakota. SR:148; Ex:2. Law enforcement was initially dispatched to 814 Joy Avenue for a burglary in progress. SR:148. While in route, the male subject, later identified as Defendant, left 814 Joy Avenue and entered the home of 808 Joy Avenue. SR:148. Defendant left 808 Joy Avenue and was apprehended by law enforcement shortly thereafter. SR:148.

At about 6:30 a.m., Defendant first broke into 814 Joy Avenue where Abigail Morgan, Rylin Morgan, and Ivy Hise resided. SR:148-49. Rylin and Ivy were sleeping in bed when Rylin woke up to an unknown male in the room at the foot of the bed. SR:149. Rylin asked Defendant what he was doing. SR:149. Defendant responded by saying Rylin was

his girlfriend and "I am going to fuck you." SR:149. Defendant unlatched his belt, unbuttoned his pants, and again referenced having sex with either Rylin or Ivy. SR:149. Ivy woke up and saw Defendant unlatching his belt. SR:149.

To prevent a sexual assault, Rylin struck Defendant and a scuffle ensued. SR:149. When Defendant was on the ground, Rylin directed Ivy to call 911. SR:149. Ivy ran to Abigail's room, woke her up, and stated someone was in the home. SR:149.

Back in Rylin's room, Defendant apologized to Rylin. SR:149. Defendant stated he just came in and wanted to ask before he "fucked [Rylin's] wife." SR:149. Rylin told Defendant that the police were coming. SR:149. Defendant responded, "the cops are on the way and its ok" and as repayment for hitting him, Defendant said he could have sex with Ivy. SR:149. Rylin attempted to remove Defendant from his room by shoving him. SR:149. Defendant then asked if he could have a threesome with Rylin and Ivy. SR:149.

Ivy and Abigail entered Rylin's room. SR:150. When Abigail observed Defendant, she "freaked out." SR:149-50. Abigail's reaction confirmed to Rylin that Defendant did not have permission to be in the home and was not invited in. SR:149. Rylin grabbed a hatchet and raised it up. SR:149. After raising the hatchet, Defendant fled from the home. SR:149-50. Rylin observed Defendant run to a neighbor's home. SR:149.

Defendant then entered a home located at 808 Joy Avenue. SR:148. Joseph Saner resided at 808 Joy Avenue with his wife and their three juvenile children. SR:148, 150. The front entry way of the split-foyer home led to a set of stairs. SR:150. Joseph, his wife, and their son slept downstairs. SR:150. Joseph's two daughters slept upstairs. SR:150.

To gain entry to the home, Defendant broke the frame of the front door, causing a loud noise that awoke Joseph. SR:150. When Joseph reached the bottom of the stairs to investigate, Defendant already stood upstairs. SR:150. Joseph did not know Defendant, and Defendant did not have permission to be in the home. SR:150.

Joseph yelled at Defendant and instructed him to leave. SR:150. Although Joseph did not own a gun, he yelled for his wife to get their gun. SR:150. Defendant left the home. SR:150.

While outside, Defendant grabbed a hammer[1] and turned back towards the home. SR:150. In an aggressive manner, Defendant raised the hammer over his head as he approached Joseph, who was standing in the doorway. SR:150. Joseph slammed the door shut before Defendant could strike him. SR:150. Joseph held the broken door shut. SR:150. Defendant backed away from the door. SR:150. Defendant

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[1] Joseph was working on the flooring in the home and had multiple tools and other materials outside. SR:150.

continued to yell at Joseph and asked if he "wanted some" in a threatening manner. SR:150.

Law enforcement arrived after Defendant left the home. SR:150. Joseph told law enforcement that Defendant left his residence southbound, described his appearance, and stated he was armed with a hammer. SR:148. Law enforcement located Defendant standing in the driveway of 714 Joy Avenue. SR:148. Law enforcement observed Defendant throw a hammer. SR:148. Law enforcement apprehended Defendant and retrieved the hammer. SR:148. Joseph agreed to do a show up identification, and he positively identified Defendant as the individual who broke into his home. SR:150.

Law enforcement believed Defendant was under the influence of a substance and in an altered state of mind. SR:148. Defendant was not making sense. SR:148. Defendant appeared to be either seeing or hearing things no one else could. SR:148. Defendant stated he killed his girlfriend but could not say her name or explain where she was.[2] SR:148. Defendant also asked if this was real life or a dream. SR:148.

After arriving at booking, law enforcement transported Defendant to a hospital for an evaluation. SR:150. At the hospital, Defendant admitted using methamphetamine earlier in the week but did not

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[2] Law enforcement proceeded to Defendant's mother's residence to check on the welfare of Defendant's girlfriend. SR:149. Defendant's mother informed law enforcement that Defendant's girlfriend was not at the residence and everyone inside was safe. SR:149.

remember which day. SR:150. Defendant fidgeted, ground his teeth, and made sudden movements. SR:151. Defendant could not complete a conversation without changing the topic. SR:151. After Defendant was released from the hospital, law enforcement transported him to jail. SR:151. Defendant continued to make statements about his girlfriend being murdered. SR:151. Law enforcement placed Defendant's clothes and the hammer into evidence. SR:151.

The stipulation stated Defendant was previously convicted of a felony sex offense. SR:151. The stipulation also cited and attached Exhibit 1, Defendants prior certified record; Exhibit 2, 911 calls made by Joseph and Rylin; and Exhibit 3, videos captured from law enforcement officer's vehicle cameras. SR:151, 157-62; Ex:1-3.

ARGUMENTS

Defendant's arguments are incompatible on appeal. Defendant argues that the circuit court was required to explicitly adjudicate all elements of the crimes, including specific intent, in a bifurcated court trial before hearing Defendant's affirmative defense of insanity. DB:15, 22. He then contrarily argues that the circuit court erred by failing to consider insanity defense expert opinions to determine specific intent. DB:22; *see also* DB:4 (arguing "the Court erroneously considered insanity and intoxication only in the context of an affirmative defense"). Here, the circuit court properly proceeded to the insanity portion of the trial at Defendant's request and Defendant never raised any alleged error

to the circuit court. Therefore, no plain error occurred. Even if this Court holds the circuit court committed plain error, the error resulted in no prejudice because sufficient evidence existed to sustain Defendant's conviction.

I.

THE CIRCUIT COURT PROPERLY HEARD DEFENDANT'S INSANITY DEFENSE BEFORE EXPRESSLY ADJUDICATING GUILT ON THE RECORD.

A. *Background.*

Defendant argues that the circuit court was required to explicitly adjudicate all elements of the crimes before hearing Defendant's affirmative defense of insanity. DB:14. But Defendant affirmatively assented to the court proceeding to his insanity defense, waiving the issue for appellate review. He also raised no concerns to the circuit court, allowing it the opportunity to hear his complaints. Under a plain-error analysis, Defendant has not established error, much less a plain error.

B. *Standard of Review.*[3]

A defendant waives an issue by affirmatively assenting to actions of the circuit court. *State v. Heer*, 2024 S.D. 54, ¶ 16 n.4, 11 N.W.3d 905, 910 n.4. When there is no adverse action of the circuit court to review, generally, "the prevailing party may not appeal a decision in its favor."

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[3] Defendant fails to include a standard of review or invoke plain-error review, thus waiving plain-error review.

State v. Black Cloud, 2023 S.D. 53, ¶ 34, 996 N.W.2d 670, 680 (citing *Hercules Inc. v. AIU Ins.*, 783 A.2d 1275, 1277 (Del. 2000)).

If an error is merely forfeited by a defendant's failure to object, alleged procedural errors that were not first brought to the attention of the circuit court will be reviewed only for plain error. *State v. Feucht*, 2024 S.D. 16, ¶ 25, 5 N.W.3d 561, 569; *see State v. Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818. When a defendant fails to invoke plain-error review on appeal, this Court has declined to review the issue. *See State v. Podzimek*, 2019 S.D. 43, ¶ 27, 932 N.W.2d 141, 149; *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (the failure to argue plain error on forfeited issues waives those issues).

Discretionary review under the plain-error doctrine should be applied "cautiously and only in exceptional circumstances." *State v. Krueger*, 2020 S.D. 57, ¶ 38, 950 N.W.2d 664, 674 (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729). To establish plain error, a defendant "must show (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 affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Manning*, 2023 S.D. 7, ¶ 40, 985 N.W.2d 743, 756 (quoting *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30). "[W]ith plain error analysis, the defendant bears the burden of showing the error was prejudicial." *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729 (quotation omitted).

C. *Defendant Waived the Procedural Issue.*

Defendant argues that the circuit court failed to adjudicate guilt at the court trial before shifting the burden to Defendant to prove his affirmative defense of insanity. DB:22. When a defendant acquiesces to a ruling, a defendant is deemed to have accepted that ruling and waived his right to argue the issue on appeal. *State v. Muetze*, 368 N.W.2d 575, 584-85 (S.D. 1985). Defendant affirmatively assented to proceeding this way, eliminating the issue for appellate review.

Before the court trial began, the State and Defendant's counsel met with the circuit court, off the record, to go over "some logistical things." SR:193. Then, the following exchange occurred:

> THE COURT: So that means that -- I know they're going to put into some facts that the State wouldn't have to prove. My understanding is is [sic] you want to just get to the heart of the issue as to whether or not you were legally insane at the time that these crimes occurred. Is that your understanding of what's going on here as well?
>
> THE DEFENDANT: Yes, Your Honor.

SR:193-94. Defendant confirmed that he did not dispute any of the facts in the stipulation. SR:195-96. He also agreed with the circuit court's understanding that the purpose of the hearing was to rule on Defendant's affirmative defense of insanity. SR:195-96. Because Defendant consented to the circuit court's actions, Defendant waived the procedural issue.

Defendant complains about the logistics of his court trial. The specific conversation between counsel and the circuit court as to the

logistics of the hearing is not part of the settled record. With an incomplete appellate record, "this Court presumes that the trial court acted correctly." *Tucek v. S.D. Dep't of Soc. Servs.*, 2007 S.D. 106, ¶ 22, 740 N.W.2d 867, 873 (citing *State v. Corey*, 2001 S.D. 53, ¶ 8, 624 N.W.2d 841, 843-44). Here, it should be presumed that the circuit court proceeded in accordance with Defendant's wishes when there was an off-the-record conversation before trial, the circuit court said it was proceeding in accordance with that conversation, Defendant agreed the hearing was only to address the insanity defense, and Defendant never objected to the proceedings deviating from his agreement. *See Graff v. Child.'s Care Hosp. & Sch.*, 2020 S.D. 26, ¶ 16, 943 N.W.2d 484, 489 ("Where the trial court record is incomplete and not adequate to [conduct meaningful review of an issue], our presumption is that the circuit court acted properly." (quotations omitted)).

D. *The Circuit Court did not Unconstitutionally Shift the Burden to Defendant to Prove Insanity before the Adjudication of Guilt.*

If this Court holds that Defendant did not waive the procedure issue, then Defendant forfeited the issue by failing to object. Defendant failed to object and thus forfeited the following related issues: 1) the circuit court shifting the burden to Defendant to prove his affirmative defense of insanity before expressly adjudicating guilt; and 2) the circuit court's timing of the finding of guilt. If plain-error review is applied, the circuit court did not plainly err by considering Defendant's affirmative

defense before adjudicating guilt or by its timing of the adjudication of guilt.

Under South Dakota's statutory scheme, a defendant "raising the defense of insanity shall, at his arraignment, specially plead 'not guilty and not guilty by reason of insanity.'" SDCL 23A-10-2. "Insanity is an affirmative defense to a prosecution for any criminal offense. Mental disease or defect does not otherwise constitute a defense. . . ." SDCL 22-5-10. Pursuant to SDCL 23A-10-4,

> In an appropriate case a court shall, upon motion of a prosecuting attorney, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose by the prosecuting attorney in an order of the court. The court may also appoint medical experts and require that the defendant submit himself for examination by such court-appointed medical experts. No statement made by an accused in the course of any examination provided for by this section, whether the examination was with or without the consent of the accused, shall be admitted in evidence against him on the issue of guilt in any criminal proceeding except for the purpose of impeaching the defendant.

SDCL 23A-10-4.

The determination of guilt and the assessment of insanity are distinct inquiries that can be made either in a unified or bifurcated trial. In *State v. Devine*, this Court noted that both guilt and sanity must be determined when the defendant pleads "not guilty and not guilty by reason of insanity." *State v. Devine*, 372 N.W.2d 132, 137 (S.D. 1985). While "South Dakota does not have statutes directing a bifurcated trial," bifurcation may be required in some cases. *Id.* at 136-37. This Court explained, "[U]pon request of the defendant for a bifurcated trial based

on incriminating statements made during a psychiatric examination[,] . . . the court . . . should generally direct a bifurcated trial." *Id.* at 137.

In *State v. Calin*, this Court outlined how evidence is considered when a defendant proceeds to a unified court trial and raises an insanity defense. *State v. Calin*, 2005 S.D. 13, ¶ 5, 692 N.W.2d 537, 540. This Court explained that first, the fact finder shall determine whether the State met its burden of proving "all the elements of the offense, including mens rea, beyond a reasonable doubt." *Id.* ¶ 6, 692 N.W.2d 537, 541. Only if the fact finder determines that the State met its burden, the fact finder can then consider a defendant's insanity defense. *Id.*; *Devine*, 372 N.W.2d at 137. Stated another way, a defendant's insanity evidence is not considered in assessing the State's burden. *See Calin*, 2005 S.D. 13, ¶ 6, 692 N.W.2d at 540.

A defendant has the burden of proving insanity by clear and convincing evidence. SDCL 22-5-10. "An insanity defense can only be successful if the defendant proves he did not know the wrongfulness of his action at the time he committed the crime." *Calin*, 2005 S.D. 13, ¶ 6, 692 N.W.2d at 541. Insanity is statutorily defined as "the condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act, the person was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior." SDCL 22-1-2(20). Further, "[n]o person who is under the influence of voluntarily consumed or

injected alcohol or controlled substances at the time of committing the act charged is for that reason insane." SDCL 22-3-1.1. "If a defendant is acquitted because he was insane when he committed the offense charged, the verdict shall be 'not guilty by reason of insanity.'" SDCL 23A-26-5.

1. No error occurred regarding Defendant's burden to prove his insanity defense.

Defendant appears to argue SDCL 22-5-10 unconstitutionally shifts the burden to a defendant to prove insanity. DB:20-22. He cites a dissenting opinion in *Calin*. DB:20 (citing *Calin*, 2005 S.D. 13, ¶ 17, 692 N.W.2d at 543 (Sabers, J. dissenting)). But this argument is disposed of in *Clark v. Arizona*, 548 U.S. 735 (2006).

In *Clark v. Arizona*, decided after *Calin*, the Supreme Court of the United States upheld an Arizona statute shifting the burden of proving insanity to the defendant. *Clark*, 548 U.S. at 742, 744. The Arizona statute is much like the South Dakota burden-shifting statute. *Compare id.* at 744, *with* SDCL 22-5-10, *and* SDCL 22-1-2(20); *see also Clark*, 548 U.S. at 751, 751 n.14 (noting Arizona, South Dakota, and eight other states have adopted an insanity rule based on the moral incapacity test alone). The Supreme Court of the United States held, "[A] jurisdiction may place the burden of persuasion on a defendant to prove insanity as the applicable law defines it, whether by a preponderance of the evidence or to some more convincing degree." *Clark*, 548 U.S. at 769. Here,

under SDCL 22-5-10, the South Dakota State Legislature determined to place the burden on a defendant "of proving the defense of insanity by clear and convincing evidence." SDCL 22-5-10. The Supreme Court of the United States has explicitly authorized such a burden, so there is no error.

2. No error occurred regarding the circuit court's timing of the finding of guilt.

Defendant's argument also fails that the circuit court unconstitutionally shifted the burden to him before explicitly determining whether the State met its burden beyond a reasonable doubt. *See* DB:16-17, 20, 22. Like *Calin*, Defendant proceeding to a unified trial where the circuit court received evidence on both the State's burden and the Defendant's burden at the same hearing. Here, the circuit court heard all the evidence, appears to have found guilt, ruled on insanity defense, and then adjudicated guilt on the record.

The record shows that the circuit court believed the stipulation proved Defendant was guilty based on its statements at the February 14, 2024, hearing. At the end of the insanity evidence, the circuit court explained that Defendant "would not be going anywhere." SR:276. It stated that all that was left to determine was whether Defendant was not guilty by reason of insanity or "he's guilty based on the stipulation that's

been set forth here, because the facts have never been in dispute . . . ."[4] SR:276. While the circuit court did not formally adjudicate Defendant's guilt until the May 7, 2024, hearing, the circuit court's February 14, 2024, statements show it made that determination before ruling on the insanity defense. *See generally State v. Berget*, 2013 S.D. 1, ¶ 87, 826 N.W.2d 1, 27 ("Judges are presumed to correctly apply the law in making their decisions.").

Even if this Court finds there was no explicit adjudication of guilt before ruling on the insanity defense, the circuit court did not err. While the *Calin* court directed the fact finder to consider insanity evidence after the State met its burden, *Calin*, 2005 S.D. 13, ¶ 6, 692 N.W.2d at 540, *Calin* is silent on whether a court commits plain error by hearing insanity evidence, in accordance with Defendant's directive, and adjudicating insanity, before explicitly finding guilt.

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[4] The circuit courts statement is consistent with SDCL 23A-26-12. SDCL 23A-26-12 states,

> If a verdict of guilty or "guilty but mentally ill" is returned against the defendant, he shall be remanded, if in custody, to the proper officer of the county to await the judgment of the court upon the verdict. When the jury has returned a verdict acquitting the defendant upon the ground of insanity, the court shall order that the defendant be committed to the human services center until such time as he is eligible for release . . . .

SDCL 23A-26-12.

Compare this court trial with a unified jury trial regarding a not guilty and not guilty by reason of insanity plea. The jury does not return a verdict of guilty in open court and then deliberate on insanity. *See* South Dakota Criminal Pattern Jury Instruction 2-5-1. Instead, a jury hears all the evidence and then considers the State's burden first. *See id.* Only if it finds the State met its burden will it consider insanity evidence. *Id.* Then, the jury will return the verdict in open court. *See generally State v. Nekolite*, 2014 S.D. 55, ¶ 12, 851 N.W.2d 914, 917 ("A general finding of guilt by a judge may be analogized to a verdict of guilty returned by a jury." (quotations omitted)).

A similar procedure was followed here. After the parties entered a factual stipulation, Defendant agreed that the only purpose of the hearing was to consider his insanity defense. The circuit court accepted the stipulation and proceeded to the insanity defense. SR:195-96. At the next hearing on May 7, 2024, the circuit court stated, "It's a stipulated fact trial. So I think procedurally we have the guilty plea or guilt -- finding of guilt, that then would require a PSI." SR:471. While the court misspoke and said, "guilty plea," it immediately corrected the statement and said, "finding of guilt." SR:471. Defendant fails to show that the circuit court's consideration of his insanity defense at his directive, before explicitly finding guilt on the record, violates his due process rights or the circuit court acted improper. While the finding of guilt and the adjudication of insanity are distinct processes, the circuit

court did not need to make an explicit finding of guilt on the record before adjudicating insanity—especially considering Defendant's directive that the only reason for the hearing was to consider his insanity defense.

3. Any alleged error is not plain.

Any error on the part of the circuit court 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 *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 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 has resolved the issue beyond debate. *Id.* (citations omitted).

The Supreme Court of the United States has resolved parts of Defendant's arguments beyond debate—against Defendant. South Dakota's statutory scheme shifting the burden to defendant to prove his insanity defense by clear and convincing evidence does not violate due process. *See generally Clark*, 548 U.S. 735. If this Court holds that the circuit court needed to make an expressed finding of guilt before proceeding to the insanity defense, the error is not a clear and obvious error.

As stated, Defendant fails to identify controlling authority showing the timing of the finding of guilt is a clear or obvious error. An oral

statement about Defendant's guilt was made on February 14, 2024. The expressed finding of guilt was made on May 7, 2024. Defendant argues his trial was required to be bifurcated with the finding of guilt made after the stipulation was accepted, but Defendant's own arguments cut against that procedural argument. DB:15, 22. Defendant also (incorrectly) argues the circuit court needed to consider his insanity evidence when determining the specific intent elements. DB:4, 22. The circuit court cannot logically consider insanity evidence when determining guilt if it is required to determine guilt before considering the insanity evidence. Defendant has not established the circuit court committed a clear or obvious error when his own arguments about the correct procedure are unclear. Therefore, the circuit court's lack of an expressed finding of guilt made after accepting the stipulation, without any objection from Defendant, was not plainly wrong.

4. Defendant fails to show a different outcome would have resulted.

The third prong for plain-error review imposes on Defendant "the burden of showing that the error affected [his] substantial rights, which 'means [he] must demonstrate that it affected the outcome of the [circuit] court proceeding.'" *McMillen*, 2019 S.D. 40, ¶ 29, 931 N.W.2d at 734 (quotations omitted). The outcome of the trial would not have been different if the circuit court explicitly found on the record that the State met its burden before hearing insanity evidence. For the reasons set forth under Issue III.C., the stipulation established proof beyond a

reasonable doubt for each element of the crimes charged. The settled record shows the circuit court determining the State's burden based on the stipulation. *See generally Berget*, 2013 S.D. 1, ¶ 87, 826 N.W.2d at 27 ("Judges are presumed to correctly apply the law in making their decisions."). Defendant cannot show that if the circuit court explicitly decided guilt after accepting the stipulation, the finding would be not guilty.

Defendant wished to proceed to his insanity defense, a consideration relevant if the State met its burden. The circuit court repeatedly stated that Defendant was guilty based on the stipulation. At sentencing, the State noted that Defendant admitted to all four counts. SR:415, 417. Contrary to Defendant's contention on appeal, the settled record suggests that even he believed the stipulation proved his guilt. Accordingly, Defendant cannot demonstrate error, much less plain error.

II.

THE CIRCUIT COURT PROPERLY EXCLUDED EVIDENCE FROM THE INSANITY PORTION OF THE TRIAL WHEN DETERMINING DEFENDANT'S SPECIFIC INTENT.

A. *Background.*

While Defendant argues the circuit court failed to adjudicate his guilt before considering insanity evidence at trial, he also argues that the circuit court erred by considering "insanity and intoxication only in the context of an affirmative defense." DB:4. Defendant argues that the circuit court erred by overbroadly stating, "It is well settled that

voluntary intoxication is not a defense to any crime." DB:16. Yet first, Defendant takes the circuit court's statement out of context. The circuit court made this statement in a letter ruling on Defendant's insanity defense. The circuit court was not ruling on the elements of the crime in the letter. And the circuit court's statement is a correct statement of the law. Second, Defendant never asked the circuit court to consider any evidence from the insanity portion of the trial to negate specific intent, and the circuit court properly did not do so. So, just as Issue I, Defendant forfeited whether evidence from the insanity portion of the trial should be considered by the circuit court in determining specific intent.

B. *Standard of Review.* [5]

The authority under Issue I.B. is incorporated here by reference.

C. *The Circuit Court's Statement and Consideration of the Evidence is Supported by Law.*

No error occurred here. The Supreme Court of the United States explained due process is not violated when a state statutory scheme "restrict[s] consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the mens rea, or guilty mind)."

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[5] Defendant fails to include a standard of review or invoke plain-error review, thus waiving plain-error review.

Clark, 548 U.S. at 742. The Supreme Court reasoned, "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." *Id.* at 750. For the reasons set forth under Issue I.D. and under the procedure outlined in *Calin*, the circuit court correctly excluded insanity defense evidence when determining the State's burden. *See Calin*, 2005 S.D. 13, ¶ 6, 692 N.W.2d at 540.

Regarding the circuit court's intoxication statement, under SDCL 22-3-1.1, "[n]o person who is under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of committing the act charged is for that reason insane." SDCL 22-3-1.1; *see* SDCL 22-1-2(21) (defining intoxications as "a disturbance of mental or physical capacities resulting from the introduction of substances into the body. Intoxication is not, in itself, a mental disease or defect."). SDCL 22-3-1.1 explicitly states that voluntary intoxication does not qualify as insanity.

Here, on May 7, 2024, the circuit court ruled on Defendant's entry of a plea of Not Guilty by Reason of Insanity by written letter to the parties. SR:308. The letter only addressed "whether or not, under the law, the Defendant was Insane at the time of the offenses." SR:309. In the letter, the circuit court noted, "It is well settled that voluntary intoxication is not a defense to any crime." SR:310. The circuit court

did not commit error because the statement is a correct statement of the law. Therefore, the circuit court's statement, in the context of ruling on whether Defendant was insane, is not an error.

Regarding intoxication evidence, as stated under Issue III.C., the circuit court properly based its finding of guilt on the factual stipulation, which included evidence of Defendant's intoxication and conduct.

Any alleged error is not clear nor obvious. Plus, for the same reasons stated under Issue I.D. and III., Defendant cannot show he was prejudiced. Accordingly, Defendant cannot demonstrate error, much less plain error.

III.

THE STIPULATION ESTABLISHED ALL ELEMENTS OF THE CRIMES TO SUSTAIN DEFENDANT'S CONVICTIONS.

A. *Background.*

Defendant vaguely challenges the sufficiency of the evidence regarding all four of his convictions, and specifically points to the specific intent elements. DB:12-13, 15, 22. Defendant argues there was insufficient evidence to support his convictions because he only stipulated to facts—not facts and elements—and he did not stipulate to specific intent. DB:3-4. Even so, when viewing the evidence in the factual stipulation in the light most favorable to the verdict, sufficient evidence exists to support the circuit court's finding of guilt.

B. *Standard of Review.*[6]

This Court reviews de novo questions about the sufficiency of the evidence. *State v. Peltier*, 2023 S.D. 62, ¶ 24, 998 N.W.2d 333, 340. This Court's "task is to determine whether the evidence was sufficient to sustain the conviction." *State v. Solis*, 2019 S.D. 36, ¶ 17, 931 N.W.2d 253, 258 (quotation omitted).

> To do so, [this Court] ask[s] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 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.

Id. (cleaned up). Likewise, "this Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or reweigh the evidence." *State v. Fasthorse*, 2009 S.D. 106, ¶ 6, 776 N.W.2d 233, 236 (citations omitted).

C. *Sufficient Evidence Supports Defendant's Convictions.*

Sufficient evidence supports Defendant's convictions for 1) Second-Degree Burglary in violation of SDCL 22-32-3, 2) Attempted First-Degree Burglary in violation of SDCL 22-32-1(2), 3) Aggravated Assault in violation of SDCL 22-18-1.1(5), and 4) Threatening to Commit a Sexual Offense in violation of SDCL 22-22-45 and SDCL 22-24B-1.

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[6] Defendant fails to include a standard of review.

"All elements of a crime, including intent . . . , may be established circumstantially." *State v. Otobhiale*, 2022 S.D. 35, ¶ 38, 976 N.W.2d 759, 772 (quoting *State v. Jensen*, 2007 S.D. 76, ¶ 9, 737 N.W.2d 285, 288). "General intent crimes only require that the offender has intent to do the physical act that is prohibited by the statute, 'regardless of what the offender intends to accomplish.'" *State v. Liaw*, 2016 S.D. 31, ¶ 11, 878 N.W.2d 97, 100 (quoting *State v. Schouten*, 2005 S.D. 122, ¶ 13, 707 N.W.2d 820, 824). Specific intent crimes require "some intent beyond the intent to do the physical act involved in the crime." *Id.* (citing *State v. Taecker*, 2003 S.D. 43, ¶ 25, 661 N.W.2d 712, 718). The offender must have "a specific design to cause a certain result." *Id.* (quoting *Schouten*, 2005 S.D. 122, ¶ 13, 707 N.W.2d at 823).

Circumstantial evidence may often be the only way to prove specific intent because rarely do criminals announce their intent before the crime. *State v. Holzer*, 2000 S.D. 75, ¶ 16, 611 N.W.2d 647, 651 (citations omitted). This Court has said, "[b]ecause the nature of intent is such that it is 'rarely susceptible to direct proof, the fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experience and observation.'" *State v. Krouse*, 2022 S.D. 54, ¶ 43, 980 N.W.2d 237, 250 (quoting *Holzer*, 2000 S.D. 75, ¶ 16, 611 N.W.2d at 652). "The actor's 'state of mind' at the time of the offense may also be determined from his acts, conduct and inferences which are fairly

deducible from the circumstances surrounding the offense." *Id.* (quoting *Holzer*, 2000 S.D. 75, ¶ 15, 611 N.W.2d at 651).

For example, in *State v. Ladu*, the defendant challenged whether there was sufficient evidence to sustain his conviction for Intentional Damage to Property. *State v. Ladu*, 2016 S.D. 14, ¶ 14, 876 N.W.2d 505, 509. In *Ladu*, the defendant was told by the lessee to leave a building he had no authority to be in. *Id.* ¶ 17, 876 N.W.2d at 509. Once the defendant was outside the building, he punched one of the building's windows with a handgun, causing the window to shatter. *Id.* ¶¶ 4, 18, 876 N.W.2d at 507, 509. This Court held there was sufficient evidence to sustain the conviction, which included the specific intent element. *Id.* ¶ 19, 876 N.W.2d at 509-10. This Court reasoned, "All of the essential elements of SDCL 22-34-1 were met by, or a jury could reasonably infer from, [lessee's] testimony." *Id.* ¶ 18, 876 N.W.2d at 509.

1. Second Degree Burglary.

The factual stipulation sustains Defendant's conviction for Second Degree Burglary at the Morgan home. For Second-Degree Burglary in violation of SDCL 22-32-3, the State was required to prove that Defendant entered or remained in an occupied structure with the intent to commit rape, under circumstances that did not amount to First Degree Burglary. SDCL 22-32-3. The stipulation shows Defendant gained access to the Morgan home and entered a bedroom where Rylin and Ivy slept. SR:149. Defendant stated, "[Y]ou are my girlfriend. I am

going to fuck you." SR:149. Defendant unlatched his belt, unbuttoned his pants, and again referenced having sex with either Rylin or Ivy. SR:149. Rylin told dispatch, "I just woke up and he's staring down over me unbuttoning his pants." Ex:2. Defendant did not have permission to be in the home and was not invited in. SR:149. While the stipulation did not say Defendant entered and remained in the Morgan home with the intent to commit rape, Defendant's intent could be reasonably inferred from the stipulated facts. The stipulated facts are sufficient.

2. Attempted First-Degree Burglary

The stipulated facts are also sufficient evidence to sustain the conviction for Attempted First-Degree Burglary at the Saner home. For Attempted First-Degree Burglary in violation of SDCL 22-32-1(2), the State was required to prove Defendant attempted to commit First-Degree Burglary and, in the attempt, did any act toward the commission of the crime, but failed or was prevented or intercepted in the perpetration of that crime. SDCL 22-4-1. Relevant here, First-Degree Burglary is committed when a person enters or remains in an occupied structure, with intent to commit assault, unless the premises are, at the time, open to the public or the person is licensed or privileged to enter or remain, and the offender is armed with a dangerous weapon. SDCL 22-32-1(2).

The stipulation showed Defendant broke the frame of the home's door and went inside. SR:150. Defendant exited the home only after hearing Joseph yelled to his wife to retrieve their gun. SR:150. While

outside the home, Defendant grabbed a hammer and turned back towards the home. SR:150. Defendant aggressively raised the hammer over his head and approached Joseph, who was standing in the doorway. SR:150. Joseph slammed the door shut before Defendant could strike him. SR:150. Joseph felt threatened by Defendant's actions. SR:150. Defendant backed away from the door, continued to yell at Joseph, and asked him if he "wanted some" in a threatening manner. SR:150.

These facts establish that Defendant attempted to enter the home, but Joseph slammed his door shut and held it shut to prevent Defendant from entering. SR:150. The hammer was a dangerous weapon for the reasons stated under Issue III.C.3. Defendant's intent to enter the home to commit an assault with a dangerous weapon is established by the evidence. Sufficient evidence exists to sustain the conviction for Attempted First-Degree Burglary.

3. Aggravated Assault.

Sufficient evidence supports Defendant's conviction of Aggravated Assault in violation of SDCL 22-18-1.1(5). The State was required to prove Defendant attempted by physical menace with a deadly weapon to put Joseph in fear of imminent serious bodily harm. SDCL 22-18-1.1(5). Defendant grabbed a hammer, turned towards Joseph, and raised the hammer over his head in an aggressive manner. SR:150. Defendant approached Joseph. SR:150. Joseph told dispatch, "[Defendant] grabbed my hammer off my front deck and starting swinging at me."

Ex:2. Joseph slammed the door shut before Defendant could strike him. SR:150. Joseph felt threatened by Defendant's actions. SR:150. Defendant yelled at Joseph, asking Joseph if he "wanted some" in a threatening manner. SR:150.

The way Defendant possessed the hammer, along with his threat, was sufficient to show the hammer was a dangerous weapon. *See* SDCL 22-1-2(10) (defining dangerous weapon as any device "which is calculated or designed to inflict death or serious bodily harm, or by the manner in which it is used is likely to inflict death or serious bodily harm"); *see, e.g.*, *State v. Robertson*, 2023 S.D. 19, ¶ 28, 990 N.W.2d 96, 103 ("Although an automobile is not calculated or designed to inflict death or serious bodily harm, it can be used in a manner that is likely to inflict death or serious bodily harm and, when so used, it constitutes a dangerous weapon." (quotation omitted)). Defendant's intent to commit the assault is shown from the stipulated facts. Sufficient facts to sustain the conviction for Aggravated Assault exist.

4. Threatening to Commit a Sexual Offense.

The State was required to prove Defendant was Threatening to Commit a Sexual Offense in violation of SDCL 22-22-45 and SDCL 22-24B-1. Contrary to Defendant's contention that the crime requires specific intent, DB:12-13, this Court has declined to read a specific intent requirement into SDCL 22-22-45, *State v. Armstrong*, 2020 S.D. 6,

¶ 40, 939 N.W.2d 9, 19. In accordance with *Armstrong,* to be convicted under SDCL 22-22-45, the State was required to prove:

> a defendant must have an intention to do the physical act (directly threaten or communicate a specific intent to commit a further felony sex offense), along with the knowledge that the nature of the communication and the context in which it is communicated is such that a reasonable recipient would perceive it as a threat.

Armstrong, 2020 S.D. 6, ¶ 41, 939 N.W.2d at 19. This Court explained, "We thus read into SDCL 22-22-45 only the intent necessary to separate speech deemed criminal from that which is not." *Armstrong*, 2020 S.D. 6, ¶ 40, 939 N.W.2d at 19.

The stipulation shows that while Defendant was in the Morgan home without permission, Defendant entered the bedroom where Rylin and Ivy slept. SR:149. The stipulation shows Defendant intended to say what he said—"I am going to fuck you." SR:149. He unlatched his belt, unbuttoned his pants, and again referenced having sex with either Rylin or Ivy. SR:149; *see* Ex:2. At one point, Defendant apologized to Rylin and said he just came in and wanted to ask before he had sex with his wife. SR:149. Defendant continued to make statements about having sex with Rylin and Ivy. SR:149.

Defendant's later statement about wanting to ask before he had sex with Rylin's wife, shows Defendant's knowledge that his first statement would be perceived as a threat if he did not ask for permission first. *See* SR:149. The context in which Defendant made the statement

shows that a reasonable person would believe the statement was a threat—the communication was made right after Defendant unlawfully entered the victims' bedroom while they slept. Indeed, the stipulation stated Rylin attacked Defendant to prevent a sexual assault. SR:149. The stipulated facts are sufficient evidence to sustain the conviction.

5. Intoxication's Effect on Intent.

Defendant argues that the circuit court overlooked evidence of his intoxication in relation to his ability to form specific intent. DB:4. Evidence of his intoxication was in the stipulation. The stipulation included written facts about Defendant's behavior as well as video evidence of Defendant after law enforcement arrived. In Exhibit 2 of the stipulation, Rylin stated, "I think he's high" and described how Defendant acted. Ex:2. Joseph stated, Defendant was "for sure drinking." Ex:2. It was for the circuit court, as fact finder, to determine whether the intoxication evidence affected Defendant's capacity to form specific intent and whether he had such specific intent as required for Counts 1 and 2. *See Liaw*, 2016 S.D. 31, ¶ 20, 878 N.W.2d at 104.

Finally, to the extent that Defendant argues the circuit court needed to find facts specially because of the specific intent elements, that argument also fails. SDCL 23A-18-3 states, "In a case tried without a jury a court shall make a general finding and shall in addition, on request made before submission of the case to the court for decision, find facts specially." SDCL 23A-18-3. Defendant never requested special

findings of facts, so a general finding was sufficient. Accordingly, Defendant fails to show error.

In viewing the evidence in the stipulation in a light most favorable to the State, there is sufficient evidence to support Defendant's convictions. The circuit court, as fact finder, had more than sufficient evidence from which it could reasonably find Defendant guilty of the crimes charged. Therefore, the circuit court's findings of guilt should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that Defendant's convictions and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 8,855 words.

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

Dated this 12th day of December 2024.

/s/ Jennifer M. Jorgenson
Jennifer M. Jorgenson
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 12, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Julius Augustin Holybear, Junior*, was served via Odyssey File and Serve upon Joseph Juenger at joseph.juenger@pennco.org.

/s/ Jennifer M. Jorgenson
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